

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
ORDINARY ORIGINAL CIVIL JURISDICTION**

**ARBITRATION PETITION NO. 436 OF 2016**

Katra Holdings Limited

.. Petitioner

Vs.

Corsair Investments LLC & Ors.

.. Respondents

Mr.Ashish Singh i/b Shrikrishna R. Ganbavale for Petitioner.

Mr.Aspi Chinoy, senior advocate a/w. Ms.Ankita Singhanian i/b Shital Turakhia for Respondent No.1.

Mr.Chandrakant R. Mhadeshwar for Respondent No.3.

Ms. Ankita Singhanian i/b i/b Abhijeet A. Desai for Respondent No.6.

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|----------------------|-----------------------------------------|
| <b>CORAM</b>         | <b>: K.R.SHRIRAM, J.</b>                |
| <b>RESERVED ON</b>   | <b>: 13<sup>TH</sup> SEPTEMBER 2017</b> |
| <b>PRONOUNCED ON</b> | <b>: 15<sup>TH</sup> SEPTEMBER 2017</b> |

**P.C.**

1      Petitioner has approached this Court challenging a Final Award dated 11<sup>th</sup> September 2015 by which Petitioner's claims against respondents were dismissed. The claims against Respondent Nos.1 and 2 were dismissed as not having been established and against Respondent Nos.3 to 6 were dismissed on the ground that the said Respondents were not parties to the Arbitration Agreement.

**I      BACKGROUND AND BRIEF FACTS :**

2      The dispute is in respect of equity shares in Tamilnad Mercantile

Bank Limited (“TMB”). The counsel for Petitioner submitted that he is challenging the Award only under Section 34(2)(ii)(b) of the Arbitration and Conciliation Act, 1996 that the Award is against Public Policy.

3 This relates to a dispute resolution provision of an amended and Restated Escrow and Transaction Settlement Agreement dated 12<sup>th</sup> May 2007 between Petitioner and Respondent Nos.1 and 2.

The Escrow Agreement is one of a number of documents that relate to a complex series of transactions involving shares of TMB, a commercial bank based in southern India (collectively, the “Transaction”). The Transaction began with an Agreement for Assignment dated March 2, 2006, pursuant to which one Mr.M.G.M.Maran, on behalf of himself and Mr.B. Ramachandra Adityan, assigned the rights they had acquired to 95,418 TMB shares (33.6% of the issues and paid-up equity shares) that previously were owned by what is referred to as the “Sterling Group” of Indian investors under an earlier Sale Agreement. Messrs. Maran and Adityan assigned their rights to Katra India (defined to include “its parent, associates, affiliates, legal heirs, assignees, nominees, administrators, receivers and successors”) and agreed to attempt to obtain and assign an additional 17% of TMB's shares to Katra India ( for a total of 50.6 %).

4 The Agreement for Assignment contained a number of important provisions and among them was a grant by Mr.Maran to Katra India including Petitioner of a right or “mandate”, exclusive for a period of 180 days, to arrange for “placement” of the TMB shares with “appropriate financial investors..... in compliance with guidelines and regulations issues by the Reserve Bank of India”.

5 After a series of negotiations and agreements, on December 29, 2006 the Petitioner entered into an agreement with Corsair and SCB Mauritius, i.e., Respondent No.1 and Respondent No.2 pursuant to which Petitioner agreed to deposit into escrow and use “all reasonable efforts to arrange to sell” TMB shares representing 40% of the outstanding shares on that date to a number of “Purchasing Entities” identified by Respondent No.1 and listed in an annex to the Placement Agreement. Subject to the satisfaction or waiver of certain specified conditions, Petitioner agreed that it would “cause [the TMB shares] to be sold to the Purchasing Entities, which would purchase them “severally and not jointly”.

6 The three parties to the Placement Agreement agreed to establish escrow arrangements for the deposit, holding and release of TMB shares to Purchasing Entities as payment for them was made and all appropriate RBI-

mandated procedures were complied with. The Placement Agreement is governed by the law of the State of New York, and disputes arising out of or connected with it are subject to the jurisdiction of specified New York Courts.

