

IN THE HIGH COURT OF DELHI AT NEW DELHI

(Reportable)

Reserved on: August 31, 2012

Decision on: October 4, 2012

O.M.P. 61 of 2012

NNR GLOBAL LOGISTICS (SHANGHAI) CO LTD.

..... Petitioner

**Through: Mr. Ciccu Mukhopadhaya, Senior
Advocate with Mr. Omar Ahmad,
Mr. Kamajeet Singh and Mr. Manu
Krishnan, Advocates**

Versus

AARGUS GLOBAL LOGISTICS PVT LTD. Respondent

**Through: Mr. Sandeep Bajaj and
Mr. Varun Pathak, Advocates**

And

O.M.P. 201 of 2012

AARGUS GLOBAL LOGISTICS PVT LTD. Petitioner

**Through: Mr. Sandeep Bajaj and
Mr. Varun Pathak, Advocates**

Versus

NNR GLOBAL LOGISTICS (SHANGHAI) CO LTD.

..... Respondent

**Through: Mr. Ciccu Mukhopadhaya, Senior
Advocate with Mr. Omar Ahmad,
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CORAM: JUSTICE S. MURALIDHAR

JUDGMENT

04.10.2012

Introduction

1. These petitions arise out of a foreign Award dated 14th October 2011. The successful party in the arbitral proceedings NNR Global Logistics (Shanghai) Co. Ltd. ('NNR') has filed OMP No. 61 of 2012 under Sections 47 and 49 of the Arbitration and Conciliation Act, 1996 ('Act') seeking enforcement of the foreign Award. In the said petition, the unsuccessful party Aargus Global Logistics Pvt. Ltd. ('Aargus') has filed objections under Section 48 of the Act. Aargus has also filed OMP No. 201 of 2012 under Section 34 of the Act seeking the setting aside of the foreign Award. The grounds for setting aside the foreign Award are identical to the grounds urged by Aargus in the objection to the enforcement petition, i.e., OMP No. 61 of 2012.

Background

2. The background to the petitions is that Aargus is a company incorporated in India having its registered office in Delhi and is engaged in the business of freight forwarding and associated international cargo services in India and abroad. NNR is a company incorporated under the laws of Peoples Republic of China having its head office in Shanghai. NNR is a joint venture between NNR Global Logistics (Japan) and Shanghai YUD International Forwarding Co. Ltd. NNR is engaged in the business of international freight forwarding and other international cargo services.

3. An agency agreement was executed on 15th October 2003 between NNR and Aargus in terms of which both Aargus and NNR were to act as each other's non-exclusive agent in the business of freight

forwarding and associated international cargo. Each party was to make efforts to increase air freight/sea freight shipments and to promote and develop related activities between their respective territories. They were to share air freight profit and were to provide and assist each other on various aspects of shipping goods.

4. The agency agreement contained the following arbitration clause:

“10. Arbitration

In any dispute arise in connection with this agreement, both parties shall make their best effort to settle it amicably. However, if said efforts have been exhausted such disputes shall be finally settled under the rules of conciliation and arbitration of the International Chambers of Commerce. In witness whereof, the parties have set their hands on the day, month and year written above.”

5. There was no agreement between the parties on the place of arbitration. While NNR suggested any neutral venue, preferably Kuala Lumpur (‘KL’) in Malaysia, and that “in order to save costs and for convenience, the hearing may be held in New Delhi”, Aargus by its letter dated 22nd September 2010 objected to the seat of arbitration being KL. Subsequently, the International Chamber of Commerce (‘ICC’) fixed the seat of arbitration at KL in Malaysia under Article 14 (1) of the ICC Rules. Consequently, the arbitration took place at KL in Malaysia and the impugned foreign Award was passed by the learned sole Arbitrator allowing the claims of NNR.

6. It is stated that the first shipment commenced on 28th October 2003 and continued up to 25th September 2007. According to Aargus, NNR started acting contrary to the terms of the contract from 2005 onwards.

