

**Civil courts have the power to grant an anti-arbitration injunction, but sparingly, and in line with principles outlined in paragraph 24 of Modi Entertainment Network**

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**Balasure Alloys Limited v. Medima LLC**

**Court:** Calcutta High Court | **Case Number:** CS No. 59 of 2020 (Ad-interim order) | **Citation:** Not available currently | **Bench:** Shekhar B Saraf J | **Date:** 12 August 2020

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Disagreeing with Rajiv Sahai Endlaw J's decision in *Bina Modi v. Lalit Modi and others*, 2020 SCC OnLine Del 901, and distinguishing the three-judge bench decision of the Supreme Court of India in *Kvaerner Cementation India Limited v. Bajranglal Agarwal*, (2012) 5 SCC 214, the Calcutta High Court has ruled that the civil courts have the power to grant anti-arbitration injunction. The court relied on paragraph 19 of *SBP & Co. v. Patel Engineering*, (2005) 8 SCC 618.<sup>1</sup> The matter was heard at an *ad-interim* stage.

**A. The background**

**A1. The underlying contract for sale and distribution provided for ICC arbitration; the purchase orders issued from time to time provided for India arbitration**

Balasure, an Indian company, and Medima, a US company, entered into an agreement in 2017 for distribution and sale by Medima of goods manufactured by Balasure. Another agreement, referred to in the judgment as the Agency Agreement, was executed in 2018. It was governed by English laws and provided for arbitration under the International Chamber of Commerce rules in London.

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<sup>1</sup> Para 19. It is also not possible to accept the argument that there is an exclusive conferment of jurisdiction on the Arbitral Tribunal, to decide on the existence or validity of the arbitration agreement. Section 8 of the Act contemplates a judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement, on the terms specified therein, to refer the dispute to arbitration. A judicial authority as such is not defined in the Act. It would certainly include the court as defined in Section 2(e) of the Act and would also, in our opinion, include other courts and may even include a special tribunal like the Consumer Forum (see *Fair Air Engineers (P) Ltd. v. N.K. Modi* [(1996) 6 SCC 385]). When the defendant to an action before a judicial authority raises the plea that there is an arbitration agreement and the subject-matter of the claim is covered by the agreement and the plaintiff or the person who has approached the judicial authority for relief, disputes the same, the judicial authority, in the absence of any restriction in the Act, has necessarily to decide whether, in fact, there is in existence a valid arbitration agreement and whether the dispute that is sought to be raised before it, is covered by the arbitration clause. It is difficult to contemplate that the judicial authority has also to act mechanically or has merely to see the original arbitration agreement produced before it, and mechanically refer the parties to an arbitration. Similarly, Section 9 enables a court, obviously, as defined in the Act, when approached by a party before the commencement of an arbitral proceeding, to grant interim relief as contemplated by the section. When a party seeks an interim relief asserting that there was a dispute liable to be arbitrated upon in terms of the Act, and the opposite party disputes the existence of an arbitration agreement as defined in the Act or raises a plea that the dispute involved was not covered by the arbitration clause, or that the court which was approached had no jurisdiction to pass any order in terms of Section 9 of the Act, that court has necessarily to decide whether it has jurisdiction, whether there is an arbitration agreement which is valid in law and whether the dispute sought to be raised is covered by that agreement. There is no indication in the Act that the powers of the court are curtailed on these aspects. On the other hand, Section 9 insists that once approached in that behalf, "the court shall have the same power for making orders as it has for the purpose of and in relation to any proceeding before it". Surely, when a matter is entrusted to a civil court in the ordinary hierarchy of courts without anything more, the procedure of that court would govern the adjudication (see *R.M.A.R.A. Adaikappa Chettiar v. R. Chandrasekhara Thevar* [AIR 1948 PC 12: 74 IA 264]).

The purchase orders issued from time to time provided that Indian laws govern them, and disputes would be settled by arbitration under the ACA.

## **A2. Medima commenced arbitration under ICC rules. Balasore applied for an anti-arbitration injunction**

Some disputes arose, and both parties initiated arbitration: Medima commenced arbitration under the ICC rules; Balasore initiated arbitration under the ACA.

