

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 03.07.2017

+ **EX.P.198/2012**

M/S VALUE ADVISORY SERVICES

..... Decree Holder

versus

M/S ZTE CORPORATION

..... Judgment Debtor

Advocates who appeared in this case:

For the Decree Holder : Mr Jeevesh Nagrath, Mr Pratham Sharma
and Mr Rohan Ganpathy.

For the Judgment Debtor : Mr T. K Ganju, Senior Advocate with Mr
Vijay Kaundal and Mr Rupesh Gupta.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

Introduction

1. Value Advisory Services (hereafter 'VAS') has filed the present petition for enforcement of the partial award dated 09.11.2009 and the final award dated 23.07.2010 (hereafter 'the impugned awards') under Sections 47 and 49 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'). The impugned awards were delivered by an arbitral tribunal constituted under the Rules of Arbitration of the International Chamber of Commerce (hereafter 'the ICC Rules') pursuant to a request for arbitration filed by VAS with the Secretariat of the International Court of Arbitration (hereafter 'the ICC Court') of the International Chamber of Commerce

(hereafter 'ICC'). The impugned awards were made in respect of disputes that had arisen between VAS and the Judgment Debtor (hereafter 'ZTE') in relation to their agreement dated 01.01.2003.

2. ZTE has opposed the enforcement of the impugned awards on two grounds. First, ZTE claims that the arbitral procedure was not in accordance with the agreement between the parties inasmuch as the parties had agreed that the disputes would be submitted to the Singapore International Arbitration Centre (hereafter 'SIAC'). However, SIAC had declined to administer the arbitration. According to ZTE, the arbitral tribunal constituted by ICC had no authority or jurisdiction to make the impugned awards. Second, ZTE claims that the impugned awards were obtained by fraud inasmuch as VAS was struck off from the Register of Companies pursuant to an application voluntarily made by it under Section 560 of the Companies Act, 1956 (hereafter 'the Companies Act'). This was also notified in the Official Gazette on 03.02.2007 and VAS ceased to exist with effect from the said date. However, this fact was concealed from the arbitral tribunal as well as from ZTE. ZTE claims that since the impugned awards were obtained by fraud, they are null and void.

Factual Context

3. VAS - a company incorporated under the laws of India - is primarily engaged in the business of providing consultancy services in the field of telecommunication in India.

4. ZTE is a company incorporated under the laws of the People's Republic of China and is, *inter alia* engaged in the business of supplying telecom equipment for telecommunication projects.

5. On 13.01.2003, ZTE and VAS entered into the agreement dated 01.01.2003 (hereafter 'the Agreement') whereby VAS was appointed to render consultancy services and to develop the market of ZTE's products in India. The Agreement was for a period of two years commencing from 13.01.2003. In consideration for its services, VAS was to receive a total consideration of US\$5000/- per month in advance and commission of 4% of total value of the order on every new purchase order received from ITI/TCIL (exclusively limited to reservation quota).

6. Disputes arose between the parties in regard to the amounts payable to VAS under the Agreement; ZTE claimed that the Agreement was terminated prior to expiry of its term, that is, in July 2003.

7. The Agreement included an arbitration clause (Clause 8), which provided for disputes to be settled under the ICC Rules and by an arbitral tribunal of three arbitrators to be constituted under the said rules. However, the arbitration clause also provided that the disputes would be submitted to SIAC.

8. On 22.04.2005, VAS wrote to the SIAC and ICC for clarification in regard to Clause 8 of the Agreement. In response to the same, on 14.05.2005, SIAC replied that it will not be able to administer the arbitration case under the ICC Rules. ICC also sent a communication on 19.05.2005 *inter alia* stating that no other arbitration institution is permitted to administer arbitration cases under the ICC Rules.

9. In view of the response received from the SIAC and ICC, VAS sent a communication dated 27.05.2005 to ZTE, informing it that in view of the

clarifications, VAS proposed to refer the disputes to ICC. However, VAS received no response to its aforesaid communication.

10. Thereafter, on 18.08.2005, VAS filed its request for arbitration with the Secretariat of the ICC Court (ICC Secretariat). This was communicated by the ICC Secretariat to ZTE. On receipt of such communication, ZTE filed its objection on 21.09.2005 with the ICC Secretariat claiming that VAS's request for arbitration was not in accordance with the Agreement and ICC had no authority to administer the arbitral proceedings in this case. ZTE also nominated Ms Gao Fei as its arbitrator subject to and without prejudice to its objections to ICC's jurisdiction.

11. On 18.11.2005, the ICC Court, being *prima facie* satisfied that an arbitration agreement under the ICC Rules may exist, decided that the arbitration shall proceed. This decision was administrative in nature. And, subsequently the controversy was referred to the arbitral tribunal for a decision on its jurisdiction in terms of Article 6(2) of the ICC Rules. Accordingly, the ICC Court confirmed the appointment of Mr N K Goyal and Ms Gao Fei, the arbitrators nominated by the respective parties, as co-arbitrators.

12. In terms of the ICC Rules, on 09.12.2005, the ICC Court appointed the Chairman of the arbitral tribunal (Mr Tan Kok Quan, SC).

13. The arbitral tribunal considered Clause 8 of the Agreement and held that it had the jurisdiction to adjudicate the disputes. The preliminary order to the aforesaid effect was issued by Mr Tan Kok Quan, the chairman of the arbitral tribunal, on 05.08.2008.

14. The said order dated 05.08.2008 was carried in appeal by ZTE before the High Court of Singapore (in case no: OS1152/2008/E), which was dismissed on 16.01.2009.

15. VAS had made an application under the Simplified Exit Scheme, 2003 for its name to be struck off from the Register of Companies maintained by the Registrar of Companies (ROC). The said application was accepted on 29.12.2006 while the arbitral proceedings were pending. The ROC struck off the name of VAS from the Register of Companies pursuant to Section 560(5) of the Companies Act. This was published in the Official Gazette on 03.02.2007.