It is alleged that NNR continued to raise several invoices contrary to the terms of the contract and attempts on settlement had failed. On 2nd July 2010 NNR invoked the arbitration clause and raised disputes before the ICC. In its letter dated 2nd July 2010 NNR stated that “in view of the fact that the closest connection of the Agreement is with India, Indian law may be applied as the substantive law of the Agreement and the arbitration may be held in the English language. However, the arbitration agreement itself would be exclusively governed by the laws of Malaysia.”

Challenge to a foreign Award under Section 34 of the Act

7. One of the preliminary objections raised by NNR to the petition (OMP No. 201 of 2012) under Section 34 of the Act is that in order for it to be maintainable the place of arbitration must be India. It is submitted that since the seat of the arbitration was KL, the curial law of the arbitration was Malaysian law (as was the proper law of the arbitration agreement). NNR states that Part I of the Act is not applicable to foreign Awards. It is submitted that the competent authority to set aside or suspend the foreign Award as such is a Court in Malaysia, i.e., the country in which the Award was made. Reliance is placed on the decisions in ***Videocon Industries Limited v. Union of India (2011) 6 SCC 161*** and ***Yograj Infrastructure Limited v. Ssang Yong Engineering and Construction Company Limited (2011) 9 SCC 735***.

8. On its part, Aargus argued that Part I of the Act applies to the impugned foreign Award since the substantive law governing the

contract was Indian law. Reliance is placed on the decisions in *National Thermal Power Corporation v. Singer Company* (1992) 3 SCC 551, *Aastha Broadcasting Network Limited v. Thaicom Public Company Ltd* 2011 (4) Arb.LR 28 (Delhi), *Anita Garg v. Glencore Grain Rotterdam B.V.* 182 (2011) DLT 365, *Bhatia International v. Bulk Trading S.A.* (2002) 4 SCC 105 and *Venture Global Engineering v. Satyam Computer Services Ltd.* 2008 (4) SCC 190.

9. After the conclusion of the arguments in the present case on 31st August 2012 a Constitution Bench of the Supreme Court delivered a judgment on 6th September 2012 in *Bharat Aluminium Co. v. Kaiser Aluminium Technical Service, Inc.* 2012 (8) SCALE 333. The Constitution Bench overruled both its earlier decisions in *Bhatia International* and *Venture Global Engineering v. Satyam Computer Services Ltd.* However, in *Bharat Aluminium Co.*, the Supreme Court clarified as under (SCALE @ p.406):

“199. The judgment in *Bhatia International* (supra) was rendered by this Court on 13th March 2002. Since then, the aforesaid judgment has been followed by all the High Courts as well as by this Court on numerous occasions. In fact, the judgment in *Venture Global Engineering* (supra) has been rendered on 10th January 2008 in terms of the ratio of the decision in *Bhatia International* (supra). **Thus, in order to do complete justice, we hereby order, that the law now declared by this Court shall apply prospectively, to all the arbitration agreements executed hereafter.**” (emphasis supplied)

10. Consequently, for the purposes of the present petition, the issue whether the petition by Aargus under Section 34 of the Act is maintainable has to be answered in the affirmative in view of the

clarification by the Supreme Court that its decision in ***Bharat Aluminium Co.*** would be applicable only to arbitration agreements executed after 6th September 2012.

Are NNR's claims barred by limitation?

11. One of the preliminary objections raised by Aargus against NNR before the learned Arbitrator was that NNR's claims were barred by limitation. The sequence of transactions between the parties was that first NNR would collect the goods from a client in Shanghai and inform Aargus that a shipment would be arriving on a certain date at a port in India where customs clearance would be given. NNR would charge for collection of the cargo at Shanghai, the transportation of the cargo to Shanghai airport, documentation fee, handling fee, loading of the goods at Shanghai airport (including all related expenses) and air freight. These charges would be collected by Aargus on behalf of NNR from the recipient of the goods in India. NNR would load the goods for shipment by air at Shanghai airport after arranging shipment with the relevant airline. Aargus would clear the goods at customs upon arrival in India and prior to delivery to the recipient. Aargus would collect payment from the client in India for the amount invoiced by NNR as well as air freight. Aargus would remit to NNR the amount so collected. NNR would pay to Aargus a share of the profits earned from air freight. The invoices were to be raised on a monthly basis under Clause 5 (v) of the agency agreement.