7 The Escrow Agreement, under which this dispute arises and which amended and restated an earlier Escrow and Transaction Settlement Agreement dated as of March 30, 2007, established and further defined the mechanisms by which the Transaction as agreed in the Placement Agreement and related documents was to be carried out. It was amended by Amendment No.1, dated April 15, 2008, which among other things provided that Broad Street Group LLC and GHI I Ltd. no longer were parties to the Escrow Agreement.

8 The Escrow Agreement thus governs aspects of the Transaction after it was well in progress. It states that it “supersedes, cancels and replaces” the Placement Agreement under which Petitioner and Respondent No.1 initially agreed on the deposit and sale of TMB shares. The Parties' affirmative obligations under the Escrow Agreement are specific and include detailed directions for the operation of escrow provisions of Closings to transfer 108,728 TMB shares that by then had been deposited in

an escrow account with Respondent No.2, i.e., SCB Mauritius, together with the relevant Transfer Deeds. Paragraph 18.6 of the Agreement provides that Petitioner shall cause an aggregate of 113,782 Bank shares, together with all necessary instruments of transfer duly endorsed in blank, to be deposited into the Escrow Account.”

## II. DISPUTE RESOLUTION AND GOVERNING LAW

9 Section 15 of the Escrow Agreement, entitled “DISPUTE RESOLUTION”, states :

15.1 *Each of Corsair, Katra and the Escrow and Transaction Settlement Agent (the “**Arbitrating Parties**”) agree to negotiate in good faith to resolve any dispute, difference or claim among the Arbitrating Parties arising out of or in connection, with the Agreement, including the construction, validity, execution, performance, termination or breach hereof. If negotiations do not resolve and dispute, difference or claim to the reasonable satisfaction of the Arbitrating Parties within 12 (fifteen) Business days of their initiation, then the Arbitrating Parties shall submit to binding arbitration. The arbitration shall be conducted according to the Commercial Arbitration Rules of the American Arbitration Association. The place of arbitration shall be New York, New York or such other place as may be agreed upon by the Arbitrating Parties. The Arbitrating Parties shall attempt to agree upon one arbitrator, but if they are unable to agree, each of Arranger, Corsair and the Escrow and Transaction Settlement Agent shall appoint an arbitrator and the total number of arbitrators shall be three. Expenses of the arbitrator(s) shall be divided equally between the Arbitrating Parties to such arbitration.*

*Judgment upon the award rendered by the arbitrator (s) may be entered in any court having jurisdiction thereof, and shall be enforceable against the Arbitrating Parties in accordance with the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, as amended.*

15.2 *The arbitrators shall issue a written statement of their award detailing the facts and reasons upon which their decision was based.*

15.3 *Any reference of any dispute, difference or claim to arbitration*

*under this Agreement shall not affect the performance by the Arbitrating Parties of their respective obligations under this Agreement other than the obligations relating to the dispute, difference or claim referred to arbitration.*

... (emphasis supplied)

10 Paragraph 16 of the Escrow Agreement, entitled "GOVERNING LAW", states :

*This agreement shall be governed and construed in accordance with the laws of India; provided however, that, in the case of Clauses 4.7, 12.3, 14.1.7, 14.1.8, 18.6 and 18.7 hereof and this proviso, New York law shall apply notwithstanding any conflicts of law principles thereof, and each of Corsair, Arranger, BroadStreet and Gupta irrevocably and unconditionally (severally) agree to the application of New York and submission to New York jurisdiction with respect to such clauses (in accordance with, without limitation, Sections 5-1401 and 5-1402 of the General Obligations Law of State of New York).*

... (emphasis supplied)

### **III. ARBITRATION PROCEEDINGS AND AWARD :**

11 Petitioner commenced this arbitration on 16<sup>th</sup> April 2012 and filed the Statement of Claim on 22<sup>nd</sup> May 2012. Respondent No.1 filed their defence and also Counterclaim on 28<sup>th</sup> June 2012 in which Respondent Nos.1 and 3 objected to the arbitral tribunal's jurisdiction. Respondent Nos. 2, 4, 5 and 6 also filed their defence and counterclaim on 28<sup>th</sup> June 2012 in which they also challenged the jurisdiction of the arbitral tribunal. Three Arbitrators were selected in accordance with the Escrow Agreement. Two of them were based in New York and one was from London, United Kingdom. The Arbitrators gave a Final Award as under :

