Harkirat Singh vs Rabobank International Holding B.V on 20 January, 2015

Author: Mohit S. Shah

Bench: Mohit S. Shah, B.P. Colabawalla

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO. 171 OF 2007
IN

ARBITRATION PETITION NO. 255 OF 2006

Harkirat Singh,]
4, Chelaram House, Carmichael Road]

Mumbai - 400 026.] ... Appellant

Versus

Rabobank International Holding B.V.]
Co-operative Centrale Raiffeisen-]
Boerenleenbank b.a., Croeselaan 18,]
3521 CB Utrecht Netherlands] ... Respondents

Mr. Hiroo Advani with Mr. Asif Lampwala, Mr. Sheikh Yusuf Ali, Mr. Madhooja Mulay and Mr. Deepak Lad for the Appellant.

Mr. Aspi Chinoy, senior counsel with Mr. Mustafa Doctor, senior counsel, Mr. Rohan Dakshini, Mr. Vineet Unnikrishnan and Mr.

Prakhar Parekh i/b M/s. Federal & Rashmikant for the Respondents.

CORAM : MOHIT S. SHAH
B.P. COLABAWAL

TUESDAY, 20 JANUARY 2

ORAL JUDGMENT : [Per Chief Justice Mohit S. Shah]

1. This appeal is directed against the order dated 16 October 2006, of a learned single Judge of this Court dismissing the appellant's APP171.07.doc arbitration petition under section 34 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as "the Indian Arbitration Act").

By the said petition, the appellant challenged the Final Award dated 10 April 2006. The Award was rendered by the Arbitral Tribunal and the seat of arbitration was London. The learned single Judge has dismissed the petition on the ground that the petition under section 34 of the Indian Arbitration Act was not maintainable as the impugned Award is a foreign Award and, therefore, Part-I of the Indian Arbitration Act would not apply.

2. In view of the above finding of the learned single Judge and the fact that the section 34 petition was dismissed only on the ground of maintainability, we have heard the learned counsel for the parties only on the question of maintainability of the petition under section 34 of the Indian Arbitration Act and not on merits of the dispute between the parties.

3. The background facts broadly stated are that a dispute arose out of a failed attempt by the parties to establish a private APP171.07.doc commercial bank "The Joint Venture Bank (India)". The appellant and two other persons were to be the Indian partners in this venture and the respondent-bank was to be the overseas party. Negotiations between the parties led to drafting the Share Subscription Agreement (SSA) and the Shareholders Agreement (SHA) and draft Articles of Association (AOA) of the proposed Joint Venture Bank. The appellant's claim was that it was a material term of alleged agreements between the Indian partners and the bank that the appellant would be the Chief Executive Officer (CEO) of the proposed Joint Venture Bank but by its actions and conduct, the respondent was in repudiatory breach of the agreements. The respondent contended that the agreements were merely draft and were of no legal force or effect and that the terms of the AOA were never agreed. The notice of arbitration was given under both SHA and SSA. There was a slight difference in the arbitration clauses in the two agreements, but in material

respects, the terms were identical. The difference was only concerning the time limit within which the party may nominate an arbitrator in case the other party fails to do so. Article 12.3 of the SSA provided for the agreement to arbitrate in the following terms :

