Imax Corporation vs M/S E-City Entertainment (I) P.Ltd on 10 March, 2017

Equivalent citations: AIR 2017 SC 1372, 2017 (5) SCC 331, 2017 (3) ABR 283, (2017) 2 KER LJ 3, (2017) 5 MAD LW 323, (2017) 3 SCALE 530, (2018) 1 ALLMR 482 (SC), (2017) 3 CAL LJ 52, (2017) 173 ALLINDCAS 68 (SC), AIR 2017 SC (CIV) 1201, (2017) 3 ANDHLD 166, (2017) 6 MAH LJ 37, (2017) 1 WLC(SC)CVL 627, (2017) 4 MPLJ 382, (2017) 3 ARBILR 102, (2017) 3 CAL HN 103, (2018) 1 CIVLJ 747, (2017) 3 BANKCAS 563, 2017 (3) KCCR SN 259 (SC), 2018 (127) ALR SOC 9 (SC), (2017) 3 BOM CR 201, AIR 2017 SUPREME COURT 1372, 2017 (3) ABR 283 AIR 2017 SC (CIVIL) 1201, AIR 2017 SC (CIVIL) 1201

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Bench: S.A. Bobde, Ashok Bhushan

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL No. 3885 OF 2017
(Arising out of SLP (C) No. 34009 of 2013)

IMAX CORPORATION ... APPELLANT

VERSUS

M/S E-CITY ENTERTAINMENT (I) Pvt. LTD. ... RESPONDENT

1

2 JUDGMENT

S. A. BOBDE, J.

Leave granted.

2. The appellant-Imax Corporation has challenged the interim order dated 10.06.2013 passed by the High Court of Judicature at Bombay in Notice of Motion No.2560 of 2008 in the Arbitration

Petition (Lodging) No.525 of 2008.

3. By the aforementioned order, the High Court held that the petition under Section 34 of the Arbitration and Conciliation Act, 1996 (for short, "the Arbitration Act") filed by the respondent-M/S E-City Entertainment (I) Pvt. Ltd. against two partial final awards dated 11.02.2006, 24.08.2007, and third final award dated 27.03.2008 was maintainable.

The appellant had objected to the maintainability of the petition under Section 34 of the Arbitration Act on the ground that the arbitration clause excluded the applicability of Part-I which contains the said section.

4. The only issue before us is whether the petition under Section 34 of the Arbitration Act is maintainable before a court in India, and in this case, the Bombay High Court.

5. On 28.09.2000, the appellant entered into an agreement with the respondent for a supply of large format projection systems for cinema theatres to be installed in theatres all across India. Clause 14 of the agreement contained an arbitration clause which reads as follows:

> "This Agreement shall be governed by and construed according to the laws of Singapore, and the parties attorn to the jurisdiction of the courts of Singapore. Any dispute arising out of this master agreement or concerning the rights, duties or liabilities of E-City or Imax hereunder shall be finally settled by arbitration pursuant to the ICC Rules of Arbitration."

6. On 16.06.2004, the appellant filed a request for arbitration with the ICC, and claimed damages. On 08.10.2004, the ICC i.e. the chosen arbitral forum fixed London as the place of arbitration i.e. the juridical seat of arbitration, after consulting the parties.

FIRST PARTIAL FINAL AWARD

7. On 11.02.2006, the first partial final award was made in favour of the appellant declaring that the respondent was in breach of the agreement and therefore liable for damages. The award stated that the decision on the other issues, including damages/costs would be reserved for a future award.

8. The aforementioned declaration was made after observing in the award that the court of the ICC had decided to fix London as the juridical seat of arbitration in accordance with the powers vested in the court under Article 14(1) of the ICC Rules. The observation read as follows:

> "As well be noticed, no provision was made for a venue for any arbitration contemplated by Clause 14, but subsequently the court of the ICC decided on the 8th of October, 2004 to fix London as the juridical seat of the arbitration in accordance with the powers vested in the court under Article 14 of the ICC Rules. Accordingly, this is an arbitration to which Part-I of the English Arbitration Act 1996 applies."

9. The appellant filed its statement of damages before the Arbitral Tribunal. The respondent filed its statement of defence.