16. The partial award regarding the merits of the dispute was delivered on 09.11.2009 and the final award regarding costs was delivered on 23.07.2010. The impugned awards were majority awards and Ms Gao Fei entered a dissenting opinion.

17. After the partial award was delivered on 09.11.2009, VAS filed a petition (Co. Pet. 72/2009) before this Court for restoration of its name in the Register of Companies. This petition was rejected. Another petition (Co. Pet. 200/2011) was filed by the creditors of VAS on 20.04.2011 for restoration of the name of VAS on the Register of Companies. This petition was allowed by the Company Court on 08.02.2012. ZTE filed an appeal against the said decision (Co. App. 25/2012), which was dismissed by the Division Bench of this Court on 14.03.2013. ZTE preferred a Special Leave Petition before the Supreme Court, which was also dismissed.

Impugned awards

18. The arbitral tribunal framed the following issues for adjudication, which are as hereunder:-

- "(1) Whether under Clause 8 of the Agreement, this Arbitral Tribunal has jurisdiction to arbitrate the disputes.
- (2) Whether the Agreement was terminated by the Respondent by notice in July 2003.
- (3) The amount of monthly payments on account due to the Claimant.
- (4) The amount of commission which the Claimant is entitled to"

19. ZTE had objected to the jurisdiction of the arbitral tribunal mainly on the grounds that (i) SIAC had erred in holding that it cannot administer the disputes under the ICC Rules; (ii) under Clause 8 of the Agreement, SIAC has jurisdiction to deal with the dispute and not ICC; and (iii) the difficulty in the application of the ICC Rules does not lead to the conclusion that SIAC has no jurisdiction.

20. The arbitral tribunal held that the letter dated 14.05.2005, sent by SIAC clearly indicated that it could not administer the arbitration between the parties under the ICC Rules. And, under the ICC Rules, no other institution is allowed to administer any arbitration case applying the ICC Rules. In view of the above, the arbitral tribunal concluded that in terms of Clause 8 of the Agreement, the arbitral tribunal had the jurisdiction to adjudicate the disputes under the ICC Rules.

21. Insofar as the issue regarding termination of the Agreement in July 2003 was concerned, ZTE asserted that a verbal notice of termination was given to VAS as evidenced by its letter dated 25.09.2004 and that the

Agreement stood terminated after six months from July 2003. VAS disputed the same and contended that no notice of termination was issued in July 2003 and the letter dated 25.09.2004 was received by VAS on 18.10.2004; VAS claimed that the said letter was antedated to deprive VAS of the commission that it was entitled to receive under a MoU dated 11.10.2004.

22. The minutes of the meeting dated 06.09.2003 held between the parties were examined by the arbitral tribunal. The said minutes *inter alia* recorded that ZTE had appreciated the work of VAS and agreed to take up the matter of delayed payment with the head office of ZTE. These minutes were approved by ZTE by sending a fax in that regard. On the basis of these minutes, the arbitral tribunal concluded that ZTE did not send any notice in July 2003 to terminate the Agreement and the earliest notice for termination was dated 15.10.2004, which was received by VAS on 18.10.2004; therefore, six months from either date would mean that the Agreement ran its course of two years and stood terminated by efflux of time on 12.01.2005.

23. Further, the arbitral tribunal directed ZTE to furnish a certificate for Tax Deducted at Source (TDS) for the amount of US\$ 2,500/- deducted by ZTE as TDS from the advance payments made under the Agreement within fifteen days of the receipt of the partial award to avoid payment of the aforesaid sum to VAS.

24. On the issue of commission to be paid for orders placed between 13.01.2003 to 12.01.2005 by ITI/TCIL as per the 'reservation quota' assigned by ITI/TCIL to ZTE, the arbitral tribunal held that in terms of Clauses 3 and 7 of the Agreement, VAS was entitled to receive 4%

commission on the total value of every new purchase order received from ITI/TCIL upto 12.01.2005, quantified at US\$ 8,12,569/-.

25. For purchase orders received after 12.01.2005, VAS submitted that it is entitled to 4% commission on every new purchase order so received, if the purchase order was issued after 12.01.2005 but had been clarified during the period 13.01.2003 to 12.01.2005 by the execution of agreements/MoUs requiring ITI to place purchase orders with ZTE. It was held that Clause 7 clearly provides for the duration of the Agreement as two years from 13.01.2003 and if VAS's contention was correct, the said clause would have been worded differently.

26. VAS also submitted that in the alternative, it is entitled to receive 2% of the value of the Agreement and the MoU as per Clause 3 of the Agreement, as varied by the parties pursuant to the meeting held on 06.09.2003. The said submission did not find favour with the arbitral tribunal as (i) the minutes of the meeting dated 06.09.2003 did not evidence any variation in Clause 3, as there was no mention of VAS's entitlement to 2% of the value of the Agreement and the MoU; (ii) the alleged variation was not supported by any consideration; and (iii) VAS did not plead its case on that basis.

27. In view of the above findings, the arbitral tribunal delivered the partial award awarding the amounts as set out hereunder:-

"(1) US\$62,500.00 (being US\$90,000.00 less US\$25,000.00) if Respondent is able to produce the TDS Certificate within 15 days of the date of Respondent's receipt of the Partial Award. If the Respondent does not produce the TDS Certificate by that date, then the Award is for

the sum of US\$65,000.00 and interest at the rate of 6% per annum from 22 August 2005 until payment on:

- (a) The sum of US\$62,500.00 if the TDS Certificate is produced within 15 days of the date of the Respondent's receipt of this Partial Award;
 - (b) Alternatively, the sum of US\$ 65,000.00 if the said TDS Certificate is not produced under (a).
- (2) US\$812,569.00 for the value of purchase orders issued to the Respondent by ITI/TCIL between 13 January 2003 and 12 January 2005 and interest on the said sum of US\$812,569.00 at the rate of 6% per annum from 22 August 2005 until payment."

