

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

Judgment Reserved on: 09.07.2015
% Judgment delivered on: 27.07.2015

+ **FAO No.101/2014**

ROHM AND HAAS ELECTRONIC MATERIALS
HOLDING UK LIMITED AND ANR.APPELLANTS

Versus

R.B. BUSINESS PROMOTIONS PVT. LTD.
AND ANR.RESPONDENTS

ADVOCATES WHO APPEARED IN THIS CASE:

For the Appellants : Mr. Parag Tripathi, Sr. Advocate with Ms. Shiraz Patodia, Ms.
Anusuya S. Sinha and Ms. Renuka Tandon, Advocates
For the Respondent : Mr. Sunil Dalal, Advocate

**CORAM :-
HON'BLE MR JUSTICE RAJIV SHAKDHER**

RAJIV SHAKDHER, J

FAO 101/2014 and CM No.6296/2014 (stay)

1. This appeal, which is filed under Section 50 of the Arbitration and Conciliation Act, 1996 (in short the Act) is directed against the judgment dated 04.02.2014, rendered by the learned Additional District Judge, Tis Hazari, Delhi.

1.1 By virtue of the impugned judgment, the trial court has dismissed the application filed by the appellants under Section 45 of the Act.

1.2 It may be relevant to note that the appellants herein were impleaded as defendants in a suit filed by the respondents for rendition of accounts and

permanent injunction. The suit was initially filed in this court and was numbered as : Suit No.1430/2000. The appellants had filed a petition under Section 8 of the Act, based on an arbitration clause, which formed part of the Technology Transfer Agreement (TTA) dated 20.05.1995, executed between LeaRonal (U.K) Plc.; a company registered and incorporated in England and LeaRonal (India) Pvt. Ltd.; a company registered and incorporated in India. It may be pertinent to note at this stage that appellant no.1 and 2 are the morphed form of LeaRonal (U.K.) and Shipley Europe Ltd. respectively.

1.3 Continuing with the narrative, it was the assertion of the appellants that rights under the TTA which, vested in LeaRonal (India) were assigned in favour of respondent no.1 herein / the plaintiff no.1.

1.4 The appellants' application under Section 8 of the Act was, however, dismissed by a single Judge of this court vide order dated 27.04.2001. Aggrieved by the decision, the appellants preferred a special leave petition bearing no.15198/2001. The Supreme Court granted leave whereupon, the Special Leave Petition was converted to a Civil Appeal, bearing no.2746/2002. Upon hearing the contesting parties, the Supreme Court vide its order dated 11.04.2002 accepted the assertions made on behalf of the respondents herein (who were also the respondents before the Supreme Court) that the appellants ought to have moved an application under Section 45 of the Act as against a petition under Section 8 of the Act; on which, a single Judge of this court had ruled; albeit in favour of the respondents.

1.5 Consequently, the Supreme Court remitted the matter to this court for fresh consideration with a specific direction that it shall be treated as an application under Section 45 of the Act. Furthermore, the appellants were also given liberty of supplementing the statement of facts contained in the application with an additional affidavit accompanied by such documents which they would want to place before the court for its consideration. Correspondingly, respondents were also given liberty to file a reply to the application supported by an additional affidavit and documents.

1.6 Importantly, the Supreme Court in its order dated 11.04.2002, adverted to a letter dated 14.05.1998, which was, purportedly written by respondent no.2 to appellant no.1; which incidently had been filed in the Supreme Court by the respondents. The court observed that since the said document had not been filed by the appellants, this court had no occasion to consider its impact.

1.7 The application under Section 45 of the Act, however, could not be considered by this court as in the meanwhile on account of enhancement of pecuniary jurisdiction, the suit had to be transferred to the District Court.

1.8 It is, in this background, that the learned ADJ was called upon to adjudicate upon the application which stood converted to an application under Section 45 of the Act.

1.9 Upon the impugned judgment being rendered by the learned ADJ, the instant appeal was filed. On the very first date i.e. 04.04.2014, my predecessor made observations to the effect that the application ought to have been preferred by the appellants under Section 8 and not under Section 45 of the Act. Accordingly, the respondents were given liberty to

move the Supreme Court and seek clarification of its order dated 11.04.2002, passed in Civil Appeal 2746/2002. The learned Judge, however, recorded the concession of the respondents that they will not, in the meanwhile, insist on the appellants filing a written statement in the suit pursuant to the trial court rendering the impugned judgment.

