



Advocates
& Solicitors

Section 9 governing Interim Awards applies to all foreign arbitrations unless expressly excluded under the terms of an arbitration agreement.

Medima LLC v. Balasore Alloys Limited

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| Case No. | AP/267/2021 |
| Date | August 3 2021 |
| Court | High Court of Calcutta |
| Coram | Hon'ble Mrs. Justice Moushumi Bhattacharya |

1. FACTUAL MATRIX

- 1.1 The present petition was filed by Medima LLC (“**Applicant/Petitioner/Award Holder**”). The Applicant, a claimant in an international arbitration emerged as a successful party with the Award dated 29 March 2021 in its favour. The Award was passed at the International Chambers of Commerce (“**ICC**”), governed by British Law seated in London, UK. The Applicant/Award Holder applied to the Hon’ble Calcutta High Court to secure the dues payable as per the Award passed under Section 9 of the Arbitration and Conciliation Act, 1996 (“**Act**”) by Balasore Alloys Limited (“**Respondent/Award Debtor**”).
- 1.2 However, Respondent challenged the maintainability of the application filed by the Applicant given the proviso to Section 2(2) of the Act.

2. ISSUE

- 2.1 Whether Governing Law Clause contained in an arbitration agreement for referring the disputes to arbitration before the ICC, excludes the operation of Section 9 of the Act given the exception carved out in the proviso to Section 2(2) of the Act?
- 2.2 Whether the remedy under Section 9 becomes unavailable in a post-award scenario concerning a foreign award that is enforceable under Part II of the Act?

3. CONTENTIONS OF THE RESPONDENT

- 3.1 On the first issue of maintainability, Respondent argued that as the substantive law, the curial law and the law governing in the underlying agreement (“**Clause 23**”) was governed by English law, it impliedly reflected the intention of the parties to exclude the application of Section 9 of the Act, or even Indian law.

“23: Governing Law; Disputes: This Agreement shall be governed by and construed under the laws for the United Kingdom. Any claim, controversy or dispute arising out of or in connection with this Agreement or the performance hereof, after a thirty-day calendar period to enable the parties to resolve such dispute in good faith, shall be submitted to arbitration conducted in the English language in the United Kingdom following the Rules of Arbitration of the International Chamber of Commerce by 3 (Three) arbitrators appointed under the said Rules, to be conducted in the English language in London per British Law. Judgment on the award may be entered and enforced in any court having jurisdiction over the party against whom enforcement is sought.”

- 3.2 Respondent argued that Clause 23 fell within the exception carved out in the proviso to Section 2(2) of the Act. The proviso contemplates that Section 9 of the Act would apply to arbitrations that take place outside India subject to an agreement to the contrary. To substantiate, Respondent relied on the recommendations of the 246th Law Commission Report (“**Report**”) dated 5th August 2014 and the Arbitration and Conciliation (Amendment) Bill, 2015 (“**2015 Amendment**”). The argument was, that contrary to the recommendations by the Report to insert the word 'express' in the proviso to Section 2(2) of the Act, the 2015 Amendment excluded the word 'express'.

This manifested the true intent of the Legislature to include both express and implied exclusion of the applicability of Section 9 of the Act to foreign-seated arbitrations. Therefore, making the present Section 9 application not maintainable.

- 3.3 On the second issue of maintainability, Respondent contended that Section 9 of the Act did not entail a grant of interim reliefs post-award in a foreign placed arbitration. Respondent urged that relief under Section 9 could only be granted before, during or after the arbitration concerning domestic awards. It contended that the proviso to Section 2(2) of the Act could not override the express language and effect of Section 9 of the Act.
- 3.4 Respondent relied on judgements to substantiate that Part I of the Act would not apply where parties agree to do so expressly or impliedly.¹

4. CONTENTIONS OF THE PETITIONER

- 4.1 Respondent Petitioner traced the legislative history of Section 2(2) of the Act when the proviso was introduced by the 2015 Amendment.
- 4.2 It referred to *Bhatia International v. Bulk Trading S.A.*² (“**Bhatia**”) which considered the applicability of Part I of the Act in the context of International Commercial Arbitrations which took place outside India. Petitioner further relied on the recommendations of the Report which culminated in the introduction of the proviso to Section 2(2) of the Act and the word ‘express’.
- 4.3 The Statement of Object and Reasons to the Act were also relied upon by the Petitioner for showing the true intent of the legislature. It cited *PASL Wind Solutions Private Limited v. GE Power Conversion India Private Limited*,³ (“**PASL**”) which held that courts in India may pass interim orders in relation to assets located in India, in arbitration that takes place outside India. Other Judgments were also cited in support of the argument.⁴

