Union Of India Ministry Of Petroleum And ... vs Hardy Exploration And Production ... on 25 September, 2018

Equivalent citations: AIR 2018 SUPREME COURT 4871, 2019 (13) SCC 472, (2018) 192 ALLINDCAS 69 (SC), (2018) 11 SCALE 733, (2018) 192 ALLINDCAS 69, (2018) 2 WLC(SC)CVL 647, (2018) 3 GUJ LH 414, (2018) 4 CURCC 470, (2018) 4 RECCIVR 614, (2018) 5 ARBILR 226, (2019) 132 ALL LR 263, (2019) 1 ALL WC 260, (2019) 2 ANDHLD 7, AIR 2020 SC (CIV) 133, AIRONLINE 2018 SC 236

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Bench: D.Y. Chandrachud, A.M. Khanwilkar, Dipak Misra

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REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

CIVIL APPEAL NO. 4628 OF 2018

Union of India …Appellant(s)

VERSUS

Hardy Exploration and Production (India) INC …Respondent(s)

JUDGMENT

Dipak Misra, CJI The present appeal arose from the final judgment and order dated 27th July, 2016 passed by the High Court of Delhi at New Delhi in FAO No. 59 of 2016 whereby the Division Bench of the High Court had dismissed the appeal preferred by the Union of India, the appellant herein, assailing the order dated 9th July, 2015 passed by the learned Single Judge in OMP No. 693 of 2013 and the order dated 20th January, 2016 passed in Review Petition No. 400 of 2015 in OMP No. 693 of 2013. The Division Bench took note of the fact that the appellant had challenged the legal propriety and correctness of the award made by the Arbitrators in favour of the respondents under Section 34 of the Arbitration and Conciliation Act, 1996 (for brevity „the Act). The said application

was contested by the respondent raising many a ground, but the thrust of the objection related to the maintainability of the application under Section 34 of the Act. It was contended before the High Court that the courts in India do not have the jurisdiction to entertain an application under Section 34 of the Act to challenge the legality of the award in question. The learned Single Judge, vide order dated 9th July, 2015, accepted the preliminary objection and came to hold that in view of the terms of the agreement and the precedents holding the field, the Indian courts have no jurisdiction to entertain the application. Being of this view, the learned Single Judge did not advert to the other grounds urged in the petition.

2. Being grieved by the aforesaid order, the Union of India preferred an appeal under Section 37(2) of the Act before the Division Bench which concurred with the opinion expressed by the learned Single Judge.

3. In appeal by special leave, the two-Judge Bench in Union of India v. Hardy Exploration and Production (India) INC1 referred to certain 1 (2018) 7 SCC 374 decisions from foreign jurisdictions, namely, Naviera Amazonica Peruana S.A. v. Compania Internacional De Seguros Del Peru2, Hiscox v. Outhwaite3, Union of India v. McDonnell Douglas Corpn.4, C v. D5, C v. D6, Braes of Doune Wind Farm (Scotland) Limited v. Alfred McAlpine Business Services Limited7, Shashoua and Ors. v. Sharma8, Sulamerica Cia Nacional De Seguros S.A. and Ors. v. Enesa Engenharia SA & Ors.9, (1) Enercon GMBH (2) Wobben Properties GMBH v. Enercon (India) Ltd.10 and Govt. Of India v. Petrocon India Ltd.11 Apart from the above, the decisions rendered in Sumitomo Heavy Industries Ltd. v. ONGC Ltd. and Others12, Bhatia International v. Bulk Trading S.A. and Another 13, Venture Global Engineering v. Satyam Computer Services Ltd. & another14, Videocon Industries Limited v. Union of India and another15, Dozco India Private Ltd. v. Doosan Infracore Co. Limited16, Bharat 2 (1988) (1) Lloyd's Law Reports 116 3 (1992) 1 AC 562 4 (1993) 2 Lloyd's Law Reports 48 5 (2007) EWCA Civ 1282 (CA) 6 (2008) 1 Lloyd's Law Reports 239 7 (2008) EWHC 426 (TCC) 8 (2009) EWHC 957 (Comm.) 9 (2012) EWCA Civ 638 10 (2012) EWHC 3711 (Comm.) 11 (2016) SCC Online MYFC 35 12 (1998) 1 SCC 305 13 (2002) 4 SCC 105 14 (2008) 4 SCC 190 15 (2011) 6 SCC 161 16 (2011) 6 SCC 179 Aluminium Company v. Kaiser Aluminium Technical Services INC17, Enercon (India) Ltd. & Others v. Enercon GMBH & Another18, Reliance Industries Limited and another v. Union of India19, Harmony Innovation Shipping Ltd. v. Gupta Coal India Limited and another20, Union of India v. Reliance Industries Limited and Others21, Eitzen Bulk A/s & others v. Ashapura Minechem Limited and another22, Imax Corporation v. E-City Entertainment (India) Pvt. Lid.23 and Roger Shashoua and others v. Mukesh Sharma and others24 were also referred to.

