

SUPREME COURT OF INDIA

Sakuma Exports Ltd.

Vs.

Louis Dreyfus Commodities Suisse S.A.

(Anil R.Dave and Shiva Kirti Singh JJ.)

28.03.2014

JUDGMENT

SHIVA KIRTI SINGH, J.

1. After hearing the parties at length and upon going through the impugned judgment and order dated 6.8.2013 passed by Division Bench of High Court of Judicature at Bombay in Appeal No. 337 of 2013, filed under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act'), we are of the considered view that the impugned order is based upon proper appreciation of relevant facts and follows the law laid down by this Court correctly in arriving at the finding that in the facts of the case the courts in India have no jurisdiction to entertain the petition under Section 34 of the Act, challenging the international commercial award of an arbitral tribunal constituted by the Refined Sugar Association, London.

2. There is no dispute between the parties that the Constitution Bench judgment of this Court in the case of Bharat Aluminium Company etc. vs. Kaiser Aluminium Technical Services Inc. etc. (BALCO)[1] overruled the earlier judgment in Bhatia International Vs. Bulk Trading S.A. and Anr.[2] in coming to the conclusion that Part I of the Act would have no application to international Commercial Arbitration held outside India, but on account of further direction that the law so declared shall apply only prospectively to all arbitration agreements executed thereafter, the arbitration agreement in the present case is to be governed by the law decided in the case of Bhatia International (supra). According to the judgment in the case of Bhatia International (supra) the provisions of Part I of the Act would apply to International

Commercial Arbitration held out of India unless the parties by agreement, express or implied, exclude all or any of its provisions.

3. Since we are in agreement with the views of learned High Court of Bombay, it is not necessary to go to the factual details but on account of lengthy submissions advanced on behalf of the petitioner, we feel it proper to extract paragraph 3 of the impugned judgment which reflects not only the relevant facts but also the relevant terms and conditions of the agreement between the parties. It reads thus: “3. The Appellant is an Indian Company which carries on the business of import and export of sugar among other commodities. The Respondent is a Swiss Company with whom the Appellant entered into an agreement on 12th January 2010 for the purchase of 2700 metric tons of Brazilian white sugar of a stipulated description. The sugar was to be shipped between 15 January 2010 and 15 February 2010 at the option of the seller, the Respondent. The port of destination was to be Nhava Sheva or Kolkata at the option of the Appellant. Disputes arose between the parties. The agreement between the parties contained inter alia the following terms and conditions:

‘Terms and conditions:

This Contract is subject to the Rules of the Refined Sugar Association, London as fully as if the same had been expressly inserted herein, whether or not either or both parties to it are Members of the Association.

If any provision of this Contract is inconsistent with the Rules, such provision shall prevail.’

Parties envisaged that all disputes would be submitted to arbitration. The arbitration agreement was thus:

‘Arbitration: All disputes arising out of or in conjunction with this Contract shall be referred to the Refined Sugar Association, London for settlement in accordance with the Rules relating to Arbitration. This Contract shall be governed by and construed in accordance with English Law.’

A final award was passed by the arbitral tribunal on 31 December, 2010 which was sought to be challenged by the Appellant in proceedings under Section 34

of the Act of 1996 before the learned Single Judge of this Court. An objection was taken to the jurisdiction of this Court to entertain the petition on the ground that the applicability of Part- I of the Act was excluded by the agreement between the parties and consequently even under the law as it then prevailed in *Bhatia International*, a Petition under Section 34 was not maintainable. The learned Single Judge has upheld the objection and has come to the conclusion that this Court has no jurisdiction to entertain a challenge to the award under Section 34. The judgment is called in question in appeal.”

4. After discussing appropriate case laws, the High Court summarized the relevant facts and its views in paragraph 20 which also conveniently extracts Rule 8 of the Rules of Refined Sugar Association, London. Paragraph 20 reads as follows:

“20. In the present case, the parties have specifically made their contract subject to the rules of the Refined Sugar Association, London. Leaving no ambiguity of interpretation the contract mandates that the rules of the Refined Sugar Association, London are incorporated ‘as fully as if the same has been expressly inserted’ in the contract. The governing law of the contract is English law. All disputes arising out or in conjunction with the contract were to be referred to the Refined Sugar Association for settlement in accordance with the rules relating to arbitration of the Association. The law in the U.K. is, therefore, the substantive law of the contract. The seat of the arbitration is in the U.K. Parties have made it clear that the rules of the Refined Sugar Association would govern the resolution of their disputes. Rule 8 of the Rules of the Refined Sugar Association (on which there is no dispute between the parties during the course of the hearing of the appeal) provides as follows:

‘8. For the purpose of all proceedings in arbitration, the contract shall be deemed to have been made in England, any correspondence in reference to the offer, the acceptance, the place of payment or otherwise, notwithstanding, and England shall be regarded as the place of performance. Disputes shall be settled according to the law of England wherever the domicile, residence or place of business of the parties to the contract may be or become. The seat of the Arbitration shall be England and all proceedings shall take place in England. It shall not be necessary for the award to state expressly the seat of the arbitration.’

The terms of the purchase contract as well as Rule 8 of the Rules of the Refined Sugar Association would make it clear that disputes shall be settled in accordance with the law of England wherever the domicile, residence or place of business of parties to the contract may be or become. Moreover, for the purposes of all proceedings in arbitration, the contract shall be deemed to have been made in England and England shall be regarded as the place of performance. The seat of the arbitration shall be England and all proceedings shall take place in England. On the basis of these provisions, it has been submitted that parties have, by the terms of their agreement, impliedly excluded the provisions of Part-I. We find merit in the submission. It is clear from the terms and conditions which have been accepted by the parties in the purchase contract, read with Rule 8 that parties have accepted English law as the governing law of the contract; that the seat of the arbitration would be London; that disputes shall be settled according to the law of England which would include the resolution of disputes and that all proceedings shall take place in England. Alternatively, even if it were to be held that parties have not provided for the curial law governing the arbitration, the decision in Bhatia International does not prohibit the exclusion of the application of Part-I on account of the proper law of the contract being a foreign law. Where the proper law governing the contract is expressly chosen by the parties, which they have done in the present case by selecting English law as the proper law of the contract, that law must, in the absence of an unmistakable intention to the contrary, govern the arbitration agreement. The arbitration agreement, though it is collateral or ancillary to the main contract is nevertheless a part of the contract. In an application for challenging the validity of an arbitral award under Section 34, the Court would necessarily have to revert to the law governing the arbitration agreement which, in our considered view, would be the law of England.”

5. Since one of the terms and conditions of the agreement makes the contract subject to the Rules of the Refined Sugar Association, London by treating the same to have been expressly inserted in the agreement, Rule 8 of the Refined Sugar Association, London leaves no manner of doubt that the parties have not only accepted English law as the law governing the contract but the disputes and the arbitration shall also be governed by the law of England. The seat of Arbitration is admittedly England.

6. Learned counsel for the petitioner highlighted that the arbitration clause is not strictly the same as recommended by the Refined Sugar Association, London which clearly stipulated that the arbitration shall be conducted in accordance with the English law. But this does not take us far. The condition that the contract is subject to the Rules of the Refined Sugar Association, London which stand inserted in the contract and wordings of Rule 8 clinch the relevant issue in favour of the respondent.

7. We find no merit in the petition and the same is dismissed as such. No costs.

[1] 2012 (9) SCC 552

[2] 2002 (4) SCC 105