

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

Judgment reserved on: 11.12.2014
% Judgment delivered on: 04.03.2015

+ Ex.P. 378/2010

KALMART SYSTEMS (M) SDN BHDDecree Holder

Versus

NATIONAL AGRICULTURAL CO-OPERATIVE
MARKETING FEDERATION OF INDIA LTD.Judgement Debtor

ADVOCATES WHO APPEARED IN THIS CASE:

For the Petitioner : Ms. Pragya Baghel Chitale, Mr. Amol Chitale and Ms. Shweta,
Advocates

For the Respondent : Mr. Himinder Lal and Ms. Rajni Ohri Lal, Advocates

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

RAJIV SHAKDHER, J

1. The petitioner, by virtue of the instant petition seeks to enforce an award dated 14.04.2010, under the provisions of Section 48 of the Arbitration and Conciliation Act, 1996 (in short the Act). The ancillary provisions to which reference has been made is, Section 47 of the Act and Section 11 read with Order 21, Rule 10 of the Code of Civil Procedure, 1908 (in short the Code).

1.1 The petitioner avers that the aforementioned award is a foreign award passed qua the respondent herein and, therefore, the award being a decree should be enforced in the terms set out therein. The petitioner thus, claims to be a decree holder, seeking recovery of moneys awarded to it.

1.2 On the other hand, the central issue raised by the respondent in defence of the captioned petition, is that, the purported agreement based on which the arbitration proceedings were triggered is, not an agreement to which it is a signatory, and hence, no legal obligations can arise from the said agreement including the obligation to arbitrate. In sum, the respondent's stand is that, there is no arbitration agreement in existence.

2. It is, in this background, that I am required to notice certain broad facts, which have led to the institution of the present petition :-

2.1 The petitioner avers that it entered into a contract for sale of 1000 MT of Crude Palm Oil (CPO) via its broker, by the name of : Ashok Bansal & Company (in short ABC). The sales contract, which is dated 05.06.2008, sets out the following broad terms :- Price : USD 1190 PMT C&F Kandla; Shipment period : August 2008; and payment: by satisfactory irrevocable unrestricted right letter of credit allowing TT reimbursement to be issued by swift and to be received in Malaysia by 22.07.2008.

2.2 In so far as arbitration agreement is concerned, the sales contract dated 05.06.2008 provided for the following in clause (o) : “..ARBITRATION, IF ANY, IN MALAYSIA, AS PER PORAM RULES AND REGULATIONS..”

2.3 PORAM is an acronym for : The Palm Oil Refiners Association of Malaysia. This association has, apparently, formulated rules for arbitration and appeal. The award was passed by an arbitral tribunal constituted by the said association. It is, on account of this fact, that clause (o) of the sales contract dated 05.06.2008, refers to PORAM Rules and Regulations.

2.4 Moving on with the narrative, what is pertinent and has raised the central issue in the matter, is that : the sales contract dated 05.06.2008 does not bear the signatures of the respondent. The sales contract has an addendum no.1 appended to it, which is dated 11.08.2008. This addendum makes a reference to the respondent's letter dated 29.07.2008 and goes on to shift only the shipment period, from August 2008 to September 2008 (1st to 30th September 2008). The other terms and conditions, ostensibly, remained unchanged. What is important is, that even addendum no.1 dated 11.08.2008 bears only the signatures of the petitioner in its capacity as the seller and those of its own broker, i.e., ABC. The addendum does not bear the signature of the respondent; an entity which is supposed to have entered into the sales contract dated 05.06.2008 for purchase of CPO.

2.5 As to how addendum no.1 got executed, the petitioner has made the following averments. The petitioner states that upon sales contract dated 05.06.2008 having been executed, it nominated a vessel by the name of "Chemitec", on 04.08.2008 for ferrying CPO to the respondent.

2.6 However, on 06.08.2008 the petitioner received a request, purportedly, from the respondent via its broker/ ABC to defer the shipment. It is on account of this request that addendum no.1 was generated on 11.08.2008 whereby, the shipment period was shifted from August 2008 to September 2008.

2.7 The petitioner avers that thereupon it sent a communication dated 02.09.2008 to its broker / ABC, calling upon it to follow up with the respondent to open a letter of credit. This request was reiterated vide communication dated 04.09.2008 and, in this communication, the petitioner

indicated that the letter of credit should refer to their re-nominated vessel “Process”.

