

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 26/07/2004

CORAM:

THE HONOURABLE MR.JUSTICE P.D.DINAKARAN
AND
THE HONOURABLE MR.JUSTICE N.KANNADASAN

O.S.A.No.29 of 1999

M/s.Moolchand Exports (P)Ltd.,
(in liquidation), rep.by
Official Liquidator, High Court
Madras.
(cause title amended vide order
of the Court dt 26.7.2004 in
C.M.P.No.12697/2004) ... Appellant

-Vs-

1.M/s.Man-Producten
Rotterdam BV, Post Box 253
3000 AG Rotterdam
Netherlands.

2.Peter J.Morgan
C/o Barrow Lane and Ballard
Limited, 52/54, Southwark
Street, London SE1-1UN. ... Respondents

Prayer: Appeal against judgment and decree dated 18th July, 1997 passed in
O.P.No.333 of 1996 on the file of this Court.

!For Appellant : Mr.Arvind Datar, Senior Counsel
^For Respondents: No appearance

:JUDGMENT

(Judgment of the Court was delivered by P.D.DINAKARAN, J.)

The point for consideration in this appeal is as to the enforcement of
an award dated 15.11.1995 passed by an arbitrator under the provisions of the
Foreign Awards (Recognition and Enforcement Act) 1973, which was enacted to
give effect to the International Convention on Recognition and Enforcement of
Foreign Arbitral Awards done at New York on 10.6.1958, in the context of
Section 85 of the Arbitration and Conciliation Act, which reads as follows:-

"Section 85(1):- The Arbitration (Protocol and Convention) Act, 1937 (6 of 1937), the Arbitration Act, 1940 (10 of 1940) and the Foreign Awards (Recognition and Enforcement) Act, 1961 (45 of 1961) are hereby repealed.

Section 85(2):- Notwithstanding such repeal:-

a)the provisions of the said enactments shall apply in relation to arbitral proceedings which commenced before this Act came into force unless otherwise agreed by the parties but this Act shall apply in relation to arbitral proceedings which commenced on or after this Act comes into force;

b)all rules made and notifications published, the said enactments shall, to the extent to which they are repugnant to this Act, be deemed respectively to have been made or issued under this Act."

2. An award came to be passed in an arbitral proceedings between the appellant, the company in liquidation and the first respondent on 15.11.1995 by the second respondent arbitrator. Immediately thereafter, the Arbitration and Conciliation (Third) Ordinance, 1996 came to be notified with effect from 25.1.1996, which in turn was replaced by the Arbitration and Conciliation Act, 1996 with effect from 22.8.1996. The Arbitration and Conciliation Act, 1996, being an Act to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitration awards as also to define the law relating to conciliation and for matters connected therewith or incidental thereto, of course brought a sea change in the arbitration enactments.

3. The enactment of Arbitration and Conciliation Act, 1996, even though came into force from the date of notification i.e., on 22.8.1996, it has to be read with reference to the date of ordinance viz., 25.1.1996 in view of Section 86 of the Arbitration and Conciliation Act 1996, which reads as follows:-

"Section 86:- Repeal of Ordinance 27 of 1996 and Saving:-

(1) The Arbitration and Conciliation (Third) Ordinance, 1996 (27 of 1996) is hereby repealed.

(2) Notwithstanding such repeal, any order, rule, notification or scheme made or having done or any action taken in pursuance of any provision of the said ordinance shall be deemed to have been made, done or taken under the corresponding provisions of this Act."

4. The first respondent filed an application to enforce the award dated 15.11.1995 invoking Sections 46,47,48 and 49 of the Arbitration and Conciliation Ordinance, 1996 in O.P.No.333 of 1996. This Court by an order dated 18.6.1997, taking note of the fact that the appellant even though had filed vakalat, but failed to substantiate their objection, held that the appellant herein had not discharged their burden that the award dated 15.11.1995 was not enforceable on the first respondent and allowed the petition, having satisfied with the conditions prescribed under Section 48 of the Arbitration and Conciliation Act, 1996. Against the said order, the appellant has preferred the above appeal.

