Bharat Aluminium Co vs Kaiser Aluminium Technical ... on 28 January, 2016

Equivalent citations: AIR 2016 SUPREME COURT 1285, 2016 (4) SCC 126, (2016) 4 CAL HN 68, (2016) 3 ANDHLD 133, (2016) 2 RECCIVR 966, (2016) 2 JCR 26 (SC), (2016) 1 ARBILR 424, (2016) 2 MAD LJ 139, (2016) 121 CUT LT 632, (2016) 2 SCALE 60, (2016) 2 ICC 123, ILR 2016 SC 230, 2016 (3) KCCR SN 308 (SC)

Bench: Amitava Roy, Kurian Joseph, Anil R. Dave

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 7019 OF 2005

BHARAT ALUMINIUM COMPANY ... APPELLANT (S)

VERSUS

KAISER ALUMINIUM TECHNICAL
SERVICES INC. ... RESPONDENT (S)

WITH

CIVIL APPEAL NO. 3678 OF 2007

J U D G M E N T

KURIAN, J.:

The residue of the Constitution Bench Judgment in Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc.[1] is the subject matter of the present appeal. At the instance of the appellant, the Bench resolved the conflicting, if not, confusing views on the applicability of Part I of Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'Arbitration Act') and held that "... Part I of the Arbitration Act is applicable only to all the arbitrations which take place within the territory of India", overruling a three-Judge Bench decision of this Court in Bhatia International v. Bulk Trading S.A. and another[2]. Exercising its the power under Article 142 of the Constitution of India, the Constitution Bench however, held that the law declared by it would only operate prospectively. In other words, all agreements executed prior to 06.09.2012 were to be governed by the decision in Bhatia International (supra).

In Bhatia International (supra), it was held that even in cases of international commercial arbitrations held out of India, provisions of Part I would apply unless the parties by agreement express or implied, excluded all or any of its provisions. To quote paragraph-32:

> "32. To conclude, we hold that the provisions of Part I would apply to all arbitrations and to all proceedings relating thereto. Where such arbitration is held in India the provisions of Part I would compulsorily apply and parties are free to deviate only to the extent permitted by the derogable provisions of Part I. In cases 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. In that case the laws or rules chosen by the parties would prevail. Any provision, in Part I, which is contrary to or excluded by that law or rules will not apply." Therefore, the simple question before us is whether the parties by agreement, express or implied, have excluded wholly or partly, Part I of the Arbitration Act.
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> The bare necessary facts of the case are that an agreement dated 22.04.1993 was executed between the appellant and the respondent with relation to supply of equipment, and modernization and up-gradation of the production facilities of the appellant at Korba in the state of Chhattisgarh. Certain disputes arose between the parties and the same were referred to arbitration. The arbitration proceedings were held in England and the arbitral tribunal made two awards in favour of the respondent dated 10.11.2002 and 12.11.2002. The appellant filed applications, under Section 34 of the Arbitration Act before the District Judge, Bilaspur, which were dismissed. Aggrieved, the appellant filed appeals before the High Court of Chhattisgarh. The High Court dismissed the appeals.

Party autonomy being the brooding and guiding spirit in arbitration, the parties are free to agree on application of three different laws governing their entire contract – (1) proper law of contract, (2) proper law of arbitration agreement and (3) proper law of the conduct of arbitration, which is popularly and in legal parlance known as curial law. The interplay and application of these different laws to an arbitration has been succinctly explained by this Court in Sumitomo Heavy Industries Limited v. ONGC Limited and others[3], which is one of the earliest decisions in that direction and which has been consistently followed in all the subsequent decisions including the recent Reliance

Industries Limited and another v. Union of India[4].

In order to ascertain the applicable laws, we have to certainly refer to the relevant clauses of the arbitration agreement, viz., Article 17 and Article 22, which read as follows:

> "Article 17 - ARBITRATION 17.1: Any dispute or claim arising out of or relating to this agreement shall be in the first instance endeavour to be settled amicably by negotiation between the parties hereto and failing which the same will be settled by arbitration pursuant to the English Arbitration Law and subsequent amendment thereto.

