

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE T.R.RAVI

TUESDAY, THE 30TH DAY OF APRIL 2024 / 10TH VAISAKHA, 1946

EP(ICA) NO. 1 OF 2018

AWARD HOLDER:

M/S.INTERNATIONAL NUT ALLIANCE LLC,
19 SPEAR ROAD, SUITE 303, RAMSEY, NJ 07446, USA,
REP BY ITS AUTHORISED SIGNATORY S.ANILKUMAR, 237,
13TH STREET, GIRINAGAR, COCHIN-682020.

BY ADV SRI.T.R.ASWAS

AWARD DEBTOR:

M/S.JOHN'S CASHEW CO
MUKKODU P.O., KARIPPURAM, KUNDARA,
KOLLAM-691503, REP BY ITS PROPRIETOR BINU JOHN.

BY ADVS.

SRI.D.AJITHKUMAR

SRI.N.D.PREMACHANDRAN

THIS EXECUTION PETITION INTERNATIONAL COMMERC HAVING
BEEN FINALLY HEARD ON 13.02.2024, THE COURT ON 30.04.2024
DELIVERED THE FOLLOWING:

T.R. RAVI, J.

EP(ICA)No.1 of 2018

Dated this the 30th day of April, 2024

ORDER

The question involved in this petition, seeking enforcement of an International Arbitration Award, is whether the court which is enforcing the award is empowered to direct payment of interest on the amount awarded, from the date of the award till the date of payment, when the award does not contemplate payment of any interest.

2. The petitioner is a company incorporated in USA. They entered into a contract with the respondent for the purchase of 700 cartons of W320-grade cashew kernels. The respondent supplied the goods and received payment. Contending that the goods supplied did not conform to the standards prescribed in the contract, the petitioner raised a claim against the respondent. When the respondent did not honour the claim, the petitioner issued notice to the respondent demanding arbitration of the dispute by the Association of Food Industries Inc. ('the AFI' for

short). On 07.01.2010, the AFI issued a notice of arbitration to the petitioner and the respondent. The respondent did not attend the arbitral proceedings but sent a reply to the AFI stating that the AFI does not have jurisdictional competence to entertain the dispute, since the contract did not contain any provision for submission to the arbitration by the AFI. The respondent contended that the clause in the contract had been altered by the petitioner without the consent of the respondent. The petitioner contended that the contract was revised after correspondence with the broker who was representing the respondent. The AFI proceeded with the hearing of the matter, and it resulted in Annexure- A1 award in favour of the petitioner allowing them to realise USD 10,225 from the respondent.

3. The respondent challenged the award in proceedings under Section 34 of the Arbitration and Conciliation Act, 1996 ('the Act' for short). The District Court found that an application under Section 34 which comes under Part I of the Act was maintainable. OP No.1106 of 2013 filed by the petitioner was dismissed by judgment dated 16.07.2014 and the judgment was affirmed by the Hon'ble Supreme Court. During that time, the judgment in

Bhatia International v. Bulk Trading S.A. & Anr. [(2002) 4 SCC 105] which said that Part I of the Act will apply to international arbitration, was holding the field. The District Court heard O.P.(Arb.)No.167 of 2010 and by judgment dated 06.07.2017, set aside the award. Against the decision in OP(Arb) No.167 of 2010, the petitioner filed Arbitration Appeal No.61 of 2017 before this Court contending that Part I of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act) will not apply. In the meanwhile, the judgment of the Constitution Bench of the Hon'ble Supreme Court in **Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc. [(2012) 9 SCC 552]** ('**BALCO**' for short) had been rendered, wherein it was categorically held that Part I of the Act will apply only to the domestic arbitration. The Division Bench of this Court considered Arbitration Appeal No.61 of 2017 relied on the decision in **BALCO** (supra) and allowed the appeal finding that Section 34 of the Act will not apply. The judgment of the Division Bench was challenged unsuccessfully before the Hon'ble Supreme Court. It is thereafter that the present petition for enforcement has been filed. Thus, in the earlier stages of these proceedings, this Court had specifically

found that Part I of the Act would not apply to the case on hand and dismissed the petition filed under Section 34 of the Act following the decision of the Constitution Bench in **BALCO** (supra).

