Sumitomo Heavy Industries Ltd vs Ongc Ltd. & Ors on 4 December, 1997

Equivalent citations: AIR 1998 SUPREME COURT 825, 1998 AIR SCW 556, 1997 (7) SCALE 338, 1998 (1) ARBI LR 10, 1998 (1) SCC 305, (2000) 6 COMLJ 178, 1998 (1) UJ (SC) 82, (1998) 1 ALLMR 715 (SC), 1998 UJ(SC) 1 82, (1997) 10 SUPREME 157, (1997) 7 SCALE 338, (1998) 91 COMCAS 349, (1997) 4 CURCC 148, (1998) 1 ARBILR 10, (1998) 1 MAD LW 674, (1998) 1 SCJ 233, (1998) 28 CORLA 17, (1998) 4 BOM CR 289

Bench: S.P. Bharucha, S.C. Sen

PETITIONER:
SUMITOMO HEAVY INDUSTRIES LTD.

Vs.

RESPONDENT:
ONGC LTD. & ORS.

DATE OF JUDGMENT: 04/12/1997

BENCH:
S.P. BHARUCHA, S.C. SEN

ACT:

HEADNOTE:

JUDGMENT:

THE 4TH DAY OF DECEMBER, 1997 Present:

Hon'ble the Chief Justice Hon'ble Mr.Justice S.P.Bharucha Hon'ble Mr.Justice S.C.Sen Soli J.Sorabjee, Shanti Bhushan, B.Dutta, Milon K.Banerjee, Sr.Advs., P.H.Parekh, Amit Dhingra, Nikihil Shakharande, G.Joshi, G.khandpal, Virendra, G.K. Banerjee, Advs., with them for the appearing parties.

J U D G M E N T The following Judgment of the Court was delivered:

BHARUCHA, J.

This appeal by special leave assails the correctness of the judgment and order of a learned single Judge of the High Court at Bombay. By the Judgment and order the petition of the first respondent for the issuance of a direction to the second respondent to file the award that he had made as the umpire in arbitration proceeding between the appellant and the first respondent in that court was allowed.

Briefly stated, these are the facts relevant to the issue in the appeal:

The appellant and the first respondent entered into a contraction on 7th September, 1983, whereunder the appellant agreed to install and commission on trunkey basis an oil platform at Bombay High, about 100 miles north-west of Bombay. The contract stipulated the following.

"17.0 Laws/Arbitration 17.1 Applicable Laws All questions disputes or difference arising under, out of or in connection with this Contract shall be subject to the laws of Indian.

17.2 Arbitration If any dispute, difference or question shall at any time hereafter arise between the parties hereto or their respective representatives or assigns in respect of the construction of these presents or concerning anything herein contained or arising out of these presents or as to the rights, liabilities or duties of the said parties hereunder which cannot be mutually resolved by the parties, the same shall be referred to arbitration, the proceeding of which shall be held at London, U.K. Within 30 days of the receipt of the notice of intention of appoint arbitrators each party shall appoint an arbitrator of its own choice and inform the other party. Before entering upon the arbitration, the two arbitrators shall appoint an umpire. In case the parties fail to appoint its arbitrator within 30 days from the receipt of a notice from the other party in this behalf of if any dispute in selection of umpire, the president of International Chamber of Commerce, Paris, shall appoint the arbitrator and/or or the umpire as the case may be.

The decision of the arbitrators and failing to an agreed decision by them, the decision of the umpire shall be find and binding on the parties.

The arbitration proceeding shall be held in accordance with the provision of International Chamber of Commerce and the rules made thereunder as amended from time to time. The arbitration proceedings shall be conducted in English language."

