A FRAUD ON THE SPIRIT OF ARBITRATION, BY ALLEGING FRAUD OF THE CLAUSE: UNDERSTOOD IN THE LIGHT OF *WORLD SPORT GROUP (MAURITIUS) LIMITED V. MSM SATELLITE (SINGAPORE) PRIVATE LIMITED.*

- Namit Bafna[1]

***ABSTRACT*:** This paper analyzes a case, wherein the approach of judiciary was emphatically pro-arbitration, thereby reaffirming the value and strength of arbitration as a viable means of dispute resolution. The case is of significance as it reflects and reiterates the BALCO position. The case is an example of a successful attempt which confirms the changing approach of the Indian judiciary towards International Commercial Arbitration. The decision was welcome by the international community and is a major pillar in the changing jurisprudence of arbitration law in India. The case comes as relief to foreign parties who deal with Indian parties. The paper gives detailed analysis of the facts, argument and judgment of the case. The conclusion follows with an insight into the recent trend of Indian judiciary towards allegation of fraud in the Arbitration agreement, where the seat is abroad.

Bench: A. K. Patnaik, Fakkir Mohamed Ibrahim Kalifulla.

Date of judgment: 24th January 2014. Supreme Court of India.

Keywords: Arbitration, fraud, BALCO, Interference by HC.

INTRODUCTION:

Disputes are an inevitable occurrence in any international commercial transactions. Varied economical and legal exceptions, cultural approaches, political ramification and geographical situations are all sources for disagreement and dispute between contracting parties. Such disputes

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need not be resolved through negations; they will need legal assistance to resolve the matter. In such cases, parties to international commercial contracts frequently look at arbitration as a private, independent and neutral system.

The instant case involves parties which entered into International commercial contract, wherein they decided to resolve any dispute through arbitration with a foreign seat. The Indian counter part of the contract challenged the contract as such whole, alleging it to be devoid of any legitimacy as it involved an element of fraud. The moot question before the court was, whether court has competency to review the contract to determine whether the contract was fraudulent or not. As the seat of arbitration was not within the jurisdiction of the court, it was held that, only the arbitrator has the authority to determine the legality of the contract. The court further remarked that, even if the contract was fraud, the arbitration clause as such wouldn't be null and void[2]

The court relied on the Doctrine of Seprarability. The doctrine of Seprarability gives autonomy from all laws, judicial autonomy and the arbitration agreement is considered separate from the main contract. The doctrine is widely relied by the court. Its application and existence can be investigated into various case laws[3] and arbitration rules[4].

The doctrine of Seprarability aims at avoiding the frustration of the arbitration contract, to run away from the liability. A party willing to avoid arbitration could simply assert that the contract was void, mainly due to fraud and therefore would revoke the jurisdiction of the court, which would lead into wastage of time and resources.

The instant case deals with one such effort to frustrate the arbitration agreement on the grounds of fraud. The paper gives an earnest attempt to analyze the position of law over such a question of law.

STATEMENT OF THE PROBLEM: THE QUESTION OF FRAUD

[2] Julian D. M. Lew, Loukas A. Mistelis & Stefan Michael Kröll, Comparative International Commercial Arbitration 2 (1 ed. 2003)
[3] See, Comandate Marine Corp v. Pan Australia Shipping Pty Ltd (2006), Fung Sang Trading Ltd. V. Kai Sun See Products and Food Co. Ltd (1992), H Smal Ltd v. Goldroyce Garment Ltd (1994).
[4] SIAC Rules, Rule 25.1; ACICA Rules, Article 24.2

There are two main, inter-related questions, when considering the question of fraud in an arbitration agreement. Firstly, do arbitral tribunals have the substantive jurisdiction to make determinations upon allegations of fraud? And secondly, if the contract containing an arbitration agreement is tainted by allegations of fraud, does the arbitration agreement survive?

The position of the law has been unclear in India since long. In UK, courts have rules that the arbitral tribunals are entitled to look into the allegation of fraud. It was only recently that the ruling of MSM case made the position of law clear. The court held that fraud claims fall under the substantive jurisdiction of an arbitral tribunal in cases where the arbitration falls under the Part II of the Indian Arbitration and Conciliation Act, 1966 which talks about foreign seated arbitration.

