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Supreme Court reiterates that legislative intent cannot be overridden in the matters pertaining to International Commercial Arbitration

Ratnam Sudesh Iyer v. Jackie Kakubhai Shroff

Case No.	Civil Appeal No. 6112 of 2021
Date	10 November 2021
Court	Supreme Court of India
Coram	Hon'ble Justice Sanjay Kishan Kaul, Hon'ble Justice M.M. Sundresh, Hon'ble Mr. Justice A.S. Bopanna

1. **FACTUAL MATRIX:**

- 1.1. The dispute arose between Ratnam Sudesh Iyer (“**Appellant**”) and Jackie Kakubhai Shroff (“**Respondent**”), who were shareholders in an investment holding company named Atlas Equifin Private Limited, India (“**Atlas**”). Atlas held a total of 11,05,829 equity shares of Rs. 10 each in Multi Screen Media Pvt. Ltd (“**MSM**”). The Appellant from inception being desirous of selling the shares of MSM, eventually entered into a placement instruction dated 15.11.2005. As per the placement instruction Standard Chartered Bank was authorised to act as an agent to identify the purchaser for the shares. The present dispute commenced on account of Respondent’s claim, that his sign on the placement instruction had been forged.
- 1.2. On 19.04.2010, respondent lodged a complaint with the Economic Offences Wing, Mumbai Police against the appellant and Standard Chartered Bank. Better sense prevailed, leading to which a Deed of Settlement dated 03.01.2011 was executed by the parties. The Deed of Settlement stated that the Respondent was to withdraw the all complaints and proceedings filed against the Appellant while also forbidding the Respondent from writing letters, exchanging communications, or filing/registering complaints with any authority about the subject matter of the deed, in exchange for monetary incentives of US\$ 1.5 million. This amount was to be held in an Escrow account. Further an amount of US\$ 2 million was to be paid to the Respondent, realised from the proceeds of the sale of MSM shares.
- 1.3. Respondent’s wife, over the course of time, sent out two emails dated 09.06.2011 and 15.06.2011 to the Appellant, dropping allegations against the Appellant, while also marking various associates of the Appellant. The Appellant contended that these emails were a breach of the covenants in the Deed of Settlement and invoked the Arbitration clause present in the Deed of Settlement.
- 1.4. The Appellant filed an Interim Application under section 9 of the Arbitration and Conciliation Act, 1996 (“**Act**”), praying for the sum in the escrow account to be withheld from being paid to the respondent on account the alleged breach of the Deed of Settlement. A consent order was passed in the section 9 application, whereby a sole arbitrator was appointed and cheque held in escrow was to be handed over to the Respondent only at the explicit directions of the arbitrator.
- 1.5. MSM shares were sold in March 2013, and Atlas declared and paid a dividend to its shareholders from the proceeds. Following which, the Appellant filed an application requesting to attach the amount that the Respondent was to receive, the same was rejected. On November 10, 2014, the arbitrator pronounced the final Award (“**Award**”) in favour of the appellant, ruling that the Respondent was not entitled to the second cheque of US\$ 2 million held in the escrow account and also Awarded the appellant liquidated damages to the tune of US\$ 1.5 million.
- 1.6. The Respondent, on January 24, 2015, filed a petition under Section 34 of the Act in the Bombay High Court challenging the Award seeking to quash and set aside the Award, while also praying to stay the Appellant’s enforcement case. The petition was deposed and the Award was set aside by a judgement dated 19.05.2020. Pursuant to which, the Appellant filed an appeal under Section 37 of the Act, the same was dismissed by the Division Bench while upholding the judgment passed by the Ld. Single Judge. The present appeal arises from the SLP filed before the Supreme Court.

2. **ISSUES:**

- 2.1 Whether the Award is arising out of an International Commercial Arbitration?
- 2.2 Whether the 2015 Amendment w.e.f. 23.10.2015 apply to the facts of the present case?