2.8 According to the petitioner, since it did not receive a positive response to its earlier communications, reminders were sent to the respondent, on 09.09.2008, 11.09.2008 and 17.09.2008. The inability to get through to the officers of the respondent, propelled the petitioner to escalate the matter and accordingly, a communication dated 06.10.2008 was sent to the Secretary, Govt. of India, Ministry of Agriculture and Co-operation.

2.9 According to the petitioner, this led to a meeting being convened at New Delhi, on 14.10.2008, between its representatives and those of the respondent.

3. Apparently, the respondent conveyed to the petitioner that they would require time up till 15.11.2008, to make arrangements to “honour the contract”.

3.1 In support of its case, that a concluded contract was in place, the petitioner has averred that parties had entered into negotiations for settlement which, had resulted in the respondent issuing a mandate to its banker i.e., the Central Bank of India, vide letter dated 15.06.2009 to forward its request to the Reserve Bank of India, for remitting a sum of USD 371,250 to it, towards settlement. In the award, the tribunal has made a reference to this communication which, it says, the petitioner submitted to PORAM alongwith a letter dated 03.03.2010.

3.2 I may only note that in the pleadings placed before the arbitral tribunal, there is no reference to this aspect of the matter. The rejoinder filed in this

court by the petitioner makes a reference to the aborted settlement and the correspondence exchanged in that behalf including the letter dated 15.06.2009. As to what would be the effect of this aspect of the matter, had the correspondence included in the rejoinder been placed before the arbitral tribunal, is something that I will consider in the later part of my discussion.

3.3 Suffice it to say that since, the sale, was not consummated, the petitioner sent a default notice dated 30.12.2008 to the respondent via the broker / ABC.

3.4 By a communication dated 05.01.2009, PORAM called upon the respondent to nominate its arbitrator from the panel of arbitrators maintained with it, within a period of 14 calendar days of the despatch of the said list of panel of arbitrators.

3.5 While the petitioner nominated, one, Sh. S.K. Mohta, as its arbitrator, upon the failure of the respondent to appoint an arbitrator, the Acting Chairman of PORAM appointed, one, Mr. David Khoo Hock Sin, as the respondent's nominee arbitrator. The two arbitrators appointed a third arbitrator in terms of the PORAM rules. The third arbitrator so appointed, is one, Mr. Yoong Chow Van. All three arbitrators accepted their appointments. Accordingly upon constitution of the arbitral tribunal, the petitioner and the respondent were duly notified of its constitution, on 17.02.2009.

3.6 Notably, pursuant to PORAM's letter dated 05.01.2009, calling upon the respondent to appoint its nominee arbitrator, the respondent sent a reply / representation dated 18.02.2009. By this representation, the respondent, broadly, indicated to PORAM that it had never accepted the proposal made

by the petitioner for sale of CPO, as indicated in the sales contract dated 05.06.2008. The respondent thus, took the stand that since “no valid contract / agreement” had been executed with the petitioner or its agent, it did not think it necessary or expedient to nominate an arbitrator. The respondent further asserted that in case PORAM were to continue with the arbitration proceedings, the respondent reserved its right to file, detailed objections, with respect to claim entered by the petitioner.

3.7 It appears that PORAM was not impressed with this reply / representation of the respondent and, accordingly, vide communication dated 18.03.2009 called upon the respondent to file its statement of defence, within 14 days of receipt of the said communication. The respondent, thereafter, sought extension of time, which was granted, for filing a statement of defence. Finally, the respondent filed its statement of defence dated 20.04.2009, with the arbitral tribunal.

3.8 The petitioner, on its behalf, filed a letter dated 24.04.2009, refuting the stand taken by the respondent in the statement of defence, filed before the arbitral tribunal.

3.9 The aforesaid propelled the respondent to issue a communication dated 04.05.2009, by way of a sur-rejoinder wherein, while reiterating the contents of its statement of defence, it chose to point out, inter alia, the anomaly in the contract numbers as set out in the statement of claim as against that which was indicated in the petitioner’s letter dated 24.04.2009.

4. The arbitral tribunal, it appears, fixed an oral hearing in the matter on 30.03.2010. The respondent, however, failed to participate in the hearing. Consequently, an ex-parte award came to be passed on 14.04.2010.

