Reportable

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 610 2015
[Arising out of SLP(C) NO. 36643 OF 2014]

Harmony Innovation Shipping Ltd. ... Appellant

Versus

Gupta Coal India Ltd. & Anr. ...Respondents

J U D G M E N T

Dipak Misra, J.

The issue that has emanated for consideration in this appeal is whether in the obtaining factual matrix, especially regard being had to the nature of the arbitration clause, the High Court is justified in setting aside the order passed by the learned Additional District Judge, Ernakulam on 25.9.2014 in I.A. No. 4345 of 2014 in O.P. (ARB) No. 802/2014 directing the first respondent therein to furnish security for US$ 11,15,400 or its equivalent (approximate) Indian Rupees 6,60,00,000/- or to show cause on or before 01.10.2014, and as an interim measure conditionally attaching the cargo belonging to the first

respondent herein, while dealing with an application moved under Section 9 of the Arbitration and Conciliation Act, 1996 (for brevity, "the Act"), on the foundation that Section 9 of the Act is limited to the applications to arbitration that takes place in India and has no applicability to arbitration which takes place outside India in view of the pronouncement in ***Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc***.[1] inasmuch as clause 5 of the contract which is the arbitration clause clearly spells out that the contract is to be governed and construed according to English law and if the dispute of the claim does not exceed USD 50,000, the arbitration should be conducted in accordance with small claims procedure of the London Maritime Arbitration Association.

2. Regard being had to the lis in question, suffice it to state that an agreement was entered into between the parties on 20.10.2010 in respect of 24 voyages of coal shipment belonging to the appellant, the first respondent before the High Court, from Indonesia to India. The respondent no. 1 herein, Gupta Coal India Ltd., undertook only 15 voyages and that resulted in disputes which ultimately stood referred to arbitration. Be it noted, an addendum to contract was executed as regards the

1 (2012) 9 SCC 552

remaining voyages on 3.4.2013 when disputes arose in respect of the principal/main agreement. As the facts would undrape arbitration proceedings were initiated and eventually an award was passed.

3. After the award came into existence, the present appellant filed an application under Section 9 before the District Court, Ernakulam for its enforcement under Sections 9/47 and 49 of the Act. As the factual narration would further uncurtain in respect of the addendum to contract, when disputes arose relating to the same, arbitration proceedings were initiated and at that juncture, the appellant moved the learned 2nd Additional District Court, Ernakulam under Section 9 of the Act seeking attachment of the cargos as an interim relief and the learned Additional District Judge, as has been stated earlier, issued conditional order of attachment.

4. The order passed by the learned Additional District Judge, was assailed before the High Court in a Writ Petition, O.P.(C) No. 2612 of 2014 raising a singular contention that the impugned order therein was absolutely without jurisdiction and hence, unsustainable in law.

5. A counter affidavit was filed contending, inter alia, that the

application before the learned Additional District Judge was maintainable inasmuch as the contract between the parties was entered into prior to the decision in ***Bharat Aluminium Co.*** (supra) and, therefore, the principle laid down in the said decision was not attracted to the facts of the case, and in fact, it was governed by the principles stated in ***Bhatia International v. Bulk Trading S.A***[2].

6. The High Court, after hearing the learned counsel for the parties, referred to main agreement, Exhibit P-1, the addendum, Exhibit P-2, and the arbitration clause in the main agreement and considered the decisions in ***Bhatia International*** (supra) and ***Venture Global Engg. v. Satyam Computer Services Ltd.***[3], some decisions of the High Court, reproduced a passage from Russell on Arbitration and eventually came to hold as follows:

> "The contention that since Ext.P1 was entered into before the judgment in Bharat Aluminium Co.'s case and therefore the principles laid down in the said decision is not applicable to the facts of the case cannot be countenanced. The law laid down by the Supreme Court in Bharat Aluminium Co.'s case is declaratory in nature and, therefore, the first respondent cannot be heard to say that he is not bound by the same and that the said principle cannot be applied to the case on hand. In the case of a

2 (2002) 4 SCC 105
3 (2008) 4 SCC 190

> declaration, it is supposed to have been the law always and one cannot be heard to say that it has only prospective effect. It is deemed to have been the law at all times. If that be so, the petition before the court below is not maintainable and is only to be dismissed."

7. At the very outset, it is necessary to clear the maze as regards the understanding of the ratio in ***Bharat Aluminium Co.*** (supra) by the High Court. In the said case, the Constitution Bench has clearly ruled thus:

> "197**.** The judgment in *Bhatia International* 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.* has been rendered on 10-1-2008 in terms of the ratio of the decision in *Bhatia International*. 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."

The aforesaid judgment by the Constitution Bench was decided on September 6, 2012. In the instant case, the arbitration agreement was executed prior to that date and the addendum, as mentioned earlier, came into existence afterwards. Therefore, there can be no scintilla of doubt that the authority in ***Bharat Aluminium Co.*** case would not be applicable for determination of the controversy in hand. In fact, the pronouncement in ***Bhatia International*** (supra) would be applicable to the facts of the present case inasmuch as there is

nothing in the addendum to suggest any arbitration and, in fact, it is controlled and governed by the conditions postulated in the principal contract. We shall advert to this aspect slightly more specifically at a later stage.