Disputes having arisen subsequent to the completion of the work under the contract, the appellant served notice of arbitration on the first respondent and appointed Mr. Robert A. MacCrindle its arbitrator. The first respondent appointed Mr. Justice Chandrasekhar (Retired) its arbitrator. The arbitrators nominated the second respondent as the umpire. Preliminary hearings commenced. The

appellant then applied to the queens Bench Division, Commercial Court in London for leave to issue and serve on the first respondent an Originating Summons seeking an order under Section 5 of the English Arbitration Act, 1979, to confirm that the arbitrators had the power toe proceed with the arbitration in default of a defence having been served by the first respondent. A learned Judge of the Commercial Court granted to the first respondent leave to issue and serve the said summons. It was heard and decided in favour of the appellant. Thereafter the first respondent's defence was served, and a summons was issued on the first respondent's behalf in the Commercial Court to set aside its earlier orders. The application made by the first respondent was decided on 23rd July, 1993 by Potter, J. (The Judgment and order is reported in (1994) 1 LIoyd's Law Reports 45). The arbitrators having differed, the second respondent entered upon the reference and, on 27th June, 1995, made his award. The award was served on the first respondent on 10th July, 1995.

On 26th July, 1995, the first respondent filed in the High Court at Bombay a petition praying that the second respondent be directed, under Section 14 of the Indian Arbitration Act, 1940, to file the award in that court. The first respondent submitted that the award was invalid, unenforceable and liable to be set aside under the provisions of the said Act. The learned Judge, as aforestated, allowed the petition.

The decision rendered by Potter, J. in the Commercial Court is of some importance because the jurisdiction of the English Courts was discussed. The learned Judge said:

> "Before stating my reasons for that conclusion and then turning to the "frustration" argument, and because questions have arisen as to whether English law or Indian law is appropriate to be applied at various stages of this application, I propose briefly to advert to the various laws potentially applicable to the various aspects of the arbitral relationship which may fall for consideration in cases of this kind.
>
> (1) The proper law of the underlying contract i.e. the law governing the contract which creates the substantive rights and obligations of the parties out of which the dispute has arisen.
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> (2) The proper law of the arbitration agreement, i.e. the law governing rights and obligations of the parties arising from their agreement to arbitrate and, in particular, their obligation to submit their disputes to arbitration and to honour an award.

This includes inter alia questions as to the validity of the arbitration agreement, the validity of the notice of arbitration, the constitution of the tribunal and the question whether an award lies within the jurisdiction of the arbitrator.

(3) The proper law of the reference, i.e. the law governing the contract which regulates the individual reference to arbitration. This is an agreement subsidiary to but separate from the arbitration agreement itself, coming into effect by the giving of a notice of arbitration from which point a new set of mutual obligations in relation to the conduct of the reference arise upon lines canvassed in the Bremer Vulkan Schiffbau and Maschinenfabrik v. South India Shipping

Corporation, [1981] 1 Lloyd's Rep. 253 at p. 263 and developed by Mr. Justice Mustill (as he then was) in Black Clawson International Ltd. v. Papierwork Waldhof-Aschaffenburg A.G. [1981] 2 Lioyd's Rep. 446. That law governs the questions of whether by reason of subsequent circumstances the parties have been discharged (whether by repudiation or frustration) from their obligation to continue with the reference of the individual dispute, while leaving intact the continuous agreement to refer future disputes pursuant to the arbitration agreement.

(4) The curial law, i.e. the law governing the arbitration proceedings themselves, the manner in which the reference is to be conducted. It governs the procedural powers and duties of the arbitrators, questions of evidence and the determination of the proper law of the contract.

In respect of many arbitrations, the applicable law will be the same in all four cases. (1) will usually be decisive as to (2), in the absence of an express contrary choice; (2) and (3) will very rarely differ. However, as to (4), it is not uncommon to encounter the incidence of a different curial law in cases where the parties have made an express choice for arbitration (frequently in London) in a jurisdiction divorced from the jurisdiction with which the contract in (1) has most real connection.

In this case, as to (1), the parties have made an express choice of Indian law as the proper law of the contract. As to (2), it seems to me likely (although) it is not necessary finally to decide) that the proper law of the arbitration agreement is similarly Indian law, since the arbitration agreement is part of the substance of the underlying contract and the terms of cl. 17.1 are clear in that respect. As to (3), it matters not for the purpose of this application whether the governing law in English or Indian law, because Mr. Dunning has conceded before me that there is no material difference between the two so far as applicable to the doctrine of frustration upon which he relies (see also par. 7 of the affidavit of Mr. Majumdar to that effect). As to (4), the curial law, it seems to me plain that it is the law of England. There is, it is true, no express choice of curial law.

