

Arbitrator's Bias Is Covered Under Public Policy Ground Of The New York Convention; Challenge In This Regard Must Be Made Before The Seat Court: Supreme Court Of India

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Introduction

In a recent decision in *Avitel Post Studioz Limited v. HSBC PI Holding (Mauritius) Limited*¹, the Supreme Court rendered a pivotal decision on the enforcement of foreign arbitral awards. The Supreme Court clarified that Indian Courts must adopt an internationalist approach when dealing with foreign award enforcement matters, strictly aligning themselves with the provisions of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**") and the principles of the New York Convention². Speaking of allegations of arbitrator's bias, the Supreme Court highlighted the need to have a high threshold, only justifying the refusal of enforcement when the most fundamental notions of morality and justice were violated. In this article, we briefly navigate through the facts and findings in the above-mentioned case.

Brief Facts

The respondent, HSBC PI Holdings (Mauritius) Limited ("**HSBC**"), is a company incorporated in Mauritius.

The first appellant, Avitel Post Studioz Limited ("**Avitel India**"), is a company incorporated under the laws of India and is the parent company of the Avitel Group. Avitel India holds the entire issued share capital of Avitel Post Studioz FZ LLC. The second appellant is the founder, chairman and director of Avitel India, while the third and fourth appellants are the second appellant's sons and also the directors of first appellant company.

On 21.04.2011, a Share Subscription Agreement was entered between HSBC and Avitel India whereby HSBC made an investment in the equity capital of Avitel India for a consideration of USD 60 million to acquire 7.8% of the paid-up capital. This agreement contained an arbitration clause which provided for the resolution of disputes at the Singapore International Arbitration Centre ("**SIAC**") with the seat of arbitration being Singapore.

Subsequently, to further define the relationship between the parties, a Shareholders' Agreement dated 06.05.2011 containing an identical arbitration clause came to be executed.

As per HSBC (award holder), the appellants at an advanced stage of the transaction made certain representations to HSBC stating that the investment of USD 60 million was required to service a significant contract with the British Broadcasting Corporation ("**BBC**").

Following the investment, the appellants ceased to provide any information regarding the purported contract with BBC despite a number of follow-up attempts. Finally, HSBC

¹ *Avitel Post Studioz Limited v. HSBC PI Holding (Mauritius) Limited*, 2024 INSC 242.

² Travaux Préparatoires, Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.

engaged an independent investigation agency which discovered that the BBC contract never existed, and the invested amounts were actually siphoned off to different companies.

As disputes arose amongst the parties, HSBC invoked the arbitration clause in May 2012 and claimed damages to the tune of USD 60 million from the appellants. Ultimately, in September 2014, the arbitral tribunal rendered its final award and directed the appellants to pay USD 60 million as damages for fraudulent misrepresentations.

To protect the subject matter of the arbitral award, a Section 9 petition under the Arbitration Act came to be filed in the High Court of Bombay. In the proceedings under Section 9 of the Arbitration Act, a direction was issued to the appellants to deposit an amount of USD 60 million for the purpose of enforcement of the arbitral award.

Aggrieved by the decision of the High Court directing the deposit of the awarded amount, the appellants engaged in multiple rounds of litigation, ultimately filing a special leave petition before the Supreme Court of India, where it was contended, amongst other things, that the disputes *inter se* the parties were non-arbitrable under the Indian law as the matter involved allegations of serious criminal offences including fraud.

In the above circumstances, the Supreme Court rendered the landmark decision in *Avitel Post Studioz v. HSBC PI Holdings*³, settling the law on arbitrability of fraud by holding that merely because there were allegations of fraud, a matter would not be rendered non-arbitrable.

Eventually, enforcement proceedings came to be initiated wherein two orders came to be passed. Firstly, the High Court of Bombay facilitated the enforcement of the final award dated 27.09.2014 issued in the SIAC arbitration. Further, the appellants' objections to the enforcement of the foreign award in terms of Section 48 of the Arbitration Act came to be rejected. Aggrieved by the aforesaid orders, the appellants challenged the order dated 25.04.2023, passed by the High Court of Bombay facilitating the enforcement of the final award dated 27.09.2014.

Submissions

The appellants argued that the presiding arbitrator in the arbitral proceedings had failed to make a full and frank disclosure of material facts and circumstances concerning potential conflicts of interest. Therefore, the arbitral award rendered by the arbitral tribunal was against public policy in terms of Section 48(2)(b) of the Arbitration Act.

