

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 27.09.2016

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR

O.P. No.625 of 2015

M/s.Shriram EPC Limited
having its Registered office at
Sigappi Achi Building, 4th Floor,
No.18/3, Rukmini Lakshmipathi Salai
Egmore, Chennai - 600 008 .. Petitioner

Vs.

1.M/s.Rioglass Solar SA
Poligno Industrial Villallana S/N
33695 Pola de Lena
Asturias, SPAIN

2.Abhijeet Projects Limited
EN1, Insignia Towers
Sector V, Salt Lake
Kolkata 700 091

3.Corporate Ispat Alloys Limited
EN1, Insignia Towers
Sector V, Salt Lake
Kolkata 700 091

4.Mr.Christopher Style, QC
Arbitral Tribunal
International Chamber of Commerce (ICC)
33-143 Avenue du President Wilson
75116 Paris
France .. Respondents

Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the Award dated 12.2.2015 passed by the 4th Respondent and for further orders.

For Petitioner : Mr.Vishnu Mohan
for M/s.Satish Parasaran

For Respondents : Mr.Hiroo Advani

ORDER

This original petition has been filed by M/s.Shriram EPC Limited, Chennai, with a prayer to set aside the Foreign Award dated 12.2.2015 passed by the 4th respondent, namely Arbitral Tribunal International Chamber of Commerce (ICC), Paris, France.

2. Facts leading to the filing of this original petition are that Shriram EPC Limited, Chennai, is a public limited company, engaged in the business of providing end to end solutions offering Multi-disciplinary design, engineering, procurement, construction and project management services, providing turnkey solutions for ferrous and non ferrous, cement, etc. It is a listed company both in the Bombay Stock Exchange Limited and the National Stock Exchange of India Limited.

3. The first respondent, M/s.Rioglass Solar SA, is a company registered under the Laws of Spain under Fiscal Company Registration, having its registered office at Poligno Industrial Villallna S/N, 33695 Pola de Lena, Asturias, Spain. The second respondent, M/s.Abhijeet Projects Limited, a company incorporated

under the Indian Companies Act, 1956, is a flagship company of the Abhijeet Group of Companies based in Nagpur. M/s. Corporate Ispat Alloys Limited, Kolkata, the third respondent, is a part of the Abhijeet Group of Companies is undertaking building, owning and operation of a 1 x 50 MW Solar Thermal Power Plant at Village Nokh, District Jaisalmer in Rajasthan (hereinafter referred to as the 'Project/Facility'). In the matter of disputes between M/s. Shriram EPC Limited, Chennai and (1) M/s. Rioglass Solar SA, (2) M/s. Abhijeet Projects Limited, and (3) M/s. Corporate Style QC, the Arbitral Tribunal is having office at International Chamber of Commerce (ICC), 33-43 Avenue du President Wilson, 75116 Paris, France. As per the Arbitral Award dated 12.2.2015 under the ICC International Court of Arbitration Foreign Award Case No.19467/TO, the petitioner is liable to pay to the respondents, the following,

- i. € 4,366,598.7 consisting of damages amounting to € 4,151,571.52 and interest amounting to € 215,028.18;
- ii. € 363,175.32 in respect of legal and other costs of the arbitration.
- iii. USD 87000 in respect of the fees and expenses of the Arbitral Tribunal and the administrative expenses of the ICC; and
- iv. simple interest @ 3.5% per annum on the amounts outstanding under the award from the date of the award until payment.

4. Assailing the correctness of the award, the instant original petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996.

Heard the parties and perused the materials available on record.

5. Mr.Hiroo Advani, learned counsel for the respondent raised an issue of jurisdiction of maintainability of this original petition on the grounds interalia that the petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 is not maintainable. Learned counsel appearing for both the parties consented that the above issue be decided first, without going into the merits of the award.

