Reportable

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL No.4834 of 2007

P.E.C. LIMITED
.... Appellant

Versus

AUSTBULK SHIPPING SDN BHD
....Respondent

J U D G M E N T

L. NAGESWARA RAO, J.

1. The judgment of the High Court of Delhi directing enforcement and execution of a foreign award dated 30.05.2001 is challenged in this appeal. The Appellant chartered MV “Rubin Halycon” from the Respondent for transportation of a minimum quantity of 16,500 MT upto a maximum of 17,000 MT of chickpeas in bulk from Geraldton Port, Australia to Jawahar Lal Nehru Port, India (JNPT). The Charter Party dated 20.04.2000 provided, inter alia, the following:

> “Box 8
> Discharge Port(s) or Place (s)
> “ISP/1-2 SB JNPT See Cl.3 shifting time to control for 2nd berth as lay time at discharge port or time on demurrage.”

Box 14

Laytime

"Nonreversible load/discharge 3,000 mt. PWWD. Sat noon/SHEX EIU/2000 mt PWWD Sat Noon SHEX EIU time from noon on Sat or a day preceding legal holiday till 0800 hrs on Mon or next working day not to count."

Box 19

Demurrage and Despatch Rate of Load (Cl.16)

"USD 4,000 PD PR/half dispatch"

Box 23

Demurrage and Despatch Rate at Discharge (Cl.27)

"USD 5,000 PD PR/half dispatch"

Box 24

Cargo Discharge Rate – Metric Tonnes per weather Working Day of 24 Consecutive Hours (Cl.25)

"Sat noon SHEX EIU, Time from noon on Sat or a day preceding a legal holiday till 0800 hrs on Mon or next wkg day not to count."

Clause 24

Time for Discharging

"Time for discharging shall commence twenty-four hours after notice of readiness has been received by written/ telegraphic or telefax notice during ordinary office hour as per the usual custom of the port, whether in berth or not at the first or sole port of discharge provided vessel within port limits and ready in all respects for discharging her cargo….")

Clause 25

Discharging Rate

"Cargo is to be discharged free of expense to the Respondent at the average rate set out in Box 24".

2. In accordance with the terms and conditions of the Charter Party, the lay time commenced at 0900 hours on 03.05.2000. The load rate of 3,000 MT per day was valid in accordance with the Charter Party and the lay time allowed for loading equated to 5.5 days. The loading of the Cargo commenced at Geraldton Port, Australia at 10.10 hrs on 01.05.2000 and was completed on 12.40 hrs on 02.05.2000. The Vessel arrived at JNPT at 0305 hrs on 15.05.2000 at which time the master tendered the notice of readiness. A request was made by the Appellant to take the vessel to a nearby port i.e. Mumbai. The request made by the Appellant was acceded to by the Respondent and the vessel was taken to the Mumbai port. The time allowed for discharge was calculated on the basis of discharge rate of 2,000 MT per day and the time allowed for discharge was 8.25 days. Taking into account the Cargo quantity being 16,500 MT, the Respondents calculated demurrage for a period of 20.9493 days at the rate of US $ 6250 per day and requested the Appellants to make the payment. A final freight account was submitted by the Respondent on 22.06.2000 taking into consideration the dispatch at Geraldton and the demurrage at Bombay. The final freight

account showed that the Appellant had to pay the Respondent US $150,362.18.

3. The Respondent appointed Mr. William Robertson Esq, 47 Perrymount Road, Haywards Health, West Sussex, RH 16 3 BN as their nominated Arbitrator and the Appellant was called upon to appoint its Arbitrator. The Appellant did not appoint its Arbitrator within 14 days as mentioned in the letter dated 19.09.2000. On 13.03.2001, the Respondent filed its claims with the supporting documents. The Arbitrator directed the Appellant to submit its defense together with counter claims, if any, before 17.04.2001. The Appellant submitted a brief response but did not participate in the arbitration. The Arbitrator proceeded and finally awarded US $ 150,362.18 to the Respondent with interest at the rate of 8% per annum compounded at three-monthly intervals from 1st July, 2000 till the date of payment.

