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Court : Mumbai

Decided On : Nov-15-2011

Judge : S. J. Kathawalla, J.

Acts : English Arbitration Act,1996 - Section 34, 11, 9, 2, 53 and 68(1); Arbitration and Conciliation Act, 1996 - Section 2(2)m 11

Appeal No. : ARBITRATION PETITION NO.636 OF 2011

Appellant : Sakuma Exports Ltd

Respondent : Louis Drefus Commodities Suisse S.A.

Judgement :

1. The Petitioner is a company in Mumbai carrying on the business of importing and exporting commodities including sugar. The Respondent is a company having its registered office at Switzerland. Under an Agreement/Contract dated 12th January, 2010, the Petitioner inter alia agreed to purchase from the Respondent 2700 MT of Brazilian White Sugar to be shipped in containers between 15th January, 2010 and 15th February, 2010 to the Port at Nhavasheva or Calcutta, India (the said Contract).

2. Dispute arose between the parties pertaining to the quality of sugar supplied by the Respondent to the Petitioner under the said contract. Since the contract contained an arbitration agreement, arbitration proceedings were initiated by the Respondent by filing their statement of claim vide their letter dated 31st May, 2010

before the Arbitral Tribunal constituted by the Refined Sugar Association (RSA) for settlement in accordance with the Rules relating to the arbitration.

3. The Arbitral Tribunal passed a final Award on 31st December, 2010 allowing the claim of the Respondent. The said Award is challenged by the Petitioner in the present Petition under Section 34 of the Arbitration Act,1996. The Respondent has contended that this Court has no jurisdiction to try, entertain and dispose of the instant Petition. In view thereof, at this stage, the Learned Advocates appearing for the parties have addressed this Court only on the limited issue as to whether the present Petition under Section 34 of the Arbitration Act,1996 is maintainable before this Court.

4. The relevant clauses of the contract are reproduced hereunder : "TERMS AND CONDITIONS:

"This contract is subject to the Rules of The Refined Sugar Association, London as fully as if the same had been expressly inserted herein, whether or not either or both parties to it are Members of the Association.

If any provision of this contract is inconsistent with the Rules, said provisions shall prevail.

ARBITRATION

All disputes arising out of or in conjunction with this contract shall be referred to the Refined Sugar Association, London for settlement in accordance with the Rules relating to Arbitration. This contract shall be governed by and construed in accordance with English Law."

5. Mr. Aspi Chinoy, Learned Senior Advocate appearing for the Petitioner in support of his submission that this Court has jurisdiction to entertain the present Petition under Section 34 of the Arbitration and Conciliation Act,1996, first pointed out that the Rules of the Refined Sugar Association relating to the Arbitration (which have been tendered/submitted in Court by the Respondent) recommend that the following arbitration clause be inserted in the contract: "Any disputes arising out of or in conjunction with this contract shall be referred to arbitration

before The Refined Sugar Association, for settlement in accordance with the Rules Relating to Arbitration. Such arbitration shall be conducted in accordance with English Law. This contract shall be governed by and construed in accordance with English Law."

6. Mr. Chinoy, therefore submits that in the present case the recommended condition/clause that "such arbitration shall be conducted in accordance with English Law" has not been agreed to/provided for in the contract.

7. Mr. Chinoy next submits that from the arbitration clause incorporated in the said contract it can be seen that : i) The substantive law of the contract of sale/purchase is English Law

ii) The Contract/Arbitration clause itself is silent as to venue of the arbitration. However, clause 8 of the Refined Sugar Association's "rules Relating to Arbitration" stipulates that "the seat of the Arbitration shall be England and all proceedings shall take place in England.".

c) The contract contains no provision stipulating a choice of the curial law /i.e. the law governing the Arbitration/ Arbitration procedure.

8. Referring to the decision of the Hon'ble Supreme Court in Bhatia International Vs. Bulk Trading S.A. 2002 (4) SCC 105, wherein three Judges of the Hon'ble Supreme Court held that part of the Arbitration and Conciliation Act, 1996 would also apply to International Commercial Arbitration which take place out of India, unless the parties by agreement excluded the applicability of Part I or any provision thereof, and, that in such case, the laws chosen by the parties would prevail/apply, Mr. Chinoy points out that in Bhatia International Case :

i) the agreement was silent as to the governing substantive law - the law governing the substantive/ commercial contract;

ii) the agreement made no provision regarding the applicable Curial law/ law governing the Arbitration; and

iii) the parties had agreed that the arbitration would be held in Paris.