5.1. Since in the meanwhile the company went into liquidation, an Official Liquidator was appointed. Mr.Arvind Datar, learned Senior Counsel appearing for the appellant company (in liquidation) invited our attention to Section 85 of the Arbitration and Conciliation Act,1996 referred supra and contends that the impugned award dated 15.11.1995 could be enforced only under the provisions of the Foreign Awards Enforcement Act referred to above.

5.2. According to Mr.Datar, eventhough the Arbitration (Protocol and Convention) Act, 1937 and the Arbitration Act, 1940 and the Foreign Awards Enforcement Act, 1961 have been repealed by the Arbitration and Conciliation (Third) Ordinance, 1996, which was subsequently replaced by Arbitration and Conciliation Act, 1996, in view of the nonobstinate clause under Section 85(2) of the 1996 Act, unless the parties to the award agree to adopt the provisions of the Arbitration and Conciliation Act, 1996 for the enforcement of the award which was passed prior to the date of notification of the said Ordinance, 1996 and the Act 1996, such arbitral proceedings including the award could be enforced only under the respective Acts. However, Mr.Datar very fairly submits that the appellant is not canvassing the case on the merits of the award at all.

6. Unfortunately, there is no representation on behalf of the respondents.

7. We have given careful consideration to the submissions made on behalf of the appellant.

8. By virtue of Section 85(1) of the Arbitration and Conciliation Act, 1996, The Arbitration (Protocol and Convention) Act, 1937 (6 of 19 37), the Arbitration Act, 1940 (10 of 1940) and the Foreign Awards (Recognition and Enforcement) Act, 1961 (45 of 1961) are repealed. But, in view of the non obstinate clause in Section 85(2) of the Arbitration and Conciliation Act, 1996, the provisions of Arbitration and Conciliation Act, 1996, The Arbitration (Protocol and Convention) Act, 1937, the Arbitration Act, 1940, and the Foreign Awards (Recognition and Enforcement) Act, 1961 shall apply in relation to the arbitration proceedings which commenced before the Arbitration and Conciliation (Third) Ordinance, 1996 and the Arbitration and Conciliation Act, 199 6 came into force.

9. Concededly, the award was passed on 15.11.1995, much earlier to the notification of the ordinance. Therefore, the impugned arbitral proceedings was neither commenced nor completed on or after the date of notification of the Arbitration and Conciliation Act 1996 much less the ordinance, 1996. A closer reading of Section 85(2)(a) of the Arbitration and Conciliation Act, 1996 makes it clear that unless otherwise the parties agree to adopt the new enactment viz., the Arbitration and Conciliation Act, 1996 , the proceedings initiated and the decisions arrived at under the respective enactments would be proceeded with only under the respective enactments. Therefore, we are of the considered opinion that since sufficient safeguards are provided under Section 85(2) of the Arbitration and Conciliation Act, 1996 to apply the provisions of the Foreign Awards (Recognition and Enforcement) Act, 1961 (45 of 1961), for the enforcement of the award dated 15.11.1995 made

under the provisions of the Foreign Awards (Recognition and Enforcement) Act, 1961 the same has to be enforced only as per Sections 6 and 7 of the Foreign Awards Enforcement Act, 1961. Since this aspect of the case was not dealt with by the learned single Judge, we are constrained to interfere with the order dated 18.7.1997 in O.P. No.333 of 1996. Accordingly, the appeal is allowed and the order of the learned single Judge is set aside, of course recording the statement of the learned Senior Counsel Mr.Arvind Datar that the appellant is not canvassing on the merits of the award and permitting the first respondent to work out his remedies in the manner known to law, invoking the provisions under the Foreign Awards (Recognition and Enforcement) Act, 1961.

Index : Yes
KST.

To

- 1.The Sub-Assistant Registrar, Original Side, High Court, Madras.
- 2.The Sub-Assistant Registrar, Judicial, High Court, Madras.

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