12. It is submitted by Aargus that since NNR invoked the arbitration clause on 2nd July 2010 when it submitted to the ICC its request for

arbitration, any claim by NNR which pertained to an invoice three years earlier to that date would be barred in terms of Article 137 of the Schedule to the Indian Limitation Act, 1963 ('ILA') which applied to arbitral claims as mandated in Section 43 of the Act which is under Part I of the Act. Aargus has in a tabulated form shown how the claims in respect of 16 invoices dated between 21st May 2005 and 20th May 2007 for a total sum of US Dollar ('USD') 102,083.95 are barred by limitation. Aargus contends that since Indian law is applicable to the contract between the parties and the ILA is the substantive law, it is the three year limitation which would apply and not the Malaysian Limitation Act, 1953 ('MLA') which provides for a six year period of limitation. It is submitted that Chapter X occurring in Part I of the Act is not a part of the curial law but part of the proper law of the arbitration agreement which in turn would follow the proper law of the contract. Reference is made to the decision in ***Thirumalai Chemicals Limited. v. Union of India (2011) 6 SCC 739.***

13. The case of NNR is that the parties maintained a running account and reconciliation took place periodically. It is pointed out that Aargus wrote to NNR on 15th February 2007 in respect of the "yearly audit confirmation 2006 (urgent request)" in which it was stated that as per their books of account, a sum of USD 299,725.91 was payable by Aargus to NNR as of 31st December 2006 and that the loss share of USD 12,900.80 was not acceptable by Aargus. On 8th November 2007 NNR wrote to Aargus regarding the outstanding of USD 199,667.64 in which it was stated that no remittance was received by NNR during October 2007. The subject of the above letter was "Aargus India

outstanding of USD 199,667.64.” In the mail NNR stated that USD 1,559.46 belonged to 2005, USD 30,484.97 belonged to 2006 and USD 30,187.93 to January 2007. Aargus replied to the above mail stating that “we have remitted USD 30,187.93, settling your Invoice 45593.” It is sought to be contended that in the above mail, though reference is made to a particular invoice, it was not denied that the amounts pertaining to the earlier years were indeed outstanding. It is contended that the above payment of USD 30,187.93 was only part payment of the total outstanding of USD 199,667.64 and therefore, “it was a clear acknowledgement of a jural relationship in relation to the debt which was subsisting at the time.” It is submitted that “if Aargus did not wish to convey or represent that it was acknowledging any liability, it should not have replied as it did. It is too late in the day for Aargus to now contend that the heading was something given by NNR and therefore should not be considered.” It is further contended by NNR that “in any event part payment of debt even by reference to a single invoice would have been sufficient to extend limitation.” It is submitted that it is only by an e-mail dated 13th January 2009 that Aargus for the first time sought to raise the dispute that the figures were wrong or inflated.

14. It is contended by NNR that since the seat of arbitration was Malaysia, the learned Arbitrator rightly applied the Malaysian curial law. It is further submitted that the limitation is a matter of procedure and *lex fori* applies to matters of limitation. It is submitted that the view taken by the learned Arbitrator that ILA did not apply was a plausible one. It is further pointed out that since the invoices from 1st

May 2007 to 23rd June 2007 were not due prior to 31st July 2007, even as per the ILA, claims pertaining to invoices totaling USD 97,024.55, were not time barred.

Indian Limitation Act is a procedural law

15. In light of the above submissions, the issue that is to be considered first is whether the law of limitation is a procedural law or a substantive law so far as time limits barring the remedy such as for breach of contract is concerned. The Madras High Court in ***Chairman, Railway Board, Government of India v. P. Chandrasekaran*** [decision dated 17th January 2006 in Writ Petition No. 29444 of 2003] held that “the principle of limitation bars the remedy but does not extinguish the right, save and except Section 27 of the Limitation Act, by virtue of which not only the remedy is barred but a right accrues in favour of a person who has prescribed his right over immovable property by the principle of adverse possession.”