Therefore notwithstanding that the Arbitration was agreed to be held in Paris, the Hon'ble Supreme Court held that the provisions of Part 1 of the 1996 Act were applicable and that the parties have not excluded their applicability.

9. Mr. Chinoy, next referred to the decision of the Hon'ble Supreme Court in the case of Venture Global Engineering Vs. Satyam Computers Services Ltd. 2008 (4) SCC 190 and pointed out that in that case the agreed venue of the arbitration was London. The contract provided that the same would be governed by the laws of the State of Michigan, USA and also that notwithstanding anything contrary in the agreement, the shareholders shall at all times act in accordance with the Companies Act and other applicable Acts/Rules in force in India at any time. Therefore, though the contract was silent as to the Curial law / law governing the arbitration, the Hon'ble Supreme Court relying on paragraph Nos.30-35 of Bhatia International (supra) held that the provisions of Part I of the Act were applicable and were not excluded.

10. Mr. Chinoy therefore submitted that from the above two judgments of the Hon'ble Supreme Court, it is clear that the provisions of Part 1 apply to International Commercial Arbitration held in foreign country; and the provisions of Part 1 are not excluded merely by the parties agreement that arbitration shall take place in a foreign country/ at designated foreign seat. Mr. Chinoy submits that in fact a mere provision for a foreign seat/venue for the arbitration could by itself never be considered as excluding part 1 of the 1996 Act, as otherwise there could never be a case where part I could apply to an International Commercial Arbitration held abroad/in a foreign country.

11. Mr. Chinoy has also referred to the decision of the Hon'ble Supreme Court in Indtel Technical Services Pvt. Ltd. Vs. W.S.Atkins Rail Ltd. (2008) 10 SCC 308 and has submitted that in that case the contract was silent as to the law of arbitration/Curial law as also the venue. However, the Hon'ble Supreme Court held that the applicability of Part I of the 1996 Act to an arbitration held in a foreign country was not excluded by a stipulation that the substantive law governing contract was the laws of England and Wales.

12. Dealing with a decision in Dozco India Pvt. Ltd. Vs. Doosan Infracore Co. Ltd. (2011) 6 SCC 179 relied upon by the Respondent in support of their contention that this Court has no jurisdiction to try and entertain the present Petition filed under Section 34 of the 1996 Act, Mr. Chinoy submitted that in that case, the substantive law governing the contract was the laws of Republic of Korea. The Curial Law/the law governing the arbitration was not provided for. However, the agreement stipulated that that arbitration was to be held in Korea. The Learned Single Judge of the Hon'ble Supreme Court acting under section 11 disclaimed jurisdiction under Section 11 on the basis that in the absence of an express agreement regarding the law of the arbitration agreement there was strong prima facie presumption that the parties intended that the Curial law would be the law of the seat of the arbitration. Mr. Chinoy submitted that the said order is with respect contrary to the final judgment of the Hon'ble Supreme Court in the case of Bhatia International (Supra) and in the case of Venture Global Engineering (supra) - in both of which the Hon'ble Supreme Court held that part 1 was applicable, notwithstanding the fact that the parties had agreed that the seat venue/seat of Arbitration would be Paris and London respectively.

13. Mr. Chinoy next referred to the decision in Videocon Industries Ltd. Vs. Union of India And Anr. (2011) 6 SCC 161. He has pointed out that in that case the substantive law governing the contract was Indian Law. The agreed venue was Kuala Lumpur, Malaysia and the curial law/law of arbitration agreement was English law. Mr. Chinoy points out that the Hon'ble Supreme Court noted the decision in Dozco India Pvt. Ltd.(supra) in paragraph 14 and proceeded to hold in para 19 that as the parties had agreed that the arbitration agreement shall be governed by the laws of England it necessarily implied that the parties agreed to exclude the provisions of part 1 of the Act. The Court accordingly based its decision on the express choice of the English Law as the Curial law/ law governing arbitration. The Court did not base the exclusion of Part I of the Act on the selection of Korea as the venue / seat of the arbitration. He has further pointed out that in Videocon's case, the Hon'ble Supreme Court also referred to the Gujarat High Court decision in the case of Hardy Oil & Gas Ltd. Vs. Hindustan Oil Exploration Co. Ltd. 658 GLR Vol XLVII(1), and recorded that the said decision rightly follows the conclusions recorded by the three judge bench of the Hon'ble

Supreme Court in Bhatia International (supra).