#### **VIII. AWARD**

WHEREFORE, for the reasons set forth above, we hereby declare and AWARD as follows :

237 All claims against Corsair Capital LLC, Standard Chartered Bank Plc., Standard Chartered Bank and Subcontinental Equities Limited, Mauritius are dismissed based on absence of jurisdiction.

238 The arbitration agreement contained in the Escrow Agreement (as amended by Amendment No.1) is valid and binding as among Katra Holdings Ltd., Corsair Investments LLC and Standard Chartered Bank (Mauritius) Limited, as this Tribunal has jurisdiction pursuant to Article 15 of the Escrow Agreement in respect of disputes falling within the scope of that Agreement.

239 The Escrow Agreement (as amended by Amendment No.1) is valid and binding as among Katra Holding Ltd., Corsair Investments LLC and Standard Chartered Bank (Mauritius) Limited.

240 All claims submitted in this arbitration by Katra Holdings Ltd., against Corsair Investments LLC and/or Standard Chartered Bank (Mauritius) Limited are denied.

241 Katra Holdings Ltd. is directed to deposit into escrow all necessary transfer documentation for the 4,733 shares that it has deposited into escrow pursuant to the Agreement without transfer deeds and for which Purchasing Entities have paid.

242 Katra Holdings Ltd. shall pay to Corsair Investment LLC and Corsair Capital LLC the sum of \$ 6, 384, 784.03 as their reasonable costs of this arbitration, together with interest thereon running from the date 30 days after the date of transmission of this Final Award to it at a rate of 3% per annum.

243 Katra Holdings Ltd. shall pay to Standard Chartered Bank (Mauritius) Limited, Standard Chartered Bank Plc., Standard Chartered Bank and Subcontinental Equities Limited the sum of \$5,529,364.00 as their reasonable costs of this arbitration, together with interest thereon running from the date 30 days after the date of transmission of this Final Award to it at a rate of 3% per annum.

244 The administrative fees and expenses of the International Centre for Dispute Resolution ("ICDR") totalling \$ 75,750,00, and the compensation and expenses of the Arbitrators totalling \$826,293.63, shall be borne one-third each by Katra Holdings Ltd., Corsair Investments LLC and Standard Chartered Bank (Mauritius) Limited shall pay to Corsair Investments LLC the sum of \$1,224.43 and also shall pay to Katra Holdings Ltd. the sum of \$2,581.29.

245 This Final Award is in full settlement of all claims and counterclaims submitted in this arbitration.

We hereby certify, for the purpose of Article 1 of the New York Convention of 1958, on the Recognition and Enforcement of Foreign Awards, that this Final Award was made in New York, N.Y., United States of America.

#### **IV SUBMISSIONS AND FINDINGS :**

12 Respondents have raised a preliminary objection challenging the jurisdiction of this Court on the ground that the juridical seat was outside India and therefore Part-I of the Arbitration and Conciliation Act, 1996 (the Act) would not be applicable and consequently the petition under Section 34 is not maintainable. If this objection of Respondents is accepted then this Court will not be required to go into the grounds of challenge to the Award. Counsel also made submissions only on this preliminary issue and if the Court was to conclude on this preliminary issue against Respondents, then another date might have been fixed to hear on the grounds of challenge to the Award.

13 It is settled law that if the Court comes to a determination that the juridical seat is outside India, Part-I of the Arbitration and Conciliation Act, 1996 will not be applicable and consequently petition under Section 34 also is not maintainable. The first issue, therefore, that is required to be determined is whether the juridical seat was in India as submitted by Mr.Singh, counsel for Petitioner or outside India as submitted by

Mr.Chinoy, senior counsel for Respondent No.1.

