



Arb.O.P.(Com.Div.)No.49 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	01.08.2024
Delivered on	30.08.2024

CORAM:

THE HONOURABLE MR. JUSTICE KRISHNAN RAMASAMY

Arb.O.P(Com.Div.)No.49 of 2022

and

A.No.1890 of 2022

M/s.Viterra B.V.

Formerly, known as M/s.Glencore Grain B.C.,

A Company incorporated under the laws

pertaining to companies in Netherlands

having its place of business at Blaak 31,

Rotterdam NL – 3011, GA, Netherlands.

Rep by its Power of Attorney, Sharmila Gaikwad

...Petitioner

Versus

1.ZETTA Resources Private Limited,

[Formerly known as M/s.G.Jawahar Enterprises]

36, Bharathi Park Road, 5th Cross Saibaba Colony,

Coimbatore, Tamil Nadu 641 011.

2.G.Jawahar

3.J.Rajalakshmi

...Respondent

[***1st respondent was amended and respondents 2 and 3 were impleaded as per order dated 25.07.2023 in A.Nos.1888 & 1891 of 2022]



Arb.O.P.(Com.Div.)No.49 of 2022

PRAYER :

WEB COPY

Arbitration Original Petition is filed under Sections 47 to 49 of the Arbitration and Conciliation Act, 1996, praying to pass an order that the petitioner is entitled to enforce and execute the Final Award dated 07.07.2017 as a deemed decree of this Court against the respondent, along with costs as awarded by the Arbitrator and the costs of the present petition.

For Petitioners : Mr.P.S.Raman, Senior counsel
for Mr.Rahul Balaji

For Respondent : Mr.R.Vidhya Shankar
Assisted by Mr.Pranav V.Shankar

ORDER

This Arbitration Original Petition has been filed under Sections 47 to 49 of the Arbitration and Conciliation Act, 1996 (hereinafter called as “the Act”) for enforcement and execution of the Foreign Award dated 07.07.2017 as a deemed decree of this Court against the respondents along with the costs as awarded by the Arbitral Tribunal and cost of the present petition.

2. The brief facts of the case are as follows:



2.1 The petitioner and the respondents were entered into 3 contracts dated 06.01.2010, 18.02.2010 and 19.02.2010 respectively for the sale and export of raw cotton by the respondents at Coimbatore in India to the petitioner at Rotterdam, Netherlands between March, 2010 and March, 2011 (hereinafter called as “Contracts”).

2.2 The Contracts were prepared and signed by the respondents at Coimbatore and the same were scanned and sent vide e-mail to the petitioner. Thereafter, the petitioner had counter-signed the said Contracts at Rotterdam, Netherlands and the same were scanned and sent back vide e-mail to the respondents.

2.3 Initially, the 1st respondent was a Partnership Firm, named as “M/s.G.Jawahar Enterprises”, represented by its Partners, viz., respondents 2 and 3. Subsequently, it was converted as a Private Limited Company on 23.10.2019. When the parties had entered into the aforesaid Contracts, i.e., during the year 2009 and 2010, the respondents 2 and 3 had only signed the said Contracts on behalf of the 1st respondent-Partnership firm. Since there was a dispute among the parties with regard to the supply of cotton, the said dispute was referred to Arbitration by



invoking the Arbitration clause available in the Contracts.

WEB COPY

2.4 Accordingly, the Arbitration was held at the International Cotton Association Limited. Subsequently, an award was passed in favour of the petitioner on 07.07.2017. Against the said award, an appeal was preferred by the 1st respondent herein, however, the same was dismissed by the Appellate Authority vide order dated 05.10.2018.

2.5 Further, an anti-suit injunction was also filed by the respondents before the District Court, Coimbatore for stay of the Arbitral proceedings held at UK. However, the said suit was dismissed, against which an appeal was filed and the same was also dismissed.

