IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
COMMERCIAL ARBITRATION PETITION (L) NO. 29646 OF 2024

Ningbo Aux Imp and Exp Co Ltd ...Petitioner

Versus

Amstrad Consumer India Pvt Ltd & Anr ...Respondents

WITH
INTERIM APPLICATION NO. 2099 OF 2025
WITH
INTERIM APPLICATION NO. 2097 OF 2025
IN
COMMERCIAL ARBITRATION PETITION (L) NO. 29646 OF 2024

Ms. Kshama Loya, *a/w Sanskriti Sharma, Oindrila Mukherjee, i/b Link Legal, for the Petitioner.*

Mr. Karl Tamboli, *a/w Gajendra Maheshwari, Siddharth Punj, Eshika Chandan & Deval Yadav, i/b Lodha & Lodha Associates, for Respondent Nos.1 & 2.*

CORAM : SOMASEKHAR SUNDARESAN, J.
DATE : JULY 4, 2025

Oral Judgement:

Context and Factual Background:

1. Heard Learned Counsel for the parties at significant length. Interim Application No.2099 of 2025 and Interim Application No.2097 of 2025 essentially seek deletion of Respondent No.2 from the array of

parties in Commercial Arbitration Petition (L) No.29646 of 2024, and vacation of an order dated March 12, 2025, directing disclosure of assets.

2. The core ground on which the prayers have been made in these interim applications is that the award has been passed in proceedings arising out of an arbitration clause contained in an agreement dated October 23, 2020. It is contended that Respondent No.2 was never a party to either the arbitration agreement or the arbitral proceedings. Therefore, it is contended that the arbitral award sought to be enforced under Part II of the Act cannot be said to be an award made between the Petitioner and Respondent No.2.

3. Learned Counsel for the original Petitioner would submit that these applications are not maintainable. The crux of the contention is that although the Court passed the order directing disclosures on March 12, 2025 on an *ex parte* basis, at the next opportunity when advocates for the Respondents appeared in Court on April 3, 2025, they did not highlight this element. Learned Counsel would cite a passage from ***Budhia Swain***[1] to submit that a judgment cannot be opened or vacated on a ground which could have been pleaded in the original action. A

[1] *Sri Budhia Swain And Ors v. Gopinath Deb And Ors May 7, 1999*

motion to vacate, Learned Counsel would submit, cannot be entertained, when the proper remedy is by some other proceedings such as by an appeal. Therefore, the contention is, the right to vacate the order of disclosure directed against the Respondent No.2 has been lost by waiver and estoppel by Respondent No.2 having been represented on April 3, 2025, and not having raised this issue on that date.

Analysis and Findings:

4. Having heard Learned Counsel for the parties, and upon a careful consideration of the sequence of events in the matter and the judgment sought to be relied upon, it is clear that by the order dated March 12, 2025, this Court had indeed directed a disclosure as prayed for in the Petition on an *ex parte* basis in ignorance of the fact that Respondent No.2 had not been a party to the arbitration proceedings. The prayers granted were those sought in prayer clauses (b) and (c). It was explicitly stated in the said order that the Respondents would be at liberty to seek variation, modification or vacation of the same on the next date. On the next date (April 3, 2025), both Respondents were represented by the same advocate, who submitted that he should be given liberty to take out appropriate proceedings to oppose the enforcement of the award. Such a statement was taken on record but the Respondents were

informed that an affidavit of disclosure as directed on March 12, 2025, must be made before the next date.

5. It is a recall of these two orders that form subject matter of the Interim Applications. When a Court directs an action, particularly on an ad interim or interim basis, the basic premise is that such action must be in aid of the final relief that can be granted in the proceedings. Therefore, the relevant extracts from the provisions of Section 46 and Section 48 of the Act, which would govern the enforcement of a foreign award, must be noticed and are extracted as below:-

> ***46. When foreign award binding.***— ***Any foreign award*** *which would be enforceable under this Chapter* ***shall be treated as binding for all purposes on the persons as between whom it was made****, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in India and any references in this Chapter to enforcing a foreign award shall be construed as including references to relying on an award.*
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> ***48. Conditions for enforcement of foreign awards****.— (1)* ***Enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the court proof that—***
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> *(a)* ***the parties to the agreement*** *referred to in section 44* ***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 arbitral proceedings or was otherwise unable to present his case; or*
>
> *(c) to (e)* *****
>
> *(2) and (3)* *****
>
> ***[Emphasis Supplied]***

6. A plain reading of Section 46 of the Act, extracted above, would show that a foreign award would be treated as binding for all purposes "*on the* ***persons as between whom*** *it was made*". The reference in Section 46 necessarily means that for the award to be binding on a person, such person ought to be a person involved in the arbitration proceedings.