> APP171.07.doc "Governing law and Consent to Jurisdiction Arbitration.
>
> (a) This Agreement and all questions of its interpretation shall be construed in accordance with the laws of the Republic of India without regard to its principles of conflicts of law.
>
> (b) The Parties agree that they shall attempt to resolve through good faith consultation in their behalf, disputes arising in connection with this Agreement, and such consultation shall begin promptly after a Party has delivered to another Party a written request for such consultation.
>
> (c) In the event that after exhausting the efforts for resolution of disputes described in paragraph (b), the parties have been unable to resolve a dispute, and if the dispute is one which relates to an alleged breach of any representation, warranty, covenant or agreement under, or the validity or termination of this Agreement, such dispute shall be finally settled according to the procedure set forth in paragraph (d).
>
> (d) A dispute subject to resolution under this paragraph (d) shall be finally settled by binding arbitration in London in accordance with the UNCITRAL Arbitration Rules, as at force on the day of the execution of this Agreement to a panel of three arbitrators, where one arbitrator is to be appointed by each of Rabo and the Indian Partners. In the event either of Rabo or the Indian Partners fail to appoint their choice of the arbitrator within 3 days of the other party appointing their Arbitrator, then the Party that has already appointed one arbitrator shall have the right to nominate the second arbitrator also. The two arbitrators thus appointed shall choose the third arbitrator. Arbitration shall be precondition to any action of law. English language shall be used throughout the arbitral proceedings. The decision of such arbitration shall be binding and conclusive upon each of the Parties and may be enforced in any court of competent jurisdiction. The parties to the arbitration shall equally share the costs and expenses of any such arbitration. The existence of any dispute(s) or difference(s) or initiation or continuance of the arbitration proceedings shall not permit the parties to the arbitration to postpone or delay the performance by the parties to the arbitration of their respective obligations pursuant to this Agreement. If court proceedings to stay litigation or compel arbitration are necessary, the party who unsuccessfully opposes such proceedings shall pay all associate costs, expenses and attorneys' fees, which are reasonably incurred by the other party to the arbitration."

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4. In view of the above agreement, there is no dispute about the fact that the laws applicable to the substance of the dispute are the laws of India without regard to its principles of conflicts of law.

There is also no dispute about the fact that the juridical seat of arbitration was London, United Kingdom.

5. On 13 January 2004, the Arbitral Tribunal made its first procedural order fixing the time limit for the parties to present their statements as well as a request for production of documents. The second procedural order was made on 20 April 2004. This order was in respect of exchange of witness summons, exchange of request for disclosure of documents, exchange of written representations by legal experts and presentations for hearing and arrangement for taking transcripts of the hearing. The third procedural order was made on the final day of the hearing when the Tribunal issued further directions regarding final submissions and exchange of written submissions.

The Tribunal gave its Final Partial Award dated 20 December 2004.

In the said Final Partial Award the Arbitral Tribunal specifically gave the following findings :

> APP171.07.doc "The Place of Arbitration and the Applicable Law.
>
> 11. The seat of the arbitration is London, United Kingdom; and the arbitral proceedings are accordingly governed by the English Arbitration Act 1996.
>
> 12. The laws applicable to the substance of the dispute are the laws of the Republic of India without regard to its principles of conflicts of laws (Article 12.3(a) of the SSA and Article 10.3(i) of the SHA)."

6. The operative Award in the said Final Partial Award was as under :

> "THE TRIBUNAL'S AWARD
>
> 233. For the reasons set out fully in this Award, and on the basis of the facts and legal submissions that have been presented to it, the Tribunal makes the following Final Partial Award.
>
> 1. There was a binding contract between the parties under which the Joint Venture Bank was to be formed, and pursuant to which Mr. Singh was to be appointed as its Chief Executive Officer.
>
> 2. By its actions and conduct, Rabobank repudiated and/or is in breach of this contract.
>
> 3. In consequence, Mr. Singh is entitle to recover such damages as he is able to prove that he has sustained in respect of (a) loss of business opportunity/profit and (b) loss

of remuneration.

4. The Tribunal reserves the issues of quantum of damages, interest and costs to a subsequent stage of this arbitration."

7. This Final Partial Award was not challenged by either party. In fact, after the above Final Partial Award was rendered by the Tribunal on 20 December 2004, the advocates for the appellant APP171.07.doc addressed a letter dated 8 April 2005 to the arbitrators, inter-alia, mentioning as under :

"We understand that under the English law, Rabobank could have challenged the FPA before a court within 28 days of it being passed or at any rate within 28 days after its Application for clarification was rejected by the Tribunal. The latest date by which Rabobank could have challenged the FPA was 25th February 2005. To the Claimant's knowledge Rabobank has not initiated any challenge to the FPA and thereby the terms of that award have become final."