5. In the background of the aforesaid facts, arguments on behalf of the petitioner were advanced by Ms.Chitale, while on behalf of the respondent, submissions were made by Mr. Lal.

5.1 It was, broadly, submitted by the learned counsel for the petitioner that the award in respect of which enforcement was sought, was a foreign award, and therefore, the scope of interference was limited, being confined to the grounds provided in Section 48 of the Act.

5.2 It was contended by the learned counsel that contrary to the stand taken by the respondent, a concluded contract had come into existence, which was evident from the conduct of the respondent; a fact in respect of which a finding had been recorded by the arbitral tribunal.

5.3 Ms. Chitale, while conceding that the sales contract dated 05.06.2008 did not bear the signature of the authorised representative of the respondent, submitted that the subsequent event of shifting of the shipment date, at the say so of the respondent, established, unequivocally, that a concluded contract stood executed between the parties. For this purpose, Ms. Chitale sought to place reliance on the following : (i). the stand taken in paragraph 3 of the reply / representation dated 18.02.2009 filed by the respondent; (ii) the letter dated 29.07.2008, which though, was brought on record by the respondent and not by the petitioner; and (iii). the addendum dated 11.08.2008, which again was, brought on record by the respondent.

5.4 Furthermore, the learned counsel contended that the absence of signature on the sales contract, of the respondent, did not carry much significance, in view of the subsequent letters and / or documents generated with respect to the transaction in issue, after the execution of the sales

contract dated 05.06.2008. It was thus, the contention of the Ms. Chitale that as long as there was an agreement in writing which, contained the arbitration clause, the arbitral tribunal was well within its jurisdiction to render an award. In support of the submission that a letter or a document could result in the formation of an arbitration agreement, reference was made to Article II, Para 2 of the First Schedule of the Act.

5.5 The learned counsel sought to support its stand that a concluded contract containing an arbitration clause was in place, by also, referring to the fact that a compromise was arrived at between the parties on 14.05.2009, which led to the crystallization of the settlement amount to the tune of USD 371,250. In this behalf, the learned counsel alluded to the letters dated 18.05.2009 and 02.06.2009. The first letter, is a letter, by which the petitioner apparently, requested the arbitral tribunal to stand over the matter in view of the settlement arrived at between the parties, while the second letter is a letter, apparently, issued by the respondent, informing the petitioner that its Board of Directors had approved the settlement, and that, it should send a debit note in the sum of USD 371,250, to enable it, to move an appropriate application with the RBI for remitting the funds.

5.6 This aspect of the matter was also sought to be supported by the learned counsel, by making a reference to the respondent's letter dated 15.06.2009, sent to its banker, Central Bank of India. A copy of which was apparently forwarded to the petitioner vide letter dated 18.06.2009.

5.7 Ms. Chitale contended that because the respondent had failed to honour the settlement dated 14.05.2009, the petitioner was constrained to withdraw

from the settlement and, consequently, sought to advise the arbitral tribunal qua this aspect vide communication dated 03.03.2010.

5.8 Ms. Chitale in support of her submissions relied upon the following judgments: ***Smita Conductors Ltd. Vs. Euro Alloys Ltd., (2001) 7 SCC 728 and Shakti Bhog Foods Ltd. Vs. Kola Shipping Ltd., (2009) 2 SCC 134.***

6. Mr. Lal, on the other hand, relied upon the pleadings filed before the arbitral tribunal to demonstrate that no concluded contract came into existence which, could have imposed an obligation on the respondent to acquiesce to the jurisdiction of the arbitral tribunal.

6.1 It was Mr. Lal's contention that in view of the admitted position that neither the sales contract dated 05.06.2008 nor the addendum dated 11.08.2008 bore the respondent's signature, no liability could flow therefrom which, could be mulcted onto the respondent.

6.2 The learned counsel made it a point to highlight the fact that letter dated 29.07.2008, which finds a mention in addendum 1 dated 11.08.2008, in no uncertain terms, sought for deferment of the contract. It was thus, the counsel's submission that the respondent had not firmed up the proposal in view of the fact that not only was the market price of CPO falling in the international and domestic market, but also, on account of the financial crunch, that the, respondent was facing. It was stated that because of the financial crunch, attempts were being made to negotiate a lower price for purchase of CPO.

6.3 Mr. Lal, contended that it was precisely for this reason that the respondent, chose not to open a letter of credit in favour of the petitioner.