8. Keeping the aforesaid in view, it is necessary to keenly understand the decision in ***Bhatia International*** (supra). In the said case, the agreement entered into between the parties, contained an arbitration clause which provided that arbitration was to be as per Rules of International Chambers of Commerce (for short, "the ICC). The parties had agreed that the arbitration was to be held in Paris, France. The first respondent filed an application under Section 9 of the Act before the learned Additional District Judge, Indore, M.P. with an interim prayer. A plea was raised by the appellant that the Indore Court had no jurisdiction and application was not maintainable. The said stand was repelled by the learned Additional District Judge, which found favour with the High Court. Before this Court, it was urged on behalf of the appellant that Part I of the Act only applies to arbitration where the place of arbitration is in India, but if the place of arbitration is not in India, then Part II of the Act would apply. On behalf of the respondent therein, it was

urged that unless the parties, by their agreement either expressly or impliedly exclude its provisions, Part I would also apply to all international commercial arbitrations including those that take place in India. The three-Judge Bench came to hold thus:-

> "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]

After the said conclusion was recorded, the stand of the learned senior counsel for the appellant was put thus:-

> "Faced with this situation Mr Sen submits that, in this case the parties had agreed that the arbitration be as per the Rules of ICC. He submits that thus by necessary implication Section 9 would not apply. In our view, in such cases the question would be whether Section 9 gets excluded by the ICC Rules of Arbitration. Article 23 of the ICC Rules reads as follows:-
>
> *Conservatory and interim measures*
>
> *1.* Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the Arbitral Tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate. The Arbitral Tribunal may make the

> granting of any such measure subject to appropriate security being furnished by the requesting party. Any such measure shall take the form of an order, giving reasons, or of an award, as the Arbitral Tribunal considers appropriate.
>
> *2*. Before the file is transmitted to the Arbitral Tribunal, and in appropriate circumstances even thereafter, the parties may apply to any competent judicial authority for interim or conservatory measures. The application of a party to a judicial authority for such measures or for the implementation of any such measures ordered by an Arbitral Tribunal shall not be deemed to be an infringement or a waiver of the arbitration agreement and shall not affect the relevant powers reserved to the Arbitral Tribunal. Any such application and any measures taken by the judicial authority must be notified without delay to the Secretariat. The Secretariat shall inform the Arbitral Tribunal thereof."

After so stating, the Court referred to Article 23 of the ICC Rules and interpreted thus:-

> "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 Section 9 of the said Act."

9. The decision in ***Bhatia International*** (supra) was followed in **Venture Global Engg.** (supra). The Court scanned the ultimate conclusion recorded in ***Bhatia International*** (supra) and in that context, referred to various paragraphs and came to hold as follows:-

"32. The learned Senior Counsel for the respondent based on para 26 submitted that in the case of foreign award which was passed outside India is not enforceable in India by invoking the provisions of the Act or CPC. However, after critical analysis of para 26, we are unable to accept the argument of the learned Senior Counsel for the respondent. Paras 26 and 27 start by dealing with the arguments of Mr Sen who argued that Part I is not applicable to foreign awards. It is only in the sentence starting at the bottom of para 26 that the phrase "it must immediately be clarified" that the finding of the Court is rendered. That finding is to the effect that an express or implied agreement of parties can exclude the applicability of Part I. The finding specifically states: "But if not so excluded, the provisions of Part I will also apply to all 'foreign awards'." This exception which is carved out, based on agreement of the parties, in para 21 (placita *e* to *f*) is extracted below: (*Bhatia International case* SCC p. 119*e* to *f*)

> "*21*. … By omitting to provide that Part I will not apply to international commercial arbitrations which take place outside India the effect would be that Part I would also apply to international commercial arbitrations held out of India. But by not specifically providing that the provisions of Part I apply to international commercial arbitrations held out of India, the intention of the legislature appears to be to ally (sic allow) parties to provide by agreement that Part I or any provision therein will not apply. Thus in respect of arbitrations which take place outside India even the non-derogable provisions of Part I can be excluded. Such an agreement may be express or implied."

33. The very fact that the judgment holds that it would be open to the parties to exclude the application of the provisions of Part I by express or implied agreement, would mean that otherwise the whole of Part I would apply. In any event, to apply Section 34 to foreign international awards would not be inconsistent with

> Section 48 of the Act, or any other provision of Part II as a situation may arise, where, even in respect of properties situate in India and where an award would be invalid if opposed to the public policy of India, merely because the judgment-debtor resides abroad, the award can be enforced against properties in India through personal compliance of the judgment-debtor and by holding out the threat of contempt as is being sought to be done in the present case. In such an event, the judgment-debtor cannot .be deprived of his right under Section 34 to invoke the public policy of India, to set aside the award. As observed earlier, the public policy of India includes — (*a*) the fundamental policy of India; or (*b*) the interests of India; or (*c*) justice or morality; or (*d*) in addition, if it is patently illegal. This extended definition of public policy can be bypassed by taking the award to a foreign country for enforcement."

After so holding the Court dealt with the contentions of the learned senior counsel who highlighted the concept of 'transfer' of shares and the procedure involved therein under the Indian Companies Act, 1956 and the impact of Foreign Exchange Management Act, 1999 and adverted to the impact and effect of the legal and regulatory scrutiny under both the Act and accepted the submission. The Court, thereafter, scanned the shareholders agreement and eventually came to hold that in terms of the decision in ***Bhatia International*** (supra) , Part I of the Act is applicable to the award that was called in question in the said case, even though it was a foreign award.

10. The aforesaid decision clearly lays down that it would be

open to the parties to exclude the application of the provision of Part I by express or implied agreement. Unless there is express or implied exclusion, the whole of Part I would apply. The Court, as stated earlier, was dealing with shareholders agreement between the parties. Sections 11.05 (b) and (c) of the shareholders agreement between the parties read as follows:-

> "(*b*) This agreement shall be construed in accordance with and governed by the laws of the State of Michigan, United States, without regard to the conflicts of law rules of such jurisdiction. Disputes between the parties that cannot be resolved via negotiations shall be submitted for final, binding arbitration to the London Court of Arbitration.
>
> (*c*) Notwithstanding anything to the contrary in this agreement, the shareholders *shall at all times* act in accordance with the Companies Act and other applicable Acts/rules being in force, in India at any time."

The said clauses were interpreted by the Court not to exclude either expressly or impliedly the applicability of Part I of the Act.