5. JUDGEMNT OF THE HON’BLE CALCUTTA HIGH COURT

- 5.1 Hon’ble Calcutta High Court discussed the Report which recommended the introduction of the proviso to Section 2(2) of the Act. The Court observed that the Law Commission found several practical difficulties which could be faced by a successful party in a foreign-seated arbitration in the matter of obtaining temporary relief against the award-debtor where the assets of the award-debtor were located in India. It was also found by the Law Commission that the possible remedies of obtaining an interim order from a foreign court or filing a civil suit for enforcing that interim order in India were unworkable. The Court stated that the award-holder would be placed at

¹ *Raffles Design International India Private Limited v. Educomp Professional Education Limited*, 2016 SCC OnLine Del 5521; *see also Ashwani Minda v. U-Shin Ltd.*, 2020 SCC OnLine Del 1648.

² (2002) 4 SCC 105.

³ 2021 SCC OnLine SC 331.

⁴ *Aircon Beibars FZE v. Heligo Charters Pvt. Ltd.*, 2017 SCC OnLine Bom 631; *see also Big Charter Private Limited v. Ezen Aviation Pty. Ltd.* 2020 SCC OnLine Del 1713.

- a distinct disadvantage in the event the award-debtor dissipated its assets and rendered the award wholly infructuous.
- 5.2 The Hon'ble Calcutta High Court made multiple observations before adjudicating the matter. Foremost, the Hon'ble Court found a place in the 2015 Amendment and the proviso as it stands today. It stated that the words 'only' and 'express' as recommended by the Law Commission were dropped.
 - 5.3 While referring to the 246th Report, the court analysed a few judgements. In the case of *Bhatia*, the Hon'ble Supreme Court held that the absence of the word 'only' from 2(2) – as it then existed – would not debar application of Part I to international commercial arbitrations held outside India unless the parties agreed to exclude such applicability. The case of *Bhatia* was overruled in *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services, Inc.*⁵ (“**BALCO**”), wherein the court stated that Section 9 of the Act could not be made applicable to arbitrations that took place outside India and declared that the law laid down in BALCO would apply prospectively to arbitration agreements executed before 6th September 2012.
 - 5.4 Concerning other enactments supporting intervention by the Indian Courts in foreign-seated arbitrations, the Hon'ble Court observed the Statement of Objects and Reasons of 2015 Amendment. It observed that Notes on Clauses to the 2015 Amendment in respect of Section 2 provided that a proviso below sub-section (2) is inserted to provide that some of the provisions of Part I of the Act shall also apply to International Commercial Arbitration, even if the place of arbitration is outside India.
 - 5.5 The Hon'ble Court observed Article 17J of the UNCITRAL Model Law on International Commercial Arbitration, 1985 (“**UNCITRAL Model Law**”). This was relied upon because the 2015 Amendment was based on it. The Article states that a court shall have the same power of issuing an interim measure to arbitration proceedings, irrespective of whether their place is in the territory of this State, as it has to proceedings in courts. The court shall exercise such power following its procedures in consideration of the specific features of international arbitration.
 - 5.6 Reliance was placed on Article 28.2 of the Arbitration Rules of ICC, 2017 that allows the parties to apply to any competent judicial authority for interim or conservatory measures. Such measure shall not be deemed to be an infringement or a waiver of the arbitration agreement and shall not affect the relevant powers reserved to the arbitral tribunal.
 - 5.7 In support of intervention by courts in India for interim relief in respect of a foreign award, the Hon'ble Court observed that in the case of *PASL*, the proviso to Section 2(2) of the Act was relevant for interim orders in a foreign-seated arbitration where the assets are located in India. In *Aircon Beibars FZE v. Heligo Charters Pvt. Ltd.*⁶ and *Heligo Charters Pvt. Ltd. v. Aircon Feibars FZE*⁷, the Single and Division Bench decisions of the Bombay High Court, respectively, the order of the First Court was upheld by the

⁵ (2012) 9 SCC 552.

⁶ 2017 SCC OnLine Bom 631.

⁷ 2018 SCC OnLine Bom 1388.

Division Bench by holding that Section 9 of the Act cannot be excluded in the absence of a specific agreement to the contrary. In *Big Charter Pvt. Ltd. v. Ezen Aviation Pty. Ltd.*⁸, a Single Bench of the Delhi High Court recognised the need to obtain interim relief under Section 9 of the Act against dissipation of assets located in India.

