



2024:DHC:7897



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

%

Reserved on: 26th April, 2024
Pronounced on: 3rd October, 2024

+

CS(COMM) 1173/2018

CAMPOS BROTHERS FARMS

15516 S, Walnut Avenue
Caruthers, California
93609-9607
United States of America

..... Plaintiff

Through: Mr. Uttam Datt and Mr. Abhishek
Mishra, Advocates.

versus

1. **MATRU BHUMI SUPPLY CHAIN PVT. LIMITED**

Office No.12, S 558, School Block,
Shakarpur New Delhi, 110092.

Also at:

BN-79, West Shalimar Bagh
Delhi-110088.
India.

2. **INDRAPRASTHA ICE & COLD STORAGE PVT LTD**

Indraprastha Bhawan
Plot No. 17& 18
Azadpur
New Subzi Mandi
Delhi-110033.
India.

3. **DEV BHUMI COLD CHAIN LTD.**

Indraprastha Bhawan
Plot No. 17& 18
Azadpur



New Subzi Mandi
Delhi-110033.
India.

4. **KUMAR DHRUVA AGGARWAL**
5. **SANJAY AGGARWAL**
6. **SUNILA AGGARWAL**
7. **JAGDISH PRASAD AGGARWAL**
8. **PREMLATA AGGARWAL**
9. **SANYOGITA AGGARWAL**

.....Defendants

Through: Mr. Sulabh Rewari and Mr. Shubhansh Thakur, Advocates for D1, 3 to 7. Mr. Amit Agrawal and Mr. Rahul Kukreja, Advocates for D-2.

CORAM:
HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G M E N T

NEENA BANSAL KRISHNA, J.

1. The defendants have raised the question of maintainability of the present suit for recovery of USD 1,155,111/- filed on behalf of the plaintiff on the ground that, the plaintiff has already availed the remedy in regard to the Contract by invoking International Arbitration which had culminated in an Award, the enforceability of which has been denied by this Court.

2. ***Briefly stated***, the plaintiff entered into three Sales Contracts with defendant No.1 and one Sale Contract with defendant No.2 for sale of Non



Pareil In-shell Almonds (NPIS) relating to the Crop Year 2015. In July, 2015 the plaintiff entered into separate Sale Contract with defendant No.1 and defendant No.2 respectively which made Uniform Almond Export Contract (UAEC, 2007) terms and conditions as part of the Contract.

3. The plaintiff supplied five shipments/loads out of ten to defendant No.1 by October, 2015, against the Invoices. The goods were received and accepted by defendant No.1, though, allegedly no payment, whatsoever, has been made by the plaintiff. The three Shipments reached the port in India on 12.10.2015 and 31.10.2015 and were awaiting clearance at the Port in Mumbai. There were two remaining loads, out of which one was shipped on 22/23.10.2015. The fifth shipment was subsequently cancelled at the buyer's request. It is claimed by the plaintiff that because of long standing relationship between the plaintiff and the defendants, it tried its best to mitigate the losses of the defendant. The plaintiff gave '*No Objection Certificate*' to the defendants to enable them to be able to clear the three shipments which were awaiting at the Port. The plaintiff also agreed to provide Credit Notes for the unlawful and non-contractual charges which were demanded by the defendant on the strict basis that buyers would comply with all the terms of the Contracts. The Credit Notes accordingly were issued on 25.11.2015. The three shipments were thus, sold to other customer, though at a loss.

4. In so far as the last two loads are concerned, one load was not shipped at the request of the buyer and the sellers indicated that they would waive their claim in respect of the one shipment. In respect of the other load which had already been shipped on 22/23.10.2015, it was sold to another customer at a significantly lower price than the contracted price. Since the



disputes arose between the parties and according to the plaintiff he suffered loss and damages, he gave Legal Notice to defendant No.1 and 2 demanding an amount of USD 1,025,611.11 and for a sum of USD 223,930.09 with a request that the amounts be paid by 03.03.2016 failing which the plaintiff shall be bound to commence legal action.

5. A **Reply** was duly given by defendant No.1 and 2 dated 01.04.2016. The plaintiff left with no option invoked arbitration on 23.03.2016 under *Clause 42* of the CENTA Rules and nominated their Arbitrator. An Award was rendered in favour of the plaintiff on 25.07.2016 and the reliefs were granted to the plaintiff. The Arbitral Award had become final since it was not challenged by the defendants by filing any independent petition. In the interim, defendants initiated frivolous litigation in India.

6. Defendant No.2 filed a suit for *Declaration and Permanent Injunction* bearing *CS(COMM) 731/2016* before this Court, which was disposed of vide judgment dated 17.08.2016 by holding it as having become infructuous.

