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Case Comment: Gemini Bay Transcription Pvt. Ltd. vs Integrated Sales Service Ltd. & Anr.

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INTRODUCTION

Without having any dispute resolution clause in contracts between corporations, international transactions lack predictability and order when disputes between parties arise.¹ There are different methods of resolving disputes between parties, the most commonly preferred one is arbitration, which can be incorporated in the contracts in an arbitration clause. Under an arbitration clause, both the parties to the contract, if a dispute arises, appoint a neutral third person or persons who then adjudicate the dispute and the award passed will be binding on both parties.² One of the most interesting questions in this arena of law is “Can a non-signatory to a contract be bound to this arbitration clause?” Recently the Supreme Court of India made certain observations on this question in the case of *Gemini Bay Transcription Pvt. Ltd. v Integrated Sales Service Ltd. & Anr.*³

¹ *Scherk v Alberto-Culver Co* 417 US 506, 516 (1974)

² *Ibid*

³ *Gemini Bay Transcription Pvt Ltd v Integrated Sales Service Ltd & Anr* Civil Appeal Nos 8343-8344/2018

LAWS INVOLVED IN THE CASE

The case involves different provisions of the Arbitration and Conciliation Act, 1996,⁴ (hereinafter “the Act”)

- **S.44. Definition** – *In this chapter, unless the context otherwise requires, “foreign award” means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October 1960 –*
 - (a) *in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies, and*
 - (b) *in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which the said Convention applies.*⁵
- **S.46. When foreign award binding** – *Any foreign award which would be enforceable under this Chapter shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set-off or otherwise in any legal proceedings in India and any references in this Chapter to enforcing a foreign award shall be construed as including references to relying on an award.*⁶
- **S.47. Evidence** – (1) *The party applying for the enforcement of a foreign award shall, at the time of the application, produce before the court –*
 - (c) *such evidence as may be necessary to prove that the award is a foreign award.*⁷
- **S.48. Conditions for enforcement of foreign awards** – (1) *Enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the court proof that –*

⁴ Arbitration and Conciliation Act 1996

⁵ Arbitration and Conciliation Act 1996, s 44

⁶ Arbitration and Conciliation Act 1996, s 46

⁷ Arbitration and Conciliation Act 1996, s 47(1)(c)

(a) the parties to the agreement referred to in section 44 were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration.⁸

BACKGROUND

On 18th September 2000, a Representation Agreement (“RA”) was entered into between Integrated Sales Services Ltd (“ISS”) a company based in Hong Kong, and DMC Management Consultants Ltd. (“DMC”), a company registered in India. By this agreement, ISS was to assist DMC to sell its goods and services to prospective customers, and in consideration thereof was to receive a commission. The agreement also mentions that if a dispute arises in connection with this RA, such dispute shall be referred to a single arbitrator in Kansas City, Missouri, U.S.A., to be appointed by agreement between the parties. It is important to note that, Mr. Rattan Pathak signed the RA as the Managing Director of DMC but the subsequent amendments to this were signed by Mr. Arun Dev Upadhyaya on behalf of DMC.

A dispute arose between the parties, and ISS filed a statement of claim dated 22nd June 2009 before the arbitrator naming Mr. Upadhyaya, chairman of DMC (India) and DMC Global, Gemini Bay Consulting Limited (“GBC”) and Gemini Bay Transcription Private Limited (“GBT”) as respondents. It was the case of ISS that as per the RA they brought two customers/companies to DMC for which they should receive 20% commission of the gross revenues to Company from these Customers for so long as they continue to be customers. But Mr. Upadhyaya used other respondent firms as his alter ego and redirected the

⁸ Arbitration and Conciliation Act 1996, s 48(1)

aforementioned two clients' business away from DMC to GBT and GBC, therefore depriving ISS of its commission. Arbitration proceedings took place and an arbitral award of USD 6,948,100 was passed against the respondents which were to be paid jointly and severally.