In Medima's arbitration, Balasore raised objections as to the existence and validity of the arbitration agreement and urged the ICC Secretariat to decide the matter as a preliminary issue before the constitution of the tribunal. The ICC Secretariat confirmed that a 3-member tribunal would be constituted, and the tribunal would decide all objections. Balasore filed this suit in the Calcutta High Court to restrain Medima from going ahead with the ICC arbitration.

## **B. The Court's decision**

### **B1. The Court's Power to Grant Anti-Arbitration Injunction**

The first question framed by Shekhar B Saraf J was whether the court had the power and the jurisdiction to grant an anti-arbitration injunction against a foreign seated arbitration, and if so, under what circumstances?

He relied on a decision of the 2-judge bench of the Calcutta High Court in *Devi Resources Limited v. Ambo Exports Ltd.*<sup>2</sup> where Sanjib Banerjee and Subra Ghosh JJ had concluded that "the authority of (the) court unless it is of very limited jurisdiction, cannot be doubted, particularly if it is a High Court in this country exercising its original civil jurisdiction...."

In rejecting the argument that the court cannot injunct an arbitration, he distinguished the following cases: –

- (a) *Chatterjee Petrochem Company Haldia Petrochemicals Ltd.*, (204) 14 SCC 574 was cited to say that a court cannot injunct a foreign seated arbitration. The argument was rejected, citing *Devi*, which has distinguished *Chatterjee Petrochem*. The court in *Devi* had said that the validity of the arbitration agreement had been questioned in *Chatterjee* and once the court found that it was valid, the order not to grant the injunction followed.
- (b) As noted in the introductory passage of this Update, *Kvaerner* was distinguished, relying on paragraph 19 of *SBP*.
- (c) As to *Bina Modi*, Saraf J said his answer "is as curt as the length of the order in *Kvaerner*." *SBP* was not brought to the attention of the court in *Bina*.

Saraf J finally concluded that, however, "this power is to be used sparingly and with abundant caution (and) it is only under the circumstances enumerated in and exhaustively discussed in paragraph 24 of *Modi Entertainment Network v. WSG Cricket* (2003) 4 SCC 3411<sup>3</sup>... which would merit the grant of an anti-arbitration injunction and therefore, its rare and controlled usage."

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<sup>2</sup> APO No. 430 of 2017 decided on 13 February 2019.

<sup>3</sup> *Modi Entertainment*, a decision of the 2-judge bench of the Supreme Court (Syed Shah Mohammed Quadri and Arijit Pasayat JJ) is an authority on the question of an anti-suit injunction. The court said at paragraph 24 as follows: "24. From the above discussion the following principles emerge:

(1) In exercising discretion to grant an anti-suit injunction the court must be satisfied of the following aspects:

## **B2. Applying the Power to Grant Injunction Not Warranted On the Facts**

At the end of his discussion, Saraf J has already summarised his conclusions. In this section, it will be useful to refer to that summary instead of identifying the reasoning process.

On the issue of whether injunction ought to be granted on the facts Saraf J concluded:

- (a) Firstly, “where a contract provides that the execution or performance of that contract shall be in terms of another contract (which contains the terms and conditions relating to performance and a provision for settlement of disputes by arbitration), then, the terms of the referred contract in regard to execution/ performance alone will apply, and not the arbitration agreement in the referred contract, unless there is a special reference to the arbitration clause also.” This conclusion of Saraf J is a reproduction from paragraph 24 of *MR Engineers & Contractors (P) Ltd. v. Som Datt Builders Ltd.*, (2009) 7 SCC 696,<sup>4</sup> where a 2-judge bench of the Supreme Court considered the meaning of Section 7 (5) ACA.”