2. The respondents did file an application for clarification before the Supreme Court in the disposed of civil appeal, which was, however, not pressed, and accordingly, dismissed vide order dated 01.05.2015.

2.1 It is, in this background, that the matter reached hearing before me.

2.2 The arguments on behalf of the appellants were advanced by Mr. Parag Tripathi, Sr. Advocate, while the respondents were represented by Mr. Sunil Dalal, Advocate.

2.3 Mr. Tripathi submitted that in view of the rights and obligations under the TTA, having been assigned to respondent no.1, the provisions of clause 15.5 of the TTA which, encompassed the arbitration agreement, became applicable and therefore, the trial court was duty bound to refer the parties to arbitration. In support of his submission that there was an assignment of the rights and obligations under the TTA in favour of respondent no.1, Mr. Tripathi relied upon two letters dated 05.05.1998 and 14.05.1998. The first letter was written on behalf of appellant no.1 to respondent no.2 indicating therein that appellant no.1 was desirous of assigning rights under the TTA in favour of respondent no.1. The second letter was addressed by respondent no.2 to the representative of respondent no.1, confirming therein, the winding up of LeaRonol (India) Pvt. Ltd. (as suggested in the letter dated 05.05.1998) and assignment of rights in the TTA.

2.4 I must indicate herein that the manner in which the aforementioned letters are read by the contesting parties is, at the heart of the dispute raised before me, in the present appeal. I shall deal with it, in some detail in the latter part of my judgment. Suffice it to say, at this stage, it was Mr. Tripathi's submission that all rights and obligations were assigned under the TTA in favour of respondent no.1 whereas, the respondents contended that only the right to "sell" products of appellant no.1 [formally known as : LeaRonal (U.K)] were assigned.

2.5 Furthermore, I must indicate that Mr. Tripathi submitted that notwithstanding the prima facie observations of my predecessor in the proceedings held on 04.04.2014, the appellants had correctly preferred an application under Section 45 of the Act.

2.6 It was also the contention of Mr. Tripathi that the trial court failed to take note of the provisions of Article II (2) of the first schedule and / or Section 7(4) (b) of the Act which, provided that an arbitration agreement is construed to be in writing if, it is contained in exchange of letters.

3. As against this, Mr. Dalal, the learned counsel for the respondents has submitted that respondent no.2 had commenced his business with appellant no.1 in 1987, in the capacity of an agent, for effecting sale of its surface treatment products. Mr. Dalal went on to state (and these are averments which are noted in the impugned judgment, as well) that an agency was created in 1990. According to the learned counsel, the agency continued till 1995 and that, for his labour, a commission of 20% on net sales, was paid to respondent no.2.

3.1 The learned counsel further stated that with the incorporation of LeaRonal (India) in March 1994, the TTA, was executed between the said company and appellant no.1. The said TTA was to come into force upon receipt of requisite approvals from the Government of India and RBI.

3.2 It was further stated that despite the execution of the TTA between appellant no.1 and LeaRonal (India) Pvt. Ltd., respondent no.1 continued with its agency business.

3.3 The learned counsel further stated that despite receipt of letter dated 05.05.1998 from appellant no.1, the respondents continued to market the products of appellant no.1 under an “oral” agreement dated 05.05.1998.

3.4 As regards the letter dated 14.05.1998, Mr. Dalal submitted that the assignment of rights under the TTA was only with regard to the right to sell the products of appellant no.1, and therefore, all other terms and conditions provided in the TTA which included the arbitration clause, were not applicable to the parties.

3.5 It was thus the submission of Mr. Dalal that there being no written arbitration agreement between the parties, as correctly found by the trial court, the application was rightly dismissed.

3.6 I must note here though, Mr. Dalal made no submissions with regard to the maintainability of the appellant’s application under Section 45 of the Act.