16. In the present case the learned Arbitrator has held in paras 91 to 94, as under:

“91. The ILA being procedural and not part of the substantive law of India cannot therefore, be used to decide this dispute. When the parties agreed to the application of Indian law to govern the merits of the dispute, this agreement was confined to the application of the substantive laws of the State. Section 30 (2) of Malaysian Arbitration Act 2005 affirms this position when it states:

‘In respect of an international arbitration, the

arbitral tribunal shall decide the dispute in accordance with the law as agreed upon by the parties as applicable to the substance of the dispute.’

92. In the premises, the law of the county of the place of arbitration, Malaysia, would be used for limitation purposes. Limitation law in Malaysia is found in the Limitation Act of 1953 (‘MLA’) and is similarly considered procedural.

93. Section 6 (1) of the MLA provides a period of 6 (six) years in all actions founded on a contract or on tort from the date on which the cause of action accrued. Section 6 (2) of the MLA provides that an action for an account shall not be brought in respect of any matter which arose more than 6 (six) years before the commencement of the action.

94. In the present case, the statute of limitations in India and Malaysia, being both procedural, an action could be brought in Malaysia even if the period of limitation in India has expired.”

17. The learned Arbitrator ruled that the statute of limitation both in India and Malaysia being procedural, an action could be brought in Malaysia even if the period of limitation for the claims as per the ILA had expired.

18. As regards the question whether the law of limitation is a substantive law or a procedural law, the decision of the Supreme Court in ***Thirumalai Chemicals Limited v. Union of India*** is instructive. There it was explained that the procedural law establishes a mechanism for determining the rights and liabilities and machinery for enforcing them. It was categorically held that “right of appeal may

be a substantive right but the procedure for filing the appeal including the period of limitation cannot be called a substantive right, and an aggrieved person cannot claim any vested right claiming that he should be governed by the old provision pertaining to period of limitation.” It was categorically held that “unless the language used plainly manifests in express terms or by necessary implication a contrary intention a statute divesting vested rights is to be construed as prospective, a statute merely procedural is to be construed as retrospective and a statute which while procedural in its character, affects vested rights adversely is to be construed as prospective.” The Court while discussing limitation further held that the “law of limitation is generally regarded as procedural and its object is not create any right but to prescribe periods within which legal proceedings be instituted for enforcement of rights which exist under substantive law.”

19. The Law Commission of India in its 193rd report on ‘Transnational Litigation – Conflict of Laws – Law of Limitation’ discussed how in the context of expansion of international trade it has become necessary to take notice of the fundamental changes in the law of limitation in all common law countries. While recommending that India should adopt the practice in civil law countries, it was pointed out that as of now the law of limitation was considered in India as part of the procedural law and not the substantive law.

20. In light of the above legal position, this Court rejects the contention of Argus that since the substantive law of the contract

between the parties is Indian law, it is the ILA that would apply. The law of limitation being a procedural law would be part of the curial law, which in this case would be the law of seat of arbitration, i.e. the Malaysian law. This legal position is acknowledged even in ***Bharat Aluminium Co.***

Applicable curial law is that of Malaysia

21. In the event for the purpose of the present petition the next question required to be considered is whether by virtue of seat of arbitration being Malaysia, the curial law would be the Malaysian law. While the substantive law is spelt out in the contract between the parties, the curial law concerning the procedure and the law of limitation would be a part of such procedure for enforcing the rights and obligations of the parties.

22. In ***Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd. (1993) AC 334*** it was held that in the absence of an explicit choice of a curial law, the inference is that the parties when contracting to arbitrate in a particular place “consented to having the arbitral process governed by the law of that place is irresistible.” Article V(1)(d) of the New York Convention also states that an Award may be set aside by the Courts of the country where enforcement is sought if the arbitral procedure “was not in accordance with the agreement of the law of the country where the arbitration took place.”

23. In ***Naviera Amazonica Peruana S.A. v. Compania Internacional De Seguros Del Peru (1988) 1 Lloyd’s Rep 116 (CA)***, it was held:

“All contracts which provide for arbitration and contain a foreign element may involve three potentially relevant systems of law: (a) the law governing the substantive contract; (2) the law governing the agreement to arbitrate and the performance of that agreement; (3) the law governing the conduct of the arbitration. In the majority of the cases all three will be the same, but (1) will often be different from (2) and (3) and occasionally, but rarely, (2) may also differ from (3).”

