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

+ **EFA(OS) 21/2018 & CM Appl.No. 52743/2018 (stay)**

DRAEGERWERK AG & CO KGAA

..... Appellant

Through Mr. Arvind Nayar, Sr.Advocate with
Mr. Jyoti Kumar Singh, Ms. Shweta
Bharti, Ms. Katyani Mahendru,
Ms.Malllika Kamal & Ms. Upasana
Chandrashekar, Advocates

versus

ION BIO MED-I-CARE PVT LTD

..... Respondent

Through Mr. Samrat K.Nigam, Advocate

CORAM:

JUSTICE S.MURALIDHAR

JUSTICE I.S.MEHTA

ORDER

26.03.2019

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Dr. S. Muralidhar, J.:

1. This appeal is directed against an order dated 1st November, 2018 passed by the learned Single Judge in EA No.139/2015 in Execution Petition No. 271/2014.

2. The aforementioned Execution Petition was filed by the Appellant/Decree Holder (DH) seeking execution of an Award dated 29th June, 2012 in its favour by the ICC's International Court of Arbitration, against the Respondent/Judgement Debtor (JD) ION Bio Med I-Care Pvt. Ltd.

3. The disputes between the DH and the JD arising out of Joint Venture Agreement dated 9th May, 1987 and the ‘Distributor Agreement’ dated 22nd February, 1999 were referred to arbitration. The aforementioned Award was passed on 29th June, 2012 in favour of the DH.

4. Subsequent to the Award the DH filed a petition under Section 9 of the Arbitration and Conciliation Act, 1996 (‘Act’) seeking an injunction to restrain the JD from disposing of its assets. Thereafter Execution Petition No.271/2014 was filed in this Court under Section 36 of the Act for enforcing the Award.

5. In response to notice issued in E.P. 271/2014, the JD filed objections under Sections 48 of the Act contending that the Award was a foreign Award and therefore not enforceable as a domestic Award. In the impugned order the learned Single Judge, after discussing the rival contentions and the law explained in *Bhatia International v. Bulk Trading SA (2002) 4 SCC 105* and *Bharat Aluminium Company v. Kaiser Aluminium Technical Services Ltd. (2012) 9 SCC 552*, came to the conclusion that the Award in question was a domestic Award and that the JD ought to have challenged it under Section 34 of the Act.

6. The learned Single Judge observed that with the JD, on 27th August, 2012 having accepted notice in the application filed by the DH under Section 9 of the Act, the JD was aware of the Award but chose not to take steps to challenge it. The learned Single Judge did not accept the plea of the JD that it was justified in not challenging the Award presuming it to be a foreign

Award. The learned Single Judge held that this was “clearly a mistake” by the JD. The learned Single Judge noted that the mistake of the JD was based on the DH’s conduct of having filed an application under Section 45 of the Act at the time of seeking a reference. It was observed that the DH “cannot be allowed to take advantage of its own wrong”.

7. The learned Single Judge then posed the question whether in such circumstances the JD should be “shown any leniency in respect of the challenge to the award, as the award has not yet been tested on available grounds of challenge either under Section 34 or Section 48 or should the award be enforced straightway?” The learned Single Judge observed that the JD was “under the presumption that since the reference was made under Section 45, the award was in fact a foreign award” and waited for the DH to seek its enforcement. According to the learned Single Judge:

“Since there was an impossibility for the Judgment Debtor to challenge the award, if it was a foreign award, and since it has been held today by this Court, that the award is a domestic award, the limitation to challenge the award, would begin from now.”

8. In conclusion, the learned Single Judge held as under:

“i. That there is no implied or express exclusion of Part I of the Act;

ii. That the award dated 29th June 2012 passed by the International Court of Arbitration of the ICC, is a domestic award' as the proceedings were held in Delhi and the law governing the arbitration agreement was not specifically mentioned. The seat of arbitration would thus be Delhi.

iii. That the Decree Holder itself had earlier taken the stand that the disputes are governed by Part II of the Act and the reference had taken place under Section 45 of the Act - thus the understanding or belief of the Judgement Debtor that the same is a 'foreign award' was a bonafide error of law;

iv. The Judgement Debtor having not had an opportunity to challenge the award under Section 34 of the Act, as it was under the bonafide belief that the same is a 'foreign award', deserves to be given an opportunity to avail of its legal remedies, upon this court declaring the award to be a 'domestic award'”

9. Mr. Arvind Nayar, learned senior counsel appearing for the DH, at the outset stated that the DH is not aggrieved by the conclusions at (i) and (ii) above but is aggrieved by those at (iii) and (iv). He submitted that the learned Single Judge erred in giving the JD an opportunity to challenge the Award under Section 34 of the Act by clarifying that the limitation to do so would begin from the date of the judgment of the learned Single Judge i.e. 1st November, 2018. He submitted that the learned Single Judge had no power to extend the period of limitation contrary to Section 34 (3) of the Act. He submitted that having correctly held that the objection under Section 48 of the Act was not maintainable and that the Award was indeed a domestic Award and not a foreign Award, there was no occasion for the learned Single Judge to hold that the JD could still challenge the Award under Section 34 of the Act, when the limitation for doing so expired in 2012 itself.