14. Mr. Chinoy accordingly submitted that (i) the fact that the arbitration is agreed to be held in a foreign country - or that the Award where it is made in a foreign country - cannot be and does not lead to any implication that the parties have agreed to exclude the applicability of Part 1 of the 1996 Act and (ii) that an express agreement of a foreign law as the curial law/ law governing the Arbitration would exclude the applicability of Part 1 of the Arbitration Act, 1996. He further submitted that in the present case although the Arbitration was held in London and the substantive law governing the contract is English Law, there is no agreement that the Curial law / law governing the Arbitration shall be English Law or any foreign law. In fact, as stated above although the Refined Sugar Association had recommended the inclusion of a clause that "such arbitration shall be conducted in accordance with English Law", no such clause was agreed to or formed part of the Arbitration clause in the present case. It is, therefore, submitted that there is no agreement of parties to exclude the applicability of Part 1 of the Act of 1996 and the present Petition filed under Section 34 of the Arbitration Act before this Court is maintainable.

15. Mr. Advani, the Learned Advocate appearing for the Respondent after referring to the aforesaid clauses under caption "Terms and Conditions" and "Arbitration" has submitted that the parties to the contract have "consensus ad-idem" and in principle agreed to settle the disputes, if any, by referring the same to Refined Sugar Association and Arbitration Rules thereunder. The seat of Arbitration has been expressly agreed to be in London. However, it is further agreed by the parties that the contract shall be governed by and construed in accordance with English Law. This essentially means that the parties desired to resolve disputes in a foreign territory i.e. London and shall be governed by the English Laws and therefore the applicability of Indian Arbitration Act, 1996 and jurisdiction of the Indian Courts to entertain any Application/Petitioner filed by the parties under Part 1 of the Act, is ousted in toto.

16. Mr. Advani, submits that his above submission gains support from the decision of the Learned Single Judge of the Hon'ble Supreme Court in Dozco India Pvt. Ltd.

(supra). Mr. Advani has also relied on the decisions of the Hon'ble Supreme Court in Bhatia International (supra) and in Videocon Industries Ltd. (supra) wherein the Hon'ble Supreme Court has held 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, law or rules chosen by the parties would prevail. Any provision, in Part I which is contrary to or excluded by the law or rules would not apply. As in the present case, it is, thus very clear even on plain reading of the Arbitration clause that the intention of the parties in respect of the arbitration proceedings, was to be governed by the English Law. This necessarily implies that the parties had agreed to exclude provisions of Part I of the Indian Arbitration Act,1996 and therefore, this Court does not have jurisdiction to entertain the instant Petition filed under Section 34 of the Arbitration and Conciliation Act,1996.

17. Mr. Advani has submitted that the Arbitration Rules of the Refined Sugar Association are also clear in this regard, more particularly, the rules reproduced hereunder :

"When the parties to a contract have incorporated a clause to the effect that any dispute arising out of it shall be referred to The Refined Sugar Association (sometimes referred to as the RSA) such dispute may be referred to the Association for settlement in accordance with the Rules relating to Arbitration and the Arbitration Act, 1996."

"The Association's Rules and Arbitration procedures are conducted in accordance with English Law. However, where the parties have agreed a contract law other than English, the Association may, with the parties' agreement, decide the dispute."

18. Mr. Advani, submits that on a co-joint reading of the contract between the parties and the Rules of Refined Sugar Association that the contract shall be governed by the English Law, disputes shall be settled as per the law of England and the seat of Arbitration shall be England and all proceedings shall take place in England, it is more than apparent that the intention of the parties is to be governed by the laws of England. The parties have therefore agreed to be governed by the

laws of England and have nowhere in the contract stated the applicability of Part I of the Indian Arbitration Act, 1996 to the arbitration proceedings held in London and have thus expressly excluded its applicability.