8. Thereafter, the Arbitral Tribunal rendered the Final Award which came to be impugned by the appellant in the petition under section 34 of the Indian Arbitration Act before a learned single Judge of this Court. As indicated above, the learned single Judge dismissed the petition as not maintainable, on the ground that the impugned Award is a foreign Award and therefore, Part-I of the Indian Arbitration Act would not apply. It is against the aforesaid order of the learned single Judge that the present appeal has been filed.

9. Mr. Hiroo Advani, the learned counsel appearing on behalf of the appellant raised the following contentions.

(i) Since the arbitration agreement in question was entered into in the year 2003, the law laid down by the Supreme Court in APP171.07.doc Bharat Aluminium Co. & Ors. vs. Kaiser Aluminium Technical Services Inc. & Ors.1, (BALCO) would not apply and the matter would be governed by the law laid down by the Supreme Court in Bhatia International vs. Bulk Trading S.A. & Anr.2 and in Venture Global Engineering vs. Satyam Computer Services Ltd. & Anr 3. This submission was made on the basis that even though Bhatia International and Venture Global have been overruled in BALCO, the law laid down in BALCO would apply only prospectively, i.e. to arbitration agreements entered into after the rendering of the said judgement on 6 September 2012. It is further submitted that in the aforesaid decisions, the Supreme Court has held that in matter of application of laws, there are three aspects - (a) the law governing the substance of the dispute between the parties; (b) the law governing the arbitration agreement and (c) the curial law or the law governing the procedure before the Arbitral Tribunal.

(ii) It is submitted that as far as the law governing the dispute between the parties is concerned, admittedly it is the Indian law which applies as specified in the agreement itself. It is submitted that, 1 (2012) 9 SCC 552 2 (2002) 4 SCC 105 3 (2008) 4 SCC 190 APP171.07.doc however, the arbitration agreement is silent on the law governing the agreement to arbitrate and, therefore, in case where the

arbitration agreement is silent, it would ordinarily be the substantial law governing the disputes between the parties. It is, therefore, submitted that in view of the above settled position, in the facts of the present case, the relevant clause being Article 12.3 of the SSA titled "Governing law and Consent to Jurisdiction, Arbitration", the laws of the Republic of India without regard to its principles of conflicts of law, would apply, both on questions of interpretation of the contract and in arbitration. In this factual matrix, the learned counsel submitted that the present case is squarely covered by the law laid down in Bhatia International2 & Venture Global3.

10. Without prejudice to the above submissions, it is submitted that in view of the aforesaid restrictions of the Court in Bhatia International2, if the agreement is treated as silent as regards the law applicable to the arbitration agreement, then the laws governing the interpretation of the contract would apply and, 2 Supra 3 Supra 2 Supra APP171.07.doc therefore, the Indian law of arbitration would apply to the facts of the present case. It is submitted that in Bhatia International, the Supreme Court has taken the view that Part-I of the Indian Arbitration Act would apply unless applicability of Part-I was excluded expressly or by necessary implication. There is nothing in the arbitration agreement to expressly exclude the applicability of Part-I of the Indian Arbitration Act, nor is there anything to indicate that applicability of Part-I is excluded by necessary implication.

11. It is submitted that in case of Bhatia International and Venture Global3 also, the arbitration agreements were silent about applicability of Part-I of the Indian Arbitration Act and the Supreme Court took the view that applicability of Part-I was not excluded. It is submitted that, therefore, in the facts of the present case also, the same principle would apply and, therefore, the learned single Judge committed a grave error in dismissing the section 34 petition on the ground of maintainability.

