

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 18.08.2016

CORAM:

THE HONOURABLE Mr.JUSTICE A.SELVAM
and
THE HONOURABLE Mr.JUSTICE P.KALAIYARASAN

O.S.A.No.199 of 2015

M/s. Sabari Exim Pvt., Ltd.,
Represented by its Managing Director
Mr.Shashi Kumar,
Trade Centre, 2nd Floor,
114 & 115, Wallajah Road,
Chennai - 600 002. ... Appellant

Vs.

SIMS Metal Management Limited
Having Registered office at
Sir Joseph Banks Corporate Park,
Suite 3, Level 2, 32 Lord Street,
Botany New South Wales 2019,
Australia. ... Respondent

Original Side Appeal under Order XXXVI Rule 1 of Original
Side Rules against the order, passed in Arbitration in O.P.No.56
of 2014, dated 26.06.2014. Consequetively set aside the
Arbitration award dated 28.02.2013 issued by the Australian
Maritime and Transport Arbitration Commission.

For appellant : Mr.S.R.Rajagopal

For respondent : Ms.Anitha Thomas
for M/s. V.J.Mathew & Co.,

JUDGMENT

(Judgment of the Court was delivered by
P.KALAIYARASAN, J.)

This Original Side Appeal is directed against the Order of
the learned single Judge, dated 26.06.2014 in O.P.No.56 of 2014,
allowing the original petition, holding that the Foreign Award,

dated 28.02.2013 is enforceable.

2. The facts of the case in nutshell are as follows :

(i) The respondent, Sims Metal Management Ltd., (for brevity Sims), a company domiciled in Australia and the appellant, Sabari Exim Pvt., Ltd., (for brevity Sabari), a company registered under the Companies Act, 1956 entered into a contract, dated 07.05.2012 for sale by the Sims to the Sabari for import of 30000 MT steel scrap plus / minus 5 percent at the sellers option.

(ii) As per Clause 5 of the Contract, the appellant company (Sabari) was to establish 100% irrevocable Letter of credit for 100% of the contract value latest by 14.05.2012 and the same was extended to 18.05.2012. The appellant completely failed to open the letter of credit as required and thereby breached the terms of the contract. The respondent company (SIMS) initiated International Commercial Arbitration in line with the Arbitration clause contained in the contract to recover damages for the loss suffered by the respondent company.

(iii) The Arbitration was conducted in Sydney in Australian Maritime and Arbitration Commission (AMTAC) Arbitration Rules in line with Clause 12 of the Contract. The appellant was duly intimated about the initiation of the Arbitral Proceedings and they participated in the proceedings.

(iv) The Arbitral Tribunal, after analysing the terms of the contract between the parties and the rival contentions passed an Award in favour of the respondent company directing the appellant company to pay a sum of USD 19,50,000 towards compensation for losses owing to the breach of the contract with interest and costs.

3. The appellant as respondent before the learned single Judge contended in its objection filed under Section 48 of the Arbitration and Conciliation Act, 1996, that the appellant was not issued with statutory notice for appointment of Arbitrator; that agreement was made under inducement and Award was passed fraudulently denying the respondent from contesting the same in free and fair manner; that the Tribunal did not consider the Clause of Force Majeure and that the Award is not enforceable as it has applied the UN convention, not in accordance with law of the country of Arbitration.

4. The respondent company contended that the Arbitrator consistently applied the principles of natural justice in the conduct of Arbitral Proceedings; that the appellant fully participated in Arbitral Proceedings and the Award is passed in terms of the clauses in the contract and procedure was adopted, as per AMTAC Arbitration Rules.

5. The learned single Judge after analysing the contentions of both sides, allowed the Original Petition.

6. For the enforcement of Foreign Award, the applicant should comply with the requirements of Section 47 of the Arbitration and Conciliation Act, 1996. If there is any reason as provided under Section 48 of the Act, for not enforcing the foreign Award, the appellant is bound to plead and establish the same.

7. The learned counsel appearing for the appellant argued in vehemence that there was no proper notice about appointment of Arbitrator and the appellant was not given fair opportunity in the Arbitral Proceedings. He further contends that the class of Force Majeure was not considered by the Arbitrator, which is against public policy.

8. The Hon'ble Supreme Court in Shri Lal Mahal Ltd., v. Progetto Grano Spa, reported in (2014) 2 SCC 433, held in paragraph 29 as follows :

"29. We accordingly hold that enforcement of foreign award would be refused under Section 48 (2)(b) only if such enforcement would be contrary to (1) fundamental policy of Indian law; or (2) the interest of India; or (3) justice or morality. The wider meaning given to the expression "public policy of India" occurring in Section 34(2) (b) (ii) in Saw Pipes (ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705) is not applicable where objection is raised to the enforcement of the foreign award under Section 48(2)(b)."

