HIGH COURT OF GUJARAT *(D.B.)*

EITZEN BULK
V/S
ASHAPURA MINECHEM LIMITED AND ANR

Date of Decision: 22 September 2010

Citation: 2010 LawSuit(Guj) 1581

Hon'ble Judges: Anant S Dave, S J Mukhopadhaya

Eq. Citations: 2011 AIR(Guj) 13, 2011 (1) GLR 229, 2011 (2) GLH 649

Case Type: Special Civil Application

Case No: 12021 of 2009

Subject: Arbitration, Civil

Head Note:

Arbitration and Conciliation Act, 1996 - Sec 2(1)(e), 34 - Arbitration - Award - As per agreement in question it was provided that disputes arising under the agreement to be adjudicate by arbitration at London and English law to apply - Main agreement did not have any relation with United Kingdom - Held, considering facts of the case, unless there is intention to country the clause in the agreement not operative and it cannot be read to exclude either Sec 9 or 34 of part I of the Act.

Arbitration and Conciliation Act, 1996 - Sec 2(1)(e), 34 - Arbitration - Award - Contended that as parties had opted for English Law, District Court at Jharkhand had no jurisdiction - Issue as to jurisdiction can be adjudicate after evidence at trial and pleading of the parties - Mixed question of the fact & law can be adjudicated by District Court - Order accordingly

Acts Referred:
CODE OF CIVIL PROCEDURE, 1908 SEC 20, SEC 20(C), OR 14R 2, OR 7R 10
ARBITRATION AND CONCILIATION ACT, 1996 SEC 2(1)(E), SEC 34, SEC 5

Final Decision: Application disposed

Advocates: K S Nanavati, Prasant Pratap, R S Sanjanwala, Mihir Thakore, Wadia Ghandy & Co

Reference Cases:
Cases Referred in (+): **13**

Judgement Text:-

S J Mukhopadhaya, C J

[1] Eitzen Bulk S/A (hereinafter referred to as 'the petitioner') preferred the writ petition for issuance of a writ of prohibition prohibiting and restraining the learned District Judge, Jamkhambhaliya from entertaining and adjudicating Civil Misc. Application No. 101 of 2009 filed by Ashapura Minechem Ltd. (hereafter referred to as 'the respondent') under Section 34 of the Arbitration and Conciliation Act, 1996 for challenging the award dated 26.5.2009. By order dated 20.11.2009, the learned Single Judge, while issued Rule, having granted interim relief and stayed the further proceedings of the aforesaid Miscellaneous case, the respondent preferred the appeal under Clause 15 of the Letters Patent being Letters Patent Appeal No. 2496 of 2009.

[2] As the issue involved as decided in the appeal, may render the writ petition infructuous, both the appeal and the writ petition were heard together on merits on the request of the parties.

[3] The learning counsel appearing on behalf of the petitioner would challenge the jurisdiction of the District Court at Jamkhambhaliya on two counts, viz.

> the application under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Arbitration Act') is not maintainable. The parties to the Contract of Affreightment (COA) have chosen to apply English law to the contract, to the arbitration agreement and to the arbitral

proceedings, thereby expressly or by necessary implication excluding the applicability of Part I of the Arbitration Act, 1996; and

Even assuming that Part I of the Arbitration Act, 1996 applies, the Court at Jamkhambhaliya is not the Court within the meaning of the term defined by Section 2(e) of the Act to hear and decide an application under Section 34 of the Arbitration Act, 1996 as no part of cause of action has arisen within the territorial limits of the Court of Jamkhambhaliya.

[4] The respondent, on appearance, has raised a preliminary objection of there being an alternative efficacious remedy. In reply, the stand taken by the petitioner is that a writ of prohibition lies when the Court in seisin of proceedings patently lacks jurisdiction to entertain the said proceedings. Whenever a subordinate Court or Tribunal usurps jurisdiction which does not belong to it and if it is brought to the notice of the High Court, the writ of prohibition is issued, though not of course, is of right and not discretionary. Reliance was placed on the decision of the Supreme Court in the case of Bengal Immunity Co. v. State of Bihar, 1955 AIR(SC) 661.