- 5.8 In contrast to the intervention by a court under Section 9 of the Act in foreign seated arbitrations, the court observed only a single judgement of *Ashwani Minda v. U-Shin Ltd.*⁹ In this judgement, the governing law of the Agreement was the laws of Singapore and the dispute was resolved by arbitration in Singapore under the Arbitration Rules of the Singapore International Arbitration Centre (SIAC) Rules. The Court construed the Arbitration Agreement as an expression of the intention of the parties to exclude the applicability of Part I of the Act. However, the court distinguished the judgement from the present case based on factual nuances.
- 5.9 Finally, understanding the meaning of the statutory expression “agreement to the contrary” under the proviso to Section 2(2) of the Act, the Court observed that this sentence means that parties must evince and articulate an intention not to subject the arbitration agreement to the application of Section 9 of the Act.
- 5.10 Thus, reading everything together, the Hon’ble Calcutta High Court rejected the first contention of the Respondent concerning the implied exclusion under Section 9 of the Indian Courts in a foreign seated arbitration. The Court held that exclusion of the word ‘express’ to ‘agreement to the contrary, means little. The structure of the proviso as it stands today is that there must be a clear, unequivocal and unambiguous articulation by the parties to exclude the application of Section 9 of the Act from the arbitration which takes place outside India. The Court stated that the application of Section 9 of the Act to an arbitration agreement and an award which is under Part II of the Act is a fallout of the Supreme Court decision in *Bhatia* which was prospectively overruled in *BALCO* only to be reinstated by the recommendations of the Law Commission. It stated that unless an arbitration agreement expressly excluded the application of Section 9 of the Act, the provision would apply to foreign seated arbitration as well.
- 5.11 Moreover, Article 28.2 of the ICC Arbitration Rules, 2017 permits the parties to apply to a competent judicial authority for interim measures. That the Hon’ble Supreme Court in *Bhatia* referred to Article 23.2 of the ICC Rules which were then in force and held that Section 9 of the Act would apply to International Commercial Arbitrations which take place outside India. Article 17 J of the UNCITRAL Model Law also green-flags the right to approach courts outside the territory of the State. The Hon’ble Court, therefore, found substance in every contention made to harmonise the provisions of a statute wherever there appeared a conflict.
- 5.12 In furtherance to the second contention of the Respondent, the High Court simply relied upon the statutory language of Section 9 of the Act, which states “A party may,

⁸ 2020 SCC Online Del 1713.

⁹ 2020 SCC OnLine Del 1648.

before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced under Section 36, apply to a court.....”. It stated that the language in Section 2(2) of the Act read with the proviso to Section 2(2) of the Act makes it clear that Section 9 would apply in a post-award scenario subject to the other conditions of the proviso being satisfied. Thus, Respondent’s argument that an award-holder is a foreign seated arbitration cannot claim interim relief under Section 9 of Part I of the Act was found to be not legally tenable.

6. CONCLUSION

- 6.1 The Hon'ble High Court allowed the present application for interim protection under Section 9 of the Act in respect of the arbitration award seated at London, UK. The Petitioner was entitled to seek interim measures against the Respondent.
- 6.2 The Court held that the arbitration agreement in the present case permitted enforcement of the award in any court having jurisdiction over the party against whom enforcement is sought.

7. PSL OPINION

- 7.1 The issue of implied exclusion of the application of Indian arbitration law to foreign seated arbitrations has been hotly discussed and debated amongst the legal fraternity. In a series of judgements, the courts have excluded the applicability of Part I based on an implied exclusion in foreign-seated arbitrations. In *Hardy Oil and Gas Limited v. Hindustan Oil Exploration Company Limited and Ors.*,¹⁰ the underlying contract was governed by Indian law, the arbitration proceedings were to be conducted and resolved under the Rules of the LCIA with the place of arbitration in London and the law governing the arbitration was the English law.
- 7.2 On the occurrence of a dispute on a similar issue of Section 9 applicability, the Gujarat High Court stated that Indian courts do not have jurisdiction to entertain the petition filed under Section 9 of the Act once the parties had agreed to be governed by any law, other than Indian law, in cases of international commercial arbitration.
- 7.3 The Supreme Court in *Reliance Industries v. Union of India*,¹¹ held that once the parties had consciously agreed that the juridical seat of arbitration would be London and Arbitration agreement would be governed by the Laws of England, it was no longer open to them to contend that Part I would also be applicable nor as to its corollary Section 9 which is included in Part I. In another case of *Max India Ltd. v. General Binding Corporation*,¹² a Division Bench of the Delhi High Court held that once the parties have expressly chosen foreign law to apply to the main contract, foreign law governing the arbitration agreement and seat of arbitration in a foreign country, it leads to an inescapable conclusion and unmistakable intention of the parties to exclude Part I of the Act and its corollary Section 9 of the Act 1996.

¹⁰ (2006) 1 GLR 658.

¹¹ (2014) 4 CTC 75.

¹² 2009 (3) ARB LR 162 (Delhi).

7.4 Therefore, despite the judgement in the present case, the applicability of Section 9 of the Act is still not very clear. The High Courts can take varying opinions unless the Hon'ble Supreme Court clears the air on the expression.