14 The jurisdiction clauses as averred in the petition are at paragraphs 50 and 51 and they read as under :

“50 The Agreement was in relation to movable property situate in India, being shares in an Indian sector bank, and has been performed in India, where the escrow accounts created under the Agreement, were operated – at Standard Chartered Bank, Mumbai Branch, an affiliate of Respondent Nos.2, 4, 5 and 6 herein. Article 16 of the Agreement provides that the Agreement is governed by the laws of India, and following **National Thermal Power Corporation V. Singer Company and Ors., (1992) 3 SCC 551** and **Sumitomo Heavy Industries Limited v. ONGC Ltd. & Ors., (1998) 1 SCC 305**, the arbitration agreement is also governed by the law of India. Article 15 of the Agreement contains the arbitration agreement which does not stipulate the Seat. It specifies the place of arbitration as “New York or such other place as may be agreed upon by the Parties.” and is thus a reference only to the venue of arbitration in terms of the law declared by the Hon'ble Supreme Court in **Enercon India Limited & Ors. V. Enercon GmbH and Anr., (2014) 5 SCC 1**. Even if it is held to be reference to the seat, the seat has not been fixed under the Agreement. In terms of paragraph 197 of the Judgment of the Hon'ble Supreme Court in **Bharat Aluminium Company & Ors., V. Kaiser Aluminium Technical Services Inc. & Ors., (2012) 9SCC 552**, the arbitration agreement is governed by the law declared in **Bhatia International V. Bulk Trading S.A. & Anr., (2002) 4 SCC 105**, in particular paragraph 32 thereof. Paragraph 32 of **Bhatia V. Bulk Trading (ibid)** has been explained and clarified by the Hon'ble Supreme Court in **Union of India V. Reliance Industries Ltd. & Anr., 2015(5) Arb. LR 255 (SC)**, in terms whereof since the arbitration agreement in the present case is governed by Indian laws and the seat has not been fixed or agreed, and all other relevant factors are in India, Part I of the Arbitration and Conciliation Act, 1996 applies. In any event, the Arbitration Agreement is governed by Indian law under clause 16. Only clauses specifically mentioned in clause 16 are governed by New York Law. Clause 15.1 which contains Arbitration Agreement is not one of the clauses mentioned in Clause 16, which are excluded from the application of Indian laws and governed by New York Law.

51 As aforesaid, in terms of clause 2.3.1(ii), the Escrow accounts are maintained by the Standard Chartered Bank, India at its Mumbai Branch. All monies are received and paid out of the said Escrow accounts and all shares along with transfer forms are also physically held in Mumbai. This Hon'ble Court, therefore, is the “Court” within

*the meaning of Court as defined in Section 2(e) of the said Act, has the jurisdiction to entertain, try and dispose of the present petition.”*

15 Therefore, according to Petitioner as Article 16 of the Agreement provides that the Agreement is governed by the laws of India and as Article 15 of the Agreement containing the arbitration clause does not stipulate the Seat, arbitration is deemed to have been held in India. It is the Petitioner’s case that Article 15 specifying the place of arbitration “*New York or such other place as may be agreed upon by the parties*” is only a reference to the venue of arbitration and not ‘*a Seat*’ and in any event, if it is held to be a reference to a seat, the seat has not been fixed under the agreement. Because it says “*.....or such other place.....*” According to Petitioner and as submitted by counsel, since the law governing clause in the present case provides the agreement shall be governed by laws of India and the seat has not been fixed or agreed and as all other relevant factors are in India, Part-I of the Arbitration and Conciliation Act, 1996 applies.

16 Mr.Singh also submitted that only certain clauses in the agreement are governed by New York law and arbitration agreement is not one of those clauses mentioned in Clause 16 which are excluded by Indian laws and governed by New York laws.

17 Mr.Chinoy for Respondent No.1, per contra, submitted that :

(i) Part-I of the Act does not apply because Clause 15 of the agreement provides that the arbitration shall be conducted according to the Commercial Arbitration Rules of the American Arbitration Association; the place of arbitration shall be New York or such other place as may be agreed upon by the Arbitrating Parties; and the award shall be enforceable in accordance with 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, as amended.