2.6 Therefore, according to the petitioner, the award has attained finality at the level of Appellate Stage. Hence, the present Original Petition has been filed under Sections 47 to 49 of the Act to enforce and execute the Foreign Award dated 07.07.2017

3. The submissions made by the petitioner:

3.1 Mr.P.S.Raman, learned Senior counsel appearing for the petitioner would submit that the Foreign Award was challenged by the



respondents mainly on the aspect of Force Majeure Clause. In terms of the Contract, the respondents are supposed to supply 16,000 Metric Tonnes of Indian origin raw cotton by virtue of total Contracts entered between the period from 18.11.2009 to 06.01.2010. The respondents have supplied the cotton and completed the performance in 7 out of 10 Contracts. As far as the remaining three Contracts are concerned, the respondent have failed to supply the agreed quantity of cotton citing the reason that there was a press note dated 19.04.2010, whereby restriction was imposed by the Ministry of Textiles, Government of India, for export of cotton to the Foreign countries.

3.2 Further, he would submit that the respondents have extensively made submission on the aspect of Force Majeure clause, i.e., clause 6 of General Conditions of Contracts (GCC), citing the press note of the Government of India dated 19.04.2010. The Arbitral Tribunal have considered the submissions made by the respondents and passed a detailed Award dated 07.07.2017, whereby they had rejected the aspect of Force Majeure implication.

3.3 Aggrieved over the said award, a technical appeal was filed by



the respondents before the Technical Appeal Tribunal and the same was dismissed vide order dated 05.10.2018. Thereafter, the respondents sought permission of the Queen's Bench Division to file an appeal against the aforesaid order dated 05.10.2018, however, the same was denied by the Queen's Bench Division vide order dated 25.02.2020.

3.4 Therefore, he would submit that there is no embargo for this Court to pass an order to enforce the Foreign Award dated 07.07.2017. Accordingly, he requested this Court to pass an order to enforce the Foreign Award in terms of the provisions of Sections 47 to 49 of the Act.

4. Counter-Submissions of the respondents:

4.1 On the other hand, Mr.R.Vidhya Shankar, learned counsel appearing for the respondents had strongly opposed for the execution of the Foreign Award for the reasons stated below.

4.2 He referred to Clause 6 of GCC and submitted that there was a Force Majeure event while executing the Contracts, i.e., there was a restriction for export of the cotton by virtue of press note dated 19.04.2024 issued by the Ministry of Textiles, Government of India, due



to which, the respondents were completely prohibited from executing the Contract. However, the said aspect was not at all considered by the Arbitral Tribunal as well as by the Appellate Authority, where the award was challenged. Further, he would submit that if there is any such prohibition, the same will be squarely covered under Clause 6 of GCC. Therefore, the said award, which was passed without considering the said aspect, cannot be enforced in terms of Sections 47 to 49 of the Act.

4.3 He would also submit that pending the Arbitral proceedings, a Certificate of Incorporation was issued on 23.10.2019, whereby M/s.Jawahar Enterprises, which was a Partnership Firm, was converted into a Private Limited Company, namely M/s.Zetta Resources Private Limited. Pursuant to the said conversion, the respondents 2 and 3, who were the partners, have become members of the 1st respondent-Company.

4.4 By citing the proviso to Section 370 of the Companies Act, 2013, he would submit that no execution of award can be issued against the property or persons on any individual member of the Company, on any decree or order obtained in any suit or proceedings of the erstwhile Partnership firm, however, in the event of property of the Company being insufficient to satisfy the decree or order, the order may be obtained for



winding up of the Company.

WEB COPY

4.5 Further, by referring the aforesaid proviso, he would submit that though the respondents 2 and 3 were Partners of the 1st respondent-Partnership Firm, since the same was subsequently converted as Private Limited Company with effect from 23.10.2019, no execution proceedings can be initiated against the properties or the persons or individual members of the said Company. After the conversion of the Partnership Firm into Private Limited Company, both the respondents 2 and 3, who were Partners, have become members of the said Company/1st respondent. Therefore, the protection has been provided from any execution proceedings against the respondents 2 and 3 under Proviso to Section 370 of the Companies Act, 2013.

4.6 He would also submit that though the respondents 2 and 3 were partners of the 1st respondent-Partnership Firm, they were neither impleaded as parties to the Arbitral proceedings nor arrayed as respondents in the award passed by the Arbitral Tribunal. Hence, he would submit that on this aspect also, no execution proceedings can be initiated against the respondents 2 and 3. In such case, the impugned Award is not enforceable against all the 3 respondents. Therefore, he



Arb.O.P.(Com.Div.)No.49 of 2022

requests this Court to reject the present petition filed for enforcement and execution of Foreign Award dated 07.07.2017.

