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

% ***Date of Decision : 27.11.2024***

\+ **O.M.P. (COMM) 518/2016**

SHREE KRISHNA VANASPATI INDUSTRIES (P) LTD .....Petitioner

Through: None.

versus

VIRGOZ OILS & FATS PTE LTD & ORS .....Respondents

Through: None.

CORAM:
HON'BLE MR. JUSTICE SACHIN DATTA

SACHIN DATTA, J. (*Oral*)

1. The present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter '*the A&C Act*') assails a foreign arbitral award dated 28.02.2012 (hereinafter referred as '*the impugned award*') which was published by an arbitral tribunal, constituted as per the Palm Oil Refiners Association of Malaysia Rules, 2005 (hereinafter '*the PORAM Rules*').

2. In its reply dated 29.05.2017, the learned counsel for the respondent has raised an objection as regards the maintainability of the present petition under Part-I of the A&C Act. It is submitted that pursuant to the principle of territoriality envisaged under Section 2(2) of the A&C Act, an arbitral award rendered by a foreign seated international commercial arbitration cannot be subjected to a challenge under Part-I of the A&C Act and the appropriate remedy for the petitioner is to take recourse to the remedies provided under

Part-II of the A&C Act. The respondent no.1 has relied on the judgement of the Supreme Court in ***Bharat Aluminium v. Kaiser Aluminium Technical Services Ltd.*** (2012) 9 SCC 552.

3. The petitioner in its written submissions has controverted the abovesaid objection by relying upon the judgement in ***Bhatia International v. Bulk Trading S.A. and Another*** (2002) 4 SCC 105, as the impugned award was rendered prior to the judgement of the Supreme Court in ***Bharat Aluminium v. Kaiser Aluminium Technical Services Ltd.*** (supra), i.e., a '*Pre-BALCO Award*'.

4. It is the petitioner's contention that the judgements of the Supreme Court in ***Bhatia International v. Bulk Trading S.A. and Another*** (supra) and ***Venture Global Engineering v. Satyam Computer Services Ltd. and Another*** (2008) 4 SCC 190, have only been prospectively overruled by the Supreme Court in ***Bharat Aluminium v. Kaiser Aluminium Technical Services Ltd.*** (supra) and therefore maintainability of the present petition, where the impugned award pre-dates the judgement in ***Bharat Aluminium v. Kaiser Aluminium Technical Services Ltd.*** (supra), would not be impacted. In this regard, reliance has been placed on paragraph 195-197 of the said judgement which reads as under:-

> ***"195.*** *With utmost respect, we are unable to agree with the conclusions recorded in the judgments of this Court in Bhatia International [(2002) 4 SCC 105] and Venture Global Engg. [(2008) 4 SCC 190] 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 simpliciter would be maintainable in India, on the basis of an international commercial arbitration with a seat outside India.*

> ***196.*** *We conclude that Part I of the Arbitration Act, 1996 is applicable only to all the arbitrations which take place within the territory of India.*
> ***197.*** *The judgment in Bhatia International [(2002) 4 SCC 105] was rendered by this Court on 13-3-2002. Since then, the aforesaid judgment has been followed by all the High Courts as well as by this Court on numerous occasions. In fact, the judgment in Venture Global Engg. [(2008) 4 SCC 190] has been rendered on 10-1-2008 in terms of the ratio of the decision in Bhatia International [(2002) 4 SCC 105]. Thus, in order to do complete justice, we hereby order, that the law now declared by this Court shall apply prospectively, to all the arbitration agreements executed hereafter.*"

5. Having considered the above aspects, I am of the considered opinion that the present petition is not maintainable.

6. The Supreme Court in ***Bhatia International v. Bulk Trading S.A. and Another*** (supra), which was later followed in ***Venture Global Engineering v. Satyam Computer Services Ltd. and Another*** (supra), while allowing for challenges to foreign awards under Part-I of the A&C Act, had held as under:-

> "***32.*** *To conclude, we hold that the provisions of Part I would apply to all arbitrations and to all proceedings relating thereto. Where such arbitration is held in India the provisions of Part I would compulsorily apply and parties are free to deviate only to the extent permitted by the derogable provisions of Part I. 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 the parties would prevail. Any provision, in Part I, which is contrary to or excluded by that law or rules will not apply.*"

(emphasis supplied)

7. Subsequently, in ***Union of India v. Reliance Industries Limited and Others*** 2015 (10) SCC 213, the Supreme Court has clarified the aforesaid paragraph 32 in ***Bhatia International*** (supra) by holding as under:-

> *"**18.** It is important to note that in para 32 of Bhatia International [Bhatia International v. Bulk Trading S.A., (2002) 4 SCC 105] itself this Court has held that Part I of the Arbitration Act, 1996 will not apply if it has been excluded either expressly or by necessary*