However, there is a clear requirement that the arbitration proceedings be held in London. In the absence of express agreement, there is a strong prima facie presumption that the parties intend the curial law to be the law of the "seat" of the arbitration, i.e. the place at which the arbitration is to be conducted, on the ground that is the country most closely connected with the proceedings - see Mustill and Boyd, 2nd ed., p.64."

Neither of the parties having filed an appeal from the judgment of Potter, J., its finding bind them. Based upon these findings, it was contended by Mr. S.J.Sorabjee, learned counsel for the appellant, that the petition filed by the first respondent in the High Court at Bombay fell outside the jurisdiction of that Court for a direction to the second respondent to file his award in court could be given only by the courts administering the curial law, that is to say the courts in England. The answer of Mr. Banerjee, learned counsel for the first respondent, is that the award having been made, the procedural or curial law had ceased to have effect, and accordingly, the courts administering the curial law and no jurisdiction to issue to the second respondent a direction to file his award therein.

This, then, is the central issue in the appeal: what is the area of operation of the curial law.

In Bank Mellat v. Helliniki Techniki S.A., 1984 (1) QB 291, the Court of Appeal said that the fundamental principle was that in the absence of any contractual provision to the country, "the procedural (or curial) law governing arbitrations' was that of the forum of the arbitration, since this was the system of law with which the agreement to arbitrate in the particular forum would have its closest connection. Parties to international arbitrations might well choose London as a convenient neutral forum and "English law will, as the curial law, apply to the conduct of the arbitration; and the parties will, by holding their arbitration here, subject themselves for that purpose to English law....." (Emphasis supplied.) In Naviera Amazonica Peruana S.A. vs. Compania International De Seguros Peru, 1988 (1) Lloyds Law Report 116, Lord Justice Kerr summarised the state of the relevant jurisprudence thus:

> "A. All contracts which provide for arbitration and contain a foreign element may involve three potentially relevant systems of law. (1) The law governing the substantive contract. (2) The law governing the agreement to arbitrate and the performance of that agreement. (3) The law governing the conduct of the arbitration. In the majority of cases all three will be the same. But (1) will often be different from (2) and (3). And occasionally, but rarely, (2) may also differ from (3)."

He said, "Prima facie, i.e. in the absence of some express and clear provision to the contrary it must follow that an agreement that the curial or procedural law of an arbitration is to be law of X has the consequence that X is also to be the "seat" of the arbitration. The lex fori is then the law of X, and accordingly X is the agreed forum of the arbitration. A further consequence is then that the Courts which are competent to control or assistant the arbitration are the Courts exercising jurisdiction at X". The learned Judge observed that there was no reason in theory which precluded "parties to agree that an arbitration shall be held at a place or in country X but subject to the procedural laws of Y". (Emphasis supplied.) In the Law and Practice of Commercial Arbitration in England, Second Edition by Mustill and Boyd, there is a chapter on "The applicable law and the jurisdiction of the Court". Under the subtitle, "Law Governing The Arbitration", it is said, "An agreed reference to arbitration involves two groups of obligations. The first concerns the mutual obligations of the parties to submit future disputes, or an existing dispute to arbitration, and to abide by the award of a tribunal constituted in accordance with the agreement. It is now firmly established that the arbitration agreement which creates these obligations is a separate contract, distinct from the substantive agreement in which it si usually embedded, capable of surviving the termination of the substantive agreement and susceptible of premature termination by express or implied consent, or by repudiation or frustration, in much the same manner as in more ordinary forms of contract. Since this agreement has a distinct life of its own, it may in principle be governed by a proper law of its own, which need not be the same as the law governing the substantive contact. The second group of obligations, consisting of what is generally referred to as the `curial law' of the arbitration, concerns the manner in which the parties and the arbitrator are required to conduct the reference of a particular dispute. According to the English theory of arbitration, these rules are to be ascertained by reference to the express or implied terms of the agreement to arbitrate. The being so, it will be found in the great majority of cases that the curial law, i.e. the law governing the conduct of the reference, is the same as the law governing the obligation to arbitrate. It is, however, open to the parties to submit, expressly or by implication, the conduct of the reference to different law from the

one governing the underlying arbitration agreement. In such a case, the court looks first at the arbitration agreement to see whether the dispute is one which should be arbitrated, and which has validly been made the subject of the reference; it then looks to the curial law to see how that reference should be conducted; and then returns to the first law in order to give effect to the resulting award.

