IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

THURSDAY, THE 30TH DAY OF NOVEMBER 2017

THE HON'BLE DR. JUSTICE ANITA SUMANTH

O.A. No.346 of 2017
AND
A. No.2049 of 2017

In the matter of Arbitration & Conciliation Act, 1996
And
In the matter of Dispute arising Out of the Joint Operating Agreement Dated 05.12.1995

M/s.Hardy Exploration & Production
(India) Inc.
Having its office at
5th Floor, Westminster Building,
108, Dr.Radhakrishnan Salai,
Mylapore, Chennai - 600 004.

: Applicant
(in both the applications)

Vs.

1.Oil & Natural Gas Corporation Ltd.
CMDA Building Tower II
7th Floor, South Wing
1, Ganesh Irwin Road, Egmore
Chennai 600 008.

2.Hindustan Oil Exploration Company Ltd.
Lakshmi Chambers
192, St.Mary's Road
Alwarpet, Chennai - 600 028.

3.Tata Petrodyne Ltd.
3rd Floor Metropolitan
Bandra Kurla Complex
Bandra East
Mumbai 400 051.

: Respondents
(in both the applications)

O.A. No.346 of 2017

Original Application praying that this Hon'ble Court be pleased to issue an order of Interim / ad-interim injunction directing the Respondents to pay to Samson the amounts due from each them in satisfaction of the Samson Award, by respectively paying the sums of USD 1,952,964, USD 1,025,307 and USD 1,025,307 or in the alternative directing the Respondents to respectively deposit the sums of USD 1,952,964, USD 1,025,307 and USD 1,025,307 with this Court.

A. No.2049 of 2017

Application praying that this Hon'ble Court be pleased to issue an order of interim/ad-interim direction, directing the Respondents to pay to Samson any additional liability towards interest that may be due under the Samson Award till the date of payment by the respective Respondents.

This Application and Original Application coming on this day before this court for hearing the court made the following order:

O.A.No.346 of 2017 has been filed by Hardy Exploration and Production (India) Inc. (in short, 'Hardy') under section 9 of the Arbitration and Conciliation Act 1996 (in short 'Act') praying for an order of ad interim injunction directing the three respondents, i.e., Oil & Natural Gas Corporation Ltd. (in short, 'ONGC'), Hindustan Oil

Exploration Company Ltd. (in short, 'HOEC') and Tata Petrodyne Ltd. (in short, 'TPL') to pay Samson the amounts due from each of them in satisfaction of the Samson award being respectively USD 1,952,964, USD 1,025,307 and USD 1,025,307 or deposit the aforesaid amounts with the Court as well as additional liability towards interest till the date of payment.

2. Serious objections have been raised by the respondents to the maintainability of this application and the arguments of Mr.Vijayan, learned counsel for King and Partridge for ONGC, Mr.Satish Parasaran, learned senior counsel for Mr.Arun Karthik Mohan for HOEC and Mr.Srinath Sridevan for TPL, the three respondents, and the response of Mr.P.R.Raman for Mr.Vinod Kumar, learned counsel for the applicant for Hardy to the preliminary objections have been taken into careful consideration. Since the objections raised go to the root of the matter, they are taken up for adjudication first and only facts as relevant for the appreciation and adjudication of the preliminary objection are taken note of at this juncture. I must mention that though counters have been filed to the applications by all three respondents, the main legal objection raised in the course of the oral hearing, being one in terms of the proviso to section 2(2) of

the Act and relating to the scope and applicability of Part I of the Act, has not been raised therein. However no objection is raised by Mr.Raman to the raising of the preliminary objection itself though he would have much to say on the veracity of the same. Also, there is no dispute with respect to the applicability of the amended law itself and both parties have addressed me in details with respect to the applicability of section 2(2) as amended in 2015. Therefore and since the scope and applicability of section 2(2) including the proviso is a purely legal question the parties have been permitted to raise and argue the same as a preliminary objection.

