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Balasore v. Medima: Providing Clarity or Creating a Mist Around the Grant of Injunctions in Foreign Seated Arbitrations?

Prasad Hegde · Tuesday, October 13th, 2020

A single-judge bench of the Calcutta High Court (**Calcutta HC**) recently delivered a judgement in *Balasore Alloys Ltd. v. Medima LLC* which revived the debate regarding whether a 'civil court has jurisdiction to grant anti-arbitration injunctions in foreign seated arbitrations?' This decision requires a careful examination because of its impact on 1) the arbitration-friendly reputation that India has slowly gained and, 2) the larger and important question of whether civil courts have the jurisdiction to grant an anti-arbitration injunction in foreign seated arbitrations.

Background of the dispute

The case before the Calcutta HC concerned agreements between India-based *Balasore Alloys Ltd.* (**Balasore**) and US-based *Medima LLC (**Medima**)*. The Agreement entered into in 2018 provided for an International Chamber of Commerce (**ICC)** Arbitration in London. Further, the purchase orders that were issued regularly provided for the application of the Arbitration and Conciliation Act, 1996 (**the Act**), and for the venue of arbitration to be Kolkata, India.

A dispute arose between the two entities, and Medima commenced arbitration under the ICC rules in London. At the same time, Balasore also initiated arbitral proceedings under the Act in Kolkata. In Medima's arbitration, Balasore raised objections regarding the validity of the arbitration agreement and urged the ICC Court to decide the matter as a preliminary issue before the constitution of the tribunal. In turn, the ICC Court confirmed that a 3-member tribunal would be constituted and it would decide all objections. Hence, Balasore approached the Calcutta HC to grant an anti-arbitration injunction against the ICC Arbitration. The primary question before the Calcutta HC was whether a civil court has the jurisdiction to grant anti-arbitration injunctions in foreign seated arbitrations?

The decision of the Court

The Calcutta HC, while ruling that a civil court has the power to grant an anti-arbitration injunction in a foreign seated arbitration, held that this power has to be exercised sparingly and only under the

circumstances listed in paragraph 24 of the Supreme Court's ***(SC)*** judgement in *Modi Entertainment Network v. WSG Cricket PTE Ltd.* Further, the Calcutta HC while rendering this decision, rejected the Delhi High Court's decision in *Bina Modi & Ors. v. Lalit Modi & Ors* which had held that a civil court lacks the power to grant anti-arbitration injunctions.

On facts, it held that Balasore is not entitled to an anti-arbitration injunction since it has failed to display how their case falls under any of the categories provided in para 24 of the judgment in *Modi Entertainment Network*. Therefore, the Calcutta HC ruled that there is no reason which merits the grant of an injunction against the ICC arbitration seated in London.

Applicability of principles governing anti-suit injunctions to anti-arbitration injunction

Although on facts, the Calcutta HC held that Balasore was not entitled to an anti-arbitration injunction, the basis on which it was decided that a civil court in India has the power to grant an anti-arbitration injunction in foreign seated arbitrations merits discussion. As mentioned above, the Calcutta HC while arriving at this conclusion, relied on the principles provided in para 24 of the SC judgment in *Modi Entertainment* which govern the grant of anti-suit injunctions.

As per the above decision, an anti-suit injunction can be granted if: (i) the proceedings are oppressive, vexatious or in a forum non-conveniens; (ii) in case the proceedings are to be allowed, then the ends of justice would be defeated; (iii) the proceedings in the foreign court (decided by the parties based on an exclusive-jurisdiction clause) would result in injustice to the parties. Therefore, looking at the decision rendered in *Balasore* a question arises that whether the principles governing an anti-suit injunction can also govern the grant of an anti-arbitration injunction.

A two-judge bench of the Delhi HC in *Mcdonald's India Pvt. Ltd. v. Vikram Bakshi & Ors*. has considered this question before, where it held that in a case involving an anti-arbitration injunction, the governing principles could not be the same as that of an anti-suit injunction. The reason being that the Act being a complete code in itself, empowers an arbitral tribunal itself to rule on its own jurisdiction. Further, it held that the governing principles of a civil suit and that of arbitration are different. Therefore, the principles applicable to govern an anti-suit injunction could not be applied to a suit concerning anti-arbitration injunctions.

Even recently in the *Bina Modi* judgement, the Delhi HC held that principles of anti-suit injunction cannot be used in a dispute concerning an anti-arbitration injunction, the reason being, under the Act, arbitrations are based on the principles of party autonomy and Kompetenz-Kompetenz. A tribunal has sufficient power to rule on its own jurisdiction, and the courts should sparingly interfere when the parties have displayed a strong intention to refer their disputes to arbitration.