12. Mr. Advani, learned counsel for the appellant, further 3 Supra APP171.07.doc submitted that all the subsequent judgments of the Supreme Court that consider Bhatia International2 and Venture Global3 contained a clause where the arbitration agreement was controlled by a foreign law, being the same as the law of the foreign seat of arbitration. In this regard, he brought to our attention the judgments of the Supreme Court in the case of Videocon Industries Limited v. Union of India and Anr.4; Dozco India Pvt. Ltd. v. Doosan Infracore Company Ltd. 5 ; and Yograj Infrastructure Limited vs. Ssang Yong Engineering and Construction Company Limited.6 ig He submitted that the factual situation in the present case was very different from the ones set out in the judgments enumerated above. In the present case it was the submission of Mr. Advani that the arbitration agreement was silent on the law governing the agreement to arbitrate whereas in the aforesaid judgments, the arbitration agreement was controlled and/or was subjected to a foreign law and it was in that situation that the aforesaid judgments hold that Part-I of the Indian Arbitration Act did not apply.

2 Supra 3 Supra 4 (2011) 6 SCC 101 5 (2011) 6 SCC 179 6 (2011) 9 SCC 735 read with the clarification in (2012) 12 SCC 359 APP171.07.doc

13. On the other hand, Mr. Aspi Chinoy, learned senior counsel for the respondent, supported the order of the learned single Judge and submitted that the present case was squarely covered by the

decision of the Supreme Court in Yograj Infrastructure Limited6. It is submitted that in the case of Yograj Infrastructure Limited the Supreme Court considered its previous decision in Bhatia International2 and Venture Global3 and, inter-alia, held that where the curial law (i.e. the procedural law governing the arbitration proceedings) was foreign law, Part-I of the Indian Arbitration Act would not apply. Relying on the aforesaid judgment, learned counsel submitted that in the instant case also, since the juridical seat of arbitration was at London, the curial law was the English law. On this aspect, the learned counsel invited our attention to the provisions of the Arbitration Act, 1996, extending to England, Wales and Northern Ireland (English Arbitration Act, 1996) and in particular Sections 2, 3, 4, 67 and 68 thereof.

14. It is submitted that in view of the aforesaid statutory 6 Supra 2 Supra 3 Supra APP171.07.doc provisions of the English Arbitration Act, 1996 the challenge to the arbitral award would be governed by sections 67 and 68 of the English Arbitration Act, 1996 and that the Award in the present case would have to be challenged in the Courts in England. It is therefore submitted that by necessary implication, the applicability of Part-I of the Indian Arbitration Act was excluded.

15. We have heard the learned counsel for the parties, perused the appeal paper book and given our anxious consideration to the rival submissions. In the case of Bhatia International2, the issue before the Supreme Court was whether Part-I of the Indian Arbitration Act would apply when the arbitration is held outside India. In the facts of Bhatia International, the arbitration was agreed to be held in Paris, France as per the Rules of International Chamber of Commerce (ICC). The first respondent in that case filed a section 9 petition before the court in Indore against which a plea was raised about its maintainability on the ground that Part-I of the Indian Arbitration Act did not apply. The said objection was dismissed by the said court at Indore as well as by the Madhya Pradesh High Court. In appeal, the 2 Supra APP171.07.doc Supreme Court, whilst dismissing the same, held as under :

> "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."

(emphasis supplied)

16. Therefore, in the case of Bhatia International2 the Supreme Court held that in case of international commercial arbitrations held outside India, Part-I of the Indian Arbitration Act applied, unless the parties, by agreement, express or implied, excluded all or any of its provisions. In such a situation, the laws or rules chosen by the parties would prevail.

17. The proposition laid down in Bhatia International was thereafter extended by the Supreme Court in the case of Venture Global3 to a challenge under section 34 of the Indian Arbitration Act.

The Supreme Court held that unless applicability of section 34 had 2 Supra 3 Supra APP171.07.doc been excluded, the parties could apply to an Indian Court as defined under section 2(1)(e) for setting aside an award which was passed outside India.