4. The respondent filed objections and the petitioner filed their reply. This Court held that the arbitral award sought to be enforced was induced and affected by fraud, on a finding that the contract was altered by the petitioner by changing the name of the arbitral institution from CENTA to AFI. The judgment of the learned Single Judge was set aside by a Division Bench of this Court in Arbitration Appeal No. 25 of 2019 and the case was remitted back, for proceeding with the enforcement of the award in accordance with the law. The Division Bench held that the respondent had a remedy as per the law of the Country where the arbitration proceedings are held and in the case on hand, this Court is bound to enforce the foreign arbitral award even if there exists any ground in favour of the respondent in terms of Section 48 of the Act. The Court found that the contention regarding the procedural aspects cannot be raised in a proceeding for the enforcement of the award, particularly since the respondent had the opportunity to raise the same in the course of the arbitration proceedings, but

had chosen not to do so. Pending the proceedings, the respondent paid USD 10,225/- which is the amount awarded as per Annexure-A1. The aspect that remains to be decided is whether the respondent is liable to pay interest for the amount awarded from the date of award till the date of payment.

5. The petitioner contends that when the award is silent about the interest payable, Section 31 (7)(b) in Part I of the Act will apply. Reference is made to Section 48 of the Act, which deals with enforcement, and it is submitted that the Section does not deal with the question of payment of interest. It is submitted that the only provision that deals with the payment of interest post-award is Section 31(7)(b) which appears in Part I of the Act. According to the counsel, what is to be looked into is the *lex fori*, which, as far as the payment of interest is concerned, is Section 31(7)(b) of the Act. In support of the above contention, it is pointed out that the right to claim interest may vary from country to country, where the Award may be sought to be enforced, and hence there is nothing unusual in the Award not stating about the payment of interest. It is submitted that in Muslim countries where the Shariya Law applies and there is a prohibition for charging of

interest, the award for payment of interest will be unenforceable due to the public policy in the country.

6. Reliance is placed on the decision of the Andhra Pradesh High Court in **International Investor KCSC vs Sanghi Polyesters Ltd. [2002 (5) ALD 647]** in support of the above contention. It is submitted that the above said judgment has been confirmed by the Hon'ble Supreme Court with a modification regarding the rate of interest which was reduced from 18% to 9%. Reliance is also placed on the decision in **Ahcom Sarl V. M/s. Peniel Cashew Company [SLP(C)No.9206/2020]**, which was disposed of by the Hon'ble Supreme Court based on the submission of the judgment debtor that 8% simple interest from the due date till the date of deposit in the court will be payable. The judgment in **Peniel** (supra) had arisen from the judgment of this Court in OP(C) No.23 of 2019, wherein this Court has held that Section 31(7) of the Arbitration Act has no application in the case of a Foreign Award which is sought to be enforced since the rate of interest in such cases will be determined by the rate of interest applicable at the seat of arbitration. The counsel referred to the decision of the Hon'ble Supreme Court in **Chatterjee**

Petrochem Co. & Anr. vs Haldia Petrochemicals Ltd. [(2014) 14 SCC 574]. Reference was made in particular to paragraph 29 of the judgment, wherein the Hon'ble Supreme Court has held that the scheme of the Act is such that the general provisions of Part I including Section 5 will apply to all the chapters or parts of the Act. It is hence submitted that Section 31(7)(b) which appears in Part I dealing with domestic arbitration, is a general provision that will apply as *lex fori* while executing foreign awards. Reliance is also placed on the judgment of the Hon'ble Supreme Court **in P.E.C. Ltd. Vs. Austbulk Shipping Sdn Bhd [2018 KHC 6913]**, wherein the Hon'ble Supreme Court held that the model law does not lay down procedural details of recognition and enforcement which are left to the national procedural laws and practices. Reference is made to the UNCITRAL Model Law on International Commercial Arbitration. The counsel also relied on paragraph 9 of the remand order of the Division Bench, wherein the Division Bench has referred to the protection of commercial interests of not only the parties to the commerce but also the countries involved and the requirement of keeping in mind the objectives of the Act while deciding on the question of payment of interest particularly

keeping in mind the fact that the Award is of 2010 and the execution of the same is still not completed in the year 2024. It is submitted that if interest is not awarded that will be a travesty of justice. The counsel relied on the judgment of the Hon'ble Supreme Court in **LMJ International Limited & Anr. v. Sleepwell Industries Co. Ltd.** [2019 KHC 6195] in particular to paragraphs 14 and 18. However, the said judgment does not deal with the issue of payment of interest for the post-award period.