(ii) Clause 16, which deals with governing law, only applies to the substantial or proper law of the agreement and not Curial law or procedural law governing the arbitration proceedings.

(iii) The Curial Law was foreign law because of what is stated in Clause 15 and therefore Part –I of the Arbitration and Conciliation Act, 1996 would not apply.

(iv) Relying on Clause 15 of the agreement, Mr.Chinoy submitted that since the juridical seat of arbitration is New York, the Curial Law was the Federal Arbitration Act, U.S.A.

(v) Admittedly, the arbitration was commenced by Petitioner in New York and not any other place and therefore, Petitioner is wrong in submitting that the seat has not been fixed under the agreement because the clause expressly provided New York and if not New York, some other place

which the parties may agree upon. It only gives a liberty to the parties to agree to alternative place of arbitration and as Petitioner itself commenced arbitration is New York, the place of arbitration shall be New York.

18 Mr.Chinoy further submitted that Petitioner had purported to join Respondent No.3 to Respondent No.6 as parties to arbitration proceedings even though Respondent Nos.3 to 6 were admittedly not signatories to the agreement. When respondent nos.3 to 6 moved an application before the Arbitral Tribunal objecting to the Tribunal's jurisdiction, Petitioner in its response relied on the Federal Arbitration Act, U.S.A. as under :

*“118. Although Corsair Capital, Standard Chartered Plc, and Subcontinental are not express signatories to the Amended Escrow Agreement, they are nonetheless bound to arbitrate this dispute under the Federal Arbitration Act and prevailing New York law.*

*119. New York law recognizes that a non-signatory can be bound to an arbitration agreement under one or more of five theories; (i) incorporation by reference, (ii) assumption, (iii) agency, (iv) veil piercing/alter ego, and (v) estoppel. Anyone of these theories suffices to continue to hold these parties into this arbitration.”*

19 It was also submitted by Mr.Chinoy that even for the post hearing brief, Petitioner had stated that the joinder of parties of arbitration is a procedural matter, to be considered under US law. He added, when a dispute arose between the Petitioner and respondents as to the nomination of Arbitrators, Petitioner's stand was *“we may also seek relief in aid of*

*arbitration from the Courts of the State of New York.*”. Mr.Chinoy submitted that Petitioner in its Statement of Claim and subsequent amendments thereto asserted that Petitioner intends to commence a separate Court proceedings in New York State Supreme Court challenging the validity of the Appointment Provision and seeking rescission or reformation thereof and hence Petitioner itself considered the Courts in New York to have jurisdiction over the disputes between the parties pertaining to the arbitration proceedings.

20 In short, Mr.Chinoy submitted that :

- (i) The arbitration was seated in New York, U.S.A.
- (ii) The arbitration was conducted in accordance with the American Arbitration Association Rules.
- (iii) As the choice of a seat confers exclusive jurisdiction on Courts of the seat of arbitration and carries with it that Court's Supervisory jurisdiction over the arbitration and as Parties having agreed that the seat would be New York, USA, the arbitration being seated in New York, USA, the Federal Arbitration Act was *ipso jure* the law applicable to the arbitration/arbitration proceedings;
- (iv) The Petitioners had in fact relied on the Federal Arbitration Act to justify their joinder of Respondent No.3 to Respondent No.6 and also indicated their intent to challenge the Appointment Provisions in the Courts of New York.

- (v) The Award was made in New York.
- (vi) The Federal Arbitration Act contains provisions for challenging/vacating award made in the USA;
- (vi) The Agreement itself provided that the Award would be enforced “*in accordance with the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards*”; and
- (viii) The applicability of Part I of the Arbitration Act has necessarily been impliedly excluded.

