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& Solicitors

## **Supreme Court holds that foreign arbitration awards may be enforced against non-signatories to the arbitration agreement**

**Gemini Bay Transcription Pvt. Ltd. v. Integrated Sales Service Ltd. & Anr.**

<b>Citation</b>	<b>Civil Appeal Nos. 8343-8344 of 2018</b>
<b>Date</b>	<b>August 10, 2021</b>
<b>Court</b>	<b>Supreme Court of India</b>
<b>Coram</b>	<b>Hon'ble Mr. Justice R.F. Nariman, Hon'ble Mr. Justice B.R. Gavai</b>

## 1. FACTUAL MATRIX

- 1.1 A representation agreement dated 18 September 2000 ('RA') was entered between Integrated Sales Services Ltd. ('ISS'), a Hong Kong corporation and DMC Management Consultants Ltd. ('DMC'), an Indian company with principal place of business at Nagpur. Under the RA, ISS was to assist DMC to sell its goods and services to prospective customers, and in consideration thereof was to receive a commission as per the payment terms envisaged therein. Moreover, ISS was to identify potential sources of investment and investors and assist DMC in negotiating the terms of purchase, sale and/or investment.
- 1.2 RA was signed by Shri Rattan Pathak as Managing Director of DMC, and by Shri Terry Peteete, Director of ISS. Subsequently, amendment to the RA was executed by Shri Arun Dev Upadhyaya, Chairman of DMC, and Shri Terry Peteete on behalf of ISS. Interestingly, the RA did not have a fixed tenure and no specific period of validity was contemplated. RA was governed by laws of Delaware, USA and contained an arbitration clause which stipulated that any dispute between the parties was to be referred to a single arbitrator in Kansas City, Missouri, USA.
- 1.3 Disputes arose between the parties, and a notice for arbitration was sent by ISS to Arun Dev Upadhyaya, followed by a statement of claim filed before the Ld. Arbitrator naming Arun Dev Upadhyaya, DMC (India), DMC Global, Gemini Bay Consulting Limited ('GBC') and Gemini Bay Transcription Private Limited ('GBT') as respondents. The disputes pivoted on ISS's allegation that Arun Dev Upadhyaya was the chairman of DMC and was in fact the person controlling the affairs of DMC and other respondents. The board of directors of the respondent companies namely GBC, GBT and DMC, was essentially owned by Mr. Upadhyaya's family, and would act as per his instructions. ISS contended that it introduced two customers namely MedQuist Transcriptions Ltd, of New Jersey and AssistMed, Inc. of California to DMC and that Mr. Upadhyaya used other respondent companies to divert the business of the above two customers away from DMC to GBT and GBC with an intent to deprive ISS of its commission. As such, ISS claimed 20% commission in terms of the RA on the gross revenues earned by respondent companies from these transactions.
- 1.4 On 28 March 2010, the Ld. Arbitrator awarded damages totalling USD 690 million to ISS jointly payable by DMC, DMC Global, Arun Dev Upadhyaya, GBC and GBT finding that the '*alter ego*' doctrine was appropriate justification for lifting the corporate veil in this case. The Ld. Arbitrator also held that the RA was not challenged by either party and hence was valid and enforceable. Pursuantly, ISS knocked at the doors of learned Single Judge of the Bombay High Court to enforce the award under Section 48 of the Arbitration and Conciliation Act, 1996 ('Act'). The Single Judge held that the arbitral award was enforceable only against DMC and not against Arun Dev Upadhyaya and GBC & GBT as they were non-signatories to the arbitration agreement even though such non-signatories may participate in the arbitration, as no acquiescence or estoppel can apply to issues relatable to jurisdiction.
- 1.5 However, on appeal, the Division Bench of the High Court reversed the judgment of the Single Judge holding that the award could only be challenged under Section 48 if the Delaware law has not been followed on the *alter ego* principle. Being satisfied that the arbitrator had properly applied the Delaware law on the facts of this case, it was held that none of the grounds contained in Section 48 of the Act would apply to resist enforcement of the foreign award. Aggrieved, GBC & GBT and Arun Dev Upadhyaya

approached the Supreme Court by way of special leave petitions resisting enforcement of the award.

