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\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ EX.P. 75/2015 & EX.APPL.(OS) Nos. 1216-1217/2015

GLENCORE INTERNATIONAL AG ..... Decree Holder

Through: Mr Gourab Banerji, Senior Advocate  
with Mr Sumeet Lall, Mr Sidhant  
Kapoor, Mr Sahil Tagotra and Ms  
Vaidehi Misra, Advocates.

versus

DALMIA CEMENT (BHARAT) LIMITED ..... Judgement Debtor

Through: Mr Abhinav Vashisth, Senior  
Advocate with Mr Ankur, Mahindro,  
Mr Sourabh Gupta and Mr S.  
Choudhary, Advocates.

**CORAM:**

**HON'BLE MR. JUSTICE VIBHU BAKHRU**

**ORDER**  
**23.08.2016**

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**VIBHU BAKHRU, J**

**EX.APPL.(OS) Nos. 306/2015 & 309/2015**

1. EA(OS) No. 306/2015 is an application filed on behalf of the Judgment Debtor (hereafter 'Dalmia'), *inter alia*, praying that the present execution petition be dismissed or be kept in abeyance till its petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') is disposed of by the Principal District Judge, Tiruchirappalli, Tamil Nadu (T.N.).

2. EA(OS) No. 309/2015 is an application filed on behalf of Dalmia, *inter alia*, praying that this Court may dismiss or return the present petition

to the Decree Holder (hereafter 'Glencore') to present the same before the Principal District Judge, Tiruchirappalli, (T.N.). Dalmia states that since it has preferred a petition under Section 34 of the Act for setting aside the arbitration award in question in the court of principal District Judge Tiruchirappalli, (T.N), the present petition for execution of the said award cannot be proceeded with in this court. It is contended that by virtue of section 42 of the Act, the Court in which an application is moved under part I of the Act, would have the exclusive jurisdiction to decide all subsequent applications.

3. The aforesaid ground is countered by Glencore as it is submitted that Part I of the Act does not apply to the arbitral proceedings in question. It is contended that in terms of the Arbitration Agreement, the governing law of the contract was agreed to be the substantive law of England; the seat of arbitration was London; and the arbitration was to be conducted under the Rules of London Court of International Arbitration. Thus, the award sought to be enforced is a foreign award.

4. The short question that arises for consideration in this petition is whether Part I of the Act would apply to the award in question.

5. Briefly stated the relevant facts that are necessary to consider the controversy are as under:-

5.1 Glencore and Dalmia entered into an agreement dated 22.02.2011 (hereafter 'the Contract') for sale and purchase of nine shipments of steam coal of Indonesian origin FOB Muara Bangkong Anchorage in Sumatra for shipment to India.

5.2 Certain disputes arose between the parties in relation to the Contract and by a notice dated 15.05.2013, Glencore terminated the Contract.

5.3 Clause 17 of the contract provided for the settlement of disputes by arbitration which is set out below:

“Laws/Arbitration

The governing law of this contract shall be the substantive law of England.

Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally solved by arbitration under the Rules of the London Court of International Arbitration, which Rules are deemed to be incorporated by reference into this clause. If the validity of the arbitration clause or the jurisdiction of the arbitration court is contested by one or the other party, the arbitration court shall be competent to make a final decision concerning the said issue.

The tribunal shall consist of three arbitrators, two of them shall be nominated by the respective parties. The place of arbitration shall be London. The language of arbitration shall be English.”

5.4 Glencore invoked the arbitration clause by sending a request dated 22.07.2013 to the Registrar of the London Court of International Arbitration (LCIA). Accordingly, by its letter dated 23.09.2013, LCIA appointed the Arbitral Tribunal comprising of Simon Crookenden QC, David Joseph QC and Christopher Style QC.

5.5 Glencore filed its statement of claims which were contested by Dalmia. Dalmia also file its counter claims. Glencore claimed damages for non-acceptance on the basis of the difference between the contract price of USD 100 per MT and market price on 15.06.2013, namely USD 69.02 per MT, totalling USD 5,170,228.97 based on a total contractual quantity of 160,000 MT + 10%, alternatively 160,000 MT giving rise to damages of USD 4,956,800.

5.6 The Arbitral Tribunal by its award dated 17.11.2014 (hereafter ‘the Award’) held that Glencore was entitled to recover USD 4,305,625 in damages along with interest up to 17.11.2014 of USD 267,388. Further, Glencore was awarded GBP 62,879.42 towards the arbitration costs paid by it to LCIA; GBP 370,000 towards the legal costs incurred by it; and interest at 4.25% on the total outstanding balance from 17.11. 2014 till the date of payment, compounded quarterly.

5.7 The counter-claims advanced by Dalmia for damages on account of alleged reduced value of the coal that it received from Glencore and suspension of performance between October 2011 and September 2012 for the non-supply of coal of adequate quality, were rejected by the Arbitral Tribunal.

6. Mr. Gourab Banerji, learned senior counsel appearing for Glencore referred to the decisions of the Supreme Court in **Eitzen Bulk A/S v. Ashapura Minechem Ltd. & Anr.**: 2016 (5) SCALE 514 and **Union of India v. Reliance Industries Limited & Ors.**: 2015 (10) SCALE 149 and on the strength of the aforesaid decisions contended that it is well established

that Part I of the Act does not apply to arbitral proceedings conducted outside India.