28. The issue of costs was reserved for adjudication under the final award. VAS submitted the details of costs for recovery of all costs and expenditure incurred in respect of the arbitration proceedings, aggregating US\$3,67,500/-.

29. The arbitral tribunal noted that VAS had succeeded in respect of issues (1) and (2) and partially succeeded in respect of issues (3) and (4). In view of the practice followed in Singapore, being that the party that fails to prevail in the arbitral proceedings pays the costs to the party who succeeds in its claim or defence, US\$ 1,57,500/- being 75% of the costs of arbitration (as fixed by the ICC Court) and other legal costs were awarded to VAS.

Submissions

30. Mr Ganju, learned senior counsel appearing for ZTE contended that the impugned awards were null and void as the arbitral proceedings were not in terms of the arbitration agreement. He contended that the agreement (arbitration clause) between the parties expressly provided that the disputes would be submitted to SIAC. Admittedly, the arbitral proceedings were not administered by SIAC and, therefore, the proceedings were contrary to the agreement between the parties. He relied on the decision of the Supreme Court in *Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd. and Another: AIR 2005 SC 3766* and on the strength of the said decision contended that the question whether the arbitral tribunal had the jurisdiction to make the impugned awards would require a full trial and the decision of the arbitral tribunal or the Singapore High Court dismissing ZTE's appeal would not be binding on this Court while considering whether the enforcement of the impugned awards ought to be declined under Section 48(1)(d) of the Act. He also relied on the decisions of this Court in *Japan Travel Services v. All Nippon Airways Company Ltd. and Ors.: 2009 SCC OnLine Del 3604; Marina World Shipping Corporation Ltd. v. Jindal Exports & Imports Pvt. Ltd.: (2012) 188 DLT 482* and *AM Rasool Const. & Engg. Services Pvt. Ltd. v. National Bldgs. Const. Corpn. Ltd.:(1998) 71 DLT 298 (DB)* in support of his contentions.

31. Mr Ganju further submitted that the premise that SIAC could not administer an ICC arbitration was also erroneous. He referred to the decision given in *Insignia Technology Co. Ltd. v. Alstom Technology Ltd.: (2009) 1 SLR 23*, wherein the Singapore High Court had upheld the validity of an arbitration clause, which provided for SIAC to administer an arbitration case under the ICC Rules. He submitted that the impugned

awards and the order dated 16.01.2009 passed by the Singapore High Court rejecting ZTE's appeal was directly contrary to the Singapore High Court's earlier decision in *Insignia Technology Co. Ltd.*(*supra*) and, therefore, were perverse and wholly unsustainable.

32. Next, Mr Ganju contended that VAS had obtained the impugned awards by fraud and by concealing that it was struck off the Register of Companies in December 2006. He submitted that prior to invoking the arbitration clause, VAS had made an application under the Simplified Exit Scheme, 2003 for the name of the company to be struck off from the Register of Companies under Section 560 of the Companies Act. He submitted that this fact and the fact that VAS's name was removed from the Register of Companies was concealed from the arbitral tribunal. VAS had applied for restoration of the company in December 2009 (Co. Pet. No.72/2009), which was subsequently dismissed. He submitted that ZTE was not made aware of this fact till VAS approached this Court for execution of the impugned awards and filed the execution petition (Ex.P. No.334/2010). The said petition was withdrawn on 23.09.2011 as VAS was not a legal entity at the material time. He submitted that VAS was restored on the Register of Companies pursuant to a fresh application filed by the creditors of VAS (Co. Pet. No.200/2011). He submitted that this was a collusive petition filed at the instance of VAS. He earnestly contended that since the impugned awards were obtained by concealment of material facts and express misrepresentation regarding VAS' legal status, the impugned awards were nullity as it is well settled that fraud vitiates all proceedings. He relied on the decision of the Supreme Court in *S. P. Chengalvaraya Naidu (dead) by LRs v. Jagannath (dead) by LRs*

and Ors.: AIR 1994 SC 853 in support of his contention that the person whose case is based on falsehood ought to be summarily sent out of litigation at any stage. He also relied on the decisions of the Supreme Court in *Raju Ramsing Vasave v. Mahesh Deorao Bhivapurkar & Ors.: (2008) 9 SCC 54; Ganpatbhai Mahijibhai Solanki v. State of Gujarat & Ors.: (2008) 12 SCC 353* and *Ramesh Kumar and Anr. v. Furu Ram and Anr.: (2011) 8 SCC 613* in support of his aforesaid contention.

33. He also contended that the restoration of VAS's name on the Register of Companies did not automatically place VAS in a position as if its name had not been struck off as no directions/orders to that effect were passed by the Company Court while restoring VAS's name on Register of Companies.

34. Mr Jeevesh Nagrath, learned counsel appearing for VAS countered the submissions of Mr Ganju. He referred to the arbitration clause and contended that parties had agreed that the arbitration shall be conducted under the ICC Rules and by an arbitral tribunal of three members constituted in accordance with the said rules. Thus, the composition of the arbitral tribunal and the arbitral proceedings were in accordance with the arbitration agreement.

35. He relied upon the decision of the Supreme Court in *Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc.: (2012) 9 SCC 552* and on the strength of the said decision submitted that the power of the Court while dealing with enforcement of foreign awards is very restricted and a party resisting enforcement must prove the grounds as mentioned in Section 48 of the Act.

36. Next, Mr Nagrath referred to the contents of the memorandum of appeal filed by ZTE before the Singapore High Court to impugn the decision of the arbitral tribunal, rejecting ZTE's plea of lack of jurisdiction. He submitted that ZTE had urged various grounds to challenge the decision of the arbitral tribunal and had also extensively relied on the decision rendered in *Insignia Technology Co. Ltd. v. Alstom Technology Ltd.* (*supra*). However, the appeal was dismissed with costs on 16.01.2009 and the said decision had become final. He submitted that admittedly Singapore High Court was a court of competent jurisdiction and thus its decision regarding the objections raised by ZTE would operate as *res judicata* and it would not be open for ZTE to re-agitate the same issues.