4.7 In support of his contentions, he referred to the following judgments:

- i) ***Gemini Bay Transcription Private Limited vs. Integrated Sales Service Limited and another*** reported in ***(2022) 1 SCC 753***;
- ii) ***National Agricultural Cooperative Marketing Federation of India vs. Alimenta S.A.*** reported in ***(2020) 19 SCC 260***;
- iii) ***COX & KINGS LTD vs. SAP INDIA (P) LTD.,*** reported in ***(2024) 4 SCC 1***;

5. The reply made by the petitioner to the counter-submissions of the respondent:

5.1 In reply, Mr.P.S.Raman, learned Senior counsel appearing for the petitioner would submit that there is no doubt that the Ministry of Textiles, Government of India, had issued a press note on 19.04.2010, due to which, there was a restriction for the export of cotton. However, in the said press note, it has been clearly stated that wherever Export



Arb.O.P.(Com.Div.)No.49 of 2022

Authorization Registration Certificate (EARC) was obtained, the parties can re-validate the same and thereafter export the cotton.

5.2 In the present case, the respondents had completed the execution of 7 out of 10 contracts. Only 3 contracts were pending, out of which, for 2 contracts, the respondents had obtained EARC. In this regard, some of the letters were also shown by the respondents for re-validation. When such being the case, it is the responsibility of the respondents to take steps to get it re-validated and hence, there is no prohibition with regard to the export of 2 Contracts.

5.3 As far as 10th Contract is concerned, a letter issued by the Government of India, Ministry of Commerce and Industries, on 10.01.2010, whereby the approval was granted for export of cotton to an extent of 2058.20 bales.

5.4 By referring the said letter, he would submit that those bales were realized subsequent to the applications received from the respective



parties from 31.12.2010 to 06.01.2011, whereas the respondents had projected as if the aforesaid quantity of 2058.20 bales alone was allotted for export consequent to their application for EARC re-validation, which was completely incorrect statement since the said 2058.20 bales of cotton was allotted based on the individual application filed by the respondents. In such case, they would have made an application for export of cotton for 10th Contract.

5.5 Hence, he would contend that as submitted above, it is only the responsibility of respondents to take serious efforts in obtaining the permission for export of cotton. Considering the said aspects, the Foreign Award was rightly passed by the Arbitral Tribunal. Therefore, he would submit that there is no merits in the submissions made by the respondents and the same is liable to be rejected.

5.6 As far as the conversion of Partnership firm is concerned, he would submit that subsequent to the dismissal of appeal filed by the respondents before the Appellate Authority and Queen's Bench Division, the steps were taken by the respondents for conversion of the Partnership Firm into the Private Limited Company and accordingly, the certificate of



incorporation was also issued on 23.10.2019.

WEB COPY

5.7 Further, by referring the Form URC-I filed by the respondents, he would submit that at the 10th Column of the said Form, the respondents had stated that no suit or legal proceedings were pending against the 1st respondent-Entity, by which, they have concealed the material facts about the pendency of the Arbitral proceedings between the petitioner and the respondents. Therefore, it is clear that only by playing fraud, the respondents had converted the 1st respondent-Partnership firm into a Private Limited Company.

5.8 He would also submit that notwithstanding the above fraud played, even assuming if the conversion is valid, the respondents cannot absolve their liabilities in terms of Section 55 read with Clause 16(1) of the Second Schedule of the Limited Liabilities of the Partnership Act, 2008, wherein it has been stated that if the liability was crystallized before conversion, every partner of a Firm, which was converted into Limited Company, shall continue to be jointly and severally liable for the liabilities of the Firm, which were incurred prior to the conversion or which arose from any contract entered into prior to the conversion.



WEB COPY

5.9 Further, he would submit that the protection under Section 370 of the Companies Act, 2013, would be available to the Partners only if the liability was not crystallized before the conversion. When such being the case, in the present case, the Foreign Award was passed much prior to the conversion and hence, at the time of conversion, the liability was crystallized and upon crystallization, the joint and several liabilities have already started against the respondents as well.