7. Likewise, under Section 48(1)(b) of the Act, the enforcement of a foreign award may be refused at the request of a party against whom it is invoked only if that party furnishes to the Court proof that the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case. In the instant case, Respondent No. 2 was not even a party to the arbitral proceedings, much less a party

to the proceedings who was entitled to notice of the appointment of the arbitrator or was unable to present his case.

8. Therefore, on the last occasion, notice was issued on the Interim Applications. Thereafter, the original Petitioner has filed an affidavit, which essentially brings on record the fact that the Petitioner had initially tried to make Respondent No.2 a party to the proceedings and the case manager of the arbitral tribunal had refused to permit Respondent No.2 being made a party. Therefore, what is evident is that Respondent No.2 is not a person against whom the arbitral award is made. However, enforcement is sought to be made against Respondent No.2 as well. This position in fact ought to have been made clear up front by the Petitioner in its pleadings in the Petition and more so when the matter was first considered on an *ex parte* basis.

9. It is true that Respondent No. 2 has been sought to be roped in, in its capacity as a guarantor for the transactions between the Petitioner and Respondent No.1. Towards this end, reliance is placed by Learned Counsel for the Petitioner on the "guarantee certificate" executed by Respondent No.2 (Exhibit 'C' to the Petition at Page 103). The guarantee certificate states that Respondent No.2 is a shareholder of Respondent No.1 and that Respondent No.2 formally guarantees that

Respondent No.2 would be responsible for all the payments to be made by Respondent No.1 to the Petitioner in respect of future orders up to a level of US $ 10 million if Respondent No.1 were to make a payment default. The guarantee certificate does not have an arbitration clause. It also does not have any incorporation of an arbitration agreement by reference to the arbitration clause contained in the agreement between the Petitioner and Respondent No. 1.

10. In these circumstances, the failed attempt to make Respondent No.2 a party to the arbitral proceedings, as is seen from the Petitioner's affidavit, gains significance. Admittedly, an attempt had been made by the Petitioner to make Respondent No. 2 a party to the arbitration proceedings and that was rejected by the case manager of the arbitral tribunal. Learned Counsel for the Petitioner would strenuously urge that rejection by a case manager of the attempt to make Respondent No.2 a party should not be treated as a rejection by the arbitral tribunal. I am unable to agree. The case manager is an officer of the arbitral tribunal. If the case manager wrongly disallowed Respondent No.2 to be made a respondent in the arbitration proceedings, the Petitioner ought to have taken recourse to steps available in those proceedings to overrule the case manager. If that had not been done, or if, despite being done, had

not been accepted, the consequence would be that the arbitral award sought to be enforced is not an award made between the Petitioner and Respondent No. 2.

11. It is evident that Respondent No.2 is not a party against whom the award sought to be enforced has been made. In these circumstances, the position of Respondent No.2 stands even higher than the position available under Section 48(1)(b) – not only is it a case where Respondent No.2 cannot be said to be a party who was unable to participate in the proceedings, Respondent No.2 is a person who was sought to be made a party and the very arbitral tribunal whose arbitral award is sought to be enforced, had not permitted making Respondent No.2 a party.

12. In these circumstances, no fruitful purpose would be served in keeping Respondent No.2 as a party. If the foundational jurisdictional fact of the arbitral award being an award made as between the Petitioner and Respondent No. 2 is absent, the order dated March 12, 2025 would be one that was passed without jurisdiction.

13. In this context, the pleadings in the Petition containing the description of facts in respect of Respondent No.2 are noteworthy.

Paragraph 8 in the Petition *inter alia* describes Respondent No.2 as a shareholder of Respondent No.1. It is explicitly stated that Respondent No.2 has been made a party to the present Petition solely for the prayers sought under paragraph 36 of the Petition. There is no specific role played by Respondent No. 2 that was adjudicated in the arbitral proceedings.

14. The prayer sought in Paragraph 36 of the Petition not only seeks disclosures by Respondent No. 2 but also seeks the appointment of a Court Receiver to attach the assets and properties of both Respondents. Therefore, the disclosure sought in Paragraph 36(b) from both Respondents is in aid of the prayer in Paragraph 36(d), which seeks appointment of the Court Receiver to the extent of US $ 1.45 million with all powers under Order 40 Rule 1 of Code of Civil Procedure, 1908 ("***CPC***") in respect of properties of both Respondents. If Respondent No.2 is not a party against whom the arbitral award has been made, it would follow that there would be no possibility to enforce the award against Respondent No.2. Consequently, forcing Respondent No.2 to make a disclosure without such disclosures being in aid of a maintainable prayer , would be inappropriate. Therefore, the request by

Learned Counsel for the Petitioner to not vacate the direction to disclose at the least, does not appeal to me.