The second question had been dealt by the House of Lords in *Fili Shipping* v. *Premium Nafta Products*[5] wherein, it laid down the *"direct impeachment" test. The Supreme Court of India has not followed the said test in the MSM case but has laid down* that the dispute involving an allegation of the voidability of the main contract on account of fraud to arbitration which seems to imply that an arbitration agreement does not perish if there are allegations of fraud pertaining to the main contract. The court referred its previous case of *SMS Tea Estates Pvt. Ltd.* Vs *Chandmari Tea Pvt. Ltd*[6] where it has remarked that, the court has to look into each case to see if the arbitration agreement is also void, unenforceable or inoperative along with the main agreement or whether the arbitration agreement or clause stands apart from the main agreement and is not null and void. This approach is similar to the doctrine of seprarability.

In the case of *Mulheim Pipecoatings v. Welspun Fintrade*[7] the court tried to formulate the essential features of the doctrine of seprarability and identified the direct impeachment test as an indispensable feature which flows from it. Hence, various case laws make the position of law clear in India.

[5] [2007] UKHL 40
[6] [2011] 14 SCC 66
[7] Appeal [L] No. 206 of 2013

The doctrine of Seprarability has been observed in various cases, which was ultimately revisited in the MSM case. The paper will look at the approach of the court in the instant case, which will make its present standing clearer.

ANALYSIS OF THE MSM CASE

The case deals with three main contentions. First investigation was related to the jurisdiction of the court. Second investigation looked at the question of fraud and misrepresentation and third being the validity of decision by the subordinate court. The paper presents the facts of the case, argument presented by each party, the observation of the court and reasoning adopted by the court in the judgment.

Key facts of the case

The facts of the case are slightly complex and complicated. A tender was called by the Board of Control for Cricket in India (BCCI) to give away broadcasting rights of Indian Premier League (IPL), a cricketing tournament, which was accepted by MSM Satellite (Singapore) on 21/01/2008. Immediately after the first season of the IPL, which ran from April till June in 2008, BCCI terminated the agreement with MSM and entered into a new agreement with World Sports Group (Mauritius) Limited (WSG) granting broadcasting rights from 2009 to 2017. Simultaneously, on 14/03/2009 MSM filed a petition in Bombay High Court against BCCI for termination of the agreement.

In accordance to the contract, WSG had to find a sub-licensee within 72 hours, which they failed. On given an extension, WSG entered into a facilitation deed with MSM worth Rs. 425 Cr, by which WSG agreed to relinquish its media rights and facilitate MSM to re-acquire these rights from the BCCI directly. As a part of the payment, MSM paid Rs. 125 Cr. (Approx. US $30 million) to WSG.

Later, MSM refused to pay the balance of Rs. 300 Cr. On the account of allegation of fraud and Misrepresentation, as WSG's rights were due to lapse and that WSG through misrepresentation and fraud purported to relinquish rights it did not even had. On 25/06/2009 MSM filed a suit against WSG at Bombay High Court to recover Rs. 125 cr. which it had already paid.

According to the Clause 9 of the Facilitation Deed, any dispute between the parties would be referred to arbitration. In accordance of Clause 9, WSG sent a request for arbitration at ICC, Singapore on 28/06/2010. A notice was issued to MSM of the same. On 30/06/2010 filed second petition at Bombay High Court seeking injunction against arbitration initiated by WSG. MSM contended that the Facilitation Deed was null and void on grounds of fraud and misrepresentation, therefore the clause 9 shall cease to have any binding effect on the parties.

On 09/08/2010, Single bench judge of the Bombay High Court dismissed the petition and held that it is upon the arbitrator to decide the legality of the facilitation deed and not the court. WSG then went on appeal before Division bench of Bombay H.C. Division bench, which passed an order of temporary injunction restraining the Arbitration of ICC, in favor of MSM, dismissing the order given by the Single bench judge.