4. The reasons for the final award were given by the Arbitrator separately. The Arbitrator dealt with the submissions made on behalf of the Appellant in a detailed manner. The contention of the Appellant that they did not sign the Charter Party and they did not agree for arbitration

by the London Maritime Arbitration Association was rejected by the Arbitrator on the ground that there is no obligation that a Charter Party or contract has to be signed under English law. The Arbitrator referred to the correspondence between Mr. Sasi Nair of Forbes Gokak Limited, Palvolk Division (Appellant's Brokers) and Mr. Ian Latimer of SSY (Respondent's brokers) which showed that the fixture was made for the account of Appellant. Documents showing that the letter of indemnity was issued on behalf of the Appellant and the freight was paid by the Appellant were relied upon by the Arbitrator to conclude that the Appellant's brokers were authorized to act on its behalf. There was other evidence on record which was referred to by the Arbitrator which showed that the Appellant fully participated in the fixture by itself and also paid the freight apart from providing a letter of indemnity when the vessel had to travel from JNPT to Mumbai Port. The Arbitrator accepted the calculations of the Respondent in support of its claim and held that the Respondent succeeded in proving its claim of US $150,362.18.

5. The Respondent filed a petition for enforcement of the award dated 30.05.2001 passed by the sole Arbitrator

Mr. William Robertson, in the High Court of Delhi. The Appellant filed its objections to the enforcement petition. The High Court observed that the award sought to be enforced was made at London and that United Kingdom was a party to the New York Convention. The United Kingdom is also a reciprocating territory and a notification was issued to that effect. The High Court also took note of the fact that a duly certified copy of the arbitration agreement was placed on record by the Appellant along with the reply filed by it. Further, the High Court observed that admittedly the Respondent placed on record the original Charter Party agreement which contained the arbitration clause during the course of the enforcement proceedings. The main point that was considered by the High Court was the maintainability of the petition for enforcement of the award without an authenticated copy of the original agreement being filed at the time of presentation of the application. The High Court was of the view that there was substantial compliance with the provisions of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the “Act”) as a certified copy of the arbitration agreement was placed on record by both the

parties. According to the High Court, the application filed for enforcement under Section 47 of the Act was in the nature of an execution and in case the relevant documents were not filed along with the application, the adjudicating forum has an obligation to return the same for compliance with the requirements of the Act. Re-filing of the Petition after curing defects is not barred by any law.

6. The High Court rejected the submissions made on behalf of the Appellant that there was no arbitration agreement. Apart from referring to the detailed discussion of the Arbitrator on this point, the High Court analyzed the correspondence exchanged between the parties and the relevant material placed on record to hold that there existed an arbitration agreement. Finally, the High Court refused to accept the submission of the Appellant that the award sought to be enforced was not a valid foreign award as defined under Section 44 of the Act.

7. The judgment of the High Court was passed on 18.02.2005 and notice was issued by us in this appeal on 15.04.2005. We stayed the execution on 29.08.2005.

8. Mr. Garvesh Kabra, learned counsel for the Appellant reiterated the points that were canvassed before the High

Court. He referred to Part II of the Act and took us through the various provisions. He submitted that it is mandatory for the party applying for enforcement of a foreign award to produce the original agreement for arbitration before the Court at the time of filing the application. He contended that the application for enforcement ought to have been dismissed on the sole ground that the arbitration agreement was not produced at the time of filing of the application. He also contended that the Appellant did not sign the Charter Party and there was no arbitration agreement between the parties. According to him, the arbitral proceedings suffer from the vice of lack of jurisdiction. He made an attempt to convince us that the Charter Party agreement initially filed was not the original agreement and that there were certain discrepancies in the agreement presented before Court. As this point was not considered either by the Arbitrator or the High Court, we informed him that we would not adjudicate upon this issue.

9. The points that arise for our consideration in this case are

a) Whether an application for enforcement under Section 47 of the Act is liable to be dismissed if it is not accompanied by the arbitration agreement?

b) Whether there is a valid arbitration agreement between the parties and what is the effect of a party not signing the Charter Party?

10. The Foreign Awards (Recognition and Enforcement) Act, 1961 was repealed by the Act. Part II of the Act deals with enforcement of foreign awards. An arbitral award made in pursuance of an agreement in writing for arbitration, to which the Convention on the Recognition & Enforcement of Foreign Arbitration Awards, 1958 (hereinafter referred to as the "New York Convention") set forth in the First Schedule of the Act applies is defined to be a "Foreign Award". Section 47 postulates that the party applying for the enforcement of a foreign award "shall" produce before the Court at the time of application the following:

> "(a) The original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made;
> (b) The original agreement for arbitration or a duly certified copy thereof, and

(c) Such evidence as may be necessary to prove that the award is a foreign award."

