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ATLAS EXPORT INDUSTRIES

v.

KOTAK AND COMPANY

SEPTEMBER 1, 1999

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[S. RAJENDRA BABU AND R.C. LAHOTI, JJ.]

Foreign Awards (Recognition and Enforcement) Act, 1965: Sections 5 and 6.

C *Arbitration—Agreement to refer disputes to arbitration—Referencial incorporation of arbitration clause is permissible and binding on parties—Seller entered into a contract to supply goods to foreign buyer through Indian agent—All were parties to the contract which incorporated by reference the standard contract of the Grains and Food Trade Association Ltd. (GAFTA)—The standard contract provided for settlement of disputes by*

D *arbitration in a foreign country which actually took place and award passed—Validity of—Held: It is not open to a party entering into a contract to raise objections about the terms of arbitration clause—High Court rightly rejected the seller's objection that there was no agreement in writing to refer disputes to arbitration under the rules of GAFTA.*

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Contract Act, 1872: Sections 23 and 28 Exception 1.

Arbitration agreement—Disputes—Reference of—For arbitration in a foreign country—Validity—Held: Merely because arbitrators are situated in a foreign country cannot by itself be enough to nullify the arbitration when

F *the parties with eyes open have willingly entered into the agreement—More so, when the parties have appointed arbitrators, participated in arbitration and suffered an award.*

Practice and Procedure:

G *New plea—Raising of—Plea not raised at the earliest cannot be allowed to be raised for the first time in appeal before the Supreme Court.*

The appellant entered into a contract with a foreign company for supply of goods (groundnut extractions) through the respondent. The contract incorporated by reference the standard contract of Grain and Food Trade

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Association Ltd. (GAFTA) which provided for arbitration in a foreign country. The respondent was also a party to the contract. A

As there was a dispute between the appellant and respondent it was referred to arbitration which took place in a foreign country. The appellant and respondent participated in the arbitration and an award was passed in favour of the respondent. B

The respondent filed an application under Sections 5 and 6 of the Foreign Awards (Recognition and Enforcement) Act, 1961 before the High Court for making the award a rule of the court. The appellant raised an objection before the High Court that there was no agreement in writing between the parties requiring the disputes to be settled by arbitration under the rules of GAFTA. The High Court rejected the objection and made the award a rule of the court. The Letters Patent Appeal preferred by the appellant was dismissed. Hence this appeal. C

On behalf of the appellant it was contended that the term of the contract relating to arbitration was opposed to public policy under Section 23 read with Section 28 of the Contract Act, 1872 since the parties were compelled to resort to arbitration in a foreign country. D

Dismissing the appeal, the Court E

HELD: 1. The appellant did not raise a plea before the High Court that it was not aware of the standard contract of the Grain and Food Trade Association Ltd. (GAFTA). The High Court was, therefore, right in rejecting the appellant's objection that there was no agreement in writing between the parties requiring that disputes be settled by arbitration under the rules of GAFTA. [197-E-F; 196-D] F

Alimenta S.A. v. *National Agricultural Co-operative Marketing Federation of India Ltd.*, AIR(1987) SC 643, relied on.

Russell on Arbitration, 19th Edn., p. 50 and *Halsbury's Laws of England*, 4th Edn., Vol. 2, p. 267, para 527, referred to. G

2. The present case is clearly covered by Exception 1 to Section 28 of the Contract Act, 1872. Right of the parties to have recourse to legal action is not excluded by the agreement. The parties are only required to have their dispute/s adjudicated by having the same referred to arbitration. Merely H

A **because the arbitrators are situated in a foreign country cannot by itself be enough to nullify the arbitration agreement when the parties have with their eyes open willingly entered into an agreement. More so when the parties have appointed arbitrators, participated in arbitration proceedings and suffered an award. [198-D-E]**

B **3. The plea that a term of the contract relating to arbitration was opposed to public policy under Section 23 read with Section 28 of the Contract Act, 1872 was not raised either before or during arbitration proceedings or before the High Court or in the Letters Patent Appeal. Such a plea cannot be raised before this Court for the first time. [198-E-F]**

C CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7410 of 1994.

From the Judgment and Order dated 25.10.93 of the Bombay High Court in L.P.A. No. 856 of 1993.