11. In this context, it will be useful to refer to the decision in ***Indtel Technical Services (P) Ltd. v. W.S. Atkins Rail Ltd.***[4] wherein the designated Judge was called to decide the issue of appointment of sole arbitrator. The arbitration clause read as follows:-

4 (2008) 10 SCC 308

"13. *Settlement of disputes*

13.1. This agreement, its construction, validity and performance shall be governed by and constructed in accordance with the laws of England and Wales;

13.2. Subject to Clause 13.3 all disputes or differences arising out of, or in connection with, this agreement which cannot be settled amicably by the parties shall be referred to adjudication;

13.3. If any dispute or difference under this agreement touches or concerns any dispute or difference under either of the sub-contract agreements, then the parties agree that such dispute or difference hereunder will be referred to the adjudicator or the courts as the case may be appointed to decide the dispute or difference under the relevant sub-contract agreement and the parties hereto agree to abide by such decision as if it were a decision under this agreement."

The Court referred to the decision in ***Bhatia International*** (supra) and ***Lesotho Highlands Development Authority v. Impregilo SpA***[5] and 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 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.*[6] *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

5 (2005) 3 WLR 129

6 (1992) 3 SCC 551

> 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. Mr. Vishwanathan, learned senior counsel, apart from citing aforesaid authorities, have also drawn inspiration from ***Citation Infowares Ltd. v. Equinox Corp.***[7] wherein the designated Judge held that unless the provisions of Part I of the Act are excluded by agreement between the parties either expressly or by implication, Part I of the Act including Section 11 would be applicable even where the international commercial agreements are governed by the laws of another country. It may be that the arbitrator might be required to take into account the applicable laws which may be the foreign laws but that does not affect the jurisdiction under Section 11 which falls in Part I which has been specifically held applicable in ***Bhatia International*** case.

13. Referring to the arbitration clause, submits learned senior counsel that there is no express or implied exclusion of the applicability of Part I of the Act and, therefore, the Courts in India have jurisdiction and the learned Additional District Judge

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7 (2009) 7 SCC 220

had not flawed in exercise of jurisdiction.

14. Mr. Giri, learned senior counsel appearing for the respondents would submit that when the juridical seat is in London, Part I of the Act would not be applicable. To bolster the aforesaid submission, he has placed reliance on ***Reliance Industries Limited and Another v. Union of India***[8]. It is also urged by Mr. Giri, learned senior counsel that after the principal agreement, an addendum was executed between the parties after pronouncement of the decision in ***Bharat Aluminium Co.*** case and, therefore, the principles laid down in ***Bhatia International*** (supra) would not be applicable.

15. It is seemly to exposit the controversy and to appreciate what has been laid down in the case of ***Reliance Industries Limited*** (supra). The appellant in the said case has assailed the judgment of the High Court of Delhi whereby the High Court had allowed the petition filed by the respondent under Section 34 of the Act, challenging the final partial award, whereby the objections raised by the Union of India relating to the arbitrability of the claims made by the petitioner therein in respect of royalties, cess, service tax and CAG audit were rejected. The Court referred to various agreements entered into

8 (2014) 7 SCC 603

between the parties. It reproduced Articles 32 and 33 which was entered into between the parties. The relevant clause for the present purpose is 33.12. We think it appropriate to reproduce the relevant part of the said clause.

> "**33. *Sole expert, conciliation and arbitration*:**
>
> 33.12. The venue of conciliation or arbitration proceedings pursuant to this article, unless the parties otherwise agree, shall be London, England and shall be conducted in the English language. The arbitration agreement contained in this Article 33 shall be governed by the laws of England. Insofar as practicable, the parties shall continue to implement the terms of this contract notwithstanding the initiation of arbitral proceedings and any pending claim or dispute."

16. As per Article 33.12, the arbitral proceedings were to be held in London as the neutral venue. The venue of the arbitral proceeding was shifted to Paris and again re-shifted to London. Consequently, the parties agreed for amendment of the agreement, which is relevant for the purpose of understanding the principle, ultimately stated in the said authority:-

> "4. Applicable law and arbitration – Except the change of venue/seat of arbitration from London to Paris, Articles 32 and 33 of the contract shall be deemed to be set out in full n this agreement mutatis mutandis and so that references therein to the contract shall be references to this agreement."

17. As issues arose, the Arbitral Tribunal was constituted under Article 33.12, the venue of arbitration was in London. A

substantial hearing was held in Singapore. Thereafter, by agreement of the parties, the Arbitral Tribunal made a final partial consent award which was as follows:-

> "3. *Final partial award as to seat*
> 3.1. Upon the agreement of the parties, each represented by duly authorised representatives and through counsel, the Tribunal hereby finds, orders and awards:
>
> (*a*) That without prejudice to the right of the parties to subsequently agree otherwise in writing, the juridical seat (or legal place) of arbitration for the purposes of the arbitration initiated under the claimants' notice of arbitration dated 16-12-2010 shall be London, England.
> (*b*) That any hearings in this arbitration may take place in Paris, France, Singapore or any other location the Tribunal considers may be convenient.
> (*c*) That, save as set out above, the terms and conditions of the arbitration agreements in Article 33 of the PSCs shall remain in full force and effect and be applicable in this arbitration."

18. The respondent, Union of India, had invoked the jurisdiction of the Delhi High Court by stating that the terms of the PSCs entered would manifest an unmistakable intention of the parties to be governed by the laws of India and more particularly the Arbitration Act, 1996; that the contracts were signed and executed in India; that the subject-matter of the contracts, namely, the Panna Mukta and the Tapti fields are situated within India; that the obligations under the contracts

had been for the past more than 15 years performed within India; that the contracts stipulate that they "shall be governed and interpreted in accordance with the laws of India"; that they also provided that "nothing in this contract" shall entitle either of the parties to exercise the rights, privileges and powers conferred upon them by the contract "in a manner which will contravene the laws of India" (Article 32.2); and that the contracts further stipulate that "the companies and the operations under this contract shall be subject to all fiscal legislation of India" (Article 15.1)".