3.7 In support of his contentions, Mr. Dalal has relied upon the following judgments :-

M.M Aqua Technologies Ltd. Vs. Wig Brothers Builders and Anr., 95 (2002) DLT 818; K. Sasidharan Vs. Kerala State Film Development Corpn., AIR 1994 SC 2534; and M.R. Engineers and Contractors Pvt. Ltd. Vs. Som Datt Buildesr Ltd., 2009 XI AD (SC) 566.

REASONS

4. Having heard the learned counsel for the parties and perused the record, what requires to be considered, is the purport of the letter dated 05.05.1998 and 14.05.1998.

4.1 As indicated above, letter dated 05.05.1998 was written on behalf of appellant no.1 to respondent no.2 who, Mr. Dalal conceded was, at the relevant time, a Director of LeaRonal (India) Ltd. I was also informed that this company was a subsidiary of appellant no.1, at the relevant point in time.

4.2 By virtue of the aforementioned letter, one, Mr. Paul Smith (writing on behalf of appellant no.1) brought to the notice of respondent no.2 that they would be happy to continue the sale of its products in India either through him or via a company controlled by him, in the context of their “discussion” to wind up LeaRonal (India) Ltd. The letter went on to say that in order to save paper work and to avoid entering into a new agency agreement, “LeaRonal (U.K.) assigns the rights of LeaRonal (India) under the Technology Transfer Agreement to R.B. Business Promotions..”

4.3 The letter concluded with a request to close the accounts of LeaRonal (India) Ltd. as soon as possible and to confirm that there were no other liabilities of that company which would befall its Directors, mainly, one, Mr. Simon and the author of the letter i.e. Mr. Paul Smith.

4.4 In response to this letter, respondent no.2 made the following assertions :-

“Thank you for your letter dated 05/05/1998 regarding winding up of LeaRonal (India) Pvt. Ltd. and your confirmation that R.B. Business Promotion Pvt. Ltd. has been assigned the rights to sell the products of Lea Ronal UK in India within the framework of the Technology Transfer Agreement executed between LR(UK) and LR (India) on 20/05/1995...”

4.4 These letters have to be read in context of the TTA whereby, appellant no.1 had, inter alia, granted a license to LeaRonal (India) Ltd. to not only manufacture its products but also market and sell its products, in India. Accordingly, LeaRonal (India) Ltd. by virtue of the TTA, was given a license to access proprietary information and related services to enable manufacture its products in India.

4.5 I was told during the course of the arguments that no manufacture of appellant no.1's products took place in India. Instead, the products of appellant no.1 were imported into the country and, sold via its erstwhile subsidiary i.e. licensee, LeaRonal (India) Ltd.

4.6 Notwithstanding the above, it was conceded by Mr. Dalal, before me, that the right to sell appellant no.1's products, which was vested in erstwhile LeaRonal (India) Ltd. was assigned in favour of respondent no.1. As noted above, while this concession was made, Mr. Dalal, continued to submit that the sale was under an oral agency agreement of 05.05.1998; a fact which is also noted in paragraph 2 of the impugned judgment.

5. According to me, these are two diametrically opposite pleas taken by Mr. Dalal, and hence, cannot pass muster. In this regard, I am also

supported by the averments made in the plaint. For the sake of convenience, the following averments made in the plaint are extracted, hereinbelow :-

“(m). That as per the terms and conditions of the New Agency Arrangements, as already stated hereinabove, it is stated that no written Agency Agreement was executed but the terms and conditions of the T.T.A. applied.

(q). ..It is pertinent to highlight at this juncture that Plaintiff No.1 herein received a letter dated February 29, 2000, wherein Defendant NO.2 under instructions from Defendant No.1 all of a sudden have decided to terminate the Agency Arrangements, under the garb of terminating the Technology Transfer Agreement...

(v). ..That the Plaintiff has performed all his obligations and is further ready willing to perform and observe all the material obligations and requirements under the terms of the Agency Arrangements and Technology Transfer Agreement...

(x). ...That the unilateral decision whereby the Defendant No.1 herein has decided to terminate the Agency Arrangements and Technology Transfer Agreement against the spirit of contract entered into between the parties. It is further submitted that Defendant No.1 herein has denied the rights available to the Plaintiff under the aforesaid Agreements by its unilateral and illegal decision to terminate the Agency Arrangements..”