21 It should be noted that no rejoinder has been filed to the affidavit in reply.

22 In support of his submission, Mr.Chinoy relied upon :-

- (i) ***Harkirat Singh Vs. Rabobank International Holdings B.V.***<sup>1</sup>
- (ii) ***Union of India Vs. Reliance Industries Limited & Ors.***<sup>2</sup>
- (iii) ***Eitzen Bulk A/s Vs. Ashapura Minechem Ltd.***<sup>3</sup>
- (iv) ***Harmony Innovation Shipping Limited Vs. Gupta Coal India Limited & Anr.***<sup>4</sup>

23 In rejoinder, Mr. Singh appearing for Petitioner only dealt with *Eitzen Bulk* (supra) and submitted that the judgment is not applicable to our case because in *Eitzen Bulk* (supra), the contract provided that the arbitration is to

1 2015 SCC OnLine Bom. 605

2 (2015) 10 SCC 213

3 2016 SCC OnLine SC 523

4 (2015) 9 SCC 172

be settled in London and English Law to apply whereas in our case, Clause 16 says Indian law to apply. The counsel also submitted that even in *Harmony Innovation* (supra), it provides arbitration in London and the contract to be governed and construed according to English Law and hence this judgment also is distinguishable.

It should be noted that no submissions were made by counsel for Respondent No.3 and Respondent No.6

24 As stated earlier, it is settled law that where the Court comes to a determination that the juridical seat is outside India or where law other than Indian law governs the arbitration agreement, Part-I of the Arbitration Act, 1996 would be excluded. [*Union of India Vs. Reliance Industries Limited & Ors.*(supra)].

25 A matter similar to the matter in hand was decided by a Division Bench of our Court in *Harkirat Singh Vs. Rabobank International Holdings B.V* (supra) in which the Division Bench held that parties may choose a particular place of arbitration because it is attractive place for arbitration but once a place of arbitration has been chosen, it brings with it its own law. In *Rabobank* (supra), it was submitted by appellants that the law governing the dispute between the parties was the Indian law which applies to the

agreement itself; since the arbitration agreement is silent on the law governing the agreement to arbitrate and, therefore, in case where the arbitration agreement is silent, it would ordinarily be the substantial law governing the disputes between the parties. In such a situation where arbitration clause is silent on the law governing the agreement to arbitration, the Division Bench held that parties having chosen the juridical seat of arbitration at London, have subjected themselves to English Law and the Award in question could be challenged only before English Courts under the English Arbitration Act, 1996 and not under Section 34 of the Indian Arbitration and Conciliation Act, 1996.

26 In our case, arbitration Clause 15 expressly provides that the arbitration shall be conducted according to the Commercial Arbitration Rules of the American Arbitration Association and the place of arbitration shall be New York and the Award shall be enforceable in accordance with 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, as amended. Mr.Chinoy has correctly submitted that there has to be distinction between the "proper law" of the contract and the "curial law" to determine the law which is to govern the arbitration itself. While the proper law is the law which governs the agreement itself, the curial law is the law which would be applicable to the arbitration proceedings and Clause 15

makes it quite clear that the curial law which regulates the procedure to be adopted in conducting the arbitration would be rules of American Arbitration Association. There is no ambiguity that the American Arbitration Association Rules read with Federal Arbitration Act, USA, would be the curial law of the arbitration proceedings. I also find support for this view from *Harmony Innovation* (supra), *Union of India Vs. Reliance Industries Limited* (supra) and *Eitzen Bulk A/S. Vs. Ashapura Minechem Ltd. & Anr.* (supra).

27 In *Eitzen Bulk* (supra), in paragraph 34, it is stated that as a matter of fact the mere choosing of the juridical seat of Arbitration attracts the law applicable to such location. In other words it would not be necessary to specify which law would apply to the Arbitration proceedings since the law of the particular country would apply *ipso jure*.

28 I cannot accept the submission of Mr.Singh for Petitioner that the seat has not been fixed as New York and/or that New York is only a Venue of arbitration. I would say that New York was the seat of arbitration under the agreement and even Petitioner has proceeded on the basis that law governing the arbitration/arbitration proceedings was the Federal Arbitration Act. The present arbitration was seated in New York, USA and the Federal

Association Act was *ipso jure* the law governing the arbitration/arbitration proceedings. It should be noted that admittedly, the arbitration was commenced by Petitioner in New York; the arbitration was seated in New York, USA; the arbitration was conducted in accordance with the American Arbitration Association Rules; Petitioner had in fact relied on the Federal Arbitration Act to justify their joining of respondent nos.3 to 6 and also indicated their intent to challenge the Appointment Provisions in the Courts of New York; the Award was made in New York, the Federal Arbitration Act contains provisions for challenging/vacating the Award made in USA and the agreement itself provided that the award would be enforceable in accordance with 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards as amended.