19. On behalf of the appellant, the issue of maintainability was raised. The High Court answered the issue in the following manner:

> "Upon consideration of the entire matter, the High Court has held that undoubtedly the governing law of the contract i.e. proper law of the contract is the law of India. Therefore, the parties never intended to altogether exclude the laws of India, so far as contractual rights are concerned. The laws of England are limited in their applicability in relation to arbitration agreement contained in Article 33. This would mean that the English law would be applicable only with regard to the curial law matters i.e. conduct of the arbitral proceedings. For all other matters, proper law of the contract would be applicable. Relying on Article 15(1), it has been held that the fiscal laws of India cannot be derogated from. Therefore, the exclusion of Indian public policy was not envisaged by the parties at the time when they entered into the

> contract. The High Court further held that to hold that the agreement contained in Article 33 would envisage the matters other than procedure of arbitration proceedings would be to rewrite the contract. The High Court also held that the question of arbitrability of the claim or dispute cannot be examined solely on the touchstone of the applicability of the law relating to arbitration of any country but applying the public policy under the laws of the country to which the parties have subjected the contract to be governed. Therefore, according to the High Court, the question of arbitrability of the dispute is not a pure question of applicable law of arbitration or *lex arbitri* but a larger one governing the public policy."

20. Addressing the issue of maintainability, this Court referred to the decision in ***Bhatia International*** (supra) and took note of the fact that parties have agreed and as is also perceivable from the final partial consent award that the juridical seat or local place of arbitration for the purpose of arbitration initiated under the claimants' notice shall be London, England. The parties have also agreed that the hearing of the notice for arbitration may take place at Paris, France, Singapore or any other location the Tribunal considers may be convenient. The Court posed the question whether in the factual matrix, there has been express or implied exclusion of the applicability of Part I of the Act. In that context, the Court referred to paragraph 32 of ***Bhatia International*** case and, thereafter, analysed the relevant articles of the PSC to discover the real intention of the parties as

to whether the provisions of the Act had been excluded. The Court referred to Articles 32.1 and 32.2 that dealt with the applicable law and language of the contract. Article 32.1 provided that the proper law of the contract would be law of India and under Article 32.2 made a declaration none of the provisions contained in the contract would entitle either the Government or the contractor to exercise the rights, privileges and powers conferred upon it by the contract in a manner which would contravene the laws of India. The Court observed that the basis of controversy involved in the case pertain to analysis of the anatomy of the Article 33.12 which provided that venue of the arbitration shall be London and that the arbitration agreement shall be governed by the laws of England. That apart, the parties had agreed that juridical seat or legal place of arbitration for the purpose initiated under the claimants' notice of arbitration would be at London. The Court posed the question whether such stipulations excluded the applicability of the Act or not. The Court repelling the contention that clauses do not exclude the applicability of the 1996 Act, observed thus:-

> "In our opinion, the expression "laws of India" as used in Articles 32.1 and 32.2 has a reference only to the contractual obligations to be performed by the parties under the substantive contract i.e. PSC. In other

> words, the provisions contained in Article 33.12 are not governed by the provisions contained in Article 32.1. It must be emphasised that Article 32.1 has been made subject to the provision of Article 33.12. Article 33.12 specifically provides that the arbitration agreement shall be governed by the laws of England. The two articles are particular in laying down that the contractual obligations with regard to the exploration of oil and gas under the PSC shall be governed and interpreted in accordance with the laws of India. In contradistinction, Article 33.12 specifically provides that the arbitration agreement contained in Article 33.12 shall be governed by the laws of England. Therefore, in our opinion, the conclusion is inescapable that applicability of the Arbitration Act, 1996 has been ruled out by a conscious decision and agreement of the parties. Applying the ratio of law as laid down in *Bhatia International* it would lead to the conclusion that the Delhi High Court had no jurisdiction to entertain the petition under Section 34 of the Arbitration Act, 1996."

21. After so stating, the Court opined that it is too late in the day to contend that the seat of arbitration is not analogous to an exclusive jurisdiction clause. Once the parties had consciously agreed that juridical seat of the arbitration would be London and that the agreement would be governed by the laws of London, it was no longer open to contend that provisions of Part I of the Act would also be applicable to the arbitration agreement. The Court referred to the decision in ***Videocon Industries Ltd. v. Union of India***[9]. Referring to clause in the ***Videocon Industries Ltd.*** (supra), the Court proceeded to state that:-

9 (2011) 6 SCC 161

47. ….The first issue raised in *Videocon Industries Ltd.* was as to whether the seat of arbitration was London or Kuala Lumpur. The second issue was with regard to the courts that would have supervisory jurisdiction over the arbitration proceedings. Firstly, the plea of *Videocon Industries Ltd.* was that the seat could not have been changed from Kuala Lumpur to London only on agreement of the parties without there being a corresponding amendment in the PSC. This plea was accepted. It was held that seat of arbitration cannot be changed by mere agreement of parties. In para 21 of the judgment, it was observed as follows: (SCC p. 170)

> "*21*. Though, it may appear repetitive, we deem it necessary to mention that as per the terms of agreement, the seat of arbitration was Kuala Lumpur. If the parties wanted to amend Article 34.12, they could have done so only by a written instrument which was required to be signed by all of them. Admittedly, neither was there any agreement between the parties to the PSC to shift the juridical seat of arbitration from Kuala Lumpur to London nor was any written instrument signed by them for amending Article 34.12. Therefore, the mere fact that the parties to the particular arbitration had agreed for shifting of the seat of arbitration to London cannot be interpreted as anything except physical change of the venue of arbitration from Kuala Lumpur to London."

48. The other issue considered by this Court in *Videocon Industries Ltd.* was as to whether a petition under Section 9 of the Arbitration Act, 1996 would be maintainable in the Delhi High Court, the parties having specifically agreed that the arbitration agreement would be governed by the English law. This issue was decided against the Union of India and it was held that the Delhi High Court did not have the jurisdiction to entertain the petition filed by the Union of India under Section 9 of the Arbitration Act.