D S.S. Javeli, (Vivek Gambhir) (NP) for the Appellant.

K.B. Rohtagi, Sunil Malhotra, Ms. Aparna Rohtagi Jain and Mahesh Kasana for the Respondent.

E The Judgment of the Court was delivered by

R.C. LAHOTI, J. The appellant, the Atlas Export Industries, Junagadh (hereinafter 'Atlas', for short) entered into a contract dated 3rd June, 1980 with M/s Oceandale Company Limited, Hongkong (hereinafter 'Oceandale', for short). The agreement was for the supply of 200 MT of Indian groundnut F extractions of the specifications as to quantity, quality and packages detailed in the contract and to be shipped on or before 30th June, 1980. The price was agreed at US $200 per M.T. The goods were to be supplied through M/s Kotak and Company, Bombay (hereinafter 'Kotak', for short). M/s Prashant Agencies, Bombay were the brokers. The existence of the contract, to which G Atlas, Oceandale and Kotak were the parties, is not in dispute. Kotak were at all times responsible for the performance on behalf of the final buyers Oceandale. The letter of credit was opened by Oceandale in favour of Kotak who then transferred it in favour of Atlas. The letter of credit was opened at US $203 whereas Kotak's purchase from Atlas was at US $200. It was agreed upon between Atlas and Kotak that the difference would be paid locally by H Atlas to Kotak in Indian rupees. The time for shipment was extended by

mutual agreement between the parties and correspondingly the period of validity of the letter of credit was also extended. However, still there was failure to ship the goods by the time appointed by the contract and as extended which resulted into a dispute arising between the parties. A

The contract dated 3rd June, 1980 incorporated an arbitration clause which is extracted and reproduced hereunder: B

> "This contract is made under the terms and conditions effective at date of the Grain and Food Trade Association Ltd. London Contract No.15 which is hereby made a part of this contract..... both buyers and sellers hereby acknowledge familiarity with the text of the GAFTA contract and agree to be bound by its terms and conditions." C

'GAFTA' stands for the Grain and Food Trade Association Ltd., London. Clause 27 of the Standard Contract 15 of the GAFTA provides as under:

> *"27. ARBITRATION -* D
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> (a) Any dispute arising out of or under this contract shall be settled by arbitration in London in accordance with the Arbitration Rules of the Grain and Food Trade Association Limited, No.125 such Rules forming part of this contract and of which both parties hereto shall be deemed to be cognisant. E
>
> (b) Neither party hereto, nor any persons; claiming under either of them, shall bring any such dispute until such dispute shall first have been heard and determined by the arbitrators, umpire or Board of Appeal, as the case may be, in accordance with the Arbitration Rules and it is expressly agreed and declared that the obtaining of the award from the arbitration, umpire or Board of Appeal, as the case may be, shall be a condition precedent to the right of either party hereto or of any person claiming under either of them to bring any action or other legal proceedings against the other of them in respect of any such dispute." F G

Kotak appointed their own arbitrator and called upon Atlas to appoint their arbitrator. Both the parties did appoint their respective arbitrators. The arbitrators gave their award, published on 22nd June, 1987 as per the rules of GAFTA. The award directed Atlas to pay Kotak a sum of US $9600 with interest calculated thereon at the rate of 12 per cent *per annum* from 26th H

A October, 1980 until the date of the award as also the costs of arbitration as specified. No appeal was preferred against the award.

Kotak moved an application under Sections 5 and 6 of the Foreign Awards (Recognition and Enforcement) Act, 1961 before the High Court of Bombay seeking enforcement of the award by filing of the same and
B pronouncing judgment according to the award. Atlas raised objections against the prayer made by Kotak. The objections have been rejected and the award made rule of the Court followed by decree in terms of the award under the judgment dated 22nd September, 1992 passed by learned Single Judge of the High Court of Bombay. A Letters Patent Appeal preferred by Atlas having
C been dismissed, the present appeal by special leave has been filed.

