

* HON'BLE SRI JUSTICE C.V.NAGARJUNA REDDY
AND
THE HON'BLE SMT. JUSTICE ANIS

CIVIL MISCELLANEOUS APPEAL No. 614 OF 2017

% Date: 14.07.2017

M/s. Ashapura Minechem Limited,
Having its registered office at
Jeevan Udyog Building, 3rd Floor,
278, D.N. Road, Fort Mumbai - 400001,
Rep. by its Authorized Signatory,
S. Gopala Krishnan, S/o. Subramanyan ... Appellant

Vs.

\$ M/s. Oldendorff Carriers GMBH & Co., KG,
Having its Office at Willy Brandt Allee,
623554 Lubeck, Germany, and another ... Respondents

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> HEAD NOTE:

!Counsel for the appellant: Sri E. Ajay Reddy

Counsel for Respondent: N.A

?CASES REFERRED:

1. 2014(3) BOM – CR 768 (SC)
- 2 (2012) 9 SCC 552
3. (2002) 4 SCC 105

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Between:

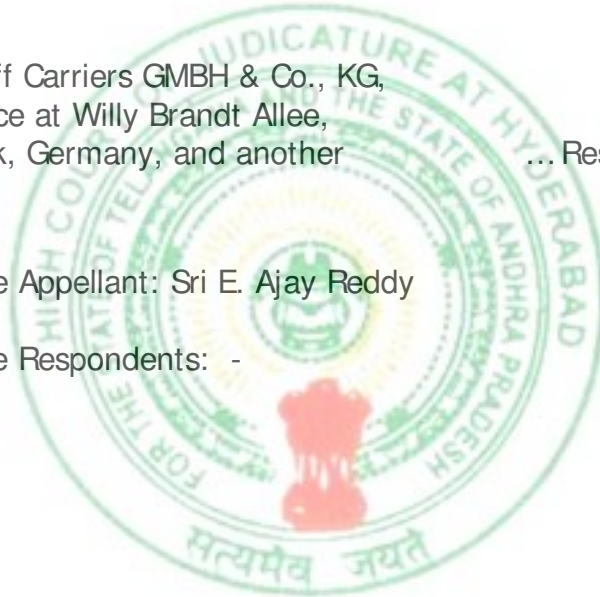
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Having its registered office at
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S. Gopala Krishnan, S/o. Subramanyan ... Appellant

And:

M/s. Oldendorff Carriers GMBH & Co., KG,
Having its Office at Willy Brandt Allee,
623554 Lubeck, Germany, and another ... Respondents

Counsel for the Appellant: Sri E. Ajay Reddy

Counsel for the Respondents: -



The Court made the following:

JUDGMENT: (per the Hon'ble Sri Justice C.V.Nagarjuna Reddy)

This Civil Miscellaneous Appeal is filed questioning the order and decree dated 20.03.2015 in A.O.P.No.414 of 2011 on the file of the I Additional District Judge, Nellore, whereby he has dismissed the said O.P filed for setting aside arbitral award dated 17.01.2011 passed by respondent No.2.

2. At the hearing, Sri E. Ajay Reddy, learned counsel for the appellant, submitted that the lower Court has committed an error in dismissing the O.P. on the sole ground of lack of jurisdiction by placing reliance on Clause 28 of the Voyage Charter Party dated 20.03.2008 (Charter). He argued that while the said clause specifically recited that English Law applies, neither the said clause nor any other clause in the agreement specifically excluded Indian Law. Learned counsel further submitted that the Court below has wrongly relied upon the judgment in *Sakuma Exports Limited v. Louis Dreyfus Commodities and Suisse S.A*¹ wherein the Supreme Court has clarified that the judgment in *Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc.*² has overruled *Bhatia International v. Bulk Trading S.A*³ prospectively and that therefore the agreement in the instant case being prior to the judgment in *Bharat Aluminium Company* (2 supra), the ratio in *Bhatia International* (3 supra) applies and consequently, the Indian Law is not excluded in the instant case.

