REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

SPECIAL LEAVE PETITION (CIVIL) NO. 35092 OF 2012

ESCORTS LTD. **Petitioner(s)**

VERSUS

UNIVERSAL TRACTOR HOLDING LLC **Respondent(s)**

O R D E R

This special leave petition seeks to challenge the judgment and order dated 13th July, 2012 passed by the learned Single Judge of the Delhi High Court in Execution Petition No.372 of 2010.

2. The short facts leading to this petition are this wise: The respondent herein and Escorts Agri Machinery Inc., ("Escorts AMI") which was a subsidiary of the petitioner, were holding following percentage of shares in another company, by name, Beever Creek Holdings ("BCH"). The respondent held 49% of shares and Escorts AMI held 51%. There was an agreement between the two parties whereby the respondent sold its shareholding in BCH for a price

of Rs.1.2 Million Dollars which was to be paid in four installments. The Escorts AMI paid the first two installments but defaulted in the payment of the other two. This led to a suit being filed by the respondent in the Wake Country Superior Court in the State of North Carolina, USA. A consent order was passed therein on 19th June, 2009, wherein both the parties agreed to refer the matter to arbitration. The arbitration was followed by an award in favour of the respondent herein. The respondent sought the execution of that award by filing the aforesaid execution petition in India, since the Escorts AMI has subsequently merged with the petitioner herein. The execution was objected to by the petitioner, and those objections have been rejected by the impugned order. Therefore, this special leave petition has been preferred by Escorts Limited.

3. The main submission of Mr. Parag Tripathi, learned senior counsel appearing for the petitioner is that under the terms of agreement, it was necessary for the respondent to go for confirmation of the award in the concerned Court in United States. He relied upon paragraphs 2 and 8 of the

consent order dated 19th June, 2009. These two paragraphs read as under:

> "2. The case will be stayed from the date and time of entry of this Order until completion of arbitration between plaintiff and EAMI. Upon the issuance of a decision by the arbitrators, this Court may confirm and enter judgement upon such decision in accordance with the Federal Arbitration Act and may conduct such further proceedings as are necessary to resolve plaintiff's claims against Escorts Limited."
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> "8. The plaintiff agree that entry of this order resolves defendants motion to dismiss. The Court shall retain jurisdiction for the purposes of entering an order confirming the arbitration decision pursuant to the Federal Arbitration Act."

4. The submission of Mr. Tripathi is that unless a confirmation of the award by the foreign Court was obtained, the award could not be executed in India. He relied upon Section 9 of the Federal Arbitration Act of U.S. which reads as follows:

> "& 9. Award of arbitrators; confirmation; jurisdiction; procedure
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> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall

specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application maybe made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court."

5. Mr. Tripathi submitted that ultimately what one has to see is whether the consent award was a binding one as required under Section 48(1)(e) of the Arbitration and Conciliation Act, 1996 and that unless a confirmation of the award was obtained, the award could not be said to be binding and, therefore, not executable in India. Mr. Tripathi

referred to and relied upon paragraph 15 of the judgment of this Court in Oil and Natural Gas Commission Vs. Western Company of North America, (1987) 1 SCC 496, wherein this Court held that recognition and enforcement of the award will be refused if the award has not become binding on the parties.

6. Mr. Rautray, learned counsel appearing for the respondent, on the other hand, pointed out that the relevant Section of the Federal US Law is concerning the domestic awards and when it comes to foreign awards, there is a separate chapter under the US Law and in that behalf he referred to Section 202 of the said Act which reads as follows:

> **"202. Agreement or award falling under the Convention**
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> **An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that**

relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States."

7. He pointed out that the requirement of this double excequatur has been removed in view of the provisions of the New York Convention which has been now adopted under the Arbitration and Conciliation Act, 1996. He further pointed out that even in England, this has been accepted. He referred to and relied upon the judgment in the case of Russeel N.V. V. Oriental Commercial & Shipping Co. (U.K.) Ltd. and Others, reported in (1991) Vol. 2 Lloyd's Law Reports 625. He referred to and relied upon an American judgment in the case of Florasynth, Inc. V. Alfred Pickholz, 750 F. 2d 171, to the same effect.

8. The Oriental Commercial & Shipping Company's judgment (supra) refers to the commentary of Dr. Albert Jan van den Berg which noted the features emerging out of the New York Convention. It records that the burden of proving that the award is not

enforceable lies on the party which has raised the issue. It also points out that if any such additional procedure is required to be followed, this will be a proceeding of no consideration or any substance. It will be a procedural addition resulting into further delay into getting the fruits of the award of the party which has succeeded.

9. He also drew our attention to certain observations of this Court in paragraph 33 in Harendra H. Mehta an Ors. Vs. Mukesh H. Mehta and Ors., reported in (1995) 5 SCC 108. It was in a situation where a judgment had, in fact, been obtained before going for execution. However, the Court also observed that it was not material for the purpose of enforcement of a foreign award under the Foreign Awards Act that the award in any country other than India is made enforceable by a judgment.

10. We have noted the submissions of both the counsel appearing for the parties. It is also material to note that even as per the requirement of the US Law, a notice of three months is required to be given in case a party does not want the award to

be enforced. In the instant case, paragraph 7 of the consent order clearly recorded that the award given by the arbitrator shall be final and binding on the parties. If the petitioner wanted to dispute it, it was required of them to have issued necessary notice which they had not done. The submission of Mr. Tripathy, which was emphasised, was that the respondent ought to proceed for confirmation of the award under the US Law and then come to India for execution. In our considered view, the said submission is not tenable in view of the changed law and doing away of the rule of double excequatur. We, therefore, see no error in the order passed by the learned Single Judge of the High Court. The special leave petition is, therefore, dismissed.

.....J
(H.L. GOKHALE)

.....J
(DIPAK MISRA)

New Delhi;
March 13, 2013.