(emphasis is mine)

5.1 A perusal of the aforesaid would show that the respondents have rested their action, if not fully, surely substantially, on the TTA. Faced with this, Mr. Dalal, sought to argue that, only the right to “sell” was assigned under the TTA, in favour of respondent no.1. It was thus argued, as noted above, by me, that the other terms of the agreement which

included the arbitration clause, stood excluded by implication and therefore, were not binding, as between the parties herein.

5.2 This submission, in my view, is completely untenable. The stand taken in the plaint is that the agency agreement, in whichever form, was terminated by the TTA; albeit erroneously, and that, a fresh oral agency agreement was entered into on 05.05.1998. As a matter of fact, it was the stand of the respondents herein, that even qua the fresh agency agreement (which was created according to them on 05.05.1998), all terms and conditions of the TTA applied. This fact is evident upon a bare perusal of the following averments made in paragraph 6(k) of the plaint :-

“..That in the month of May on 05.05.1998, the Director of the Plaintiff Company, Mr. Ravi Pall had received a letter from Mr. Paul K. Smith, Managing Director of Defendant No.1, wherein Defendant No.1 showed its willingness to wind-up LeaRonol (India). However, it was confirmed that Defendant No.1 is happy to continue selling its products in India either through a company controlled by Mr. Ravi Pall or directly through Mr. Ravi Pall. It is further stated that it was also mentioned in the aforesaid letter that in order to avoid paper work and entering into a new Agency Agreement, Defendant No.1 assigns all the rights of LeaRonol under the Technology Transfer Agreement to Plaintiff No.1. It is submitted that vide the aforesaid letter, a fresh Agency Agreement was created in favour of plaintiffs on 05.05.1998 and all the terms and conditions of the TTA applied..”

(emphasis is mine)

5.3. In these circumstances, the submission of Mr. Dalal that the arbitration clause i.e. clause 15.5 would not bind the parties, being untenable, is rejected.

6. I may also note that the trial court, in my view, has erred in holding that Part I of the Act, would be applicable to international commercial arbitrations, which are seated outside India, unless any or all such provisions of the said part, are excluded by agreement between parties. This observation of the trial court is in the teeth of the decision of the Constitution Bench of the Supreme Court in the case of ***Bharat Aluminium Company Vs. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552***. At the heart of this judgment, is the acceptance by the court the applicability of the principle of territoriality - as an award arising from an international commercial arbitration, rendered outside India, would be a foreign award, to which, only Part-II of the Act, would apply. The fact that under clause 15.8, the TTA is to be construed and governed by the laws of India, in my opinion, would make no difference. The arbitration under sub clause (1) of clause 15.1 is to be conducted in accordance with the rules of International Chambers of Commerce (ICC). The said clause empowers the President of the ICC to appoint a single arbitrator at the request of the parties to the TTA. The appellant no.1 is concededly a company incorporated outside India which, decidedly, gives rise to an international commercial arbitration.

6.1 The trial court, it appears, while taking recourse to Part-I of the Act, has based his reasoning on the judgment of the Supreme Court in ***Bhatia International Vs. Bulk Trading S.A. and Anr., (2002) 4 SCC 105***. This judgment of the Supreme Court has been specifically overruled in the ***Balco***'s case; albeit prospectively . In the ***Balco*** decision, the Supreme Court has stated the law laid by it would apply only to those agreements which are arrived at or entered into after the date of its judgment i.e.

06.09.2012. This aspect of the matter though, has not been noted by the trial court.

6.2 The position even prior to the *Balco* judgment, in principle, appears to be the same. Reference in this regard, may be had to the judgment of the Supreme Court in *Harendra H. Mehta and Ors. Vs. Mukesh H. Mehta and Ors., (1999) 5 SCC 108*. This was the judgment, where the Supreme Court, inter alia, was called upon to consider : whether the subject award placed before it for consideration was a foreign award and enforceable in India under the Foreign Awards (Regulation & Enforcement) Act, 1961. In reaching this conclusion as to whether or not the subject award was a foreign award, one of the ingredients which was given weight was the venue (i.e. the seat) of arbitration. The observations made in this behalf in paragraph 22 of the said judgment being relevant are extracted below :-