[5] The learned Counsel for the petitioner would contend that in view of Section 5 of the Arbitration Act, which restricts judicial intervention except in the manner provided under the Act, the petitioner has no alternative efficacious remedy. The Arbitration Act and more particularly Section 34 thereof, does not contemplate a stage for filing an application either under Order VII, Rule 10 and/or 11 of the Code of Civil Procedure or an application under Order XIV, Rule 2 of the Code of Civil Procedure. In any case, the alternative remedy does not bar issuance of a writ of prohibition. He would also contend that as the petition involves adjudication of important questions of law involving reading and interpretation of the provisions of the Arbitration Act and various judgments of the Supreme Court and High Courts of the country, the parties to the proceedings have already undertaken successive litigations. To avoid multiplicity of proceedings, the issue arising in the present petition is required to be determined. It is brought to the notice of the Court that a number of proceedings have been instituted by the parties, including

Special Civil Suit No. 55 of 2008 filed by the respondent seeking a declaration that the COA and/or the arbitration clause is illegal, null and void ab-initio,

Appeal From Order No. 27 of 2009 for challenging the order below Exh. 5 for interim injunction in the aforesaid suit,

Civil Misc. Application No. 101 of 2009 under Section 34 of the Arbitration Act, 1996,

Special Civil Application No. 9097 of 2009 for challenging the order dated 24.8.2009 rejecting the application for interim injunction,

Letters Patent Appeal (Stamp) No. 2497 of 2009 for challenging the order in SCA No. 9097 of 2009,

Transfer Petition No. 1037 of 2009,

Present Special Civil Application, and

Present Letters Patent Appeal.

In view of the aforesaid pendency of cases and important questions of law involved, we decided to hear the case on merits.

[6] The first question raised is relating to maintainability of the application under Section 34 of the Arbitration Act, 1996. The question raised is

Whether the trial Court has inherent jurisdiction to set aside the Foreign Arbitration Award dated 26th May, 2009 under Section 34 of the Arbitration and Conciliation Act, 1996 and whether a petition under Section 34 is maintainable in the facts and circumstances of the case?

[7] The learned Counsel for the petitioner would contend that the petition under Section 34 for setting aside the Foreign Arbitration Award dated 26.5.209 is not maintainable in the facts and circumstances of the case. For the purpose of considering the question, he referred to the relevant arbitration Clause 28 of the COA dated 8.1.2008 executed

between the parties wherein it was stipulated that any dispute arising under the COA is to be settled and referred to arbitration in London and English law shall apply. He would contend that the aforesaid Clause constitutes an arbitration agreement between the parties. It is an agreement which is distinct and separate from the main contract. The agreement expressly provides for the disputes to be settled and referred to arbitration in London. This means that the seat of arbitration is London. The agreement further provides that English law to apply. This means that the English law is the proper law of the arbitration agreement and the law governing the arbitration agreement. There is, however, no express choice of law governing the contract as a whole. Therefore, according to the petitioner, the following position emerges:

(a) Place of arbitration : London

(b) Law governing the arbitration agreement : English law

(c) Law governing the contract : Silent

Reliance was placed on the Supreme Court decision in Bhatia International v. Bulk Trading S.A., 2002 4 SCC 105, wherein the Supreme Court held that 'in cases of international commercial arbitrations held out of India, the provisions of Part I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions.

It was submitted that in the case of the petitioner, the parties have expressly agreed for English law as the law governing the arbitration agreement; the parties have agreed that English law shall apply to the arbitration, and by necessary implication, excluded the provisions of Part I of the Arbitration and Conciliation Act, 1996. In other words, English law and the English Arbitration Act, 1996 shall apply and not Part I of the Indian Act. Reliance was also placed on the decision of the Supreme Court in Sumitomo Heavy Industries Ltd. v. ONGC Ltd., 1998 1 SCC 305, a decision of the Gujarat High Court in Hardy Oil and Gas Ltd. v. Hindustan Oil Exploration Co. Ltd.,2006 1 GLR 659, a decision of the Chattisgarh High Court in Bharat Aluminium Co. Ltd. v. Kaiser Aluminium Technical Services Inc.,2006 1 ArbLR 113 (Chattisgardh) (DB) and the judgment dated 16.7.2009 of the

Delhi High Court in Max India Ltd. v. General Building Corporation unreported FAO (OS) No. 193/2009. There are other judgments relied upon of which are relevant will be discussed by us at the appropriate stage.

