

Can a non-signatory object to enforcement of foreign award in India?

In a most recent judgment¹, the Apex Court had the occasion to deal with an interesting issue i.e., “whether a non-signatory to an arbitration agreement can challenge the enforcement of a foreign award in India on any of the parameters setout in Section 48 of the Arbitration and Conciliation Act, 1996 (“**the Act**”)”.

Factual Matrix:

A Representation Agreement dated 18.09.2000 (“**RA**”) was executed between Integrated Sales Services Ltd. (“**ISS**”) of Hongkong and DMC Management Consultants Ltd. (“**DMC**”) an Indian company based at Nagpur. This RA did not have any specific period of its validity. Under the RA, ISS was to assist DMC in its efforts to sell its goods and services to prospective customers. In addition, wherever possible, ISS was to identify potential sources of investment and investors and assist the DMC in negotiating the terms of purchase, sale and/or investment.

For the services to be rendered by ISS, it was to receive commission as per “payment” term defined under the RA. As per the RA, the agreement was subject to laws of Delaware, USA and that every dispute arising in connection with the agreement was to be referred to single arbitrator in Kansas City, Missouri, U.S.A. The RA was signed by one Shri Rattan Pathak on behalf of DMC, though subsequent amendments to the RA were signed by Shri Arun Dev Upadhyaya on behalf of DMC. Disputes arose between the parties resulting into initiation of arbitration proceedings by ISS. ISS impleaded

¹ Gemini Bay Transcription Pvt. Ltd. Vs. Integrated Sales Service Ltd. & Anr. Civil Appeal Nos.8343-8344 of 2018 dated 10.8.2021



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Mr. Arun Dev Upadhyaya, DMC, DMC Global, Gemini Bay Consulting Ltd. ("GBC") and Gemini Bay Transcription Private Ltd. ("GBT") as respondents. The disputes in essence were resting on ISS's allegations that Mr. 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 all the respondent companies, which were owned by Mr. Upadhyaya's family, would act as per the instructions of Mr. Upadhyaya. It was the case of ISS 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 aforesaid two customers away from DMC to GBT and GBC with an intent to deprive ISS of its commission. ISS claimed 20% commission in terms of the RA on the gross revenues earned by respondent companies from the aforesaid two customers, for the period they continued to be the customers. The arbitral award dated 28.03.2010 was pronounced by the arbitrator finding that the alter ego doctrine was appropriate justification for lifting the corporate veil in this case. The Id. arbitrator held that the RA was not challenged by either party and hence was valid and enforceable. Termination of ISS/DMC business relationship was not valid as the RA was for indefinite term and respondents have failed to prove by reliable and relevant evidence that any specific and reasonable guidelines were established by the respondents which were not followed by ISS. Reference was made to Clause 4 of the RA which specifically provided that the clause relating to payment of commission shall survive cancellation of RA for any reason. The Id. Arbitrator further held that since GBT/GBC "inherited" the MedQuist and AssistMed's business from DMC, it did so inheriting also the terms and conditions of ISS/DMC RA. Accordingly, it was held that GBT/GBC is subrogated to DMC and therefore DMC's breach can be imputed to all the respondents. Finally, the Id. Arbitrator awarded USD 6,948,100 to be paid by the respondents jointly and severally to ISS within 30 days from the transmittal of the award. The award contained other direction as to payment of administrative fee as well as interest on the awarded amount, in case of non-payment of awarded amount to ISS within 30 days.

Proceedings before the Hon'ble Bombay High Court, Nagpur Bench

A Id. single judge of the Hon'ble High Court of Bombay, Nagpur Bench held vide his judgment dated 18.04.2016 that the foreign award would be enforceable against DMC only and not against other respondents who were non-signatory to the arbitration agreement. In an appeal, Id. division bench, vide judgment dated 04.01.2017, set aside the judgment passed by the Id. single judge and held that none of the grounds contained in Section 48 would be available to resist enforcement of the foreign award.

Contentions before the Hon'ble Supreme Court of India:

In the SLP filed by DMC, the Apex Court granted the leave subject to DMC depositing a sum equivalent to USD 2.5 million within 3 months. As DMC did not deposit the amount, the leave stood revoked and hence the foreign award against DMC attained finality. In the SLP filed by other respondents before the arbitral tribunal, following grounds were raised for objecting to the enforcement of the foreign award:

- (i) Under Section 47(1)(c), the burden of proving that foreign award may be enforced is on the person in whose favour the award is made. Such a burden, in case of a non-signatory to the arbitration agreement, can only be discharged by adducing evidence which would independently establish that such non-signatory can be covered by foreign award in question. This having not been done in the present case, the enforcement petition ought to have been thrown out only on this ground.
- (ii) A non-signatory to arbitration agreement would be covered by sub-clause (a) as well as sub-clause (c) of Section 48(1) of the Act.
- (iii) The ground under Section 48 (1)(b), referring to natural justice ground, would be attracted as no proper reasons have been given by the Ld. Arbitrator. It was submitted that the award was perverse due to non-examination of the two customers.
- (iv) Damages were awarded without actual loss having been proved.
- (v) Commission of tort would be outside the contractual disputes and since the cause of action really arose in tort, the award was vitiated on that ground.
- (vi) Under Section 46, a foreign award is to be treated as binding only on the persons as between whom it was made and not on persons who may claim under the parties. Therefore, in the absence of any evidence to show the involvement of non-signatory to the arbitration agreement with reasoned findings, the award stands vitiated.