6.4 It was also the contention of Mr. Lal that the instant award was not a foreign award as, it did not arise out of an agreement for arbitration in writing as is postulated in Section 44 of the Act. According to Mr. Lal, since the respondent had never entered into an agreement for arbitration in writing, the instant award was incapable of being enforced under Sections 48 and 49 of the Act.

6.5 Apart from the above, the learned counsel submitted that the arbitration clause by itself was vague and uncertain, in as much as, clause (o) of the sales contract dated 05.06.2008 did not articulate as to the aspects which could be referred for adjudication by way of arbitration.

6.6 According to Mr. Lal, a contract of a value, such as, the sales contract dated 05.06.2008, could not have been executed except with the due authorisation of its Board of Directors given via its chairperson.

6.7 In so far as the present petition was concerned, it was stated that the same was not maintainable as it was instituted by one, Mr. Navnit Lal Vrajila based on a Board of Director's resolution, dated 29.12.2008, whereas the award of which enforcement was sought was, dated much later in point in time i.e, 14.04.2010. In other words, it was learned counsel's contention that the said authority could not be used to enforce the award dated 14.04.2010.

6.8 In so far as documents, which were relied upon by the counsel for the petitioner to demonstrate that a settlement had been reached, Mr. Lal contended that those documents could not dilute the respondent's stand that no arbitration agreement was in existence. According to the learned counsel, the purported compromise adopted the principle of a "wash out

settlement” only to buy peace and since, it did not ultimately fructify, it could have no legal bearing on the central issue to be decided in the matter.

6.9 In support of his submissions, Mr. Lal relied upon the following judgments : *Agritrade International Pte Ltd. Vs. National Agricultural Cooperative Marketing Federation of India Ltd., (2012) 11 AD (Delhi) 616* and the judgment dated 19.09.2012, passed in : OMP 389/2006, titled : *Cinergy Corporation Pte. Ltd. Vs. National Agricultural Cooperative Marketing Federation of India Ltd.*

7. I have heard the learned counsel for the parties and perused the record. What has clearly emerged from the record and, in respect of which, there is no dispute, is the following :-

(i). The sales contract dated 05.06.2008 does not bear the signature of the respondent. As a matter of fact, there is an annotation in the agreement to the effect which reads as follows : “*please sign and return one copy for our records..*”. The admitted position, is that, the respondent did not sign and send any copy to the petitioner.

(ii). ABC, which acted as a broker, was the agent of the petitioner. The respondent vide communication dated 29.07.2008 wrote to ABC that it should take up the matters with the concerned sellers which (apart from the petitioner included other sellers, involving three other contracts) that, they should, defer the contracts, which were otherwise scheduled for shipment, during the month of August 2008. The deferment of the contract was sought till September 2008. The title of this letter though, spoke about “deferment of shipment of CPO”, on which much emphasis was laid by the counsel for the petitioner.

(iii). Addendum no. 1 dated 11.08.2008 whereby, the shipment period was shifted to September 2008 makes a reference to the letter dated 29.07.2008. This addendum also, does not bear the signature of the respondent. Addendum no. 1 bears the signatures of only the petitioner and the broker, i.e., ABC.

(iv). The respondent, in its very first reply / representation dated 18.02.2009, took the position that there was no concluded contract in place, and therefore, it did not see the necessity of appointing its nominee arbitrator.

(v). This position was reiterated by the respondent in its statement of defence dated 20.04.2009.

(vi). The statement of claim filed by the petitioner before the arbitral tribunal, which was filed somewhere in January - February 2009, was not amended to include the reference to correspondence /communication generated on the aspect of settlement said to have been arrived at between the parties or at least attempted, if not cemented. These documents were filed by the petitioner as Annexures A to F, for the first time, along with its rejoinder.

(vii). The arbitral tribunal though, in its award has made a reference to the respondent's letter dated 15.06.2009, written to its banker i.e., Central Bank of India, apparently, written in the context of the said settlement. The arbitral tribunal has noted in the award that the said letter was forwarded to it, by PORAM, along with a letter dated 03.03.2010.

8. In the context of the aforesaid, what requires to be determined is, as to whether the award dated 14.04.2010 is a foreign award. It is only if, this court were to come to a conclusion that the award dated 14.04.2010 is a foreign award, could the petitioner then, seek its enforcement under Section 48 read with Section 49 of the Act.