[8] The main thrust of the argument of the learned Counsel for the petitioner is that the law governing the arbitration agreement will also be the law which will apply to the arbitration. Clause 28 of the COA expressly provides for English law to apply. Hence, English law will be the law governing the arbitration agreement and shall also apply to the arbitration. The express applicability of English law to the arbitration excludes by necessary implication the applicability of the Indian Arbitration Act.

The English Arbitration Act, 1996, according to him, will apply for all purposes i.e. once the arbitration award has been made and not merely after the stage of award. Referring to the Supreme Court judgment in the case of Sumitomo Heavy Industries Ltd. v. ONGC Ltd. (supra), he would further contend that the law which would apply to the filing of the award, to its enforcement and to its setting aside will be the law governing the agreement to arbitration and the performance of that agreement. In this case, it is the English law and the applicability of the English Arbitration Act does not cease on the making of the award and continues to apply to any challenge to the award is made clear by the provisions of Section 1(c) and Section 2(1) of the English Arbitration Act, 1996. The provisions of the said part of the English law will apply where the seat of arbitration is England and Wales.

[9] Referring to Sections 67 to 71 of the English Arbitration Act, 1996, it is further contended that the remedy provided for challenging the arbitration award and the grounds on which an award can be challenged are completely different from the remedy provided and the grounds available under Part I of the Indian Arbitration and Conciliation Act, 1996. In fact, the English Act provides for an appeal on a point of law and also for a challenge to the award on the grounds of serious irregularity as set out in Sections 69 and 68 respectively of the English Arbitration Act, 1996. No such provisions exist under the Indian Arbitration Act. Thus, in light of the observations made in the case of Bhatia International v. Bulk Trading S.A. (supra), the English Arbitration Act being contrary to the provisions of Section 34 of the Indian Act, consequently Section 34 will not apply and the law chosen by the parties, viz. English law and English Arbitration Act will prevail.

[10] The next question raised is on the territorial jurisdiction of the District Court at Jamkhambhaliya. The learned Counsel for the petitioner would submit that 'assuming that the foreign arbitration award can be set aside on an application under Section 34 of the Indian Arbitration and Conciliation Act, 1996, whether the District Court at Jamkhambhaliya has territorial jurisdiction to entertain such application'. His answer is negative.

He would contend that the District Judge, Jamkhambhaliya has no territorial jurisdiction to entertain an application under Section 34 of the Act. He referred to the definition of 'Court' under Section 2(1)(e) of the Arbitration and Conciliation Act, 1996, wherein 'Court' as defined is as follows:

'Court' means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes.

Therefore, according to him, the Court which has the jurisdiction to decide the questions forming the subject matter of the arbitration as if the same had been the subject matter of a suit, would be the Court that would have jurisdiction to entertain an application under Section 34. The only issue between the parties was the repudiation of the contract by the respondent and the only question was whether the respondentcharterer was entitled to repudiate the COA dated 8.1.2008. If the repudiation is wrongful, the damage follows as a consequence thereof.

[11] Referring to the Supreme Court decision in the case of ABC Laminart Pvt. Ltd. v. AP Agencies, 1989 2 SCC 163 (para 15), he would contend that in cases of repudiation of the contract, the place where the repudiation is received is the place where the suit would lie.

In the present case, according to him, the respondent repudiated the contract by its communication dated 29.9.2008 addressed by e-mail from

Mumbai stating that the situation amounts to frustration/force-majeure; we therefore give you formal notice that we regard the COA as terminated by reason of force-majeure/frustration. The petitioner did not accept that there was any force-majeure/frustration and by their ex-mail dated 23.10.2008 addressed to the respondent at Mumbai notified the respondent of the appointment of arbitrator pursuant to Clause 28 of the COA. In response, the respondent addressed e-mail dated 24.10.2008 from Mumbai stating that there was force-majeure/frustration and stating that they will appoint an arbitrator and get back shortly. The respondent then addressed a further letter dated 10.11.2009 to the petitioner at Norway stating that the COA was entered into without obtaining a license under the Merchant Shipping Act and the COA was bad in law and void ab-initio. This communication also amounted to a repudiation of the contract and was addressed by the respondent at Mumbai to the petitioner at Norway. Therefore, the counsel for the petitioner would contend that the repudiation having taken place at Mumbai and the communication having made to the petitioner at Norway, the Mumbai Court alone would have the jurisdiction to decide the question of repudiation of the contract. Hence, the Mumbai Court would be the Court within the meaning of Section 2(1)(e) of the Arbitration and Conciliation Act, 1996.