7. The plaintiff then filed *OMP (EFA) (COMM) 1/2017* seeking Enforcement of the Award dated 25.07.2016, which is pending consideration. By way of abundant caution, the plaintiff also filed the present Suit to avoid any bar of limitation *qua* the original cause of action in the event the Award for any reason was not recognized or enforced in India. In the event the enforcement succeeds, the plaintiff may not proceed further with the present suit. In case the enforcement is not allowed, then the original cause of action would still survive as the plaintiff has not been paid even a penny by the defendant against the subject matter of the Suit.

8. The plaintiff has thus, filed the present suit for recovery.



9. The *defendant No.1* has taken an objection to the maintainability of the present suit. It is stated that the Execution Petition in respect of the *Arbitral Award dated 25.07.2016* has been *dismissed* vide Order dated 02.05.2019 of this Court, wherein the learned Single Judge has held that although there was a valid and binding Arbitration Clause between the parties, it was unenforceable as the plaintiff had unlawfully consolidated proceedings against defendant No.1 and 2 and pierced the Corporate Veil without assigning any reasons for either of the above. *The Enforcement was refused as the Award was violative of Principles of Natural Justice and, therefore, contrary to the Public Policy of India.*

10. The Appeal against the Order of the learned Single Judge is pending before the Division Bench of this Court.

11. ***It is claimed by the defendant*** that the present suit on the same cause of action, is *ex-facie* not maintainable, is a gross abuse of process of law and ought to be dismissed in *limine*.

12. ***The first ground*** agitated in support of its contention is that the Suit is barred by *res judicata*. The reliance has been placed on Satish Kumar vs. Surinder Kumar AIR 1970 SC 833, wherein it was held that even when an Award is not made Rule of Court (as was required under Arbitration Act, 1940), it has a binding legal effect. Reliance has also been placed on Uttam Singh Dugal & Co. vs. Union of India Civil Appeal No.162/62 decided on 11.10.1962, wherein it has been held that all Claims referred to arbitration merge in the Arbitral Award and after the Award is pronounced, no action can be started on the original claim which had been referred to arbitration. Reliance has also been placed on Maimunabhai Akbar Ali vs. Mumtaz Hussain Akber Ali Topiwale (1987) 1 Bom. CR 17. Though it has been



qualified that all the aforesaid three decisions pertain to Domestic Awards under the Arbitration Act, 1940, the same principle apply in greater force in the context of a New York Convention Award under Part II of the 1996 Act, as the entire scheme of this Act is designed to increase the sanctity of the arbitral process and to reduce judicial interference.

13. **The second ground** agitated on behalf of the defendant is that having sought to enforce the Award, the plaintiff cannot file a Suit subsequently on the original cause of action. The reliance has been placed on Century Metal Recycling Private Limited vs. Sachin Chhabra (2018) 247 DLT 234; Badat and Co. Bombay vs. East India Trading Co. AIR 1964 SC 538 and Bank Kreiss AG vs. Ashok K. Chauhan and Ors. 2003 (68) DRJ 492.

14. **The third ground** to challenge the maintainability of the suit is that the plaintiff has been simultaneously pursuing the Execution proceedings and the present Civil suit as well, which amounts to abuse of process and may lead to multiplicity of proceedings. Reliance on this aspect has been placed on Mumbai International Airport Private Limited vs. Golden Chariot Airport and Anr. (2010) 10 SCC 422 and Dwijender Narain Roy vs. Jogs Chandra AIR 1924 Cal. 600; Marina World Shipping Corporation Ltd. vs. Jindal Exports Private Ltd. ILR (2007) I Del 1294 and on Narinder S. Chadha vs. Municipal Corporation of Greater Mumbai (2014) 15 SCC 689.

15. **The plaintiff in its written arguments** has countered the issue of maintainability of the present suit by explaining in detail that the relationship between defendant No.1 and 2 and No.3 to 9, wherein it has been asserted that they all are having common shareholders and have same surname and same addresses and it is defendant No.4 who is controlling the will and personality of defendant No.1 to 3. It is claimed that the defendant



No.4 to 9 have used the *Corporate veil* as an engine of fraud to make wrongful gains at the cost of causing wrongful losses to the plaintiff. It is asserted that defendant No.1 and 2 while entering into the Contracts with the plaintiff, had agreed to be bound by the terms and conditions of UAEC 2007, *Clause 42* of which provides for arbitration. The plaintiff had duly issued Notice dated 23.03.2016 to invoke the Arbitration Clause and had nominated Ms. Sheryl Wheeler as their Arbitrator and the defendant was called to nominate its own Arbitrator within fourteen days, failing which as per the rules of the Nut Association, Ms. Wheeler would act as the Sole Arbitrator.

16. The defendant No.1 on receiving the Notice of Arbitration, vide its Reply had denied the existence of the Arbitration Agreement. Several opportunities thereafter, were given to the defendant to appoint the Arbitrator and when the defendants refused to appoint an Arbitrator, the Arbitration appointed by the plaintiff was held by the Sole Arbitrator.