“..We do not understand as to how it could be said that the award was not a foreign award. All the ingredients of Foreign award were there. Parties were having business both in India and in the United States of America as a joint venture and they also acquired properties. Differences that arose between the parties were out of legal relationships and certainly of commercial nature under the laws of this country. Agreement to refer the disputes to arbitration, in writing, was made in the United States where arbitration proceedings held and award given. It is not disputed that United States is a country to which clause (b) of Section 2 of the Foreign Awards Act applies. In the present case, the parties are no doubt related to each other but that could not take the award outside the ambit of the Foreign Awards Act. We asked Mr. Ganesh as to what would happen if there were two strangers having businesses both in India and in United States or when there was a joint venture between an Indian and a US national having properties both moveable and immovable in both the countries and disputes having arisen and award given in the United States,

Mr. Ganesh, in spite of his resourcefulness, was unable to give any convincing reply. There is no merit in the objection of the appellant that the award is not a foreign award and that it is outside the Foreign Awards Act...”

6.3 Also see the judgment of *Hon'ble Mr. Justice S.B. Sinha (as he then was) in Centrotrade Minerals and Metals Inc. Vs. Hindustan Copper Ltd., (2006) 11 SCC 245* at pages 299 to 301, paragraph 158 to 163¹. This

¹ “...158. Section 44 of the Act, as quoted herein above, therefore, makes an award foreign, if the above mentioned criteria are fulfilled, ‘unless the context otherwise requires’. The Division Bench, however, laid heavy stress on this phrase to say that, even though the ICC award fulfils conditions under section 44 of the Act, it cannot be considered to be a “foreign award”. According to the Division Bench one of the situations to which the phrase “unless the context otherwise requires” is applicable, is when the law governing an arbitration agreement is Indian law. Thereby, saying that if the law governing the “otherwise foreign award” is Indian, the award becomes a domestic award. While coming to this decision, the Division Bench relied on the decisions of this Court in *Sumitomo Heavy Industries Limited v. ONGC Ltd.*, [1998] 1 SCC 305 and *National Thermal Power Corporation v. Singer Company*, [1992] 3 SCC 551. However, the aforesaid two decisions of this Court were based on section 9(b) of the repealed Foreign Awards (Recognition and Enforcement) Act, 1961. Under the repealed Foreign Awards (Recognition and Enforcement) Act 1961, section 9(b) expressly provided that its provisions would not be applicable to any award made on an arbitration agreement governed by the law of India. However, on repeal of this 1961 Act, by section 85 of the Act, no corresponding provision to Section 9(b) of the 1961 Act has been made. In other words, the position of law under section 9(b) of the Foreign Awards (Recognition and Enforcement) Act, 1961 was deliberately not incorporated in the present Act. Therefore, under the present Act, an award in pursuance of an arbitration agreement governed by Indian Law, if the conditions under Section 44 are satisfied, will not cease to be a foreign award, merely because the arbitration agreement is governed by the law of India. Accordingly, in my view, the aforesaid two decisions of this Court on which strong reliance was placed by the Division Bench of the Calcutta High Court can easily be distinguished. The Division Bench of the Calcutta High Court also held that section 48(1)(e) of the Act is one such provision which attracts the first part of section 44 i.e. the phrase “unless the context otherwise requires”. Section 48 (1)(e) reads as under :

“48. Conditions for enforcement of foreign awards.-

(1) Enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the court proof that-

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.” (emphasis supplied)

159. From a bare reading of this Section, it is evident that Section 48 (1)(e) deals with the grounds for refusal of the enforcement of a Foreign Award. Production of proof that such an award has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made, cannot change a foreign award to a domestic award, but merely makes it a foreign award which

case though because of difference of opinion stands referred to a larger bench.

6.4 The position of law post *Balco* case continues to hold. In this regard, reference be made to the judgments passed in: *Reliance Industries Limited*

may not be enforced. In *Sumitomo Heavy Industries Limited v. ONGC Ltd.*, [1998] 1 SCC 305 it was however held, in substance, by this Court, where the contract is governed by Indian law and the seat of the arbitration is elsewhere, wherein arbitrability of the dispute is established, procedural law of the country of seat of arbitration governs the conduct of the arbitration proceedings till the award is delivered. Therefore, the phrase "or under the law of which that award was made" used in section 48(1)(e) refers to the law of the country in which the arbitration had its seat rather than the country whose law governs the substantive contract. It is true that the contract and the agreement clause is governed by the substantial law of India. It is an admitted position that the seat of the second arbitration was in U.K. Therefore, relying on *Sumitomo Heavy Industries v. ONGC Ltd.* (Supra) the relevant country was U.K. under the procedural law of which the award was made. Thus, section 48 (1)(e) does not by itself contemplate attracting first part of section 44 of the Act.