[12] Next it was contended that no cause of action has taken place at Jamkhambhaliya. In this connection, reliance was placed on the Supreme Court decision in ABC Laminart Pvt. Ltd. v. AP Agencies (supra), wherein the Court held that if a contract is pleaded as a part of the cause of action giving rise to the jurisdiction of the court where the suit is filed and that contract is found to be invalid, such part of the cause of action disappears. It was further contended that the plaintiff, the respondent herein, cannot create a cause of action solely by his own effort. It must be created for him by some act of the defendant, i.e. the petitioner herein. Reliance was placed on the Supreme Court decision in Zilla Parishad v. Shanti Devi, 1965 AIR(All) 590.

[13] The learned Counsel referred to paragraphs 6 and 7 of the plaint wherein the respondent, which is the plaintiff, has stated as follows:

6. The applicant humbly states that the cause of action for filing the present application has arisen within the jurisdiction of this Hon'ble Court as the applicant has been prevented from performing the said contract at Okha.

7. The cause of action first arose when the impugned award came to be received by the applicant on or about 2.6.09 and.

It is stated that the impugned award was not received by the application at Okha, but was received by them at Mumbai and this has not been disputed by the respondent. It is also stated that the petitioner never prevented the performance of the contract and thereby no cause of action has taken place at Jamkhambhaliya.

[14] As noticed earlier, the respondent opposed the prayer on the ground of alternative remedy and would contend that the District Court is also entitled to decide both the issues as raised in this case, but we have shown the ground for taking up the matter and deciding the main issue.

[15] Mr Mihir Thakore, learned senior counsel for the respondent would submit that the award made in London pursuant to Clause 28 of the COA can be challenged under Section 34 of the Arbitration and Conciliation Act, 1996, as the provisions of Part I of the Arbitration Act, 1996 cannot be said to have been excluded expressly or implication by Clause 28 of the COA or by any other Clause. In this connection, he relied on the decisions of the Supreme Court in the case of Bhatia International v. Bulk Trading S.A., 2002 4 SCC 105 and in the case of Venture Global Engineering v. Satyam Computer Services Ltd., 2008 4 SCC 190 and then submitted that Part I of the Arbitration Act, 1996 would apply even to international commercial arbitrations such as the present one, unless the parties having expressly or impliedly excluded the same by an agreement. The illustrative Clauses which could expressly or impliedly exclude the non-derogable provisions of Part I, according to the counsel for the respondent, would be:

The parties agree that none of the provisions of Part I of the Arbitration and Conciliation Act, 1996 shall apply to the arbitration (Express Clause),

The parties agree that Qurial Law and Lex Arbitri shall be exclusively the laws of England (Implied Clause), and

The parties agree that the Courts in England shall have exclusive jurisdiction

over the arbitration to which jurisdiction the parties hereby submit (implied exclusion).

Reliance was also placed on the other decisions of the Supreme Court, which will be discussed at the appropriate stage.

[16] The counsel for the respondent would contend that the words English law to apply read with the words any dispute arising under the COA is to be settled and referred to arbitration in London in Clause 28 of the COA, necessarily mean that the crucial law governing conduct of arbitration is English law. Once the arbitration is over and the award has been passed, the applicability of law comes to an end. There is nothing in Clause 28 to expressly exclude the applicability of Part I and, therefore, Clause 28 cannot be read to exclude Sections 9 or 34 of Part I.

[17] So far as the District Court at Jamkhambhaliya is concerned, the stand taken by the respondent is that the said Court has the jurisdiction to entertain and decide the application filed under Section 34 of the Arbitration and Conciliation Act, 1996. For the purpose of determining as to which Court/District Court will have the territorial jurisdiction to entertain the application under Section 34, the question which is to be considered is which District Court would have the territorial jurisdiction in respect of the subject matter of the arbitration. The learned Counsel for the respondent would submit that the subject matter of the arbitration in the instant case is a claim for damage for an alleged breach of the COA and the defense thereto is the frustration/illegality of the COA. If the claimantpetitioner desires to file a suit claiming such damage, he would be required to take recourse to a Court having territorial jurisdiction under Section 20 of the Code of Civil Procedure. The claimantpetitioner could have filed a suit either where the respondentopponent actually or voluntarily resides or carries on business or personally works for gain at the time of commencement of the suit. Moreover, the suit could also be filed under Section 20(c) of the CPC where the cause of action wholly or in part arises. Therefore, the respondent herein could have preferred the suit either at the place where the contract was made or at the place where the breach occurred. The explanation to Section 20 provides that a Corporation shall be deemed to carry on business at its sole or principal office in India or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place. The respondentopponent had its principal office at Bombay. In the present case, the contract was to be performed by both the parties either at Okha or at Bedi or at Porbandar as evident from the COA. In fact, one