22. While discussing about the ratio laid down in ***Videocon Industries Ltd.*** (supra), the Court analysed the agreement of the earlier case, and mainly the relevant parts of Articles 33, 34 and 35. Article 34.12 in ***Videocon Industries Ltd.*** case read as follows:

> "34.12. *Venue and law of arbitration agreement*.—The venue of sole expert, conciliation or arbitration proceedings pursuant to this article, unless the parties otherwise agree, shall be Kuala Lumpur, Malaysia, and shall be conducted in the English language. Insofar as practicable, the parties shall continue to implement the terms of this contract notwithstanding the initiation of arbitral proceedings and any pending claim or dispute. Notwithstanding the provisions of Article 33.1, the arbitration agreement contained in this Article 34 shall be governed by the laws of England."

Clause 35.2 of the agreement pertaining to amendment stipulated that the said contract shall not be amended modified, varied or supplemented in any respect except by an instrument in writing signed by all the parties, which shall state the date upon which the amendment or modification shall be effective. Thereafter, the Court had proceeded to state what we have reproduced hereinbefore.

23. In ***Reliance Industries Ltd.*** (supra), the Court took note of the fact that parties had made necessary amendment in the PSCs to provide that the juridical seat of arbitration shall be

London and the arbitration agreement will be governed by the laws of England and in that context observed that the ratio laid down in ***Videocon Industries Ltd.*** (supra) would be relevant and binding. Proceeding further, the Court stated thus:

> "The arbitration agreement in this appeal is identical to the arbitration agreement in *Videocon Industries*. In fact, the factual situation in the present appeal is on a stronger footing than in *Videocon Industries Ltd.* As noticed earlier, in *Videocon Industries*, this Court concluded that the parties could not have altered the seat of arbitration without making the necessary amendment to the PSC. In the present appeal, necessary amendment has been made in the PSC. Based on the aforesaid amendment, the Arbitral Tribunal has rendered the final partial consent award of 14-9-2011 recording that the juridical seat (or legal place) of the arbitration for the purposes of arbitration initiated under the claimants' notice of arbitration dated 16-12-2010 shall be London, England. Furthermore, the judgment in *Videocon Industries* is subsequent to *Venture Global*. We are, therefore, bound by the ratio laid down in *Videocon Industries Ltd."*

24. The Court also referred to ***Bharat Aluminium Co.*** (supra), especially para 123, which is as follows:

> "*123. … '… an agreement as to the seat of an arbitration is analogous to an exclusive jurisdiction clause. Any claim for a remedy … as to the validity of an existing interim or final award is agreed to be made only in the courts of the place designated as the seat of arbitration'*."
>
> [emphasis in original]

25. The two-Judge Bench referred to ***Dozco India Private Ltd.***

v. Doosan Infracore Company Ltd.[10], ***Sumitomo Heavy Industries Ltd. v. ONGC Ltd***.[11], ***Yograj Infrastructure Ltd. v. Ssang Yong Engg. and Construction Co. Ltd***.[12] and quoted a paragraph from ***C v. D***[13], which was approved in ***Bharat Aluminium Co.*** (supra) and reiterated in ***Enercon (India) Ltd. v. Enercon GmbH***[14] and further quoted a paragraph from the said authority which we think condign to be reproduced:-

> "this follows from the express terms of the Arbitration Act, 1996 and, in particular, the provisions of Section 2 which provide that Part I of the Arbitration Act, 1996 applies where the seat of the arbitration is in England and Wales or Northern Ireland. This immediately establishes a strong connection between the arbitration agreement itself and the law of England. It is for this reason that recent authorities have laid stress upon the locations of the seat of the arbitration as an important factor in determining the proper law of the arbitration agreement."
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> Thereafter, the two-Judge Bench held thus:-
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> "In our opinion, these observations in *Sulamerica Cia Nacional de Seguros SA v. Enesa Engelharia SA -- Enesa*[15] are fully applicable to the facts and circumstances of this case. The conclusion reached by the High Court would lead to the chaotic situation where the parties would be left rushing between India and England for redressal of their grievances. The provisions of Part I of the Arbitration Act, 1996 (Indian) are necessarily excluded; being wholly inconsistent with

10 (2011) 6 SCC 179
11 (1998) 1 SCC 305
12 (2011) 9 SCC 735
13 2008 Bus LR 843
14 (2014) 5 SCC 1
15 (2013) 1 WLR 102

> the arbitration agreement which provides "that arbitration agreement shall be governed by English law". Thus the remedy for the respondent to challenge any award rendered in the arbitration proceedings would lie under the relevant provisions contained in the Arbitration Act, 1996 of England and Wales. Whether or not such an application would now be entertained by the courts in England is not for us to examine, it would have to be examined by the court of competent jurisdiction in England."

26. Elaborating the said facet, the Court discussed the principle that has been stated in ***Bhatia International*** (supra) laying that 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. Elaborating further, it proceeded to lay down thus:

> "In this case, the parties have by agreement provided that the *juridical seat* of arbitration will be in London. On the basis of the aforesaid agreement, necessary amendment has been made in the PSCs. On the basis of the agreement and the consent of the parties, the Arbitral Tribunal has made the "final partial consent award" on 14-9-2011 fixing the *juridical seat* (or legal place) of arbitration for the purposes of arbitration initiated under the claimants' notice of arbitration dated 16-12-2010 in London, England. To make it even further clear that the award also records that any hearing in the arbitration may take place in Paris, France, Singapore or any other location the Tribunal considers

> convenient. Article 33.12 stipulates that arbitration . proceedings shall be conducted in English language. The arbitration agreement contained in Article 33 shall be governed by the laws of England. A combined effect of all these factors would clearly show that the parties have by express agreement excluded the applicability of Part I of the Arbitration Act, 1996 (Indian) to the arbitration proceedings."