4. The two-Judge Bench noted:-

> "17. The argument of both the learned senior counsel mainly centered around to one question which, in our opinion, does arise in the appeal, namely, when the arbitration agreement specify the "venue" for holding the arbitration sittings by the arbitrators but does not specify the "seat", then on what basis and by which principle, the parties have to decide the place of "seat" which has a material bearing for determining the applicability of laws of a particular country for deciding the post award arbitration proceedings.

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17 (2012) 9 SCC 552
18 (2014) 5 SCC 1
19 (2014) 7 SCC 603
20 (2015) 9 SCC 172
21 (2015) 10 SCC 213
22 (2016) 11 SCC 508
23 (2017) 5 SCC 331
24 (2017) 14 SCC 722

20. One of the arguments of Dr. Singhvi, learned senior counsel was that the decision rendered by Three Judge Bench in the case of Sumitomo Heavy Industries Ltd. vs. ONGC Ltd. & Others (supra) on which great reliance was placed by Mr. Tushar Mehta, learned ASG has lost its efficacy, though approved by another recent decision of Three Judge Bench in Bharat Aluminum Company vs. Kaiser Aluminum Technical Services INC (supra), for the reason that it was rendered under the Arbitration Act, 1940, which now stands repealed by Arbitration Act, 1996 and secondly, it was rendered in relation to Section 9 of the Foreign Awards (Recognition and Enforcement) Act, 1961, which also now stands repealed by 1996 Act.

21. It was his submission that while approving the ratio of Sumitomo Heavy Industries Ltd. (supra) these two factors which have some relevance on its efficacy do not seem to have been examined in the case of Bharat Aluminum Company (supra) .

22. Dr. Singhvi also urged that what is the effect of UNCITRAL Model Law, when they are made part of the arbitration agreement for deciding the question of "seat" has also not been so far decided in any of the earlier decisions."

5. Appreciating the same, the learned Judges opined thus:-

"23. In our opinion, though, the question regarding the "seat" and "venue" for holding arbitration proceedings by the arbitrators arising under the Arbitration Agreement/ International Commercial Arbitration Agreement is primarily required to be decided keeping in view the terms of the arbitration agreement itself, but having regard to the law laid down by this Court in several decisions by the Benches of variable strength as detailed above, and further taking into consideration the aforementioned submissions urged by the learned counsel for the parties and also keeping in view the issues involved in the appeal, which frequently arise in International Commercial Arbitration matters, we are of the considered view that this is a fit case to exercise our power under Order VI Rule 2 of the Supreme Court Rules, 2013 and refer this case (appeal) to be dealt with by the larger Bench of this Court for its hearing." That is how the matter has been placed before us.

6. At the very beginning, we may note with profit that Mr. Tushar Mehta, learned Additional Solicitor General appearing for the Union of India and Dr. Abhishek Manu Singhvi, learned senior counsel appearing for the respondent very fairly stated that no reference was called for and there is no justification to answer the reference, but to deal with the case on its own merits. In spite of the said submission advanced at the Bar, we think it appropriate to put the controversy to rest as the two-Judge Bench thought it appropriate to refer the matter to a larger Bench.

