TWO INDIAN COMPANIES CAN RESOLVE THEIR DISPUTES BY WAY OF A FOREIGN SEATED ARBITRATION - Supreme Court of India

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The Supreme court of India in its recent judgment, in the matter of PASL Wind Solutions[2] delivered on 20th April 2021, held that two or more Indian parties can resort to a foreign seated arbitration to resolve their disputes and further held that an award that arose out of the foreign seated arbitration can be enforced in India under New York Convention on recognition and enforcement of foreign awards. The above said judgment enhances the supremacy off party autonomy in selecting the arbitration seat and in selecting the arbitration procedure. The court further held that such an act of choosing a foreign seat by 2 or more Indian Nationals does not amount to violation of public policy of India. By this judgment the Supreme Court of India has differentiated foreign seated arbitrations from the international commercial arbitrations held in foreign seats. Hence, Indian parties can choose a foreign seated arbitration and effectively exclude the Indian courts in the stage of challenging of the awards. Moreover, such an award being a foreign seated award, it will enjoy narrow interpretation of public policy at the stage of enforcement of the said award in India. Even though this judgment is a good news for the parties that are frustrated due to the delayed disposal of the applications challenging the arbitration awards passed in India due to huge pendency of cases in Indian Courts but is a bad news for those who were dreaming for an Indian arbitration hub.

The appellant is a company incorporated under the Companies Act,1956 with its registered office at Ahmedabad Gujarat. The respondent is a company incorporated under the Companies Act 1956 of India with its registered officer Chennai Tamil Nadu and a 99% subsidiary of General Electric conversion international SAS, France, which in turn is a subsidiary of the General Electric company, United States. In the year 2010, the appellant issued 3 purchase orders to the respondent for supply of certain converters. Pursuant to these purchase orders , the respondent supplied 6 converters to the appellant. However, disputes arose between the parties in relation to the expiry of the warranty of the said converters. In order to resolve this disputes the party entered into a settlement agreement which contained the dispute resolution clause as well. The dispute resolution clause provided for an arbitration seated in Zurich , the language of arbitration shall be English and the rules of arbitration will be the rules of conciliation and arbitration of international Chamber of Commerce.

The appellant initiated the arbitration under ICC rules and the respondent filed preliminary objection challenging the jurisdiction of the arbitrator on the ground that two Indian parties parties could not

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[2] PASL Wind Solutions Private Limited Vs GE Power Conversion India Private Limited (2021) SCC Online SC 331

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have chosen a foreign seat of arbitration. The said objection was dismissed by the arbitral tribunal citing various judgements of the Supreme Court of India holding that the applicability of Section 28 of the Indian contract act is restricted to substantive law of the contract and does not apply to the seat of arbitration / proper law. After that the parties proceeded with the proceedings by selecting Mumbai as the venue of arbitration and the final award was passed by the arbitrator on 18.04.2019. After the said award the respondent called upon the appellant to pay the amounts granted by the arbitrator in the above said award. Since the appellant failed to make the payment as per the arbitration award the respondent initiated enforcement proceedings under section 47 and 49 of the Arbitration Act[3] in the High Court of Gujarat, within whose jurisdiction the assets of the appellant where located. The appellant took a stand that the seat of arbitration was Mumbai since the actual arbitration proceedings happened in Mumbai. The appellant also filed an application under section 34 of the Arbitration Act challenging the remove said arbitration award in the High Court of Ahmadabad. The appellant came on appeal to the Supreme Court of India on the order of the High Court recognising the enforcement of the above said arbitration award.

Citing various judgments of the Supreme Court and the high courts of India, the court held that freedom of contract needs to be balanced with clear undeniable harm to the public, even if the facts of a particular case do not fall within the crystallised principles enumerated in the well-established 'heads' of public policy. The court further held that exception 1 to section 28 of the Contract Act specifically saves the arbitration of disputes between two persons without reference to the nationality of persons who may resort to arbitration. It further stated that the Supreme Court of India took a similar view in the case of Atlas[4] for the same reason. It further held that it can be seen from Section 28(1)(a) of the Arbitration Act when it is read with Sections 2(2), 2(6) and Section 4, it makes clear that in case of an arbitration other than the international commercial arbitration, the arbitrator shall decide the disputes according to the substantive laws of India and it cannot be taken as a bar for Indian parties choosing a foreign seat of arbitration. The Court further dealt with the importance of Party autonomy and held that the awards arose from a foreign seated arbitration between two Indian parties are enforceable in India, under New York Convention.

[3] Arbitration and Conciliation Act, 1996.
[4] Atlas Exports Vs Kotak & Company (1999)7SCC 61

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