19. I have considered the submissions advanced by the Learned Advocates for the parties and the decisions of the Hon'ble Supreme Court relied upon by them including the case law referred to in those decisions.

20. The leading case on the issue of applicability of the provisions of the Part I of the Arbitration Act, 1996 is Bhatia International (Supra) and it has settled the law thus:

"32..... the provisions of Part I would apply to all arbitrations and to all proceedings relating thereto. Where such arbitration is held in India the provisions of Part I would compulsory apply and parties are free to deviate only to the extent permitted by the derogable provisions of Part I. In cases of international commercial arbitration 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 provisions, in Part I, which is contrary to or excluded by that law or rules will not apply."

21. Accordingly, in any matter brought before the Court in an international commercial arbitration, the question of jurisdiction of the court for any application under Part I of the 1996 Act has to be decided by considering whether or not the parties have by agreement, express or implied, excluded the particular provision of Part I under which such application is made. If the provision is so excluded, it will not apply and the court will have no jurisdiction to consider any relief under such provision.

22. In the instant case, the contract between the parties contains no express agreement to exclude the particular provision, namely, Section 34 of the 1996 Act under which the present application is made. Therefore, the question which falls for determination is - Whether Section 34 is excluded by necessary implication by reason of agreement between the parties ?

23. For considering this question, it is first necessary to decide which is the law governing an application to set aside an award and then see whether such law is agreed upon between the parties. If the agreed law, if any, is contrary to, or excludes, Section 34, the aforestated ratio laid down in Bhatia International (Supra) would apply and this court will have no jurisdiction.

24. It is an undisputed position that all contracts which provide for arbitration and contain a foreign element may involve three relevant systems of law i.e. (i) law governing the substantive contract or the proper law of contract; (ii) the law governing the agreement to arbitrate, which is the proper law of the arbitration agreement; and (iii) the law governing the conduct of the arbitration proceedings which is the curial law.

25. It will be apposite here to set out the observations in the Law and Practice of Commercial Arbitration in England, 2nd Edition by Mustill & Boy quoted with approval by the Hon'ble Supreme Court in the case of Sumitomo Heavy Industries Ltd. V/s. ONGC Ltd. & Ors (1998) 1 SCC 305.

"An agreed reference to arbitration involves two groups of obligations. The first concerns the mutual obligations of the parties to submit future disputes, or an existing dispute to arbitration, and to abide by the award of a tribunal constituted in accordance with the agreement. It is now firmly established that the arbitration agreement which creates these obligations is a separate contract, distinct from the substantive agreement in which it is usually embeded, capable of surviving the termination of the substantive agreement and susceptible of premature termination, in much the same manner as in more ordinary forms of contract. Since this agreement has a distinct life of its own, it may in principle be governed by a proper law of its own, which need not be the same as the law governing the substantive contract.

The second group of obligations, consisting of what is generally referred to as the 'curial law' of the arbitration, concerns the manner in which the parties and the arbitrator are required to conduct the reference of a particular dispute. According to the English theory of arbitration, these rules are to be ascertained by reference to the express or implied terms of the agreement to arbitrate. This being so, it will

be found in the great majority of cases that the curial law, i.e. the law governing the conduct of the reference, is the same as the law governing the obligation to arbitrate. It is, however, open to the parties to submit, expressly or by implication, the conduct of the reference to a different law from the one governing the underlying arbitration agreement. In such a case, the court looks first at the arbitration agreement to see whether the dispute is one which should be arbitrated, and which has validly been made the subject of the reference, it then looks to the curial law to see how that reference should be conducted and then returns to the first law in order to give effect to the resulting award.

It may therefore be seen that problems arising out of an arbitration may, at least in theory, call for the application of any one or more of the following laws:

1. The proper law of the contract, i.e. the law governing the contract which creates the substantive rights of the parties, in respect of which the dispute has arisen.

2. The proper law of the arbitration agreement, i.e. the law governing the obligation of the parties to submit the dispute to arbitration, and to honour an award.

3. The curial law, i.e. law governing the conduct of the individual reference."

The difference in the proper law of the arbitration agreement and the curial law is dealt with in the same passage as follows: "1. The proper law of the arbitration agreement governs the validity of the arbitration agreement, the question whether a dispute lies within the scope of the arbitration; the validity of the notice of arbitration; the constitution of the tribunal; the question whether an award lies within the jurisdiction of the arbitrator; the formal validity of the award; the question whether the parties have been discharged from any obligation to arbitrate future disputes.