WSG appealed to the Supreme Court and requested to reverse the decision of the Bombay High Court and allow arbitration to prevail.

CONTENTIONS AND REASONING OF THE SUPREME COURT

DOES THE HIGH COURT OF BOMBAY HAVE THE JURISDICTION TO PRESIDE OVER THE MATTER WHICH IS TO BE DECIDED THROUGH AN INTERNATIONAL ARBITRATION?

According to the senior council for the Appellants, *firstly*, the Bombay High Court had no jurisdiction to pass an order of injunction restraining a foreign seated International Arbitration, Singapore between the parties who were not residents of India. They referred to Clause Nine of the facilitation Deed which stipulated that any party may seek equitable relief in a court of competent jurisdiction in Singapore, or any other court that may have jurisdiction over the parties. *Secondly*, the principal of Comity of Court, the Court should have refused to interfere in

the matter and should have allowed the parties to resolve their dispute through International Chamber of Commerce's arbitration and in accordance with clause nine of the Facilitation Deed. *Thirdly*, According to the Section 45 of the Arbitration and Conciliation Act[8] the court seized of an action in a matter in respect of which the parties have made an agreement referred to in Section 44 of the same Act[9], wherein the parties have to refer to the arbitration in case of any dispute, unless the court finds that the agreement referred to in Section 44 is *null and void, inoperative or incapable of being performed*. The court will not entertain a dispute covered by the arbitration agreement and refer the partied to the arbitration. The council relied on the decisions of the court *in Chloro Controls India Pvt. Ltd*. V. *Seven Trent Water Purification Inc & Ors.*[10] *Fourthly*, Article 6(4) of the ICC Rules of the Arbitration, the Arbitral Tribunal has the power to exercises jurisdiction and adjudicates the claims even if the main contract is alleged to be null and void or nonexistent because the Arbitration clause is an independent and distinct agreement. *Fifthly*, the principle of *Kompetenz Kompetenz* has been recognized in Section 16 of the Act, under which the Arbitral tribunal has the competence to rule on its own jurisdiction. They relied on case of *Insurance Company Ltd.* V. *Boghara Polyfab Pvt. Ltd*[11]. And *Reva Electric Car Co. Pvt. Ltd.* V. *Green Mobil*.[12] *Sixthly*, it was submitted that courts have also held that unless the Arbitrational Contract itself apart from the underline contract is assailed as vitiated by fraud or misrepresentation, the Arbitral Tribunal will have jurisdiction to decide all issues including the validity and scope of the arbitration agreement. Further it was submitted

[8] Section 45 of the Arbitration and Conciliation Act, 1996 : Power of judicial; authority to refer parties to arbitration: Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908(5 of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in Section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

[9] Section 44 defines "foreign award" as 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.

[10] (2013) 1 SCC 641
[11] (209) 1 SCC 267
[12] (2012) 2 SCC 93

that in the present case the Arbitration clause itself was not assailed as vitiated by fraud or misrepresentation. This argument was relied on the decision of the House of Lords in *Premium Nafta Products Ltd.* V. *Fili Shipping Co. Ltd. & Ors.*[13], *Buckeye Check Cashing, Inc V. John Cardegna et al*[14] and *Branch Manager, Magma Leasing and Finance* Ltd. & Anr. V. *Potluri Madhavilta & Anr.*[15] Last but not the least, According to the *N. Radhakrishna* v. *Maestro Engineers and others*[16] to hold serious allegation of fraud, inquiry by a court is required and not by an arbitrator, but the division bench failed to appreciate that in above mentioned case, the court relied on the case *of Abdul Kadir Shyam Shamsuddin Bubere* v. *Madhav Prabhakar Oak* [17] wherein it was observed that it is only a party against whom a fraud is alleged, can only request the court to inquire into the allegation of fraud instead of allowing the Arbitrator to decide on the allegation of the fraud. In the instant case, the respondent has alleged fraud against the appellant and thus it was the appellant to request the court to decide on the allegation of the fraud instead of referring the same to the arbitrator and no such request have been made by the appellant. It was further submitted that in any case the judgment of this court in *Maestro Engineers* case was rendered in the context of domestic arbitration in reference to the provision of Section 8 of the instant Act, the language of Section 45 of the instant Act is sustainably different from Section 8 of the Act and it will be clear from the language of Section 45 of the Act, that unless the Arbitration agreement is null and void, inoperative or incapable of being performed the parties will have to be refereed to Arbitration by the court. In the instant case, the respondent has not made out that, the Arbitration Agreement is null and void inoperative or incapable of being performed.