3. The brief facts as set out by Mr.Raman are stated below to the limited extent and purpose of setting the legal dispute in context. Hardy, formerly known as Vaalco Energy (India) Inc., along with HOEC and TPL are parties to a Production Sharing Contract (in short, 'PSC') dated 30.12.1994 along with ONGC and the Government of India for the purpose of carrying out petroleum operations in the Cauvery basin. The rights of the parties have been set out in Joint Operating Agreement (in short, 'JOA'), entered into by the parties on 05.12.1995. Hardy was designated as the operator to carry out the petroleum operations and such operations were performed by it,

according to Mr.Raman, on behalf of all the individual constituents. Pursuant to the PSC and the JOA, Hardy entered into contracts with various entities for services required in connection with the execution of the petroleum operations. An agreement was entered into on 11.07.1996 with Hitachi Drilling Services India Limited, now Aban Offshore Limited for provision of a Floating Production and Storage System for the production and storage of petroleum from the block. Time charters were executed with Samson Maritime Limited (in short, 'Samson') for support services and for the hire of two standby Vessels M.V.Jade and M.V.Ocean Tanzanite.

4. Disputes arose in the execution of the works by the sub-contractors that were referred to Arbitration. As far as the contract with Samson is concerned, Hardy suffered an Award dated 25.08.2015 and Additional Award dated 25.10.2015. The Awards were challenged under section 34 of the Act in O.P.111 of 2016 that was dismissed by this Court on 4.10.2016. Samson has, as a consequence, initiated petitions for execution of the Award. Samson had also approached this Court post Award seeking relief under 9 of the Act for disclosure of bank accounts of Hardy as well as a direction to it to furnish security failing which to attach its bank accounts. The applications

were allowed by the Single Judge as against which Original Side Appeals were filed by Hardy. The Division Bench while confirming the direction to Hardy to effect disclosure of its bank accounts substituted the second direction to the effect that any monies received from the Government of India consequent on Execution Petitions filed by Hardy to the extent of the Award, would be deposited in this Court. Incidentally, parties would confirm that till date no monies have been received or deposited.

5. One interesting factual argument is raised by the respondents and I deal with the same briefly before proceeding to address the legal issue raised. Samson issued notices seeking reference of the dispute to arbitration addressing all parties including the respondents in this application, on 09.10.2012. The notices were resisted by the respondents. A petition under Section 11 of the Act was thus filed by Samson before the Supreme Court seeking the appointment of an Arbitrator to adjudicate upon the disputes inter se the parties. In the proceedings under section 11, Hardy, the first respondent, filed an affidavit releasing the respondents herein from the purview of those proceedings. The affidavit, at paragragh 4 and 5, states thus:

'4. It is respectfully submitted that the present claims by the Applicant jointly and severally against all the respondents herein is not covered by the Arbitration clause in the Time Charter/Agreement. The said agreement/Time Charter was signed and executed by the Applicant and Respondent No.1 alone. Therefore, the present application arraigning respondents 2 to 4 also as party respondents is not maintainable as they are not parties/signatories to the Time Charter/Agreement which contains the arbitration clause.

5. It is further submitted that the Arbitration clause in the agreement/Time Charter, viz., clause 44.2 clearly mentions that any dispute arising between the parties out of the Time Charter shall be settled by arbitration. Therefore it is only disputes between the parties to the Time Charter that can be referred to arbitration. While so, in the present application, admittedly the applicant is seeking relief against respondents 2 to 4 also, who are not parties to the Time Charter and therefore not bound by the arbitration clause contained therein. Therefore the present application ought to be dismissed in limine as not maintainable.'

6. The respondents would strongly rely upon the contents of the affidavit as extracted above to point out that, even according to Hardy there was no involvement of theirs in the transaction with

Samson. That being the case, the present prayer, which seeks to draw them into the controversy between Hardy and Samson is, according to them, not maintainable. The defence of Hardy to this is that the respondents had originally agreed that the disputes with Samson were liable to be settled out of court and persuaded Hardy to represent them all in the talks for settlement. This, according to Hardy, was the reason behind the affidavit filed. While I do not propose to dwell upon the submissions on merits any further, on a plain reading, the contents of the affidavit do not support the reasoning now advanced. I might add that the factual aspect noted by me as aforesaid is only incidental and does not impinge in any manner on my decision on the maintainability of the application. Further, I hasten to add that the above observations will not stand in the way of the parties in any other proceedings including arbitration.