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- (a) the defendant, against whom injunction is sought, is amenable to the personal jurisdiction of the court;
- (b) if the injunction is declined, the ends of justice will be defeated and injustice will be perpetuated; and
- (c) the principle of comity — respect for the court in which the commencement or continuance of action/proceeding is sought to be restrained — must be borne in mind.
- (2) In a case where more forums than one are available, the court in exercise of its discretion to grant anti-suit injunction will examine as to which is the appropriate forum (forum conveniens) having regard to the convenience of the parties and may grant anti-suit injunction in regard to proceedings which are oppressive or vexatious or in a forum non-conveniens.
- (3) Where jurisdiction of a court is invoked on the basis of jurisdiction clause in a contract, the recitals therein in regard to exclusive or non-exclusive jurisdiction of the court of choice of the parties are not determinative but are relevant factors and when a question arises as to the nature of jurisdiction agreed to between the parties the court has to decide the same on a true interpretation of the contract on the facts and in the circumstances of each case.
- (4) A court of natural jurisdiction will not normally grant anti-suit injunction against a defendant before it where parties have agreed to submit to the exclusive jurisdiction of a court including a foreign court, a forum of their choice in regard to the commencement or continuance of proceedings in the court of choice, save in an exceptional case for good and sufficient reasons, with a view to prevent injustice in circumstances such as which permit a contracting party to be relieved of the burden of the contract; or since the date of the contract the circumstances or subsequent events have made it impossible for the party seeking injunction to prosecute the case in the court of choice because the essence of the jurisdiction of the court does not exist or because of a vis major or force majeure and the like.
- (5) Where parties have agreed, under a non-exclusive jurisdiction clause, to approach a neutral foreign forum and be governed by the law applicable to it for the resolution of their disputes arising under the contract, ordinarily no anti-suit injunction will be granted in regard to proceedings in such a forum conveniens and favoured forum as it shall be presumed that the parties have thought over their convenience and all other relevant factors before submitting to the non-exclusive jurisdiction of the court of their choice which cannot be treated just as an alternative forum.
- (6) A party to the contract containing jurisdiction clause cannot normally be prevented from approaching the court of choice of the parties as it would amount to aiding breach of the contract; yet when one of the parties to the jurisdiction clause approaches the court of choice in which exclusive or non-exclusive jurisdiction is created, the proceedings in that court cannot per se be treated as vexatious or oppressive nor can the court be said to be forum non-conveniens.
- (7) The burden of establishing that the forum of choice is a forum non-conveniens or the proceedings therein are oppressive or vexatious would be on the party so contending to aver and prove the same”.

<sup>4</sup>Section 7(5) ACA states as follows:- “7. Arbitration agreement.—(1) In this Part, ‘arbitration agreement’ means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

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(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.”

- (b) Secondly, however, Saraf J also concluded that the above-noted principle “does not take away the right of the parties to raise a dispute under the 2018 Agency Agreement unless the arbitration clause therein has become inoperative or incapable of being performed.”
- (c) Thirdly, the burden of proof to show that the arbitration clause in the 2018 Agency Agreement has become inoperative or incapable of being performed is on the party asserting it, in this case, the plaintiff Balasore.<sup>5</sup>
- (d) Fourthly, the burden of proof to establish the argument of forum non-conveniens, or that proceedings in the neutral foreign forum are vexatious or oppressive, is also upon the party asserting the same, in this case, the plaintiff Balasore.<sup>6</sup>
- (e) Fifthly, the mere existence of multiple proceedings and/or chance of a matter proceeding in multiple forums are not sufficient reasons to render an arbitration agreement inoperative.<sup>7</sup>
- (f) Sixthly, incorporation of the pricing mechanism of the 2018 Agency Agreement into the purchase orders did not by itself make the arbitration clause in the 2018 Agency Agreement inoperative. The 2018 Agency Agreement was the subsisting umbrella, and its arbitration clause continues to operate on all aspects of the agreement. Multiple proceedings ambiguous clauses cannot make one of the proceedings, especially a neutral foreign seated arbitration applying a neutral governing and proper law, a vexatious or oppressive proceeding.
- (g) Seventhly, Balasore’s stance before the ICC agreeing to the arbitration by a sole arbitrator and retaining its right to urge the jurisdiction point before such arbitrator does not by itself bar them from filing the present suit. However, such acquiescence is one of the factors to be kept in mind while granting ad interim injunction.

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<sup>5</sup> Saraf J had found at paragraph 30 as a matter of fact that the Agency Agreement subsisted.

<sup>6</sup> It was found in paragraph 31 that the ICC London arbitration was a “thought over” provision and a choice of a neutral venue. Also, the fact that no amendment was made to the 2018 Agreement triggered the *Modi Entertainment* rule set out at para 24 (5) of that case. See fn. 1.

<sup>7</sup> The court cited *World Sport Group (Mauritius) Ltd. v. MSM Satellite (Singapore) Pvt. Ltd.*, (2014) 11 SCC 639.