According to the senior council of the respondent firstly the Section 9 of the code of civil procedure 1908 confers upon the court jurisdiction to try all civil suits except suits which are either expressly or impliedly barred. Therefore the jurisdiction to try both, first suit and the second suit and there was no express or implied bar in section 45 of the act restraining the court to try the first suit and the second suit. Secondly, in India as well as in England, courts have power to issue injunction to restrain parties from proceeding with arbitration in foreign countries.

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[13] (2007) UKHL 40
[14] 546 US 440(2006)
[15] (2009) 10 SCC 103
[16] (2010) 1 SCC 72
[17] AIR 1962 SC 46

The arguments were relied on the case of *V.O. Tractor export, Moscow* Vs. *Tarapore and Co. Anr.*,[18] *Oil and natural gas commission* Vs. *western company of north America*[19], *Claxton engineering* Vs. *Txm olaj-es gaz kutao*[20]. *Thirdly*, in the case of *Chloro Controls Pvt. Ltd*. v. Seven Trent water Purification Inc. & Anr[21] the Section 45 of the Act casts an obligation on the court to determine the validity of the agreement at the threshold itself because this is an issue which goes to the root of the matter under decision on this issue will prevent a futile exercise of proceedings before the Arbitrator. It was submitted that, under Section 45 of the Act, the court is required to consider not only a challenge to Arbitration agreement but also a serious challenge to the substantive contract containing the arbitration agreement. This argument was relied on the case of *SMS Tea estates Pvt. Ltd.* V. *Chand Mati Tea Company Pvt. Ltd.*,[22] henceforth, the contention on behalf of the appellant that the court has to determine whether the Arbitration agreement contained in the main agreement is void and therefore not correct. *Fourthly*, In the cases of fraud wherein the allegation of fraud are prima facie made out, the judicial trend in India, has been to have them adjudicated them by the court., this argument was supported by the case of *Abdul Kadir Shyam Shamsuddin Bubere* v. *Madhav Prabhakar Oak,*[23] *Haryana Telecom Ltd. V. Sterlite Industries Ltd*[24] *and N. Radhakrishna* v. *Maestro Engineers and others.*[25] Wherein, the situation was reversed in the Madras High Court case *H.G.Oomar Sait* v. *Aslam Sait*[26] was reversed. Last but not the least, the facts in the instant case prima facie establishes that a grave fraud was played by the appellant not only upon the respondent but also upon the BCCI. The Facilitation Deed ultimately deals with meadia rights belonging to the BCCI and it has been held in the case of M/s. Zee Telefilms ltd. and Anr. V. Union of Indi and Ors[27]. That BCCI is a public body, therefore, the view that the dispute in this case cannot be ket outside the purview of the India court and if the Arbitration is allowed to go on without BCCI, the interest of the BCCI would be adversely affected. The magnifute of the fraud alleged in the instant case, the dispute

[18] (1969) 3 SCC 562
[19] (1987) 1 SCC 496
[20] Ktf [2011] EWHC 345 (COMM.)
[21] Supra at 3
[22] (2011) 14 SCC 66
[23] Supra at 10.
[24] (1999) 5 SCC 688
[25] Supra at 9.
[26] (2001) 3 CTC 269 (Mad.)
[27] AIR 2005 SC 2677

were in capable of being arbitrated, relying on *Booz Allen Hamilton* v. *SBI Home Finance*[28] , Haryana Telecom Ltd. V *Sterlite Industries Ltd*[29] *, India Household and Health Care Ltd*. V. *L.G House hold and health care ltd*.[30] And *N. Radhakrishna* v. *Maestro Engineers and others, i*t was submitted that such allegations of fraud can only be inquired into by the court and not by the arbitrator.