7. The respondents would strongly canvas the view that the present application is not maintainable in the light of section 2(2) of the Act and the proviso thereto inserted vide Amendment Act 3 of 2016 w.e.f. 23.10.2015. Post the 2015 amendment and in cases where the seat of arbitration is outside India, the scope of Part I of the Act continues be applicable provided such applicability has not been

excluded by agreement of parties.

8. The relevant clauses of the agreement are thus to be examined and are extracted below:

'17.3. Unresolved Disputes

Subject to the provisions of this Agreement, the Parties hereby agree that any matters unresolved, disputes, differences or claims which cannot be settled amicably within twenty-one (21) days, may be submitted to a sole expert where Article 17.2 applies or otherwise to an arbitral tribunal for final decision as hereinafter provided.

17.9. UNCITRAL Rules to Apply

Arbitration proceedings shall be conducted in accordance with the UNCITRAL Model law on International Commercial Arbitration of 1985 except that in the event of any conflict between these rules and the provisions of this Article 17, the provisions of this Article 17 shall govern.

......

17.12. Venue

The venue of sole expert, conciliation or arbitration proceedings pursuant to this Article, unless the parties otherwise agree, shall be Kuala Lumpur, Malaysia, and shall *be conducted in the English language. Insofar as practicable, the Parties shall continue to implement the terms of this Agreement notwithstanding the initiation of arbitral proceedings and any pending claim or dispute. Notwithstanding the provisions of Article 18, the arbitration agreement contained in this Article 17 shall be governed by the laws of England.*

.....

18.1. Indian Law to Govern

Subject to Article 17, this Agreement shall be governed by and interpreted in accordance with the Laws of India.'

9. Further, the dispute as regards the monies stated to be due to Hardy by the respondents was sought to be referred to arbitration by Hardy on 17.3.2017. Hardy's claim petition dated 10.7.2017 as well as the counter claims are before the Arbitral Tribunal at KL, Malaysia, and the proceedings are to be conducted in accordance with UNCITRAL Model law as per clause 17.9 of the JVC between the parties. As far as the present petition is concerned, the collective submissions of the respondents who challenge the maintainability of the applications is that the parties have agreed, in Article 17.12 that the law applicable to the Arbitration Agreement would be English

law, specifically excluding the same from application in Article 18.1. Thus by virtue of the proviso to section 2(2) it was only English law that was applicable. The respondents rely on the following judgment/decisions:

i) *Videocon Industries Limited V. Union of India and another* (2011) 6 SCC 161 (SC)

ii) *Raffles Design International India Private Limited & Anr. V. Educomp Professional Education Limited & Ors. (*2016 SCC OnLine Del 5521)

iii) *Trammo DMCC V. Nagarjuna Fertilizers And Chemicals Ltd. (*Manu/MH/2373/2017)

10. Per contra, it is Mr.Raman's case that it is Indian law that is the applicable law as per Article 18.1. He would argue that the protection available and sought for by Hardy in this application under section 9 of the Act is a statutory protection and thus it is substantive law that is applicable in its interpretation. He would rely on *Sumitomo Heavy Industries Ltd. V. ONGC Ltd. and others (*(1998) 1 SCC 305) and *Firm Ashok Traders and Anr. etc. V. Gurumukh Das Saluja and Ors. etc. (*AIR 2004 SC 1433) to butress his submission

that the right conferred by Section 9 is a statutory right and not one arising from contract.

11. Having heard learned counsel and perused the papers and case law cited my decision and reasoning are set out hereunder.

12. It is relevant to advert to the legislative history behind the insertion of the proviso to section 2(2) of the Act and I set the same out in brief. In 2002, the Supreme Court, in *Bhatia International v. Bulk Trading S.A and Another* ((2002) 4 SCC 105) considered the applicability of Part I of the Act to foreign seated arbitrations and even in the absence of the proviso to section 2(2) as we have it today, held as under:-

> *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 parties would prevail. Any provision, in Part I, which is contrary to or excluded by that law or rules will not apply.*

13. Thereafter the Constitutional Bench of the Supreme Court in the case of *Bharat Aluminum Company v. Kaiser Aluminum Technical Services Inc* (2012) 9 SCC 552 reversed the conclusion in Bhatia (supra) holding that Part I would stand excluded if the seat of the

Arbitration was outside India. The Bench held:

> *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.*

14. The above position now stands reversed by the amendment brought in to the Act in 2015 bringing back the pre-BALCO position. The conclusion of the Supreme Court in Bhatia's case now stands incorporated in section 2(2) via the proviso inserted, outlining the scope of Part I.