27. On a further analysis of the said decision, we notice that the Court repelled the submission that irrespective of the provisions contained in Article 33.12, the Act would be applicable to arbitration proceeding and the English law would be applicable only in relation to the conduct of the arbitration up to the passing of the partial final award, as in the said case, it was the partial final award was in question. In justification in repelling such a submission, the Court opined thus:

> "69. ..... As noticed earlier, Article 32.1 itself provides that it shall be subject to the provision of Article 33.12. Article 33.12 provides that the arbitration agreement contained in this article shall be governed by the laws of England. The term "laws of England" cannot be given a restricted meaning confined to only curial law. It is permissible under law for the parties to provide for different laws of the contract and the arbitration agreement and the curial law. In *Naviera Amazonica Peruana SA v. Compania Internacional De Seguros Del Peru*[16], the Court of Appeal in England considered an agreement which contained a clause providing for the jurisdiction of the courts in Lima, Peru in the event .of judicial dispute and at the same time contained a clause providing that the arbitration would be governed by the English law and the proce-

16 (1988) 1 Lloyd's Rep 116 (CA)

dural law of arbitration shall be the English law. The Court of Appeal observed as follows:

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

70**.** From the above, it is evident that it was open to the parties to agree that the law governing the substantive contract (PSC) would be different from the law governing the arbitration agreement. This is precisely the situation in the present case. Article 32.1 specifically provides that the performance of the contractual obligations under the PSC would be governed and interpreted under the laws of India. So far as the alternative dispute redressal agreement i.e. the arbitration agreement is concerned, it would be governed by the laws of England. There is no basis on which the respondents can be heard to say that the applicability of laws of England related only to the conduct of arbitration reference. The law governing the conduct of the arbitration is interchangeably referred to as the *curial law* or *procedural law* or the *lex fori*. The delineation of the three operative laws as given in *Naviera Amazonica* has been specifically followed by this Court in *Sumitomo*. The Court also, upon a survey, of a number of decisions rendered by the English courts and after referring to the views expressed by learned commentators on international commercial arbitration concluded that:

> *16*. 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."

28. After so holding, the Court referred to the legal position stated in ***Dozco's*** case wherein it has been ruled thus:

"In the backdrop of these conflicting claims, the question boils down to as to what is the true interpretation of Article 23. This Article 23 will have to be read in the backdrop of Article 22 and more particularly, Article 22.1. It is clear from the language of Article 22.1 that the whole agreement would be governed by and construed in accordance with the laws of The Republic of Korea. It is for this reason that the respondent heavily relied on the law laid down in *Sumitomo Heavy Industries Ltd.* v. *ONGC Ltd.* This judgment is a complete authority on the proposition that the arbitrability of the dispute is to be determined in terms of the law governing arbitration agreement and the arbitration proceedings have to be conducted in accordance with the curial law. This Court, in that judgment, relying on *Mustill and Boyd*: *The Law and Practice of Commercial Arbitration in England*, 2nd Edn., observed in para 15 that 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". In para 16, this Court, in no uncertain terms, declared that 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."

The said view was accepted by the two-Judge Bench.

29. Eventually, the Court dislodged the decision of the High Court of Delhi stating that:

> "76.2. We further overrule and set aside the conclusion of the High Court that, even though the arbitration agreement would be governed by the laws of England and that the *juridical seat* of arbitration would be in London, Part I of the Arbitration Act would still be applicable as the laws governing the substantive contract are Indian laws.
>
> 76.3. In the event a final award is made against the respondent, the enforceability of the same in India can be resisted on the ground of public policy.
>
> 76.4. The conclusion of the High Court that in the event, the award is sought to be enforced outside India, it would leave the Indian party remediless is without any basis as the parties have consensually provided that the arbitration agreement will be governed by the English law. Therefore, the remedy against the award will have to be sought in England, where the juridical seat is located. However, we accept the submission of the appellant that since the substantive law governing the contract is Indian law, even the courts in England, in case the arbitrability is challenged, will have to decide the issue by applying Indian law viz. the principle of public policy, etc. as it prevails in Indian law."

30. We have dealt with the said decision as it has taken note of all the pronouncements in the field and further, Mr. Giri, learned senior counsel appearing for the respondents would heavily rely on it and Mr. Viwanathan, learned senior counsel would leave no stone unturned to distinguish the same on the factual foundation especially in reference to the arbitration clause.

31. At this juncture, it is profitable to note that in ***Reliance***

Industries Ltd. (supra), the authority in **Venture Global Engg.** (supra) has been distinguished by taking note of the various clauses in the agreement and opined that as there was a non obstante clause in the agreement hence, the claim of the appellant therein can be enforced in India.

32. In view of the aforesaid propositions laid down by this Court, we are required to scan the tenor of the clauses in the agreement specifically, the arbitration clause in appropriate perspective. The said clause read as follows:

> "5. If any dispute or difference should arise under this charter, general average/arbitration in London to apply, one to be appointed by each of the parties hereto, the third by the two so chosen, and their decision or that of any two of them, shall be final and binding, and this agreement may, for enforcing the same, be made a rule of Court. Said three parties to be commercial men who are the members of the London Arbitrators Association. This contract is to be governed and construed according to English Law. For disputes where total amount claim by either party does not exceed USD 50,000 the arbitration should be conducted in accordance with small claims procedure of the London Maritime Arbitration Association."

33. Two aspects emerge for consideration: (i) Whether on the basis of construction placed on the said clause in the agreement it can be stated that the ratio laid down in ***Bhatia International*** (supra) would not be attracted, but what has been laid down in ***Reliance Industries Ltd.*** (supra) would be

applicable and (ii) whether the execution of the addendum would attract the principles laid down in ***Bharat Aluminium Co.*** case and oust the jurisdiction of the Indian courts.

34. First, we shall advert to the first proposition. There is no cavil over the principle stated in ***Bhatia International*** (supra) that Part I of the Act is applicable to arbitrations held outside India unless the parties have either expressly or impliedly excluded the provisions of the Act. Mr. Vishwanathan, learned senior counsel has submitted in the case at hand there is no express exclusion, for clause remotely does not suggest so. For the said purpose, he has commended us to the decisions in ***A.B.C. Laminart Pvt. Ltd. and Anr. v. A.P. Agencies, Salem***[17] and ***Rajasthan SEB v. Universal Petrol Chemicals Ltd***.[18] It is also urged by him that the stipulation in the agreement does not even remotely impliedly exclude the jurisdiction of the Indian courts. He would submit that to apply the principle of implied exclusion, the Court has to test the "presumed intention" and in such a situation, it is the duty of the Court to adopt an objective approach, that is to say, what would have been the intention of reasonable parties in the position of the actual parties to the

17 (1989) 2 SCC 163
18 (2009) 3 SCC 107

contract. Learned senior counsel would also contend that the concept of fair result has to be kept in view while construing a contract. To buttress the aforesaid submissions, he has drawn inspiration from ***Kim Lewison's The Interpretation of Contracts***, pages 26, 41, 110 and 217 wherein various judgments have been referred.