In rebuttal, ISS supported the judgment of the division bench and pointed out that addresses of Shri Upadhyaya, GMC, GBT were all at the very same place in Nagpur. It was contended that the Ld. Arbitrator applied his mind to oral and documentary evidence and passed the award with reasons. It was further submitted that neither Section 48(1)(a) nor 48(1)(c) would remotely deal with non-signatory to arbitration agreement. Further, as no objection qua enforcement of the award being contrary to public policy was raised by either appellant, the appeals should be dismissed.

Decision of the Hon'ble Supreme Court of India

The apex court dismissed the appeal holding as under:

- (i) Referring to the meaning of expression “legal relationship” and “commercial” in the provision of the Act as well as UNCITRAL Model Law, the court held that expression “commercial” should be construed broadly having regard to the manifold activities, which are integral part of international trade today.
- (ii) The requirements under Section 47(1) are all procedural in nature and are aimed at securing satisfaction to the enforcing court that the award in question is indeed a foreign award.
- (iii) Section 47(1)(c) does not require substantive evidence to “prove” that a non-signatory to an arbitration agreement can be bound by a foreign award. The contention that the burden of proof was on the person enforcing the foreign award and that such a burden can only be discharged by such person by leading evidence to affirmatively show that a non-signatory to an arbitration agreement can be bound by a foreign award, was dismissed.
- (iv) A party resisting enforcement of a foreign award must prove to the court that its case falls within any of the sub-clauses of Section 48(1) or 48(2). The expression “proof” in Section 48 cannot possibly mean the taking of oral evidence but would only mean “establish on the basis of the record of the arbitral tribunal”.
- (v) Section 48(1)(a), on its literal reading, refers only to the parties to the agreement. Therefore, a non-signatory alleging that it cannot be bound by the foreign award cannot be said to be covered under Section 48(1)(a).
- (vi) With respect to Section 48(1)(c), it was held that the same relates to an award which deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submissions to arbitration. It was held that an arbitral award would not be beyond the scope of submission to arbitration if the determination therein could be said to have been fairly comprehended as “disputes” within the arbitration agreement. Given the fact that the expression ‘submission to arbitration’ would refer primarily to arbitration agreement, sub-clause (c) only deals with a dispute that could be said to be outside the scope of 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.
- (vii) As regards availability of Section 48(1)(b) was concerned, the court held that the said provision does not speak of absence of reasons in an arbitral award at all. The only grounds on which a foreign award cannot be enforced under Section 48(1)(b) are natural justice grounds relating 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 would apply at the hearing stage before the arbitrator and not after the award has been delivered.

- (viii) As regards the ground of perversity is concerned, the same is not available for setting aside an International Commercial Arbitration held in India after 2015 amendment to the Act. Perversity does not fall within the ambit of public policy ground after 2015 amendment and hence cannot be raised as a ground to refuse enforcement of a foreign award under Section 48 of the Act.
- (ix) The court rejected the contention that legislature circumscribed the power of the enforcing court under Section 46 to persons who are bound by a foreign award and not person including person claiming under them. It was held that Section 46 uses the expression "person", which may include non-signatory to arbitration agreement. The court further referred to Section 35 of the Act which speaks of "persons" in the context of arbitral award being final and binding on "parties" and "person claiming under them" respectively. Therefore, it was held that the expression "person" used in Section 46 has much wider meaning.
- (x) It was held that Section 44 of the Act recognizes the fact that tort claim may be decided by the arbitrator provided they are disputes that arise in connection with the agreement.
- (xi) The court further held that damages awarded by the tribunal in the absence of any evidence forthcoming from the appellant, had been rightly assessed by making a best judgment assessment. In the damage so awarded, nothing can be said to shock of the conscience of the court or clutch at "the basic notion of justice" ground contained in Section 48(2). The court held that there can be no doubt that as a result of machinations of Upadhyaya and Pathak, actual loss has been occasioned to ISS who was deprived of commission legitimately due to it under the RA.

Conclusion

In this judgment again the court has emphasized on the restrictive scope of grounds on which enforcement of a foreign award can be refused. The court held that these grounds cannot be expansively interpreted as that would amount to try and fit a square peg in a round hole. Unless a party is able to show that its case comes clearly within Section 48(1) or 48(2), the foreign award must be enforced.

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