

IN THE HIGH COURT OF SINDH AT KARACHI

Present:

Mr. Justice Muhammad Iqbal Kalhoro

Mr. Justice Muhammad Osman Ali Hadi

H.C.A. No.429 of 2023

Hunaneng Fuyun Port & Shipping (Pvt.) Ltd. Appellant

Vs.

Jiaozuo Creation Heavy Industry Company Ltd. Respondents.

Date of hearing : 14.05.2025

Date of decision : 23.05.2025

Appellant : Through Mr. Farooq H. Naik, Advocate a/w
Qaim Ali Shah, Advocate

Respondent : Through Mr. Hasan Mandviwalla a/w Hassan
Ali, Advocates.

JUDGMENT

MUHAMMAD IQBAL KALHORO J: This appeal impugns an order dated 07.11.2023 passed by learned Single Judge of this court in Suit No.983/2022 pending between appellant and respondent. The suit is actually an application seeking recognition and enforcement of foreign Arbitral Award (Award) U/s 6 of Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011 (Act, 2011). The award dated 02.11.2021 for the enforcement of which the suit has been filed has been rendered by China International Economic and Trade Arbitration Commission (CIETAC) in favour of respondent and against the appellant.

2. As per brief facts, the appellant, a Chinese company, is a lessee of Berths No.3 & 4 at Port Qasim, used for transferring the coal from Karachi to Sahiwal Punjab for a power plant there. Vide agreement dated 03.07.2016, appellant entered into a contract with respondent for Design, Equipment supply and Equipment Installation and Commissioning for Upgrading and Rebuilding Project over the Berths No.3 & 4. Under part 1 of the agreement, respondent was responsible for completeness of supplied equipment capacity and quality that shall meet the capacity and technical requirements specified in the schedule. Subsequently, the agreement dated 21.10.2016 was also signed by the parties in which in terms of Article 5, it was agreed by the parties that governing law will be Chinese Law and any dispute in respect of the agreement shall be referred to CIETAC for arbitration. Seemingly, over performance of the agreement and

payment, a dispute arose between the parties and hence respondent initiated arbitration proceedings against appellant in the year 2020 before CIETAC, the Arbitration Tribunal rendered arbitral award by directing the appellant to pay a total sum RMB 127,434,205.22 within 30 days. It seems that appellant failed to make any payment and hence the respondent filed above suit in the form of an application U/s 6 of the Act, 2011 as stated above. During pendency thereof, appellant filed CMA No.12142/2022 for summoning the record of arbitration proceedings and CMA 12143/2022 U/o XVIII rule 18 CPC for Nazir's inspection of the site . Both the applications have been dismissed by learned Single Judge vide impugned order.

3. Learned counsel for appellant has argued that learned Single Judge has erred by not considering the facts that the respondent had made various errors and incorrect statements as well as made false and fabricated claim in the plaint with regard to the dispute between the parties, hence a perusal of record of arbitral proceedings by the court was necessary to reach a just conclusion in the case; learned Single Judge has erred by not appreciating the fact that learned Arbitrators have cited insufficient reasons in arriving at a conclusion in the award, hence it was necessary to call for the entire record and proceedings of the arbitral case; learned Single Judge lost sight of the fact that it cannot enforce award with closed eyes as the same cannot be enforced in contravention of Article V of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (Contention, 1958).

4. He next argued that learned Single Judge failed to appreciate that the arbitration Tribunal had not granted application for appraisal moved by the appellant which affected adversely its case, hence summoning of complete record of the Arbitral proceedings is necessary to ascertain whether a proper opportunity was given to the appellant or not; learned Single Judge failed to appreciate that Arbitral Tribunal was not composed as per law and it was in violation of Article V(i) (d) of Convention 1958; learned Single Judge failed to appreciate that respondent had provided equipment of lower quality which adversely affected appellant's performance; learned Single Judge did not appreciate the fact that amount was payable to respondent only on fulfillment of conditions and responsibilities stipulated in the agreement; there was no evidence that respondent had fulfilled terms and conditions of the agreement and was entitled to the payments; learned Single Judge failed to appreciate that the respondent has not yet finished the work of the project, hence the appellant is not liable to make any payment; that unfinished work over the project can be ascertained from inspection by Nazir of this court; learned Single Judge failed to