6. Learned counsel for the first respondent has contended that the arbitration, in the case on hand, is an international arbitration, as defined under Section 2(f) of the Arbitration and Conciliation Act, 1996 and mere reading of clause 17.0 of the contract for the supply of parabolic mirrors dated 30.11.2011 (agreement between the parties) would show the law governing dispute resolution. The first respondent has further submitted that the seat and venue of the arbitration is outside India and hence a petition under Section 34 of the Arbitration and Conciliation Act,

1996, falling under Part I of the Arbitration and Conciliation Act, 1996, is not maintainable. According to the respondent, in terms of the arbitration agreement, the arbitration has taken place in London from 14.5.2013, being the request for arbitration, the parties have filed their pleadings and a final award has been passed on 12.2.2015. Learned counsel for the first respondent has also submitted that a petition under Section 47 of the Arbitration and Conciliation Act, 1996 in O.P.No.587/2015 has been filed by the first respondent for enforcement of the foreign award. Learned counsel for the first respondent has further contended that since the award has not been challenged in the appropriate forum (London under the English law), under the governing law, the award dated 12.2.2015 has become final and binding between the parties, in terms of Section 48(1)(e) of the Arbitration and Conciliation Act, 1996.

7. Learned counsel for the first respondent has also contended that this court is not empowered to have second look at the award, at the enforcement stage, under Section 48(1)(e) of the Arbitration and Conciliation Act, 1996.

8. To sustain the maintainability of the petitioner under Section 34 of the Arbitration and Conciliation Act, 1996, petitioner

has contended that unless and until the arbitration agreement expressly or impliedly, excludes the provision of Part I, the same would be applicable to a International Commercial Arbitration and in support of the same, relied on a Three Judge Bench judgment of the Hon'ble Supreme Court in ***Bhatia International vs. Bulk Trading S.A. and Another*** reported in **(2002) 4 SCC 105** and at paragraph No.32, held as follows:

"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 compulsory apply and parties are free to deviate only to the extent permitted by the derogable provisions of Part I. In cases of international commercial arbitrations held out of India provisions of Part I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions. In that case the laws or rules chosen by the parties would prevail. Any provision, in Part I, which is contrary to or excluded by that law or rules will not apply."

9. Placing reliance on ***Venture Global Engineer vs. Satyam Computer Services Ltd. & Another*** reported in **(2008) 4 SCC 190**, and by referring to clause 17 of the Multi-Party Agreement, the petitioner has further contended that there is no express or

implied exclusion or inapplicability of Part I of the Arbitration and Conciliation Act, 1996 and hence petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 is maintainable and challenged the award on merits also.

10. Clause 17.0 of the Agreement, dealing with governing law dispute resolution, reads as follows:

"17.1 This contract shall be governed and interpreted in accordance with the laws of England. Any disputes of differences arising out of, in connection with or in relation to this Contract shall be resolved as follows:

i) In the first instance they shall be attempted to be resolved by amicably negotiations in good faith between the Parties. An attempt at settlement shall be deemed to have failed as soon as one of the parties so notifies the other in which case each party may initiate an arbitration proceeding pursuant to the following section.

ii) All disputes arising out of or in connection with the present Agreement, including any question regarding its existence, validity or termination, shall be finally settled under the Rules of arbitration of the International Chamber of Commerce (ICC) by one or more arbitrators appointed in accordance with the said Rules. The seat of arbitration shall be London, England. The procedural law of this seat applicable to international arbitration proceedings shall apply where the Rules are silent. The language

to be used in the arbitration proceedings shall be English and the arbitration award shall be final and binding on the parties. The procedural law of the place of arbitration shall apply where the Rules are silent."

11. In terms of clause 1.5 of the agreement, the goods were to be delivered - FCA Production Site (according to the INCO Terms 2010) at Spain. Therefore, Part I of the Arbitration and Conciliation Act, 1996, would be wholly inapplicable to the instant case. Added further, in the Constitutional Bench judgment of the Hon'ble Apex Court in ***Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.***, reported in **(2012) 9 SCC 552**, the Hon'ble Apex Court held as follows:

" 195. With utmost respect, we are unable to agree with the conclusions recorded in the judgments of this Court in Bhatia International (supra) and Venture Global Engineering (supra). In our opinion, the provision contained in Section 2(2) of the Arbitration Act, 1996 is not in conflict with any of the provisions either in Part I or in Part II of the Arbitration Act, 1996. In a foreign seated international commercial arbitration, no application for interim relief would be maintainable under Section 9 or any other provision, as applicability of Part I of the Arbitration Act, 1996 is limited to all arbitrations which take place in India. Similarly, no suit for interim injunction simplicitor would be

maintainable in India, on the basis of an international commercial arbitration with a seat outside India.