3. We have carefully considered these submissions of the learned counsel.

4. In *Bhatia International* (3 supra), a three-Judge Bench of the Supreme Court held that to the extent Part II of the Arbitration and

¹ 2014(3) BOM – CR 768 (SC)

² (2012) 9 SCC 552

³ (2002) 4 SCC 105

Conciliation Act, 1996 (for short 'the Act') provides a separate definition of an arbitral award and separate provisions for enforcement of foreign awards, the provisions in Part I dealing with these aspects will not apply to such foreign awards and that the arbitration not having taken place in India, all or some of the provisions of Part I may also get excluded by an express or implied agreement of parties, but if not so excluded the provisions of Part I will also apply to "foreign awards".

5. In *Bharat Aluminium Company* (2 supra), a Constitution Bench of the Supreme Court overruled the judgment in *Bhatia International* (3 supra) holding that the words "under the law" in Section 48(1)(e) of the Act are referable only to the procedural law/curial law of the country under the law of which the award was made and that it has no reference to the substantive law of the contract between the parties. It has held that Part-I of the Act regulates domestic arbitrations at all the four stages of the arbitration, i.e., (i) the commencement of arbitration; (ii) the conduct of arbitration; (iii) the challenge to the award; and (iv) the recognition or enforcement of the award, that Part-II regulates only two stages, (i) and (iv) only to the extent provided therein and that foreign arbitrations covered by stages (i) and (iii) have to be regulated by arbitration law in the country in which the juridical seat is situated. While explaining the difference between the 'domestic award' and 'foreign award', the Supreme Court held that the domestic award can either be (i) an award made in India in a domestic arbitration, or (ii) an award in international arbitration whose juridical seat is in India; and that a foreign award is an award in any arbitration whose juridical seat is outside India which would be enforceable in India, if at all under Part –II and only to the extent provided therein. The Court further held that in case of foreign

award, Part-I is inapplicable and that the Courts in India have no jurisdiction to consider the validity or otherwise of foreign award and they cannot be challenged on merits in Indian Courts. The Supreme Court however followed the doctrine of prospective overruling by clarifying that the law declared in *Bharat Aluminium Company* (2 supra) shall apply prospectively to all the agreements executed after the judgment.

6. No doubt, as submitted by the learned counsel for the appellant, the instant case, in which arbitration agreement was entered into prior to the judgment in *Bharat Aluminium Company* (2 supra), is covered by the law laid down in *Bhatia International* (3 supra). Even so, the Act is not applicable to the agreement between the parties in the instant case as even in *Bhatia International* (3 supra), the Supreme Court held that if all or some of the provisions of Part I of the Act are excluded by an express or implied agreement of parties, the provisions of the Act are not applicable.

In the instant case, Clause 28 of the Charter reads as under:

“Any dispute arising under this Charter Party is to be settled and referred to Arbitration in London. One Arbitrator to be employed by the Charterers and one by the Owners and in case they shall not agree then shall appoint an Umpire whose decision shall be final and binding, the Arbitrators and Umpire to be Commercial Shipping Men. English Law to apply. Notwithstanding anything to the contrary agreed in the charter Party, all disputes where the amount involved is less than USD 35,000 (thirty five thousand) the Arbitration shall be conducted in accordance with the Small Claims Procedure of the L.M.A.A.”

(emphasis added)

7. It is evident from the clear and unambiguous language of Clause 28 of the Charter that it contains an express recital that English Law shall apply. Thus, by implication, all other laws including Indian Law are

excluded. Therefore, even if the ratio in *Bhatia International* (3 supra) is applied in the light of Clause 28 of the Charter, the provisions of Part I of the Act under which the appellant has filed the O.P for setting aside the arbitral award has no application.

8. On the analysis as above, we do not find any illegality in the order passed by the lower Court. Hence, the Civil Miscellaneous Appeal is dismissed.

As a sequel, C.M.A.M.P.No.1010 of 2017 filed by the appellant for interim relief is disposed of as infructuous.

C.V.NAGARJUNA REDDY, J

ANIS, J

14.07.2017

va/bnr

Note: LR copies to be marked.
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