7. It may be usefully noted that the two-Judge Bench has also taken note of some of the decisions rendered by the Constitution Bench and some by a strength of three Judges and two Judges. One of the submissions that was advanced before the two-Judge Bench was that in Bharat Aluminium Company (supra), the decision in Sumitomo Heavy Industries Ltd. (supra) had not been examined. To appreciate the controversy, first we have to analyse what has been said in Sumitomo Heavy Industries Ltd. (supra). The controversy in the said case related to laws governing arbitration under the Arbitration Act, 1940 (hereinafter referred to as „the 1940 Act). The learned Judges referred to some passages from paragraph 10 which contains a chapter on „The Applicable Law and the Jurisdiction of the Court . The three-Judge Bench reproduced some passages from sub-title „Laws Governing the Arbitration which read thus:-

> "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.
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> 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.

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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 In the absence of express agreement, there is a strong prima facie presumption tha 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" After reproducing the same, the Court opined:-

"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.

> 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."

Eventually, the Court concluded:-

> “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.”

8. On a careful reading of the aforesaid decision, it is quite vivid that the controversy related to the 1940 Act and the discussion pertained to foreign award under the Foreign Awards (Recognition and Enforcement) Act, 1961 (for brevity, „the 1961 Act). Thus, the principle laid down therein is in no way applicable to the concept of determination of jurisdiction as has been dealt with in BALCO case and also the conception of implied exclusion as Bhatia International (supra) states. Quite apart from that, we shall also advert to the later authorities how they have understood the said decision.

9. In Bhatia International (supra), a Bench of this Court was dealing with the applicability of Section 9 of the Act and the jurisdiction of the courts in India. Referring to various aspects, the Court held:-

> “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 compulsory 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."

10. A contention was raised before the Court that when the parties had agreed that the arbitration shall be as per the ICC Rules, by necessary implication, Section 9 would not apply. The learned Judges referred to Article 23 of the ICC Rules and, thereafter, came to hold that:-

> "Thus Article 23 of the ICC rules permits parties to apply to a competent judicial authority for interim and conservatory measures. Therefore, in such cases an application can be made under Sectionof the said Act.
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> Lastly it must be stated that the said Act does not appear to be a well drafted legislation. Therefore the High Courts of Orissa, Bombay, Madras, Delhi and Calcutta cannot be faulted for interpreting it in the manner indicated above. However, in our view a proper and conjoint reading of all the provisions indicates that Part I is to apply also to international commercial arbitrations which take place out of India, unless the parties by agreement, express or implied exclude it or any of its provisions. Such an interpretation does not lead to any conflict between any of the provisions of the said Act. On this interpretation there is no lacunae in the said Act. This interpretation also does not leave a party remedyless. Thus such an interpretation has to be preferred to the one adopted by the High Courts of Orissa, Bombay, Madras, Delhi and Calcutta. It will therefore have to be held that the contrary view taken by these High Courts is not good law."

11. In Indtel Technical Services Private Ltd. v. W.S. Atkins Rail Limited25, the designated Judge was called upon to decide the issue of appointment of sole arbitrator. Analysing the arbitration clause and the authority in Lesotho Highlands Development Authority v. Impregilo SpA26, the Court came to hold as follows:-

> "It is no doubt true that it is fairly well settled that when an arbitration agreement is silent as to the law and procedure to be followed in implementing the 25 (2008) 10 SCC 308 26 (2005) 3 WLR 129 arbitration agreement, the law governing the said agreement would ordinarily be the same as the law governing the contract itself. The decisions cited by Mr Tripathi and the views of the jurists referred to in NTPC v. Singer Co. case support such a proposition. What, however, distinguishes the various decisions and views of the authorities in this case is the fact that in Bhatia International this Court laid down the proposition that notwithstanding the provisions of Section 2(2) of the Arbitration and Conciliation Act, 1996, indicating that Part I of the said Act would apply where the place of arbitration is in India, even in respect of international commercial agreements, which are to be governed by the laws of another country, the parties would be entitled to invoke the provisions of Part I of the aforesaid Act and consequently the application made under Section 11 thereof would be maintainable."