7. Mr. Abhinav Vashisth, the learned counsel appearing for Dalmia contended that Dalmia had substantive objections to the award and since the same are pending before the Court of Tiruchirappalli, the present petition ought not be proceeded with.

8. I have heard the counsel for the parties.

9. The essential facts are not in dispute; the seat of the Arbitration was London and the substantive law of England is applicable to the Contract. It is also not disputed that Dalmia participated in the arbitration proceedings that culminated in passing of the Award.

10. In the present case, the question whether Part I of the Act is applicable to arbitral proceedings would have to be decided on the basis of the decision of the Supreme Court in **Bhatia International vs. Bulk Trading S.A.& Anr: (2002) 4 SCC 105** as the law declared by the Constitution Bench in **Bharat Aluminium Company vs Kaiser Aluminium Technical Services Inc: (2012) 9 SCC 552** is applicable prospectively .

11. In ***Bhatia International*** (*supra*) the Supreme Court held that:

“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.”

12. In cases where the parties agree that the substantive law of a country other than India is applicable and the seat of arbitration is outside India; the inference that follows is that the parties have excluded by necessary implication, the application of Part I of the Act. This legal position has now been settled by a series of judgements rendered by the Supreme Court. In ***Reliance Industries Limited*** (*supra*) the Supreme Court held as under:

“The last paragraph of *Balco* judgment has now to be read with two caveats, both emanating from paragraph 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.

On the facts in the present case, it is clear that this Court has already determined both that the juridical seat of the arbitration is at London and that the arbitration agreement is governed by English law. This being the case, it is not open to the Union of India to argue that Part-I of the Arbitration Act, 1996 would be applicable. A Section 14 application made under Part-I would consequently not be maintainable.”

13. In ***Eitzen Bulk A/S*** (*supra*), the Supreme Court considered a similar situation where the appellant had filed an application under section 47 to 49 of the Act for enforcement of a foreign award in Bombay High Court and the respondent had filed a prior petition under section 34 of the Act

before the District Judge, Jamnagar. The Supreme Court considered the relevant clauses and held that the Part-I of the Act would not apply. The relevant extract of the said judgement is reproduced below:-

“26. According to the learned counsel, Clause 28, which is the Arbitration Clause in the Contract, clearly stipulates that any dispute under the Contract "is to be settled and referred to Arbitration in London". It further stipulates that English Law to apply. The parties have thus clearly intended that the Arbitration will be conducted in accordance with English Law and the seat of the Arbitration will be at London.

27. The question is whether the above stipulations show the intention of the parties to expressly or impliedly exclude the provisions of Part I to the Arbitration, which was to be held outside India, i.e., in London. We think that the clause evinces such an intention by providing that the English Law will apply to the Arbitration. The clause expressly provides that Indian Law or any other law will not apply by positing that English Law will apply. The intention is that English Law will apply to the resolution of any dispute arising under the law. This means that English Law will apply to the conduct of the Arbitration. It must also follow that any objection to the conduct of the Arbitration or the Award will also be governed by English Law. Clearly, this implies that the challenge to the Award must be in accordance with English Law. There is thus an express exclusion of the applicability of Part I to the instant Arbitration by Clause.

28. In fact, Clause 28 deals with not only the seat of Arbitration but also provides that there shall be two Arbitrators, one appointed by the charterers and one by the owners and they shall appoint an Umpire, in case there is no agreement. In this context, it may be noted that the Indian Arbitration and Conciliation Act, 1996 makes no provision for Umpires and the intention is clearly to refer to an Umpire contemplated by Section 21

of the English Arbitration Act, 1996. It is thus clear that the intention is that the Arbitration should be conducted under the English law, i.e. the English Arbitration Act, 1996. It may also be noted that Sections 67, 68 and 69 of the English Arbitration Act provide for challenge to an Award on grounds stated therein. The intention is thus clearly to exclude the applicability of Part I to the instant Arbitration proceedings.

28. This is a case where two factors exclude the operation of Part I of the Arbitration Act. Firstly, the seat of Arbitration which is in London and secondly the clause that English Law will apply.”

14. In view of the aforesaid, the settled position is that Part I of the Act would not apply and consequently Dalmia’s application under section 34 is not maintainable.

15. The contention that this court would not have jurisdiction to entertain the present petition by virtue of section 42 of the Act is also bereft of any merit. In view of the conclusion that Part-I of the Act does not apply, Section 42 of the Act - which falls within Part I of the Act - would also be inapplicable.

16. In the circumstances, I see no reason for staying the present proceedings which are premised only on the issue that a petition under Section 34 is pending before the Court of Tiruchirappalli.

17. The applications are, accordingly, dismissed.

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18. List on 19.10.2016 at 02:30 p.m.

19. Glencore may file its reply to the objections within a period of three weeks from today. Rejoinder, if any, be filed within a period of three weeks thereafter.

20. It is clarified that no further time will be granted to the parties to complete the pleadings.

**VIBHU BAKHRU, J**

**AUGUST 23, 2016**  
**RK**