10. On 05.09.2006 the respondent objected that the appellant has no legal status and the law firm representing them is not authorized to pursue the arbitration. In that application, the respondent stated as follows:

> "The seat of this arbitration is London. Therefore, English law determines the effect of any want of capacity suffered by "Imax Ltd" under the Canadian law as a result of its amalgamation into Imax Corporation with effect from 1st January, 2001."

SECOND PARTIAL FINAL AWARD

11. On 24.08.2007, the Arbitral Tribunal passed the second partial award rejecting the above objection filed by the respondent. By this award, the tribunal determined the quantum of damages payable to the appellant. This award was also made in London, the juridical seat of this arbitration. A sum of $9,406,148.31 was awarded to the appellant.

THIRD FINAL AWARD

12. The Arbitral Tribunal passed a final award on 27.03.2008 on the issue of interest and costs. A sum of $1,118,558.54 by way of interest and a further sum of $2,512.60 per day from 01.10.2007 until the payment of the award was awarded in favour of the appellant. Sums of $400,000 and $384,789.21 by way of costs of arbitration fixed by the ICC and costs by way of attorney's fees, expert fees and related expenses were also directed to be paid. Final award dated 27.03.2008 was received by the respondent on 01.04.2008.

The final award on the issues of interest and costs was amalgamated with the earlier awards, both of which were incorporated by reference into itself. The third final award also stated that the place of arbitration is London.

PETITION UNDER SECTION 34 BEFORE THE BOMBAY HIGH COURT

13. On 21.07.2008, the respondent challenged the aforesaid awards under Section 34 of the Arbitration Act before the Bombay High Court in India after a period of more than two years from the first partial award, more than one year from the second partial award and a period of 3 months, 24 days from the final award.

14. The learned Single Judge allowed the notice of motion on the condonation of delay and held that the petition under Section 34 was maintainable before the Bombay High Court.

Hence, this appeal.

15. The only question that arises for consideration before us is whether the challenge to the award made by the respondent under Section 34 of the Arbitration Act is maintainable before a court in India. Clearly, if the answer is in the negative it is not necessary to decide the question of delay. Thus, we make it clear that we are not deciding where else in the world a challenge to the award would be maintainable.

16. Dr. A.M. Singhvi, learned senior counsel for the respondent relied on Clause VIII (2) of the Request for Arbitration dated 16.06.2004 wherein the petitioner stated as follows:

> "VIII Place of Arbitration, Law and Language (2) Section 14 of the letter Agreement is silent as to the place of the arbitration. Claimant believes that Paris and France are suitable places for arbitration to take place, indeed, this is the venue chosen by the ICC for the related EML Arbitration and the claimant believes that this arbitration should be consolidated along with the pending EML Arbitration.

Paris is roughly equal distant from both parties."

17. The above submission was made in response to Mr. Pallav Shisodia's argument, learned senior counsel for the appellant, that the respondent had in fact stated in its petition under Section 34 of the Arbitration Act that "the seat of arbitration was in London". Also in the counter affidavit before this Court it was submitted that the seat of arbitration being London in no way precludes the respondent from challenging the awards under Section 34 of the Act.

Having noted the above submissions and statements made by the parties, we propose to decide the question on the construction of Clause 14 and the law governing such challenges.

CLAUSE 14: THE ARBITRATION CLAUSE

18. Clause 14 of the Agreement deals with two matters:

> (i) the laws which will govern the agreement; and
>
> (ii) a provision of settling disputes by arbitration.

As regards the first, it provides that in case a question arises as to the agreement i.e. what the agreement means or what the parties intended, it shall be interpreted according to the laws of Singapore and these laws will govern the understanding and the acts of the parties. Further, in case the parties resort to a court, they shall approach the courts of Singapore which alone shall adjudicate upon the issue. The courts of Singapore will thus adjudicate in relation to any non-arbitrable dispute that might arise under the agreement or possibly a dispute regarding the correctness or validity of an arbitration award. It is not necessary to consider whether a challenge to the award would lie in Singapore in this case because the award in fact was made in London and in any case no party has approached the court in Singapore.

