JUDICIAL INTERVENTION IN ARBITRAL PROCEEDINGS- ANALYSIS POST BALCO VS. KAISER ALUMINIUM

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ABSTRACT

The *Balco v Kaiser* judgment is a must read for anyone interested in arbitration. This was a case where it was debated whether the Indian judiciary can intervene in arbitration proceedings or not. Here the Supreme court clearly configured their boundaries and disagreeing with previous judgments in similar matters, they held that Indian courts do not have the power to rule any judgments on those arbitration matters where the seat and governing law is not in India, be it before or during the specific alternate dispute resolution or even after the award is given. They clearly distinguished the meaning of seat and venue and held that those two had their separate meanings and do not interlap. The Supreme court judges stated that out of both the parts in the Indian arbitration act, part one applied only to domestic arbitration proceedings where the parties consented that the procedure which will take over the arbitration would not be Indian law. The court also stated that there were two types of awards in the Arbitration act which is domestic and foreign awards and, in this case, domestic awards do not apply. In Balco vs Kaiser, the seat, as well as the venue, was originally decided to be in London.

KEYWORD

Arbitration, Supreme Court, Arbitral Award, Mediation.

INTRODUCTION

Arbitration can be defined as when two or more persons resolve their disputes by going to a third unbiased party who will declare an 'award'. This is done so that they can avoid court proceedings which are long and tedious. Hence, sometimes before drafting a contract up, the parties put a clause stating that if any disputes arise from that particular contract, then it shall be resolved by negotiation first, followed by mediation and finally a last resolve will be arbitration proceedings. But still the parties of the contract have

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come to the courts from the very beginning of the alternate dispute resolutions. Sometimes, the court interferes in the proceedings to manage them or to authorize the award given. These arbitrators act like tribunal judges.[2] They don't pass judgements, rather their resolutions are called 'awards'. It is a good alternative to prevent companies to go to courts.

The United Nations Commission on International Trade law (UNCITRAL) made a prototype of the ideal arbitration laws in the International Commercial Arbitration, 1985 which was suggested by our national advisory committee for framing the laws of arbitration in India.

Halsbury has explained the meaning of the word arbitration very well. Arbitration should have a minimum of two parties and both should be given an equal chance of explaining themselves like how its done in a court proceeding. They should be heard by competent persons.[3] Both the parties should agree for arbitration. It should not be forced. All the parties involved ought to know that in this particular arbitration proceeding,if the judge passes an award,it will be binding on all the parties involved in the case. Suppose if the award is unfair and binds on only one party, then it cannot be considered an arbitration.[4]

India has a constructive arbitration law established. The arbitration and Conciliation Act, 1996 is an important act to regulate and unify the proceedings of arbitration in India. Even in matters which are not corporate, such laws are used.

Process & Industrial Developments Ltd v The Federal Republic of Nigeria[5] gives a lot of pointers on the seat of arbitration. It showed a difference between the seat of jurisdiction and the place where hearings of the party are conducted and whether a tribunal has the jurisdiction to rule a seat.

BALCO VS KAISER

Balco v. Kaiser aluminum judgement is a significant judgement which decided the interference of Indian courts in the arbitration proceedings of Indian companies and it

[2] *Fazalally Jivaji Raja v. Khimji Poonji & Co*. AIR 1934 Bom 476.
[3] *Hormusji & Daruwala v. Distt. Local Board,* AIR 1934 Sind 200.
[4] *State of U.P. v. Padam Singh Rana,* AIR 1971 All 270
[5] *Process & Industrial Developments Ltd v The Federal Republic of Nigeria* [2019] EWHC 2241 (Comm)

gave distinction to the meanings of 'seat and 'venue' in Indian arbitration. This judgement was passed on 10th august in the year 2005. It is a 190 pages long judgement and was much awaited.

The events of the case started when a contract was drafted up on 22 April,1993. It was held between two parties which is BALCO & Kaiser. Kaiser was a computer system installation company. What Kaiser had to do was to simply deliver and download the software's at the branch of Balco. But this was a special case because even though the jurisdiction of this contract applied to the territory of India, there was a special clause in it, which stated that if any disputes start between Kaiser and Balco, then those disputes will be resolved through arbitration proceedings in London and over there, the arbitration proceedings will be governed by law of England. Hence, when these disputes started, the head of both the parties involved went to London. Two arbitral awards were passed in these sessions.