## **2. CONTENTIONS BEFORE THE SUPREME COURT AND ANALYSIS**

### **A. Burden to Prove Award Can Be Enforced against Non-Signatory by Adducing Evidence**

- 2.1 GBT relied on Sections 44 and 47 of the Act, and argued that under Section 47(1)(c), the burden of proving that a foreign award may be enforced under Part II is on the person in whose favour that award is made, and that such burden in the case of a non-signatory to an arbitration agreement can only be discharged by adducing evidence which would independently establish that such non-signatory can be covered by the foreign award in question. This not being done in the facts of this case, the threshold of burden of proof requirement is not met, because of which the enforcement petition ought to have been dismissed on this ground alone.
- 2.2 The SC observed that the requirements of Section 47(1) are procedural in nature, the object being that the enforcing court must first be satisfied that it is indeed a foreign award, as defined, and that it is enforceable against persons who are bound by the award. Section 47(1)(c) being procedural in nature does not go to the extent of requiring substantive evidence to “prove” that a non-signatory to an arbitration agreement can be bound by a foreign award. As a matter of fact, Section 47(1)(c) speaks of only evidence that may be necessary to prove that the award is a foreign award. The provision only has reference to the six ingredients of a foreign award that are contained in the definition provision, namely, Section 44.
- 2.3 Ingredients 1 to 4 of Section 44 can easily be made out from the foreign award itself as the award would narrate facts which would show the legal relationship between the ‘persons’ bound by the award (who need not necessarily be parties to the arbitration agreement), and as to whether the award deals with matters that can be considered commercial under the law in force in India. Equally, the date of the foreign award would appear on the face of the foreign award itself.
- 2.4 Thus, Section 47(1)(c) of the Act would apply to adduce evidence as to whether the arbitration agreement is a New York Convention agreement. Also, the requisite Central Government notification can be produced under Section 47(1)(c), so that Section 44(b) gets satisfied. To argue that the burden of proof is on the person enforcing the award and that this burden can only be discharged by such person leading evidence to affirmatively show that a non-signatory to an arbitration agreement can be bound by a foreign award is outside the ambit of Section 47(1)(c) of the Act. As such, this argument was henceforth dismissed.

### **B. Refusing Enforcement of Award under Section 48(1)(a)**

- 2.5 GBT referred to Section 48 and in particular sub-section (1) sub-clause (a), to argue that a non-signatory to an arbitration agreement would be directly covered by sub-clause (a). If read literally, Section 48(1) (a) speaks only of parties to the agreement being under some incapacity, or the agreement being invalid under the law to which parties have subjected it. There can be no doubt that a non-party to the agreement, alleging that it cannot be bound by an award made under such agreement, is outside the literal construction of Section 48(1)(a).



2.6 Also, it must not be forgotten that whereas Section 44 speaks of an arbitral award on differences between “persons”, Section 48(1)(a) refers only to the “parties” to the agreement referred to in Section 44(a). Thus, to include non-parties to the agreement by introducing the word “person” would run contrary to the express language of Section 48(1)(a), when read with Section 44. The Supreme Court categorically observed that the grounds are very specific, and only speak of incapacity of parties and the agreement being invalid under the law to which the parties have subjected it. To attempt to bring non-parties within this ground is to try and fit a square peg in a round hole.

### **C. Refusing Enforcement of Award under Section 48(1)(b)**

2.7 GBT pressed the ground that since the award in the present case contained reasoning which was perfunctory in nature, it would not pass muster and it would be a breach of natural justice, ‘reasons’ being a part of natural justice as understood in this country. For this, reference to Section 48(1)(b) was made.

2.8 The Supreme Court observed that Section 48(1)(b) does not speak of absence of reasons in an arbitral award at all. The only grounds for refusal of enforcement of a foreign award under Section 48(1)(b) are natural justice grounds relatable to notice of appointment of the arbitrator or of the arbitral proceedings, or that a party was otherwise unable to present its case before the arbitral tribunal, all of which are events anterior to the making of the award.