ISS approached the Bombay High Court to enforce the arbitral award. A single-judge bench held that the arbitral award is enforceable against DMC but, as GBT and Mr. Upadhyaya were not signatories to the arbitration agreement, the award would not be enforceable against them. In appeal, the division bench reversed this order and held it enforceable against all of them. Aggrieved by this, GBT and Mr. Upadhyaya approached the Supreme Court (“the court”).

ARGUMENTS ADVANCED

Senior. Adv. K.V. Vishwanathan appearing on behalf of GBT argues-

1. Reading Section 44 and Section 47(1)(c) together, the burden of proving that a foreign award may be enforced is on the person in whose favour that award is made, and that such a burden in the case of a non-signatory to an arbitration agreement can only be discharged by adducing evidence which would independently establish that such non-signatory can be covered by the foreign award in question. This was not being done in the facts of this case, and hence, the enforcement petition cannot be allowed.⁹
2. When enforcement of a foreign award is resisted, the party who resists it must prove to the court that its case falls within any of the sub-clauses of sub-section (1) or sub-section (2) of Section 48.¹⁰ A non-signatory to an arbitration agreement would be directly covered by sub-clause (a) and (c) of Section 48 (1).¹¹
3. Section 48(1)(b),¹² which provides for the ground of natural justice, is breached as no proper reasons have been given by the arbitrator in this case.¹³

⁹ *Gemini Bay* (n 3)

¹⁰ Arbitration and Conciliation Act 1996, s 48(2)

¹¹ *Gemini Bay* (n 3)

¹² Arbitration and Conciliation Act 1996, s 48(1)(b)

¹³ *Gemini Bay* (n 3)

4. The award is perverse because there was no examination of the two clients of DMC by the arbitrator.¹⁴
5. Relying on a judgment of the Supreme Court of Victoria, Australia, in the case of *IMC Aviation Solutions Pty Ltd. v Altain Khuder*¹⁵ to submit that, where a party resists enforcement of a foreign award on the ground that it is not a signatory to the arbitration agreement, the enforcing court is duty-bound to examine the question of jurisdiction by itself.¹⁶
6. Damages were awarded without actual loss having been proved before the learned arbitrator contrary to the judgment of the Delhi High Court in *Agritrade International (P) Ltd. v National Agricultural Coop. Mktg. Federation of India Ltd.*¹⁷, as a result of which arbitral award stood vitiated.¹⁸

Senior. Adv. Harish Salve appearing on behalf of Mr. Arun Dev Upadhyaya argues-

1. The cause of action arose in tort, and as the commission of a tort is outside the contractual disputes, the award stands vitiated.¹⁹
2. Relying upon three judgments of the court,²⁰ a comparison between Sections 35²¹ and 46²² of the Act would show,²³ that the legislature circumscribed the power of the enforcing court under Section 46 to persons who are bound by a foreign award as

¹⁴ *Ibid*

¹⁵ *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* [2011] VSCA 248

¹⁶ *Gemini Bay* (n 3)

¹⁷ *Agritrade International (P) Ltd. v. National Agricultural Coop. Mktg. Federation of India Ltd* Ex P 57/2009 with E A No 253/2010

¹⁸ *Gemini Bay* (n 3)

¹⁹ *Ibid*

²⁰ *Indowind Energy Ltd v Wescare (India) Ltd* (2010) 5 SCC 306

²¹ Arbitration and Conciliation Act 1996, s 35

²² Arbitration and Conciliation Act 1996, s 46

²³ *Chloro Controls India (P) Ltd v Severn Trent Water Purification Inc* (2013) 1 SCC 641

opposed to persons who would include “persons claiming under them”.²⁴ Therefore, a foreign award would be binding on parties alone and not on non-signatories.²⁵

Senior. Adv. Arif Bookwala appearing on behalf of ISS, supporting the division bench judgment argues-