17. The plaintiff had submitted its Statement of Claim on 26.04.2016 and the Statement of Defence was required to be filed within fourteen days of receipt of plaintiff's submissions, i.e. by 10.05.2016 as per Rule 3(b) of the Arbitration Rules of CENTA. However, the defendants failed to do so. Both the parties were asked to file their additional documents by 13.06.2016 which was duly filed by the plaintiff but defendant again failed to comply. The Arbitral Tribunal after considering the exhaustive submissions and documents filed by the plaintiff, gave an Arbitral Award dated 25.07.2016, whereby the claim of the plaintiff was allowed against the defendants.

18. It is asserted that the Arbitration proceedings were only collateral as the present suit rests on the original cause of action. The right to sue on the



original cause has not got extinguished even after passing of the Foreign Award as Foreign Award merely created contractual obligations in favour of the plaintiff and furnished a new cause of action to sue. Furthermore, after passing of the Foreign Judgment, the original cause of action does not merge with it and it is the choice of the plaintiff whether to sue on the basis of Foreign Award or on the basis of original cause of action. Reliance has been placed on Mohd. Sherrif & Co. Ltd. vs. A.P.N Abdul Jabbar and Ors. (1966) ILR 1 Mad 18 and Badat and Co. (supra).

19. In the end, it is submitted that Arbitral Award is not a Decree of Civil Court and unless it is ordered to be enforced, it does not have the effect of a decree. It further does not bar the institution of a Suit in terms of Section 45 of the Arbitration & Conciliation Act, 1996. Moreover, the defendants have always claimed that there is no valid Arbitration Clause between the parties. The defendant No.2 in fact, had also filed *CS (COMM) 731/2016* seeking relief for Declaration that no Arbitration Agreement exists between the parties and had sought consequential relief of Permanent Injunction.

20. Further, as defendant No.3 to 9 were never parties to the Arbitration proceedings, the plaintiff cannot be non- suited because of the acts of the defendant. It is thus, contended that defendants cannot be permitted to blow hot and cold and urgent relief of attachment in favour of the plaintiff is required to be granted. It was thus, argued that the present suit is maintainable.

21. **Submissions heard and the written arguments perused.**

22. **Briefly stated** the plaintiff had entered into three contracts with Defendant No. 1 and one contract with Defendant No. 2 for sale of Non Pareil In-shell Almonds. In all these four sale Contracts, parties agreed to be



to abide by the terms of the Contract of Uniform Almond Export Contract (UAEC), 2007 Terms and Conditions. Its Clause 42 provides for Arbitration for resolution of disputes in accordance with the Arbitration Rules of the NUT Association, whose Arbitrators' International participation as permitted, shall be competent for final settlement of all or any dispute arising therefrom. Admittedly, the disputes arose and the plaintiff invoked Arbitration and appointed the Sole Arbitrator under UAEC, 2007, which had a Seat in London.

23. The learned Sole Arbitrator rendered the *Award dated 25.07.2016* in respect of which an Enforcement Petition OMP.EFA (Comm)1/2017 was filed but the same has been dismissed vide Order dated 02.05.2019.

24. The plaintiff had filed the Suit in 2018 on the basis of the original cause of action claiming breach of the Contract for supply of NPIS by the Defendants. The Defendant has questioned the maintainability of the present Suit on the three grounds, namely:

- (i) *the present Suit is barred by **Res Judicata** in view of the award dated 25.07.2016;*
- (ii) *having filed for Enforcement of the award, the present Suit on the original cause of action is not maintainable; and*
- (iii) *the simultaneous pursuing of the present Suit on the original cause of action and the Arbitration Proceedings in respect of the same cause of action is an abuse of process as it would lead to multiplicity of the proceedings.*

25. The three contentions raised by the Defendants, essentially are different facets of the same arguments which is: *whether having availed the*



Arbitration which ended in a Award in favour of the plaintiff, though the enforcement has been denied, the original cause of actions survives in favour of the plaintiff on the basis of which the present Suit has been filed.

26. The Arbitration was recognized as an alternate mode of Civil Dispute Resolution and found mention in Section 89 of the Code of Civil Procedure, 1908 (*hereinafter referred to as 'CPC'*). However, this Section got repealed when a separate Arbitration Act, 1940, was enacted. Essentially, the 1940 Act provided that the parties may agree to refer their disputes to Arbitration instead of agitating the same before the Civil Court; the implication being that the Arbitration was also in the nature of civil litigation with the only distinction being that instead of the matter being adjudicated by a Judge in Civil Court, it is decided by an Arbitrator, who is the Judge of the choice of the parties.