35. The issue has to be tested, as we perceive, on the parameters of law laid down in the cases of ***Videocon Industries Ltd.*** (supra), ***Dozco*** (supra) and ***Reliance Industries Ltd.*** (supra).

36. In ***Videocon Industries Ltd.*** (supra), the Court has referred to Section 3 of the English Arbitration Act, 1996, which reads as follows:

> "**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
>
> (*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."

Analysing the said provision, the Court proceeded to state

as follows:

> "A reading of the above reproduced provision shows that under the English law the seat of arbitration means juridical seat of arbitration, which can be designated by the parties to the arbitration agreement or by any arbitral or other institution or person empowered by the parties to do so or by the Arbitral Tribunal, if so authorised by the parties. In contrast, there is no provision in the Act under which the Arbitral Tribunal could change the juridical seat of arbitration which, as per the agreement of the parties, was Kuala Lumpur. Therefore, mere change in the physical venue of the hearing from Kuala Lumpur to Amsterdam and London did not amount to change in the juridical seat of arbitration."

Eventually, the Court in the said case has ruled thus:

> "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."

37. In ***Dozco*** (supra), the Court referred to Article 22 and Article 23 of the agreement, which dealt with the governing laws and arbitration. Article 22.1 in the said case provided that the agreement shall be governed by and construed in accordance with the laws of the Republic of Korea. Article 23.1, which dealt

with arbitration, stipulated that all disputes arising in connection with the agreement, shall be finally settled by arbitration in Seoul, Korea or such other place as the parties may agree in writing, pursuant to the rules of agreement then in force of the I.C.C. The Court referred to the decisions in ***Bhatia International*** (supra), ***Indtel Technical Services*** (supra), ***Citation Infowares Ltd.*** (supra), ***NTPC v. Singer Co.***[19] and while analysing the import of Clause 23.1, the Court placed heavy reliance on ***Naviera Amazonica Peruana SA*** (supra) and held thus:

> "19. In respect of the bracketed portion in Article 23.1, however, it is to be seen that it was observed in *Naviera case*:
>
> "… It seems clear that the submissions advanced below confused the legal 'seat', etc. of an arbitration with the geographically convenient place or places for holding hearings. This distinction is nowadays a common feature of international arbitrations and is helpfully explained in *Redfern and Hunter* in the following passage under the heading 'The Place of Arbitration':
>
> 'The preceding discussion has been on the basis that there is only one "place" of arbitration. This will be the place chosen by or on behalf of the parties; and it will be designated in the arbitration agreement or the terms of reference or the minutes of proceedings or in some other way as the place or "seat" of the arbitration. This does not mean, however, that the Arbitral Tribunal must hold all its meetings or hearings at the

19 (1992) 3 SCC 551

> place of arbitration. International commercial arbitration often involves people of many different nationalities, from many different countries. In these circumstances, it is by no means unusual for an Arbitral Tribunal to hold meetings — or even hearings — in a place other than the designated place of arbitration, either for its own convenience or for the convenience of the parties or their witnesses....
>
> It may be more convenient for an Arbitral Tribunal sitting in one country to conduct a hearing in another country — for instance, for the purpose of taking evidence.... In such circumstances, each move of the Arbitral Tribunal does not of itself mean that the seat of the arbitration changes. The seat of the arbitration remains the place initially agreed by or on behalf of the parties.'

These aspects need to be borne in mind when one comes to the Judge's construction of this policy."

It would be clear from this that the bracketed portion in the article was not for deciding upon the seat of the arbitration, but for the convenience of the parties in case they find to hold the arbitration proceedings somewhere else than Seoul, Korea. The part which has been quoted above from *Naviera Amazonica Peruana S.A.* v. *Compania International de Seguros del Peru* supports this inference.

20. In that view, my inferences are that:

(*i*) The clear language of Articles 22 and 23 of the distributorship agreement between the parties in this case spells out a clear agreement between the parties excluding Part I of the Act.

(*ii*) The law laid down in *Bhatia International* v. *Bulk Trading S.A.* and *Indtel Technical Services (P) Ltd.* v.

W.S. Atkins Rail Ltd., as also in *Citation Infowares Ltd.* v. *Equinox Corpn.* is not applicable to the present case.

(*iii*) Since the interpretation of Article 23.1 suggests that the law governing the arbitration will be Korean Law and the seat of arbitration will be Seoul in Korea, there will be no question of applicability of Section 11(6) of the Act and the appointment of arbitrator in terms of that provision."

38. In ***Yograj Infrastructure Ltd.*** (supra), two-Judge Bench dealt with the concept of "procedural law" and "curial law". In that context, it referred to the agreement in the contract, namely, Clauses 27 and 28. In that context the Court opined that:

"..... 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 indi-

> cates that the arbitration proceedings are to be conducted in accordance with the SIAC Rules."
>
> [Emphasis supplied]

39. After so stating, the Court posed the question whether in such a case, the provisions of Section 2(2), which indicates that Part I of the Act would apply, where the place of arbitration is India, would be a bar to the invocation of provisions of Sections 34 and 27 of the Act, which have been conducted in Singapore. The Court referred to the decision in ***Bhatia International*** (supra) wherein it was held that there cannot be any automatic exclusion, but on express or implied exclusion and opined regard being had to the Rule 32 of the SIAC Rules, the law laid down in ***Bhatia International*** (supra) would not be applicable. The said Rule, being pertinent to the issue in question, is reproduced below:-

> "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."