160. In this connection, the next question is whether the expression "unless the context otherwise requires" as used in section 44 of the Act ever comes into play. This question can be looked into by the following illustration where the expression takes relevance.

161. Let us consider a contract, including the arbitration agreement, governed by Indian Law and under it the seat of arbitration is mentioned as U.K. However, before the commencement of the arbitration proceeding, the parties agree that though the physical seat of arbitration is in U.K., for all purposes the seat of arbitration shall be deemed to be India and the arbitral proceedings shall be conducted under the curial law of India. In this situation, though all the conditions under section 44 were satisfied the award by the arbitrator cannot be said to be a foreign award. In such a situation, the expression "unless the context otherwise requires" in section 44 takes meaning and becomes applicable and relevant.

162. There is yet another aspect in this matter on the question whether the award that was passed by the ICC arbitrator was a foreign award or not. According to the Division Bench, as noted herein earlier, the award passed by the ICC arbitrator was not a foreign award. Sub-section (2) of Section 2 of the Act clearly says that Part I of the Act shall apply where the place of arbitration is in India. Sub-Section (7) of Section 2 of the Act says that an arbitral award made under Part I shall be considered as a domestic award. In view of sub-sections (2) and (7) of Section 2 of the Act read with Section 44, in respect of which I have already dealt with, there cannot be any doubt that the Division Bench was wrong in its conclusion that the award passed by the ICC arbitrator was a domestic award. As noted herein earlier, we should also keep in mind that Section 9(b) of the Foreign Awards (Recognition and Enforcement) Act, 1961 which provided that it did not apply to an arbitral award made pursuant to an arbitration agreement governed by law of India, has been clearly omitted by Section 51 of the 1996 Act. In this connection, reference may be made to a decision of this Court in *Shreejee Traco (I) Pvt. Ltd. v. Paperline International Inc.*, [2003] SCC 79.

163. In this view of the matter and in view of the discussions made herein above, I am of the firm opinion that the award of the ICC arbitrator was not a domestic award but a foreign award as rightly held by the learned Single Judge of the High Court..."

& Anr. v. Union of India, (2014) 7 SCC 603 and Enercon (India) Ltd. v. Enercon GmbH, (2014) 5 SCC 1.

6.5 The trial court based on its reasoning that there was no written agreement obtaining between the parties, adverted to the provisions of sub-sections (3) and (5) of Section 7 of the Act. The reference to these sections, in my view, was wholly irrelevant, in view of the finding reached by me that parties were bound by the arbitration agreement contained in clause 15.5 of the TTA, as the rights under the TTA were assigned by appellant no.1 in favour of respondent no.1. TTA undoubtedly is a written agreement.

6.6 Therefore, willy-nilly, the suit filed by the appellants herein cannot proceed further and, the parties, will have to be referred to arbitration as there is a written arbitration agreement in existence. If once this determination is made then, in so far as the suit filed by the respondents is concerned, it cannot proceed further irrespective of the form that appellants' application takes.

6.7 According to me, the ratio of three judgments cited by Mr. Dalal, is not applicable to the issue raised, in the present case. The issue which falls for consideration, as indicated hereinabove, in the present case, is : as to whether the TTA was assigned. Once that issue is resolved in favour of the appellants, which it is, then, the respondents would undoubtedly be bound by all terms of the said agreement, which would include the arbitration agreement contained in clause 15.5 of the TTA.

7. Accordingly, the appeal is allowed and the impugned judgment dated 04.02.2014 is set aside. Interim order dated 04.04.2014 is made absolute.

The application, being: CM 6296/2014 stands disposed of. The parties shall stand referred to arbitration.

RAJIV SHAKDHER, J.

JULY 27, 2015

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