2.9 Justice R.F. Nariman, also relied on the narrow construction of Section 48(1)(b) in the case of *Vijay Karia v. Prysmian Cavi E Sistemi SRL*<sup>1</sup> where it was stated that the expression “*was otherwise unable to present his case*” occurring in Section 48(1)(b) cannot be given an expansive meaning and would have to be read in the context and colour of the words preceding the said phrase. In short, this expression was held to be a facet of natural justice, which would be breached only if a fair hearing was not given by the arbitrator to the parties. Thus, this argument was also rejected.

### **D. Refusing Enforcement of Award under Section 48(1)(c)**

2.10 Section 48(1)(c) relates to an award which deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or if it contains decisions on matters beyond the scope of the submission to arbitration. Given the fact that the expression ‘submission to arbitration’ would refer primarily to the arbitration agreement<sup>2</sup>, sub-clause (c) only deals with disputes that could be said to be outside the scope of the arbitration agreement between the parties – and not to whether a ‘person’ who is not a party to the agreement can be bound by the same.

2.11 In fact, the proviso to Section 48(1)(c) makes this even clearer, as it states that an award may be partially enforced, provided that matters which are outside the submission to arbitration can be segregated, thereby again showing that the thrust of the provision is whether the dispute between parties are *qua* excepted matters for example or are otherwise outside the scope of the arbitration agreement.

2.12 The Supreme Court referred to the decision in *Aloe Vera of America, Inc v. Asianic Food (S) Pte Ltd & Anr.*<sup>3</sup>, where the Singapore High Court adverted to Section 31(2)(d) of the Singapore Act (which is the equivalent to Section 48(1)(c) of the Indian Act), and

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<sup>1</sup> (2020) 11 SCC 1.

<sup>2</sup> (1999) 5 SCC 651.

<sup>3</sup> 2006 SGHC 78.

remarked that ground of challenge under Section 31(2)(d) relates to the scope of the arbitration agreement rather than to whether a particular person was a party to that agreement.

#### **E. Perversity**

- 2.13 GBT also argued that the award is perverse in that vital evidence was not led in support of the claimant's case before the arbitrator and perversity is a ground to set aside an award in an international commercial arbitration.
- 2.14 However, Justice R.F. Nariman, placing reliance on *Ssangyong Engg. & Construction Co. Ltd. v. NHAI*<sup>4</sup>, observed that perversity as a ground to set aside an award in an international commercial arbitration held in India is no longer available after the 2015 Amendment to the Act. The judgment in *Ssangyong* explicated that the ground of "patent illegality appearing on the face of the award" is an independent ground of challenge which applies only to awards made under Part I and does not involve international commercial arbitrations.
- 2.15 Thus, the "public policy of India" ground after the 2015 Amendment does not take within its scope, "perversity of an award" as a ground to set aside an award in an international commercial arbitration under Section 34, and concomitantly as a ground to refuse enforcement of a foreign award under Section 48, being a *pari materia* provision which appears in Part II of the Act.

#### **F. Commission of Tort Outside the Scope of Arbitration Agreement**

- 2.16 GBT argued that the commission of a tort would be outside the scope of contractual disputes that arise under the arbitration agreement and that since the cause of action really arose in tort, the award was vitiated on this ground.
- 2.17 Justice R.F. Nariman observed that Section 44 recognises the fact that tort claims may be decided by an arbitrator provided they are disputes that arise in connection with the agreement. Relying on *Renusagar Power Co. Ltd. v. General Electric Co.*<sup>5</sup>, it was observed that the relevant question is not whether a claim lies in tort but whether even though it has lain in tort it "arises out of" or is "related to" the contract. Simply put, whether the claim arises out of the terms of the contract or is consequential upon any breach thereof. Reliance was also placed on *Tarapore & Co. v. Cochin Shipyard Ltd.*<sup>6</sup> and *Astro Vencedor Compania Naviera S.A. of Panama v. Mabanaft GmbH*<sup>7</sup> to finally conclude that this contention has no legs to stand.