And in that context, the Court ruled thus:

> "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.*, which was applied subsequently in *Venture Global Engg.* .v. *Satyam Computer Services Ltd.* and *Ci-*

> *tation Infowares Ltd.* v. *Equinox Corpn.* 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.
>
> xxxxx xxxxx xxxxx
>
> 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*[1] 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."
>
> [Emphasis added]

40. In ***Reliance Industries Ltd.*** (supra), the two-Judge Bench, while referring to the submissions of the learned counsel for the appellant therein had also referred to the pronouncement in ***Yograj Infrastructure Ltd.*** (supra) and dealt with it thus:

> "Again this Court in *Yograj Infrastructure* (two-Judge Bench) considered a similar arbitration agreement. It was provided that the arbitration proceedings shall be conducted in English in Singapore in accordance with the Singapore International Arbitration Centre (SIAC) Rules (Clause 27.1). Clause 27.2 provided that the arbitration shall take place in Singapore and be conducted in English language. This Court held that having agreed that the seat of arbitration would be Singapore and that the curial law of the arbitration proceedings would be the SIAC Rules, it was no longer open to the appellant to contend that an application under Section 11(6) of the Arbitration Act, 1996 would be

> maintainable. This judgment has specifically taken into consideration the law laid down in *Bhatia International* and *Venture Global*. The same view has been taken by the Delhi High Court, the Bombay High Court and the Gujarat High Court, in fact this Court in *Videocon* has specifically approved the observations made by the Gujarat High Court in *Hardy Oil and Gas Ltd. v. Hindustan Oil Exploration Co. Ltd.*[20]"

41. 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 London Arbitration Association; the contract is to be construed and governed by 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.

42. Mr. Giri, learned senior counsel would submit that from the clause which is a comprehensive one, it is London, which is the seat of arbitration. In ***Videocon Industries Ltd.*** (supra), as we have analysed earlier, Article 33.1 of the agreement which stipulated that subject to the provisions of Article 34.12, the contract would be governed and interpreted in accordance with

20 (2006) 1 Guj LR 658

the laws of India. Clause 34.12 of the agreement read as follows:

> "34.12. *Venue and law of arbitration agreement.*—The venue of sole expert, conciliation or arbitration proceedings pursuant to this article, unless the parties otherwise agree, shall be Kuala Lumpur, Malaysia, and shall be conducted in the English language. Insofar as practicable, the parties shall continue to implement the terms of this contract notwithstanding the initiation of arbitral proceedings and any pending claim or dispute. Notwithstanding the provisions of Article 33.1, the arbitration agreement contained in this Article 34 shall be governed by the laws of England."

43. In that context, the Court referred to Section 3 of the English Arbitration Act, 1996 and as has been stated earlier, opined that as per the English law, the seat of arbitration as per the said provision would mean "juridical seat of arbitration" and accordingly opined that principles stated in ***Bhatia International*** (supra) would not be applicable.

44. 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. Vishwanathan, 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 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 that US $ 50000 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***[21] 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

21 [1997] 1 Lloyd's Rep. 343

> 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."

45. In ***Cargill International S.A. v. Bangladesh Sugar & Food Industries Corp.***[22], Potter L.J. balanced the two approaches and said:

> "In this connection [counsel] has rightly made the point that, when construing the effect of particular words in a commercial contract, it is wrong to put a label on the contract in advance and this to approach the question of construction on the basis of a pre-conception as to the contact's intended effect, with the result that a strained construction is placed on words, clear in themselves, in order to fit them within such pre-conception...
>
> On the other hand, modern principles of construction require the court to have regard to the commercial background, the context of the contract ad the circumstances of the parties, and to consider whether, against that background and I that context, to give the words a particular or restricted meaning would lead to an apparently unreasonable and unfair result."

46. 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

22 [1998] 1 W.L.R. 461 CA

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.

47. Having said that the implied exclusion principle stated in ***Bhatia International*** (supra) 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.

48. Before parting with the case, it is obligatory on our part to state that the Division Bench of the High Court has allowed the petition on the foundation that the ***Bharat Aluminium Co***. case would govern the field and, therefore, the court below had no jurisdiction is not correct. But as has been analysed and discussed by us, even applying the principles laid down in ***Bhatia International*** (supra) and scanning the anatomy of the

arbitration clause, we have arrived at the conclusion that the courts in India will not have jurisdiction as there is implied exclusion.

49. Consequently, for different reasons, we concur with the conclusion arrived at by the High Court and accordingly, the appeal, being sans merit, stands dismissed. However, in the facts and circumstances of the case, there shall be no order as to costs.

.....J.
[Dipak Misra]

....., J.
[Prafulla C. Pant]

New Delhi
March 10, 2015

ITEM NO.1C COURT NO.5 SECTION XIA

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Civil Appeal No(s). 610/2015

HARMONY INNOVATION SHIPPING LTD. Appellant(s)

VERSUS

GUPTA COAL INDIA LTD. AND ANR. Respondent(s)

Date : 10/03/2015 This appeal was called on for hearing today.

For Petitioner(s) Mr. K.V. Vishwanathan, Sr. Adv.
Mr. Ashwin Shankar, Adv.
Mr. Abhishek Kaushik, Adv.
Mr. Sameer Dawar, Adv.
Mr. Abhinav Mukerji, AOR

For Respondent(s) Mr. V. Giri, Sr. Adv.
Mr. Raghenth Basant, Adv.
Mr. Hardeep Singh, Adv.
Ms. Aditi Mishra, Adv.
Ms. Liz Mathew, AOR

Hon'ble Mr. Justice Dipak Misra pronounced the judgment of the bench comprising His Lordship and Hon'ble Mr. Justice Prafulla C. Pant.

The appal, being sans merit, stands dismissed in terms of the signed reportable judgment.

(Gulshan Kumar Arora) (Tapan Kumar Chakraborty)
Court Master Court Master

(Signed Reportable judgment is placed on the file)