12. In Reliance Industries Ltd. (I), (supra), the appellant had challenged the decision of the High Court of Delhi whereby it had entertained the petition preferred under Section 34 of the Act. The Court scanned the clause relating to "Sole expert, conciliation and arbitration" and the clause that pertained to "applicable law and arbitration" and further other clauses and came to hold that once the parties had consciously agreed that the juridical seat of the arbitration would be at London and that the agreement would be governed by the laws of London, the provisions of Part I of the Act would not be applicable.

13. In Videocon Industries Limited (supra), the Court referred to Section 3 of the English Arbitration Act, 1996 which deals with the seat of arbitration and Section 53 that stipulates the place where the award is treated as made. It referred to the authority in Dozco India P. Ltd. (supra) and, eventually, came to hold that:-

> "In the present case also, the parties had agreed that notwithstanding Article 33.1, the arbitration agreement contained in Article 34 shall be governed by laws of England. This necessarily implies that the parties had agreed to exclude the provisions of Part I of the Act. As a corollary to the above conclusion, we hold that the Delhi High Court did not have the jurisdiction to entertain the petition filed by the respondents under Section 9 of the Act and the mere fact that the appellant had earlier filed similar petitions was not sufficient to clothe that High Court with the jurisdiction to entertain the petition filed by the respondents."

14. The Constitution Bench in Bharat Aluminium Company (supra) overruled the judgments of this Court in Bhatia International (supra) and Venture Global Engineering (supra) and opined:-

> "In our opinion, the provision contained in Section 2(2) of the Arbitration Act, 1996 is not in conflict with any of the provisions either in Part I or in Part II of the Arbitration Act, 1996. In a foreign seated international commercial arbitration, no application for interim relief would be maintainable under Section 9 or any other provision, as applicability of Part I of the Arbitration Act, 1996 is limited to all arbitrations which take place in India. Similarly, no suit for interim injunction simplicitor would be maintainable in India, on the basis of an international commercial arbitration with a seat outside India.
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> We conclude that Part I of the Arbitration Act, 1996 is applicable only to all the arbitrations which take place within the territory of India."

15. Be it noted, the larger Bench ruled that in order to do complete justice, the law declared by this Court shall apply prospectively to all the arbitration agreements executed after the date of delivery of the judgment. In the said case, the Constitution Bench, while dealing with the concept of seat/place/situs of arbitration, referred to the decisions in Naviera Amazonica Peuana S.A. v. Compania International de Seguros del Peru27and Union of India v. McDonnell Douglas Corporation28 and came to hold thus :-

"76. It must be pointed out that the law of the seat or place where the arbitration is held, is normally the law to govern that arbitration. The territorial link between the place of arbitration and the law governing that arbitration is well established in the international instruments, namely, the New York Convention of 1958 and the UNCITRAL Model Law of 1985. It is true that the terms "seat" and "place" are often used interchangeably. In Redfern and Hunter on International Arbitration (Para 3.51), the seat theory is defined thus: "The concept that an arbitration is governed by the law of the place in which it is held, which is the „seat (or „forum or locus arbitri) of the arbitration, is well established in both the theory and practice of international arbitration. In fact, the Geneva Protocol, 1923 states:

(1998) 1 Lloyd's Rep 116 (CA) (1993) 2 Lloyd's Rep 48 "2. The arbitral procedure, including the constitution of the Arbitral Tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place." The New York Convention maintains the reference to "the law of the country where the arbitration took place" [Article V(1)(d)] and, synonymously to "the law of the country where the award is made" [Articles V(1)(a) and (e)]. The aforesaid observations clearly show that the New York Convention continues the clear territorial link between the place of arbitration and the law governing that arbitration. The author further points out that this territorial link is again maintained in the Model Law which provides in Article 1(2) that:

"1. (2) the provision of this Law, except Articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of the State." Just as the Arbitration Act, 1996 maintains the territorial link between the place of arbitration and its law of arbitration, the law in Switzerland and England also maintain a clear link between the seat of arbitration and the lex arbitri. The Swiss Law states:

"176(I). (1) The provision of this chapter shall apply to any arbitration if the seat of the Arbitral Tribunal is in Switzerland and if, at the time when the arbitration agreement was concluded, at least one of the parties had neither its domicile nor its habitual residence in Switzerland." (Emphasis supplied)

77. We are of the opinion that the omission of the word "only" in Section 2(2) of the Arbitration Act, 1996 does not detract from the territorial scope of its application as embodied in Article 1(2) of the Model Law. The article merely states that the arbitration law as enacted in a given State shall apply if the arbitration is in the territory of that State. The absence of the word "only" which is found in Article 1(2) of the Model Law, from Section 2(2) of the Arbitration Act, 1996 does not change the content/import of Section 2(2) as limiting the application of Part I of the Arbitration Act, 1996 to arbitrations where the place/seat is in India.

16. In this context, we may carefully analyse what has been stated in Harmony Innovation Shipping Limited (supra). In the said case, the Court relied on Reliance Industries Ltd. (I) (supra) and other

decisions, analysed the arbitration clause and held:-

> "45. Coming to the stipulations in the present arbitration clause, it is clear as day that if any dispute or difference would arise under the charter, arbitration in London to apply; that the arbitrators are to be commercial men who are members of the London Arbitration Association; the contract is to be construed and governed by the English law; and that the arbitration should be conducted, if the claim is for a lesser sum, in accordance with small claims procedure of the London Maritime Arbitration Association. There is no other provision in the agreement that any other law would govern the arbitration clause.
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> 48. In the present case, the agreement stipulates that the contract is to be governed and construed according to the English law. This occurs in the arbitration clause. Mr Viswanathan, learned Senior Counsel, would submit that this part has to be interpreted as a part of "curial law" and not as a "proper law" or "substantive law". It is his submission that it cannot be equated with the seat of arbitration. As we perceive, it forms as a part of the arbitration clause. There is ample indication through various phrases like "arbitration in London to apply", arbitrators are to be the members of the "London Arbitration Association" and the contract "to be governed and construed according to the English law". It is worth noting that there is no other stipulation relating to the applicability of any law to the agreement. There is no other clause anywhere in the contract. That apart, it is also postulated that if the dispute is for an amount less than US $50,000 then, the arbitration should be conducted in accordance with small claims procedure of the London Maritime Arbitration Association. When the aforesaid stipulations are read and appreciated in the contextual perspective, "the presumed intention" of the parties is clear as crystal that the juridical seat of arbitration would be London. In this context, a passage from Mitsubishi Heavy Industries Ltd. v.

Gulf Bank K.S.C. is worth reproducing:

> "It is of course both useful and frequently necessary when construing a clause in a contract to have regard to the overall commercial purpose of the contract in the broad sense of the type and general content, the relationship of the parties and such common commercial purpose as may clearly emerge from such an exercise. However, it does not seem to me to be a proper approach to the construction of a default clause in a commercial contract to seek or purport to elicit some self-contained „commercial purpose underlying the clause which is or may be wider than the ordinary or usual construction of the words of each sub-clause will yield." xxx xxx xxx
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> 50. Thus, interpreting the clause in question on the bedrock of the aforesaid principles it is vivid that the intended effect is to have the seat of arbitration at

> London. The commercial background, the context of the contract and the circumstances of the parties and in the background in which the contract was entered into, irresistibly lead in that direction. We are not impressed by the submission that by such interpretation it will put the respondent in an advantageous position. Therefore, we think it would be appropriate to interpret the clause that it is a proper clause or substantial clause and not a curial or a procedural one by which the arbitration proceedings are to be conducted and hence, we are disposed to think that the seat of arbitration will be at London.
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> 51. Having said that the implied exclusion principle stated in Bhatia International would be applicable, regard being had to the clause in the agreement, there is no need to dwell upon the contention raised pertaining to the addendum, for any interpretation placed on the said document would not make any difference to the ultimate conclusion that we have already arrived at."