29 In ***Yograj Infrastructure Limited Vs. Ssang Yong Engineering and Construction Company Limited***<sup>5</sup>, the arbitration clause and the governing law clause were similar to the clause in our case. Arbitration law clause and the curial law clause can be found in paragraphs 47 and 48 of the judgment and the same read as under :

47 Clause 27 of the Agreement provides for arbitration and reads as follows :

"27. Arbitration.

27.1 All disputes, differences arising out of or in connection with the Agreement shall be referred to arbitration. The

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<sup>5</sup> (2011) 9SCC 735

*arbitration proceedings shall be conducted in English in Singapore in accordance with the Singapore International Arbitration Centre (SIAC) Rules as in force at the time of signing of this Agreement. The arbitration shall be final and binding.*

*27.2 The arbitration shall take place in Singapore and be conducted in English language.*

*27.3 None of the Party shall be entitled to suspend the performance of the Agreement merely by reason of a dispute and/or a dispute referred to arbitration."*

48      *Clause 28 of the Agreement describes the governing law and provides as follows :*

*"This agreement shall be subject to the laws of India. During the period of arbitration, the performance of this agreement shall be carried on without interruption and in accordance with its terms and provisions."*

30      The Apex Court came to conclusion that since the proceedings were to be conducted in Singapore in accordance with the Singapore International Arbitration Centre (SIAC) Rules, there was no ambiguity that the procedural law with regard to the arbitration proceedings, is the SIAC Rules and the Clause makes it very clear that the seat of arbitration would be Singapore. The Apex Court also held that once the parties agreed by virtue of clause 27.1 of the agreement that the arbitration proceedings would be conducted in Singapore, i.e., the seat of arbitration would be in Singapore in accordance with the SIAC Rules, it was no longer available to the appellant to contend that the "proper law" of the agreement would apply to the arbitration proceedings. It would be useful to reproduce paragraphs 49 to 59

of the judgment which read as under :-

49        *As will be seen from Clause 27.1, the arbitration proceedings are to be conducted in Singapore in accordance with the SIAC Rules as in force at the time of signing of the agreement. There is, therefore, no ambiguity that the procedural law with regard to the arbitration proceedings, is the SIAC Rules. Clause 27.2 makes it clear that the seat of arbitration would be Singapore.*

50        *What we are, therefore, left with to consider is the question as to what would be the law on the basis whereof the arbitral proceedings were to be decided?*

51        *In our view, Clause 28 of the Agreement provides the answer. As indicated hereinabove, Clause 28 indicates that the governing law of the agreement would be the law of India, i.e., the Arbitration and Conciliation Act, 1996. The learned counsel for the parties have quite correctly spelt out the distinction between the "proper law" of the contract and the "curial law" to determine the law which is to govern the arbitration itself. While the proper law is the law which governs the agreement itself, in the absence of any other stipulation in the arbitration clause as to which law would apply in respect of the arbitral proceedings, it is now well-settled that it is the law governing the contract which would also be the law applicable to the Arbitral Tribunal itself. Clause 27.1 makes it quite clear that the Curial law which regulates the procedure to be adopted in conducting the arbitration would be the SIAC Rules. There is, therefore, no ambiguity that the SIAC Rules would be the Curial law of the arbitration proceedings. It also happens that the parties had agreed to make Singapore the seat of arbitration. Clause 27.1 indicates that the arbitration proceedings are to be conducted in accordance with the SIAC Rules.*

52        *The immediate question which, therefore, arises is whether in such a case the provisions of Section 2(2), which indicates that Part I of the above Act would apply, where the place of arbitration is in India, would be a bar to the invocation of the provisions of Sections 34 and 37 of the Act, as far as the present arbitral proceedings, which are being conducted in Singapore, are concerned.*