2. The curial law governs the manner in which the reference is to be conducted; the procedural powers and duties of the arbitrator; questions of evidence; the determination of the proper law of the contract."

26. It was argued by Mr. Chinoy that an express agreement of a foreign law as the curial law/law governing the conduct of arbitration would exclude the applicability

of Part I of the Arbitration Act, 1996 and inasmuch as there is no such agreement, Part I would apply. In my view there is a fundamental fallacy in this argument. The argument presupposes that curial law/law governing the conduct of arbitration covers the entire field of Part I of the 1996 Act, so that its choice alone would ipso facto exclude the applicability of the Part I. This is far from correct. As noted by the Supreme Court in the paragraph quoted above in Sumitomo Heavy Industries (Supra), an agreed reference to arbitration involves different sets of obligations which arise at different stages in an arbitration and different laws apply to these different sets of obligations. The questions as to (i) whether there is in existence a valid arbitration agreement between the parties, (ii) whether a valid notice of arbitration is given by the party requiring arbitration and (iii) whether and what kind of arbitral tribunal needs to be constituted, all of which arise in an application under Section 11 of the 1996 Act for appointment of an arbitrator, are governed by the proper law of the arbitration agreement, whereas questions which arise in pending arbitration reference such as protection of the property involved in an arbitration which are the subject matter of an application under Section 9 of the 1996 Act are governed by the curial law i.e. the law governing the conduct of individual reference.

27. The question, therefore, is which law governs an application to set aside an award. And the answer is to be found in the judgment of Sumitomo Heavy Industries (Supra) itself. The Supreme Court in that case held-

"11. The conclusion that we reach is that the curial law operates during the continuance of the proceedings before the arbitrator to govern the procedure and conduct thereof. The courts administering the curial law have the authority to entertain applications by parties to arbitrations being conducted within their jurisdiction for the purpose of ensuring that the procedure that is adopted in the proceedings before the arbitrator conforms to the requirements of the curial law and for reliefs incidental thereto. Such authority of the courts administering the curial law ceases when the proceedings before the arbitrator are concluded.

12. The proceedings before the arbitrator commence when he enters upon the reference and conclude with the making of the award. As the work by Mustill and

Boyd aforementioned puts it, with the making of a valid award the arbitrator's authority, powers and duties in the reference come to an end and he is "functus officio" (page 404). The arbitrator is not obliged by law to file his award in court but he may be asked by the party seeking to enforce the award to do so. The need to file an award in court arises only if it is required to be enforced, and the need to challenge it arises if it is being enforced. The enforcement process is subsequent to and independent of the proceedings before the arbitrator. It is not governed by the curial or procedural law that governed the procedure that the arbitrator followed in the conduct of the arbitration."

The Supreme Court in Sumitomo expressly rejected the argument of Mr.Sorabji in that case that the procedural law would determine what judicial remedies were available to a party "who wishes to challenge the award once it has been rendered and before it is sought to enforce it abroad" and "that the court that administered the curial law of arbitration had the jurisdiction to entertain a challenge to the award". The Supreme Court added emphatically.

"15. We think that our conclusion that the curial law does not apply to the filing of an award in court must, accordingly, hold good. We find support for the conclusion in the extracts from Mustill and Boyd which we have quoted earlier. Where the law governing the conduct of the reference is different from the law governing the underlying arbitration agreement, the court looks to the arbitration agreement to see if the dispute is arbitrable, then to the curial law to see how the reference should be conducted, " and then returns to the first law in order to give effect to the resulting award."

"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. In Dozco India (P) Ltd. (Supra), the Supreme Court reiterated this proposition of law, holding that "this judgment (i.e. Sumitomo) 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 Edition, 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." It is thus clear that the law governing an application to set aside an award is the law governing the arbitration agreement i.e. the proper law of the arbitration agreement.

29. All that remains to be considered now is whether the law governing the agreement to arbitrate and the performance of that agreement or, in other words, the proper law of the arbitration agreement, is agreed upon between the parties and whether the same is contrary to or excludes Section 34.