5.10 Therefore, he would submit that there is no merits in the submissions made by the learned counsel for the respondents and hence, he pleaded to pass an order to enforce and execute the Foreign Award dated 07.07.2017.

6. I have given due consideration to the submissions made by Mr.P.S.Raman, learned Senior counsel appearing for the petitioner and Mr.R.Vidhya Shankar, learned counsel appearing for the respondents and also perused the entire materials available on record.

7. In the present case, the Foreign Award was passed by the



Arb.O.P.(Com.Div.)No.49 of 2022

Arbitral Tribunal on 07.07.2017. Subsequently, against the said award, an appeal was filed by the respondent, however, the same was dismissed by the Appellate Authority on 05.07.2018. Therefore, now the award holder-petitioner has filed this present original petition for enforcement of the Foreign Award in terms of Sections 47 to 49 of the Act.

8. The respondents made objections before the Arbitral Tribunal by citing the reasons that the Contracts were frustrated and not enforceable due to the prohibition imposed by the Government of India for export of cotton by virtue of the press note dated 19.04.2010, whereby the respondents were prevented from executing the Contract Nos. 8, 9 and 10.

9. I have perused the Foreign Award passed by the Arbitral Tribunal and upon perusal, it appears that the respondents have made submissions elaborately with regard to the Force Majeure both before the Arbitral Tribunal and the Appellate Authority. Thereafter, though the Arbitral Tribunal and Appellate Authority have discussed with regard to the Laws of England and the procedure applicable in terms of the said Laws, they have ultimately come to the conclusion that there was no



Force Majeure situation and therefore, the protection under the Force Majeure Clause for the non-enforcement of the Contract will not be available for the respondents. Only if there was any prohibition for export of cotton and if any public policy decision was taken by the Government of India not to export the cotton, the same would be considered as Force Majeure situation as the same is against the public policy.

10. Further, in the present case, there is no dispute with regard to fact that the parties had entered into 10 Contracts totally. Out of 10 Contracts, 7 Contracts were executed by the respondents. While executing Contracts 8, 9 and 10, there was a press note dated 19.04.2010 issued by the Ministry of Textiles, Government of India, whereby the Government of India had put restrictions on the export of cotton. The said press note is extracted hereunder:

“Pursuant to the Inter Ministerial meeting on steep increase in prices of cotton etc, the Government have decided that the registration of Export contracts prior to shipment of Raw Cotton (Lint) -Tarrif item code 5201, Cotton Waste (including yarn waste and garnetted stock) Tarrif item code 5202 and Cotton carded or combed Tarrif item code 5203 allowed so far under Ministry of Commerce and Industry notification No. 26 (RE-



WEB COPY



Arb.O.P.(Com.Div.)No.49 of 2022

2008)/2004-09 dated 22.07.2008, shall now be suspended with effect from 19.04.2010 till further orders. Consequently, the procedure prescribed under the Textile Commissioner's Memorandum-I bearing No. 1/162/2008/cotton/131 dated 26.07.2008, as amended vide corrigendum of even No. 44 dated 10.10.2008 on the subject of registration of export contracts, is hereby kept in abeyance till further orders.

The suspension of registration of export contracts shall extend to the applications for registration in pipeline in the office of Textile Commissioner, Mumbai for which Export Authorisation Registration Certificate (EARC) have not been issued The EARC's issued prior to the closing hours of 19.04.2010 and having valid shipment period with unshipped quantity shall have to be got revalidated by the exporters with the office of the Textile Commissioner, Mumbai by preferring an application in the prescribed form to enable the clearance of goods by the Customs. The Textile Commissioner would allow revalidation of EARC's permitting unshipped quantity for shipment on monthly pro-rata limits so that a reasonable carry over stock of the Cotton is maintained in the country."

11. A perusal of the above press note makes it clear that wherever



Arb.O.P.(Com.Div.)No.49 of 2022

EARC was issued and the same can be re-validated by the Textile Commissioner upon the requests made by the parties concerned.

12. In the present case, the EARC was already issued for the Contract Nos. 8 and 9, however, the respondent was unable to get re-validation of the same. By citing some letters, it was submitted by the learned counsel for the respondents that they have send the said letters to the Ministry of Textile for re-validation of EARC, however, they have not received any response for the same.

