"*Bharat Aluminium Co. V. Kaiser Aluminium Technical Service, Inc.*" - Landmark Judgement on the Powers of Indian Courts over Arbitration Proceedings situated Overseas

By

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1. The Constitutional Bench of the Supreme Court delivered a landmark judgment on 6th September 2012 in *Bharat Aluminium Co. vs. Kaiser Aluminium Technical Service Inc.* [MANU/SC/0722/2012]. This judgment overruled the doctrine laid down by the Supreme Court in *Bhatia International vs. Bulk Trading S.A & Anr.* [MANU/SC/0185/2002] and followed in *Venture Global Engineering v. Satyam Computer Services Ltd.* [MANU/SC/0333/2008]. *Bharat Aluminium* ruled that domestic courts shall have no jurisdiction to pass interim orders in disputes forming part of any arbitration where the seat of the arbitration proceeding is situated overseas.

2. In *Bhatia International* and later decisions that followed its ratio, the Supreme Court had interpreted the provisions of the Act in a manner that lead to excessive intervention of the Indian judiciary in international arbitrations negating the intent of the Act which was to minimise the intervention of the judiciary in the arbitration process. These judgments had held that even where international commercial arbitrations are held outside India, Indian courts would have the power to assume jurisdiction and grant injunctions / interim relief against foreign arbitral awards whenever a party makes an application in this regard and an exception to this principle could be allowed only if the parties had specifically opted out of such an arrangement in the arbitration agreement between them.

3. In *Bharat Aluminium*, the Supreme Court has now laid down the principle that in case of a foreign-seated international commercial arbitration, no application for interim relief would be maintainable under Section 9[1] or any other provision of the Act. The Court held that Part I of the Act shall not be applicable to the arbitrations seated outside India whether or not the parties chose to apply the Act in terms of the arbitration agreements entered between them. The ruling specifically states that the seat of arbitration per se shall be the test of the applicability of the Act. The concluding paragraphs of this landmark judgment read as follows:

"198. …We are of the considered opinion that Part I of the Arbitration Act, 1996 would have no application to International Commercial Arbitration held outside India. Therefore, such awards would only be subject to the jurisdiction of the Indian courts when the same are sought to be enforced in India in accordance with the provisions contained in Part II of the Arbitration Act, 1996. In our opinion, the provisions contained in Arbitration Act, 1996 make it crystal clear that there can be no overlapping or intermingling of the provisions contained in Part I with the provisions contained in Part II of the Arbitration Act, 1996.

[1] Section 9 of the Act deals with the grant of interim reliefs, etc. by the court on an application made by the party.

199. With utmost respect, we are unable to agree with the conclusions recorded in the judgments of this Court in Bhatia International (supra) and Venture Global Engineering (supra). In our opinion, the provision contained in Section 2(2) of the Arbitration Act, 1996 is not in conflict with any of the provisions either in Part I or in Part II of the Arbitration Act, 1996. In a foreign-seated international commercial arbitration, no application for interim relief would be maintainable under Section 9 or any other provision, as applicability of Part I of the Arbitration Act, 1996 is limited to all arbitrations which take place in India. Similarly, no suit for interim injunction simplicitor would be maintainable in India, on the basis of an international commercial arbitration with a seat outside India.

200. We conclude that Part I of the Arbitration Act, 1996 is applicable only to all the arbitrations which take place within the territory of India."

4. Arbitration proceedings in India are regulated by the Arbitration and Conciliation Act 1996 ("**the Act**"). The Act is divided into four parts and contains three Schedules. Part I of the Act comprising Sections 2 to 43 deals with Arbitration; Part II deals with enforcement of certain Foreign Awards comprising Sections 44 to 60; Part III comprising Sections 61 to 81 deals with Conciliation; and Part IV comprises of Supplementary Provisions. The aim and the objective of the Arbitration Act, 1996 was to give effect to the United Nations Commission on International Trade Law (UNCITRAL) Model Laws which was adopted by the UN body on 21st June 1985.

5. As observed by the Supreme Court, much of the debate before the Court was concentrated on the comparison between Article 1(2) of UNCITRAL and Section 2(2) of the Act and whether the Parliament had deliberately deviated from Article 1(2) of UNCITRAL to express its intention that Part I shall apply to all arbitrations whether they take place in India or in a foreign country.[2] The Supreme Court observed that:

(1) The word "only" is conspicuously missing from Section 2(2) of the Act which is included in Article 1(2) of UNCITRAL. The Model Law has not been bodily adopted but the Scheme of the Act makes it abundantly clear that the territorial principle, accepted in the UNCITRAL Model Law, has been adopted by the Act. Like Article 1(2) of the Model Law, the Act maintains the territorial link between the place of arbitration and its law of arbitration. Parliament by limiting the applicability of Part I to arbitrations which take place in India, has expressed a legislative declaration. Section 2(2) is clear enough to express the parliamentary declaration/ recognition that Part I of the Act applies to arbitration having their place/seat in India and does not apply to arbitrations seated in foreign territories. It is not the function of the Court to supply the supposed omission.

(2) One of the sound reasons to reject the appellants' contention is, if Part I were to be applied to the arbitration seated in foreign country, then Section 2(2) would have to provide that "this part shall apply where the place of arbitration is in India and to arbitrations having its place out of India." This would be contrary to the contextual intent and object of this Section and such an interpretation will amount to an extreme and unnecessary rewriting/alteration of the language of Section 2(2).