18. It must be noted that Bhatia International2 and Venture Global3 were thereafter expressly overruled by a Constitution Bench (5 Judges) of the Supreme Court in the case of BALCO 1. After a lengthy discussion on the provisions of the Indian Arbitration Act, the Supreme Court in BALCO held that the Indian Arbitration Act was seat-centric and the supervising court for any arbitration and for challenges thereto, would be where the foreign seat was located. In view thereof, the judgment in BALCO concluded that Part-I of the Indian Arbitration Act was applicable only to all arbitrations which take place within the territory of India. The relevant portion reads thus:

> "Conclusion
>
> 194. In view of the above discussion, we are of the considered opinion that the Arbitration Act, 1996 has accepted the territoriality principle which has been adopted in the UNCITRAL Model Law. Section 2(2) makes a declaration that Part I of the Arbitration Act, 1996 shall apply to all arbitrations which take place within India. We are of the 2 Supra 3 Supra 1 Supra APP171.07.doc considered opinion that Part I of the Arbitration Act, 1996 would have no application to international commercial arbitration held outside India. Therefore, such awards would only be subject to the jurisdiction of the Indian courts when the same are sought to be enforced in India in accordance with the provisions contained in Part II of the Arbitration Act, 1996. In our opinion, the provisions contained in the Arbitration Act, 1996 make it crystal clear that there can be no overlapping or intermingling of the provisions contained in Part I with the provisions contained in Part II of the Arbitration Act, 1996.
>
> 195. With utmost respect, we are unable to agree with the conclusions recorded in the judgments of this Court in Bhatia International [(2002) 4 SCC 105] and Venture Global Engg. [(2008) 4 SCC 190] 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 simpliciter would be maintainable in India, on the basis of an international commercial arbitration with a seat outside India.
>
> 196. 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.

> 197. The judgment in Bhatia International [(2002) 4 SCC 105] was rendered by this Court on 13-3-2002. Since then, the aforesaid judgment has been followed by all the High Courts as well as by this Court on numerous occasions. In fact, the judgment in Venture Global Engg. [(2008) 4 SCC 190] has been rendered on 10-1-2008 in terms of the ratio of the decision in Bhatia International [(2002) 4 SCC 105] . Thus, in order to do complete justice, we hereby order, that the law now declared by this Court shall apply prospectively, to all the arbitration agreements executed hereafter."

19. It is, therefore, clear that Bhatia International2 and Venture Global3 were expressly overruled in BALCO1. However, in 2 Supra 3 Supra 1 Supra APP171.07.doc order to do complete justice, and since the judgment of Bhatia International and Venture Global were followed by several High Courts as well as by the Supreme Court, the law declared under BALCO was ordered to apply prospectively i.e. to all arbitration agreements executed after the said judgment was delivered on 6 September 2012.

20. For the purposes of the present appeal we have not examined to what extent the law laid down in BALCO is to be treated as prospective. We will assume for the purposes of the present appeal that the law laid down by the Supreme Court in BALCO would not apply in the facts of the present case, and we would be bound by the law laid down in Bhatia International2 and Venture Global3. It would still make no difference to the outcome of the present appeal. As rightly submitted by Mr. Chinoy, the learned senior counsel appearing on behalf of the respondent, the facts of the present case are squarely covered by the decision of the Supreme Court in the case of Yograj Infrastructure Limited.6 In the case of Yograj Infrastructure Limited 2 Supra 3 Supra 6 Supra APP171.07.doc the Supreme Court considered its previous decision in Bhatia International and Venture Global and thereafter held as under :-

> 50 [Ed.: See clarification of paras 50 to 56 in Yograj Infrastructure Ltd. v.Ssang Yong Engg. & Construction Co.