With Balco vs Kaiser, another case was put together which is the *Bharti Shipyard Ltd. v/s Ferrostaal AG & Anr*.[6] where the relevance of Art 9 of Arbitration Act was questioned. Here also, the parties agreed to resolve through arbitration but the difference is that the venue was chosen as Paris and the rules under which the proceeding would carry on, that is the seat of arbitration, would be in London. The rules of Rules of London Maritime Arbitrators would apply in this particular case.

In Bharat aluminium judgement, when the alternate dispute resolution was being carried out, the appellants, Bharti Shipyard Ltd, made a demand. This was made before judge in Mangalore. They refused to give back cash which was like a warrantee stated in the agreement in case of non-performance of one of the parties in the contract. Their appeals were allowed, but then the opposite party opposed them in the Higher court which was the High court in the city of Mangalore itself. That particular court held that the appellant's wishes would be granted if they would suggest a better alternative that would help both the parties. This remedy should be searched from the laws and courts of England as the seat was of the latter and the entire contract could be governed only from those laws. But then the appellants challenged the above given High court order again, this time

[6] *Bharti Shipyard Ltd. v. Ferrostaal AG & Anr.* (2009) 7 SCC 220

in the Apex court of India in Delhi. This case was made before the Supreme court in a three-judge bench. One of the judges of the Supreme court in that case said the judgement was filmsy, but another judge of the Bench disagreed with the first judge's remark.

LATEST JUDGEMENT

The judgement then studied all the sections in the Arbitration Act very carefully and it also decided the future of International Commercial and corporate arbitration proceedings in India. There was a lot of analysis whether Part one of our Indian Arbitration rules apply to foreign seat cases.

In Sec. 2(7) of Arbitration act, it is written that an award made in Part one is called as a domestic award and hence it differs from the foreign award, which is made in part two of that particular Arbitration act. But it does not separate a domestic award from an international award that was given in India. Domestic award means the award which is wholly granted in the state due to the conditions in the contract. If the award was granted in international arbitration and its contract stated that the rules of Indian law would be applied, then if the award is unfair, then it can be challenged under sec 34 of the act, and it is also enforced by the courts under sec 36 of the act.

The Supreme court also held in its judgement that the two parts in the Arbitration Act are totally different. They work in different contexts and they do not interject one another. It was held that there is a crystal-clear differentiation between the meanings of seat and venue in any arbitration proceeding, even though they both can be the same place and that same place's laws applied. And we can see in this case that a foreign country that is England, was chosen as the seat where the parties will arbitrate. It was merely the place where the parties would go (an unbiased place is always chosen and its mutually consented by both or all the parties), and resolve their disputes. England will also act as the place whose courts of law's rules and procedures would apply to this contract. Hence that is why the court held that Indian law would not apply to even the management and administration of the proceeding. Thus, the court held that the Indian courts cannot intervene in these arbitration proceedings or even in the award or challenges to the award because part one of the Arbitration Act is not applicable in these scenarios since the parties, although Indian themselves, have mutually consented that their governing laws

for the arbitration would be outside India, in England. They both knew the consequences if disputes arose and willingly accepted these clauses.

It was held that that the parties have taken from the Indian arbitration act, only those clauses which dealt with the inner performance of their alternate dispute resolution proceedings and only those arbitration laws which were not interjecting with the English laws as those English laws were forefront in this case. If the seat that is the governing rules of arbitration applied to India, then only part one of the Indian act would have applied as it is only put in cases there the governing laws relating to the arbitration are our Indian rules and laws.

This bench disagreed with the Bhatia International judgement. What differed in their opinions was that when they studied our Indian Arbitration Act, they interpreted that Indian courts do not have any rights to accord provisional measures if the seat was based outside the country and it is out of the bounds of the Indian judiciary. They stated that even if a plain reading is done of Sec. 9 of Arbitration act, then it can be construed that measures can be granted prior to or throughout the arbitration proceeding or even after the award is awarded. But it is important to note that this section is applicable only with respect to Sec. 36 of the act which deals only with domestic awards. In that fashion, Indian courts have no jurisdiction when it comes to challenging an award whose seat was outside India. This was a very justified judgement and the Indian judiciary once again proved its fairness and was not arbitrary and they clearly demarcated their powers