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CRYTICAL ANALYSIS OF AUTONOMY TO CHOOSE FOREIGN ARBITRATION BY TWO INDIAN PARTIES THROUGH PASL WIND SOLUTIONS PASL (P) Ltd. v. GE POWER CONVERSION (INDIA)(P) Ltd CASE

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ABSTRACT

The Indian courts are burdened with thousands of cases leading to inefficiency and delay in the court proceedings. This dilemma suffered by Indian courts are due to small matters which can be settled outside are clogged before the courts. Hence, Alternative Dispute Resolution Mechanism becomes the fastest and most appropriate technique to settle the disputes outside the court. Among the forms of ADR, Arbitration is the most appropriate dispute mechanism for settling commercial disputes, where the parties want a third neutral person to decide the outcome of their dispute, thus to circumvent formality, time, and expense of a trial. The technique of Arbitration has evolved, to settle the international disputes between two states. International Arbitration being one of the developing area, there exist numerous uncertainties to be resolved. This article aims to track the controversy regarding autonomy of two Indian parties to opt for foreign arbitration.

KEYWORDS:

Alternative Dispute Resolution, Arbitration, international Arbitration, Settlement, Neutral, Foreign Award.

INTRODUCTION

This article aims to track the controversy regarding autonomy of two Indian parties to opt for foreign award. The article has various sections, starting with the introduction to the issue, following the containing the summary of facts of the case which includes various conclusions the court came to while deciding the case. The article have also look in to various precedent that the Supreme Court has relied on, while deciding the dispute.

The issue "whether two companies incorporated in India can choose a forum for arbitration outside India" has been vigorously debated from time to time. Various Courts decided on the basis of pro arbitration approach and supported the same but some gave an opposing decision. The controversy finally ended on 20th April 2021, when a three-judge bench of the Supreme Court of India, in *PASL Wind Solutions Private Limited v. GE Power Conversion India Private Limited*[78] conclusively decided that two Indian parties can choose a foreign seat of arbitration.

SUMMARY OF FACTS

Dispute arose between PASL Wind Solutions Pvt Ltd ("PASL") and GE Power Conversion India Pvt Ltd ("GE India") both being incorporated in India GE India being a 99% subsidiary company of General Electric Conversion International SAS (France), which in turn is a wholly-owned subsidiary of the General Electric Company (United States) and PASL Wind Solutions Pvt Ltd, both are companies incorporated under the Companies Act, 1956.both the companies entered in to arbitration agreement where the arbitration clause in the settlement agreement provided for arbitration in accordance with the International Chamber of Commerce Rules and seated in Zurich. The settlement agreement was governed by Indian law.

[78] PASL Wind Solutions Private Limited v. GE Power Conversion India Private Limited, Civil Appeal no. 1647 of 2021.

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In 2017 dispute arose between the two companies PASL initiated arbitration proceedings against GE India as per clause (6) of arbitration agreement. The jurisdiction of the arbitrator was challenged by GE on the ground that two Indian parties cannot choose a foreign seat of arbitration under the Arbitration and Conciliation Act, 1996. The sole arbitrator dismissed GE's application and ruled that two Indian parties can arbitrate outside India and conformed the seat of the arbitration at Zurich but the hearings would be conducted in Mumbai. The arbitration proceedings completed and the arbitrator issued a final award in favour of GE India directing PASL to pay damages and costs.

As PASL's refused to make the payments as per the final award, GE commenced the enforcement proceedings before the Gujarat High Court under Sections 47 and 49 under part 2 of the Arbitration and Conciliation Act, 1996. PASL argued that the enforcement of the award was contrary to Indian public policy and the award was not a foreign award and cannot be enforcement under Sections 47 and 49 of the Act and hence it have to be set aside under Sec 34 of the Act. On 3rd November 2020, the Gujarat High Court decided in favour of GE and upheld the award.

PASL approached the Supreme Court. The appellant have filed petition challenging the seat of arbitration as two Indian parties cannot choose a foreign seat of arbitration (Zurich) as it is widely accepted that two Indian nationals should, as a matter of Indian public policy, not be permitted to derogate from Indian substantive law, this fails to distinguish between the *lex arbitri* and the *lex causae*. The appellant challenged that the award passed in the present case is not enforceable as a foreign award under Part 2 of the Act, as a foreign element is essential when parties arbitrate outside India, as stated in the definition of 'international commercial arbitration' under Section 2(1)(f). The appellant further added that when two Indian parties designate a foreign arbitral seat, would be contrary to Section 23 and 28 of the Indian Contract Act, 1872, as they cannot derogate from Indian substantive law and breach Indian public policy.