The Court replied in positive that The Bombay High Court had the jurisdiction to pass an order of injunction restraining the arbitration at Singapore between the parties. The court relied on Section 9 of the CPC, wherein the courts in India have jurisdiction to try all suits of a civil nature expecting suits of which cognizance is either expressly or impliedly barred. Therefore, the appropriate civil court in India has jurisdiction to entertain the suit and pass appropriate orders. The court also observed that under Clause 9 of the Facilitation Deed provided that the courts in Singapore or any other courts having jurisdiction over the parties can be approached for equitable relief. It was observed that the Facilitation Deed was executed at Mumbai and the fraudulent inducement on the part of the defendant also happened in Mumbai. Thus, the cause of action for filing the suit arose with the jurisdiction of the Bombay High Court and the High Court had territorial jurisdiction to entertain the suit under Section 20 f the CPC. But, then, any Civil Curt in India, entertaining a suit, has to follow the mandate of the legislature in Section 44 and Section 45 in Chapter 1 of Part II of the Act. The court observed that the language of Section 45 of the Act makes I clear that notwithstanding anything contained in Part I or in the Code of Civil Procedure, a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement is null and void, inoperative or incapable of being performed. Thus, under Section 9 read with Section 20 of the CPC, the High Court had the jurisdiction to entertain the suit once a request is made by one of the parties or any person claiming through or under him to refer the parties to arbitration, the Bombay High Court was obliged to refer the parties to arbitration unless it found that the agreement referred to in Section 22 of the Act was null and void, inoperative or incapable of being performed. Therefore, the Court observed that the appellants may not have made an application to refer the parties to arbitration; but Section 45 of the Act does not refer to the request of one of the parties or any

[28] (2011) 5 SCC 532
[29] Supra at 20
[30] (2007) 2 SCC 510

person claiming through or under him to refer the parties to arbitration. The defendants had already evoked the arbitration agreement in the Facilitation Deed and the suit was an abuse of the process of Court. Therefore, the court held that the Bombay High Court had no jurisdiction or power to entertain the suit.

WOULD CLAUSE 9 OF THE FACILITATION DEED WILL ALSO BE NULL AND VOID?

According to the respondents, the main agreement was voidable on account of fraud and misrepresentation by the appellant, Clause 9 of the main agreement which contained the arbitration agreement in writing was also null and void.

The appellants relied on the decision in SMS Tea Estates Pvt. Ltd. V. Chandmari Tea Co. Pvt. Ltd,[31] wherein the court held that the court will have to see in each case whether the arbitration agreement is also void, unenforceable or inoperative along with the main agreement or whether the arbitration agreement stands apart from the main agreement and is not null and void.

For better understanding, the Court looked in to the case of Nafta Production Ltd. V. Fili Shipping Company Ltd. & Ors. [32] Wherein, the court particularly looked at the Principe of Severability, which according the House of Lords, meant the invalidity or rescission of the main contract does not necessarily entail the invalidity or rescission of the arbitration agreement. The arbitration agreement must be treated as a "distinct agreement" and can be void or voidable only on grounds which relate directly to the arbitration agreement.

The Court also held that, even if there was fraud, it doesn't attack the arbitration clause. It would have to be shown that whatever the terms if the main agreement or the reasons for which the agent concluded it, he would have no authority to enter into the arbitration agreement Even if the allegation is that there was no concluded agreement that is not necessarily an attack in the arbitration agreement If the arbitration clause has been agreed, the parties will be presumed to have intended the question whether there was a concluded main agreement to be decided but the arbitration.

[31] AIR 2011 SC (Civ) 1972
[32] [2007] UKHL 40

The court held that, even if there was fraud on the part of appellant, it does not in any manner affect the arbitration agreement as it is independent of and separate from the main Facilitation Deed and does not get rescinded as void.