consider the fact that URS Inspection Private Ltd. had carried out inspection and reported non-completion of the project; learned Single Judge did not appreciate the fact that application u/s 6 of Act, 2011 is not maintainable and it was liable to be dismissed; more so, the same was barred under Article 178 of Limitation Act; learned Single Judge failed to appreciate that arbitral award is neither rule of the court nor it is a decree in terms of section 2(2) of the CPC as well as section 17 of the Arbitration Act, 1940; learned Single Judge has failed to appreciate that if the applications are not allowed, it will cause irreparable damage to the appellant's business and will adversely affect running of the appellant company which would be in violation of Article 18-A of the Constitution.

5. On the other hand, learned counsel for respondent has opposed the appeal stating that appeal is nothing but a tactic to delay enforcement of the award; that Act, 2011 does not require summoning or filing of the entire Arbitral proceedings; that respondent had filed all the documents in terms of section 5 of the Act, 2011; that U/s 6 of the Act, 2011 the award is liable to be enforced. According to him, the courts are mandated to enforce the foreign award under the Act, 2011 in terms of principle of "*pro-enforcement bias*" and unless material infirmity determined by the court as provided u/s 7 of the Act, 2011 is there in the award the court cannot refuse to enforce the award; that learned Single Judge was not the court of appeal but the executing court; the contentions raised by the appellant cover merits of the case which cannot be reopened u/s 6 of the Act, 2011; appellant had actively joined Arbitration proceedings and never raised any objection to its authority or constitution; that only in exceptional circumstances specified in Article V of the New York Convention which require high standard of proof, the court can decline enforcement of foreign award. He has relied upon 2021 CLD 1069 SC, PLD 2014 Sindh 349, PLD 2018 Lahore 597,, 1999 CLC 1018, 1999 CLC 437, 1987 CLC 83, 2007 YLR 2287.

6. We have considered arguments, perused material available on record including impugned order and taken guidance from the case law cited at bar. It seems, learned Single Judge after taking into account all the contentions raised by the appellant has been pleased to observe that when the appellant failed to raise any objection over composition of the Tribunal before it, it cannot be permitted to do so in the proceedings u/s 6 of the Act, 2011 which has a limited scope: recognition and enforcement of the award. While making such observations, learned Single Judge has also held that composition of Tribunal is manifest from the award itself and there is no ambiguity in it. According to his view, all the documents as required u/s 5 of the Act, 2011 were filed by the respondent and if any document, part of the arbitral proceedings, the appellant wanted to rely

upon, it was at liberty to furnish it as a proof in support of its defence. Learned Single Judge has wondered as to why the appellant who had participated actively in arbitration proceedings cannot itself file the record and is seeking its summoning in the proceedings u/s 6 of the Act, 2011. While dismissing the application for inspection, learned Single Judge has observed that under the garb of such application, the appellant actually wanted to bring on record additional evidence which course was not available to it in the proceedings u/s 6 of the Act, 2011. It is further observed by him that if the appellant failed to file such application before the arbitration tribunal, then in law it was not competent to do so in the proceedings filed for enforcement of the award. For the reasons below, we do not find any error or illegality in the aforesaid observations.

7. Section 5 of the Act 2011 stipulates filing of the documents. It states that a party applying for recognition and enforcement of foreign arbitral award under the Act shall at the time of application furnish the documents to the court in accordance with Article IV of the Convention. Article IV of the Convention enjoins upon the party to supply duly authenticated original award or duly certified copy thereof; the original agreement referred to in Article II or a duly certified copy thereof. Apart from that, said Article stipulates that if the award and agreement is not made in official language of the country in which the award is relied upon, the party seeking enforcement of the award shall produce translation of those documents into such language.