despatch was effected from Okha as noticed in para 17 of the arbitral award. The suit could have, therefore, been filed within the territorial jurisdiction of the District Court at Jamkhambhaliya as Okha is situated within the jurisdiction of the said Court and the contract was to be performed thereat.

[18] In the present case, the question involved is whether the parties by agreement, expressly or impliedly, have excluded all or any of the provisions of the Arbitration and Conciliation Act, 1996.

[19] In Sumitomo Heavy Industries Ltd. v. ONGC Ltd. (supra), the law applicable to the contract was Indian law and the arbitration was to be held in London in accordance with the provisions of the International Chamber of Commerce and the Rules framed thereunder. In para 9, the Supreme Court referred to a passage from the judgment in Naviera Amazonica Peruana S.A. v. Compania International de Seguras Del Peru,1988 1 LLR 116, as follows:

> A. 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).

> At para 16, the Supreme Court observed 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.

[20] In Bhatia International v. Bulk Trading S.A. (supra), the Supreme Court noticed the argument advanced by the counsel for the respondents in the said case that unless the parties by their agreement exclude its provisions Part I would also apply to all international commercial arbitrations including those that take place out of India. Having noticed such submission and the rival contention as raised on behalf of the appellant of the said case, the Supreme Court observed as follows:

> 13. On the other hand Mr. Sundram, for the respondents has taken us

through the various provisions of the said Act. He has ably submitted that a conjoint reading of the provisions shows that Part I is to apply to all arbitrations. He submits that unless the parties by their agreement exclude its provisions Part I would also apply to all international commercial arbitrations including those that take place out of India.

14. At first blush the arguments of Mr. Sen appear very attractive. Undoubtedly Sub-section (2) of Section 2 states that part I is to apply where the place of arbitration is in India. Undoubtedly, Part II applies to foreign awards. Whilst the submissions of Mr. Sen are attractive, one has to keep in mind the consequence which would follow if they are accepted. The result would:

(a) Amount to holding that the legislature has left a lacuna in the said Act. There would be a lacuna as neither Part I or II would apply to arbitrations held in a country which is not a signatory to the New York Convention or the Geneva Convention (hereinafter called a non-convention country). It would mean that there is no law, in India, governing such arbitrations.

(b) Lead to an anomalous situation inasmuch as Part I would apply to Jammu and Kashmir in all international commercial arbitrations but Part I would not apply to the rest of India if the arbitration takes place out of India.

(c) Lead to a conflict between Sub-section (2) of Section 2 on one hand and Sub-sections (4) and (5) of Section 2 on the other. Further, Sub-section (2) of Section 2 would also be in conflict with Section 1 which provides that the Act extends to the whole of India.

(d) Leave a party remediless inasmuch as in international commercial arbitrations which take place out of India they party would not be able to apply for interim relief in India even though the properties and assets are in India. Thus a party may not be able to get any interim relief at all.

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[21] Now let us look at Sub-sections (2), (3), (4) and (5) of Section 2. Sub-section (2) of Section 2 provides that Part I would apply where the place of arbitration is in India. To be immediately noted, that it is not providing that Part I shall not apply where the place of arbitration is not in India. It is also not providing that Part I will only apply where the place of arbitration is in India (emphasis supplied). Thus the legislature has not provided that Part I is not to apply to arbitrations which took place outside India. The use of the language is significant and important. The legislature is emphasizing that the provisions of Part I would apply to arbitrations which take place in India, but not providing that the provisions of Part will not apply to arbitrations which take place out of India. The wording of Sub-section (2) of Section 2 suggests that the intention of the legislature was to make provisions of Part I compulsorily applicable to an arbitration, including an international commercial arbitration, which takes place in India. Parties cannot, by agreement, override or exclude the non-derogable provisions of Part I in such arbitrations. 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.