To make it further clear, the court also looked at the various interpretations of the word "inoperative or incapable of being performed". The Court looked at Redfern and Hunter on International Arbitration[33], Article by Albert Jan Van Den Berg titled "The New York Convention, 1958 – An Overview"[34], book titled "Recognition and Conferment of Foreign Arbitral Awards: A Global Commentary on the New York Conventions".[35]

Thus, the court came to the conclusion that the arbitration agreement does not become "inoperative or incapable of being performed" where allegations of fraud have to be inquired into and the court cannot refuse to refer the parties to arbitration as provided in Section 45 of the Act on the ground that allegation of fraud have been made by the party which can only be inquired into by the court and not by the arbitrator.

S.C. ON THE JUDGMENT OF DIVISION BENCH OF HIGH COURT

[33] NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 148 (Oxford Univ Pr 2009): "At first sight it is difficult to see a distinction between the terms 'inoperative' and 'incapable of being performed'. However, an arbitration clause if inoperative where it has ceased to have effect as a result, for example, of a failure by the parities to comply with a time limit, or where the parties have by their conduct impliedly revoked the arbitration agreement. By contrast, the expression 'incapable f being performed' appears to refer to more practical aspects of the perspective arbitration processing. It applies, for example, if for some reason it is impossible to establish the arbitral tribunal"

[34] Albert Jan van den Berg, The New York Convention of 1958: An Overview http://www.arbitration-icca.org/(2014),http://www.arbitrationicca.org/media/0/12125884227980/new_york_convention_of_1958_overview.pdf. "The words "null and void" may be interpreted as referring to those cases where the arbitration agreement is affected by some invalidity right from the beginning, such as lack of consent due to misrepresentation duress, fraud or undue influence. The word "incapable of being performed would seem to apply to those cases where the arbitration cannot be effectively set into motion. This may happen where the arbitration clause is too vaguely worded, or other terms of the contract contradict the parties' intention to arbitrate, as in the case of the so-called co-equal forum section clauses. Even in these cases, the court interprets the contract provisions in favor of arbitration".

[35] Herbert Kronke et al., Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention 82 (1 ed. 2010): " Most authorities hold that the same school of thought and approaches regarding the term nil ans void also apply to the terms inoperative and incapable of being performed. Consequently, the majority of authorities do not interpret these terms uniformly, resulting in an unfortunate lack of uniformity. With that caveat, we shall give an overview of typical examples where arbitration agreements were held to be (or not to be) inoperative or incapable of being performed…."

The S.C. observed that the reasoning of the H.C. in considering BCCI as a public body is not in consideration with Section 45 of the Act, which mandates that in the case of arbitration agreements covered by the New York Convention, the court which is seized of the matter will refer the parties to arbitration agreement null and void, inoperative or incapable of being performed, The S.C. held that the division bench of H.C was required to only consider whether Clause 9 of the Vacillation Deed which contained the arbitration agreement was null and void, inoperative or incapable of being performed.

Supreme Court also held that the reasoning adopted by Division Bench of High Court was not in conformity with Section 45 of the Act. The Division Bench held Facilation Deed as void because it is against public Policy as clause 9 of the deed restricts the rights of the parties to move to the courts for appropriate relief and also bards the right to trial by a jury. H.C. stated that the Parliament had enacted the Arbitration and Conciliations Act, 1996 for providing domestic arbitration and international arbitration as made of resolution of disputes between the parties and Exception 1 to Section 28 of the Indian Contract Act, 1872 clearly states that Section 28shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration and that only that amount awarded in such arbitration and that only the amount awarded in such arbitration shall be recoverable in respect of the disputes referred.

The Supreme Court observed that, the finding of Division Bench of the High Court is erroneous as the Clause 9 of the Facilitation Deed is consistent with the policy of the legislature as reflected in the Act and is saved by the Exception 1 of Section 28 of the Contract Act, 1872. The right to jury is not available under the Indian laws.