11. It is also necessary to refer to Section 48 of the Act which provides for certain conditions for enforcement of the foreign award. According to Section 48, the Court may refuse the enforcement of a foreign award at the request made by the party against whom it is invoked, provided the party furnishes proof to the Court that

"(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 unable 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."

12. Admittedly, an authenticated copy of the arbitration agreement was not placed on record by the Respondent at the time of filing of the application for enforcement. It is clear from the record that the Appellant placed the arbitration agreement along with its reply and thereafter the Respondent also filed the original arbitration agreement in the Court. The submission made by the Appellant is that production of the arbitration agreement at the time of filing of the application is mandatory, the non-compliance of which ought to have resulted in the dismissal of the application. The Appellant sought support for this submission from the word "shall" appearing in Section 47. We do not agree with the submission made by the learned

counsel for the Appellant. We are of the opinion that the word "shall" appearing in Section 47 of the Act relating to the production of the evidence as specified in the provision at the time of application has to be read as "may".

13. The word "shall" in its ordinary import is "obligatory". But there are many decisions wherein the Courts under different situations construed the word to mean "may"[1]. The scope and object of a Statute are the only guides in determining whether its provisions are directory or imperative[2]. It is the duty of the Courts of Justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed[3].

14. The word "shall", though *prima facie* gives an impression of being of mandatory character, is required to be considered in light of the intention of the legislature by carefully attending to the scope of the Statute, its nature and design and the consequences that would flow from the construction thereof one way or the other. The Court is required to keep in mind the mischief that would ensue by the construction of the word "shall" as "may". Whether the

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1 Rani Drig Raj Kuer v. Raja Sri Amar Krishna Narain Singh, [1960 (2) SCR 431]
2 Caldow v. Pixwell, (1876) 2 C.P.D. 562
3 Craies on Statute Law, 5th Edition.

public convenience would be sub served or whether public inconvenience or general inconvenience may ensue if it is held mandatory[4].

15. Section 46 of the Act makes a foreign award enforceable under the Act as binding on the persons between whom it is made. Article III[5] of the New York Convention provides for recognition of arbitral awards by each contracting State as binding. Enforcement of the arbitral awards shall be in accordance with the rules and procedure of the territory where the award is sought to be enforced. Article III restricts imposition of substantial onerous conditions for enforcement of the arbitral awards. Article IV[6] requires the party applying for recognition and enforcement to file an authenticated original award or duly certified copy thereof and the original agreement referred

4 Mohan Singh v. International Airport Authority of India, (1997) 9 SCC132

5 Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

6 1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply: (a) The duly authenticated original award or a duly certified copy thereof; (b) The original agreement referred to in article II or a duly certified copy thereof. 2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

to in Article II[7] or a duly certified copy thereof at the time of the application. It is relevant to mention that the word “shall” is employed in Article IV. The object and purpose of the New York Convention as summarized by the Guide to Interpretation of the New York Convention issued by the International Council for Commercial Arbitration is as follows:

> “The Convention is based on a pro-enforcement bias. It facilitates and safeguards the enforcement of arbitration agreements and arbitral awards and in doing so it serves international trade and commerce. It provides an additional measure of commercial security for parties entering into cross-border transactions”[8].

16. The object and purpose of the New York Convention is to facilitate the recognition of the arbitration agreement within its purview and the enforcement of the foreign arbitral awards. This object and purpose must, in the first place, be seen in the light of enhancing the effectiveness of

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7 1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration. 2. The term “agreement in writing” shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams. 3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

8 “ICCA’S Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges” (2011)
p. XI (hereinafter, ICCA Guide).

the legal regime governing international commercial arbitration[9].

17. According to the ICCA Guide, the approach of the Court for enforcement should be having a strong pro enforcement bias, a pragmatic, flexible and non formalist approach. The Courts in several countries have been liberal in interpreting the formal requirements of Article IV of the New York Convention[10]. Excessive formalism in the matter of enforcement of foreign awards has also been deprecated.