9. In the contract between the parties, dated 03.05.2012, Clause 14 relates to Force Majeure, which reads as follows :

"14. FORCE MAJEURE :
Force Majeure, as used herein, shall mean a cause or causes beyond the will or control of any of the parties to this contract as the case may be, which wholly or in part, prevents performance by the claiming party of its obligations hereunder (Except for buyer's obligation to pay for the cargos hereunder).
Examples of Force Majeure include without Limitation : Acts of God, insurrections, blockage of the loading port and / or the discharge port, declared or undeclared war, riot, strikes lockouts, breakdown of or damages to or destruction of installations and / or machinery and / or plant fires,

accidents, epidemics, floods natural or man-made disasters, actions and / or restrictions of Government (or agencies thereof), or any like contingency beyond the reasonable control of seller or buyer."

10. As per the contract, dated 03.05.2012, parties agreed as under :

"It is the essence of the contract and constitutes an essential condition of the present agreement, that the letter of credit is received and confirmed by seller's bank for 100 PCT of the contracted quantity latest by 14 May 2012."

11. The main contention of the appellant is that PEC Ltd., a Government of India Enterprises expressed its inability to grant Letter of credit and the appellant also informed the same to the respondent and that obtaining Letter of credit was beyond the control of the appellant and therefore, it comes within the definition of Force Majeure and the same has not been considered by the Arbitral Tribunal.

12. As already pointed out, the receipt of Letter of credit and confirmed by seller's Bank for 100 PCT of the contracted quantity latest by 14th May 2012 was stipulated as the essence of the contract, as the clause 11 of the contract. In spite of extension of time for Letter of credit till 18.05.2012, the appellant company failed to comply with the same. The reason stated by the appellant for its inability to produce Letter of credit cannot be construed as Force Majeure, that too for the reasons stated to be given to the appellant by the PEC Ltd. The reasons mentioned in the letter reads thus :

"Please refer your letter, dated 8.5.2012 regarding L/c for import of 30,000 MT steel scrap from M/s.Sims Metal Management Limited, Australia.

We regret our inability to process your request at the moment because of the volatility of Indian currency and the resultant affect of currency on the scrap demand / price in India. As a matter of fact, PEC is already over-exposed on scrap at the moment. We, therefore, have decided not to open any fresh Letter of Credit for Steel scrap till the currency stabilities and inventories in hand are reduced to an acceptable level."

The reasons mentioned in the letter cannot be construed to come within the clause of Force Majeure and the appellant cannot absolve himself under that score. Thus, there is no contravention that the public policy much less the Fundamental

policy of Indian law.

13. Another contention of the appellant is that the appellant was not given proper notice of the appointment of the Arbitrator and of the Arbitral proceedings. But the Award discloses that the appellant fully participated in the proceedings and he was also put on notice about the appointment of Arbitrator.

14. The learned single Judge has elaborately discussed how the appellant was informed to their mail address about the Arbitral Proceedings and they were directed to put forth objection or grounds to challenge the jurisdiction of the Tribunal or any other preliminary issues.

15. As rightly stated by the learned single Judge, paragraph 15 to 19 of the Award discloses how the Tribunal proceeded to take all reasonable steps to inform the respondent about the proceedings. Even before the appointment of Arbitrator, AMTAC sent communication by email to the email address all along used by the appellant for communicating with PEC Ltd. In Arbitral Proceedings, the appellant fully participated as discerned from the Award.

16. One another contention of the appellant that appeal shall lie only from the order refusing to enforce foreign award under Section 48 of the Arbitration and Conciliation Act, 1996 is also not sustainable.

17. A cursory reading of Section 50 of the Arbitration and Conciliation Act, does give way for the appeal from an order and prohibits only second appeal. No doubt in the said section, it has been specifically stated that appeal shall lie from the orders refusing (a) to refer the parties to arbitration under Section 45; and (b) to enforce a foreign award under Section 48. That does not preclude the right of appeal from orders granting the above reliefs. The foreign Award which would be enforceable shall be treated as binding for all purposes on the persons as between whom it was made, as per Section 46 of the Arbitration and Conciliation Act. Therefore, the above contention is not sustainable.

18. Yet another contention of the appellant is that the agreement was made under inducement. There is no material to show that such a plea was raised before the Arbitral Tribunal. Further there is absolutely no material even to probablise such a version. The argument that the award applied the U.N. Convention and not the law of country of Arbitration is without any basis. As initially pointed out, Australian Maritime and Transport Arbitration Commission (AMTAC) Arbitration Rules was followed by the Tribunal. For the aforesaid reasons, this Court do not find any reason to interfere with the orders of the learned single Judge and the appeal is liable to be dismissed.

In fine, this Original Side Appeal is dismissed, confirming the order of the learned single, dated 26.06.2014 made in O.P.No.56 of 2014. No costs.

s/d-
Assistant Registrar(CS-VI)

True Copy

Sub-Assistant Registrar

To

The Sub Assistant Registrar
Original Side
High Court, Madras

+1 cc to Mr.S.R.Rajagopal Advocate sr 47344
+1 cc to Mr.V.J.Mathew Advocate sr 47314

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