27. The *Arbitration Act, 1940*, required that an Award delivered by the Arbitrator be made into a Rule of the Court under Section 33 of the Act, to be effective as a decree of which the Execution could be sought. At this stage, either party was entitled to submit their respective Objections before the Court, which after consideration of rival Objections, may pass a Court decree, in terms of the Award. Such decree thus, became enforceable under the provisions of Code of Civil Procedure read with Arbitration Act, 1940.

28. This Act of 1940 got repealed and substituted by the Arbitration and Conciliation Act, 1996, to not only address the functional difficulties noticed under the old 1940 Act, but was also in line with the *UNCITRAL* Model. It brought in substantial changes to curtail and minimize the interference of the Courts in the Arbitration Matters. Under this 1996 Act, in addition to



Domestic Arbitration which is dealt with in Part -I of the Act, Foreign arbitration i.e. arbitration which have their juridical seat outside India, was separately provided in Part-II of the Act. The major change which has been brought by this Act of 1996, is that it provides the entire procedure for enforcement of Foreign Arbitration Awards.

29. Questions have been raised from time to time about the binding nature of the Foreign Awards and also on their mode of Enforceability. The **auxiliary** question which has been raised is *whether the Foreign Award merges with the original cause of action or whether the original cause of action survives*, on which an independent Suit can be maintained by the parties.

30. To put it succinctly, there are two aspects of any proceedings envisaged; *first* being to determine the *validity of the award on merits* and the *second* is the independent Execution proceedings for the enforcement of the Foreign Award. Such procedure does not prejudice either party in any manner because both the parties have the right of being heard before any findings on any aspect are rendered by the Courts.

31. It would be pertinent here to observe that there is no challenge that one of the parties was a foreign party and the Arbitration has taken place in England which was the Seat of Arbitration and the resultant Award is a Foreign Award as defined under S.44 of the Act, 1996 which is governed by Part II of the Arbitration and Conciliation Act, 1996.

A. Enforceability of the Foreign Award:

32. Before considering the validity of an Award and its challenge on merits, it would be appropriate to first consider the extent of interference of the Court at the time of Execution of the Foreign Award.



33. Part II of the Act, 1996 deals with Foreign Awards for enforcement of New York Convention Awards. Section 46 defines the conditions in which a Foreign Award is binding. It reads as under:

46. When foreign award binding.—Any foreign award which would be enforceable under this Chapter shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in India and any references in this Chapter to enforcing a foreign award shall be construed as including references to relying on an award.

34. Section 48 provides for the conditions for the enforcement of foreign Awards.

“48. Conditions for enforcement of foreign awards.— [...]

- (2) Enforcement of an arbitral award may also be refused if the Court finds that—
- (a) the subject-matter of the difference is not capable of settlement by arbitration under the law of India; or
 - (b) the enforcement of the award would be contrary to the public policy of India.

[Explanation 1.—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,—

- (i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or
- (ii) it is in contravention with the fundamental policy of Indian law; or
- (iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.—For the avoidance of doubt, the test as to whether there is a contravention with the fundamental



policy of Indian law shall not entail a review on the merits of the dispute.]...”

“49. Enforcement of foreign awards.—*Where the Court is satisfied that the foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of that Court.”*

35. From the bare perusal of Section 49, it is evident that the Foreign Award shall be treated as binding if it is held enforceable by the Courts. S. 46 further states that if the Award is found enforceable, it shall be *treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in India.*

36. Therefore, the prerequisite for holding an Award to be a Decree which is binding, it has to be first ascertained if it is enforceable. The question of maintainability of Execution of a foreign Award was considered in the case of Marina World Shipping Corporation Limited vs. Jindal Exports Private Limited, 2007 SCC OnLine Delhi 469. The Co-ordinate Bench of this Court in the said case, made a Reference to the provisions of Part-II of the Act and it was observed that the mode and manner of enforcement of foreign Award, was provided specifically therein. The enforceability of a foreign Award is a pre-requisite since without the same, there can be no question of even an endeavour to enforce the Award. The ambit and scope of explanation of Section 44 of the Act, makes it clear that the exception is carved out in case the Arbitration Award *“even if such an award is enforceable as a Judgment or decree.”* The objections to the Award, have to be within the ambit of Section 48 of the Act.



37. In Fuerst Day Lawson Ltd. v. Jindal Exports Ltd., (2001) 6 SCC 356, the Apex Court held that a proceeding seeking recognition and enforcement of a foreign Award envisages different stages to execute the Award; the *first stage* being to determine whether it is enforceable having regard to the requirements of Section 47 and 48 of the 1996 Act. If the Executing Court finds that the Award is enforceable, it is held to be binding and would then proceed with the enforcement of the award. Thus, there is no requirement of filing separate Petition for first determination of enforceability and thereafter proceed with its execution. A party holding a foreign Award can apply for its Enforcement, but the Court before taking any further steps for execution, would first decide about its enforceability having regard to the requirements of Section 47 to 49. Once the foreign Award is found to be enforceable, it can proceed further for Execution. There arises no question of making a Foreign Award as a *rule of the court or a decree* again. There are no separate proceedings required, otherwise resulting in multiplicity of litigation. This interpretation also finds support from the Statement of Objects and Reasons to the 1996 Act. Similar observations have been made in LMJ International Ltd. vs. Sleepwell Industries Company Ltd., (2019) 5 SCC 342.