7. The counsel for the respondent contended that since the award does not grant any interest, the only conclusion possible is that the Tribunal had refused to grant interest. It is submitted that the refusal to grant interest for the post-award period has not been challenged by the petitioner before any Forum and the issue is raised only at the stage of enforcement of the award. It is submitted that the question whether interest should be granted is to be decided primarily by the Arbitrators and the executing court or the enforcing court has no role. The counsel contends that after having suffered a decision that Part I will not apply, the petitioner cannot now take up the contention that Section 31(7)(b) of Part I will apply as *lex fori* for the award of interest. **Bharat Aluminium**

Company v. Kaiser Aluminium Technical Services Inc.

[(2016) 4 SCC 126] ('**BALCO (2)**' for short) is relied on to submit that the application of Part I is excluded. The counsel submits that the claim for interest cannot be justified even on facts, since between 2010 and 2024, the matter was in Court mostly at the instance of the petitioners themselves. It is submitted that even though an appeal was filed against the earlier judgment of the Single Judge, the same was not brought up for almost 1½ years. The judgment of the learned Single Judge was set aside stating that the party ought to have challenged the award before the foreign court. It is contended that the same yardstick should be applied with regard to the claim for interest, which the petitioner ought to have taken up either before the Arbitration Tribunal or before the court of the seat of arbitration. Another contention raised is that the claim for interest is part of substantive law and not procedural, and necessarily the law applicable can only be the law at the seat of arbitration. The counsel relied on the decision in **LMJ(supra)**, wherein the Hon'ble Supreme Court held that even if the Arbitral Tribunal had committed any error, the same would at best be a matter for

correction by way of appeal to be resorted to on grounds as may be permissible under the law which applies at the seat of arbitration, which was the English law in the said case. The counsel also referred to the relevant Rules of the AFI, which say that the arbitrator may add interest at the legal rate, to the amount awarded, to commence from the date it was granted, provided that the award has not been satisfied within 30 days of notice to the parties. It is hence contended that when the Rules of AFI itself provide for how interest is to be awarded, the absence of an award of interest can only be treated as a refusal to award interest and the same ought to have been challenged before the appropriate forum. Counsel referred to the decision rendered in **Fuerst Day Lawson Ltd. vs Jindal Exports Ltd. [(2011) 8 SCC 333]** at paragraph 89 to submit that the Act is a self-contained code. The counsel referred to the decision of the Delhi High Court in **Jindal Exports Ltd. v. Fuerst Day Lawson Limited** reported in **Manu/DE/3204/2009**, wherein the court had held that the court does not have power to award interest since it is only enforcing a foreign award and it cannot go behind the award. In a subsequent decision in **Progetto Grano SPA v.**

Shri Lal Mahal Limited [Ex.Petition No.52 of 2012], the Delhi High Court after referring to the decision of the Andhra Pradesh High Court in **International Investor** (supra) and **BALCO (supra)** held that Section 31(7) of the Act which falls in Part I of the Act cannot be made applicable to Foreign awards, since Part II of the Act has no provision relating to interest to be awarded for the period from the date of award till date of payment, by drawing an analogy from Section 31(7) of the Act. The Court also held that since the Act is a self-contained code only such acts as are mentioned in the Act are permissible to be done.