#### **G. Circumscription of Power under Section 46**

- 2.18 GBT relying upon three judgments, namely, *Indowind Energy Ltd. v. Wescare (India) Ltd.*<sup>8</sup>, *Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc.*<sup>9</sup> and *Cheran Properties Ltd. v. Kasturi & Sons Ltd.*<sup>10</sup>, argued that a comparison between Sections 35 and 46 of the Act would show that the legislature circumscribed the power of the enforcing court under Section 46 to persons who are bound by a foreign award as

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<sup>4</sup> (2019) 15 SCC 131.

<sup>5</sup> (1984) 4 SCC 679.

<sup>6</sup> (1984) 2 SCC 680.

<sup>7</sup> [(1971) 2 QB 588.

<sup>8</sup> (2010) 5 SCC 306.

<sup>9</sup> (2013) 1 SCC 641.

<sup>10</sup> (2018) 16 SCC 413.

opposed to persons which would include ‘persons claiming under them’ and that, a foreign award would be binding on parties alone and not on others.

- 2.19 The Supreme Court succinctly held that Section 46 does not speak of “parties” at all, but of “persons” who may, therefore, be non-signatories to the arbitration agreement. Also, Section 35 of the Act speaks of “persons” in the context of an arbitral award being final and binding on the “parties” and “persons claiming under them”, respectively. Section 35 would, therefore, refer to only persons claiming under parties and is, therefore, more restrictive in its application than Section 46 which speaks of “persons” without any restriction.

#### H. Infraction of Domestic Law

- 2.20 The Division Bench had applied the Delaware Law to satisfy itself that such law had indeed been followed to apply the *alter ego* doctrine correctly, as a result of which the foreign award would have to be upheld. However, the Supreme Court held that such approach is completely erroneous. Section 48 does not contain any ground for resisting enforcement of a foreign award based upon the foreign award being contrary to the substantive law agreed to by the parties and which it is to apply in reaching its conclusion.
- 2.21 It was held that there is no ground in the *pari materia* provisions of Section 34 to set aside such award on the ground that the substantive law of that country has been infringed. Indeed, the only ground on which such award could possibly be interfered with is if such award, valid under the law which it applied, could be held to be contrary to the public policy of India. Therefore, a foreign award cannot be set at naught under Section 48 on the ground that it has infringed the substantive law of the agreement.

#### I. Damages Awarded Without Any Basis

- 2.22 GBT also argued that damages were awarded without actual loss having been proved before the Ld. Arbitrator contrary to the judgment of the Delhi High Court in *Agritrade International (P) Ltd. v. National Agricultural Coop. Mktg. Federation of India Ltd.*<sup>11</sup>, as a result of which the award stood vitiated on this ground also.
- 2.23 The Supreme Court dismissed this contention since it did not fall within any of the exceptions contained in Section 48(1). Moreover, it distinguished the facts in this case from *Agritrade* as actual loss can be said to have been occasioned to the respondent. Additionally, in order to attract Section 48(2), read with Explanation 1(iii), in *Ssangyong* it was held that it is only in exceptional cases which involve some basic infraction of justice which shocks the conscience of the court that such a plea can be entertained, which was definitely not the case herein.

### 3. CONCLUSION


- 3.1 Since the appellants failed to establish any ground to refuse the enforcement of the award, the appeals were dismissed.

### 4. PSL OPINION

- 4.1 In yet another hallmark judgment reinforcing the pro enforcement bias of the Indian judiciary, the Supreme Court has categorically emphasized that the restrictive scope of grounds on which enforcement of a foreign award may be refused in India. This

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<sup>11</sup> 2012 SCC OnLine Del 896.



judgment vindicates the New York Convention in letter and spirit and vanquishes the creative attempts of shrewd award-debtors to resist the enforcement of foreign arbitral awards by compelling the courts to adopt an expansive interpretation of the specific grounds enumerated in the Act. This judgment may be touted as a parting gift from Hon'ble Mr. Justice R.F. Nariman to the Indian arbitration regime, which has conspicuously taken large strides in the recent past to resemble the international best practices. The legal position qua enforcement of foreign awards is now settled for good- Unless a party can readily demonstrate grounds under Section 48(1) or 48(2) of the Act, the award will be enforced in India.