Pro-Arbitration trend continues in India?

Introduction

The beginning of new international arbitration friendly regime in India was marked when the Supreme Court of India (**"Supreme Court"**) handed down a landmark judgement *Bharat Aluminium Company and Ors. v. Kaiser Aluminium Technical Services Inc. and Ors.*[1] (**"Balco"**) overturning the law laid down by *Bhatia International v. Bulk Trading S. A. and Anr* [2] (**"Bhatia International"**). Interestingly, the Supreme Court on July 3, 2013, passed a seminal judgement in *Shri Lal Mahal Ltd. v. Progetto Grano Spa*[3] (**"Shri Lal Mahal"**), holding that doctrine of "patent illegality" doesn't apply to enforcement of foreign awards and unequivocally confirmed that challenges to set aside a domestic award under Section 34 of the Arbitration and Conciliation Act, 1996 (**"Act"**) and scope of objections to the enforceability of foreign awards under Section 48 are inherently different. As a result, the scope of the expression "public policy" in Section 48 has been limited and does not include "patent illegality" as a ground for review of a foreign award.

1. Facts of the case

In Shri Lal Mahal case[3], an Indian seller (**"Appellant"**) entered into a contract with an Italian buyer (**"Respondent"**) for sale of Indian origin durum wheat. After the goods were delivered at the destination, the Respondent informed the Appellant that the wheat loaded was soft common wheat and not durum wheat as required under the contract and alleged breach of contract by the Appellant, as the goods did not match the contractual terms. As a consequence thereof, the Respondent initiated arbitration proceedings through Grain and Food Trade Association (**"GAFTA"**). The Appellant in the meanwhile unsuccessfully tried to frustrate the arbitral proceedings through Indian Courts. However, the arbitral tribunal constituted under the aegis of GAFTA seated in London rendered two awards in favour of the Respondent and awarded damages against the Appellant. The Appellant preferred appeals against the awards before the Board of Appeal of the GAFTA. After, the Board of Appeal rejected those appeals; the Appellant filed an application under Section 68 of the English Arbitration Act, 1996, to set aside the awards, before the High Court of Justice in London. However, the application was rejected. After the awards attained finality, the Respondent approached the Delhi High Court for enforcement of awards. The Appellant objected towards enforcement of the awards contending that the awards sought to be enforced were contrary to the "public policy" of India. The Delhi High Court rejected the objections raised by the Appellant and held that the awards were enforceable under Part II of the Act, and that it was not expected to re-determine questions of fact in enforcement proceedings. The Appellant appealed against this decision to the Supreme Court.

[1] 2012 (3) ARBLR 515 (SC). For details, please read http://psalegal.com/bulletins/dispute_resolution_bulletin.html
[2] (2002) 4 SCC 105
[3] 2013 (3) ARBLR 1 (SC)

2. Contentions of the parties

The Appellant argued that an Indian Court "*can refuse to enforce a foreign award if it is contrary to the contract between the parties and/or is illegal*". To bolster their arguments, the Appellant relied on two decisions of the Supreme Court viz. *Oil and Natural Gas Corporation Limited v. Saw Pipes Limited*[4] (**"Saw Pipes"**) and *Phulchand Exports Limited v. O.OO. Patriot*[5] (**"Phulchand Exports"**). The Appellant further contended that expression "public policy of India" under Section 48(2)(b) is an expression of wider import than expression "public policy" in Section 7(1)(b)(ii) of the Foreign Awards (Recognition and Enforcement) Act, 1961 and insisted that the expansive construction given by the Supreme Court to the term "public policy of India" in *Saw Pipes*[4] case must also apply to the use of the same term "public policy of India" in Section 48(2)(b). The Appellant asserted that awards sought to be enforced by the Respondent are contrary to public policy of India.

The Respondent in turn relied on *Renusagar Power Co. Limited v. General Electric Company*[6] (**"Renusagar"**) and contended that the expression "public policy of India" under section 48(2)(b) has narrower meaning than Section 34. The Respondent insisted that similar interpretation given to the expression "public policy of India" while interpreting Section 7(1)(b)(ii) of the Foreign Awards Act was equally applicable to Section 48(2)(b). The Respondent argued that *Saw Pipes*[4] case never meant to give wider meaning to the expression "public policy of India" insofar as Section 48 was concerned. The Respondent brought to the attention of the Supreme Court that in *Phulchand Exports*[5] case scope of patent illegality as laid down in the the *Saw Pipes*[4] case applied to Section 48(2)(b). The Respondent further insisted that *Renusagar*[6] case being a decision of larger bench must prevail instead of *Saw Pipes*[4] case and *Phulchand Exports*[5] case which were decisions by a two Judge bench.

The Decision

Providentially, a three judge bench hearing *Shri Lal Mahal*[4] case, was presided over by Justice R M Lodha (interestingly, the author of *Phulchand Exports*[5] case) rectified the judicial error and overruled the case of *Phulchand Exports.*[5] The Supreme Court held that at the stage of challenge to an arbitral award under Section 34 during setting aside proceedings, the arbitral award is not yet final and executable and this is in contradistinction to a challenge during enforcement where the award is final and binding. On this basis, the Supreme Court took the opportunity to overrule *Phulchand Exports*[5] case and followed the decision in *Renusagar*[6] case and held that enforcement can only be opposed on grounds of public policy where it is contrary to:

- *Fundamental policy of Indian law;*
- *The interests of India; or*
- *Justice and morality*

The Supreme Court clearly repudiated to allow a challenge on the grounds of "patent illegality".

[4] (2003) 5 SCC 705
[5] (2011) 10 SCC 300
[6] 1994 Supp (1) SCC 644

Since the challenge raised by the Appellant required reconsideration of the merits of the case and re-looking at the facts, the Supreme Court declined to entertain the challenge and allowed enforcement.

Conclusion

India, as an arbitration hub, has been a dream yet to be realised. Until recently, India has been subjected to much flak for being an "arbitration-unfriendly" jurisdiction. In the last two years, international arbitration community has witnessed significant judicial maturity on the part of Indian Courts. In narrowing the scope of intervention of the Indian Courts in execution of foreign awards, by limiting the scope of public policy of India applicable to foreign awards, significant attempt has been made by the Supreme Court to bring India back on map as pro-arbitration jurisdiction rather than an arbitration-unfriendly jurisdiction. The aim and intent of the Act was to limit the scope of judicial review and judicial intervention in the arbitral process. The last two years have been eventful and a way forward. The current approach is making headway towards speedy mechanism of enforcement of foreign awards. Henceforth, enforcement of foreign awards would not be declined routinely. As on date, it is clear that Section 34 is a remedy available to a party in a domestic arbitration or in an India seated arbitration before the award is made final whereas under Section 48, a foreign award is deemed final and scope of judicial review is scant and cannot be challenged on the ground of "public policy of India". Thus, to keep up with the pro-arbitration approach and to establish India as an arbitration hub, similar approach to restrict intervention under Section 34 ought to be adopted in India.

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