38. The jurisdiction of the Court in which *enforcement is sought* is a *secondary jurisdiction limited to the question whether the Award is enforceable in that particular jurisdiction*. A review of the merits of the dispute does not fall within the jurisdiction of the Court under Section 48 of the Arbitration Act as also has been held in the case of Shri Lal Mahal Ltd. vs. Prerogative Grano Spa, (2014) 2 SCC 433.



39. In the case of Vijay Karia vs. Prysmian Cavi E Sistem Srl. And Ors. 2020 11 SCC 1, the Apex Court while considering the grounds taken to challenge the enforcement of Award under Section 48 of the Act, observed that the pleas taken by the Appellant were going to the unfairness of the conclusion reached by the Award, which is plainly a foray into the merits of the matter which is plainly proscribed by Section 48 of the Arbitration Act read with New York Convention.

40. The aforesaid dicta by the Apex Court notices the paradigm shift under the 1996 Act under which the party may apply for recognition and enforcement of a Foreign Award after it is passed by the Arbitral Tribunal without having to obtain the leave of the Court of the Seat in which or under the laws of which the Award was made. It is amply clear that the Executing Court while examining the enforceability of a Foreign Award, is confined to the grounds as stated in Section 48 of the 1996 Act and cannot foray into the merits of the Award.

41. ***In the present case***, the plaintiff has sought enforcement of the Execution bearing No. *OMP.EFA(Comm)1/2017*. The Coordinate Bench of this Court *vide* Order dated 05.05.2019 while observing that there was a binding Arbitration Clause between the parties, further considered if it had been rendered in accordance with the *Fundamental Policy of the Country*. Reference was made to the submissions that had been filed on behalf of Defendant Nos. 1 and 2 through e-mail dated 13.06.2016 which was within the time granted by the learned Arbitrator. The same have been excluded by the learned Arbitrator without giving any reason in the impugned Award. It does not record any finding that the learned Arbitrator had not taken into consideration the submissions made by Defendant No. 1 and 2 as they were



beyond the time that was permitted. It was thus, concluded that the submissions made by Defendants had been totally disregarded. Such Award was held to be in violation of principles of Natural Justice and contrary to Public Policy of India as stated in Sub Section 2(b) read with Explanation 1 of Section 48 of the Act. It was thus, held that the Award was bad on account of violation of *Principles of Natural Justice*.

42. Further, it was observed that here were three separate Contracts executed by the Plaintiff with Defendant No. 1 and one independent contract with Defendant No. 2 which constituted separate transactions. Both the defendants have a separate entity and a single Arbitration for all the distinct transactions, could not have been combined in one Arbitration. The subject matter did not involve Arbitrable matters which could be consolidated; in fact, it was a joint statement and consolidated proceedings were not maintainable.

43. Ld. Single Judge noted that the plaintiff had issued separate Legal Notices to Defendant No. 1 and 2 claiming the amounts due from them. It was also observed that there was no pleading, leave alone any material on record, for lifting of the corporate veil or for making Defendant No.1 and 2 jointly and severally liable for all the contracts. The statement of Claim as preferred before the learned Arbitrator, did not claim any *lifting of the corporate veil* which is an essential attribute of a separate Corporate personality. It was concluded that the Award did not disclose any reasons for lifting of the corporate veil and/or consolidation of proceedings. The learned Arbitrator did not address whether such Claims arising out of different contracts could be consolidated as one and whether joint liability could be fastened on Defendant No. 1 and 2 without lifting the *Corporate veil* and



giving the reasons for the same. It was thus held that the Award dated 25.07.2016 was a non-speaking one and was therefore, it was not enforceable under the Indian Law. It was accordingly, not binding on the parties, as provided in Section 46 of the Arbitration and Conciliation Act, 1996.

B. Challenge to the Award on Merits:

44. *The next question* which arises, is whether the present Suit on the original Cause of Action is maintainable once the Award is held to be not enforceable. This raises the question of the *validity of the Award which goes to the merits of the case*, which pertinently was completely out of bounds of the Executing Court.

45. *First essential aspect* is to understand the the nature of the Award delivered by the Arbitrator. An Award which is delivered by an Arbitrator, is executed on the requisite stamp paper and is a decree under the new 1996 Act. Once it is a Decree, it does not require any further endorsement of its validity by any procedure to be undertaken before any Court, as was envisaged in the 1940 Act. An Award under the 1996 Act is in the nature of a Decree.