Secondly, this clause provides that any dispute arising out of this agreement or concerning the rights, duties or liabilities of the parties shall be settled by arbitration. The arbitration shall be pursuant to the ICC Rules of Arbitration. In other words, the parties shall invoke the ICC Rules of Arbitration in case a dispute arises between them concerning their rights, duties or liabilities. The intention is to have the dispute settled by and in accordance with the ICC Rules of Arbitration. In this sense, the ICC Rules of Arbitration must be construed as being read into this clause.

THE ICC RULES

19. The ICC Rules provide for the entire conduct of arbitration from its commencement to the passing of an award. They provide that the arbitration shall be conducted by the court i.e. the International Court of Arbitration, appointed by the council of the ICC. A party wishing to have recourse to arbitration under the rules is required to submit a Request for Arbitration to the Secretariat of the ICC along with the information prescribed and in particular comments as to the place of arbitration. The ICC Rules clearly stipulate that the seat of arbitration shall be fixed by the court, in the following words:-

> "1. The place of the arbitration shall be fixed by the Court unless agreed upon by the parties.
>
> 2. The Arbitral Tribunal may, after consultation with the parties, conduct hearings and meetings at any location it considers appropriate unless otherwise agreed by the parties.
>
> 3. The Arbitral Tribunal may deliberate at any location it considers appropriate." In this case, the appellant had proposed the venue of arbitration to be Paris in France. Upon notice being issued, the respondent was obliged to file an answer including a comment concerning the number of arbitrators and their choice as to the place of arbitration.

The respondent, in their answer stated that the venue suggested by the claimant i.e. Paris in France would unnecessarily increase the cost of arbitration and therefore suggested that Singapore would be the most appropriate and convenient venue for the arbitration, vide "Answer to Request for Arbitration pursuant to Article 5(1) of the ICC Rules of Arbitration" dated 30.08.2004.

The International Court of Arbitration decided inter alia that London, United Kingdom will be the juridical seat of the arbitration in view of Article 14(1) of the ICC Rules and, therefore, proceeded on the basis of the Part-I of the English Arbitration Act, 1996.

What is significant and needs to be pointed out is that the parties had agreed in pursuance of the agreement to have the dispute decided in accordance with the ICC Rules by submitting the dispute to the ICC. The court (of the ICC) considered the stand of the parties on the venue for arbitration and fixed London as the seat of arbitration.

INTENTION OF THE PARTIES TO EXCLUDE PART-I

20. In this case, there is an express choice of the law governing the contract as a whole i.e. Singaporean Law.

There is an express agreement that any arbitration would be governed by the ICC Rules of Arbitration. The general principle is that, in the absence of any contradictory indication, it shall be presumed that the parties have intended that the proper law of contract as well as the law governing the arbitration agreement is the same as the law of the country in which the arbitration is agreed to be held.

21. It would be apposite to refer to a case decided by the Supreme Court of Sweden from a passage in Redfern and Hunter[1]. Quoting the Supreme Court of Sweden it is stated that:-

> "...no particular provision concerning the applicable law for the arbitration agreement itself was indicated [by the parties]. In such circumstances the issue of the validity of the arbitration clause should be determined in accordance with the law of the state which the arbitration proceedings have taken place, that is to say, Swedish Law." In the present case, the arbitration clause contemplates an award made in pursuance to the ICC rules without specifying the applicable law for the arbitration agreement. It would therefore be appropriate to hold that the question of validity of the award should be determined in accordance with the law of the state in which the arbitration proceedings have taken place i.e. the English Law. Though for the purposes of this decision we would only hold that the conduct of the parties exclude the applicability of Part- I. In other words, where the parties have not expressly chosen the law governing the contract as a whole or the arbitration agreement in particular, the law of the country where the arbitration is agreed to be held has primacy.

22. Here, an express choice has been made by the parties regarding the conduct of arbitration, i.e., that a dispute shall be finally settled by arbitration according to the ICC Rules of Arbitration. The parties have not chosen the place of arbitration. They have simply chosen the rules that will govern the arbitration, presumably aware of the provision in the rules that the place of arbitration will be decided by the ICC vide Article 14(1) of the ICC Rules. The ICC having chosen London, leaves no doubt that the place of arbitration will attract the law of UK in all matters concerning arbitration.

23. The arbitration clause appears consistent with Section 2(7) of the Arbitration Act, 1996 which recognizes the freedom to authorize any person including an institution to determine an issue such as the choice of the place of arbitration.