1. The award shows us that the learned arbitrator applied his mind to the oral and documentary evidence produced before him, and it is well reasoned.²⁶
2. Their clients had conceded before the learned single Judge that only questions of law arose due to which no evidence needed to be led - which was contrary to the submissions made by Senior. Adv. Vishwanathan and Senior. Adv. Salve before us.²⁷
3. None of the grounds under Section 48 had been made out as neither Section 48(1)(a) nor Section 48(1)(c)²⁸ would even remotely deal with non-signatories to an arbitration agreement.²⁹
4. There is no objection to enforcement of the award being contrary to the public policy being argued by either appellant in the courts below; the appeals should be dismissed³⁰

COURT’S OBSERVATIONS

It was a division bench. Justice R.F Nariman (now retd.) wrote the judgment on behalf of Justice B.R. Gavai and himself. In the judgment, the court made the following observation on the question of “Can a non-signatory Object to enforcement of a Foreign Award in India?”

1. A reading of Section 44 of the Act would show us that there are six ingredients on the fulfilment of which an award can be said to be a foreign arbitral award.³¹

²⁴ *Cheran Properties Ltd v Kasturi & Sons Ltd* (2018) 16 SCC 413

²⁵ *Gemini Bay* (n 3)

²⁶ *Gemini Bay* (n 3)

²⁷ *Ibid*

²⁸ Arbitration and Conciliation Act 1996, s 48(1)(c)

²⁹ *Gemini Bay* (n 3)

³⁰ *Ibid*

³¹ *Ibid*

- A. *Firstly*, it must be an arbitral award on the differences between persons arising out of “legal relationships”. The expression “legal relationships” has been explained in *Vidya Drolia v Durga Trading Corpn.*³² as a relationship that gives rise to legal obligations and duties and, therefore, confers a right.³³
- B. *Secondly*, these differences may be in or outside of the contract, for example, in tort.
- C. *Thirdly*, the legal relationship so spoken of ought to be considered “commercial” under the law in India. The expression “commercial” as held in *R.M. Investment and Trading Co. (P) Ltd. v. Boeing Co*³⁴ should be construed broadly having regard to the manifold activities which are an integral part of international trade today.³⁵
- D. *Fourthly*, the award must be made on or after the 11th day of October 1960.
- E. *Fifthly*, the award must be a New York Convention award³⁶ – in short; it must be in pursuance of an agreement in writing to which the New York Convention applies and be in one of such territories.
- F. *Sixthly*, it must be made in one of such territories that the Central Government by notification declares to be territories to which the New York Convention applies.

As all these six requirements have been met in the said award, and thus it will be regarded as a foreign arbitral award.

- 2. Referring to Article IV of the New York Convention³⁷ and Gary B. Born’s *International Commercial Arbitration*,³⁸ the court rejected Mr. Vishwanathan’s first argument. It observed that the requirements of Section 47(1)³⁹ are procedural, and speak of only evidence “as may be necessary” to prove that the award is a foreign arbitral award. It

³² *Vidya Drolia v Durga Trading Corp* (2021) 2 SCC 1

³³ *Gemini Bay* (n 3)

³⁴ *R M Investment & Trading Co (P) Ltd v Boeing Co* (1994) 4 SCC 541

³⁵ *Gemini Bay* (n 3)

³⁶ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (signed 10 June 1958)

³⁷ *Ibid*

³⁸ Gary B Born, *International Commercial Arbitration* (2nd edn, Wolters Kluwer 2014)

³⁹ Arbitration and Conciliation Act 1996, s 47(1)

does not go to the extent of requiring substantive evidence to “prove” that a non-signatory to an arbitration agreement can be bound by a foreign award.⁴⁰