<u>implication. Several judgments of this Court have held that Part I is excluded by necessary implication if it is found that on the facts of a case either the juridical seat of the arbitration is outside India or the law governing the arbitration agreement is a law other than Indian law</u>. This is now well settled by a series of decisions of this Court [see Videocon Industries Ltd. v. Union of India [(2011) 6 SCC 161: (2011) 3 SCC (Civ) 257], Dozco India (P) Ltd. v. Doosan Infracore Co. Ltd. [(2011) 6 SCC 179 : (2011) 3 SCC (Civ) 276] , Yograj Infrastructure Ltd. v. Ssang Yong Engg. and Construction Co. Ltd. [(2011) 9 SCC 735 : (2011) 4 SCC (Civ) 864] , the very judgment in this case reported in Reliance Industries Ltd. v. Union of India [Reliance Industries Ltd. v. Union of India, (2014) 7 SCC 603 : (2014) 3 SCC (Civ) 737] and a recent judgment in Harmony Innovation Shipping Ltd. v. Gupta Coal India Ltd. [(2015) 9 SCC 172 : (2015) 4 SCC (Civ) 341]].

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21. *The last paragraph of BALCO [BALCO v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810] judgment has now to be read with two caveats, both emanating from para 32 of Bhatia International [Bhatia International v. Bulk Trading S.A., (2002) 4 SCC 105] itself — that <u>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.</u> Therefore, even in the cases governed by the Bhatia [Bhatia International v. Bulk Trading S.A., (2002) 4 SCC 105] 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 [Bhatia International v. Bulk Trading S.A., (2002) 4 SCC 105] 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 [Bhatia International v. Bulk Trading S.A., (2002) 4 SCC 105] rule.*"

(emphasis supplied)

8. In the present case, the Sales Contract no. SG/08/0560/07B04 dated 24.07.2008 (hereinafter '*the sales contract*') executed between the parties, reflects the choice of seat and governing law of the agreement. The clause reads as under:-

"11) All other terms and conditions to be in accordance with FOSFA 81 currently in force. <u>Arbitration if any shall take place in Malaysia in</u>

<u>accordance with the PORAM Rules of Arbitration and appeal in force at the date of contract. This contract shall be governed by Malaysian Law</u>.”

9. It can be clearly seen from the aforementioned clause that the choice of seat and governing law of the agreement is unequivocal, thereby excluding the applicability of Part-I of the A&C Act by necessary implication.

10. The above position is fortified by the judgment of the Supreme Court in ***Noy Vallesina Engg. SpA v. Jindal Drugs Ltd. and Others*** (2021) 1 SCC 382, in which, the appellants therein had challenged a judgement of the Bombay High Court holding that a petition against a ‘*pre-Balco’* award where the choice of seat was London is maintainable under Section 34 A&C Act. The choice of seat as reflected in the arbitration clause therein was as under:-

> “*12.4.1. This engineering contract shall be governed by the laws of India.*
> *12.4.2. In case of disputes or disagreement between the parties as any matter arising out of or relating to this engineering contract and provided no understanding between the parties can be reached for the settlement of the difference, <u>the matter shall be finally settled by arbitration under the Rules of Conciliation and Arbitration of the International Chamber of Commerce, Paris and Arbitration proceedings shall be in the English language and shall take place in London</u>. The decisions of such arbitration shall be final and binding on the parties*.”
>
> (emphasis supplied)

11. The Supreme Court, while allowing the appeal and taking note of the judgments in ***Bhatia International v. Bulk Trading S.A. and Another*** (supra), ***Venture Global Engineering v. Satyam Computer Services Ltd. and Another*** (supra) and ***Bharat Aluminium v. Kaiser Aluminium Technical Services Ltd.*** (supra), held that a ‘*pre-BALCO’* award rendered by a foreign seated tribunal in an international commercial arbitration cannot

be challenged under Section 34 of the A&C Act (Part-I of the A&C Act) pursuant to the rule laid down in ***Bhatia International v. Bulk Trading S.A. and Another*** (supra) when there is an unequivocal choice of a seat outside India. In this regard, it was held as under:-

> *"25. Having regard to the precedential unanimity, so to say, about the manner of applicability of Balco [Balco v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810] in respect of agreements entered into and awards rendered earlier, with respect to the law of the seat of arbitration (or the curial law) excluding applicability of Part I of the Act, and the unambiguous intention of the parties in the present case (expressed in Clause 12.4.2) that the seat of arbitration was London, where ICC arbitration proceedings were in fact held, and the awards rendered, this Court is of the opinion that the impugned judgment cannot be sustained."*
>
> (emphasis supplied)

12. In the present case as well, the arbitration clause contained in the sales contract reflects an "*unambiguous intention of the parties*" as regards the seat of the arbitration being outside India, i.e. Malaysia.

13. In view of the above, the present petition is not maintainable.

14. In the circumstances, for the aforesaid reasons, and on account of non-appearance of the petitioner, the present petition is dismissed.

SACHIN DATTA, J

NOVEMBER 27, 2024/*dn*