15. The Report of the Law Commission throws some light on the reasons why the amendment was thought necessary as follows:

> ***JUDICIAL INTERVENTIONS IN FOREIGN SEATED ARBITRATIONS***
>
> *38. Section 2(2) of the Arbitration and Conciliation Act, 1996 (the "Act"), contained in Part I of the Act, states that "This Part shall apply where the place of arbitration*

is in India." In comparison, Article 1(2) of the UNCITRAL Model Law provides: "The provisions of this Law, ***except articles 8, 9, 35 and 36****, apply* ***only*** *if the place of arbitration is in the territory of this State." The central issue, therefore, that was before the two judge Bench of the Supreme Court in Bhatia International vs. Interbulk Trading SA, (2002) 4 SCC 105, and before the five-judge Bench in Bharat Aluminum and Co. vs. Kaiser Aluminium and Co., (2012) 9 SCC 552 (hereinafter called "BALCO") was whether the exclusion of the word "only" from the Indian statute gave rise to the implication that Part I of the Act would apply even in some situations where the arbitration was conducted outside India.*

39. The Supreme Court in Bhatia, held that Part I mandatorily applied to all arbitrations held in India. In addition, Part I applied to arbitrations conducted outside India unless it was expressly or impliedly excluded. While Bhatia was a case arising out of section 9, the same principle was extended by the Supreme Court to sections 11 and 34 as well (in Venture Global v Satyam Computer, (2008) 4 SCC 190; Indtel Technical Services v W.S. Atkins, (2008) 10 SCC 308; Citation Infowares Ltd v Equinox Corporation, (2009) 7 SCC 220; Dozco India v Doosan Infrastructure, (2011) 6 SCC 179; Videocon Industries v Union of India, (2011) 6 SCC 161). As a result, Indian Courts were competent to provide interim relief pending arbitration, appoint arbitrators and set aside arbitral awards even if the arbitration was conducted outside India. These powers existed unless Part I was expressly or impliedly excluded. Further, an implied exclusion was construed not on the basis of conflict of laws principles but in an ad hoc manner. This position now stands overruled following BALCO.

40. The Supreme Court in BALCO decided that Parts I and II of the Act are mutually exclusive of each other. The intention of Parliament that the Act is territorial in nature and sections 9 and 34 will apply only when the seat of arbitration is in India. The seat is the "centre of gravity" of arbitration, and even where two foreign parties arbitrate in India, Part I would apply and, by virtue of *section 2(7), the award would be a "domestic award". The Supreme Court recognized the "seat" of arbitration to be the juridical seat; however, in line with international practice, it was observed that the arbitral hearings may take place at a location other than the seat of arbitration. The distinction between "seat" and "venue" was, therefore, recognized. In such a scenario, only if the seat is determined to be India, Part I would be applicable. If the seat was foreign, Part I would be inapplicable. Even if Part I was expressly included "it would only mean that the parties have contractually imported from the Arbitration Act, 1996, those provisions which are concerned with the internal conduct of their arbitration and which are not inconsistent with the mandatory provisions of the [foreign] Procedural Law/Curial Law." The same cannot be used to confer jurisdiction on an Indian Court. However, the decision in BALCO was expressly given prospective effect and applied to arbitration agreements executed after the date of the judgment.*

41. While the decision in BALCO is a step in the right direction and would drastically reduce judicial intervention in foreign arbitrations, the Commission feels that there are still a few areas that are likely to be problematic.