CONSIDERATION:

8. The award which is sought to be executed, admittedly does not say anything about payment of interest. The Execution Petition has been filed claiming interest at the rate of 18% from the date of the award i.e; 11.05.2010 till realisation. The claim for interest is made primarily based on the judgment of a learned Single Judge of the Andhra Pradesh High Court in **International Investor (supra)**. The said judgment was pronounced on 09.09.2002 before the decision of the Hon'ble Supreme Court in **BALCO (supra)**. The learned Judge in the said judgment had

relied on the judgment in **Renusagar Power Co. Ltd. V. General Electric Co. [AIR 1999 (SC) 1258]**, wherein the Hon'ble Supreme Court had held that the interest for the period before the date of reference to arbitration, the period during which the arbitration proceedings were pending before the Arbitrators and the period from the date of the award till the date of institution of proceedings in a court for enforcement of the award would be governed by the law governing the arbitral proceedings and are matters which have to be dealt with by the Arbitrators, in the award itself, and the award in relation to those matters cannot be questioned at the stage of its enforcement. The Hon'ble Supreme Court further held that, at the stage of enforcement, the court is only required to deal with the interest for the period from the institution of the proceedings in a court till the passing of the decree and the period after the decree till payment. After referring to the said judgment, the learned Single Judge referred to Section 31(7)(b) of the Act and held that the *lex fori* would be Section 31(7)(b) in cases where interest is not referred to in the award. Section 31(7)(b) says that the sum directed to be paid by an arbitral award shall unless the award otherwise directs, carry

interest at the rate of 18% per annum from the date of the award to the date of payment. The claim for 18% interest is thus based on Section 31(7)(b).

9. The question whether Part I of the Act would apply in case of foreign awards is no longer *res integra*. In **BALCO (supra)**, the Hon'ble Supreme Court has held that Part I of the Act applies only to the arbitrations that take place within the territory of India. The Constitution Bench has in the process overruled the Three Judge Bench decision in **Bhatia International (supra)**. Even though it was held in **BALCO (supra)** that the law declared by it would only operate prospectively, by the subsequent judgment in **BALCO 2 (supra)**, the above conclusion has undergone a change, as it was held that once it is found that the law governing the arbitration agreement is English Law, Part I of the Act stands impliedly excluded. In this case, admittedly, the arbitration took place outside India following the law of the seat of arbitration and the Arbitration Rules of the AFI. In view of the categorical pronouncement of the Hon'ble Supreme Court in **BALCO and BALCO 2 (supra)** and several other decisions, it is no longer open to contend that any provision

contained in Part I of the Act would still be applicable. Section 31(7)(b) relied on comes in Part I of the Act and the main section 31 deals with the "Form and Contents of an Arbitral Award", which necessarily means the form and content of a domestic arbitral award. The provision does not and cannot deal with the form and content of a foreign award. In **Jindal Exports (supra)**, the High Court of Delhi held that while executing/enforcing a foreign award, the Court does not have the power to go behind the award and order payment of interest. The common judgment of the Delhi High Court had been challenged before the Hon'ble Supreme Court in several Special Leave Petitions and in the judgment of the Hon'ble Supreme Court in **Fuerst Day Lawson Ltd. (supra)**, it was held that the Arbitration Act is a self-contained code and exhaustive and only such Acts as are mentioned in the Act are permissible to be done and Acts or things not mentioned therein are not permissible to be done. The above observation is also relevant when it comes to the question of applicability of Section 31(7)(b).

10. In **Pasi Wind Solutions (P) Ltd. v. GE Power Conversion (India) (P) Ltd. [(2021) 7 SCC 1]**, the Hon'ble

Supreme Court reiterated the legal position that Part I and Part II of the Act are mutually exclusive. The Court held that Part I which deals with arbitrations where the seat is in India, is a complete code dealing with the appointment of arbitrators, commencement of arbitration, making of an award, and challenges to the aforesaid award as well as execution of such awards, and that, Part II on the other hand, is not concerned with the arbitral proceedings at all. The Court held that Part II is concerned only with the enforcement of a foreign award, as defined, in India and that it is impossible to accede to any argument that would breach the wall between Parts I and II. The Hon'ble Supreme Court relied on the judgment of the Constitution Bench in **BALCO (supra)**, wherein it was held that Part I and Part II are exclusive of each other as is evident also from the definitions section in Part I and Part II. It was specifically held that the definitions contained in Sections 2(1) (a) to (h) are limited to Part I. The Constitution Bench had held that going by the intention of the Parliament and the territoriality principle of the Arbitration Act, 1996, Part I cannot be made applicable to a foreign seated arbitration, even if the agreement purports to provide that the arbitration proceedings will be

governed by the Arbitration Act, 1996. In paragraph 124 of the judgment, the Constitution Bench held that, having accepted the principle of territoriality, it is evident that Parliament intended to segregate Part I and Part II and that none of the provisions contained in Part I can be made applicable to foreign awards, as defined under Sections 44 and 53, i.e., the New York Convention and the Geneva awards.