17. The aforesaid passages clearly show that the arbitration clause has to be appositely read to understand its intention so as to arrive at a conclusion on whether it determines the seat or not.

18. In Reliance Industries Limited (II), the Court, after referring to various decisions, came to hold that the applicability of Part I of the Act can be excluded by necessary implication if it is found that on the facts of the case, either the juridical seat of the arbitration is outside India or the law governing the arbitration agreement is a law other than Indian law. Referring to the decision in Harmony Innovation Shipping Limited (supra), the Court said:-

> "20. It is interesting to note that even though the law governing the arbitration agreement was not specified, yet this Court held, having regard to various circumstances, that the seat of arbitration would be London and therefore, by necessary implication, the ratio of Bhatia International would not apply."

19. In Eitzen Bulk A/S (supra), the Court analysed the arbitration clause that stipulated that the disputes under the COA were to be settled and referred to arbitration in London and the English Law would apply. Interpreting the said clause, the Court held:-

> "33. We are thus of the view that by Clause 28, the parties chose to exclude the application of Part I to the arbitration proceedings between them by choosing London as the venue for arbitration and by making English law applicable to arbitration, as observed earlier. It is too well settled by now that where the parties choose a juridical seat of arbitration outside India and provide that the law which governs arbitration will be a law other than Indian law, Part I of the Act would not have any application and, therefore, the award debtor would not be entitled to challenge the award by raising objections under Section 34 before a court in India. A court in India could not have jurisdiction to entertain such objections under Section 34 in such a case.

34. As a matter of fact the mere choosing of the juridical seat of arbitration attracts the law applicable to such location. In other words, it would not be necessary to specify which law would apply to the arbitration proceedings, since the law of the particular country would apply ipso jure. The following passage from Redfern and Hunter on International Arbitration contains the following explication of the issue:

"It is also sometimes said that parties have selected the procedural law that will govern their arbitration, by providing for arbitration in a particular country. This is too elliptical and, as an English court itself held more recently in Breas of Doune Wind Farm it does not always hold true. What the parties have done is to choose a place of arbitration in a particular country. That choice brings with it submission to the laws of that country, including any mandatory provisions of its law on arbitration. To say that the parties have "chosen" that particular law to govern the arbitration is rather like saying that an English woman who takes her car to France has "chosen" French traffic law, which will oblige her to drive on the right-hand side of the road, to give priority to vehicles approaching from the right, and generally to obey traffic laws to which she may not be accustomed. But it would be an odd use of language to say this notional motorist had opted for "French traffic law". What she has done is to choose to go to France. The applicability of French law then follows automatically. It is not a matter of choice.

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"."

20. In IMAX Corporation (supra), interpreting the arbitration clause and the ICC Rules and referring to earlier precedents, the Court ruled:-

"39. 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 ICC. 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, and the decisions referred to and followed therein."

21. In Roger Shashoua (supra), apart from dealing with the concept of precedents, the two-Judge Bench also scanned the anatomy of the arbitration clause and held:-

> "...the distinction between the venue and the seat remains. But when a court finds that there is prescription for venue and something else, it has to be adjudged on the facts of each case to determine the juridical seat. As in the instant case, the agreement in question has been interpreted and it has been held that London is not mentioned as the mere location but the courts in London will have the jurisdiction, another interpretative perception as projected by the learned Senior Counsel is unacceptable."

22. We may now focus on the discussion and the ultimate conclusion in Sumitomo Heavy Industries Ltd. (supra) and how the later decisions under the 1996 Act perceived the same. In Bharat Aluminium Corporation (supra) (BALCO-II), the three-Judge Bench dealt with the decisions in Sumitomo Heavy Industries Ltd (supra) and Reliance Industries Limited (supra) and noted thus:-

> "13. Sumitomo is of no avail to the appellant. In Sumitomo, 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 laid emphasis on Reliance Industries Limited (II) (supra) and opined that an application under Section 34 of the 1940 Act was not maintainable.