Having heard the learned counsel for the parties we are of the opinion that the appeal is devoid of any merit and hence liable to be dismissed. The only objection raised by Atlas before the High Court of Bombay was that there was no agreement in writing between the parties requiring the disputes
D arising out of the contract being referred to arbitration in accordance with the arbitration rules of GAFTA. No particulars of the plea were given. As already noticed, the existence of contract between the parties is not denied. The arbitration clause in the contract is incorporated by reference. The parties knew that excepting the terms specifically set out therein in the contract dated 3rd June 1980, the rest of the terms and conditions were to be the same as
E were incorporated in the Standard Contract No.15 of GAFTA as effective on the date of the contract. Clause 27, entitled Arbitration, and finding its place in Standard Contract No.15 is also not in dispute. The law on the subject is stated in Russell on Arbitration (19th Edition, at page 50) is under:

F "The agreement may arise by the incorporation of one document containing an arbitration clause in another under which the dispute arises. "Where parties by an agreement import the terms of some other document as part of their agreement those terms must be imported in their entirety...but subject to this: that if any of the imported terms in any way conflicts with the expressly agreed terms, the latter must
G prevail over what would otherwise be imported."

In Halsbury's Law of England (4th Edition, Vol. 2, Page 267, para 522), it is stated as under:

"If the agreement is written, it may be included in a particular
H contract by reference or implication. The agreement between the parties

may incorporate arbitration provisions which are set out in some other document, but in order to be binding the arbitration provisions must be brought to the notice of both parties.

It is inherent in cases of incorporation by reference that the parties are concerned not with one document alone but with at least two, one of which contains an arbitration clause and the other of which does not. In some cases the one document may constitute a contract between other parties. A common case is where the two documents concerned are a charterparty and a bill of lading. If the relevant contract between the relevant parties is contained in the document which does contain the arbitration clause, no question of incorporation arises. Where this is not the case, the question whether the document containing the arbitration clause is incorporated in the relevant contract between the relevant parties is, as always, a question of construction."

In *Alimenta S.A.* v. *National Agricultural Co-operative Marketing Federation of India Ltd. and Anr.*, AIR (1987) SC 643, the arbitration clause contained in an earlier contract between the parties was incorporated into a latter contract only by reference. This Court held that such a referential incorporation was permissible and the clause was binding between the parties unless it was insensible, unintelligible or was inconsistent with the terms of the present contract.

It is not the case of the appellant Atlas that they were not aware of the terms and conditions of the Standard Contract No.15 of GAFTA. Such a plea if at all it was sought to be raised then should have been raised specifically but that is not the case here. The High Court was therefore right in rejecting the only objection which was raised on behalf of the appellant Atlas before it.

It was however contended by the learned counsel for the appellant that the award should have been held to be unenforceable inasmuch as the very contract between the parties relating to arbitration was opposed to public policy under Section 23 read with Section 28 of the Contract Act. It was submitted that Atlas and Kotak, the parties between whom the dispute arose, are both Indian parties and the contract which had the effect of compelling them to resort to arbitration by foreign arbitrators and thereby impliedly excluding the remedy available to them under the ordinary law of India should be held to be opposed to public policy. Under Section 23 of the

A Indian Contract Act the consideration or object of an agreement is unlawful if it is opposed to public policy. Section 28 and Exception 1 to it, (which only is relevant for the purpose of this case) are extracted and reproduced hereunder:-

> "28. Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the
> B usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.
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> Exception 1. - This section shall not render illegal a contract by which two or more persons agree that any dispute which may arise
> C between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred."

The case at hand is clearly covered by Exception 1 to Section 28. Right of the parties to have recourse to legal action is not excluded by the agreement.
D The parties are only required to have their dispute/s adjudicated by having the same referred to arbitration. Merely because the arbitrators are situated in a foreign country cannot by itself be enough to nullify the arbitration agreement when the parties have with their eyes open willingly entered into the agreement. Moreover, in the case at hand the parties have willingly
E initiated the arbitration proceedings on the disputes having arisen between them. They have appointed arbitrators, participated in arbitration proceedings and suffered an award. The plea raised before us was not raised either before or during arbitration proceedings, nor before the learned Single Judge of the High Court in the objections filed before him, nor in the Letters Patent Appeal filed before the Division Bench. Such a plea is not available to be raised by
F the appellant Atlas before this Court for the first time.

For the foregoing reasons, we find no fault with the award having been made rule of the Court by the High Court. The appeal is dismissed with costs.

V.S.S. Appeal dismissed.