Where the assets of a party are located in India, and there is a likelihood that that party will dissipate its assets in the near future, the other party will lack an efficacious remedy if the seat of the arbitration is abroad. The latter party will have two possible remedies, but neither will be efficacious. First, the latter party can obtain an interim order from a foreign Court or the arbitral tribunal itself and file a civil suit to enforce the right created by the interim order. The interim order would not be enforceable directly by filing an execution petition as it would not qualify as a "judgment" or "decree" for the purposes of sections 13 and 44A of the Code of Civil Procedure (which provide a mechanism for enforcing foreign judgments). Secondly, in the event that the former party does not adhere to the terms of the *foreign Order, the latter party can initiate proceedings for contempt in the foreign Court and enforce the judgment of the foreign Court under sections 13 and 44A of the Code of Civil Procedure. Neither of these remedies is likely to provide a practical remedy to the party seeking to enforce the interim relief obtained by it. That being the case, it is a distinct possibility that a foreign party would obtain an arbitral award in its favour only to realize that the entity against which it has to enforce the award has been stripped of its assets and has been converted into a shell company. (ii) While the decision in BALCO was made prospective to ensure that hotly negotiated bargains are not overturned overnight, it results in a situation where Courts, despite knowing that the decision in Bhatia is no longer good law, are forced to apply it whenever they are faced with a case arising from an arbitration agreement executed pre- BALCO.*

42. The above issues have been addressed by way of proposed Amendments to sections 2(2), 2(2A), 20, 28 and 31.

16. Amended section (2)2 with the proviso is extracted hereunder:

(2) This Part shall apply where the place of arbitration is in India.

Provided that subject to an agreement to the contrary, the provisions of sections 9, 27 and clause (a) of sub-section (1) and sub-section (3) of section 37 shall also apply to international commercial arbitration, even if the place of arbitration is outside India, and an arbitral award made or to be made in such place is enforceable and recognized under the provisions of Part II of this Act.

17. The unchanged and universal position as regards Arbitration as a mode of dispute resolution, and one that permeates through

amendments made at various stages of the existence of the Act, is twofold. Firstly, supremacy of party autonomy and secondly, reduced judicial intervention in the process of ADR. The insertion of the proviso to section 2(2), as I see it, is in keeping with this policy. While it is inserted expressly for the purpose of protecting the interests of parties and permitting access to Indian Courts notwithstanding that the seat of the Arbitration is outside India, party autonomy has been reiterated by use of the phrase '*subject to an agreement to the contrary*'.

18. I will thus, for deciding this issue, have to examine and interpret the agreement between the parties dated 05.12.1995, particularly Article 17 dealing with the ADR mechanism and procedures that the parties have put in place. In the context of Alternate dispute resolution, normally, a bundle of rights are seen to flow from the Agreement entered into by the parties. One relates to the terms of the contract itself, another to the clause for dispute resolution and the third that regulates the procedure agreed to be adopted by the parties. This has been noticed by the Full Bench of the Supreme Court in *Sumitomo Heavy Industries vs ONGC Ltd* ((1998) 1 SCC 305) where, in Paragraph 10, the Bench refers to a chapter from

Mustill and Boyd under the sub-title 'Laws Governing the Arbitration' as extracted below:

> *10. In the Law and Practice of Commercial Arbitration in England, 2nd Edn. by Mustill and Boyd, there is a chapter on "The Applicable Law and the Jurisdiction of the Court". Under the sub-title "Laws Governing the Arbitration", it is said,*
>
> *"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 embedded, capable of surviving the termination of the substantive agreement and susceptible of premature termination by express or implied consent, or by repudiation or frustration, 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.

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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 disputes to arbitration, and to honour an award.

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

***

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 agreement; 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.*
>
> *3. The proper law of the reference governs the question whether the parties have been discharged from their obligation to continue with the reference of the individual dispute.*

19. The clauses, extracted earlier, reveal the choice of the parties as regards (i) curial law, (ii) lex arbitri or law relating to the arbitration agreement and (ii) substantive law. Article 17.9, referring to Article 17 of the UNCITRAL Rules governs procedure, curial law. Article 17.12, which stipulates the law governing the arbitration agreement is the law of England, the Lex Arbitri, and states explicitly that '*the arbitration agreement contained in Article 17 shall be governed by the laws of England*'. Article 18.1, which is subject to the provisions of Article 17.12 provides for substantive law governing the contract, being the laws of India. The parties have identified clearly the different rights that flow from the Agreement and there is no ambiguity or dispute on which law is to apply to which right. I am thus not called upon in the present case to decide whether the exclusion is express or implied requiring to be gathered from alternate sources, as it is, quite evidently, in my view, an express agreement between the parties to exclude the

arbitration agreement from the application of Indian Law. I may also note that the UNCITRAL Rules that govern the conduct the proceedings for Arbitration now on-going between all the parties before me provide for the grant of interim orders by the Tribunal itself and I will advert to the same in conclusion. Keeping aside this aspect for the moment, I now undertake an analysis of the cases cited at the Bar.

