

Powers of Indian Courts to grant Anti-Arbitration Injunctions¹

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India is still a litigation country and people are more comfortable with litigations than other modes of dispute resolution. But Arbitration is also a popular, private and alternate dispute resolution mechanism and it is Governed by Arbitration and Conciliation Act,1996 in India. After the 1996 Act and more particularly after 2015 Arbitration and Conciliation (Amendment) Act, it is also being considered as one of the progressive arbitration country in Asia. But the anti-arbitration injunctions issued by Indian National courts have always created a bad PR, since it always creates a doubt about the consistency of judicial verdicts on arbitration related litigation matters. One of such recent case which created a controversy was an anti-arbitration injunction issued in McDonald case (2016) SCC online Del 3949, restraining an arbitration seated in London. Even though the said injunction issued by the single Judge was revoked by the Division bench of the High Court, it created a lot of ripples in the arbitration circles across the world. Hence the endeavor of the author in this article is to analyze the powers of the Indian Courts to grant such anti arbitration injunctions against both India and Foreign seated arbitrations.

Powers of the Supervising National Courts Even though arbitration is a private dispute resolution mechanism, the national courts are given the powers to supervise the arbitrations. The said power also includes appointment of arbitrators, interim orders, replacement of arbitrators, recognition and enforcement of arbitration awards etc., These powers are exercised as per the procedural law applicable to the seat of arbitration. Many Countries have taken away the applicability of Civil Codes to arbitrations. But still Courts have certain powers by way of inherent jurisdiction or powers of equity or civil code, which are invoked by parties while seeking anti-arbitration injunctions.

There was an arbitration clause between McDonald and the Indian parties in their JV agreement which provided for a London seated arbitration with Indian laws as applicable laws. The Indian parties chose to file applications before the company law tribunal seeking to restrain McDonald from indulging in oppressive actions and mismanagement of the JV. McDonald initiated the arbitration in London. The Indian parties filed a suit seeking an injunction against the London seated Arbitration on various grounds including forum Non Conveniens, pendency of Multiple proceedings on the same subject matter, waiver by McDonald of its right to arbitrate by withdrawing an application before the Company Law tribunal, inoperative arbitration clause etc.,. The Single Judge came to a conclusion that the arbitration clause having Indian laws as applicable laws, cause of action arose in India, except

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one party all are from India and hence having the arbitration in London is a forum inconvenience and hence granted the injunction against the London seated arbitration.

Hence Mc Donald filed an appeal before the Division Bench and the judgment of which is the subject matter of the present Appeal. The following are the main issues arose in the said case:

Forum Non Conveniens is the first contention raised by the petitioner before the Single Judge of the High Court. The doctrine of Forum inconvenience is a doctrine, invoked by the defendants while there are two courts having jurisdiction over the subject matter and the plaintiff has chosen an inconvenient forum to file his suit. Hence on the application of the defendant the Court in which the matter is pending may decide either to continue with the case or to transfer the same to the other Court. Hence it can be understood that the court in which the case is pending, decides whether to continue or not. But in the present case Single judge wrongly used the said doctrine for issuing injunction against a proceeding which is not before him, which is not permissible. More over Non Conveniens is governed is essentially an equitable common law principle but in India it is governed by Code of Civil Procedure hence defendant could have invoked Section 24 and 25 of CPC. But it is important to note that a Court in India cannot refuse to entertain the case filed before it, if it also has jurisdiction over the subject matter of the case.

The Division Bench held that no court has powers to grant injunction against an arbitration, when the said arbitration agreement is a valid one. The valid arbitration agreement is one which is neither null and void, nor inoperative or incapable of being performed. The court also held following World Sports Group Vs MSM Satellite (Singapore) PTE limited (2014) 11 SCC 639 Judgment that the existence of multiple legal proceedings can also not a valid reason for granting an anti-arbitration injunction. The Division Bench further held that the Indian courts have the powers to grant anti-arbitration injunction under the provisions of Code of Civil Procedure, only when the arbitration clause is null and void or inoperative or incapable of being performed. The said finding was given by court because of S. 45 of the Arbitration and Conciliation Act, 1996 that mandates reference to arbitration unless “it finds that the said arbitration agreement is null and void, inoperative or incapable of being performed” which is the reflection of Article II of the New York Convention on recognition and enforcement of Foreign awards.