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Important Judgement for CLAT PG: Pasl Wind Solutions Pvt Ltd vs. Ge Power Conversion India Pvt Ltd

Indrasish Majumder · 08 Feb 2023

Bench: Rohinton Fali Nariman, B.R. Gavai, Hrishikesh Roy Date of Direction: 20 April 2021

Facts of the Case

The dispute pertaining to the supply and warranties of certain converters arose between two Indian parties, PASL Wind Solutions Pvt. Ltd. (PASL), the appellant, and GE Power Conversion India Pvt. Ltd. (GE), the respondent; both are companies incorporated under the Companies Act, 1956, with their registered offices at Ahemdabad, Gujarat, and Chennai, Tamil Nadu, respectively. Further, GE is a 99.9% subsidiary of General Electric Conversion International SAS, France, which in turn is a subsidiary of the General Electric Company, United States.

At the time of the dispute arising between the parties, PASL issued a request for arbitration to the International Chamber of Commerce as per Cl. 6 of the settlement agreement. The relevant portion of Clause 6 is reproduced here:

In case no settlement can be reached through negotiations, all disputes, controversies, or differences shall be referred to and finally resolved by arbitration in Zurich in the English language.

A preliminary objection was raised by GE with respect to the seat of arbitration; however, the arbitrator ruled that the seat of arbitration is Zurich, Switzerland. GE suggested Mumbai as the most convenient venue to hold arbitration proceedings so as to reduce the cost. PASL objected to the suggestion. The Tribunal, however, agreed to the suggestion and decided that, while the seat would be in Zurich, all hearings would be held in Mumbai. The arbitral award was passed in favour of GE.

After the passing of the final award, GE called upon PASL to pay the amounts granted vide the said award; however, PASL failed to oblige, and GE initiated enforcement proceedings under Sections 47 and 49 of the Arbitration Act before the High Court of Gujarat, within whose jurisdiction the assets of the appellant were located. At this stage, PASL resisted the enforcement of the arbitral award on the ground that the seat of arbitration was Mumbai, where all the hearings of the arbitral proceedings took place. The said argument of PASL was rejected by the Gujarat High Court, which upheld the enforcement of the arbitral award, against which PASL filed a special leave petition before the Supreme Court.

Applicable Laws

The laws and provisions applicable are:

- Sections 47 and 49 of the Arbitration Act 1996
- Section 2(2) of the Arbitration Act, 1996
- Section 23 of the Contract Act, 1872
- Section 2(1)(f) of the Arbitration Act (Part I)
- Section 28 of the Contract Act

Issues

- Whether two companies incorporated in India can choose a forum for arbitration outside India?
- Whether an award made at such a forum outside India, to which the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards applies, can be said to be a “foreign award” under Part II of the Arbitration and Conciliation Act, 1996, and be enforceable as such?

Arguments of the parties before the Supreme Court

PASL argued that two Indian parties cannot designate a seat of arbitration outside India.

(i) Because doing so would be in violation of Section 23 of the Contract Act, 18726 (the Contract Act), as well as Sections 28(1)(a) and 34(2)(A) of the Arbitration Act;

(ii) Parties could avoid India’s substantive law by choosing a foreign seat, which would go against the country’s public policy;

(iii) That foreign awards, as defined by Part II of the Arbitration Act, can only be obtained in international commercial arbitrations. It was said that the definition of "international commercial arbitration" in Section 2(1)(f) of the Arbitration Act (Part I) says that at least one of the parties to the arbitration is a foreign national, a company incorporated in a country other than India, an association whose central management or control is outside India, or a foreign government; and

iv) Based on the closest connection test, the arbitration would have to take place in Mumbai, not Zurich, because there was no foreign element and the dispute between the two parties was about a contract that had to be fulfilled entirely in India.

GE said that the Arbitration Act doesn't stop Indian parties from choosing a place outside of India.

(i) It is a well-established rule of law that Parts I and II of the Arbitration Act can't be used together, so "unless the context otherwise requires" in Section 44 can't be used to bring the definition of international commercial arbitration (ICA) from Part I of the Act into Section 44;

(ii) That, unlike the definition of "international commercial arbitration" in Section 2(1)(f) of Part I, the nationality, domicile, or residence of the parties has nothing to do with whether or not Section 44 of the Arbitration Act applies;

(iii) Neither Section 23 nor Section 28 of the Contract Act require arbitrators to choose a foreign seat. In fact, the Contract Act's exception to Section 28 makes it clear that arbitration is not covered by Section 28, which is a clear endorsement of party autonomy and the basis of the Arbitration Act.

(iv) The arbitration clause in the settlement agreement, along with the arbitrator's procedural rules, designated Zurich as the seat and Mumbai simply as a convenient location, which both parties recognised and which must control the arbitral proceedings in this case.

Judgement

Based on the definition of "foreign award" in Section 44 of the Arbitration Act, it is not clear whether the parties or the Tribunal chose the seat. The arbitration seat in Mumbai (India) was rejected. The Court also held that the closest connection test would apply only if, as in the instant case, the parties, by their express consent, designated Zurich as the seat of arbitration and Mumbai as the venue.

The Court clarified that an ICA and a foreign award are not the same. An award made in a state other than the state where enforcement is sought is a foreign award. The nationality, domicile, and residence of parties are irrelevant to determining whether an award is a foreign award or not. The majority of the contracting states of NYC consider the “seat” chosen by the parties or the tribunal as the place where the award is made. The concept of a foreign award is thus “seat-oriented” rather than “party-oriented.”

The Court clarified that an ICA and a foreign award are not the same. An award made in a state other than the state where enforcement is sought is a foreign award. The nationality, domicile, and residence of parties are irrelevant to determining whether an award is a foreign award or not. However, the parties’ nationality, domicile, and residence would be relevant in determining whether an award is an ICA or not. The majority of the contracting states of NYC consider the “seat” chosen by the parties or the tribunal as the place where the award is made. The concept of a foreign award is thus “seat-oriented” rather than “party-oriented.”

In PASL Wind Solutions, the Supreme Court, after citing numerous judgements on public policy and referring to Sections 23 and 28 of the Contract Act, came to the conclusion 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 refer their dispute to arbitration at a neutral forum outside India.

The Court accepted the argument of the respondent GE that the parties in the present scenario will have two bites at the cherry, i.e., by challenging the award under Swiss law in Zurich and, second, by resisting the enforcement under the grounds mentioned in Section 48 of the Arbitration Act. The Supreme Court concluded that Section 48 of the Arbitration Act provides sufficient safeguards against the enforcement of an award that is violative of public policy. If two Indian citizens are found to have broken a law that is important to India’s public policy or if it is found that enforcing a foreign award would go against India’s public policy, Indian courts may refuse to enforce that foreign award.

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