24. Dr. Singhvi rightly submitted that the decisions of the court in Sakuma Exports Ltd. vs. Louis Dreyfus Commodities Suisse Sa[2], Harmony Innovation Shipping Ltd. vs. Gupta Coal India Ltd.[3], and Reliance Industries Ltd. vs. Union of India[4] do not help the appellant in view of the main difference between the abovementioned cases and the present one i.e. in all these cases, the parties

had specifically agreed that the seat of arbitration will be London. The arbitration clause in these cases itself specified the seat to be at London. In Reliance Industries Ltd. (supra), the agreement that the seat of arbitration would be London was incorporated in the final partial award.

However, as we shall see the agreement to have the arbitration conducted by the ICC and the choice of London as the seat of arbitration has made no material difference for the purpose of exclusion of Part-I. The relevant clause in these cases was undoubtedly different in that the seat of arbitration outside India was specified in the clause itself. However, we have found that the relevant clause in the present case had the effect of an agreement to have the seat of the arbitration outside India, as chosen by the ICC and agreed to by the parties.

25. We find that in the present case, the seat of arbitration has not been specified at all in the arbitration clause. There is however an agreement to have the arbitration conducted according to the ICC rules and thus a willingness that the seat of arbitration may be outside India. In any case, the parties having agreed to have the seat decided by the ICC and the ICC having chosen London after consulting the parties and the parties having abided by the decision, it must be held that upon the decision of the ICC to hold the arbitration in London, the parties agreed that the seat shall be in London for all practical purposes. Therefore, there is an agreement that the arbitration shall be held in London and thus Part-I of the Act should be excluded.

26. The construction that the parties agreed to exclude the applicability of Part-I of the Act and generally to have the entire agreement governed not according to Indian law is also apparent from the express provision that:

> "This agreement shall be governed by and construed according to laws of Singapore and parties attorn to jurisdiction of the Courts of Singapore".
>
> In para 25 of National Thermal Power Corporation vs. Singer Company[5], this Court held:
>
> "On the other hand, where the proper law of the contract is expressly chosen by the parties, as in the present case, such law must, in the absence of an unmistakable intention to the contrary, govern the arbitration agreement which, though collateral or ancillary to the main contract, is nevertheless a part of such contract".
>
> This principle is again reiterated in Sakuma Exports Ltd. (supra).
>
> This stipulation expressly excludes Part-I of the Act because it governs both the principal agreement as well as the accompanying arbitration agreement.
>
> NON- APPLICABILITY OF PART-I

27. It is settled law in India that the provisions of Part-I of the Arbitration Act would apply to all arbitrations and all proceedings relating thereto. In Bhatia International vs. Bulk Trading S.A. and

Anr.[6], this Court observed:-

> "32. .....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." This view has been followed in several cases, See Venture Global Engg. vs. Satyam Computer Services Ltd.[7], Videocon Industries Limited vs. Union of India[8], Dozco India (P) Ltd. vs. Doosan Infracore Co. Ltd.[9], Cauvery Coffee Traders vs. Horner Resources (International) Co. Ltd.[10], Reliance Industries Ltd. (supra) and Sakuma Exports Ltd. (supra), Union of India vs. Reliance Industries Ltd.[11], Harmony Innovation Shipping Ltd. (supra) and Eitzen Bulk A/S vs. Ashapura Minechem Ltd.[12] The relevant clause in these cases was undoubtedly different in that, the seat of arbitration outside India was specified in the clause itself.

However, we have found that the clause in this case had the effect of an agreement to have the seat of arbitration outside India, as chosen by the ICC, and as agreed to by the parties.

28. On a true construction of Clause 14 in this case, there is no doubt the parties have agreed to exclude Part-I by agreeing that the arbitration would be conducted in accordance with the ICC Rules. The parties were undoubtedly conscious that the ICC could choose a venue for arbitration outside India. That in our view is sufficient to infer that the parties agreed to exclude Part-I. The ICC could well have chosen a venue in India. The possibility that ICC could have chosen India is not a counter indication of this inference. It could also be said that the decision to exclude the applicability of Part-I was taken when the ICC chose London after consulting the parties. Either way Part-I was excluded.

