

Tauseef

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

**COMMERCIAL ARBITRATION PETITION NO.1065 OF 2018
WITH
CHAMBER SUMMONS NO.331 OF 2019
IN
COMMERCIAL ARBITRATION PETITION NO.1065 OF 2018
WITH
NOTICE OF MOTION NO.1173 OF 2019
IN
COMMERCIAL ARBITRATION PETITION NO.1065 OF 2018**

Norscot Rig Management Pvt. Ltd.	...Petitioner
V/S.	
Essar Oil field Services Ltd. & Anr.	...Respondents

Mr. Zal Andhyarujina & Mr. Kunal Dwarkadas a/w. Mr. Rishab Gupta, Mr. Sohil Shah & Mr. Jugal Kanani i/b. M/s. Shardul Amarchand Mangaldas for Petitioner.

Mr. Ravi Kadam Senior Counsel a/w. Ms. Rashmin Khandekar, Mr. Ravitej Chilumuri, Ms. Shobhana Narayan, Mr. Chakrapani Misra i/b. M/s. Khaitan & Co. for Respondent No.1.

Mr. Dinyar Madon Senior Counsel a/w. Mr. Atul Daga i/b. Mr. Aditya Khanna for Respondent No.2.

Mr. Gourav Mehta Senior Counsel i/b. Mr. Vikrant Zunjarrao for Axis Bank (Intervenor).

**CORAM : G.S. KULKARNI, J.
Date : 03 OCTOBER 2019.**

P.C.:

1. This petition is filed under Section 9 of the Arbitration and Conciliation Act, 1996, whereby, the petitioner has prayed for interim measures pending the enforcement of a foreign award dated 30 November

2019. It is not in dispute that the arbitral tribunal is a London seated arbitral tribunal and the arbitral award was made in accordance with the ICC rules.

2. Mr. Kadam learned counsel for respondent No.1 has raised an objection to the maintainability of this petition referring to the provision of Section 13 of the Arbitration and Conciliation (Amendment Act), 2019 (for short **“2019 Amendment Act”**). By a virtue of Section 13 of the 2019 Amendment Act, in the Principal Act after Section 86, a new provision Section 87, is inserted providing for the “Effect of arbitral and related court proceedings commenced prior to 23 October 2015” Section 13 reads as under:

*“13. **Insertion of new Section 87** – After section 86 of the principal Act, the following section shall be inserted and shall be deemed to have been inserted with effect from the 23 October 2015 namely:*

*87. **Effect of arbitral and related Court proceedings commenced prior to 23 October 2015.** - Unless the parties otherwise agree, the amendments made to this Act by the Arbitration and Conciliation (Amendment) Act, 2015 (3 of 2016) shall -*

(a). Not apply to -

(i). arbitral proceedings commenced before the commencement of the Arbitration and Conciliation (Amendment) Act, 2015 (3 of 2016);

(ii). Court proceedings arising out of or in relation to such arbitral proceedings irrespective of whether such Court proceedings are commenced prior to or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015 (3 of

2016);

(b). *apply only to arbitral proceedings commenced on or after commencement of the Arbitration and Conciliation (Amendment) Act, 2015 (3 of 2016) and to court proceedings arising out of or in relation to such arbitral proceedings.”*

4. The contention of Mr. Kadam is that by virtue of the aforesaid amendment to the Principal Act a remedy under Section 9 of the Act would not be available to the petitioner, for the reason that the arbitration in question is a foreign seated arbitration and not governed by the India Law. It is contended that the basis for filing these proceedings, being the 2015 Amendment provision (proviso to sub-section 2 of the section2) itself now being declared by the legislature to be non-applicable, by virtue of the 2019 Amendment Act.

5. Mr. Kadam has also referred to the decision of the Supreme Court in ***Union of India Vs. Reliance Industries Limited***¹ to contend that in the present case, by necessary implication Part I of the Arbitration Act, is not applicable when the seat of the arbitration was outside India.

6. A reading of Section 87 as inserted by the 2019 Amendment Act makes it quite clear that the legislature has now stipulated that unless the parties otherwise agree the provisions of the 2015 Amendment Act, shall not apply to arbitral proceedings, which commenced before the

¹(2014) 7 SCC 603

commencement of the 2015 Amendment Act (i.e. on 23 October 2015), as also to Court proceedings arising out of or in relation to such arbitral proceedings, irrespective of whether such Court proceedings commenced prior to or after commencement of 2015 Amendment Act, sub-clause (b) of section 87 also provides that unless the parties otherwise agree 2015 Amendment Act shall not apply to arbitral proceedings commenced on or after the commencement of the 2015 Amendment Act and to court proceedings arising out of or in relation to such arbitral proceedings.

7. In the present case, it is not in dispute that the arbitration is a foreign seated international commercial arbitration. Also the parties are not governed by the Indian Law. There is no agreement between the parties to apply Part I of the Act much less the 2015 Amendment Act, in this eventuality, in my opinion even applying the provisions of Section 87 as amended by the 2019 Amendment Act, this petition would not maintainable.

8. There is also much substance in the contention as urged by Mr. Kadam referring to the decision of Supreme Court in ***Union of India Vs. Reliance Industries Limited***.(supra), in which the Supreme Court has held that when the juridical seat is outside India or where the law other than Indian Law governs arbitration agreement Part One of the Arbitration

Act would be excluded by necessary implication. The Supreme Court in para 20 and 21 observed thus:

“(20).It is interesting to note that even though the law governing the arbitration agreement was not specified, yet this Court held, having regard to various circumstances, that the seat of arbitration would be London and therefore, by necessary implication, the ratio of Bhatia International would not apply.

(21).The last paragraph of Balco Judgment has now to be read with two caveats, both emanating from para 32 of Bhatia International itself – 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 by necessary implication. Therefore, even in the cases governed by the Bhatia principle, it is only those cases in which agreements stipulate that the seat of the arbitration is in India or on whose facts a judgment cannot be reached on the seat of the arbitration as being outside India that would continue to be governed by the Bhatia principle. Also, it is only those agreements which stipulate or can be read to stipulate that the law governing the arbitration agreement is Indian law which would continue to be governed by the Bhatia rule.”

(emphasis supplied)

9. Considering the aforesaid clear position in law not only as brought about by the 2019 Amendment Act but also from the decision of the Supreme Court in ***Union of India Vs. Reliance Industries Limited*** (supra), in my opinion, this petition under Section 9 is not maintainable. The petition is accordingly dismissed, however, keeping open all contentions of the petitioner, to be espoused in appropriate proceedings.

(G.S. KULKARNI, J.)