Ltd., (2012) 12 SCC 359.] . What we are, therefore, left with to consider is the question as to what would be the law on the basis whereof the arbitral proceedings were to be decided? 51 [Ed.: See clarification of paras 50 to 56 in Yograj Infrastructure Ltd. v.Ssang Yong Engg. & Construction Co. Ltd., (2012) 12 SCC 359.] . In our view, Clause 28 of the agreement provides the answer. As indicated hereinabove, Clause 28 indicates that the governing law of the agreement would be the law of India i.e. the Arbitration and Conciliation Act, 1996. The learned counsel for the parties have quite correctly spelt out the distinction between the "proper law" of the contract and the "curial law" to determine the law which is to govern the arbitration itself. While the proper law is the law which governs the agreement itself, in the absence of any other stipulation in the arbitration clause as to which law would apply in respect of the arbitral proceedings, it is now well settled that it is the law governing the contract which would also be the law applicable to the Arbitral Tribunal itself. Clause 27.1 makes it quite clear that the curial law which regulates the procedure to be adopted in conducting the arbitration would be the SIAC Rules. There is, therefore, no ambiguity that the SIAC Rules would be the curial law of the arbitration proceedings. It also happens that the parties had agreed to make Singapore the seat of arbitration. Clause 27.1 indicates that the arbitration

proceedings are to be conducted in accordance with the SIAC Rules.

52 [Ed.: See clarification of paras 50 to 56 in Yograj Infrastructure Ltd. v.Ssang Yong Engg. & Construction Co. Ltd., (2012) 12 SCC 359.] . The immediate question which, therefore, arises is whether in such a case the provisions of Section 2(2), which indicates that Part I of the above Act would apply, where the place of arbitration is in India, would be a bar to the invocation of the provisions of Sections 34 and 37 of the Act, as far as the present arbitral proceedings, which are being conducted in Singapore, are concerned.

53 [Ed.: See clarification of paras 50 to 56 in Yograj APP171.07.doc Infrastructure Ltd. v.Ssang Yong Engg. & Construction Co. Ltd., (2012) 12 SCC 359.] . In Bhatia International [(2002) 4 SCC 105] , wherein while considering the applicability of Part I of the 1996 Act to arbitral proceedings where the seat of arbitration was in India, this Court was of the view that Part I of the Act did not automatically exclude all foreign arbitral proceedings or awards, unless the parties specifically agreed to exclude the same.

54 [Ed.: See clarification of paras 50 to 56 in Yograj Infrastructure Ltd. v.Ssang Yong Engg. & Construction Co.

Ltd., (2012) 12 SCC 359.] . As has been pointed out by the learned Single Judge in the impugned order, the decision in the aforesaid case would not have any application to the facts of this case, inasmuch as, the parties have categorically agreed that the arbitration proceedings, if any, would be governed by the SIAC Rules as the curial law, which included Rule 32, which categorically provides as follows:

> "32. Where the seat of arbitration is Singapore, the law of the arbitration under these Rules shall be the International Arbitration Act (Cap. 143-A, 2002 Edn., Statutes of the Republic of Singapore) or its modification or re-enactment thereof."

55 [Ed.: See clarification of paras 50 to 56 in Yograj Infrastructure Ltd. v.Ssang Yong Engg. & Construction Co. Ltd., (2012) 12 SCC 359.] . Having agreed to the above, it was no longer available to the appellant to contend that the "proper law" of the agreement would apply to the arbitration proceedings. The decision in Bhatia International v. Bulk Trading S.A. [(2002) 4 SCC 105], which was applied subsequently in Venture Global Engg.v. Satyam Computer Services Ltd. [(2008) 4 SCC 190] and Citation Infowares Ltd. v. Equinox Corpn. [(2009) 7 SCC 220] would have no application once the parties agreed by virtue of Clause 27.1 of the agreement that the arbitration proceedings would be conducted in Singapore i.e. the seat of arbitration would be in Singapore, in accordance with the Singapore International Arbitration Centre Rules as in force at the time of signing of the agreement.