197. The judgment in Bhatia International (supra) was rendered by this Court on 13th March, 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 Engineering (supra) has been rendered on 10th January, 2008 in terms of the ratio of the decision in Bhatia International (supra). 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."

12. In the subsequent decision in ***Reliance Industries Limited and Another v. Union of India*** reported in **(2014) 7 SCC 603**, the Hon'ble Apex Court held as follows:

"74. We are also unable to agree with the submission of Mr. Ganguli that since the issues involved herein relate to the public policy of India, Part I of the Arbitration Act, 1996 would be applicable. Applicability of Part I of Arbitration Act, 1996 is not dependent on the nature of challenge to the award. Whether or not the award is challenged on the ground of public policy, it would have to satisfy the pre-condition that the Arbitration Act, 1996 is applicable to the arbitration agreement. In our opinion, the High Court has committed a

jurisdictional error in holding that the provisions contained in Article 33.12 is relevant only for the determination of the curial law applicable too the proceedings. We have already noticed earlier that the parties by agreement have provided that the juridical seat of the arbitration shall be in London. Necessary amendment has also been made in the PSCs, as recorded by the Final Partial Consent Award dated 14th September, 2011. It is noteworthy that the Arbitration Act, 1996 does not define or mention juridical seat. The term 'juridical seat' on the other hand is specifically defined in Section 3 of the English Arbitration Act. Therefore, this would clearly indicate that the parties understood that the arbitration law of England would be applicable to the arbitration agreement.

75. In view of the aforesaid, we are unable to uphold the conclusion arrived at by the Delhi High Court that the applicability of Arbitration Act, 1996 to the arbitration agreement in the present case has not been excluded.

76. In view of the above, we hold that:

76.1 The petition filed by respondents under Section 34 of the Arbitration Act, 1996 in the Delhi High Court is not maintainable.

76.2 We further over-rule 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 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.

13. Yet another recent judgment in ***Harmony Innovation Shipping Limited v. Gupta Coal India Limited & Another*** reported in **(2015) 9 SCC 172**, the Hon'ble Apex Court held as follows:

" 45. Coming to the stipulations in the present arbitration clause, it is clear as day that if any dispute or difference would arise under the charter, arbitration in London to apply; that the arbitrators are to be commercial men who are members of 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.

48. In the present case, the agreement stipulates that the contract is to be governed and construed according to the English law. This occurs in the arbitration clause.....

..... 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.....

51. 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.

42. 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.

Thus, it could be seen that when the agreement was post BALCO's case and when the jurisdiction seat is outside India, the law governing the arbitration should be law, other than Indian Law, namely Part I of the Arbitration and Conciliation Act, 1996 and that the same is not applicable to the case on hand.

14. The judgment rendered in ***Bhatia International*** case has been overruled by the Constitutional Bench in BALCO's case. As per the ratio decidendi, when the law governing the agreement to

arbitrate, the law governing the conduct of arbitration and the law governing the contract, are English Laws, the question of applying Part I of the Arbitration and Conciliation Act, 1996 does not arise.

15. In yet another decision, in ***Eitzen Bulk A/S v. Ahapura Minechem Limited & Another*** reported in **(2016) SCC Online SC 523**, the Hon'ble Apex Court held as follows:

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

16. This Court is of the view that the governing law is the Laws of England and the rules governing the procedural law, are the Rules of Arbitration of International Chamber of Commerce,

when the seat of arbitration is at London, England. Therefore, the procedural law applicable to the case on hand, is the procedural law of the seat of arbitration, London, England, applicable to international arbitration proceedings.

17. Going through the material record, this court is of the view that the laws governing arbitration is English Law, the seat was outside India and the procedural law to be applied should be the law of the seat at London, England. Going through the clauses in the agreement, and the decisions stated supra, this court is of the view that the petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, challenging the award dated 12.2.2015 is not maintainable.

18. Accordingly, O.P.No.625 of 2015, is dismissed, on the grounds of jurisdiction.

27.09.2016

Index : Yes/No
Internet : Yes/No
asr

S. MANIKUMAR, J.

asr

O.P.No.625 of 2015

27.09.2016