The three judge's bench of Supreme Court consisting of Rohinton Fali Nariman, B.R. Gavai, Hrishikesh Roy rejected PASL's appeal and each of its arguments on whether two Indian parties could choose a foreign seat. The Supreme Court also upheld GE India's claim for interim relief to prevent the dissipation of PASL's assets.

CONFLICT WITH PUBLIC POLICY

In the present case the Supreme Court after citing several judgments which lead to the controversy that when two Indian parties chose to foreign arbitration is against Indian public policy, came to the conclusion that when two Indian parties designate a foreign seat of arbitration there cannot be any harm to the public policy and cannot be held void.

Respondent relied up on the judgement of *Atlas Exports Industries v. Kotak and Company* [79]which ruled that such contract is not unlawful under Sec 23 of Indian Contract Act merely because the arbitrators are situated in foreign countries. Similarly such contracts are not void under Sec 28 of Indian Contract Act, 1972 as exception 1 expressly excludes an arbitration agreement. In the present case the Supreme Court stated that *"the balancing act between freedom of contract and clear and undeniable harm to the public must be resolved in favour of freedom of contract, as there is no clear and undeniable harm caused to the public in permitting two Indian nationals to avail of a challenge procedure of a foreign county when, after a foreign award passes muster under that procedure, its enforcement can be resisted in India".*[80]

[79]Atlas Exports Industries v. Kotak and Company, (1999) 7 SCC 61.
[80] See supra note 1.

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Thus the Supreme Court in the present dispute opined that there would be no bar on two Indian parties selecting a foreign substantive law to govern their rights and obligations under the contract and they are free to choose a foreign seat.

PART I AND PART II ARE MUTUALLY EXCLUSIVE

The Court reiterated the established position of law that Part I and Part II of the Arbitration and Conciliation Act, 1996 are mutually exclusive and that the provisions of Part II are not supplementary as well as not overlapping to Part I.

The first issue raised by the appellant was, the seat of arbitration should be at Mumbai and not at Zurich as there were no foreign elements present in the case. The respondent pointed out that the closest connection test is not applicable in the present case as the seat of arbitration is clearly been designated by the parties as given under the arbitration clause in the settlement agreement.

The appellant interpreted the clause under Section 2(2) "unless the context otherwise requires" can be only applied when at least one party resides outside India and stressed that foreign award under Sec 44 cannot be imposed on two Indian party without the involvement of a foreign element.

Respondent argued, Part I and Part II of the Arbitration and Conciliation Act, 1996 have been held to be mutually exclusive in the decision given in *Bharat Aluminium Co v. Kaiser Aluminium Technical Services Inc*[81]. Thus the appellant cannot import the definition of International Commercial Arbitration from Part I of the Arbitration and Conciliation Act, 1996 into Section 44 through the expression "unless the context otherwise requires". Thus the present case explicitly states that Sec 2(1) (a) under Part I, cannot be used for interpreting provisions under Part II.

The present case Supreme Court interpreted, the Part I of Arbitration and Conciliation Act, 1996 only deals with arbitration seated in India and Part II deals exclusively with foreign awards. Supreme Court further held that Sec 2(1) (f) which states the definition of 'International Commercial Arbitration' is applicable only when at least one of the party is a resident outside India, thus said Sec is 'party centric'. However the term 'International Commercial Arbitration' under Sec 44 cannot be interpreted the same. Sec 44 only applies when an arbitration process takes place outside India hence it is 'place centric'. Thus in such circumstances the New York Convention would apply and such award will be classified as 'foreign award'.

PARTY AUTONOMY IS THE GUIDING PRINCIPLE

The party autonomy was held as the guiding spirit of arbitration. The root of the arbitration lies on the freedom of party to opt conditions of the arbitration agreement, place of arbitration, the law governing them etc.

In the present case the respondent interpreted the importance of party autonomy as given in Law and Practice of International Commercial Arbitration "Party autonomy is the guiding principle in determining the procedure to be followed in an International Arbitration. It is a principle that is endorsed not only in national laws, but also by International Arbitral Institutions worldwide, as well as by international instruments such as the New York Convention and the Model Law." [82]

Further the respondent cited Comparative International Commercial Arbitration to show that the autonomy of the parties can be extended to the choice of substantive law, which states "All modern arbitration laws

[81] Bharat Aluminium Co v. Kaiser Aluminium Technical Services Inc, (2016) 4 SCC 126.