46. The *second essential aspect* which needs to be highlighted is that the *validity* of an Award is distinct from its *enforceability and binding nature*. The power to set aside foreign Awards vests only with the Court *at the Seat of Arbitration*, which exercises *the supervisory or primary jurisdiction*.

47. In the case of Government of India vs. Vedanta, Limited, (2020) 10 SCC 1: SCC OnLine SC 749, it was explained that under the 1996 Act, there is no requirement for the foreign Award to be filed before the Seat Court and to obtain a decree thereon after which it becomes enforceable as a foreign



decree. This was referred to as “*double exequatur*” which was the requirement under the Geneva Convention, 1927 and was done away by the New York Convention, which superseded it.

48. In Cairn (India) Ltd. vs Union of India 2020 SCC OnLine Del 1426, it was held that Section 48 pre-supposes that a Foreign Award is a decree whose execution can only be impeded by a party against whom it is sought to be executed, if it is able to discharge its burden that its Objections can be sustained under one or more clauses of Sub Section 1 and or Sub-Section 2 of Section 48 of 1996 Act. The Foreign Award is enforceable on its own strength and is not dependent on whether or not it goes through the process of Section 48 proceedings. The Award does not become a Foreign Decree at any stage of the proceeding; it is enforced as a *deemed decree in the Indian Courts*, in an Execution Petition filed under Section 47 of the Act and is sustainable only on the grounds specified in Section 48 by the parties, who is resisting the enforcement of the Award.

49. In the case of Union of India vs. Cairn Energy (India) Pvt. Ltd. 2011 SCC OnLine MYFC 35, the Malaysian High Court after considering the Indian Judgments in ONGC vs. Saw Pipes Ltd. (2003) 5 SCC 705, explained that the law applicable shall be the choice of the parties, which would have to be considered to see if it provides for an Appeal on any question of law arising out of an Award. It was further held that it is the court which has the juridical Seat of Arbitration whose curial law would be applicable; mandatory Procedural Rules will remain subject to the jurisdiction and control of the *Seat of Arbitration* which would regulate the various aspects of the arbitral proceedings. The courts at the Seat of Arbitration *exercise supervisory or primary jurisdiction* over the arbitral proceedings except if



the parties have made an express and effective choice of a different *lex arbitri* in which event the role of the Courts at the Seat will be limited to those matters which are specified to be internationally mandatory and are of a non-derogable nature. *Therefore, any challenge to the merits to the Award shall be ascertained according to the law of Seat of Arbitration.*

50. Similar observations were made by the Apex Court in the case of Government of India vs. Vedanta Ltd (2020) 10 SCC1 that it is only the courts at Seat of Arbitration which exercised *supervisory or primary jurisdiction* over the Award. The language of Section 48 makes it abundantly evident that the Enforcement Court which may refuse the Enforcement on the limited grounds given in Section 48, *is not to correct the errors in the Award or undertake a review on the merits of the award, but is conferred with the limited power to refuse its Enforcement.*

51. Admittedly, no Appeal was preferred by either Party against the Impugned Award on merits before the Court in England which was the Seat of Arbitration, making it final insofar as the merits are concerned.

52. From the aforesaid judgements, it is abundantly clear that Foreign Award is recognized as a deemed decree, which does not need to be presented in the Court of the seat of jurisdiction to be made into a Foreign Award. Further, the Party aggrieved can also challenge the merits of a foreign Award only in that Court. If neither party questions the merits, they become unassailable and cannot be challenged in the Enforcement proceedings.

53. The plaintiff has placed reliance on various judgements, but they all deal with Foreign Judgements to which the provisions of *Code of Civil Procedure* are applicable, Section 13 of which provides for the various



conditions to be satisfied before a Foreign judgement is recognized as a decree for execution in India. However, the 1996 Act, which is based on UNCITRAL Model, and incorporates The New York Convention has done away this dual-procedure of Award being made into the Judgement. Therefore, the principles of Foreign Judgement no longer hold good for the Foreign Awards which are deemed Decrees, which can be enforced directly, without any further ado.

54. Having so concluded, the necessary and inevitable corollary is that there is finality on merits which cannot be subject to further litigation. In this regard, some insight may be draw from the 1969 judgement of the Apex Court in the case of Satish Kumar & Others. vs. Surinder Kumar & Others, (1969) 2 SCR 244 wherein it had been observed that once an Award has been passed, it would have some legal force even though if it is not made a Rule of the Court and it is not a mere waste paper but has some legal effect.

55. This case was referred to in the case of Maimunabai Akbar Ali & Others vs. Mumtaz Hussain Akber Ali Tipiwale and Another, 1986 SCC OnLine Bom 78 wherein it was observed that an Award between the parties would be final and binding, although not made into a Rule of the Court and the Suit on the original cause of action shall be barred by limitation.

