



ISS approached the High Court of Judicature at Bombay (**HC**), Nagpur Bench for enforcement of the Award. Although the learned judge enforced the Award as against DMC, it found that the Award could not bind the non-signatories to the arbitration clause. In the appeal before the Division Bench of the HC, the Division Bench held that the award was enforceable as against the non-signatories as well.

Although DMC filed a special leave petition against the decision of the Division Bench, as it did not comply with pre-deposit requirements, the SC dismissed the petition, and the Award became enforceable as against DMC. The non-signatory parties moved the SC likewise against the decision of the Division Bench. These came up before the SC.

## FINDINGS OF THE COURT

### *The award holder does not need to prove that the award is binding on non-signatories*

Since it was contended that the award holder must discharge the burden of proof that the foreign award is binding as against non-signatories to the arbitration agreement, the SC examined the process of enforcement of a foreign award and came to the conclusion that under Section 44 and 47 of the Arbitration Act the enforcing court must simply be satisfied that the award is a foreign award. This means that (1) the award must be an arbitral award on differences between persons arising out of legal relationships; (2) the differences may be in contract or outside of contract; (3) the legal relationship must be commercial under the Indian law; (4) the award must be made on or after the 11 day of October, 1960; (5) the award must be a New York Convention (**NY Convention**) award and; (6) the award must be made in one of such territories which the Central Government (**GOI**) by notification declares to be territories to which the NY Convention applies. As such, the SC concluded that there is no burden of proof on the award holder to establish that the foreign award can bind the non-signatory to the arbitration agreement. The SC held that the proof required under Section 47 is only in respect of demonstrating that the award is a foreign award. Section 47 does not require substantive evidence to “*prove*” that a non-signatory to an arbitration agreement can be bound by a foreign award.

### *Foreign Award is enforceable as against non-signatories*

The SC examined Section 46 and found that a foreign award is binding between *persons* and not *parties*, thereby indicating a broader intent as compared to Section 35 (which deals with domestic awards and limits itself to be binding as against *parties* and *persons claiming under them*). Thus, the SC held that the foreign award is binding on non-signatories to the arbitration agreement.

### *Non-signatory to arbitration agreement cannot oppose enforcement under Section 48 (1)(a)*

Keeping in mind the pro-enforcement policy as expressed in the NY Convention, the decisions of the SC in *Ssangyong Engg. & Construction Co. Ltd. v. NHAI*<sup>2</sup> and *Vijay Karia v. Prysmian Cavi E Sistemi SRL*<sup>3</sup>, the SC held that non-signatories to arbitration agreement cannot oppose enforcement under Section 48(1) (a). The SC held that Section 48(1) (a) (which permits objections to the enforcement of an award on the ground of invalidity of the arbitration agreement or incapacity of the parties thereto) restricts itself to *parties to the agreement*, thus, excluding non-parties.

Importantly, the SC considered the decision in *Dallah Real Estate and Tourism Co v Ministry of Religious Affairs of the Government of Pakistan*<sup>4</sup> (**Dallah**) wherein a non-signatory to the arbitration agreement successfully resisted enforcement of a foreign award on the ground that it was not party to the arbitration agreement. The SC stated that *Dallah* was distinguishable on facts and also based on the wording of the Arbitration Act. The SC also distinguished the decision of the Supreme Court of Victoria in *IMC Aviation Solutions Pty Ltd. v Altain Khuder LLC*<sup>5</sup> where a non-signatory to the arbitration agreement resisted enforcement of a foreign award. The SC held that the Australian International Arbitration Act, 1974 was materially different from the Arbitration Act as the former restricted the binding effect of the foreign award to “*parties to the arbitration agreement*”.

<sup>2</sup> (2019) 15 SCC 131

<sup>3</sup> (2020) 11 SCC 1

<sup>4</sup> (2010) 3 WLR 1472

<sup>5</sup> (2011) VSCA 248

### ***Rejection of plea under Section 48(1) (b) and (c)***

The SC also rejected the plea that the Award ought not to be enforced under Section 48(1) (b) as the arbitrator had not given adequate reasons to justify the lifting of corporate veil under Delaware Laws. The SC correctly held that the said provision deals with a situation where 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. The plea that the arbitrator had not given adequate reasons could not be equated to a violation of the rule of natural justice. Thus, a disguised review of the Award was not permitted under this Section. It was also contended that since the damages were given in tort, the Award thus considered matters outside the scope of the arbitration agreement and hence the Award was not enforceable under Section 48(1) (c). The SC rejected this argument stating that it is well settled law that tort claims may be decided by an arbitrator provided they are disputes that arise in connection with the agreement.

### ***Division Bench, albeit correct in its conclusion, applied the law incorrectly in some parts***

The SC also reproached the Division Bench of the HC for satisfying itself that the arbitral tribunal had correctly applied the legal principles of Delaware Laws in the lifting of the corporate veil. The SC stated that Section 48 does not contain any ground for resisting enforcement of a foreign award that permits the enforcing court to examine whether the foreign award is contrary to the substantive law agreed to by the parties. The SC held that a review of the merits of the matter is impermissible during enforcement proceedings.

## **CONCLUSION**

It is abundantly clear that the SC adopted a pro-enforcement stand in this decision. Appropriately, it permitted enforcement of a foreign award which was issued against non-signatories to an arbitration agreement. Now, it is settled law that (i) a domestic award is enforceable against non-signatories if they fall within the parameters of the words *persons claiming under the signatories*<sup>6</sup> in Section 35 and that (ii) a foreign award is similarly enforceable if the non-signatories amount to *persons* within the ambit of Section 46.

The SC's decision that non-signatories to an arbitration agreement cannot even raise an objection under Section 48(1) (a) that they are not party to the arbitration agreement seems debatable though. If the award debtor who is a signatory to the arbitration agreement is permitted to take up such a stand, it does not appear correct that a non-signatory is not permitted to do so likewise. The reasoning in *Dallah* wherein the non-signatory was permitted to resist enforcement of a foreign award seems to be aligned with the global interpretation of NY Convention. In fact, the Arbitration Act itself under Section 48(1)(a) states that the parties who can object to enforcement are – parties to the agreement referred to in Section 44. The said Section 44 in turns uses the word "*persons*" which as recognized by the SC itself is a broad phrase that covers non-signatories. Thus, as a corollary even a non-signatory should be permitted to object to the enforcement of a foreign award on the ground that it is not a party to the arbitration agreement.

In any event what is overwhelming is that the SC has given a strong and clear message that foreign awards are capable of being enforced as against non-signatories to the arbitration agreement. This only bodes well for award holders.

We hope you have found this information useful. For any queries/clarifications please write to us at [insights@elp-in.com](mailto:insights@elp-in.com) or write to our authors:

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<sup>6</sup> *Cheran Properties Ltd. v. Kasturi & Sons Ltd.*, (2018) 16 SCC 413