18. It is relevant to take note of the Preamble of the Act wherein it is mentioned that the United Nations Commission on International Trade Law (UNCITRAL) has adopted the UNCITRAL Model law on International Commercial Arbitration ("Model Law") in 1985 and that the Act is made taking into account the Model law and Rules. Chapter VIII of the Model Law governs the recognition and enforcement of Awards. Article 35 (2)[11] provides that the party applying for enforcement of the award shall supply

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9 Dardana Limited v. Yukos Oil Company, [2002] 1 ALL ER (Comm.) 819

10 The New York Arbitration Convention of 1958 – by Albert van den Berg

11 (2) The party relying on an award or applying for its enforcement shall supply the original award or a copy thereof. If the award is not made in an official language of this State, the court may request the party to supply a translation thereof into such language.

the original award or a copy thereof. The Model Law does not lay down procedural details of recognition and enforcement, which are left to national procedural laws and practices. However, Article 35 (2) was amended in 2006 to liberalise formal requirements. Presentation of a copy of the arbitration agreement is no longer required under Article 35 (2).

19. The object of the New York Convention is smooth and swift enforcement of foreign awards. Keeping in view the object and purpose of the New York Convention, we are of the view that the word “shall” in Section 47 of the Act has to be read as “may”. The opposite view that it is obligatory for a party to file the arbitration agreement or the original award or the evidence to prove that the award is a foreign award at the time of filing the application would have the effect of stultifying the enforcement proceedings. The object of the New York Convention will be defeated if the filing of the arbitration agreement at the time of filing the application is made compulsory. At the initial stage of filing of an application for enforcement, non-compliance of the production of the documents mentioned in Section 47 should not entail in dismissal of the application for

enforcement of an award. The party seeking enforcement can be asked to cure the defect of non-filing of the arbitration agreement. The validity of the agreement is decided only at a later stage of the enforcement proceedings.

20. It is relevant to note that there would be no prejudice caused to the party objecting to the enforcement of the Award by the non-filing of the arbitration agreement at the time of the application for enforcement. In addition, the requirement of filing a copy of the arbitration agreement under the Model Law which was categorized as a formal requirement was dispensed with. Section 48 which refers to the grounds on which the enforcement of a foreign award may be refused does not include the non-filing of the documents mentioned in Section 47. An application for enforcement of the foreign award can be rejected only on the grounds specified in Section 48. This would also lend support to the view that the requirement to produce documents mentioned in Section 47 at the time of application was not intended to be mandatory.

21. Reading the word “shall” in Section 47 of the Act as “may” would only mean that a party applying for

enforcement of the award need not necessarily produce before the Court a document mentioned therein "at the time of the application". We make it clear that the said interpretation of the word "shall" as "may" is restricted only to the initial stage of the filing of the application and not thereafter. It is clear from the decisions relied upon by the counsel for the Appellant that Courts in certain jurisdictions have taken a strict view regarding the filing of the documents for enforcement of a foreign award. Courts in many other jurisdictions have taken the opposite view that the application for enforcement of the foreign awards does not warrant rejection for non-filing of the relevant documents including the award and the arbitral agreement. We need not adjudicate on this issue as the subject matter of this case does not relate to the non-filing of the arbitration agreement during the enforcement proceedings. There is no dispute that the arbitration agreement has been brought on record by both the parties.

22. The learned counsel for the Appellant also submitted that the Appellant did not sign the Charter Party and cannot be treated as a party to the agreement. There is no dispute that the contract is governed by the English law under which there

is no requirement for the Charter Party to be signed by the parties to make it binding. We have no doubt in approving the conclusion of the High Court on this point and rejecting the submission made on behalf of the Appellant. Abundant material was examined by both the Arbitrator and the High Court to record a finding that there existed a valid arbitration agreement. Article II of the First Schedule of the Act defines arbitration agreement as including an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams. The High Court found that the Charter Party which contained the arbitration agreement was agreed to and entered upon by the parties and the same is supported by the correspondence between the parties. The term "agreement in writing" in Article II is very wide. An arbitral clause need not necessarily be found in a contract or an arbitral agreement. It can be included in the correspondence between the parties also. In the present case the arbitration agreement is found in the Charter Party which has been accepted by both the Arbitrator and the High Court. We see no reason to differ from the view taken by the High Court on this point.

23. Pursuant to our order dated 10.10.2007, the principal amount awarded by the arbitrator was deposited in this Court and reinvested from time to time in fixed deposit. The amount lying in the bank shall be paid to the respondent.

24. For the aforementioned reasons, the judgment of the High Court is upheld and the appeal is dismissed. No costs.

..................................J.
[A.M. KHANWILKAR]

..................................J.
[L. NAGESWARA RAO]

NEW DELHI,
NOVEMBER 14, 2018.