56. In the case of Bhajahari Saha Banikya vs. Behary Lal Basak, ILR (1967) 1 Punjab and Haryana 622, it was observed that the “Award is in fact a final adjudication of the Court of the parties own choice, and until impeached upon sufficient grounds in an appropriate proceeding, an Award is conclusive upon the merits of the controversy submitted, unless possibly the parties had intended that the Award shall not be final and conclusive. In reality, an Award possesses all the elements of vitality even though it has not



been formally enforced, and may be relied upon in a litigation between the parties relating to the same subject-matter”. Therefore, if the Award which has been pronounced between the parties has in fact, or can in law, be deemed to have dealt with the dispute, the second reference would be incompetent.

57. Pertinently, though these Judgments relate to domestic Award made under the Arbitration Act, 1940, but what is confirmed is that the Award delivered by the Arbitrator, is not a waste Paper. In the 1996 Act, the law is much more clear in the sense that a Foreign Decree is a deemed Decree meaning thereby that unless the Award is set aside in Appeal, its findings become binding and beyond challenge in any subsequent proceedings.

58. A reference to the case of *Baddat and Co. (supra)* is made in detail being the judgement relied on both the Parties. The facts involved were that the respondent which was a Partnership Firm incorporated in New York, carried on import and export business in spices, in Bombay. The appellant and the respondent agreed to do business in turmeric fingers on the terms and conditions of the American Spice Trade Association, one of which was an *Arbitration clause*. The appellant failed to supply turmeric in terms of the two Contracts it entered into with the respondent. The respondent put the matter into arbitration in pursuance of the Arbitration clause. The appellant took no part in it. The arbitrators gave the two Awards in favour of the respondent for damages. The appellant did not pay. The respondent then took appropriate proceedings and got the awards confirmed by the judgment of the Supreme Court of the State of New York. The respondent then filed a suit in the original side of the Bombay High Court against the appellant for recovery of a sum of Rs. 92,884 on the basis of a judgment of the



Supreme Court of the State of New York affirming two Awards obtained by it and also on the awards in the alternative.

59. The Single judge of the High Court held that the suit seeking recovery of money on the basis of the Awards and Foreign Judgement affirming the Awards, was not maintainable.

60. The Majority Judgement was delivered by Dayal and Mudholkar JJ. upheld the decision, by giving the following reasons. A reference was made to the provisions of the Arbitration Protocol and Conventions Act, 1937, to observe that the foreign awards and foreign judgments based upon Award are enforceable in India on the same grounds and in the same circumstances in which they are enforceable in England under the Common Law on grounds of justice, equity and good conscience. On the original side of the Bombay High Court English Common Law is also applicable under clause 19 of the Letters Patent read with Cl. XLI of the Charter of that Court. If the award is followed by a judgment which is rendered in a proceeding in which the person against whom judgment is sought can take objections as to the validity of the award, the judgement will be enforceable in England. Even then the plaintiff will have the right to sue on the original cause of action. *Secondly*, even a foreign award will be enforced only if it satisfies *mutatis mutandis* the tests applicable to the enforcement of foreign judgments on the ground that it creates a contractual obligation arising out of submission to arbitration.

61. Although, the respondent could sue on the original cause of action in the Bombay High Court that cause of action must be distinguished from the one furnished by the 'judgment of the New York Supreme Court which must be held to have arisen in New York and not in Bombay and was a



cause of action independent of the one afforded by the contracts and the Bombay High Court would, consequently, have no jurisdiction to try the suit based on that judgment. For this proposition, *East India Trading Co. v. Carmel Exporters & Importers Ltd.*, (1952) 2 Q. B. 439, *Schibsby v. Westenholz.*, (1870) 6 Q. B 155 and *Re Davidson's Settlement Trust*, (1873) L. R. 15 Eq. 383, were referred to.

62. It was further held in *Baddat and Co (supra)* that in a suit based on a foreign award the plaintiff has to prove: (1) *that the contract between the parties provided for arbitration by a tribunal in a foreign country*, (2) *that the award is in accordance with the agreement*, (3) *that the award is valid according to the law of that country* (4) *that it was final according to that law and*, (5) *that it was subsisting award at the date of the suit*.

63. Thereafter, the essential difference between a foreign judgement and foreign Award was explained by observing is that while the former is a command of the foreign sovereign and the coming of nations to accord international recognition to it if it fulfils certain basic requirements, the latter is founded on the contract between the parties and is not given the status of a judgment in the country in which it is made and cannot claim the same international status as the act of a foreign sovereign. Even though an Award may not have obtained the status of judgment in the country in which it is made, if it possesses the essential attribute of a judgment, that is finality, it can be sued upon in in other country, as had also been held in *Union Nationale des Cooperatives Agricoles de Careales v. Robert Catterall & Co. Ltd.*' (1959) 2 Q. B. 44.