The appellants referred to the IBA Guidelines on Conflict of Interest in International Arbitration, 2004 ("**IBA Guidelines**") along with Red, Orange, and Green lists appended thereto covering matters concerning disclosure and conflict of interest to argue that the High Court ought to have refused the enforcement of the award.

The respondents submitted that the concerned party in the arbitral proceedings was HSBC PI Holdings (Mauritius) Limited, a subsidiary of HSBC PLC (United Kingdom). The other subsidiary is HSBC (Singapore) Nominees Pte Ltd. which is alleged to have a contractual relationship with Wing Tai. Insofar as the presiding arbitrator was concerned, he has been an independent non-executive director of Wing Tai since 28.10.2013 and also the chairman

³ *Avitel Post Studioz v. HSBC PI Holdings*, 2020 INSC 498.

of the audit and the risk committee of Wing Tai. However, Wing Tai had no relationship with the award holder and was not a part of the HSBC Group. Thus, as per the respondents, the concerns raised by the appellants with respect to bias were unfounded.

Moot Question

The Supreme Court culled out the following fundamental issues in the present matter:

- (i) Whether the High Court was correct in its decision to reject the appellants objection under Section 48(2)(b) of the Arbitration Act against enforcement of the foreign award on the grounds of bias and violation of public policy?
- (ii) Whether the ground of bias can even be raised at the stage of enforcement under Section 48(2)(b) of the Arbitration Act?

Findings

The Supreme Court observed that India is one of the earliest signatories of the New York Convention which superseded the Geneva Convention of 1927 to facilitate the enforcement of foreign arbitral awards.

Under the New York Convention, the recognition and enforcement of an arbitral award may be refused⁴ if the (i) subject matter of the difference is not capable of being settled by arbitration, and (ii) the recognition or enforcement of the award would be contrary to the public policy of the country where the award is being enforced.

The predecessors to the New York Convention provided for an expansive scope for invoking the public policy ground based on the violation of the fundamental principles of law. The Supreme Court reiterated the notion that "public policy" is a "very unruly horse"⁵, however, with a good person on the saddle, the unruly horse can be kept in control.⁶

(i) Limited Scope Of Intervention Under The New York Convention

The Supreme Court referred to the decision in *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier*⁷ where the United States Court of Appeals, Second Circuit discussed about the pro-enforcement bias under the New York Convention and the need to construe the public policy defense narrowly. The decision in *Parsons & Whittemore*⁸ had held that the enforcement of arbitral awards may be denied "only where enforcement would violate the forum state's most basic notions of morality and justice".

The above decision came to be followed by the Supreme Court of India in *Renusagar Power Co. Ltd. v. General Electric Co.*⁹ In fact, the words "forum state's most basic notions of morality and justice" were legislatively adopted in the Arbitration Act.

⁴ Article V(2) of the New York Convention.

⁵ *J. Burrough, Richardson v. Mellish*, (1824) 2 Bing. 229 at 252.

⁶ *Enderby Town Football Club Ltd. v. The Football Association Ltd.*, [1971] Ch 591.

⁷ 508 F.2d 969 (1974).

⁸ 508 F.2d 969 (1974).

⁹ 1994 Supp (1) SCC 644.

In view of the above discussion, the Supreme Court opined that minimal judicial intervention in foreign award's enforcement was the norm and intervention could only be warranted based on the exhaustive grounds mentioned under Section 48 of the Arbitration Act.¹⁰ As such, a review of the merits of the dispute is impermissible.¹¹

The Supreme Court reiterated the law laid in its earlier decision in *Vijay Karia v. Prysmian Cavi E. Sistemi SRL*¹² to hold that Section 50 of the Arbitration Act does not provide for an appeal against a foreign award enforced by a judgment of the High Court. Hence, an appeal should be seldom entertained and only with a view to settle the law.