37. He next submitted that the objections now sought to be raised by ZTE were also raised before the Division Bench of this Court in Co. App. no. 25/2012, filed by ZTE. He drew the attention of this Court to various observations made by the Division Bench in the aforementioned order dated 14.03.2013 and submitted that the same makes it amply clear that the Division Bench had not accepted the said objections; therefore, ZTE's objections ought to meet the same fate in the present proceedings.

Reasoning and Conclusion

38. The first and foremost question to be addressed is whether the enforcement of the impugned awards are liable to be declined on the grounds as mentioned in Section 48(1)(d) of the Act, that is, '*the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration*

took place'. The arbitration clause (Clause 8) included in the Agreement is set out as under:-

“8. Governing Law and Arbitration

The conclusion of this agreement, its validity, construction, performance and settlement of the disputes shall be governed by the Laws of Singapore.

All disputes arising from the execution of or in connection with the contract shall be settled through friendly negotiation between both parties. In case no settlement can be reached, the disputes shall be submitted to the Singapore International Arbitration Centre for arbitration in accordance with the Rules of Arbitration of the International Chamber of Commerce in effect at the time of applying for arbitration by three (3) Arbitrators appointed in accordance with the said Rules. The venue of arbitration shall be Singapore. The arbitration award shall be final and binding upon both parties. The arbitration fees shall be borne by the losing party except otherwise awarded by the arbitration commission.”

39. A plain reading of the aforesaid clause indicates that the parties had agreed that (a) the disputes would be submitted to SIAC; (b) the arbitration would be in accordance with the ICC Rules; and (c) the arbitration shall be conducted by three arbitrators appointed in accordance with the ICC Rules. There is no dispute that arbitration was conducted in accordance with the ICC Rules. It is also apparent that the constitution of the arbitral tribunal was also in accordance with the ICC Rules. Sub-article 4 of Article 8 of the ICC Rules as applicable at the material time (ICC Rules, 1998) provides for constitution of the arbitral tribunal, in cases where the parties have agreed that their disputes shall be resolved by three arbitrators. The said sub-article reads as under:-

“Article 8 Number of Arbitrators

XXXX

XXXX

XXXX

XXXX

4. Where the dispute is to be referred to three arbitrators, each party shall nominate in the Request and the Answer, respectively, one arbitrator for confirmation. If a party fails to nominate an arbitrator, the appointment shall be made by the Court. The third arbitrator, who will act as chairman of the Arbitral Tribunal, shall be appointed by the Court, unless the parties have agreed upon another procedure for such appointment, in which case the nomination will be subject to confirmation pursuant to Article 9. Should such procedure not result in a nomination within the time limit fixed by the parties or the Court, the third arbitrator shall be appointed by the Court.”

40. In terms of the said Rules, the ICC Court confirmed the appointment of Mr N K Goyal nominated as an arbitrator by VAS. Further, Ms Gao Fei, who was nominated as an arbitrator by ZTE, subject to its objection as to jurisdiction, was confirmed as the co-arbitrator by the ICC Court. In terms of the ICC Rules, the Chairman of the arbitral tribunal (Mr Tan Kok Quan, SC) was appointed by the ICC Court. Thus, indisputably, the appointment of the arbitral tribunal was in terms of the ICC Rules.

41. There is also no dispute that the arbitral procedure followed by the arbitral tribunal was in conformity with the ICC Rules, and, thus, was in accordance with the Agreement between the parties. The only controversy that remains is with respect to the institutional administrative assistance rendered in the context of the arbitral proceedings. According to ZTE, the role performed by the ICC Court and its Secretariat ought to have been performed by SIAC.

42. The Agreement provided that the disputes be submitted to SIAC which in this case was not done on account of SIAC declining to administer the arbitration in accordance with the ICC Rules.

43. Admittedly, VAS had sent a letter to the President, SIAC and ICC seeking clarification with regard to the arbitration clause. VAS had received a response from the SIAC which clearly stated that (a) the clause regarding submission of disputes to SIAC was not workable because SIAC only administered arbitration under the SIAC Rules and if the parties choose ICC Rules, SIAC would not be able to administer the arbitration; and (b) that the case will have to be administered by the ICC Court. ICC had also responded to VAS's request for clarification by stating that ICC Rules could only be administered by the ICC Court and no other institution such as SIAC could administer arbitration cases under the ICC Rules.

44. Mr Ganju has earnestly contended that SIAC could also administer arbitrations under the ICC Rules with the SIAC Secretariat, Registrar and Board of Directors of SIAC performing the roles of the ICC Secretariat, Secretary General and the ICC Court respectively, and by suitably adapting the ICC Rules in this regard. This Court is not persuaded to accept the same essentially for two reasons. First, that the parties had expressly agreed that arbitration shall be conducted under the ICC Rules by three arbitrators to be appointed in accordance with the said rules. Admittedly, the ICC Court plays a significant role under the ICC Rules. In terms of Article 1(2) of the ICC Rules, the ICC Court does not resolve the disputes but administers the resolution of disputes by the arbitral tribunals. Article 1(2) (as subsequently amended) now expressly provides that the "*Court is the only body authorized to administer arbitration under the Rules,*

including the scrutiny and approval of awards rendered in accordance with the Rules”. The ICC Court had adopted its own set of internal rules in accordance with which it functions. In terms of Article 1(5) of the ICC Rules, the ICC Court is assisted by Secretariat of the Court but functions under the directions of the “Secretary General”.

45. A plain reading of the ICC Rules indicates that the ICC Court plays a pivotal role in administration of the arbitration conducted under the ICC Rules including the appointment of an arbitrator and approval and scrutiny of the awards.

46. It is clear from the plain reading of the arbitration clause, that the parties had agreed that arbitration would be conducted under the ICC Rules. This would also imply that the parties had agreed to the ICC Court playing the role specifically provided under the ICC Rules. Plainly, there was little scope for SIAC to be substituted in place of the ICC Court.