23. In view of the aforesaid development of law, there is no confusion with regard to what the seat of arbitration and venue of arbitration mean. There is no shadow of doubt that the arbitration clause has to be read in a holistic manner so as to determine the jurisdiction of the Court. That apart, if there is mention of venue and something else is appended thereto, depending on the nature of the prescription, the Court can come to a conclusion that there is implied exclusion of Part I of the Act. The principle laid down in Sumitomo Heavy Industries Ltd. (supra) has been referred to in Reliance Industries Limited (II) and distinguished. In any case, it has no applicability to a controversy under the Act. The said controversy has to be governed by the BALCO principle or by the agreement or by the principle of implied exclusion as has been held in Bhatia International.

24. Thus, we answer the reference accordingly.

25. Having addressed the reference, we shall advert to the arbitration clause to delineate on whether it ousts the jurisdiction of the courts in India. Article 32 of the arbitration agreement reads as follows:-

> "32.1 This Contract shall be governed and interpreted in accordance with the laws of India.
>
> 32.2 Nothing in this Contract shall entitle the Contractor to exercise the rights, privileges and powers conferred upon it by this Contract in a manner which will contravene the laws of India."

26. Article 33 deals with "Sole expert, conciliation and arbitrator". Article 33.9 and 33.12 read thus:-

> "33.9 Arbitration proceedings shall be conducted in accordance with the UNICITRAL Model Law on International Commercial Arbitration of 1985 except that in the event of any conflict between the rules and the provisions of this Article 33, the provisions of this Article 33 shall govern.
>
> xxx xxx xxx 33.12 The venue of conciliation or arbitration proceedings pursuant to this Article unless the parties otherwise agree, shall be Kuala Lumpur and shall be conducted in English language. Insofar as practicable the parties shall continue to implement the terms of this contract notwithstanding the initiation of arbitration proceedings and any pending claim or dispute." [Emphasis supplied]

27. It is submitted by Mr. Tushar Mehta, learned Additional Solicitor General appearing for the Union of India that there is no specific mention of juridical seat but reference is to the venue. He has also drawn our attention to the UNCITRAL Model Law which is referred to in Article 33.9 of the agreement. Article 20 of the UNCITRAL Model Law reads as follows:-

> "Article 20. Place of arbitration.—(1)The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.
>
> (2) Notwithstanding the provisions of paragraph (1) of this article, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents." [Emphasis added] Thus, Article 20(1) mandates "determination" of "juridical seat" while Article 20(2) leaves it open to the Arbitral Tribunal to select "venue".

28. Article 31(3) of the UNCITRAL Model Law is as follows :-

> "Article 31. Form and contents of award.— (3)The award shall state its date and the place of arbitration as determined in accordance with article 20(1). The award shall be deemed to have been made at that place."

29. On a perusal of Articles 20 and 31(3) of the UNCITRAL Model Laws, we find that the parties are free to agree on the place of arbitration. Once the said consent is given in the arbitration clause or it is interpretably deduced from the clause and the other concomitant factors like the case of Harmony Innovation Shipping Ltd. which states about the venue and something in addition by which the seat of arbitration is determinable. The other mode, as Article 20 of the UNCITRAL Model Law provides, is that where the parties do not agree on the place of arbitration, the same shall be determined by the Arbitral Tribunal. Such a power of adjudication has been conferred on the Arbitral Tribunal. Article 31(3) clearly stipulates that the Award shall state the date and the place of arbitration as determined in accordance with Article 20(1).