The legal position for grant of anti-arbitration injunctions in foreign seated arbitrations

A two-judge bench of the SC in *Chatterjee Petrochem v Haldia Petrochemicals* held that civil courts in India have the power to grant anti-arbitration injunctions in foreign seated arbitrations. The SC held that the grant of such injunctions should be based on the parameters mentioned in Section 45 of the Act i.e. if the arbitration agreement is "null and void, inoperative, or incapable of being performed".

In *World Sport Group (Mauritius) Ltd v MSM Satellite (Singapore) Pte Ltd*, a two-judge bench of the SC upheld *Chatterjee Petrochem*. *The SC* relied on Redfern and Hunter to explain that an arbitration clause is "*inoperative*" and "*incapable of being performed*" when "it has ceased to have effect as a result, for example, of a failure of the parties to comply with a time-limit, or where the parties by their conduct impliedly revoked the arbitration agreement".[1)]

Kvaerner Cementation v. SBP

A three-judge bench of the SC in *Kvaerner Cementation India Ltd. v. Bajranglal Agarwal & Anr*held that by virtue of Section 16 of the Act, a civil court lacks the power to look into matters related to the existence or validity of an arbitration clause (jurisdictional issues). However, the Calcutta HC made an interesting observation by noting that *Kvaerner s*tood implicitly overruled by a seven-judge bench decision of the SC in *SBP & Co. v. Patel Engineering Ltd. & Ors.* The reason behind this was that the majority opinion of the SC in *SBP* had conclusively rejected the argument that an arbitral tribunal solely has competence, to the complete exclusion of civil courts, to determine its own jurisdiction. Therefore, the Court held that in light of the majority opinion in *SBP*, it may be interpreted that the dictum in *Kvaerner* stood implicitly overruled. However, a careful analysis of both *Kvaerner* and *SBP* reveals that both these judgements operate in totally different planes.

The main issue referred to a seven-judge bench in *SBP* was to decide whether the power exercised by a Chief Justice or his/her designate under Section 11 of the Act was an administrative function or a judicial function. With a majority of 6-1, the SC decided this function to be a judicial function. Further, the SC ruled that a civil court has the power to rule on a tribunal's jurisdictional issues. However, this power of a civil court was decided only in relation to Section 11 of the Act.

The SC in *SBP* dealt with the powers of a civil court to rule on the tribunal's jurisdiction. No where did the SC in *SBP* deal with the issue regarding the exclusion of powers of a civil court to grant an anti-arbitration injunction by virtue of *Section 16*. However, this was exactly the question that the SC was concerned about in *Kvaerner* i.e., exclusion of powers of a civil court. Therefore, both these judgments apply to whole together different aspects, and there cannot be any kind of overlap between them. Hence, *Kvaerner* very well stands firm and cannot be rejected on the ground that it stands implicitly overruled by virtue of *SBP*.

Applicability of Kvaerner to foreign seated arbitrations

The Calcutta HC in *Balasore* rejected *Kvaerner* by giving an invalid reason as explained above. However, the HC was right in rejecting *Kvaerner* but should have done so with a different reason i.e., by holding that *Kvaerner* applies to domestic arbitrations and not to foreign seated arbitrations.

Kvaerner reached the SC through Article 136 of the Constitution. It was an appeal against an order of the Bombay HC wherein the Bombay HC had upheld the district court's decision which rejected *Kvaerner's* plea to grant an anti-arbitration injunction. Hence, it can be seen that *Kvaerner* was a case that dealt with anti-arbitration injunctions in a domestic seated arbitration because it is only in cases of domestic arbitrations that a district court has the power to entertain a suit for grant of anti-

arbitration injunctions. If it were to be a foreign seated arbitration then the jurisdiction would lie with an appropriate high court.

Kvaerner's decision in holding that civil courts lack the power to grant such injunctions still holds ground, but this is only in context to domestic arbitrations. Therefore, the Delhi HC in *Bina Modi* erred in holding that a civil court lacks the power to grant an anti-arbitration injunction in a foreign seated arbitration, by relying on *Kvaerner*. Instead, it should have upheld the power of civil courts to grant such injunctions by relying on Section 45 of the Act and *Chatterjee Petrochem.* Further, while the Calcutta HC was right in rejecting *Kvaerner*, its reasoning behind the same seems to be flawed (as explained above).

Conclusion

The single-judge bench decision in *Balasore* has been appealed to a division bench. However, the division bench is yet to re-examine the question as to whether civil courts have the jurisdiction to grant anti-arbitration injunctions in foreign seated arbitrations. Therefore, the Calcutta HC still has an opportunity to rectify the errors committed by the single-judge bench. Hence, it is high time the HC 1) clarifies the applicability of Kvaerner to foreign seated arbitrations, lay to rest the apparent conflict between Kvaerner & SBP and, 2) firmly establishes the grounds on which an injunction can be granted against a foreign seated arbitration.

References

?1 Page 148, 5th Edition, Redfern and Hunter on International Arbitration (OUP).

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