11. The law being as declared above, there can be no intermingling of the provisions, and Section 31(7)(b) cannot be indirectly introduced to a proceeding under Part II of the Act, for enforcement of a foreign award, under the guise that it is the *lex fori* when it comes to the award of interest. Such an interpretative process is not possible in the circumstances. It has to be remembered that it is not as if the *lex arbitrai* did not contain provisions regarding payment of interest. The Arbitration Rules of the AFI very clearly say that Arbitrators may add interest at the legal rate to an award to commence from the day it was granted, provided that the award had not been satisfied within 30 days of notice to the parties. Thus, it can be seen that there is a provision for the award of interest after 30 days of notice of the award to

the parties. If the Arbitrators did not award interest despite such a provision being available under the Rules, it was for the petitioner to have approached the appropriate forum for correction of the award. It is settled law that the executing court cannot review the award or add anything to the award which is sought to be executed when it is a foreign award to which Part II applies. Even otherwise, the executing court cannot go behind the decree sought to be executed. The foreign award is a deemed decree and no provision for payment of interest can be read into the award/decreed. [See **Coal Linker v. Coal India Ltd. (2009) 9 SCC 491**]. Section 31(7) insofar as it prescribes the rate of interest and the right for interest, is a substantive provision applicable to domestic awards. The provisions contained in Part I cannot replace the *lex arbitrai* by a process of interpretation as *lex fori*, and the argument can only be seen as a misplaced ingenuity. In view of subsequent developments in law, the judgment of the learned Single Judge of the Andhra Pradesh High Court, in **International Investors (supra)**, is no longer good law. A similar view has been taken by a learned Single Judge of this Court in **Peniel Cashew Company v. M/s Ahcom Sarl [O.P.**

(C)No.23 of 2019] and I am in respectful agreement with the reasoning stated therein in paragraphs 25 to 27 of the judgment. Even though the above judgment was challenged before the Hon'ble Supreme Court, the same was compromised between the parties and the Hon'ble Supreme Court did not have the occasion to go into the merits of the contentions.

12. An argument was advanced that **Renusagar** (supra) still has a pride of place as has been held in **Vijay Karia & Ors. v. Prysmian Cavi E Sistemi SRL & Ors. [(2020) 11 SCC 1]**. The above judgment was regarding the grounds on which enforcement of a foreign award can be refused under Section 48 and does not deal with the grant of interest. The reference to the judgment in **Renusagar** (supra) in the said judgment also was not regarding the award of interest. **Renusagar** (supra) is a judgment rendered prior to the coming into force of the 1996 Act and what has to be considered by the Court is the provisions of the 1996 Act, wherein there is a clear exclusion of applicability of Part I of the Act to enforcement of foreign awards.

13. In view of the conclusions stated above, and the fact that the entire amount awarded has been paid as directed by this

Court earlier, no further orders are required in the execution petition and the petition is closed making the interim orders regarding payment of the award amount final. There will be no orders as to costs.

Sd/-

**T.R. RAVI
JUDGE**

dsn/pn

APPENDIX OF EP(ICA) 1/2018

PETITIONER ANNEXURES

- ANNEXURE A1 ORIGINAL FOREIGN ARBITRATION AWARD #2540 DATED 11/05/2010 ISSUED BY ASSOCIATION OF FOOD INDUSTRIES INC., USA.
- ANNEXURE A2 CERTIFIED COPY OF ARBITRATION AGREEMENT DATED 25/06/2009.
- ANNEXURE A3 ATTESTED TRUE COPY OF CERTIFICATE DATED 04/12/2017 ISSUED BY ASSOCIATION OF FOOD INDUSTRIES INC., USA.