30. In IMAX Corporation (supra), there is reference to the ICC Rules and the Rules provide that the place of arbitration shall be fixed by the Court unless agreed upon by the parties. In the said case, the appellant had proposed the venue of Arbitration as Paris in France. The International Court of Arbitration decided that London, United Kingdom would be the juridical seat of arbitration in view of Article 14(1) of the ICC Rules and, therefore, provided on the basis of Part I of the English Arbitration Act, 1996. The three-Judge Bench ruled:-

> "24. In the present case, the arbitration clause contemplates an award made in pursuance of 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.
>
> 25. 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 ICC vide Article 14(1) of the ICC Rules. ICC having chosen London, leaves no doubt that the place of arbitration will attract the law of UK in all matters concerning arbitration." The Court further noticed that in the said case, the seat of arbitration had not been specified at all in the arbitration clause. There was a stipulation that the arbitration shall be conducted according to the ICC Rules and opining on the same, it was observed:-

> "29. 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 ICC and 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 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."

31. In the present case, the place of arbitration was to be agreed upon between the parties. It had not been agreed upon ; and in case of failure of agreement, the Arbitral Tribunal is required to determine the same taking into consideration the convenience of the parties. It is also incumbent on the Arbitral Tribunal that the determination shall be clearly stated in the „form and contents of

award that is postulated in Article 31. There has been no determination.

32. Be it noted, the word „determination requires a positive act to be done. In the case at hand, the only aspect that has been highlighted by Mr. C.U. Singh, learned senior counsel, is that the arbitrator held the meeting at Kuala Lumpur and signed the award. That, in our considered opinion, does not amount to determination. The clause is categorical. The sittings at various places are relatable to venue. It cannot be equated with the seat of arbitration or place of arbitration which has a different connotation as has been held in Reliance Industries Ltd. (I), (II) (supra), Harmony Innovation Shipping Limited (supra) and in Roger Shashoua (supra).

33. The word „determination has to be contextually determined. When a „place is agreed upon, it gets the status of seat which means the juridical seat. We have already noted that the terms „place and „seat are used interchangeably. When only the term „place is stated or mentioned and no other condition is postulated, it is equivalent to „seat and that finalises the facet of jurisdiction. But if a condition precedent is attached to the term „place , the said condition has to be satisfied so that the place can become equivalent to seat. In the instant case, as there are two distinct and disjunct riders, either of them have to be satisfied to become a place. As is evident, there is no agreement. As far as determination is concerned, there has been no determination. In Ashok Leyland Limited and State of T.N. and another29, the Court has reproduced the definition of „determination from Law Lexicon, 2nd Edition by Aiyar, P. Ramanatha and Black s Law Dictionary, 6th Edition. The relevant paragraphs read thus:-

> (2004) 3 SCC 1 “Determination or order.—The expression „determination signifies an effective expression of opinion which ends a controversy or a dispute by some authority to whom it is submitted under a valid law for disposal. The expression „order must have also a similar meaning, except that it need not operate to end the dispute. Determination or order must be judicial or quasi-judicial. Jaswant Sugar Mills Ltd. v. Lakshmi Chand30 (Constitution of India, Article
>
> 136).” “A „determination is a „final judgment for purposes of appeal when the trial court has completed its adjudication of the rights of the parties in the action. Thomas Van Dyken Joint Venture v. Van Dyken31.” The said test clearly means that the expression of determination signifies an expressive opinion. In the instant case, there has been no adjudication and expression of an opinion. Thus, the word „place cannot be used as seat. To elaborate, a venue can become a seat if something else is added to it as a concomitant. But a place unlike seat, at least as is seen in the contract, can become a seat if one of the conditions precedent is satisfied. It does not ipso facto assume the status of seat.

Thus understood, Kuala Lumpur is not the seat or place of arbitration and the interchangeable use will not apply in stricto sensu.

34. In view of the aforesaid analysis, the irresistible conclusion is that the Courts in India have jurisdiction and, therefore, the order passed by the Delhi High Court is set aside. Resultantly, the

appeal stands allowed AIR 1963 SC 677, 680 90 Wis 236, 27 NW 2d 459,463 and the High Court is requested to deal with the application preferred under Section 34 of the Act as expeditiously as possible. There shall be no order as to costs.

.....CJI.

(Dipak Misra) .....J. (A.M. Khanwilkar) .....J. (Dr. D.Y. Chandrachud) New Delhi;

September 25, 2018