PETITIONER:
TRANSOCEAN SHIPPING AGENCY P.LTD.

Vs.

RESPONDENT:
BLACK SEA SHIPPING & ORS.

DATE OF JUDGMENT: 14/01/1998

BENCH:
SUJATA V. MANOHAR, D.P. WADHWA

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T

Mrs. Sujata V. Manohar, J.

Leave granted.

Application for impleadment allowed.

This is an appeal from a judgment and decree of the High Court dated 9th of October, 1996 in Arbitration Petition No.22 of 1996 whereby the High Court has allowed the petition and passed a decree, under the provisions of the Foreign Awards (Recognition and Enforcement) Act, 1961, in terms of the foreign award dated 3rd of October, 1995, given by the second respondent-arbitrator at Odessa, Ukraine.

In 1983 the 1st respondent-Black Sea Shipping Co. was a division of M/s Sovefracht a wholly owned company of the then Government of the USSR. Under an agreement date 26.8.83 the 1st respondent appointed, inter alia, the appellants-M/s Transocean Shipping Agency (P) Ltd. as their shipping agents for the 1st respondent's business of shipping and carriage of goods to and from various Indian ports. The engagement of the appellants by the 1st respondent was done under various agreements, the last of which was dated 26.8.1983. Under Clause 5.30 of the agreement of 26.8.1983 all payments between the owners i.e. the 1st respondent and the agents were to be effected in accordance with the terms of a payment agreement existing between the USSR and India otherwise than in free convertible currency. All remittances from the appellants to the 1st respondent were, therefore, to be made in accordance with rupee-rouble payment agreement between the USSR and India.

Clause 7 of the agreement of 26.8.1983 contains an arbitration clause requiring the disputes, if not settled amicable, to be referred to the Maritime Arbitration Commission of the USSR with the Chamber of Commerce and Industry in Moscow for arbitration in accordance with the Rules and Procedure of this Commission.

In or around December, 1991, dissolution of the USSR took place, Several Socialist Republic which had formed a part of the USSR became independent Sovereign State. The State of Ukraine also thus became an independent Sovereign State. The 1st respondent company became a company owned by

the State of Ukraine. In January, 1992 the Reserve Bank of India issued a directive the at henceforth all trade and non-trade transactions with the State of Ukraine and the other Soviet countries would be effected only in freely convertible currencies. All disbursements in respect of Ukrainian vessels and collection of rates will be in convertible rupees in dollar terms only. At this time a sum of approximately Rs. 28.11 crores was lying with the appellants to the credit of the 1st respondent in the form on non-convertible rupees. Because of the directive issued by the Reserve Bank of India, this amount could not be used by the appellants to meet disbursements in respect of the vessels of the 1st respondent. The 1st respondent, therefore, decided to utilise this non-convertible rupee amount for purchasing different items and commodities like tea, containers, garments etc, in India after obtaining the requisite permission from the Reserve Bank of India. In this manner, a sum of Rs. 21.7 crores was utilised by the 1st respondent and was disbursed by the appellants on the instructions of the 1st respondent after obtaining the requisite Reserve Bank of India's permission.

On the 18th of May, 1992 a fresh agency agreement was executed between the appellants and the 1st respondent. The 1st respondent appointed the appellants as their agents in respect of their ships coming to and going from, Indian ports on the terms and conditions stipulated therein. Under Clause 5.2 of the agreement dealing with freight. It was provided that the freight amounts accepted by the shipper or receivers as well as other amounts relevant to freight were to be remitted to the owners in accordance with the attached Financial Addendum to the agreement. Clause 5.21 required all payment to be effected in free convertible currency, unless otherwise stipulated. The first addendum relating to financial obligations provided in Clause 5 that any balance due to the owners should be paid by the agents in accordance with Clause 5.2 on owner's instructions. Clause 7 of this agreement contained an arbitration clause. It provided as follows :-

> "Clause 7.1: All disputes between owners and Agents which may arise in connection with the fulfilment of their Agreement are to be settled amicable, but if impossible then to be referred to Arbitration of country where the owners are registered."

In January, 1995 the appellants had with them a sum of Rs. 6,41,66,410-60 as non-convertible balance amount of freight payable by them to the 1st respondent. The 1st respondent directed the appellants to pay this amount to M/s Akshay Exports, Calcutta in connection with a purchase contract for coffee entered into between the 1st respondent and M/s Akshay Exports. Permission of the Reserve Bank of India was sought for this payment. As the permission was declined, the appellants, could not pay this amount to M/s Akshay Export. Thereafter disputed arose between the appellants and the 1st respondent. The 1st respondent claimed substantial amounts from the appellants pertaining to various payments made by them in India as shipping agents of the appellants.