EFFECTS OF THE JUDGMENT AND THE JUDICIAL VIEW ON THE ARBITRATION IN INDIA

The decision of the Supreme Court has eased the difficulty of foreign parties having agreement with Indian counter – parts, with an arbitration clause. Before this ruling the, the Indian parties when alleged of fraud used to approach Indian courts to decide the matter pertaining to allegation of fraud. The Supreme Court in the instant case has narrowed its previous ruling in the case of *N Radhakrishnan* v. *Masestro Engineers & Ors.* to the domestic arbitration, clarifying that the

allegation of fraud is not a bar on arbitrability of disputes between the parties under India Law, when the seat is outside India.

The Supreme Court clarified the position of the law, ruling that allegation of fraud is not a bar to refer parties to foreign seated arbitrations and that the law doesn't require a formal application to refer parties to arbitration. The court further remarked that, if the arbitration agreement providing foreign seat should be referred only by such seat but the court also remarked that if the agreement is null and void or inoperative or incapable of being performed then the domestic court will have the jurisdiction.

The decision provides some sort of clarity in this area, reflecting the changing attitude of Indian court towards international arbitration.

The decision has successfully applied the doctrine of seprarability, maintaining the sanctity of the arbitral tribunals which would in return, will discourage abuse by the parties who intents at frustrating the purpose of arbitral tribunal by invoking the jurisdiction of the court despite having an arbitration clause in the agreement, thereby adding unnecessary burden on the tribunal, making it difficult to resolve disputes in fair, speedy and effective manner.

It can be clearly deduced that Indian judiciary is taking a pro-arbitration approach. It has shifted from being highly interventionist in arbitration matter to giving arbitration its own much needed importance and bestowed its trust in the mechanism of arbitration.

Cases like *Bhatia International* vs. *Bulk Trading S. A. & Anr*[36] and *Venture Global Engineering* vs. *Satyam Computer Services Ltd & Anr*[37] clearly shows the interventionist attitude of the Indian judiciary but the approach of Indian judiciary saw a change through the decisions in the cases like *BALCO v. Kaiser Aluminum*[38], *Shri Lal Mahal v. Progetto Grano SpA*[39] *and* Enercon (India) Ltd *v.* Enercon Gmbh and Anr[40]. The Pro-arbitration and non-interventionist approach

[36] (2002) 4 SCC 105. The question involved in the case was, can a party file a petition under Section 9 for an interim order from a court in India In an international commercial arbitration taking place outside India. The court answered in affirmation.

[37] (2008) 4 SCC 190. In case of international commercial arbitrations held out of India provisions of Part-I would apply unless the parties by agreement express or implied, exclude all or any of its provisions.

[38] Civil Appeal No. 7019 of 2005

[39] Civ. App. No. 5085 of 2013

[40] Civ. App. No. 2087 of 2014

became more clear and evident from the ruling of instant case, *World Sport Group (Mauritius) Ltd v. MSM Satellite (Singapore) Pte Ltd.*, which narrowed down its earlier approach as reflected in the case of *N. Radhakrishnan v. Maestro Engineers to arbitration seated domestically.*

The case of *Bharat Aluminum Co.* vs. *Kaiser Aluminum Technical Services Inc (BALCO* case) overruled *Bhartia* and *Satyam Computer* case. The court held that Indian court will be devoid of power to set aside foreign arbitral awards, which would be also applicable even if the law is applicable to the substantive aspects of the dispute, is Indian law. Also, the Indian courts would not be empowered to order interim relief in support of foreign – seated arbitration. It was highly welcomed and appreciated by the international community[41], but as much as it has changed the face of Indian International Commercial Arbitration it has some ill-effects, as when unavailability of Interim award, the entire purpose of the arbitration proceedings may get defeated even if a favorable award is passed, as a party *(*against whom, the award has been passed*)* having assets in India, can in the interim, dispose of or encumber such assets with a view to defeating any award that may be passed against them outside India. An amendment to this effect would be quintessential to ensure that the interest of a party is safeguarded.[42]

This approach of Indian judiciary was retrieved in, and took another leap with the ruling of *Shri Lal Mahal* v. *Progetto Grano SpA.* The SC remarked that the "public policy" applicable in case of international commercial arbitration, would be considerably different than that applicable to domestic arbitrations. The court refused to apply the wider definition of "public policy" as was laid down in the case of *Oil & Natural Gas Corporation Ltd.* vs. *Saw pipes*[43] and *Phulchand*