8. The impugned order shows that respondent in compliance of said provision of law had submitted all the documents as required and nothing was missing on the record which may have hindered process of enforcing the award under the law. Before the court necessary record was available and the court was ready to take up further proceedings to decide the matter. In such circumstances, if appellant wanted to bring on record some other documents to establish its defence, it could do so only on its own volition by simply filing the documents with its reply. It is not necessary to move an application for such purpose and delay the matter. Not the least, when such object can be achieved easily by a little bit effort by appellant: collecting certified copies of relevant documents from the Arbitral proceedings and filing the same in the court. Insofar as power of the court in this regard is concerned, in our view, since it is not the court of appeal, it cannot indulge itself into merits of the case by allowing an application for calling R & Ps of the award and then causing some change in it based on such an exercise. Then, it is also not clear either what benefit other than restarting process of consideration of merits once again, the appellant want to gain from calling the

entire R & Ps of the Arbitral proceedings, which admittedly is not allowable under the Act, 2011.

9. Nonetheless, it may be said that jurisdiction of the court enforcing the foreign award is defined in section 6 of the Act, 2011. According to which unless the court pursuant to section 7 refuses the application seeking recognition and enforcement of a foreign award, it shall recognize and enforce the award in the same manner as a judgment or order of a court in Pakistan. Further, a foreign arbitral award which is enforceable under this Act shall be treated as binding for all purposes on the persons between whom it was made and may accordingly be relied upon by any of those persons by way of defence, set off or otherwise in any legal proceedings in Pakistan. This provision of law makes it abundantly clear that except under the circumstances listed U/s 7 read with Article V of the Convention, the court has no option but to recognize and enforce the award in the same manner as it does a judgment or order of the court in Pakistan. The court is not empowered to hold a trial, weigh the merits and substitute its own view for the view already arrived at in the award. The court is required under the said provision to treat the award being enforced as binding for all purposes on persons between whom it was made and further it is only the award which could be relied upon by any of those persons by way of defence or set off. The circumstances under which the court can refuse to recognize and enforce the foreign award as enumerated in Article V of Convention are as follows:-

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:-

- (a) The parties to the agreement referred to in article II 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 arbitration 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 recognized and 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. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:-

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

10. Learned counsel for appellant while arguing the appeal has failed to establish existence of any of the above circumstances in the case which may justify summoning of entire R & Ps of the award and an inspection of the site by Nazir of the court. He could not place any evidence that appellant was under some incapacity to perform the agreement or the agreement between the parties was not valid under the law or the appellant was not given a proper notice of appointment of Arbitrators or of the Arbitration proceedings or the appellant was unable to present its case in the Arbitration proceedings. Learned counsel also failed to vouch for a fact that award deals with a difference not contemplated or not valid within the terms of submission to arbitration or it contained a decision on matter beyond scope of submission of arbitration; or the composition of arbitral authority or arbitral procedure was not in accordance with law of the country where the arbitration took place or how it was in violation of Article V(i) (d) of Convention, 1958. He could not satisfy us either that award had not become binding between the parties or it has been set-aside by the competent authority of the country in which that award was made. Minus any material establishing existence of above factors, the appellant in our view has no case to agitate either for summoning the entire record of the award proceedings or asking for inspection of the site by the Nazir.

11. The Act, 2011 does not confer any power on the court enforcing the foreign award to deviate from the procedure available therein and start hearing of the case like a court of appeal and reopen its merits either by calling for R & Ps of the award passed in a foreign country or carrying out inspection of the site by some of its officials to collect additional evidence in the matter. There could be no other reason for summoning the R & Ps of the award and site inspection except to consider merits of the case once again. The court enforcing foreign award is empowered only to recognize and enforce the award as if it was a judgment or order of Pakistani court on the basis of documents submitted in terms of section 5 of the Act, 2011 which essentially would mean that such court has to act as an executing court. The executing court cannot resume merits of the case and alter terms and conditions of a judgment or decree. Likewise the courts enforcing the foreign arbitral award is not empowered to question merits of the award and substitute its view for a view taken by the Arbitrators in the award except only in

the circumstances enumerated in Article V of the Convention, as reproduced above.

12. We, therefore, find no ambiguity or illegality in the impugned order and hence dismiss the appeal alongwith pending applications.

The Appeal stands disposed of alongwith pending applications.

JUDGE

JUDGE

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