The 1st respondent invoked the arbitration clause in the agreement of 18th of May. 1992 in respect of their claim for Rs. 6,41,66,410.60. On 11th August, 1995 by Government Order issued by the Ministry of Transport of Ukraine, Department of Merchant Marine and River Transport, the

second respondent was appointed as sole arbitrator in the matter of disputes between the State owned 1st respondent and their agents in India- the appellants, as well as another agent in Madras, to settle the issues by arbitration. The date of arbitration was fixed in respect of the appellants as 3rd of October, 1995 at Odessa. The second respondent thereafter sent a letter to the appellants dated 28th August, 1995 informing them of her appointment as sole arbitrator and directing the 1st respondent to file the statement of claim on or before 11th of September, 1995 and directing the appellants to file their objections/reply on or before 26th of September, 1995. She also notified the parties that meeting would be held by her in her office at Odessa on 3rd of October, 1995. The appellants wrote a letter objecting to the appointment of the arbitrator and raised various contentions therein. They, however, did not file a any objections or reply to the statement of claim filed by the first respondent claiming a sum of Rs. 6,41,66,410.60; nor did they appear before the arbitrator. As a result the arbitrator made and published her award dated 3rd of October, 1995 awarding the sum of Rs. 6,41,66,410/- to the 1st respondent together with interest and costs. The 1st respondent has thereafter filed petition No. 22 of 1996 in the High Court for enforcement of the foreign award. Under the impugned judgment a decree has been passed in terms of the award under the Foreign Awards (Recognition and Enforcement) Act, 1961.

The appellants contend that the award in the present case is not a foreign award as defined in Section 2 of the Foreign Awards (Recognition and Enforcement) Act, 1961. The relevant portion of Section 2 of the Foreign Award (Recognition and Enforcement) Act, 1961 is as follows:-

> "2. In this Act, unless the context otherwise requires, "foreign award" means an award of differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960-
>
> (a).....
>
> (b) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made, may, by notification in the Official Gazette, declare to be territories to which the said Convention applies."

The Convention referred to in this section is the Convention on the Recognition and Enforcement of Foreign Awards made at New York on 10th of June, 1058 to which India is a signatory. The USSR, as it then was, acceded to the New York Convention on 24.8.1960. Under the relevant constitutional provision pertaining to the USSR, two of its republics Ukraine and Byelorussia had a right to enter into separate treaty arrangements. Accordingly, Ukraine acceded to the New York Convention on 10.10.1960.

The Foreign Awards (Recognition and Enforcement) Act, 1961 was brought on the statute book to give effect to the New York Convention. The Act expressly states that it is an Act to enable effect being given to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards done

at New York on the 10th day of June, 1958 to which India is a party and for purposes connected therewith. Under Section 2 of the said Act which has been reproduced earlier the Ministry of Foreign Trade issued a notification dated 7th of February, 1972 in exercise of powers conferred by Section 2 of the said Act. The notification states that the "the Central Government being satisfied that reciprocal provisions have been made, hereby declares Union of Soviet Socialist Republics to be a territory to which the convention on the recognition and enforcement of foreign arbitral awards set forth in the schedule to that Act applies." As a result awards made in the territories of the Union of Soviet Socialist Republics could be enforced in India under the Foreign Awards (Recognition and Enforcement) Act, 1061.

The appellants contend that on the break-up of the USSR in 1991-1992 it was necessary that a new notification under Section 2 should have been issued by India recognising Ukraine as a reciprocal territory. In its absence award made in Ukraine cannot be enforce in India under the Freing Awards (Recognition and Enforcement) Act, 1961. This contention has no merit. The notification of 7th of February, 1972 covers awards made in the territories of the then existing USSR which included Ukraine as a part of it. Although various republics which formed a part of the territories of the USSR may have separated, the territories continue to be covered by the notification of 7.2.1972. Prior to 1992 an award made in Ukraine was an award made in a reciprocating territory as notified and this position continues even after the political separation of various Soviet Socialist Republics. Ukraine continues to be a signatory to the New York Convention and the notification of 7.2.1972 continues to operate in the territories then forming part of the USSR, including the territory of Ukraine. Although the appellants has relied upon various agreements between India and the Russian Republic where India was recognised Russian Republic as a successor of the old State of USSR, this makes no difference to the recognition granted under the notification of 7.2.1972 to the entire territory of USSR as then in existence as a reciprocating territory for the purposes of Section 2 of the Foreign Awards (Recognition and Enforcement) Act, 1961. There is no implied curtailment of the notification of 7.2.1972 as now applying only to that territory which forms a part of the Russian Republic.

The respondents have drawn our attention to a decision of the Bombay High Court in M/s Francesco v. M/s Gorakhram (AIR 1960 Bom. Page 91), where in a converse situation the question arose whether Arbitration (Protocol and Convention) Act, 1937 had any force in India after 26th of January, 1950 when India was divided into two State - India and Pakistan. The Court held that India, before partition being a State signatory to the protocol on arbitration clauses set forth in the First Schedule to the Arbitration (Protocol and Convention) Act, 1937 and to the Convention on the Execution of Foreign Arbitral Awards set forth in the Second Schedule to that Act, the obligations undertaken thereunder continue to bind India after India was constituted a Dominion and they continue to bind India thereafter. In that case the Court had relied upon the Indian Independence (International Arrangements) Orders, 1947. This decision, therefore, does not directly apply to the present case. In view, however, of the notification of 7th of February, 1972 the contention of the appellants that the present award is not a foreign award as defined in Section 2 must be rejected. No new

notification is necessary in respect of Ukraine.