47. The second and more important reason is that SIAC had declined to administer the arbitration conducted under the ICC Rules and ICC had also clarified that the ICC Court was the only body authorized to administer the arbitration under the ICC Rules. This clarification was subsequently expressly included in Article 1(2) of the ICC Rules.

48. By a letter dated 27.05.2005, VAS informed ZTE of the aforesaid communications received from SIAC and ICC and stated that in view of the clarifications given by SIAC and ICC, VAS was proposing to prefer the disputes in accordance with the ICC Rules to ICC and sought the response from ZTE. VAS further stated that in the event no comments were received within 15 days, it would proceed with the matter. No response to the said

letter was received by VAS. Plainly, disputes had arisen between the parties and VAS had, in no uncertain terms, expressed its intention to refer the disputes to ICC under the ICC Rules. In the event ZTE wanted to contest the same and refer the disputes to SIAC, it was open to ZTE to independently convince SIAC that it could administer an arbitration under the ICC Rules. Concededly, no such efforts were made by ZTE. ZTE made no efforts to approach SIAC at the material time.

49. The decision in *Insignia Technology Co. Ltd.* (*supra*) turns on its own facts. In that case, SIAC had confirmed that it was prepared to administer the arbitration under the ICC Rules and had proposed that SIAC Secretariat, Registrar and the Board of Directors would perform the roles of the ICC Secretariat, Secretary General and the ICC Court respectively. In the present case, SIAC had declined to administer arbitration under the ICC Rules and thus there was no possibility of an arbitration conducted under the ICC Rules, to be administered by SIAC, assuming that this was at all possible in the first place. This Court is of the view that on a plain reading of the ICC Rules, it would not be possible to administer any arbitration case to be conducted under the said rules by any other body performing the role of the ICC Court. This is also the clarification furnished by ICC to VAS and the ICC Rules (as subsequently amended) now expressly clarify the same. Secondly, the ICC Court itself has to function under the set of rules as specified (Appendix II to the ICC Rules); SIAC would function in accordance with its rules and not in conformity with the rules adopted by the ICC Court for its functioning.

50. The arbitral tribunal had considered the rival contentions and had observed as under:

“24. Under Singapore Law, any ambiguity in an agreement has to be interpreted in a manner so as to give effect to it rather than in a manner that renders it nugatory (See: The interpretation of Contracts by Lewison 4th Edition – paragraph 7.15). The effect of SIAC’s letter of 14 May 2005 is that SIAC made it clear that it could not administer this Arbitration under ICC Rules. However, under the ICC Rules of Arbitration, no other institution is allowed to administer any arbitration case applying the ICC Rules of Arbitration. Pursuant to the ICC Rules, the ICC Court plays an important role in several stages of the arbitration, such as the scrutiny of awards, and no Award can be rendered by the Arbitral Tribunal until it has been approved by the Court in accordance with Article 27 of the ICC Rules.

25. As the parties have agreed that any dispute should be resolved by arbitration, for the reasons set out above, on a true and proper construction, the Arbitral Tribunal by a majority (Ms Gao Fei dissenting) finds that Clause 8 confers jurisdiction on this arbitral tribunal to adjudicate the disputes under ICC Rules.”

51. This Court concurs with the conclusion of the arbitral tribunal - as also upheld by the Singapore High Court - that submission of disputes to SIAC for an arbitration to be conducted under the ICC Rules was not workable.

52. The immediate question that follows is whether the part of the clause requiring the disputes to be submitted to SIAC was severable from the remaining clause. It is well settled that the doctrine of severability or the Blue Pencil Rule is applicable where a part of the contract, which is void or unenforceable, can be severed from the main contract without affecting the substantial agreement between the parties (See *Shin Satellite Public Co. Ltd v. Jain Studios Ltd.*: (2006) 2 SCC 628).

53. In the present case, it cannot be disputed that the parties had agreed (a) that their disputes shall be resolved by arbitration; (b) that the arbitration shall be conducted under the ICC Rules; (c) that it shall be conducted by an arbitral tribunal constituted by three arbitrators appointed in accordance with the ICC Rules; (d) the venue of the arbitration would be Singapore; and (e) that the arbitral award would be final and binding on the parties. The aforesaid constitutes the quintessential agreement between the parties. The invalidity or unworkability of the part of the clause that provides for the disputes to be submitted to SIAC would not render the entire arbitration agreement (arbitration clause) void. In ***Enercon (India) Ltd & Ors. v. Enercon GMBH & Anr: 2014 (5)SCC 1***, the Supreme Court had observed that "*when faced with a seemingly unworkable arbitration clause, it would be the duty of the court to make the same workable within the permissible limits of the law, without stretching it beyond the boundaries of recognition*".

54. It is also necessary to observe that the parties had indisputably agreed that "*the conclusions of this agreement, its validity, construction, performance and settlement of the disputes shall be governed by the Laws of Singapore*". Thus, the question as to the interpretation of the arbitration clause would have to be addressed in accordance with the laws applicable in Singapore. Thus, if according to Singapore Law, the arbitration clause was required to be interpreted in a manner so as to sustain the arbitration clause (as has been held by the arbitral tribunal), the decision of the arbitral tribunal to sever the part of the arbitration clause that provided for disputes to be submitted to SIAC and to ignore the same, cannot be faulted. In the present case, ZTE has not produced any material to dispute the proposition

that under the Singapore Law, an agreement has to be interpreted in a manner so as to sustain it rather than render it nugatory.