RESPONDENT ANNEXURES

- ANNEXURE 1 TRUE COPY OF CONTRACT NO.ATI/175/09-10 DATED 25/06/2009.
- ANNEXURE 2 TRUE COPY OF INVOICE NO. JCCF023/09-10 DATED 03/07/2009.
- ANNEXURE 3 TRUE COPY OF THE BILL OF LADING DATED 03/07/2009.
- ANNEXURE 4 TRUE COPY OF THE REPORT DATED 09/09/2009 ISSUED BY M/S. FOREIGN TRADE SERVICES FTS A PRIVATE AGENCY.
- ANNEXURE 5 TRUE COPY OF THE DEBIT NOTE DATED 10/06/2009 RAISING TOTAL CLAIM OF USD 12366.83 ON VARIOUS COUNTS.
- ANNEXURE 6 TRUE COPY OF THE SURVEY REPORT DATED 02/07/2009 BY M/S. GEO CHEM.
- ANNEXURE 7 TRUE COPY OF THE NOTICE DATED 16/12/2009 IN THE LETTER HEAD OF THE ASSOCIATION OF FOOD INDUSTRIES, INC.3301 ROUTE 66, SUITE 205, BUILDING C. NEPTUNE, NJ 07753.
- ANNEXURE 8 TRUE COPY OF NOTICE OF ARBITRATION FROM THE AFI DATED 07/01/2010.
- ANNEXURE 9 TRUE COPY OF CONTRACT COPY ATI/175/09-10 SENT ALONG WITH ANNEXURE 8 NOTICE OF ARBITRATION DISCLOSED PRIMA FACIE TEMPERING AND MATERIAL ALTERATION.
- ANNEXURE 10 TRUE COPY OF REPLY FOR ANNEXURE 8 SENT BY THE

AWARD DEBTOR TO THE AFI ON 09/05/2010.

- ANNEXURE 11 TRUE COPY OF COMMUNICATION DATED 24/03/2010 SENT BY AFI TO THE AWARD DEBTOR.
- ANNEXURE 12 TRUE COPY OF REPLY DATED 12/04/2010 SUBMITTED BY AWARD DEBTOR.
- EXHIBIT B1 CERTIFIED COPY OF THE CONTRACT DATED 25/06/2009.
- EXHIBIT B2 CERTIFIED COPY OF THE INVOICE NO.JCCF023-09-10 DATED 03/07/2009.
- EXHIBIT B3 CERTIFIED COPY OF THE BILL OF LADING ECLV 1039000-10291/3.7.2009.
- EXHIBIT B4 CERTIFIED COPY OF THE REPORT DATED 09/09/2009.
- EXHIBIT B5 CERTIFIED COPY OF THE DEBIT NOTE.
- EXHIBIT B6 CERTIFIED COPY OF THE SURVEY REPORT 02/07/2009 BY M/S. GEO-CHEM.
- EXHIBIT B7 CERTIFIED COPY OF THE NOTICE DATED 16/12/2009 IN THE LETTER HEAD OF THE ASSOCIATION OF FOOD INDUSTRIES, INC.3301 ROUTE 66, SUITE 205, BUILDING C., NEPTUNE, NJ 07753.
- EXHIBIT B8 CERTIFIED COPY OF THE NOTICE OF ARBITRATION FROM THE AFI DATED 07/01/2010.
- EXHIBIT B9 CERTIFIED COPY OF THE CONTRACT COPY ATI/175/09-10.
- EXHIBIT B10 CERTIFIED COPY OF THE REPLY DATED 09/02/2010.
- EXHIBIT B11 CERTIFIED COPY OF THE COMMUNICATION DATED 24/03/2010.
- EXHIBIT B12 CERTIFIED COPY OF THE REPLY DATED 13/04/2010.
- ANNEXURE A4: TRUE COPY OF PAGE 52 OF THE DIRECTORY OF INDIAN CASHEW EXPORTERS 2017-18
- ANNEXURE R1(A) : COPY OF ORDER IN SLP No.22006 OF 2014 OF THE HON'BLE SUPREME COURT DT.4.1.2016.