9. For this purpose, one would have to look at the definition of the foreign award. For the sake of convenience, Section 44, which defines a foreign award, is extracted hereinbelow :-

“44. Definition – In this Chapter, unless the context otherwise requires, “foreign award” means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960 –

(a). in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies, and

(b). in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which the said Convention applies..”

10. A bare perusal of the provisions of Section 44 would show that it has the following ingredients :- (i). it should be an award pertaining to differences between persons arising out of legal relationships which, may or may not be contractual but, which are considered commercial under the law in force in India; (ii). the legal relationships should pertain to a period on or after 11.10.1960; (iii). the award should be passed in pursuance of an agreement in writing to which the convention on recognition and enforcement of foreign arbitral award (hereinafter referred to New York

Convention) as set out in the first Schedule to the Act applies; and (iv).
lastly, the award should be passed in one such territory which the Central Government based on the principles of reciprocity has declared to be a territory to which the New York Convention applies.

10.1 Before me, there is no argument raised that the award has not been passed in a territory to which New York Convention applies. What is put in issue, is that, there was no agreement in writing for referring the disputes qua the parties herein to arbitration, and hence, a foreign award within the meaning of Section 44 of the Act having not emerged, no enforcement could be sought by the petitioner by seeking recourse to the provisions of Sections 48 and 49 of the Act.

10.2 There is no doubt that if, one were to have regard to Para 2 of Article II of the New York Convention, an agreement in writing would include not only an arbitral clause in a contract or even an arbitration agreement signed by parties but also that which emerges out of exchange of letters and telegrams.

10.3 Sub-Section (4) of Section 7 of the Act also provides for such an eventuality. The question therefore, before me, essentially, veers down to the consideration of the letter dated 29.07.2008, which is cited as a document by the petitioner, to contend that a concluded contract emerged between the parties. As indicated above, what preceded the issuance of the letter was, the sales contract which, categorically sought return of the document as an affirmation of the respondent's agreement to the transaction in issue. Undoubtedly, the respondent did not oblige. It is also not in dispute that the respondent's interface with the petitioner was through the

petitioner's broker i.e., ABC. The fact that the respondent had not opened an letter of credit in favour of the petitioner would, only go to show that the transaction or the proposal was, in a nacent stage which, required a positive affirmation on the part of the respondent before it could morph into a legal obligation. Addendum no. 1 dated 11.08.2008, which got, ostensibly, generated pursuant to respondent's letter dated 29.07.2008, would only show that the petitioner's offer had not transmuted into a contract as, even the said addendum did not bear the respondent's signature.

10.4 Since, the transaction did not fructify, the CPO was not shipped. The petitioner's claim before the arbitral tribunal was thus, a claim only for damages based on the difference between the contracted price, which was USD 1190 per MT as on 05.06.2008, and the market price on the purported date of default i.e., 30.12.2008 which, the petitioner crystallized at USD 520 per MT.

10.5 It is in this context that a settlement was proposed perhaps by adopting the principle of a "wash out settlement". Undoubtedly, the settlement did not go through. The fact that respondent had engaged in a settlement, in my view, did not, in any manner, dilute its stand that there was no arbitration agreement existing between the parties. I may only note that in somewhat similar situations, single judge of this court, in two separate judgments in the case of *AgriTrade International Pte Ltd.* and *Cinergy Corporation Pte. Ltd.*, has refused to entertain petitions against the respondent herein.

10.6 The two judgments cited by the petitioner, i.e., *Smita Conductors Ltd.* and *Shakti Bhog Foods Ltd*, are clearly distinguishable on facts. One cannot quibble with the fact that as per, Para 2, Article II of the New York

Convention the agreement in writing would include exchange of letters and / or telegrams. The point for consideration, in this particular case is : as to whether the respondent had conveyed its acceptance to the offer of the petitioner contained in the sales contract dated 05.06.2008. Having come to the conclusion that in the facts of this case, there was no acceptance of the offer made by the petitioner, in my opinion, no concluded contract came into existence and, therefore, by logical corollary, one could safely say that there was no binding arbitration agreement subsisting between the parties.

11. In view of the foregoing discussion, I am not inclined to grant the reliefs prayed for in the petition. The petition is accordingly dismissed. Parties shall, however, be left to bear their own costs.

RAJIV SHAKDHER, J.

MARCH 04, 2015

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