3. SUBMISSIONS OF THE APPELLANT:

- 3.1. The Appellant's first contention was that the Award is arising out of an International Commercial Arbitration (ICA). The definition of ICA as given in the Act is attracted when either party to the dispute is a person/company which is resident/incorporated in any country other than India. Since in the case at hand the Appellant was a party based in Singapore, that qualified the Award passed by the arbitrator as an ICA Award. Moreover, with the 2015 amendment to the Act, the scope of judicial interference became further restricted. Thus, the Appellant contended that any further amendment to the Act shall be applicable to the arbitration in question.
- 3.2. The second contention of the Appellant was that the Award had to be scrutinised in the post amendment scenario, thus patent illegality has no application as to test the Award rendered by the arbitrator. However, this was not the case and the High Court applied the pre-amendment test. The appellant placed reliance on the wordings of Clause 9 of the Deed of Settlement which provided for an arbitration in case of a dispute. The clause stated, "*the Arbitration proceedings shall be governed by the Arbitration and Conciliation Act, 1996 of India or any amendment thereto*". Thus, the appellant submitted that the phrasing of section includes any further amendments and has to be scrutinized in the post amendment scenario and.

4. SUBMISSIONS OF THE RESPONDENTS:

- 4.1. The Respondent submitted that the Award was in contravention of the public policy of India, as the stance taken by the arbitrator when pronouncing the Award in completely baseless. The arbitration proceedings commenced before the amendment came into force, thus, these amendments cannot be applied retrospectively, irrespective of any arbitration clause contrary to this.
- 4.2. Further, it submitted that the arbitrator was at fault to hold Respondent in breach of the clauses of the Deed of Settlement on the basis of the emails sent by Respondent's wife, who was not a party to the Deed of Settlement and was impleaded out of the arbitration proceedings by mutual consent of the parties.

5. DECISION OF THE SUPREME COURT:

- 5.1. The apex court stated that, the 2015 amendment sought to make the test of inference more stringent with respect to domestic Award arising out of ICA, by carving out a distinction between domestic Award and domestic Award arising out of an ICA. The court observed that the Respondent had taken all necessary steps to avoid being in breach of the deed. Holding the Respondent liable for his wife's emails, was egregious, when the wife wasn't even a party to the dispute. However, the court opined that even though the Respondent had not ratified the actions of his wife, the Respondent ought to have clarified the emails sent by his wife. The court held that the arbitrator's conclusion holding this scenario a breach is against the fundamental policy of Indian Law and shall be set aside under the pre-2015 amendment.
- 5.2. The court with respect to the second issue, remarked that the 2015 amendment shall not apply to the present case, as in this case the S.34 proceeding had already commenced before the amendment came into effect. The proceedings were already

subject to the pre- 2015 legal position. The court relied upon *BCCI v. Kochi Cricket*¹, *Ssangyong Engineering and Construction Company Ltd*² and various other judgments, and reiterated that the 2015 Amendment Act would only apply to proceedings commenced on or after 23.10.2015, being the date on which the amendment came into effect. The Supreme Court also observed that, the primary reason to set aside the order was that the legal position applicable to the Award of the learned arbitrator should have been pre-amendment. A clause in the agreement that seeks to include any amendment to the Act must not alter the scope of the Act as against the legislative intent.

6. PSL Opinion:

- 6.1. The nature of the arbitration procedure and the arbitral clause have been stressed upon in the current judgement, as their interpretation was the basis of the present case. While echoing the court's position in prior decisions, the court elaborated that a single arbitration agreement cannot override the entire Act.
- 6.2. The desire to decrease judicial interference is crucial to consider since it is the rationale for the legislative decision to make the amendments prospectively applicable. Thus, a provision that tries to override this intention of the legislature, and applies any future amendments retroactively would be against the fundamental policy of India.

¹ Board of Control for Cricket in India v. Kochi Cricket Pvt. Ltd. & Ors., (2018) 6 SCC 287.

² Ssangyong Engineering and Construction Company Ltd. v. National Highways Authority of India (NHAI), (2019) 15 SCC 131.