[41] See, Supreme Court of India delivers landmark arbitration decision in Bharat Aluminium, overruling Bhatia International, (1 ed. 2012), http://www.herbertsmithfreehills.com/-/media/HS/L-180912-18.pdf (last visited Jun 28, 2014. See also, INDIAN SUPREME COURT RULING SUPPORTS FOREIGN ARBITRATION PROCEEDINGS, (1 ed. 2012),http://www.gibsondunn.com/publications/Documents/IndianSupremeCourtRulingSupportsForeignArbitration Proceedings.pdf (last visited Jun 28, 2014).

[42] Vinay Vaish, International Commercial Arbitrations- A Critique Of Bharat Aluminium Co. vs. Kaiser Aluminium Technical Services Inc - Litigation, Mediation & Arbitration - India Mondaq.com (2012), http://www.mondaq.com/india/x/199168/Arbitration+Dispute+Resolution/International+Commercial+Arbitrations+A+Critique+Of+Bharat+Aluminium+Co+vs+Kaiser+Aluminium+Technical+Services+Inc (last visited Jun 28, 2014).

[43] (2003) 5 SCC 705

EXPORTS Ltd. Vs *OOO Patriot.*[44] The court held that the broader interpretation of "public policy" used for setting aside domestic arbitration cannot be applied of an international arbitration award in India. Further, the court also held that, courts do not act in appeal over international arbitrations and enforcement of an award could only be refused on very limited grounds. The court held that foreign arbitration could be refused enforcement only if it is contrary to fundamental policy of India, the interests of India or contrary to justice or morality.

The *Lal Mahal* case sought to reduce judicial intervention in enforcement of foreign awards and accomplishes to make the process swifter and less time consuming.

Further, this trend of the judiciary is also reflected in the case of *Enercon (India) Ltd v. Enercon Gmbh and Anr.* The SC in this case held that certain errors in the arbitration clause would not prevent parties from arbitrating unless the clause was incapable of being performed. Through this decision the SC also ensured that Indian courts would not unduly interfere in international commercial arbitrations.

MSM case is one of the important recent example this judicial trend. Through the ruling of MSM, It becomes clear that international commercial arbitration in India has undergone a sea change in the last few years and will continue to do so. This trend would need to continue in order to ensure that India becomes a global hub for arbitration.

The recent ruling of *Reliance Industries* Ltd. & Ors v. *Union of India*[45]**,** *Videocon Industries Ltd.* v. *Union Of India & Anr*[46]*, Ram Chandra Parolia* v. *Bishwant Parolia & Ors*[47] and *HSBC PI Holdings (Mauritius) Limited, Mauritius* v. *Avitel Post Studioz Limited, Mumbai and others*[48] Provide further reassurance of Indian judicial approach of pro- arbitration. This case confirmed that in the circumstances where arbitration is seated outside of India and the parties have

[44] 2012(2) ALD 133 (SC)
[45] 2014 Indlaw SC 391
[46] 11 May, 2011
[47] 2014 Indlaw CAL 537
[48] 2014 Indlaw MUM 29. Came just two days before the MSM case.

expressly chosen a foreign law to govern the arbitration agreement, the Indian courts should not have jurisdiction to set aside an arbitral award.

CONCLUSION:

Problem is people try to avoid international liability by resorting to various tactics in the domestic forums thereby defeating the spirit of having an arbitration agreement. This will only lead to a lot of mistrust and bad blood between contracting parties and ultimately this will affect international trade and investments in India. The Supreme Court through this judgment has decisively laid down that the arbitration law in India cannot be used to frustrate and consequently destroy the arbitration agreement. This will only boost and promote the confidence of international benefactors in investing in India because unlike before they have access to fair remedies and their positions will be ameliorated as well.

To conclude, the author believes that this judgment will be very welcoming to the foreign investors and will only boost economic growth and health of Indian economy.