

Form No:HCJD/C-121
ORDER SHEET
IN THE LAHORE HIGH COURT LAHORE
JUDICIAL DEPARTMENT

Civil Original No.628 of 2014

Jess Smith and Sons Cotton LLC **Versus** D.S. Industries

| Sr.No. of Order/ Proceeding | Date of Order/ Proceeding | Order with signatures of Judge and that of parties or counsel, where necessary. |
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12.12.2017 M/s Qazi Iftikhar Ahmad and Ms. Gohar Batool, Advocates for plaintiff.
M/s Waleed Khalid, Furqan Naveed and Muhammad Ali Khan, Advocates for defendant.
Mr. Imran Aziz Khan, DAG, as amicus curie.

A preliminary question which falls for determination in this suit under section 6 of the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011 for recognition and enforcement of the foreign award dated 16th December, 2011 made by the International Cotton Association Limited is whether the controversy involved therein should be resolved after framing issues and recording evidence.

2. The case of the plaintiff is that the contractual relationship between the plaintiff and the defendant was governed by the terms and conditions of the contract which came into existence through exchange of letters/e-mails. According to the plaintiff, the contract was governed in its entirety by the rules and regulations of the International Cotton Association Limited under English law and jurisdiction which inter-alia contained an arbitration clause for settlement of any dispute under the contract by arbitration of the International Cotton Association Limited. It has been

C.O. No.628 of 2014

maintained in the plaint that through a sale contract dated 2nd February, 2011, the defendant agreed to purchase from the plaintiff 140 metric tons (approximately 604 bales of cotton) of 2010/2011 American Raw Cotton SJV-ACALA-RECAP3 at the price of 188.00 US cents per pound, the shipment thereof was to be made by the end of May-2011 and letter of credit was to be opened prior to shipment; that the plaintiff had been willing and ready to perform its parts of the said contract but the defendant committed default which led the plaintiff to move an application before the International Cotton Association Limited for commencement of arbitration proceedings; and, that the International Cotton Association Limited after complying with the requirements of the rules and regulations made an ex-parte award dated 16th December, 2011.

3. The defendant, apart from raising certain preliminary objections to the maintainability of the suit in the written statement filed by it, has submitted that there was no legally executed and subsisting arbitration agreement between the parties for referring any dispute to the International Cotton Association Limited. The defendant has also pleaded that in the absence of agreement, the defendant was not under obligation to take delivery of any cotton from the plaintiff; that the defendant was never informed of any application being made to the International Cotton Association Limited for commencement of arbitration; that the defendant did not receive any notice regarding the said arbitration; and that no actual shipment of cotton was

C.O. No.628 of 2014

made to the defendant for which compensation was being sought. On the basis of above said assertions, the defendant has made a prayer that the suit be dismissed as ex-parte award is illegal, unlawful and unenforceable in terms of laws of Pakistan.

4. Heard. According to the provisions of the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011, this court cannot assume jurisdiction unless the party applying for recognition and enforcement of a foreign award supplies the following two documents:-

- (a) the duly authenticated original award or a duly certified copy thereof; and,
- (b) the original agreement for arbitration or a duly certified copy thereof.

5. The plaintiff has placed on record the certified copy of the award. As regards agreement for arbitration the plaintiff has placed on record the letters/e-mails which were exchanged between the plaintiff and M/s Pakistan AXA International; and, the defendant and the Pakistan AXA International. There is no direct exchange of letters/ e-mails between the plaintiff and the defendant. Before proceeding further it would be apposite to state here that the plaintiff in paragraph No.6 of the plaint has stated that Pakistan AXA International was its dealer. The plaintiff, however, has not placed on record any document/evidence to show how the said dealer was engaged and what was its authority and role in the sale and purchase of cotton. The plaintiff has also not stated any reason for not

C.O. No.628 of 2014

impleading the said dealer as a party in the present proceedings. On the other hand, the defendant has denied the existence of any contractual relationship with the plaintiff. This denial raises a threshold question, that is, whether this Court has jurisdiction to take cognizance of the instant application for recognition and enforcement of a foreign award. The said question along with other questions which have been raised in the pleadings are required to be determined by following the procedure as nearly as may be provided by the Code of Civil Procedure, 1908.

6. The conjoint reading of Article IV and Article V of the Schedule to the Recognition and Enforcement (Arbitration Agreement and Foreign Arbitral Awards) Act, 2011 (that is, New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards), suggests that the Court may refuse recognition and enforcement of the foreign award on the following points:

- (i) If the application for the recognition and enforcement of foreign award is not accompanied by: (a) the duly authenticated original award or duly certified copy thereof; and, (b) the original Arbitration Agreement or a duly certified copy thereof.
- (ii) Article V uses the expression “may” in the context of refusing enforcement instead of the mandatory “shall” or “must”. In other words the legislature has left it to the discretion of the court to refuse enforcement of a foreign award, depending upon the facts and circumstances of a particular case.

C.O. No.628 of 2014

- (iii) The scope of inquiry before the Court before whom the application for enforcement of the foreign award is pending is circumscribed by the condition for refusal set out in clauses (a) to (e) of Article V. It is not open to a party seeking to resist a foreign award to assail the award on merits or because a mistake of fact or law has been committed by the Arbitral Tribunal.
- (iv) The legislative intent regarding enforcement of a foreign award is writ large, in that, the conditions for refusing enforcement are to be narrowly construed, and, as far as possible the court may exercise its discretion in favour of enforcement of the award as is clear from the use of the words “recognition and enforcement of the award may be refused,only if that party furnishes to the competent authority..... prove that”.

7. The above noted points usually involve investigation into the disputed questions but it is not in every case that the Court would be under obligation to frame issues, record evidence of the parties and follow the procedure prescribed for decision of the suit. In my view, the matter has been left to the satisfaction of the Court which has to regulate its proceedings and keeping in view the nature of the allegations in the pleadings, may adopt such mode for its disposal, as in consonance with justice, the circumstances of the case may require. It is thus within the competence of this Court to frame formal issues and record evidence if the facts of a particular case so

C.O. No.628 of 2014

demand. So far as the case on hands is concerned, inter alia, the questions whether the e-mails/ letters available on record constitute contract containing arbitration; whether Pakistan AXA International was duly authorized to act as an agent of the plaintiff; and, whether the arbitration proceedings were conducted in accordance with the rules of the International Cotton Association Limited, in my view, are the questions which cannot be decided without framing issues and allowing the parties to adduce evidence in support of their respective claims.

8. In view of above, office is directed to fix this case on 12 .01.2018 for framing of issues.

(*SHAHID WAHEED*)
JUDGE

Announced in open Court on _____.

Judge

Approved for reporting

Judge