3. When enforcement of a foreign award is resisted, the party who resists it must prove to the court that its case falls within any of the sub-clauses of sub-section (1) or sub-section (2) of Section 48. Rejecting Mr. Vishwanathan’s second argument, the court held that, if read literally, Section 48(1)(a) speaks only of “parties” to the agreement being under some incapacity, or the agreement is invalid under the law to which “parties” have been subjected to. A non-party to the agreement is not bound by an award made under such agreement and to attempt to bring non-parties within this ground is to try and fit a square peg in a round hole. As GBT and Mr. Upadhyaya were non-signatories to the agreement, they cannot object on the ground of Section 48(1)(a).⁴¹ But the court, without much elaboration, also observed that it might perhaps be open in an appropriate case for a non-signatory to bring its case within Section 48(2)⁴² read with Explanation 1(iii).⁴³
4. Relying on *Vijay Karia v Prysmian Cavi E Sistemi SRL*,⁴⁴ the court held that the ground of breach of natural justice would apply at the hearing stage and not after the award is passed, and thus, the court rejected Mr. Vishwanathan’s third contention as well.⁴⁵
5. Rejecting Mr. Vishwanathan’s fourth argument, the court held that perversity as a ground to set aside an award in an international commercial arbitration held in India no longer obtains after the 2015 amendment to the Act.⁴⁶ To support its instance, the court also relied on *Ssangyong Engg. & Construction Co. Ltd. v NHAI*.⁴⁷
6. Rejecting Mr. Vishwanathan’s fifth argument, the court said that the Australian law on this point is different from Indian law. To support its instance, the court takes the help

⁴⁰ *Gemini Bay* (n 3)

⁴¹ *Ibid*

⁴² Arbitration and Conciliation Act 1996, s 48(2)

⁴³ Arbitration and Conciliation Act 1996, s 48(1)(iii)

⁴⁴ *Vijay Karia v Prysmian Cavi E Sistemi SRL*, (2020) 11 SCC 1

⁴⁵ *Gemini Bay* (n 3)

⁴⁶ *Ibid*

⁴⁷ *Ssangyong Engg & Construction Co Ltd v NHAI* (2019) 15 SCC 131

of *Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd & Anr*,⁴⁸ where Singapore HC concluded, on facts similar to ours, that the equivalent of Section 48(1)(a) in the Singapore Act would not be attracted.

7. As already stated above, when enforcement of a foreign award is resisted, the party who resists it must prove to the court that its case falls within any of the sub-clauses of sub-section (1) or sub-section (2) of Section 48. So Mr. Vishwanathan's final argument that damages have been awarded on no basis whatsoever is rejected as it neither would fall within any of the exceptions contained in Section 48(1) nor it shook the consciousness of the court to attract Section 48(2) read with Explanation 1(iii).⁴⁹
8. Rejecting Mr. Salve's first argument, the court held Section 44 recognises that an arbitrator may decide tort claims provided they are disputes that arise in connection with the agreement.⁵⁰ To support its instance, the court relied on *Renusagar Power Co. Ltd. v General Electric Co.*⁵¹
9. Rejecting Mr. Salve's second argument, the court held that the arbitral award would be binding on non-signatories as well because Section 46 does not speak of "parties" at all but of "persons" who may, therefore, be non-signatories to the arbitration agreement. Additionally, the expression "persons" have a much broader meaning in the context of section 46 than in section 35. This is the most important observation of the court in this case.

CONCLUSION

The approach of binding non-signatories,⁵² to an arbitration clause is not new,⁵³ and it is practised in many foreign jurisdictions as well.⁵⁴ The court, in this case, has been seen to take a

⁴⁸ *Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd & Anr* [2006] SGHC 78

⁴⁹ *Gemini Bay* (n 3)

⁵⁰ *Ibid*

⁵¹ *Renusagar Power Co Ltd v General Electric Co* (1984) 4 SCC 679

⁵² *Interocean Shipping Co v Nat'l Shipping & Trading Corp* 523 F 2d 527, 539 (2d Cir 1975)

⁵³ *Hartford Fin Sys Inc v Florida Software Servs Inc* 550 F Supp 1079, 1086 (D Me 1982)

⁵⁴ *Cia Platamon de Navegacion, SA v Empresa Colombiana de Petroleos* 478 F Supp 66, 67 (SDNY 1979)

pro-enforcement bias of the New York convention on which the Act is based, which is desirable. It also clearly pointed out that when enforcement of a foreign award is resisted, the party who resists it must prove to the court that its case falls within any sub-clauses of sub-section (1) or sub-section (2) of Section 48 of the Act. Unless such is proved, the court will enforce the foreign arbitral award.