[82] ALAN REDFERN AND MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION, pp. 353-414, (6th ed. 2015).

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recognise party autonomy that is, parties are free to determine the substantive law or rules applicable to the merits of the dispute to be resolved by arbitration. Party autonomy provides contracting parties with a mechanism of avoiding the application of an unfavourable or inappropriate law to an international dispute. This choice is and should be binding on the Arbitration Tribunal. This is also confirmed in most arbitration rules."[83]

The Supreme Court in the present case relied on *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc*[84] where it was held that "party autonomy being the brooding and guiding spirit in arbitration, the parties are free to agree on application of three different laws governing their entire contract — (1) proper law of contract, (2) proper law of arbitration agreement, and (3) proper law of the conduct of arbitration, which is popularly and in legal parlance known as "Curial law". Thus in the present case the court upheld the party autonomy and stated that two Indian parties are free to choose foreign seat of arbitration.

PRECEDENT VALUE

PASL's case rested on the controversy that existed under Indian law as to whether two Indian parties could choose a foreign seat. Various High Courts in India had taken a pro-arbitration approach and have given various significant precedent to support the reasoning whereas some of them have opposed the same.

At the first instance the Indian Courts have shut down the door to foreign arbitration on Indian parties as Indian parties are not permitted to seek the advantages of more favourable law under another jurisdiction. The contention of the Supreme Court under the case *TDM Infrastructure Private Limited v. UE Development India Private Limited*[85] was that "when both the companies are incorporated in India and have been domiciled in India, the arbitration agreement entered into by and between them would not be an international commercial arbitration agreement." The same judgement has been adopted to support the reasoning under *Addhar Mercantile Private Limited v. Shree Jagdamba Agrico Exports Pvt. Ltd*,[86] the Bombay High Court held that "the intention of the legislature would be clear that Indian nationals should not be permitted to derogate from Indian law. This is part of the public policy of the country". Thus both the above precedent have restricted the scope of international arbitration in case of dispute between two Indian parties, by holding them against public policy of India and disregarded the principle of party autonomy.

In contrast to the above judgements the Supreme Court in *Atlas Exports Industries v. Kotak & Company*[87], where the allowed two Indian parties to choose international arbitration and upheld the party autonomy by stating that "merely because the arbitrators were situated in a foreign country cannot by itself be enough to nullify the arbitration agreement when the parties have with their eyes open willingly entered into the agreement."

In the said case was relied on by Madhya Pradesh High Court in *Sasan Power v. North American Coal Corporation*[88], concluded that "two Indian Companies are permitted to arbitrate their dispute in a foreign country." The same approach was further taken by the Delhi High Court in *GMR Energy Limited v. Doosan Power Systems India Private Limited*[89].

[83] JULIAN D. M. LEW, LOUKAS A. MISTELIS, AND STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION, pp. 411-437 ,(Kluwer Law International 2003).
[84] See supra note 4.
[85] TDM Infrastructure Private Limited v. UE Development India Private Limited, (2008) 14 SCC 271.
[86] Addhar Mercantile Private Limited v. Shree Jagdamba Agrico Exports Pvt. Ltd, (2015) SCC Online Bom 7752.
[87] See supra note 2.
[88] Sasan Power v. North American Coal Corporation, (2016) 10 SCC 813 (RL-6).
[89] GMR Energy Limited v. Doosan Power Systems India Private Limited, CS (Comm) 447/2017 (RL-7).

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CONCLUSION

From the above research paper it can be concluded that the issue regarding the autonomy of two Indian parties to opt for foreign arbitration has affected various foreign companies with local subsidiaries who prefer to dissolve their dispute through neutral forum. The decision of *PASL Wind Solutions Ltd. v. GE Power Conservation (India) (P) Ltd*[90] can facilitate these entities to choose foreign arbitral seats, like London, Dubai, Singapore etc, even if the subject matter of their contracts and counterparties are entirely situated within India. This development can also facilitate complex transactions involving multiple agreements between parties of different countries.

In the above decision of Supreme Court is a welcome step towards making India more arbitration friendly and thus to transform India in to a hub of arbitration. This decision gives more clarity to Indian parties while opting foreign arbitration. The decision act as a milestone in Indian judicial history as the decision upholds the party autonomy and freedom of contract, which forms the backbone of arbitration.

[90] See supra note 1.