

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 14.09.2016

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THE HONOURABLE MR. JUSTICE RAJIV SHAKDHER

Original Petition No.41 of 2012

M/s.Tamil Nadu Industrial Explosives Ltd.,
having its registered Office at LLA Building
I Floor, No.735, Anna Salai
Chennai 600 002.
rep.by its Managing Director
Shri.V.Sampath, IAS

.. Petitioner

vs

1. M/s.Thor Rederi A/s
Svendborg, Denmark
rep.by its POA, S.Ramamoorthy
2. Mr.Christopher Lau SC
Singapore
3. Mr.Vangat Ramayah Esq
Singapore

.. Respondents

Prayer: Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 seeking to set aside the Arbitration Award dated 07.06.2011.

For petitioner : Mr.P.J.Rishikesh
For respondents : Mr.S.Raghunathan for R1

ORDER

1. This is a petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, whereby the challenge is laid to the award, dated 07.06.2011, passed by the respondent Nos.2 and 3.

2. By virtue of this award, the learned Arbitrators have ruled against the petitioner/original respondent and directed the following payments to be made to the respondent No.1 herein/original claimant.

"I. The Respondents do pay the Claimants the sum of USD37,762.50 with interest thereon at the rate of 5.33% per annum from 7 October 2009 until the date of this Award within 21 days of the date of receipt of this Award.

II. The Respondents do pay the Claimants the sum of USD693,140.20 with interest thereon at the rate of 5.33% per annum from 7 October 2009 until the date of this Award within 21 days of the date of receipt of this Award.

III. The Respondents do pay and bear the costs and expenses of the Claimants incurred in these proceedings to be agreed and failing agreement, to be taxed by the Tribunal.

IV. The Respondents do bear the costs of this arbitration of SGD112,500.00.

The parties are jointly and severally liable for payment of the above costs of the arbitration. These will be paid in the first instance out of the deposits paid by the parties to the Tribunal. The Respondents shall reimburse the Claimants in full for such part of the costs that has been paid by the Claimants."

3. In this proceedings, respondent No.1 has raised a preliminary objection, that since as per the Fixture Note, dated 30.01.2009 executed between the petitioner and respondent No.1, the arbitration proceedings were to be held in Singapore and was governed by the Laws of England, the instant petition would not lie.

3.1. For this purpose, reliance has been placed on the Fixture Note. The relevant portion of the said note reads as follows:

"Arbitration: If any to be held in Singapore and English Law to apply. This Fixture Note is governed by Force Majure Clause applicable."

4. In support of this submission, learned counsel for respondent

No.1, relies upon ***Eitzen Bulk A/S vs. Ashapura Minechem Ltd., and Another [AIR 2016 SC 2438]***.

5. Learned counsel submits that parties, by agreement, had clearly indicated that Part I of the 1996, Act, would not apply in respect of the subject transactions.

5.1. It is the submission of the learned counsel for respondent No.1 that, as a matter of fact, this position would hold good even if this Court were to apply the decision rendered by the Supreme Court in ***Bhatia International vs. Bulk Trading S.A. and another (2002) 4 SCC 105***. In other words, notwithstanding the judgment of the Supreme Court in ***BALCO vs. Kaiser Aluminium Technical Services Inc. (2012) 9 SCC 552***, which ruled, albeit, prospectively, that where the seat of Arbitration was outside India, then Part I of the 1996 Act, would not apply, the captioned petition would not be maintainable.

6. To be noted, in the ***BALCO*** judgment, the Supreme Court had made the declaration of law prospective, i.e., from the date of the judgment, which is 06.09.2012.

7. Counsel for the petitioner, on the other hand, submitted that since the Fixture Note was executed on 30.01.2009, the judgment, in ***Bhatia International***, which was rendered prior to the decision in ***BALCO's case*** would govern the field.

8. Having heard the learned counsels for the parties, I am of the view that whether the decision rendered in ***Bhatia International*** is applied or that which is rendered in ***BALCO***, is applied, the petition would not be maintainable, in view of the fact, that parties consciously chose to agree, that the seat of Arbitration would be in Singapore and Laws of England would apply. In effect parties agreed that Part I of the 1996 Act, would not apply to the subject transaction.

8.1. This position has attained greater clarity with the decision rendered by the Supreme Court in ***Eitzen Bulk A/s. vs. Ashapura Minechem Ltd., and another, [AIR 2016 SC 2438]***, which has been cited by the learned counsel for the respondent No.1.

8.2. The relevant observations, which are contained in para Nos.31 and 32 are extracted herein below for the sake of convenience.

"31. When the judgment in Reliance was sought to be indirectly reviewed in another case under the same agreement and between the same parties, this Court reiterated its earlier view and observed in Union of India v. Reliance Industries Limited and others in para 18 as follows:-

"18. It is important to note that in para 32 of Bhatia International (AIR 2002 SC 1432) itself this Court has held that Part I of the Arbitration Act, 1996 will not apply if it has been excluded either expressly or by necessary implication. Several judgments of this Court have held that Part I is excluded by necessary implication if it is found that on the facts of a case either the juridical seat of the arbitration is outside India or the law governing the arbitration agreement is a law other than Indian Law. This is now well settled by a series of decisions of this Court [see Videocon Industries

Ltd., vs. Union of India (AIR 2011 SC 2040), Dozco India (P) Ltd., vs. Doosan Infracore Co.Ltd. (AIR 2011 SC (Civ) 334), Yograj Infrastructure Ltd. vs. Ssang Yong Engg. and Construction Co.Ltd.(AIR 2011 SC 3517), the very judgment in this case reported in Reliance Industries Ltd., vs. Union of India (AIR 2014 SC 3218) and a recent judgment in Harmony Innovation Shipping Ltd., vs. Gupta Coal India Ltd., (AIR 2015 SC 1504)]".

We see no reason to take a different view. In Bhatia International's case (AIR 2002 SC 1432), this Court concluded as follows:

"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."

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

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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."
(emphasis is mine)

9. I may also note that in another judgment of the Supreme Court, in the case, titled: ***Bharat Aluminium Co. Vs. Kaiser Aluminium Technical Services, Inc., (2016) 4 SCC 126***, the Court, has taken the same view.

10. Having regard to the aforesaid, in my view, the petition would not lie. It is accordingly, dismissed.

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