56 [Ed.: See clarification of paras 50 to 56 in Yograj Infrastructure Ltd. v.Ssang Yong Engg. & Construction Co. Ltd., (2012) 12 SCC 359.] . As noticed hereinabove, Rule 32 of the SIAC Rules provides that the law of arbitration would be the International Arbitration Act, 2002, where the seat of arbitration is in Singapore. Although, it was pointed out on APP171.07.doc behalf of the appellant

that in Rule 1.1 it had been stated that if any of the SIAC Rules was in conflict with the mandatory provision of the applicable law of the arbitration, from which the parties could not derogate, the said mandatory provision would prevail, such is not the case as far as the present proceedings are concerned.

57. In the instant case, Section 2(2) of the 1996 Act, in fact, indicates that Part I would apply only in cases where the seat of arbitration is in India. This Court in Bhatia International [(2002) 4 SCC 105] , while considering the said provision, held that in certain situations the provision of Part I of the aforesaid Act would apply even when the seat of arbitration was not in India.

58. In the instant case, once the parties had specifically agreed that the arbitration proceedings would be conducted in accordance with the SIAC Rules, which includes Rule 32, the decision in Bhatia International [(2002) 4 SCC 105] and the subsequent decisions on the same lines, would no longer apply in the instant case where the parties had willingly agreed to be governed by the SIAC Rules.

21. Before the Supreme Court, since the SIAC Rules included Rule 32 which categorically provided that when the seat of arbitration was in Singapore, the law of arbitration under those Rules would be the International Arbitration Act (Cap. 143-A, 2002 Edn., Statutes of the Republic of Singapore) or its modification or re-

enactment thereof, the Supreme Court held that having agreed that Singapore law would apply to arbitration proceedings, it was no longer available to the appellant in that case to contend that the substantive law of the contract would apply to arbitration proceedings.

The Supreme Court further held that the decision in Bhatia APP171.07.doc International which was subsequently applied in Venture Global would have no application once the parties agreed that the arbitration proceedings would be conducted in Singapore i.e. the seat of arbitration would be in Singapore in accordance with the Singapore International Arbitration Centre (SIAC) Rules as in force at the time of signing the agreement.

22. In the facts of the present case also, it is an admitted position that the juridical seat of arbitration was at London. As far as the law governing the arbitration is concerned, the provisions of sections 2, 3 and 4 of the English Arbitration Act, 1996 stipulate as follows :

> "2.Scope of application of provisions.
>
> (1) The provisions of this Part apply where the seat of the arbitration is in England and Wales or Northern Ireland. (2) The following sections apply even if the seat of the arbitration is outside England and Wales or Northern Ireland or no seat has been designated or determined--
>
> (a) sections 9 to 11 (stay of legal proceedings, &c.), and

(b) section 66 (enforcement of arbitral awards).

... ...

3. The seat of the arbitration.

In this Part "the seat of the arbitration" means the juridical seat of the arbitration designated--

(a) by the parties to the arbitration agreement, or APP171.07.doc

(b) by any arbitral or other institution or person vested by the parties with powers in that regard, or

(c) by the arbitral tribunal if so authorised by the parties, or determined, in the absence of any such designation, having regard to the parties' agreement and all the relevant circumstances.

4. Mandatory and non-mandatory provisions. (1) The mandatory provisions of this Part are listed in Schedule 1 and have effect notwithstanding any agreement to the contrary.

(2) The other provisions of this Part (the "non-mandatory provisions") allow the parties to make their own arrangements by agreement but provide rules which apply in the absence of such agreement."