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> 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.

[22] The Supreme Court in Venture Global Engineering v. Satyam Computer Services

Ltd. (supra) followed the decision in the case of Bhatia International (supra) and held that even when the award has been made by the London Court of International Arbitration, the same can be challenged under Section 34 of the Arbitration and Conciliation Act, 1996. Therein the Supreme Court observed as follows:

> 31. On close scrutiny of the materials and the dictum laid down in the three-Judge bench decision in Bhatia International we agree with the contention of Mr. K.K. Venugopal and hold that paras 32 and 35 of Bhatia International make it clear that the provisions of Part I of the Act would apply to all arbitrations including international commercial arbitrations and to all proceedings relating thereto. We further hold that where such arbitration is held in India, the provisions of Part I would compulsorily apply and parties are free to deviate to the extent permitted by the provisions of Part I. It is also clear that even in the case 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. We are also of the view that such an interpretation does not lead to any conflict between any of the provisions of the Act and there is no lacuna as such. The matter, therefore, is concluded by the three-Judge Bench decision in Bhatia International.
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> 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 in 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.

The Supreme Court in the facts of the said case did not find that the provisions of Part I were excluded expressly or by implication in spite of the fact that the language in the arbitration clause is final binding arbitration to the London Court of Arbitration.

[23] In Indtel Technical Services Pvt. Ltd. v. WS Atkins Rail Ltd., 2008 10 SCC 308, the Supreme Court examined the applicability of Part I qua appointment of an arbitrator under Section 11 of the Arbitration and Conciliation Act, 1996. In the said case, the arbitration clause read as under:

13. Settlement of disputes.

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

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;

If any dispute or different 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.

In the said case, the Supreme Court having noticed the wording of the Clause, observed as follows:

36. Although the matter has been argued at great length and Mr. Tripathi has tried to establish that the decision of this Court in Bhatia International case is not relevant for a decision in this case, I am unable to accept such contention in the facts and circumstances of the present case. 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, 1992 3 SCC 551 support such a proposition. What, however, distinguishes the various decisions and views of the authorities in this case is the fact that in Bhatia International this Court laid down the proposition that notwithstanding the provisions of Section 2(2) of the Arbitration and Conciliation Act, 1996, indicating that Part I of the said Act would apply where the place of arbitration is in India, even in respect of international commercial agreements, which are to be governed by the laws of another country, the parties would be entitled to invoke the provisions of Part I of the aforesaid Act and consequently the application made under Section 11 thereof would be maintainable.

37. The decision in Bhatia International case has been rendered by a Bench of three Judges and governs the scope of the application under consideration, as it clearly lays down that the provisions of Part I of the Arbitration and Conciliation Act, 1996, would be equally applicable to international commercial arbitrations held outside India, unless any of the said provisions are excluded by agreement between the parties expressly or by implication, which is not so in the instant case.

38. Furthermore, from the wording of Clause 13.2 and Clause 13.3, I am convinced, for the purpose of this application, that the parties to eh memorandum intended to have their disputes resolved by arbitration and in the facts of this case the petition has to be allowed.

[24] In Citation Infowares Ltd. v. Equinox Corporation, 2009 7 SCC 220, the Supreme

Court was required to decide the issue in the context of an application under Section 11 of the Arbitration and Conciliation Act, 1996. The relevant Clause of the agreement being Clause 10.1 was interpreted by the Supreme Court not to exclude Part I and the plea raised that the Clause expressly excludes the provisions of Part I was rejected. Therein the relevant Clause 10.1 was as under:

> 10.1 Governing law - This agreement shall be governed by and interpreted in accordance with the laws of California, USA and matters of dispute, if any, relating to this agreement or its subject-matter shall be referred for arbitration to a mutually agreed arbitrator.