XXX XXX XXX It may therefore be seen that problems arising out of an arbitration may, at least in theory, call for the application of any one or more of the following laws-

1. The proper law of the contract, i.e. the law governing the contract which creates the substantive rights of the parties, in respect of which the dispute has arisen.

2. The proper law of the arbitration agreement, i.e. the law governing the obligation of the parties to submit the disputes to arbitration, and to honour an award.

3. The curial law, i.e. the law governing the conduct of the individual reference.

XXX XXX XXX

1. The proper law of the arbitration agreement governs the validity of the arbitration agreement, the question whether a dispute lies within the scope of the arbitration agreement; the validity of the notice of arbitration; the constitution of the tribunal; the question whether an award lies within the jurisdiction of the arbitrator; the formal validity of the award; the question whether the parties have been discharged from any obligation to arbitrate future disputes.

2. The curial law governs' the manner in which the reference is to be conducted; the procedural powers and duties of the arbitrator;

questions of evidence; the determination of the proper law of the contract.

3. The proper law of the reference governs; the question whether the parties have been discharged from their obligation to continue with the reference of the individual dispute.

XXX XXX XXX The conclusion that we reach is that the curial law operates during the continuance of the proceeding before the arbitrator to govern procedure and conduct thereof. The courts administering the curial law have the authority to entertain applications by parties to arbitrations being conducted within their jurisdiction for the purpose of ensuring that the procedure that is adopted in the proceedings before the arbitrator conforms to the requirements of the curial law and for reliefs incidental thereto. Such authority of the courts administering the curial law ceases when the proceedings before the arbitrator are concluded.

The proceedings before the arbitrator commence when he enters upon the reference and conclude with the making of the award. As the work by Mustill and Boyd aforementioned puts, it with the making of a valid award the arbitrator's authority, powers and duties in the reference come to an

end and he is "functus officio" (page 404). The arbitrator is not obliged by law to file his award in court but he may be asked by the party seeking to enforce the award to do so. The need to file an award in court arises only if it is required to be enforced, and the need to challenge it arises if it being enforced. The enforcement process is subsequent to and independent of the proceedings before the arbitrator. It is not governed by the curial or procedural law that governed the procedure that the arbitrator followed in the conduct of the arbitrator.

Mr. Sorabjee relied upon observations in Dicey and Morris on "The Conflict of Law, 12th Edition". The first Rule under the heading "Arbitration" in the Chapter on "Arbitration and Foreign Awards" reads thus:

> "Rule 57 - (1) The validity, effect and interpretation of an arbitration agreement are governed by its applicable law.
>
> (2) The law governing arbitration proceeding is the law chosen by the parties, or, in the absence of agreement, the law of the country in which the arbitration is held."

In discussing clause (2) of the Rule aforementioned, this is stated:

> "The procedural law of the arbitration will determined how the arbitrators are to be appointed, in so far as this si not regulated in the arbitration agreement; the effect of one party's failure to appoint an arbitrator, e.g. whether an arbitrator may be appointed by a court, or whether the arbitration can proceed before the sole arbitrator appointed by the other party, and whether the authority of an arbitrator can be revoked. The law will also determine what law the arbitrators are to apply, and whether they are expected or allowed to decide ex aequo et bono or as amiables compositeurs, and, if not, whether the parties can gave them this power or impose on them this duty. That law will also determine the procedural powers and duties of the arbitrators, e.g. whether they must hear oral evidence (but not their jurisdiction to decide the dispute, which is governed by the arbitration agreement and the law applicable to it) or whether the arbitrators have been guilty of misconduct. It will also determine what judicial remedies are available to a party who wishes to apply for security for costs or for discovery or who wishes to challenge the award once it has been rendered and before it is sought to enforce it abroad, and the circumstances in which judicial remedies may be excluded."