In the words of the Supreme Court, a party resisting enforcement could only have one bite at the cherry and when it loses in the High Court, the limited scope for interference could be merited only "*in exceptional cases of blatant disregard of Section 48*".¹³

As a matter of principle, the Supreme Court noted that some countries have recognised that when applying the public policy ground to foreign/ convention awards, the Courts should look at the matter from an international perspective and not a domestic perspective. For instance, the arbitration law in France made an explicit distinction between national and international public policy concerns limiting refusal of enforcement only on the latter grounds. The Supreme Court observed that the scholarly opinion was strongly against the notion that reliance should be placed on local public policies without international limitations.¹⁴

To further highlight the limited scope of interference, the Supreme Court referred to the decision in *Shri Lal Mahal Ltd. v. Progetto Grano SpA*¹⁵ wherein it was held that the wider meaning given to public policy of India in the domestic sphere under Section 34 of the Arbitration Act was held to be non-applicable to objections raised under Section 48(2)(b) of the Arbitration Act. Thus, the grounds for resisting a foreign award were much narrower than the grounds available for a domestic award under Section 34 of the Arbitration Act.

(ii) Tracing The Indian Legal Position On Bias

It was observed that even though the New York Convention did not explicitly mention bias, the possible grounds for refusing recognition of foreign awards were contained under Article V. Speaking on bias, the Supreme Court opined that the Courts across the world have applied a higher threshold on bias to prevent enforcement of an award. Thus, as a matter of principle, arbitral awards would seldom be refused to be enforced on alleged partiality.¹⁶

¹⁰ *Union of India v. Vedanta*, (2020) 10 SCC 1.

¹¹ *Shri Lal Mahal Ltd. v. Progetto Grano SpA*, (2014) 2 SCC 433.

¹² (2020) 11 SCC 1.

¹³ *Union of India v. Vedanta*, (2020) 10 SCC 1.

¹⁴ Gary Born, *International Commercial Arbitration* (3rd ed, 2021) 2838; Robert Briner, *Philosophy and Objectives of the Convention* in *Enforcing Arbitration Awards under the New York Convention. Experience and Prospects* (United Nations 1999).

¹⁵ (2014) 2 SCC 433.

¹⁶ Stavroula Angoura, 'Arbitrator's Impartiality Under Article V(1)(d) of the New York Convention' (2019) 15 (1) AIAJ 29.

More importantly, the Supreme Court observed that the Courts across the world did not adopt to a uniform test while dealing with the allegations of bias. The standards for determining bias varied across different legal systems and jurisdictions.¹⁷

In view of the above, the Supreme Court opined that it is only when the most basic notions of morality and justice are violated that the ground of public policy may be attracted. It was further held that the term "most basic notions of morality and justice" includes allegations on bias.

Reverting to the facts of the matter, the Supreme Court noted that the award in the matter was passed in Singapore - a New York Convention country also notified as a reciprocating territory by India. Further, the parties had expressly chosen Singapore to be the seat of the arbitration. As such, the relevant Court located at the seat of the arbitration had the exclusive supervisory jurisdiction to determine claims for a remedy relating to the existence or scope of arbitrator's jurisdiction or the allegation of bias. A contrary approach, as per the Supreme Court, would go against the scheme of the New York Convention which has been incorporated in India.

Notably, in the present matter, no setting aside challenge based on bias was raised before the concerned Court located at Singapore by the appellants within the limitation period. In this regard, the High Court of Bombay in a judgment in *Perma Container (UK) Line Limited v. Perma Container Line (India) Ltd.*¹⁸ had noted that since the objection of bias was not raised in appropriate proceedings under the applicable law, it could not be raised at the post-award stage. Similar views were also taken in the decision in *Vijay Karia*¹⁹.

The Supreme Court noted that the circumstances alleged by the award debtor/ appellants for arbitral bias was the purported business interaction between one of the group companies of the award holder with independent private companies where the presiding arbitrator was an independent and non-executive director. However, going by the IBA Guidelines, it was held that neither of the private companies named by the appellants fell within the definition of an "affiliate" of the award holder. Therefore, no reasonable third person could have come to the conclusion that there existed justifiable doubts on impartiality and independence of the presiding arbitrator.

Conclusion

After having examined the case thoroughly, the Supreme Court was of the view that the High Court had rightly held that the award-debtors failed to substantiate the allegation of bias, conflict of interest or failure by the presiding arbitrator to render full disclosure to the parties. Even otherwise, the award-debtor/ appellants had failed to challenge the appointment of the arbitrators in the relevant Court located at Singapore. Such being the position, the Supreme Court dismissed the appeals.

¹⁷ Vibhu Bakhru J., 'Impartiality and Independence of the Arbitral Tribunal' in Shashank Garg(ed), Arbitrator's Handbook (Lexis Nexis 2022).

¹⁸ 2014 SCC OnLine Bom 575.

¹⁹ (2020) 11 SCC 1.

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