Vs. E. Piyarellal Import and Export Limited

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SooperKanoon Citation : sooperkanoon.com/31742

Court : Kolkata

Decided On : Jan-22-2015

Judge : I. P. Mukerji

Respondent : E. Piyarellal Import and Export Limited

Judgement :

EC No.311 of 2013 With EC No.312 of 2013 IN THE HIGH COURT AT CALCUTTA Ordinary Original Civil Jurisdiction Original Side Bunge London Limited Vs.E.Piyarellal Import and Export Limited Appearance Mr.Jishnu SahaSr.Adv., Mr.Sanjay Ginodia.Adv., Mr.Debnath Ghosh.Adv.for petitioneRs.Mr.Jayanta Banerjee ...Adv., Mr.Koushik Chatterjee..Adv.for the judgment debtor.

Heard On:- 06th January, 2015 Judgement On: - 22nd January, 2015 I.P.MUKERJI, J.

EC No.311 of 2013 In an execution application to enforce a foreign arbitral award dated 23rd February, 2013, in favour of the petitioner, the judgement debtor has taken various points to challenge this award under Part-II chapter-I of the Arbitration and Conciliation Act, 1996.

The award is of the Refined Sugar Association 154, Bishopsgate London made and published by its Chairman.

The alleged contract was entered into between the parties on 21st December, 2010.

The petitioner was the seller and the judgement debtor, the buyer.

The opening words of the contract document recited as follows:We confirm having sold to you under the following terms and conditions stipulated hereinafter.

The contract was for sale of 12,500 MT of white sugar, described as Thailand Refined Sugar.

It was to be shipped in 250 lots of 50 MT each in polypropylene bags each of 50 Kg.

net.

The load ports were to be Bangkok and two other ports in Thailand.

The shipment was to be made between 10th March, 2010 and the 15th May 2010.

The above quantity was to be shipped in a maximum of three full vessels and the balance in containeRs.It was a FOB Contract.

There was a technical stipulation with regard to fixation of the price, which has given rise to a part of the present dispute between the parties.

According to the contract; Basis BEO for 250 lots (Basis 12,500 Metric Tons) of the March 2010 London No.5 white sugar contract plus a premium or US$ 15.00 (Fifteen) per metric ton to give a price in metric tons, basis FOB stowed Bangkon and/or Sriracha and/or Laemchabang and/or Kohsichang.

Each lot is equivalent to 50 metric tons.

The buyer has to finally price the nearest lot quantity to match the final shipped quantity.

Pricing to be fixed 5 days before the terminal expires or 20 days before the vessel arrival at the load port.

The judgement debtor was to deposit US$ 1 lakh in the account of the petitioner within four working days of receiving the contract.

They were also required to open a fully workable and irrevocable letter of credit in favour of the petitioner.

The contract contains an arbitration clause which is as follows:All disputes arising out of this contract are hereby submitted to the Refined Sugar Association for settlement in accordance with the Arbitration rules of the Refined Sugar Association. It would be governed by the laws of England.

It appears that the judgment debtor neither made the deposit 1 lakh US dollars nor opened the letter of credit in favour of the petitioner.

The period for performance of the contract expired.

The judgment debtor did not buy any sugar from the petitioner.

An attempt was made to settle the dispute between the parties.

It failed.

On 29th June, 2010 the petitioner wrote to the judgment debtor alleging repudiation of the contract by them and accepting this repudiation.

Therefore, we can safely say that on 29th June, 2010 the contract between the parties was terminated without any performance.

According to the petitioner the pricing of the contract was completed on 13 February 2010 resulting in an average price, including premium, of US$ 744.9832 per MT.

According to the petitioner there was a fall in price and they suffered loss.

The claim under the contract was calculated to be US$ 1,509,200.

By the said award the respondent was directed to pay to the petitioner.a.US$ 1,646,311.56, comprising the principal sum of US$ 1,509,200.00, plus interest of

US$ 137,111.56; and b.

Compound interest on the said suMs.which total US$ 1,646,311.56, at 90 day rests, at a rate of 8% per annum from and including the sate following the date of this Award until payment is made.

The respondent was also directed to pay costs to the petitioner.

The award was passed by the Arbitral Tribunal in London.

The judgment debtor did not prefer any application to challenge the award in an English Court, to which such application necessarily lay.

This award is a foreign award under the description of New York Convention Awards under Chapter I Part II of the Arbitration and Conciliation Act, 1996.

Section 49 states that when the Court is satisfied that the foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of the court.

Hence, the award can be enforced in execution as a decree.

The petitioner has put the said award to execution by filing the above execution case in this court.

It is also necessary to mention Section 46 of the Act which says that when a foreign award is enforceable under this chapter it shall be treated as binding for all purposes on the persons between whom it was made.

The language of Section 48 of the Act is drafted in negative terMs.It seems to suggest that ordinarily an award is enforceable and is presumed to be so.

Its enforcement may be refused at the request of the party against whom it is made, if the party establishes the following: (a) The parties to the agreement referred to in section 44 were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise under to present his case; or (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration: Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be enforced; or (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing, such agreement, was not in accordance with the law of the country where the arbitration took place; or (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

(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.

Mr.Jayanta Banerjee, learned Advocate for the respondent tried to establish one point with great condour.

There was no formation of contract between the parties, because the price was not fixed.

Hence, the contract was vague in its terms and void on the ground of uncertainty.

He also argued that since the price was not fixed the contract had no consideration and hence it was void.

Therefore, the contract could be challenged on the ground of invalidity under Section 48 of the Act.

On 04th July, 2011 the judgment debtors had filed an application for oral hearing.

The only other point urged on behalf of the judgment debtor was that the oral arguments had closed on 12th September, 2011.

On 28th September, 2011 the tribunal ordered that for oral hearing costs of pounds 12,000 had to be paid by the judgment debtor.

The application was withdrawn on 29th September, 2011 because the petitioner objected that the requisite fees or costs of pounds 12,000 had not been paid.

According to the judgment debtor the evidence of Barry Callingham by way of statement dated 09th September, 2011 was allowed to be filed on 04th November, 2011.

The Judgment debtor did no