(Emphasis supplied.) Mr. Sorabjee submitted, relying upon the proposition that the procedural law would determine what judicial remedies were available to a party "who wishes to challenge the award once it has been rendered and before it is sought to enforce it abroad", that the court that administered the curial law of the arbitration had the jurisdiction to entertain a challenge to the award and, therefore, the jurisdiction to receive it. The footnote relative to the above proposition (at pave 583) reads thus:

"Whitworth Street Estates (Manchester) Ltd. v. James Miller & Partners Ltd. [1970] A.C. 583 (English remedies not available in Scots arbitration)."

Mr. Banerjee submitted, and it seems to us, correctly, that the case of James Miller & Partners Vs. Whitworth Street Estates, 1970 A.C. 583, does not bear out the proposition. The facts of the case, shortly put, were these:

> A contract was entered into between an English company, Whitworth, and a Scottish company, James Miller. The Scottish company was to carry out work at the English company's premises in Scotland. The contract did not provide for the place of arbitration or its procedure. Disputes arose between the parties and were referred to arbitration. The arbitration was held in Scotland, in accordance with Scottish law. The English company asked the arbitrator to state his award in the form of a special case for the decision of the English courts. The arbitrator refused to do so on the ground that the arbitration was a Scottish arbitration, and he issued his final award. The issue was whether the arbitrator should be required to state his award in the form of a special case. The case was, therefore, concerned with the question of which law governed the proceedings before the arbitrator and not with the question of which law governed proceedings to set an award.
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> We think that our conclusion that the curial law does not apply to the filing of an award in court must, accordingly, hold good. We find support for the conclusion in the extracts from Mustill and Boyd which we have quoted earlier. Where the law governing the conduct of the reference is different from the law governing the underlying arbitration agreement, the court looks to the arbitration agreement to see if the dispute is arbitrable, then to the curial law to see how the reference should be conducted, "and then returns to the first law in order to give effect to the resulting award".
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> The law which would apply to the filing of the award, to its enforcement and to its setting aside would be the law governing the agreement to arbitrate and the performance of that agreement. Having regard to the clear terms of Clause 17 of the contract between the appellant and the first respondent, we are in no doubt that the law governing the contract and the law governing the rights and obligations of the parties arising from their agreement to arbitrate, and, in particular, their obligations to submit disputes to arbitration and to honour the award, are governed by the law of India; nor is there any dispute in this behalf. Section 47 of the Indian Arbitration Act, 1940, reads thus:
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> "47. Act to apply to all arbitrations. - Subject to the provisions of Section 46, and save in so far as is otherwise provided by any law for the time being in force, the provisions of this Act shall apply to all arbitrations and to all proceedings thereunder"

Provided that an arbitration award otherwise obtained may with the consent of all the parties interested be taken into consideration as a compromise or adjustment of a suit by any Court before which the suit is pending." The only other statute which is required to be considered in the context of the provisions of Section 47 of the 1940 Act is the Foreign Awards (Recognition and Enforcement) Act, 1961. For the purposes of determining whether the provision of the 1940 Act are subject to the provisions of the 1961 Act, Section 9 is relevant. It reads thus:

> "9. Saving - Nothing in this Act shall-
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> (a) prejudice any rights which any person would have had of enforcing in India of any award or of availing himself in India of any award if this Act had not been passed, or
>
> (b) apply to any award made on an arbitration agreement governed by the law of India."

By reason of Section 9(b), the 1961 Act does not apply to any award made on an arbitration agreement governed by the law of India. The 1961 Act, therefore, does not apply to the arbitration agreement between the appellant and the first respondent. The 1940 Act, applies to it and, by reason of Section 14(2) thereof, the courts in India are entitled to receive the award made by the second respondent. We must add in the interests of completeness that is not the case of the appellant that the High Court at Bombay lacked the territorial jurisdiction to do so.

In the result, the appeal must fail, and it is dismissed with costs.