30. It is a admitted fact that the parties have in the instant case agreed in the clause pertaining to 'Arbitration' that "this contract shall be governed by and construed in accordance with English Law. In the case of National Thermal Power Corporation V/s. Singer Company & Ors., 1992 (3) S.C.C. 551, their Lordships have held that the parties have freedom to choose the law governing an international commercial arbitration agreement. They may choose the substantive law governing the arbitration agreement as well as the procedural law governing the conduct of arbitration. Such choice is exercised either expressly or by implication. Where there is no express choice of law governing contract as a whole, or the arbitration agreement in particular, there is, in the absence of any contrary indication, a presumption that the parties have intended that the proper law of the contract as well as the law governing the arbitration agreement are the same as the law of the country in which the arbitration is agreed to be held. On the other hand, where the proper law of the contract is expressly chosen by the parties, such law must, in the absence of an unmistakable intention to the contrary, govern the arbitration agreement which, though collateral or ancillary to the main contract, is never the less a part of such contract. The Supreme Court in

National Thermal Power Corporation (Supra) held in para 44 and 45 as follows :

"44. It is important to recall that in the instant case the parties have expressly stated that the laws applicable to the contract would be the laws in force in India and that the courts of Delhi would have exclusive jurisdiction 'in all matters arising under this contract'. They have further stated that the 'Contract shall in all respects be construed and governed according to Indian laws'. These words are wide enough to engulf every question arising under the contract including the disputes between the parties and the mode of settlement. It was in Delhi that the agreement was executed. The form of the agreement is closely related to the system of law in India. Various Indian enactments are specifically mentioned in the agreement as applicable to it in many respects. The contract is to be performed in India with the aid of Indian workmen whose conditions of service are regulated by Indian laws. One of the parties to the contract is a public sector undertaking. The contract has in every respect the closest and most real connection with the Indian system of law and it is by that law that the parties have expressly evinced their intention to be bound in all respects. The arbitration agreement is contained in one of the clauses of the contract, and not in a separate agreement. In the absence of any indication to the contrary, the governing law of the contract (i.e., in the words of Dicey, the proper law of the contract) being Indian law, it is that system of law which must necessarily govern matters concerning arbitration, although in certain respects the law of the place of arbitration may have its relevance in regard to procedural matters.

45. It is true that an arbitration agreement may be regarded as a collateral or ancillary contract in the sense that it survives to determine the claims of the parties and the mode of settlement of their disputes even after the breach or repudiation of the main contract. But it is not an independent contract, and it has no meaningful existence except in relation to the rights and liabilities of the parties under the main contract. It is a procedural machinery which is activated when disputes arise between parties regarding their rights and liabilities. The law governing such rights and liabilities is the proper law of the contract, and unless otherwise provided, such law governs the whole contract including the arbitration agreement, and particularly so when the latter is contained not in a separate

agreement but, as in the present case, in one of the clauses of the main contract."

31. It is clear from the contract in the instant case that the arbitration agreement is contained in one of the clauses of the contract and not a separate agreement. The governing law of the contract being the English Law, it is that system of law which must necessarily govern the arbitration agreement and its enforcement in the absence of any indication of the contrary. In the instant case, thus the proper law of the arbitration agreement is the same as the proper law of the underlying contract, which, as mentioned above, is the English Law.

32. Clause 1 of Section 2 of the English Arbitration Act,1996 provides as follows :

(1) The provisions of this Part apply where the seat of the arbitration is in England and Wales or Northern Ireland.

33. Sections 53 and 68(1) of the English Arbitration Act, 1996 are provisions of Part I of the English Arbitration Act, 1996 and are reproduced hereunder :

"53. Place where award treated as made.- Unless otherwise agreed by the parties, where the seat of the arbitration is in England and Wales or Northern Ireland, any award in the proceedings shall be treated as made there, regardless of where it was signed, dispatched or delivered to any of the parties."

"68 Challenging the award: serious irregularity.

(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award. A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).

34. In view of the provisions of the English Arbitration Act set out in Paragraph 32 and 33 above and the seat of the arbitration in the case herein being admittedly in England, the award made can only be challenged before the courts in England according to the applicable English Law, namely, the English Arbitration Act, 1996. The Indian Law, namely, Part 1 of the Arbitration Act, 1996 clearly stands

excluded so far as challenge to an arbitration award is concerned.