10. In reply Mr. Samrat K. Nigam, learned counsel appearing for the JD submitted that at the outset the stand of the JD also was that the Award was

only a domestic Award. During the arbitral proceedings the parties had agreed on the applicability of Indian law to the proceedings. The seat of arbitration was also in India. Consequently, even the JD was not in doubt about the Award being a domestic award. Nevertheless he submitted that since the DH had initially proceeded on the basis that Part II of the Act applied, and had therefore applied under Section 45 of the Act for reference of the disputes to arbitration, the JD opted not to challenge the Award till enforcement proceedings were initiated by the DH. Referring to the decision in *Mumbai International Airport (P) Ltd. v. Golden Chariot Airport (2010) 10 SCC 422*, he submitted that the DH having elected to proceed on the basis that the Award was a foreign Award, later filed the petition under Section 36 of the Act by treating the Award as a domestic one. According to him, it is this change of stand of the DH, that persuaded the learned Single Judge to afford the JD an opportunity to challenge the Award under Section 34 of the Act.

11. The above submissions have been considered. The scope of the proceedings before the learned Single Judge was whether the execution petition filed by the DH under Section 36 of the Act was maintainable as such. As is evident from the impugned order of the learned Single Judge this issue was answered in the affirmative with the learned Single Judge agreeing with the DH that the Award in question was indeed a domestic Award which was enforceable as such.

12. It was not as if the JD was not aware that the Award was sought to be enforced by the DH in the Indian Courts. As noted by the learned Single

Judge soon after the passing of the Award on 29th June, 2012 the DH had filed OMP No. 777/2012 of this Court under Section 9 of the Act seeking interim reliefs and the JD had accepted notice in that petition on 27th August, 2012. For reasons best known to it, the JD failed to take steps immediately to challenge the Award. This was perhaps a mistake but certainly not a ‘bonafide error of law’ as held by the learned Single Judge. The question posed by the learned Single Judge whether the JD should be “shown any leniency in respect of the challenge to the award” was unwarranted. That was not even the plea of the JD before the learned Single Judge.

13. By not challenging the domestic Award under Section 34 of the Act within the time stipulated under Section 34 (3) of the Act, the JD had clearly missed the bus. It was not for the Executing Court to facilitate such challenge by the JD when the limitation for doing so had long expired. This was beyond the scope of the jurisdiction of the learned Single Judge under Section 36 of the Act in a petition seeking the enforcement of a domestic Award.

14. The law in relation to the limitation under Section 34 (3) of the Act is well settled. There are instances where the benefit of Section 14 of Limitation Act has been extended to Section 34 of the Act thereby excluding the time spent in *bonafide* pursuing proceedings in a Court which lacks jurisdiction. [See *State of Goa v. Western Builders (2006) 6 SCC 239*; *Consolidated Engineering Enterprises v. Principal Secretary, Irrigation Department (2008) 7 SCC 169*; *Coal India Ltd. v. Ujjal Transport Agency (2011) 1 SCC 117*

and *M.P. Housing Board v. Mohanlal & Co. (2016) 14 SCC 199*. However, this is not a case where the JD was pursuing proceedings in any Court, much less under a mistake, to challenge the Award. Here the JD simply failed to challenge the Award within the stipulated time.

15. In a recent decision dated 26th September 2018 in C.A. Nos. 7710-13 of 2103 (*P. Radha Bai v. P. Ashok Kumar*), the Supreme Court held that even Section 17 of the Limitation Act would not apply to Section 34 of the Act. It reiterated the earlier decision in *Union of India v. Popular Construction Co. (2001) 8 SCC 470* and held:

“The proviso to Section 34(3) enables a Court to entertain an application to challenge an Award after the three months period is expired, but only within an additional period of thirty days, "but not thereafter". The use of the phrase "but not thereafter" shows that the 120 days period is the outer boundary for challenging an Award. If Section 17 were to be applied, the outer boundary for challenging an Award could go beyond 120 days. The phrase "but not thereafter" would be rendered redundant and otiose. This Court has consistently taken this view that the words "but not thereafter" in the proviso of Section 34 (3) of the Arbitration Act are of a mandatory nature, and couched in negative terms, which leaves no room for doubt. (*State of Himachal Pradesh v. Himachal Techno Engineers & Anr., (2010) 12 SCC 210, Assam Urban Water Supply & Sewerage Board v. Subash Projects & Marketing Ltd., (2012) 2 SCC 624 and Anilkumar Jinabhai Patel (D) through LRs v. Pravinchandra Jinabhai Patel & Ors., (2018) SCC Online SC 276*)”

16. In the same decision *P. Radha Bai v. P. Ashok Kumar (supra)*, the Supreme Court explained the rationale behind the water-tight limitation

period in Section 34 (3) of the Act as under:

“37. This Court in *Popular Construction Case* (*supra*) at page 474 followed the same approach when it relied on the phrase "but not thereafter" to hold that Section 5 of Limitation Act was expressly excluded.

“12. As far as the language of Section 34 of the 1996 Act is concerned, the crucial words are "*but not thereafter*" used in the proviso to subsection (3). In our opinion, this phrase would amount to an express exclusion within the meaning of Section 29(2) of the Limitation Act, and would therefore bar the application of Section 5 of that Act. Parliament did not need to go further. To hold that the court could entertain an application to set aside the award beyond the extended period under the proviso, would render the phrase "but not thereafter" wholly otiose. No principle of interpretation would justify such a result. (emphasis added)”

38. Further, the exclusion of Section 17 is also necessarily implied when one looks at the scheme and object of the Arbitration Act.

39. First, the purpose of Arbitration Act was to provide for a speedy dispute resolution process. The Statement of Objects and Reasons reveal that the legislative intent of enacting the Arbitration Act was to provide parties with an efficient alternative dispute resolution system which gives litigants an expedited resolution of disputes while reducing the burden on the courts. Article 34(3) reflects this intent when it defines the commencement and concluding period for challenging an Award. This Court in *Popular Construction Case* (*supra*) highlighted the importance of the fixed periods under the Arbitration Act. We may also add that the finality is a fundamental principle enshrined under the Arbitration Act and a definitive time limit for challenging an Award is necessary for ensuring finality.

If Section 17 were to be applied, an Award can be challenged even after 120 days. This would defeat the Arbitration Act's objective of speedy resolution of disputes. The finality of award would also be in a

limbo as a party can challenge an Award even after the 120 day period.

40. Second, extending Section 17 of Limitation Act to Section 34 would do violence to the scheme of the Arbitration Act. As discussed above, Section 36 enables a party to apply for enforcement of Award when the period for challenging an Award under S.34 has expired. However, if Section 17 were to be extended to Section 34, the determination of "time for making an application to set aside the arbitral award" in Section 36 will become uncertain and create confusion in the enforcement of Award. This runs counter to the scheme and object of the Arbitration Act.

41. Third, Section 34(3) reflects the principle of unbreakability. Dr. Peter Binder in *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions*, 2nd Ed., observed:

"An application for setting aside an award can only be made during the three months following the date on which the party making the application has received the award. Only if a party has made a request for correction or interpretation of the award under Art. 33 does the time limit of three months begin after the tribunal has disposed of the request. This exception from the three month time limit was subject to criticism in the Working group due to fears that it could be used as a delaying tactics.

However, although "an unbreakable time limit for applications for setting aside" was sought as being desirable for the sake of "certainty and expediency" the prevailing view was that the words ought to be retained "since they presented the reasonable consequence of article 33". According to this "unbreakability" of time limit and true to the "certainty and expediency" of the arbitral awards, any grounds for setting aside the award that emerge

after the three month time limit has expired cannot be raised.”

42. Extending Section 17 of the Limitation Act would go contrary to the principle of 'unbreakability' enshrined under Section 34(3) of the Arbitration Act”.

17. Thus, in the instant case, there was no occasion for the learned Single Judge to direct that the limitation would start running from the date of the order of the learned Single Judge for the purposes of the JD challenging the Award under Section 34 of the Act.

18. In the circumstances, this Court sets aside conclusions (iii) and (iv) above in the impugned order of the learned Single Judge. In effect, this Court sets aside the permission granted by the learned Single Judge to the JD to challenge the Award by treating the limitation for that purpose to begin from 1st November, 2018.

19. The appeal is disposed of in the above terms. The application is also disposed of. The further proceedings in Execution Petition No. 271/2014 will continue in accordance with law.

S. MURALIDHAR, J.

I.S. MEHTA, J.

MARCH 26, 2019

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