23. On a perusal of section 2, it is clear that the provisions of Part-I of the English Arbitration Act, 1996 apply where the seat of arbitration is in England and Wales or Northern Ireland. Section 3 defines the seat of arbitration to mean the juridical seat of the arbitration designated by (a) parties to the arbitration agreement; or (b) any arbitral or institution or person vested by the parties with powers in that regard; or (c) the arbitral tribunal if so authorized by the parties; or (d) determined, in the absence of any such designation having regard to the parties' agreement and all the relevant circumstances. In the facts of our case, it is an admitted position that the juridical seat of arbitration was in London. Section 4 thereafter APP171.07.doc goes on to set out the mandatory and non-mandatory provisions of Part-I of the English Arbitration Act, 1996. The mandatory provisions are listed in Schedule 1 and have effect notwithstanding any agreement to the contrary. Section 67 & 68 of the English Arbitration Act, 1996 and which deal with challenges to an arbitral award, fall under Part-I and form a part of Schedule 1, as the mandatory provisions. Sections 67 and 68 read thus :-

"67. Challenging the award: substantive jurisdiction.

(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court--

(a) challenging any award of the arbitral tribunal as to its substantive jurisdiction; or

(b) for an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction.

A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3). (2) The arbitral tribunal may continue the arbitral proceedings and make a further award while an application to the court under this section is pending in relation to an award as to jurisdiction.

(3) On an application under this section challenging an award of the arbitral tribunal as to its substantive jurisdiction, the court may by order

--

(a) confirm the award,

(b) vary the award, or

(c) set aside the award in whole or in part.

(4) The leave of the court is required for any appeal from a decision of the court under this section.

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68. Challenging the award: serious irregularity.

(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award.

A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3). (2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant--

(a) failure by the tribunal to comply with section 33 (general duty of tribunal);

(b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67);

(c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;

(d) failure by the tribunal to deal with all the issues that were put to it;

(e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;

(f) uncertainty or ambiguity as to the effect of the award;

(g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;

(h) failure to comply with the requirements as to the form of the award;

or

(i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award."

24. On a conjoint reading of all the aforesaid provisions, it is clear that if the juridical seat of arbitration is in London, Part-I of the English Arbitration Act, 1996 would apply. In fact, under Part-I of the said Act, sections 67 and 68 which deal with challenges to an arbitral APP171.07.doc award, are mandatory provisions having effect notwithstanding any agreement to the contrary. In this view of the matter, we are of the clear view that in the present case, the parties, having chosen the juridical seat of arbitration at London, had subjected themselves to the English law by virtue of section 2, read with section 4 and sections 67 and 68 of the English Arbitration Act, 1996. We are, therefore, of the firm view that the award in question could be challenged by the appellant only before the English Courts under sections 67 and 68 of the English Arbitration Act, 1996 and not under section 34 of the Arbitration & Conciliation Act, 1996. This is also the law that has been laid down by the Supreme Court in the case of Yograj infrastructure Limited. We, therefore, cannot agree with the submission of Mr. Advani that Article 12.3 of the SSA is silent on the law governing the arbitration and, therefore, the substantive law viz.

the laws of Republic of India would apply.

25. It is true, as submitted by Mr. Advani, that in Videocon Industries Ltd.4 and Dozco India Pvt. Ltd.5 the agreement was specific 4 Supra 5 Supra APP171.07.doc with reference to the law governing the arbitration. However, that would make no difference. All these judgments clearly lay down, including the judgment in Yograj Infrastructure Limited6, that once the parties have chosen the law governing the arbitration to be foreign law, then Part-I is necessarily excluded. We, therefore, find no infirmity in the impugned order and hold that the section 34 petition filed by the appellant before the learned single Judge challenging the Final Award dated 10 April 2006 was not maintainable, who rightly dismissed the same.

26. Before parting, it would be apposite to quote a passage from Redfern and Hunter on International Arbitration, which to our mind puts the entire controversy in its proper perspective. It reads thus:-

> "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 Braes 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 6 Supra APP171.07.doc '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 arbitrations 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."

27. The Appeal is, accordingly, dismissed. However, in the facts and circumstances of the case, we leave the parties to bear their own costs.

CHIEF JUSTICE B.P. COLABAWALLA, J.