35. There is yet another ground on which the aforesaid conclusion can be reached. It also arises out of the express agreement between the parties. As noted above, the express agreement between the parties stipulates that Rules of the Refined Sugar Association, London form part of the contract, if they are not inconsistent with the other provisions of the contract. The first clause relied upon by the Respondent from the Introduction/Preamble to the Rules of Refined Sugar Association relating to Arbitration reads as under :

"When the parties to a contract have incorporated a clause to the effect that any dispute arising out of it shall be referred to The Refined Sugar Association (sometimes referred to as the RSA) such dispute may be referred to the Association for settlement in accordance with the Rules relating to Arbitration and the Arbitration Act, 1996."

36. From the above clause, it is clear that once the parties to the contract incorporate a clause to the effect that any dispute arising out of the contract shall be referred to the Refined Sugar Association, such dispute must be settled in accordance with the Rules relating to Arbitration and English Arbitration Act, 1996. Therefore even on this analysis it is clear that this Court does not have jurisdiction to entertain the present Petition under Section 34 of the Arbitration and Conciliation Act, 1996.

37. Again, the second clause relied upon by the Respondent from the Introduction/Preamble to the Rules of Refined Sugar Association relating to Arbitration reads as under :

"The Association's Rules and Arbitration procedures are conducted in accordance with English Law. However, where the parties have agreed a contract law other than English, the Association may, with the parties' agreement, decide the dispute."

38. The above Clause clearly stipulates that the Association's Rules and Arbitration procedures are conducted in accordance with English Law and it is only

where the parties have agreed to a contract law other than English, the association may, with the parties agreement decide the dispute. In the present case, the parties have not agreed to any contract law other than English. In view of categorical assertion in the clause set out hereinabove that the Association Rules and Arbitration procedures are conducted in accordance with English law coupled with the fact that the parties have expressly agreed to be governed by the Association's Rules relating to arbitration, there remains no doubt in concluding that the parties have expressly agreed that the arbitration would be conducted in accordance with the English law. Again in Rule 8 it is clearly stated that "For the purpose of all proceedings in arbitration, the contract shall be deemed to have been made in England, ...England shall be regarded as the place of performance, disputes shall be settled according to the law of England..... The seat of the arbitration shall be England and all proceedings shall take place in England....." In view thereof, nothing turns on the issue raised by the Petitioner that the Respondents have not exactly incorporated the recommended arbitration clause which include a condition that "such arbitration shall be conducted in accordance with English Law". As set out hereinabove, the introduction to the Association's Rules/Preambles provide that the arbitration proceedings are generally conducted in accordance with English Law except where the parties have agreed to a contract law other than English. In view thereof, though it is beyond any doubt from the aforestated decisions of the Hon'ble Supreme Court that the curial law does not govern the question pertaining to the maintainability of the present Petitions u/s.34 of the Arbitration & Conciliation Act, 1996, it is established that the parties herein have agreed to the Association's Rules and arbitration procedures being conducted in accordance with English law and Mr. Chinoy is not correct in his submission that the agreement contains no provision stipulating a choice of law governing the arbitration procedure.

39. I shall now briefly deal hereunder with the decisions relied upon by Mr. Chinoy :-

(i). Bhatia International (Supra)

The entire issue before the Hon'ble Supreme Court in Bhatia International (supra) pertains to the interpretation of sub- Section 2(2) of the Arbitration and Conciliation Act, 1996. In that case, no arguments were advanced on the proper law of contract or proper law of arbitration or the curial law pertaining to that case except the fact, as the Hon'ble Supreme Court records in paragraph No.33 that faced with the conclusion of the Hon'ble Supreme Court as set out in paragraph No.32 therein (reproduced hereinabove), the Learned Advocate for the appellants submitted that the parties had agreed that the arbitration be as per the Rules of ICC and thus, by necessary implications, Section 9 would not apply. The said contention was rejected by the Hon'ble Supreme Court in view of Article 23 of the ICC Rules permitting the parties to apply to the competent judicial authority for conservatory and interim measures. In view thereof notwithstanding the fact that the Arbitration was agreed to be held in Paris, the Hon'ble Supreme Court in the case of Bhatia International (supra) held that the provisions of Part I of the 1996 Act were applicable and the parties had not excluded their applicability.