20. The Supreme Court in *Videocon Industries Limited* (supra) considered the interpretation of identical clauses as in the present case concluding that where the clauses relating to Lex Arbitri excluded the applicability of Indian Law, Part I of the Act stood automatically excluded. It may be of use to extract the clauses in the agreement dealt with by the Supreme Court in *Videocon (supra)* and Articles 33, 34 and 35 of that PSC are extracted herein:

> *'33.1.Indian law to govern.—Subject to the provisions of Article 34.12, this contract shall be governed and interpreted in accordance with the laws of India.*
>
> *33.2.Laws of India not to be contravened.—Subject to Article 17.1 nothing in this contract shall entitle the contractor to exercise the rights, privileges and powers conferred upon it by this contract in a manner which will contravene the laws of India.*
>
> *****

34.3.Unresolved disputes.—Subject to the provisions of this contract, the parties agree that any matter, unresolved dispute, difference or claim which cannot be agreed or settled amicably within twenty-one (21) days may be submitted to a sole expert (where Article 34.2 applies) or otherwise to an Arbitral Tribunal for final decision as hereinafter provided.

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34.12. Venue and law of arbitration agreement.—The venue of sole expert, conciliation or arbitration proceedings pursuant to this article, unless the parties otherwise agree, shall be Kuala Lumpur, Malaysia, and shall be conducted in the English language. Insofar as practicable, the parties shall continue to implement the terms of this contract notwithstanding the initiation of arbitral proceedings and any pending claim or dispute. Notwithstanding the provisions of Article 33.1, the arbitration agreement contained in this Article 34 shall be governed by the laws of England.

21. In the interpretation of the above clauses, the Bench held that the lex arbitri, as per Article 34.12 of the Agreement was the law of England and Part I of the Act thus stood specifically excluded by agreement of the parties.

22. Mr.Raman would seek to distinguish the judgment in Videocon on the ground that it was rendered prior to the amendment of 2015, which made wholesale changes to the Arbitration Act. I do not agree. The rationale of the judgement in Videocon is based on an interpretation of identical clauses as in the present case and the

decision of the Full Bench in Bhatia’s case that is presently the law as incorporated in section 2(2) and the proviso thereunder.

23. The argument of Mr.Raman is that the right under section 9 is statutory and not contractual. He would refer to paragraph 13 of Firm Ashok Traders (supra) wherein the Bench states as follows:

> *13. The A&C Act, 1996 is a long leap in the direction of alternate dispute resolution systems. It is based on UNCITRAL Model. The decided cases under the preceding Act of 1940 have to be applied with caution for determining the issues arising for decision under the new Act. An application under Section 9 under the scheme of the A&C Act is not a suit. Undoubtedly, such application results in initiation of civil proceedings but can it be said that a party filing an application under Section 9 of the Act is enforcing a right arising from a contract? “Party” is defined in clause (h) of sub-section (1) of Section 2 of the A&C Act to mean “a party to an arbitration agreement”. So, the right conferred by Section 9 is on a party to an arbitration agreement. The time or the stage for invoking the jurisdiction of court under Section 9 can be: (i) before, or (ii) during arbitral proceedings, or (iii) at any time after the making of the arbitral award but before it is enforced in accordance with Section 36. With the pronouncement of this Court in Sundaram Finance Ltd. v. NEPC India Ltd. [(1999) 2 SCC 479 : AIR 1999 SC 565] the doubts stand cleared and set at rest and it is not necessary that arbitral proceedings must be pending or at least a notice invoking arbitration clause must have been issued before an application under Section 9 is filed. A little later we will revert again to this topic. For the moment suffice it to say that the right conferred by Section 9 cannot be said to be one arising out of a contract. The qualification which the person invoking jurisdiction of the court under Section 9*