55. There is much merit in Mr Ganju's contention that the finding of an arbitral tribunal regarding its own jurisdiction is not final and binding on this Court while considering an application under Section 48 of the Act. This is also the consistent view expressed by this Court (See: ***Sudhir Gopi v Indira Gandhi National Open University and Anr: 2017 SCC OnLineDel 8345, Falcon Progress Ltd. v. Sara International Ltd.: 238 (2017) DLT 565*** and ***Cruz City 1 Mauritius Holdings v. Unitech Limited: 239 (2017) DLT 649***). Thus, the party against whom a foreign award is sought to be enforced is to be provided full opportunity to provide evidence to show that the arbitral tribunal lacked the jurisdiction to make the foreign award. In ***Shin-Etsu Chemical Co. Ltd.*** (*supra*), the Supreme Court held that a finding regarding an arbitration agreement rendered under Section 45 of the Act would only be a *prima facie* finding and would not preclude a full examination at the post award stage. There can be no quarrel to this proposition. However, the onus to prove that the arbitral tribunal lacked jurisdiction or that any of the other grounds as set out under Section 48(1) of the Act are attracted, lies squarely on a party challenging the enforcement of the foreign award. Thus, ZTE was required to provide all material necessary for establishing that enforcement of the impugned awards ought to be declined as the arbitral proceedings were not in accordance with the Agreement. The only material referred to by ZTE is the arbitration clause (Clause 8) as well as the decision of the Singapore High Court in ***Insignia Technology Co. Ltd.*** (*supra*). Accordingly, this Court has independently examined the contentions regarding the

interpretation of the arbitration agreement (Clause 8) and finds no reason to differ with the view taken by the arbitral tribunal.

56. The decision of this Court in *Japan Travel Services* (*supra*) is of little assistance to ZTE. In that case, the arbitration clause expressly provided that the disputes between the parties would be referred to and finally resolved by arbitration “*in Tokyo, Japan in accordance with the Arbitration Rules of the Arbitration Institute, Ministry of Justice (Japan) for the time being in force, which Rules are deemed to be incorporated by reference into this Clause. There shall be a sole arbitrator to be appointed by the Director of the Arbitration Office*”. However, the disputes were submitted to Japan Commercial Arbitration Association (JCAA) and the subject arbitral awards were delivered by an arbitrator appointed by JCAA. This was (a) plainly not in terms of the arbitration clause and (b) there was no evidence produced either before the arbitral tribunal or before this Court to establish that the arbitration clause as agreed was unworkable. On the contrary, the respondents (who were seeking to sustain and enforce the arbitral awards delivered by the arbitrator appointed by the JCAA), sought to rely on the correspondence between the parties to submit that the arbitration under JCAA was agreed to between the parties. This Court observed that the submissions made on behalf of the respondents indicated that their contention was that a new arbitration agreement had been executed between the parties superseding the dispute resolution mechanism provided under the arbitration clause. Accordingly, this Court examined the correspondence between the parties and found that the said submission was unmerited. In the present case, VAS had produced sufficient evidence to show that the arbitration clause was not workable and the submission

that part of the arbitration clause requiring the disputes to be submitted to SIAC is not workable, had been accepted by the arbitral tribunal. Further, the arbitration has been conducted as per the ICC Rules (as expressly agreed by the parties) by the arbitral tribunal constituted in terms of the said rules.

57. The decision of this Court in ***Marina World Shipping Corporation Ltd.*** (*supra*) is wholly inapplicable in the facts of the present case. In that case, a co-ordinate bench of this Court had held that this Court was not satisfied “*even prima facie that there was, in fact, an arbitration agreement between Marina and Jindal*”. Plainly, in absence of an arbitration agreement, the question of an arbitral award did not arise.

58. The decision of this Court in the case of ***AM Rasool Const. & Engg. Services Pvt. Ltd.*** (*supra*) also does not further ZTE's case in any manner. In that case, the parties had agreed that the disputes would be referred to the sole arbitration of the “Project Director” and he could arbitrate the dispute himself or refer the same to another officer of the Corporation (respondent therein). However, there was no person who was holding the post of Project Director at the material time and the arbitrator was appointed by the Chairman cum Managing Director of the Corporation. The matter came to be considered by the Court in the context of the Arbitration Act, 1940 and it was held that the appointment of an arbitrator was a matter of agreement and if no person was designated as a Project Director, the only available course of action was to approach this Court under Section 20(4) of the Arbitration Act, 1940, for appointment of an arbitrator. It is relevant to note that this Court did not hold that the arbitration clause was frustrated or was void. Clearly, this case does not

support the contentions advanced on behalf of ZTE. On the contrary, this decision does support the view that even if a part of an arbitration clause is unworkable (as in that case arbitration by the Project Director or a person appointed by him was not possible), the bargain of the parties to resolve the disputes by arbitration must be sustained and the arbitrator could be appointed by the court.

59. The next issue to be addressed is whether the impugned awards are void on account of alleged fraud committed by VAS. The fulcrum of the contention rests on the failure of VAS to disclose that its name was struck off the Register of Companies by the ROC.

60. Admittedly, VAS did not disclose to the arbitral tribunal that its name had been struck off the Register of Companies and it stood dissolved on 03.02.2007. VAS had fairly conceded that its Board of Directors had acted on an erroneous understanding, as on one hand, VAS was pursuing the arbitration proceedings, and on the other hand, VAS had also applied for its name to be struck off the Register of Companies. Mr Jeevesh Nagrath contended that the Directors of VAS had proceeded on the basis that they could pursue the arbitral proceedings, which had already commenced.

61. The questions to be addressed is (i) whether such conduct would amount to fraud, which would vitiate the arbitral proceedings and the impugned awards?; and (ii) whether the enforcement of the impugned awards rendered in favour of VAS should be declined on the ground that VAS stood dissolved at the material time when the awards were rendered?

62. The Supreme Court has considered the meaning of fraud in several cases. In ***Bhaurao Dagdu Paralkar v. State Of Maharashtra and Ors.:*** (2005) 7 SCC 605, the Supreme Court observed that “*By fraud is meant an intention to deceive; The expression “fraud” involves two elements, deceit and injury to the person deceived*”. The Court further observed that “*A fraudulent misrepresentation is called deceit and consists in leading a man into damage by wilfully or recklessly causing him to believe and act on falsehood. It is a fraud in law if a party makes representations, which he knows to be false, and injury in ensues therefrom*”.

