GLENCORE INTERNATIONAL AG V. INDIAN POTASH LIMITED AND ANOTHER (2019) 263 DLT 663

Delhi High Court; single-judge bench, Rajiv Shakdher J; decided on 9 August 2019

Stamping of an award, natural justice, notions of justice, arbitral procedure, the fundamental policy of Indian law *et. al.*

Enforcement of two foreign awards–final award and cost award–passed in a Singapore seated arbitration was resisted under Section 48 of the ACA claiming:

(i) The awards were not stamped.

(ii) Section 48 (1) (d) of the ACA was attracted because:

   a. There was no agreement between the parties on procedural rules. Therefore, the composition of the tribunal and arbitral proceedings should have been in accordance with the International Arbitration Act of Singapore ("IAA") and the Model Law, which govern international commercial arbitrations conducted in Singapore. However, erroneously, the rules of SIAC were applied.

   b. Although both under IAA/Model law and SIAC Rules, SIAC Chairman was the authority competent to appoint the arbitrator in the event of disagreement between parties, SIAC had assumed jurisdiction on the wrong premise that rules framed by it applied to the arbitration.

   c. Had the tribunal been validly constituted, the procedure laid down under the Model law would have applied. But, instead, the expedited procedure under Rule 5 of SIAC Rules was applied.

(iii) Sections 48 (1) (b) and 48 (2) (b) were attracted. The tribunal violated principles of natural justice and the award conflicted with most basic notions of justice because:

   a. The tribunal did not rule on its jurisdiction as a preliminary matter but at the time of pronouncing the final award, depriving IPL of an opportunity to appeal under the IAA.

b. The tribunal permitted Glencore to amend its opening statement at the stage of final hearing.

The court dismissed all objections:

(A) MUST A FOREIGN AWARD BE STAMPED?

The court held no–as decided by the Supreme Court in *Shriram EPC Limited* v. *Rioglass Solar SA*.[12] Besides, it could not be the legislative intent (behind the ACA) to insist stamping of a foreign award in India as stamp duty (often) differs from state to state. It would be impossible for the enforcer to pay stamp duty in every state.

(B) ON THE COMPOSITION OF THE TRIBUNAL AND ARBITRAL PROCEDURE: SIAC V. IAA

The arbitration agreement referred to the rules of "Singapore International Arbitration of the Chambers of Commerce." Since no such arbitral institution existed, the tribunal relied on extrinsic evidence (drafting history) to construe that parties intended SIAC Rules to apply. In adopting this interpretive route, the tribunal applied the *lex arbitri*, i.e., the Singaporean law, as laid down in *Zurich Insurance (Singapore) Pte Ltd.* v. *B-Gold Interior Design & Construction Pte Ltd*.[13]

This approach was also in consonance with the Indian law on the interpretation of written contracts. Even if it were different, the court would be very slow in interfering with the enforcement of the final award because the *lex arbitri* was Singapore law. Even assuming there was a procedural defect, enforcement could not be refused because no prejudice was caused to IPL. Whether SIAC Rules applied or IAA/ Model Law, the competent authority to appoint arbitrators if parties disagreed was the same (SIAC's Chairman).

Courts ought to enforce an award if the procedural defect had not led to the failure of justice.

---

[12] (2018) 18 SCC 313

[13] (2008) 3 SLR(R) 10293.

If *Pricol Ltd.* v. *Johnson Controls* (2015) 4 SCC 177 had a precedential value or not required no discussion because the *lex arbitri* was Singaporean law.[14] But, it is relevant to emphasize that decisions that are not binding precedents can have persuasive value.

(C) ON NATURAL JUSTICE AND NOTIONS OF JUSTICE

There is no fundamental policy in Indian law that adjudicating authorities should mandatorily render decision on jurisdictional issues before hearing the matter on merits. The judge has discretion. Section 10 (2) of the IAA is in sync and provides that an arbitral tribunal may rule on a plea of jurisdiction at any stage of the arbitral proceedings.

Order XIV Rule 2 of the CPC would take to the same conclusion. If the question is mixed, of both fact and law, the court would ordinarily deal with it at the final stage. The issue of whether SIAC had jurisdiction was a mixed question of fact and law.

Rule 17.5 of the SIAC Rules empowers the tribunal to allow amendment of pleadings. The overarching principle is that the amendment should not fall outside the scope of the arbitration agreement. There is nothing in that rule barring an amendment on the date of the final hearing. While exercising its discretion to allow an amendment to pleadings, the arbitrator allowed IPL to respond, which it failed to avail.

---

[14] *Glencore* cited to *Pricol's* case in which the contract referred to an institution not in existence. IPL contended that *Pricol* was decided by the delegate of the Chief Justice of India, a judicial authority not a court of record, while exercising powers under Section 11 of ACA and, therefore, would have no precedential value.