[2] Section 2(2) of Part I of the Act states that *"[T]his Part shall apply where the place of arbitration is in India."* Article 1(2) of UNCITRAL Model Law reads as *"Article 1(2): The provisions of this law, except Articles 8, 9, 17(H), 17(I), 17(J), 35 and 36 apply <u>only</u> if the place of arbitration is in the territories of this State."* [Emphasis supplied]

(3) There is no inconsistency between Sections 2(2), 2(4) and 2(5)[3]. Section 2(4) and Section 2(5) would not be applicable to arbitrations which are covered by Part II of the Arbitration Act, 1996, i.e. the arbitrations which take place outside India. The conclusion in *Bhatia International* that limiting the applicability of Part I to arbitrations that take place in India, would make Section 2(2) in conflict with Sections 2(4) and 2(5), is not correct.

(4) It cannot be accepted that "every arbitration" in Section 2(4) would include arbitrations which take place outside India. The phrase "all arbitrations" in Section 2(5) has to be read as limited to all arbitrations that take place in India. The two sub-sections merely recognize that apart from the arbitrations which are consensual between the parties, there may be other types of arbitrations, namely, arbitrations under certain statutes like Section 7 of the Indian Telegraph Act, 1886, etc., and arbitrations pursuant to international agreement, that would have to be regarded as covered by Part I, except in so far as the provisions of Part I are inconsistent with the other enactment or any rules made thereunder.

(5) Section 2(7)[4] does not relax the territorial principle adopted by the Act. Part I of the Act applies not only to purely domestic arbitrations, i.e., where none of the parties are in any way "foreign" but also to "international commercial arbitrations" covered within Section 2(1)(f) held in India. The term "domestic award" means an award made in India whether in a purely domestic context, i.e., domestically rendered award in a domestic arbitration or in the international context, i.e., domestically rendered award in an international arbitration. Both the types of awards are liable to be challenged under Section 34 and are enforceable under Section 36 of the Act.[5] Therefore, it seems clear that the object of Section 2(7) is to distinguish the domestic award covered under Part I of the Act from the "foreign award" covered under Part II and not to distinguish the "domestic award" from an "international award" rendered in India.

(6) There is no overlapping of the provisions in Part I and Part II nor are the provisions in Part II supplementary to Part I. Rather there is complete segregation between the two parts.

(7) The intention of the legislature is clear that the Court may refuse to enforce the foreign award on satisfactory proof of any of the grounds mentioned in Section 48(1), by the party resisting the enforcement of the award. The word "suspended/set aside" in Section 48(1)(e) cannot be interpreted to mean that foreign awards sought to be enforced in India can also be challenged on merits in Indian Courts. The provision only means that Indian Courts would recognize as a valid defence in the enforcement proceedings relating to a foreign award, if the Court is satisfied that the award has been set aside in one of the two countries, i.e., the "first alternative" or the "second alternative".

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[3] "*2(4) This Part except sub-section (1) of section 40, sections 41 and 43 shall apply to every arbitration under any other enactment for the time being in force, as if the arbitration were pursuant to an arbitration agreement and as if that other enactment were an arbitration agreement, except in so far as the provision of this Part are inconsistent with that other enactment or with any rules made thereunder;*
"2(5) Subject to the provisions of sub-section (4), and save in so far as is otherwise provided by any law for the time being in force or in any agreement in force between India and any other country or countries, this Part shall apply to all arbitrations and to all proceedings relating thereto." [Emphasis supplied]

[4] "*2(7) An arbitral award made under this Part shall be considered as a domestic award."*

[5] Section 34 deals with recourse recourse against arbitral awards and Section 36 deals with enforcement and both provisions fall under Part I of the Act.

(8) No interim relief will be available under Section 9 (which falls under Part I) of the Act in respect to the arbitration which are conducted with the foreign seat. A bare perusal of Section 9 clearly show sthat it relates to interim measures before or during arbitral proceedings or at any time after the making of the arbitral award, but before it is enforced in accordance with Section 36. Section 36 necessarily refers to enforcement of domestic awards only.

6. In the interest of justice, the Supreme Court has said that the *ratio decidendi* of *Bharat Aluminium* will be applicable prospectively to all arbitration agreements that are executed after the pronouncement of this decision, that is, 6th September 2012. The operative portion to this effect is quoted below:

"201. The judgment in Bhatia International (supra) was rendered by this Court on 13th March, 2002. Since then, the aforesaid judgment has been followed by all the High Courts as well as by this Court on numerous occasions. In fact, the judgment in Venture Global Engineering (supra) has been rendered on 10thJanuary, 2008 in terms of the ratio of the decision in Bhatia International (supra). Thus, in order to do complete justice, we hereby order, that the law now declared by this Court shall apply prospectively, to all the arbitration agreements executed hereafter."

7. This decision of the Supreme Court has come as a big relief to foreign parties doing business with their Indian counterparts. This ruling renders certainty to transactions which provide for the arbitration with a foreign seat and is likely to encourage arbitration to be the preferred mode of resolving disputes. Some uncertainty will still persist due to the prospective applicability of the verdict as Indian courts are still seized with jurisdiction to grant interim relief in foreign arbitration proceedings pursuant to arbitration agreements executed before this date.

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