64. But the finality that R. 15, cl. (E) of the American Spice Trade Association gives to the Awards in question is no more than a matter of



contract between the parties and must be subject to the law of the State. A reference to the laws of the State of New York makes it abundantly clear that the relevant provisions of the laws of the State under which alone the awards could become final had not been complied with and they could not, therefore, provide a cause of action for the suit. For an award to furnish a fresh cause of action, it must be final. If the law of the country in which it was made gives finality to the judgment based on an award and not to the award itself, the Award cannot furnish a cause of action in India. Although the High Court of Bombay has jurisdiction to enforce a Final Award made in a foreign country in pursuance of a submission made within the limits of its original jurisdiction, the awards in question not being final, the suit (for judgement for enforcement) by the respondent must fail.

65. This Judgement, though in the context of Foreign Award and the Foreign Judgement, was given in regard to the Awards under the provisions of *Arbitration Protocol and Conventions Act, 1937*, but the fundamental underlying principle is that if there is a finality attached to an Award under the governing law, it can be enforced in the reciprocating Country and does not need to seek a separate Judgement in the Country of origin where it is sought to be enforced, if it has not been challenged on merits, in the Court having the seat of jurisdiction.

66. The Judicial Committee in *Oppenheim and Co. vs. Mahomed Haneef*, 1922 ILR 45 Madras 496, sanctioned the ***maintainability of a Suit, to enforce an Award which ended in a Judgment***. It laid down the proposition if it is an Authority on the position that an Award which does not merge in a foreign Judgment, it affords a cause of action in another country. Therefore, the Suit would lie on the basis of an Award in foreign country *for the*



purpose of enforcement, provided it is completed in the manner prescribed by the law of the country.

67. In the case of Norske Atlas Insurance Co. Ltd. vs. London General Insurance Company Limited, (1927) 43 TLR 541, an Award was made in Norway but was sought to be enforced in England. The action was brought not on the Contract, but on the Award. Mackinnon, J. laid down that three things have to be proved for obtaining a decree thereon namely :

- (1) *That there was an arbitration agreement;*
- (2) *That the arbitration was conducted in accordance with that agreement; and*
- (3) *That the award was made pursuant to the provisions of the agreement and a sum is valid according to the lex fori of the place where the arbitration was carried out and where the award was made.*

If the award is validly made in consequence of a valid arbitration Agreement, a sum found due by the award and unpaid may be sued for in an action upon the agreement.

68. This judgement also emphasizes that a Foreign Award given in accordance with the applicable law, has to be enforced and given effect to. This doctrine has been accepted and followed by Indian Courts: *see Popat v. Damodar, Oppenheim and Company v. Mahomed Haneef and Nil rattan Mukhopadhyaya v. Cooch Behar Loan Office Ltd.*

7. *If the contract does not merge in Judgment, by parity of reasoning, the award on which a foreign judgment is made cannot also merge in the judgment. While conceding the said legal position, the learned counsel for the appellant contends that the award to furnish a valid cause of action shall be one which is legally enforceable in the country in which it is made. An award made in New York, the argument proceeds, by its own*



force does not create rights or impose liabilities thereunder and, therefore, such an inchoate document cannot afford a cause of action.

69. This contention has not been raised for the first time, but has been noticed in the Merrifield, Ziegler, and Co. vs. Liverpool Cotton Association Limited, (1911-12) 105 LTR 97, 106, the plaintiff had brought an action against the defendant in England, for restraining the defendant from expelling the plaintiffs from membership of the Association. The counter-claim was filed by the defendants against the Award made, in Germany. The Claim was based on the Award and in effect, it was a claim to enforce the Award by German Law and enforcement Order was necessary before an Award could be enforced but no such Order was made. It was observed that for all practical purposes, it was still-born until vitality was infused into it by the Court. It is only then, for the first time that the essential characteristics of a Judgement and the right to enforce obedience to it, would arise.

70. Likewise, this Judgment clearly brings out the proposition that an Award cannot affect a cause of action till it is complete in the country of its origin. The reason for the Rule is that until and unless the appropriate Court determines its regularity, it is inchoate and it becomes enforceable only when an enforcement Order or Judgment puts its seal of approval on it.

Conclusion

71. In the light of the principles as discussed above, it is hereby concluded that the cause of action having merged in the Foreign Award, which could have been challenged if at all, it could be at the Court *at the Seat of Arbitration*, which exercises *the supervisory or primary jurisdiction*. There being no challenge to the Award, it has become binding and the cause



2024:DHC:7897



of action having merged in the Award, it does not survive to enable to file a fresh suit on the same cause of action in the State of origin that is India.

72. The present suit on the same cause of action which was adjudicated by the Award which has not been challenged on merits, and now is a deemed decree, fresh suit on the same cause of action is held to be *not maintainable* and is hereby dismissed.

**(NEENA BANSAL KRISHNA)
JUDGE**

OCTOBER 03, 2024
va