29. The view that it is the law of the country where arbitration is held that will govern the arbitration and matters related thereto such as a challenge to the award is well entrenched. In Dozco India (P) Ltd. (supra), this Court observed:-

> "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 that is the country most closely connected with the proceedings. So in order to determine the curial law in the absence of an express choice by the parties it is first necessary to determine the seat of the arbitration, by construing the agreement to arbitrate."

30. The relationship between the seat of arbitration and the law governing arbitration is an integral one. The seat of arbitration is defined as the juridical seat of arbitration designated by the parties, or by the arbitral institution or by the arbitrators themselves as the case may be. It is pertinent to refer to the following passage from Redfern and Hunter (supra):-

> "This introduction tries to make clear, the place or seat of the arbitration is not merely a matter of geography. It is the territorial link between the arbitration itself and the law of the place in which that arbitration is legally situated:
>
> When one says that London, Paris or Geneva is the place of arbitration, one does not refer solely to a geographical location. One means that the arbitration is conducted within the framework of the law of arbitration of England, France or Switzerland or, to use an English expression, under the curial law of the relevant country. The geographical place of arbitration is the factual connecting factor between that arbitration law and the arbitration proper, considered as a nexus of contractual and procedural rights and obligations between the parties and the arbitrators.
>
> The seat of arbitration is thus intended to be its centre of gravity." Further, in the same work on International Arbitration by Redfern and Hunter (supra), the following passage emphasizes the connection between the lex arbitri and lex fori:-
>
> "Parties may well choose a particular place of arbitration precisely because its lex arbitri is one which they find attractive. Nevertheless, once a place of arbitration has been chosen, it brings with it its own law. If that law contains provisions that are mandatory so far as arbitration are concerned, those provisions must be obeyed. It is not a matter of choice any more than the notional motorist is free to choose which local traffic laws to obey and which to disregard." Thus, it is clear that the place of arbitration determines the law that will apply to the arbitration and related matters like challenges to the award etc, see Eitzen Bulk A/S (supra).

31. The significant determinant in each case is the agreement of the parties as to the place of arbitration and where in fact the arbitration took place.

If in pursuance of the arbitration agreement, the arbitration took place outside India, there is a clear exclusion of Part-I of the Arbitration Act. In the present case, the parties expressly agreed that the arbitration will be conducted according to the ICC Rules of Arbitration and left the place of arbitration to be chosen by the ICC. The ICC in fact, chose London as the seat of arbitration after consulting the parties. The arbitration was held in London without demur from any of the parties. All the awards i.e. the two partial final awards, and the third final award, were made in London and communicated to the parties. We find that this is a clear case of the exclusion of Part-I vide Eitzen Bulk A/S (supra), and the decisions referred to and followed therein.

32. The respondent contends before us that Part-I of the award was applicable, however they themselves stated the place of arbitration to be London.

It is pertinent to reproduce the relevant portion in the respondent's application before the ICC while objecting to the authority of the law firms representing the appellant. It stated:-

"The seat of this arbitration is London." Therefore, the two reasons for Part-I not being applicable are as follows:-

Parties agreed that the seat maybe outside India as may be fixed by the ICC; and It was admitted that the seat of arbitration was London and the award was made there.

Therefore, there is no doubt that Part-I has no application because the parties chose and agreed to the arbitration being conducted outside India and the arbitration was in fact held outside India.

33. In view of the foregoing observations, we find that the High Court committed an error in observing that the seat of arbitration itself is not a decisive factor to exclude Part-I of the Arbitration Act. We therefore set aside the judgment of the High Court and dismiss the petition filed by the respondent under Section 34 of the Arbitration Act before the Bombay High Court.

34. In the result the appeal is allowed as no order to costs.

……J. [S.A. BOBDE] ……J. [ASHOK BHUSHAN] NEW DELHI, March 10, 2017

Redfern and Hunter on International Arbitration, Fifth Edition [2] (2015) 5 SCC 656 [3] (2015) 9 SCC 172 [4] (2014) 7 SCC 603 [5] (1992) 3 SCC 551 [6] (2002) 4 SCC 105 [7] (2008) 4 SCC 190 [8] (2011) 6 SCC 161 [9] (2011) 6 SCC 179 [10] (2011) 10 SCC 420 [11] (2015) 10 SCC 213 [12] (2016) 11 SCC 508