(ii) Venture Global Engineering (Supra)

In the case of Venture Global Engineering (supra) referred to by Mr. Chinoy, it is true that the Hon'ble Supreme Court relying on Bhatia International (supra) held that the provisions of Part I of the Act were applicable and were not excluded. Section 11.05 (b) and (c) of the Shareholders Agreement between the parties reads as follows:

"(b) This agreement shall be construed in accordance with and governed by the laws of the State of Michigan, United State, 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 that time act in accordance with the Companies Act and other applicable Acts/Rules being in force, in India at any time".

The Hon'ble Supreme Court accepted the submission of the Learned Advocate appearing for the appellant in that case that the non- obstante clause would override the entirety of the agreement including Sub-section (b) which deals with settlement of the dispute by arbitration and therefore, clause (c) would apply to the enforcement of Award which declares that notwithstanding that the proper law of the governing law of the contract is the law of the State of Michigan, USA, their shareholders shall at all times act in accordance with Companies Act and other applicable Acts/Rules being in force in India at any time and that the Respondent totally violated the agreement between the parties by seeking enforcement of the transfer of the shares in the Indian Company by approaching the district court in the United States. It is for this reason that the Hon'ble Supreme Court relying on paragraphs 32 and 33 of the Bhatia International (supra) held that the provisions of Part I of the Act were applicable and were not excluded. The facts in the case of Venture

Global Engineering (supra) are therefore clearly different from the facts of the present case.

(iii). Indtel Technical Services Pvt. Ltd. (Supra) In the case of Indtel Technical Services Pvt. Ltd. (supra) relied on by Mr. Chinoy, the only agreement between the parties to the agreement was that the agreement shall be governed by and construed in accordance with the law of England and Wales. Admittedly, the law which was to govern the conduct of arbitration or the curial law as also the venue of arbitration were not indicated in the agreement. The Learned Single Judge of the Hon'ble Supreme Court, therefore, whilst deciding the Petition/Application under Section 11 of the Arbitration and Conciliation Act, 1996 held that none of the provisions of Part I of the Arbitration and Conciliation Act, 1996 were expressly or impliedly excluded by the parties under the said agreement. Accordingly, the Hon'ble Supreme Court appointed a sole arbitrator to arbitrate upon the disputes arising between the parties and provided that the arbitrator would be entitled to decide upon the procedure to be adopted in the arbitral proceedings and also venue of the arbitral proceedings.

(iv). Videocon Industries Ltd. (Surpa)

In the case of Videocon Industries Ltd. (supra), and the decision of the Learned Single Judge of the Gujrat High Court in the case of Hardy Oil and Gas Ltd. (supra) confirmed therein, admittedly, the respective parties had agreed that the law governing the arbitration will be the English Law. It was, therefore, held that there was explicit exclusion of applicability of Indian Law to the arbitration under the respective agreements. In fact, in the decision of Hardy Oil and Gas Ltd. (supra), the Learned Judge has after referring to the decisions of the Hon'ble Supreme Court in Shreejee Traco (I) Pvt. Ltd. vs. Paperline International Inc. 2003 (9) SCC 79 and National Thermal Power Corporation Vs. Singer Co. 1992(3) SCC 551 has in paragraph 11.6 of the judgment held as follows:

"Thus, the proposition of law which clearly emerges is that it is for the parties to decide and agree as to which law would govern the contract in principal and/or the arbitration proceedings. The parties may decide to have different laws applicable to both the cases. Where there is no separate arbitration agreement, but arbitration agreement forms part of the principal agreement as a clause thereof, if there is no specific agreement between the parties to the contrary, law governing principal agreement would govern the arbitral proceedings or arbitration. But, where parties have, in clear terms, agreed to different laws being applicable to the agreement in main and the arbitration, the said intention would govern the question of applicability of law."

(emphasis supplied)

40. I accordingly hold that this Court has no jurisdiction to entertain any challenge to the award under Section 34 of the Arbitration and Conciliation Act, 1996. Arbitration Petition No. 636 of 2011 is accordingly disposed of. In view thereof, Chamber Summons No. 1474 of 2011 also stands disposed of.

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