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Supreme Court Demystifies Qualms Concerning Maintainability Of Section 34 Petitions To Challenge Foreign Awards



The Supreme Court (“SC”) in its recent ruling in *Noy Vallesina Engineering SpA v. Jindal Drugs Limited*^[1] has clarified that proceedings under section 34 of the Arbitration & Conciliation Act, 1996 (“Arbitration Act”) would not be maintainable to challenge Foreign Arbitral Awards, even so in respect of Arbitration Agreements that were entered into prior to *Bharat Aluminium Co. v/s Kaiser Aluminium Technical Services, Inc.*^[2] (“BALCO”)^[3], and disputes that arise thereunder.

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Judicial Background: Earlier Judgments

The question as to the whether Part I of the Arbitration act would be applicable to foreign Awards or not had been formally answered in the negative by SC in BALCO. However, an exception to BALCO was sought to be carved out in the present case by contending that arbitration agreements that were entered into prior to BALCO, and disputes that arose thereunder, would continue to be bound by pre-BALCO Rules.

Support to the above contention was sought to drawn from two pre-BALCO decisions of the Supreme Court, namely (i) Bhatia International v. Bulk Trading S. A. & Anr.[4] (“*Bhatia International*”) and (ii) Venture Global Engineering v. Satyam Computer Services Ltd.[5] (“*Venture Global*”). In both of these cases, the Supreme Court had ruled that resort to remedies under Part I of the Act can be made in respect of Foreign Awards. However, the views taken in Bhatia International and Venture Global were held to be incorrect by BALCO.

Thus, essentially the question now to be answered by the court was whether Part I of the Arbitration Act was to be applicable in respect of Foreign Awards in respect of arbitration agreements that were entered into prior to BALCO and disputes that arose thereunder and accordingly would petitions under section 34 of the Arbitration Act could be maintained.

Firstly, that a petition under section 34 of the 1996 Act is not maintainable to challenge Foreign Awards, even in respect of Awards arising out agreements prior to BALCO.

Secondly, that an appeal against an order granting enforcement of foreign award (not being an order appealable under section 50) is not maintainable, even under letters patent appeal.

Why is Part I so sought after?

The question that naturally arises is then why is Part I of the Arbitration Act so important and what added advantage does it offer over and above

Part II which formally applies to foreign Awards. The answer being that Section 34 of the Arbitration Act, which is placed in Part I of the Arbitration Act, permits a challenge to an award on merits, whereas under section 48 of the Arbitration Act, placed in Part II of the Arbitration Act, the court may refuse to enforce a 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 provision sets out the defences open to the party to resist enforcement of a foreign award.

Section 48 does not allow a challenge to a foreign award on merits. A challenge to the foreign Award on merits would have to be pursued in courts having supervisory jurisdiction over such foreign seated arbitrations. Section 48 does not ipso facto confer jurisdiction on Indian courts for annulment of an award made outside the country. So far as India is concerned, the Arbitration Act does not confer any such jurisdiction on the Indian courts to annul an international commercial award made outside India. It is only when the award is sought to be enforced in India, can resort to section 48 be made.

What did the court hold?

Rejecting the plea, the court held that there exists a clear dichotomy between Part I and Part II of the 1996 Act. The court drew inspiration from BALCO to the effect that if the agreement is found or held to provide for arbitration outside India, then a provision that the 1996 Act would govern the Arbitration proceedings would not make Part I of the 1996 act applicable or enable Indian Courts to exercise supervisory jurisdiction. Such awards would be subject to the jurisdiction of Indian courts when the same are sought to be enforced in India in accordance with the provisions contained in part II of the 1996 Act.

The court ultimately held that having regard to the precedential unanimity about the manner of applicability of BALCO in respect of agreements entered into and awards rendered earlier, with respect to the law of the seat of arbitration (the curial law) excluding applicability of Part I of the Arbitration Act, the impugned judgement cannot be sustained.

Maintainability of appeals under section 50

The court further considered the scope of appeals under section 50 of the Arbitration Act. Section 50 of the Arbitration Act provides for a restrictive category of appealable orders and prohibits appeals in other matters. Section 50 *inter-alia* provides that an appeal shall lie against an order *refusing* to enforce a foreign award under section 48. The court relied upon

judgments to the effect that the 1996 Act is a complete code in itself and a letters patent appeal was not available. The Court noticed that the decision in *Feurest Day Lawson Ltd. v. Jindal Exports Ltd.*^[6] had unambiguously ruled out the maintainability of any appeal against an order granting enforcement of a foreign Arbitral Award. The Court thus termed the appeal against order *granting* enforcement of foreign awards as not maintainable.

Conclusion

This judgment is of prime importance as it confirms two key principles of arbitration jurisprudence. Firstly, that a petition under section 34 of the 1996 Act is not maintainable to challenge Foreign Awards, even in respect of Awards arising out agreements prior to BALCO. Secondly, that an appeal against an order granting enforcement of foreign award (not being an order appealable under section 50) is not maintainable, even under letters patent appeal.

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^[1] Dated 26.11.2020 in Civil Appeal No. 8607/2020

^[2] (2012) 9 SCC 552

^[3] Foreign Arbitration – The New Road Ahead –
https://www.hariani.co.in/newsletters/85819_newsletter_september_13.pdf

^[4] (2002) 4 SCC 105

^[5] (2008) 4 SCC 190

^[6] (2011) 8 SCC 333

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