must possess is of being a "party" to an arbitration agreement. A person not party to an arbitration agreement cannot enter the court for protection under Section 9. This has relevance only to his locus standi as an applicant. This has nothing to do with the relief which is sought for from the court or the right which is sought to be canvassed in support of the relief. The reliefs which the court may allow to a party under clauses (i) and (ii) of Section 9 flow from the power vesting in the court exercisable by reference to "contemplated", "pending" or "completed" arbitral proceedings. The court is conferred with the same power for making the specified orders as it has for the purpose of and in relation to any proceedings before it though the venue of the proceedings in relation to which the power under Section 9 is sought to be exercised is the Arbitral Tribunal. Under the scheme of the A&C Act, the arbitration clause is separable from other clauses of the partnership deed. The arbitration clause constitutes an agreement by itself. In short, filing of an application by a party by virtue of its being a party to an arbitration agreement is for securing a relief which the court has power to grant before, during or after arbitral proceedings by virtue of Section 9 of the A&C Act. The relief sought for in an application under Section 9 of the A&C Act is neither in a suit nor a right arising from a contract. The right arising from the partnership deed or conferred by the Partnership Act is being enforced in the Arbitral Tribunal; the court under Section 9 is only formulating interim measures so as to protect the right under adjudication before the Arbitral Tribunal from being frustrated. Section 69 of the Partnership Act has no bearing on the right of a party to an arbitration clause to file an application under Section 9 of the A&C Act.

24. I fail to see how this case advances the case of Hardy. The Bench in that case was concerned with the effects of non-registration under the Partnership Act on the maintainability of an application

under section 9 of the Act. There was no dispute whatsoever on the lex arbitri being the laws of India or otherwise as in the present case. Even otherwise, the Bench has noticed two conditions so far as entitlement to file an application under section 9 is concerned. Firstly, the applicant under section 9 must be a 'party' to the agreement/contract and secondly, the court considering the grant of relief must have the power to grant the same. As seen in the present case, this Court, by virtue of Articles 17.12 r.w. 18.1 of the Agreement stands expressly excluded from exercising jurisdiction to the Arbitration Agreement. *S*ince the present application under Section 9 draws its sustenance from the arbitration agreement, which is expressly governed by the laws of England only, I am of the view that the present application is not maintainable in this Court.

25. Reliance is also placed by Mr.Raman on *M/s.Archer Power Systems Private Ltd. V. Kohli Ventures Limited and others* in O.S.A.No.144 of 2017 dated 16.11.2017 where, in fact, the First Bench of this Court holds, on an interpretation of the agreement in that case, that the application under Section 9 of the Act was not maintainable in India.

26. Mr.Sridevan would also make reference to three decisions of High Courts, this Court in *SSPV Construction Consorti vs Vallal RCK Trust* (2015 (5) MLJ 362), Calcutta High Court in *Brand Value Communications vs Eskay Video Private Ltd* ((2010 (4) Arb L R 452) and Delhi High Court in *AFCONS Infrastructure Ltd vs Board of Trustees of the Port of Mumbai* ((2014 (1) Arb L R 512). The proposition put forth is that the prayer sought for, for deposit of the amounts awarded, cannot be granted in an application under section 9 of the Act as it would amount to conversion of an unsecured claim to a secured one. I refrain from considering the argument in the light of my conclusion that the application is itself not maintainable.

27. Before concluding, let me briefly touch on the UNCITRAL Model Law on International Commercial Arbitration that, in terms of Article 17.9 of the JVA, applies to the conduct of arbitration between these parties. Article 17 of the Model Law reads thus:

> Article 17. Power of arbitral tribunal to order interim measures Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subjectmatter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure.

The Model Law also provides, in Article 9 for the grant of interim protection, from the appropriate Court in accordance with the Arbitration Agreement. Article 9 states:

> *Article 9. Arbitration agreement and interim measures by court It is not incompatible with an Arbitration agreement for a court to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.*

28. The Model Law thus provides for the grant of interim measures of protection by the Tribunal that Hardy is at liberty to avail of in accordance with applicable law. I may also, for the sake of completion mention, that the reference to 'court' in Article 9 is, obviously, the appropriate court/law as per the Arbitration agreement to consider and grant such protection, in this case, English Law.

29. It is made clear that any observations referring to the merits are to be seen only in the context of the maintainability of this application and no more. Application dismissed.

Sd./- A.S.M.J.

30.11.2017

//Certified to be true copy//

Dated at Madras this the th day of 2017.

COURT OFFICER (O.S.)

TPY/11.12.2017