15. As regards the ruling in ***Budhia Swain*** sought to be relied upon by the Petitioner, the following extracts are noteworthy:

> *"What is a power to recall? Inherent power to recall its own order vesting in tribunals or courts was noticed in Indian Bank v. M/s Satyam Fibres India Pvt. Ltd, [1996] 5 SCC 550. Vide para 23, this Court has held that the* ***courts have inherent power to recall and set aside an order*** *(i) obtained by fraud practised upon the Court, (ii) when the Court is misled by a party, or (iii)* ***when the Court itself commits a mistake which prejudices a party****. In A.R. Antulay v. R.S. Nayak & Anr. AIR (1988) SC 1531 (vide para 130),* ***this Court has noticed motions to set aside judgments being permitted where*** *(i) a judgment was rendered in ignorance of the fact that a necessary party had not been served at all and was shown as served or in ignorance of the fact that a necessary party had died and the estate was not represented, (ii) a judgment was obtained by fraud, (iii) a party has had no notice and a decree was made against him and such party approaches the Court for setting aside the decision ex debito justitiae on proof of the fact that there was no services.*
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> *In Corpus Juris Secundum (Vol. XIX) under the Chapter "Judgment-Opening and Vacating" (paras.265 to 284 at pages 487-510) the law on the subject has been stated.* ***The grounds on which the courts may open or vacate their judgments are generally matters which render the judgment void or which are specified in statutes authorising such actions. Invalidity of the judgment of such nature as to render it void is a valid ground for vacating it at least if the invalidity is apparent on the face of the record****. Fraud or collusion in obtaining a judgment is a sufficient ground for opening or vacating it. A judgment secured in*

> *violation of an agreement not to enter judgment may be vacated on that ground.* ***However, in general, a judgment will not be opened or vacated on grounds which could have been pleaded in the original action. A motion to vacate will not be entered when the proper remedy is by some other proceedings, such as by appeal. The right to vacation of a judgment may be lost by waiver or estoppel. Where a party injured acquiesces in the rendition of the judgment or submits to it, waiver or estoppel results.***
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> *[Emphasis Supplied]*

16. Learned Counsel for the Petitioner seeks to rely on the last portion emphasised above in ***Budhia Swain***, to submit that Respondent No. 2 has lost the right to have the order of disclosure dated March 12, 2025 vacated by acquiescing to the order, not having raised this issue on April 3, 2025. The passage cited by Learned Counsel for the Petitioner is an extract read in isolation from the larger context in which the passage is contained. In fact, the absence of jurisdiction or the passing of a judgment in ignorance of a necessary fact are examples of the need to recall as articulated in the very same judgement. Since Section 46 and Section 48 of the Act delineate the jurisdiction and reach of this Court in respect of a foreign award, it would follow that the direction to disclose assets or a direction to attach them would be void if made against a person who is not a party against whom the award is made. The *ex parte ad interim* order of March 12, 2025 was passed in ignorance of the fact

that Respondent No. 2 was not a party to the arbitration proceedings and that despite efforts to make him a party, he was not made a party by the very institution conducting the arbitration proceedings.

17. This Court is administering the provisions of Part II which sets out the jurisdiction of this Court. If the Court does not have jurisdiction by the reading of Section 46 and Section 48 (analysed above) to enforce the arbitral award against Respondent No. 2 since he is not a person against whom the award is made, it would follow that the power to recall ought to be exercised.

18. In these circumstances, in my opinion, it would be inappropriate to continue to keep Respondent No.2 as a party to these proceedings. I have no hesitation in allowing both the Interim Applications. The order directing disclosures by Respondent No.2 (who was rejected as a proposed party in the arbitral proceedings) stands vacated. The Petitioner shall carry out the deletion of Respondent No.2 within four weeks of the upload of this order on the website of this Court.

19. I note that Respondent No. 1 has made the disclosures as directed. Learned Counsel for the Petitioner seeks a short date to consider further reliefs against Respondent No.1 in terms of securing

the amount owed under the arbitral award. Stand over for further consideration of such additional reliefs sought against Respondent No.1 to ***July 18, 2025***.

20. All actions required to be taken pursuant to this order shall be taken upon receipt of a downloaded copy as available on this Court's website.

[SOMASEKHAR SUNDARESAN, J.]