In the context of the aforesaid Clause 10.1, the Supreme Court observed as follows:

> 32. Shri Venugopal, however, contended that if the parties intended specifically in this case that the law governing the contract was Californian law, as expressed in Bhatia International as well as in Indtel Technical Services case, an implied exclusion of Part I should be presumed. I am afraid it is not possible to read such an implied exclusion. Seeing the striking similarity between Clause 10.1 in the instant case and Clauses 13.1 and 13.2 in Indtel case which have been quoted above and further the view expressed by the learned Judge in Indtel Technical Services case regarding the exclusion, it is not possible to even distantly read such an implied exclusion of Part I. It cannot be forgotten that one of the contracting parties is the Indian party. The obligations under the contract were to be completed in India. Further, considering the nature of the contract, it is difficult to read any such implied exclusion of Par I in the language of Clause 10.1. That argument of learned Senior Counsel for the respondent therefore must be rejected.
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> 35. Similarly the language of Clause 10.1, it is suggested, was expressly agreed between the parties that the procedural law would be that of California. The suggestion given by the learned Senior Council for the

respondent that since the provision about the arbitration is included in the same sentence the intention must be presumed that the parties intended only the California law even to govern the procedure. As I have said, that by itself it cannot be the way to read the said clause as the decision in Bhatia International was available on the date when the agreement was signed.

[25] In the present case, Clause 28 of the COA reads as follows:

> 28. Any dispute arising under this C.O.A is to be settled and referred to Arbitration in London. One Arbitrator to be employed by the charterers and one by the owner and in case they shall not agree then shall appoint an umpire whose decision shall be final and binding, the Arbitrators and umpire to be commercial shipping Men. English Law apply. Notwithstanding anything to the contrary agreed in the C.O.A., all disputes where the amount involved is less than USD 50,000/ - (fifty thousand) the Arbitration shall be conducted in accordance with the small claims procedure of the L.M.A.A.

The question is whether the aforesaid Clause 28 expressly or impliedly excludes Part I of the Arbitration and Conciliation Act, 1996.

In Clause 28, it is mentioned that any dispute arising under this COA is to be settled and referred to arbitration in London. It further refers to English law to apply. Clause 28 of the COA does relate to curial law governing conduct of arbitration is English law. The law governing the conduct of the arbitration i.e. curial law is different and distinct from the law governing challenge to the arbitral award. In this connection, one may refer to the decision of the Supreme Court in the case of Sumitomo Heavy Industries Ltd. v. ONGC Ltd. (supra) where three different systems of law - (i) the law governing the substantive contract, (ii) the law governing the agreement to arbitrate and the performance of that agreement, and (iii) the law governing the conduct of the arbitration were noticed.

[26] In absence of any intention to the contrary, the proper law of arbitration agreement is the same as the proper law of the main contract. In the present case, there is no connection whatsoever of the main contract with the United Kingdom. Clause 28 of the

COA deals with the disputes arising under the COA. Therein, it is made clear that any dispute arising under the COA is to be settled and referred to arbitration in London. It talks of one arbitrator to be employed by the charterers and one by the owner and in case they shall not agree, then they shall appoint an umpire whose decision shall be final and binding. The arbitrators and umpire to be commercial shipping men with a further stipulation that English law to apply. However, the disputes where the amount involved is less than USD 50,000, the arbitration shall be conducted in accordance with the small claims procedure of the London Maritime Arbitrators Association (LMAA). From the aforesaid clause, it will be evident that for arbitration relating to a dispute involving an amount more than USD 50,000, while it is to be settled and referred to arbitration, the English law is applicable only for such arbitration. With regard to the disputes involving the amount less than USD 50,000, small claims procedures of the LMAA shall apply. Therefore, it is clear that the sentence English law to apply only indicates that English law is to apply to the conduct of arbitration proceedings because other than the seat of arbitration being London, there is no other connection of the contract with the U.K. Therefore, as the main contract is silent with regard to English law and there is no intention to the contrary, and in absence of any express or implied exclusion of Part I of the Arbitration and Conciliation Act, 1996, it is difficult to accept the plea that Clause 28 of the COA excludes Part I of the Arbitration and Conciliation Act, 1996.

[27] The last portion of Clause 28 of the COA, though has no application in the present case, but the said portion shows the specific provisions mentioned with regard to the procedures to be adopted if the dispute relates to an amount less than USD 50,000. In such case, the procedure to be adopted is Small Claim Procedure of LMAA. That implies that the procedural law is not the general English law.

> Even if it is accepted that the arbitrator is to follow the procedures laid down in English law, but such procedural law comes to an end after the award is announced.

[28] The phrase English law to apply has thus to be read in the context of any dispute arising under the COA is to be settled and referred to arbitration in London, and at the best the procedure to be followed by the arbitrator. The terms settled and referred cannot be read to mean a final conclusion by a Court of Law pursuant to the challenge of the award. It only means that the dispute has to be resolved by arbitration and nothing beyond that. In the circumstances, the phrase English law to apply cannot be

read to exclude either Section 9 or Section 34 of Part I of the Arbitration and Conciliation Act, 1996.