63. In ***S. P. Chengalvaraya Naidu (dead) by LRs v. Jagannath (dead) by LRs and Ors.***(supra), the Supreme Court held that fraud “*is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another’s loss. It is a cheating intended to get an advantage*”.

64. The issue whether VAS has committed a fraud must be considered in the context of the disputes between the parties. The claims made by VAS are essentially for recovery of consultancy fees in terms of the Agreement between the parties. The Agreement was valid for a period of two years commencing from 13.01.2003. There is no dispute that VAS was a validly constituted entity during the subsistence of the Agreement. ZTE failed and neglected to pay the amounts due to VAS and this led to the disputes between the parties. Indisputably, VAS was a validly constituted company at the time when arbitration clause was invoked and the arbitral tribunal was constituted and its claims were filed. The name of VAS was struck off the Register of Companies during the course of the arbitral proceedings.

65. It is seen from the above that VAS had filed its claims limited to the amounts that it claimed as due and payable by ZTE. There is no allegation of any deception on the part of VAS to claim more than what was due under the Agreement. Plainly, VAS was entitled to pursue the arbitral proceedings and claim its rightful dues. There is no illegal or illegitimate claim sought to be pursued by VAS by concealment or deception. ZTE had no counterclaims against VAS. There is no allegation that failure on the part of VAS to disclose that its name had been struck off by the ROC was motivated or directed towards avoiding any claim or liability towards ZTE.

66. In ***Harjas Rai Makhija (dead) through LRs v. Pushprani Jain and Anr.***: 2017 2 SCC 797, the Supreme Court had held that “*a mere concealment or non-disclosure without intent to deceive or a bald allegation of fraud without proof and intent to deceive would not render a decree obtained by a party as fraudulent. To conclude in a blanket manner that in every case where relevant facts are not disclosed, the decree obtained would be fraudulent, is stretching the principle to a vanishing point.*”

67. Any allegation of deceit and fraud must necessarily be considered in the context of the factual matrix of the disputes. A clear distinction must be drawn between cases where a party acts erroneously or otherwise proceeds on an erroneous assumption and cases where a party deliberately and wilfully practices deception to acquire a benefit, which is not legitimately due to it, at the cost of the other party and but for the deception, it would not be able to secure the same. The latter would be a case of fraud and not the former. In the oft-cited decision in ***S. P. Chengalvaraya Naidu*** (*supra*)

(also relied upon by ZTE), the Supreme Court considered a case where one Jagannath, who was working as a clerk with one Chunilal Sowcar, purchased on behalf of his employer (Chunilal Sowcar), a property that was put to auction by the court in execution of a decree obtained by Chunilal Sowcar. Thereafter, Jagannath executed a Release Deed releasing the property to Chunilal Sowcar. In the meantime, the Judgment Debtors (appellants therein) paid the decretal amount to Chunilal Sowcar and he was, thereafter no longer entitled to the property purchased through his clerk (Jagannath). Notwithstanding that Jagannath had no interest in the property purchased, he filed a suit for partition without disclosing the Release Deed executed in favour of Chunilal and obtained a decree. It is in this context that the Supreme Court held that Jagannath had obtained preliminary decree by playing a fraud on the Court. It is in this context that the Court explained that *“a fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another’s loss. It is a cheating intended to get an advantage.”*

68. The foundation of fraud rests on deception to acquire, in substance, an illegitimate gain. There is little possibility of sustaining an allegation of fraud where the party accused of fraud does not seek to acquire anymore than what it is legitimately entitled to. In the present case, there can be little doubt that the amounts awarded are legitimately due and payable by ZTE to VAS. ZTE has not advanced any contention to challenge the impugned award on merits. Thus, in effect, what ZTE seeks to contend is that it has been deprived and cheated of its opportunity, whereby it could have withheld the legitimate dues of VAS. Plainly, this cannot be accepted.

69. If the removal of name from the Register of Companies was realised to be an impediment in pursuing the arbitration proceedings, VAS would have had to take immediate steps for restoration of its name at the material time. This may have delayed the arbitral proceedings (or at the highest, VAS may have been put in at a disadvantage of initiating fresh and/or further proceedings); however, VAS could not be deprived of its legitimate dues as awarded.

70. In view of this Court, ZTE's claim that the impugned awards are vitiated by fraud, must fail.

71. The next aspect to be examined is the effect of the name of VAS being struck off the Register of Companies and subsequently being reinstated. VAS became a defunct company and was dissolved, pursuant to removal of its name from the Register of Companies. Mr Ganju submitted that although the name of VAS had been restored on the Register of Companies, no directions were issued by the Company Court under Section 560(6) of the Companies Act, for placing VAS in the same position as if its name had not been struck off; therefore, VAS could not enforce the impugned awards delivered when it was not in existence.

72. In my view, the aforesaid contention is wholly bereft of any merit. The provisions of Section 560(7) of the Companies Act and the orders passed by this Court are unambiguous and clear.

73. By an order dated 08.02.2012 passed by this Court in Co. Pet. 200/2011 captioned ***Siddhant Garg and Anr v. Registrar of Companies and Ors.***, this Court had allowed the petition for restoring VAS's name in the Register of Companies. In its order, this Court had observed as under:

“if the respondent no.2 company is today restored, it would be in a position to prosecute its execution petition for recovery of the Foreign Award and if it is successful in its endeavour, then not only would the company revive, but also society would gain as a defunct company would stand restored as a healthy company”.

74. The Court had, thereafter, proceeded to specifically direct that VAS, “*is restored to its original status*”. In view of the above, no further directions were required for enabling VAS to either file and pursue the present execution proceedings or to make any specific observations regarding the arbitral proceedings or the impugned awards.