13. This Court is of the view that as long as there was no prohibition for the export of cotton, it is only the respondents' inability to obtain the re-validation of EARC and hence, the respondents cannot say that they have made application and the Government had not considered the same. Therefore, in the event of inability to execute the Contract Nos.8, 9 and 10, ultimately the respondents have to compensate the petitioner. That is what happened in the present case and the said aspect was well considered by the Arbitral Tribunal while passing the Award.

14. Further, he would submit that consequent to the respondents'



Arb.O.P.(Com.Div.)No.49 of 2022

application for re-validation, the Ministry of Textiles has permitted 2058.20 bales of cotton for export by virtue of letter dated 10.01.2010 and the same is extracted hereunder:

“Policy Circular No. 09(RE-2010)/2009-14 dated 29.12.2010 had stated that the declaration of allocation of quantities against the applications received from 31.12.2010 to 06.01.2011 will be made a 10.01.2011.

The Annexure to this Trade Notice contains the allocation of 19,00,000 Bales of cotton. The fractional numbers, in the annexed allocations will be rounded off at the time of issue of Registration of Certificates, in order to ensure commercially meaningful transaction.

A separate trade notice is being issued about the scheme and modalities of scrutiny of documents. The scrutiny would commence at 1000 Hrs on Tuesday 11.01.2011 and will close at 1100 Hrs on Tuesday 25.01.2011, as was given in Policy Circular.”

15. A reading of the above shows that the allocations were made based on the applications received from 31.12.2010 to 06.01.2011, which is not pertaining to the application for re-validation of EARC, whereas it was projected by the respondents as if 2058.20 bales of cotton was



allotted consequent to the application filed by the respondents for re-validation of EARC, which is incorrect since this allocation was made based on the fresh applications for fresh allotment. Even there was no separate application was made with respect of Contract No. 10. This shows that Respondent had failed to discharge their obligations as per the contract.

16. Further, on perusal of various mails filed before the Arbitral Tribunal and this Court, it appears that the respondents had bargained with the petitioner for increase in the price of cotton during the relevant period and also he expressed his readiness to supply the same for higher price. In such case, it creates a doubt in the mind of this Court that the respondent might have obtained approval for export of cotton and thereafter, using the situation, they could have allotted the same to sell it to the 3rd parties at higher rate. Though it was argued by the respondents that they have not obtained revalidation of EARC, the wordings in the e-mail, which were perused by this Court, would indicate their readiness to supply the cotton immediately during the contract period at higher price, in the event if the Petitioners agreed for the same, which means, there was all possibilities that respondents would have obtained re-validation of EARC pertaining to Contract Nos. 8 and 9 and sold the same to the 3rd



parties at a higher rate.

WEB COPY

17. All these aspects were well considered by the Arbitral Tribunal, including the Force Majeure clause, and therefore, I do not find any merits in the contentions raised by the respondents that the Contract was unenforceable due to the Force Majeure situation and hence, the same is rejected.

18. The next contention raised by the respondents is with regard to the absolving the liability by the partners due to the reason that they have not impleaded to the proceedings before the Arbitral Tribunal. Further, it was contended by the respondents that subsequent to the conversion of Partnership Firm as a Private Limited Company, i.e., with effect from 23.10.2019, the protection is available to the respondents 2 and 3 in terms of Section 370 of the Companies Act, 2013.

19. As far as the above contentions made by the respondents are concerned, before the conversion of 1st respondent-company from Partnership Firm, the contracts were entered between the petitioners and Partnership Firm, whereby the respondents 2 and 3 had represented the



Arb.O.P.(Com.Div.)No.49 of 2022

Partnership Firm and signed on behalf of the Partnership Firm in all the 10 Contracts. In this regard, it is relevant to extract Section 25 of the Partnership act, 1932 which reads as under:

“25. Liability of a partner for acts of the firm.—

Every partner is liable, jointly with all the other partners and also severally, for all acts of the firm done while he is a partner.