It is next contended by the appellants that the dispute between the parties is under the old arbitration agreement of 26th of August, 1983 and, therefore, arbitration could only be in terms of the arbitration clause 7.1 of that agreement which required that the dispute should be referred to the Maritime Arbitration Commission of the USSR with the Chamber of Commerce and Industry in Moscow. This contention has to be rejected because the old agreement has been superseded by the agreement of 18th of May, 1992 under which, as per clause 5.2 and the 1st Addendum, all claims relating to freight have to be decided under the new agreements. This would include a claim for freight under previous agreements also. The High Court has, therefore, rightly held that it is the arbitration clause in the agreement of 18th of May, 1992 which governs the parties.

The appellants have raised various disputes in relation to the arbitration. The appellants has contended that the arbitration has not been conducted in accordance with the law of Ukraine. They also contend that the Government order appointing the second respondent as the sole arbitrator is not a valid appointment of the arbitrator. They have also contended that the arbitrator being an official of the first respondent, is an interested arbitrator. The appellants, however, did not produce before the High Court any material including the law of Ukraine to establish that the award was invalid as per Ukrainian law or the procedure was incorrect.

Under Section 7 of the Foreign Awards (Recognition and Enforcement) Act, 1961 it is provided as follows :-

> "7. Conditions for enforcement of foreign award :
> (1) A foreign award may not be enforced under this Act :-
> (a) If the party against whom it is sought to enforce the award proves to the Court dealing with the case that :
> (i).....
> .....
> (ii).....
> .....
> (iii).....
> .....
> (iv) 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.
> ....."

It is for the party against whom a foreign award is sought to be enforced, to prove to the court dealing with the case that he composition of the arbitral authority or the arbitral procedure was not in accordance with the law of the country where the arbitration took place. The burden to prove in this regard is expressly placed on the challenger by the statute. This section is in conformity with Article V of the New York Convention which provides "(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, proves that....(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.....". It was, therefore, entirely for the appellants to prove before the High Court that the appointment of the second respondent or the procedure of arbitration was not in accordance with the law of Ukraine. The appellants, however, did not produce any relevant law of Ukraine in this connection apart from raising the bare contention.

Under Rule 801 of the Bombay High Court Rules, which forms a part of Chapter XLIII dealing with Rules under the Foreign Awards (Recognition and Enforcement) Act. 1961, it is provided as follows :-

"801. Enforcement of foreign award-
The party seeking to enforce a Foreign award shall produce with his petition :
(c) An affidavit or affidavits showing
(1).....
(2).....
(3)that it was made in conformity with the law governing the arbitration procedure and
(4)that it had become binding on the parties in the country in which it was made.
....."

The respondents did file an affidavit in this connection affirming that the award had been made in conformity with the law of Ukraine and that it was binding on the parties under the law of Ukraine. It was for the appellants who was challenging the validity of the award to have shown that appointment of the arbitrator or the arbitration procedure was not in accordance with the law of Ukraine. They failed to do so. The High Court, therefore, rightly rejected this contention.

The appellants have now sought permission to produce before us the arbitration law of Ukraine which according to t hem, is the prevailing law. This is rightly objected to by the respondents. The respondents also contend that what is sought to be produced is not he entire law on the subject. We do not propose to permit the appellants now to produce/prover the relevant law of Ukraine when they have failed to do so before the High Court, and their contention has been consequently rejected by the High Court. The practice of filing fresh documents or evidence for the first time before this Court when the High Court had rejected the claim in the absence of such material, must be deprecated. The appellants were in a position to produce the relevant material before the High Court. They filed and neglected to do so. They must take the consequence. The respondents have, in this connection, also pointed out that any objections to the competence of the arbitrator, or any defect in arbitration procedure could have been agitated by the appellants in Ukraine before the prescribed authorities. They have, however, not taken any steps in accordance with the law of Ukraine to challenge the arbitration or the award. Hence the award has now become final and binding. The respondents have filed an affidavit stating that the award has become final and binding as per Ukrainian law. The appellants has not controverted this by showing the relevant law. A mere assertion by the appellants that the award is defective or not in accordance with the law of Ukraine

cannot be treated as establishing this contention. On the contrary, the presumption would be in favour of the validity of the award.

The last objection which is taken by the appellants is to the second respondent being appointed as arbitrator on the ground that she was a high ranking officer of the first respondent. According to the appellants an award which is given by her cannot be enforced in India because it would be against public policy. There is, however, no violation of any public policy in the present case. The parties had agreed to be governed by the law of Ukraine as far as the arbitration proceedings were concerned. If the award given by the second respondent is valid under the law of Ukraine, then there is no violation of any public policy in enforcing it hers. Often parties appoint an officer of one of the parties to the arbitration agreement, as a sole arbitrator. Sometimes the agreement in terms so provides. This does not ipso facto make the arbitration or the award contrary to any public policy, especially if the officer had not personally handled disputed transactions and is impartial.

The High Court has, therefore, correctly passed a decree in terms of the award. The appeal is dismissed with costs.