75. It is also relevant to note that ZTE did not accept the decision of the Company Court in Co. Pet. 200/2011 and had appealed against the said decision before the Division Bench of this Court on several grounds including that VAS had suppressed the fact that its name had been struck off the Register of Companies from the arbitral tribunal and also from this Court in other proceedings. The appeal (Co. App. 25/2012) preferred by ZTE was rejected by the Division Bench of this Court by an order dated 14.03.2013 and the order dated 08.02.2012 was affirmed. While dismissing ZTE’s appeal, the Division Bench in its order observed as under:-

“16. On no count can the petitioners succeed. This appears to be a classic case where the appellant is making desperate effort by one way to ward off its liability which he admittedly owes to the company in terms of the Arbitral Awards which has been passed against him. It is also not a case where the appellant would be remediless, he has the option to contest the Award at the time as and when the execution proceedings are filed by the company.”

76. The Special Leave Petition (SLP No.23946/2013) preferred by ZTE against the order of the Division Bench dated 14.03.2013 passed in Co. App. 25/2012 was also rejected.

77. It is also relevant to refer to Sub-sections (6) and (7) of Section 560 of the Companies Act which read as under:-

“560(6) If a company, or any member or creditor thereof, feels aggrieved by the company having been struck off the register, the Court, on an application made by the company, member or creditor before the expiry of twenty years from the publication in the Official Gazette of the notice aforesaid, may, if satisfied that the company was, at the time of the striking off, carrying on business or in operation or otherwise that it is just that the company be restored to the register, order the name of the company to be restored to the register; and the Court may, by the order, give such directions and make such provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off.

(7) Upon a certified copy of the order under sub- section (6) being delivered to the Registrar for registration, the company shall be deemed to have continued in existence as if its name had not been struck off.”

78. Section 560(7) of the Companies Act makes it amply clear that once the name of the company is restored on the Register of Companies, its position would be the same as if the name had not been struck off. Thus, by virtue of order dated 08.02.2012 passed in Co. Pet. 200/2011, VAS would continue to be in existence as if its name had never been struck off. Hence,

for all purposes, the act of the ROC striking off the name of VAS from the Register of Companies was undone by the order dated 08.02.2012.

79. Section 560(6) of the Companies Act only enables the Court to pass certain directions and make provisions for placing the company and other persons in the same position, as nearly as possible, as if the name of the company had not been struck off. Clearly, there may be myriad of situations where such orders may be necessary. However, this is not one such case, considering that the arbitral proceedings had proceeded, and the impugned awards had been delivered, on the basis that VAS was a validly constituted entity.

80. In its order dated 08.02.2012, the Court had also observed that ZTE's contention that VAS had concealed the fact regarding its name being struck off the Register of Companies from the arbitral tribunal, was left open to be decided. On the strength of these observations, it was contended on behalf of ZTE that the aforesaid order must not be construed as restoring the name of VAS on the Register of Companies from the day it was struck off. This contention is unpersuasive as the effect of the order dated 08.02.2012 read with Section 560(7) of the Companies Act leaves no room for doubt that the effect of restoring VAS to its original status is that it is deemed that its name was never struck off the Register of Companies. However, the question whether the impugned awards are vitiated on account of fraud and on account of VAS concealing from the arbitral tribunal that its name had been struck off the Register of Companies have been considered on merits.

81. It is also relevant to mention that an application under Section 560(6) of the Companies Act can be made any time within a period of 20 years from the publication in the Official Gazette. The provisions of Section 560(7) must be given its natural meaning. The enactment makes a specific provision whereby the existence of the company, even during the period that it was struck off the register can be subsequently resuscitated and treated as if it never ceased to be in existence. The company is a legal juristic entity and that clothes an association of persons with an independent and a separate identity. However, such entity is not a hollow entity; its resources, human as well as material, constitute the substratum of such legal entity. Thus, even though the legal form may disappear, the substratum continues to exist and its form can be resuscitated as the law enacts specific provisions for the said purpose. Section 560(7) expressly provides that once such order restoring the company to its legal status is passed, such company would be deemed to have been always in existence.

82. A Constitution Bench of the Supreme Court in ***Builders' Association of India and Ors. v. Union of India and Ors.***: 1989 2 SCC 645, had observed that “*When the law creates a legal fiction such fiction should be carried to its logical end. There should not be any hesitation in giving full effect to it*”. Thus, legal fiction as contained in Section 560(7) of the Companies Act must be carried to its logical purpose. The effect of the said provision is that once the company whose name had been removed from the Register of Companies, is restored, it must be deemed to be in existence as if it had never been struck off. Thus, after the company is restored, there is no scope to consider that it was not in existence in the intervening period. It plainly follows that the transactions entered into by

the company in that period cannot be held to be a nullity on the ground that the company was not in existence during the said period.

83. In this context, it is also relevant to refer to the oft-quoted opinion of Lord Asquith in ***East End Dwellings Co. Ltd. Finsbury Borough Council: [1952] AC 109 at p. 132.***, which reads as under:-

"If you are bidden to treat an imaginary state of affairs as real, you must surely unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs, had in fact existed, must inevitably have flowed from or accompanied it... The statute says that you must imagine a certain state of affairs, it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

84. In view of the above discussion, this Court is not persuaded to accept the contention that the legal proceedings continued after the name of VAS was struck off the Register of Companies, should be held as void, notwithstanding, that its name had been restored on the Register of Companies subsequently.

85. The existence of a company whose name has been removed from the Register of Companies would continue, at least to the extent of enabling it to have the same restored (See: ***Top Creative Ltd. v. St. Albans District Council: (1999) BCC 999***); and, once the company's name has been restored, it would be restored to the same position as if its name had never been struck off.

86. In these circumstances, this Court is unable to accept that ZTE has established, by sufficient proof, any of the grounds as set out in Section 48(1) of the Act to decline enforcement of the impugned awards.

87. In the circumstances, the objections raised by ZTE are rejected.

88. The Registrar General is directed to encash the bank guarantees furnished by ZTE forthwith.

89. List for further proceedings on 07.07.2017.

JULY 03, 2017
MK

VIBHU BAKHRU, J