[29] There is nothing indicative in Clause 28 to expressly exclude applicability of Part I, as noticed earlier. In the circumstances, Clause 28 of the COA cannot be read even by implication to exclude Part I. To exclude Part I by implication, the clause will have to mean that the jurisdiction to challenge the award is exclusively with the Courts in England as distinct from the phrase English law. Therefore, the use of the words English law to apply in an arbitration clause cannot be read to give exclusive jurisdiction to the Courts in England.

[30] Similar matter fell for consideration before a Division Bench of the Andhra Pradesh High Court in National Aluminium Company Ltd. v. Gerald Metals, 2004 2 ArbLR 382. Therein, the Court examined the following clause governing arbitration:

> 6. Arbitration
>
> In the even of any question or dispute arising under or our of or relating to construction, meaning and operation or effect of this contract or breach thereto, matter in dispute shall be referred to two Arbitrators, one to be nominated by the Seller and the other by the Buyer and in case of the said Arbitrators not agreeing then to an Umpire to be appointed by the Arbitrators in writing before proceedings on the reference. The decision of the Arbitrators or in the even of their not agreeing of the said Umpire shall be final and binding on the parties to the contract. The provision of English Law to apply to the proceedings. The arbitrators or the Umpire as the case may be shall be entitled with the consent of the parties, to enlarge the time from time to time for making the award. The Arbitrators/Umpire shall give a reasoned award. The venue of the Arbitration shall be London, England. The Arbitration shall take place in English language. Pending the settlement and thereafter until the Arbitrators made the award:
>
> & & &. &. &. &. &
>
> *13. Jurisdiction/Governing law:

For all disputes arising out of this contract, the respective Courts in London, England shall have exclusive jurisdiction.

The contract shall be governed by and construed in accordance with the Laws of English.

The Andhra Pradesh High Court after considering the Bhatia International case, held as follows:

16. We agree with Mr. Singhvi and, in our view, there is no implied consent for excluding the jurisdiction of the Courts n India under Part I of the Act. Mr. Singhvi contended that, as a matter of fact, Section 9 of the Act operates in a specific field and the efficacy of Section 9 of the Act would be more in cases in which arbitration takes place outside India. He contends that it would be absurd to assume that if an arbitration takes place outside India or in England or in Paris, or in United States, goods are somewhere in India which are perishable, would it be advisable to tell the parties to go to England, Paris or United States for seeking interim orders for preservation of goods. He contend that even in the present case where the vessel was at the Port from 1st January, 2004 and the party is paying damages of US $ 25,000 per day, the doors of the Court shall not be shut to him by the Courts in India on the ground that since the place of arbitration has been fixed in England, therefore they cannot help him. We do not think that the present is one in which there was an implied consent of the parties to exclude the applicability of Part I of the Act.

[31] Therefore, we hold that Clause 28 of the COA does not exclude applicability of Part I of the Arbitration and Conciliation Act, 1996, expressly or impliedly, either all or any of its provisions, and, therefore, the petition preferred by the respondent under Section 34 of the Arbitration and Conciliation Act, 1996 is maintainable in India.

[32] The second question relates to territorial jurisdiction of the District Court at Jamkhambhaliya. Both the parties advanced their arguments with regard to the jurisdiction of the District Court at Jamkhambhaliya to decide the application under Section 34 of the Arbitration Act. The aforesaid question is dependent on the place

where cause of action has taken. Such issue can be determined only on the basis of the relevant evidence and the stand as taken by the parties in their respective plaint and written statement. The aforesaid question being a mixed question of facts and law, the District Court at Jamkhambhaliya can decide the same. In the facts and circumstances of the case, as the second issue is required to be determined on the basis of the respective stand taken by the parties and the facts pleaded, which is based on evidence, it is desirable that the parties should raise such issue before the Court below and in such case, the learned District Judge, Jamkhambhaliya will decide the question of jurisdiction.

[33] In view of the observations as made above, the interim order dated 20.11.2009 passed by the learned Single Judge is vacated. Both the Special Civil Application and the Letters Patent Appeal and connected Civil Application are disposed of with the aforesaid observations. No costs.