20. In terms of the above provision of Section 25 of the Partnership Act, 1932, the partners are jointly and severally liable for the liability of the Partnership Firm. That apart, the Foreign Award has attained its finality by virtue of dismissal of appeal filed by the respondents on 05.10.2018. Therefore, the joint and several liability have already been crystallized against the Partners, viz., respondents 2 and 3 and the same is in existence till now.

21. As far as, the protection available under Section 370 of the Companies Act, 2013 is concerned, the same will not be available by virtue of the conversion of Partnership firm into Private Limited Company



on 23.10.2019. When the Arbitral Award attained finality on 05.10.2018. At this juncture, it would be apposite to extract Section 370 of the Companies Act, 2013, which reads as follows:

“370. Continuation of pending legal proceedings.—

All suits and other legal proceedings taken by or against the company, or any public officer or member thereof, which are pending at the time of the registration of a company in pursuance of this Part, may be continued in the same manner as if the registration had not taken place.

Provided that execution shall not issue against the property or persons of any individual member of the company on any decree or order obtained in any such suit or proceeding; but, in the event of the property of the company being insufficient to satisfy the decree or order, an order may be obtained for winding up the company.”

22. A reading of the above Section would makes it clear that all the suits and other legal proceedings taken by or against the Company or member thereof which are pending at the time of the Registration of the



Company may be continued as if the registration has not taken place and if any suit was already filed, the same would be continued against the Company in the same manner as if the registration has not taken place.

23. Further, a reading of the proviso to Section 370 of the Companies Act, 2013, would show that the execution shall not be issued against the properties or persons or individuals of the Company on obtaining any decree or order. This proviso will apply in a situation where any suit was pending and a decree was passed in the said suit after the conversion of Partnership Firm into a Company. In such situation, no action can be taken against the persons, who were partners before the conversion and became members after the conversion. This is because, at the time of conversion into company, the objection from creditors would be called for. In which case, the objection if any, from any creditor, should be filed before the concerned authority. The authority would consider the same and pass orders. Once the authority approved the conversion, thereafter, the protection available to the partners will come into effect. Therefore, if any award was passed and liability was crystallized against the Partners as on the date of conversion, the



Arb.O.P.(Com.Div.)No.49 of 2022

protection available under Section 370 will not be available to the respondents.

24. In the present case, the award attained its finality well before the conversion of Partnership Firm into Company. Thus, on the above aspect, the respondents 2 and 3 cannot absolve any liability by citing the reason that they have protection under Section 370 of the Companies Act, 2013 since once any liability is crystallized against the partners before conversion of Partnership Firm as Private Limited Company, the status of the partner as 'debtor' cannot be changed by virtue of such conversion and the protection available under Section 370 of the Companies Act, 2013, will also not available to them.

25. As far as the Form URC-1 filed by the respondents is concerned, this Court is of the considered view that since the award attains finality, the respondent have not considered the present proceedings as a pending suit and hence, it was marked in the URC-1 by the respondents that no legal proceedings are pending against the Firm whereby they have not issued any notice to any person based on the



Arb.O.P.(Com.Div.)No.49 of 2022

pending claims to invite the objections before the Authority, which would ultimately prove that the award attained its finality and the same was accepted by the respondent. Therefore, the joint and several liability has already been crystallized against both the Partnership Firm as well as the Partners in their respective capacity. Hence, there is no embargo to initiate the legal proceedings to recover the amount from respondents 2 and 3 along with 1st respondent company by the petitioner to enforce the award.

26. In such view of the matter, this Court is inclined to allow this petition by permitting the petitioner to enforce the foreign award in terms of Sections 47 to 49 of the Act.

27. Since this Court decided the dispute on the facts available and in view of the above findings, it may not be necessary for this Court to consider the very many case laws referred by the learned counsel for the respondents.

28. Accordingly, this Arbitration Original Petition is allowed. No cost. Consequently, the connected application is also closed.

30.08.2024

Speaking order : Yes



Arb.O.P.(Com.Div.)No.49 of 2022

Index : Yes

Neutral Citation: Yes

nsa

WEB COPY



WEB COPY



Arb.O.P.(Com.Div.)No.49 of 2022

KRISHNAN RAMASAMY.J.,

nsa

Pre-Delivery Order made in
Arb.O.P (Com.Div.)No.49 of 2022
& A.No.1890 of 2022

30.08.2024