Article 17.2: The arbitration proceedings shall be carried by two arbitrators, one appointed by the Petitioner and one by Respondent chosen freely and without any bias. The Court of arbitration shall be wholly in London, England and shall use the English language in the proceedings. The finding and award of the Court of Arbitration shall be final and binding.

Article 17.3: Before entering upon the arbitration, the two Arbitrators shall appoint an Umpire. If the two arbitrators are not able to reach an agreement on the selection of an Umpire, the Umpire shall be nominated by the International Chamber of Paris.

Article 22: GOVERNING LAW This agreement will be governed by the prevailing law of India and in case of Arbitration, the English Law shall apply." In order to coherently analyse the situation, we shall first see the proper law of contract, the law governing the arbitration agreement and finally the law governing the procedure. Article 22 of the Arbitration Agreement leaves no room for any doubt, and it has also not been disputed, that the proper law of contract is Indian law. Therefore, crossing that gate, we shall now proceed to the door on the Arbitration Agreement.

Article 17 is solely on arbitration. Article 17.1 clearly stipulates that the disputes or claims arising out of or relating to the agreements, if not amicably settled by negotiation, will be settled by the arbitration pursuant to the English Arbitration Law and subsequent amendments thereto. The expression "pursuant to", according to Concise Oxford English Dictionary means "in accordance with". The New Oxford Dictionary of English has also given the same meaning to the expression. Words and Phrases, Permanent Edition, Volume 35A, explains the expression as "in conformity with". "The expressions "pursuant to or in pursuance of" have a restrictive interpretation and have been regarded as equivalent to "in conformity with", and imply that what is done is in accordance with an instruction or direction".[5] In Aircraft Employees' Housing Cooperative Society Limited v. Secretary, Rural Development and Panchayat Raj, Government of Karnataka, Bangalore and others[6], though in the context of the pre-amended Land Acquisition Act, this court has dealt with the meaning of the expression "in pursuance of". It has been held – "4....."In pursuance of" would mean under the authority of or by virtue of or in the course of carrying out in accordance with the scheme or plan or direction or order or anything in consequence or conformable to or according to; act of pursuing, carrying out and performance, prosecution." Therefore, it is clear that the parties have agreed in expressed terms that the law of arbitration would be English Arbitration Law.

Article 22 has in fact two parts. In the first part of that Article, it is agreed between the parties that the proper law of the contract will be governed by the prevailing law of India, and in the case of arbitration, English Law would apply. In other words, the agreement as a whole would be governed by Indian Law, and in case of arbitration, the English Law will apply. No doubt, one should not strain too much to interpret an agreement between two parties as in the case of a statutory interpretation. The approach in analysing the terms of agreement should be straight and plain but at the same time cohesive and logical.

In the matter of interpretation, the court has to make different approaches depending upon the instrument falling for interpretation. Legislative drafting is made by experts and is subjected to scrutiny at different stages before it takes final shape of an Act, Rule or Regulation. There is another category of drafting by lawmen or document writers who are professionally qualified and experienced in the field like drafting deeds, treaties, settlements in court, etc. And then there is the third category of documents made by laymen who have no knowledge of law or expertise in the field. The legal quality or perfection of the document is comparatively low in the third category, high in second and higher in first. No doubt, in the process of interpretation in the first category, the courts do make an attempt to gather the purpose of the legislation, its context and text. In the second category also, the text as well as the purpose is certainly important, and in the third category of documents like wills, it is simply intention alone of the executor that is relevant. In the case before us, being a contract executed between the two parties, the court cannot adopt an approach for interpreting a statute. The terms of the contract will have to be understood in the way the parties wanted and intended them to be. In that context, particularly in agreements of arbitration, where party autonomy is the grundnorm, how the parties worked out the agreement, is one of the indicators to decipher the intention, apart from the plain or grammatical meaning of the expressions and the use of the expressions at the proper places in the agreement. Contextually, it may be noted that in the present case, the respondent had invoked the provisions of English law for the purpose of the initiation of the unsettled disputes. It has hence, while interpreting an agreement, to be kept in mind that the parties, intended to avoid impracticable and inconvenient processes and procedures in working out the agreement. Potter J. made a similar observation in Cargill International S.A. v. Bangladesh Sugar and Food Industries Corporation[7]:

> "As Lord Goff observed in another context in Palm Shipping v. Kuwait Petroleum [1988] 1 Lloyds Rep 500 at 502: "It is not a permissible method of construction to propound a general or generally accepted principal ... (and) ... then to seek to force the provisions of the ... (the contract) ... into the straightjacket of that principle." On the other hand, modern principles of construction require the court to have regard to the commercial background, the context of the contract and the circumstances of the parties and to consider whether, against that background and in that context, to give the words a particular or restricted meaning would lead to an apparently unreasonable and unfair result." A close perusal of the terms between the parties would clearly show that the first part of Article 22 is on the law governing the contract and in the second part the parties intended to lay down the law applicable to the arbitration agreement, viz., the proper law of the agreement of arbitration. It is unnecessary that after already agreeing on the procedural law governing the

> arbitration in Article 17.1, the parties intended to state the same again in a separate clause within the same contract in Article 22. Therefore, the intention of the parties to apply English Law to the arbitration agreement also and not limit it to the conduct of the arbitration is fairly clear from Article 22.

Sumitomo (supra) is of no avail to the appellant. In Sumitomo (supra), there was no specific choice on the law of arbitration agreement and this court held that in absence of such choice, the law of arbitration agreement would be determined by the substantive law of the contract. That is not the case in this agreement.

It is clear that the law applicable to arbitration agreement in the present case is English Law. Once it is found that the law governing the arbitration agreement is English Law, Part I of the Indian Arbitration Act stands impliedly excluded. This has been a long settled position and the latest judgment in Union of India v. Reliance Industries Limited and others[8] reaffirms the same. In the words of R.F. Nariman J., "20. The last paragraph of Bharat Aluminium's judgment has now to be read with two caveats, both emanating from paragraph 32 of Bhatia International itself-that where the Court comes to a determination that the juridical seat is outside India or where law other than Indian law governs the arbitration agreement, Part-I of the Arbitration Act, 1996 would be excluded by necessary implication. Therefore, even in the cases governed by the Bhatia principle, it is only those cases in which agreements stipulate that the seat of the arbitration is in India or on whose facts a judgment cannot be reached on the seat of the arbitration as being outside India that would continue to be governed by the Bhatia principle. Also, it is only those agreements which stipulate or can be read to stipulate that the law governing the arbitration agreement is Indian law which would continue to be governed by the Bhatia rule." We are hence unable to be persuaded by the persuasive argument advanced by Shri Sundaram, learned Senior Counsel appearing for the appellant that the arbitration agreement is to be governed by the Indian Law.

Accordingly, we find no error in the view taken by the High Court that the applications filed by the appellant under Section 34 of the Indian Act are not maintainable against the two foreign awards dated 10.11.2002 and 12.11.2002 between the appellant and the respondent.

The appeals are accordingly dismissed. There shall be no order as to costs.

.....J. (Anil R. Dave) .....J. (Kurian Joseph) .....J. (Amitava Roy) New Delhi;

January 28, 2016

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[1] (2012) 9 SCC 552.
[2] (2002) 4 SCC 105.
[3] (1998) 1 SCC 305.
[4] (2014) 7 SCC 603.
[5] Words and Phrases, Permanent Edition, Volume 35A, page 337, citing

Fabianich v. Hart, D. C. Mun App., 31A.2d 881, 883.
[6] (1996) 11 SCC 475
[7] [1998] 1 W.L.R. 461 CA.
[8] 2015 (10) SCALE 149.

REPORTABLE