24. The following observations of Mustill and Boyd have been relied upon by the Supreme Court in ***Dozco India Private Limited v. Doosan Infracore Company Limited*** (2011) 6 SCC 179 and ***Sumitomo Heavy Industries Ltd. v. ONGC Ltd.*** (1998) 1 SCC 305:

“there is a strong prima facie presumption that the parties intend the curial law to be the law of the ‘seat’ of the arbitration, i.e., the place at which the arbitration is to be conducted, on the ground that that is the country most closely connected with the proceedings.”

25. Likewise in ***Bharat Aluminium Co.*** it has been held that “the legal position that emerges from a conspectus of all the decisions, seems to be that the choice of another country as the seat of arbitration inevitably imports an acceptance that the law of that country relating to the conduct and supervision of arbitrations will apply to the proceedings.”

26. In the instant case, the conclusion drawn by the learned Arbitrator that it is the MLA which would apply is perfectly plausible and consistent with the internationally accepted legal position which has been reaffirmed by the Constitution Bench of the Supreme Court in ***Bharat Aluminium Co.*** At this juncture it is necessary to note that the

declaratory part of the decision in ***Bharat Aluminium Co.***, regarding the curial law in an international arbitration being that of the seat of arbitration is in line with the internationally accepted legal position which is what has been reiterated in the impugned Award. Therefore, even while Aargus' petition under Section 34 is being considered on merits because of the prospective overruling of ***Bhatia International*** in ***Bharat Aluminium Co.*** the declaratory part of the latter decision makes it clear that the curial law in an international arbitration is that of the seat of arbitration and in the instant case it is the Malaysian law.

27. Once the ruling of the learned Arbitrator that it is the MLA that applies to NNR's claims is upheld, then obviously NNR's claims have rightly been held to be within limitation. The Court therefore does not consider it necessary to examine NNR's alternative plea that even if the ILA is held to apply, its claims would not be barred by limitation.

Award of compound interest and costs

28. As regards the challenge to the Award in respect of compound interest awarded to NNR by the learned Arbitrator, it is pointed out by NNR that 8% interest compounded annually works out to only 8.66% simple interest over three years. NNR is right in its submission that the mere grant of compound interest cannot *per se* be said to be opposed to the public policy of India. Even in the context of an Award under the Arbitration Act, 1940 it was observed by the Supreme Court in ***Renusagar Power Co. Ltd. v. General Electric Co. 1994 Supp (1) SCC 644*** that the award of compound interest or costs consistent with the terms of the contract cannot be said to be opposed to the public

policy of India.

No merit in objections to enforcement of the foreign Award

29. As regards the objections of Aargus to the enforcement of the foreign Award under Section 48 of the Act, the grounds for opposing such enforcement are indeed narrower than the scope of Section 34(2)(b)(ii) of the Act. The use of the word “may” in Section 48(2)(b) of the Act is reflective of the legislative intent that the power to refuse enforcement is discretionary and should be exercised only where the enforcement is contrary to the public policy of India.

30. There is nothing in the present case to suggest that the enforcement of the impugned Award, which is essentially a money decree, would compel Aargus to do something which is prohibited or contrary to law as prevailing in India. In other words, the enforcement of the impugned Award which is in the form of a money decree cannot be held to be opposed to the public policy of India.

31. The objections of Aargus to the enforcement of the impugned foreign Award under Section 48 of the Act are hereby rejected.

Conclusion

32. Consequently, O.M.P. No. 201 of 2012 is dismissed and the objections by Aargus in O.M.P. No. 61 of 2012 are rejected with costs of Rs. 20,000 which should be paid by Aargus to NNR within a period of four weeks.

33. Aargus is directed to deposit the decretal amount in Court within a period of eight weeks from today.

34. List OMP No. 61 of 2012 for further directions on 13th December 2012.

S. MURALIDHAR, J.

OCTOBER 4, 2012

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