53        *In Bhatia International (supra), wherein while considering the applicability of Part I of the 1996 Act to arbitral proceedings where the seat of arbitration was in India, this Court was of the view that Part I of the Act did not automatically exclude all foreign arbitral proceedings or awards, unless the parties specifically agreed to exclude the same.*

54        *As has been pointed out by the learned Single Judge in the order impugned, the decision in the aforesaid case would not have any application to the facts of this case, inasmuch as, the parties have categorically agreed that the arbitration proceedings, if any, would be governed by the SIAC*

Rules as the Curial law, which included Rule 32, which categorically provides as follows :

*"Where the seat of arbitration is Singapore, the law of the arbitration under these Rules shall be the International Arbitration Act (Cap. 143A, 2002 Ed, Statutes of the Republic of Singapore) or its modification or re-enactment thereof."*

55 Having agreed to the above, it was no longer available to the appellant to contend that the "proper law" of the agreement would apply to the arbitration proceedings. The decision in *Bhatia International Vs. Bulk Trading S.A.* [(2002) 4 SCC 105], which was applied subsequently in the case of *Venture Global Engg. Vs. Satyam Computer Services Ltd.* [(2008) 4 SCC 190] and *Citation Infowares Ltd. Vs. Equinox Corporation* [(2009) 7 SCC 220], would have no application once the parties agreed by virtue of Clause 27.1 of the Agreement that the arbitration proceedings would be conducted in Singapore, i.e., the seat of arbitration would be in Singapore, in accordance with the Singapore International Arbitration Centre Rules as in force at the time of signing of the Agreement.

56 As noticed hereinabove, Rule 32 of the SIAC Rules provides that the law of arbitration would be the International Arbitration Act, 2002, where the seat of arbitration is in Singapore. Although, it was pointed out on behalf of the appellant that in Rule 1.1 it had been stated that if any of the SIAC Rules was in conflict with the mandatory provision of the applicable law of the arbitration, from which the parties could not derogate, the said mandatory provision would prevail, such is not the case as far as the present proceedings are concerned.

57 In the instant case, Section 2(2) of the 1996 Act, in fact, indicates that Part I would apply only in cases where the seat of arbitration is in India. This Court in *Bhatia International (supra)*, while considering the said provision, held that in certain situations the provision of Part I of the aforesaid Act would apply even when the seat of arbitration was not in India.

58 In the instant case, once the parties had specifically agreed that the arbitration proceedings would be conducted in accordance with the SIAC Rules, which includes Rule 32, the decision in *Bhatia International* and the subsequent decisions on the same lines, would no longer apply in the instant case where the parties had willingly agreed to be governed by the SIAC Rules.

59 With regard to the effect of Section 42 of the Arbitration and Conciliation Act, 1996, the same, in our view was applicable at the pre-arbitral stage, when the Arbitrator had not also been appointed. Once the Arbitrator was appointed and the arbitral proceedings were commenced, the SIAC Rules became applicable shutting out the applicability of Section 42 and for that matter Part I of the 1996 Act, including the right of appeal

*under Section 37 thereof.*

31 Therefore, since the parties herein, agreed by virtue of Clause 15 of the agreement that arbitration proceedings would be conducted in New York in accordance with the rules of American Arbitration Association, it is no longer available to Petitioner to contend that the proper law of the agreement, i.e., Indian Law, would apply to the arbitration proceedings.

32 In the circumstances, I am of the clear view that the juridical seat of arbitration as chosen by the parties was New York and the parties had subjected themselves to the Federal Arbitration Act of USA. I am of the firm view that the Award in question would be challenged by Petitioner only under the provisions of Federal Arbitration Act, USA and not under Section 34 of the Arbitration and Conciliation Act, 1996.

Therefore, there is no need to go into the grounds of challenge to the Award, which in any ways would have been argued only if I had held in favour of Petitioner on this preliminary issue of jurisdiction.

33 The Arbitration Petition accordingly dismissed with costs in the sum of Rs.5 lakhs. The costs to be paid within four weeks from today by way of cheque drawn in favour of the Advocate on record for respondent no.1.

**(K.R.SHRIRAM, J.)**