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

% ***Judgment Pronounced on***: ***25.10.2018***

\+ OMP (COMM.)7/2017

DELHI AIRPORT METRO EXPTRESS PRIVATE LIMITED (INDIA) ..Petitioner

Through Mr.P.Chidambaram, Sr.Adv. with Mr.Rishi Agrawala, Ms.Malavika Lal and Mr.Vikrant Pachnanda, Advs.

Versus

CONSTRUCCIONES Y AUXILIAR DE FERROCARRILES & ANR. …Respondent

Through Mr.Arun Kathpalia, Sr.Adv. with Mr.Tanuj Bhushan, Mr.Shantanu Tyagi, Mr.Samaksh Goyal and Ms.Nandita Chauhan, Advs.

CORAM:
HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.

1. This petition is filed under section 34 of the Arbitration and Conciliation Act, 1996 seeking to challenge the final award dated 22.8.2016, partial award on jurisdiction dated 2.2.2015 and partial award on costs of jurisdictional challenge dated 15.12.2015 passed by the learned Arbitral Tribunal.

2. I may note that when this matter came up for hearing on 10.1.2017 notice was issued confined to the issue of maintainability of the present petition under section 34 of the Arbitration and Conciliation Act, 1996.

3. Some of the relevant facts are that CAF Spain (respondent No.1) and Reliance Infrastructure Limited jointly bid for the Airport Metro Express

Line Project in New Delhi. The project connects Indira Gandhi International Airport, New Delhi with the city of New Delhi. The two parties, namely, CAF Spain and Reliance had entered into an MOU on 24.3.2007. They further entered into a Consortium Agreement on 9.10.2007. The respondent No.2/CAF India is a company incorporated under the Companies Act, 1956 and is wholly owned subsidiary of CAF Spain/respondent No.1.

4. The Consortium comprising CAF Spain and Reliance was awarded the project by DMRC on 21.1.2008. As per the requirements of the contract the consortium incorporated the petitioner company on 1.4.2008 as the special purpose vehicle to partly implement and then operate the project. Reliance had 95% equity shares and CAF Spain had 5% equity shares. The petitioner and respondent No.1 entered into two Agreements, namely, Rolling Stock Supply Contract (hereinafter referred to as "the Supply Contract") vide contract dated 30.6.2008 and Maintenance Services Agreement (hereinafter referred to as "the Maintenance Contract") also executed on 30.6.2008. It is stated that by Agreement dated 17.5.2010, respondent No.1 assigned its obligations under the Maintenance Contract to respondent No.2. On 25.08.2008 a Concession Agreement for implementing the project was executed between the petitioner and DMRC. On 20.8.2008 respondent No.1 issued a performance bank guarantee for furtherance of the contractual understanding with the petitioner.

5. Disputes arose between the parties as the petitioner alleged defects in the Rolling Stock provided by respondent No.1 under the Supply Contract. Disputes also arose regarding the invoices raised by respondent No.2 under the Maintenance Contract and on the other obligations of the parties under the Supply Contract and the Maintenance Contract.

6. On 16.7.2013 petitioner notified respondent No.1 that the petitioner shall be encashing the Performance Bank Guarantee on account of its failure to cure the defects. The respondent No.1 filed a petition before this Court being OMP 695/2013 challenging the said action. The said OMP was dismissed on 17.1.2014 by this court. The petitioner received from the bank the Performance Bank Guarantee amount of Euro 4,761,963.50/- on 20.1.2014. An appeal was filed by respondent No.1 being FAO(OS)58/2014 which was withdrawn on 24.1.2014.

7. In the meantime, the Concession Agreement with DMRC stood terminated. The petitioner served a letter dated 27.6.2013 on DMRC for handing over of the project assets post termination of the Concession Agreement. DMRC took over the project w.e.f. 1.7.2013. Thereafter the respondents filed a joint request for arbitration dated 21.1.2014 under Article 22 of the Supply Contract and Article 14 of the Maintenance Contract in respect of the respective claims. An Arbitral Tribunal was constituted to adjudicate upon the disputes.

8. The case of the petitioner is that the learned Arbitral Tribunal had no jurisdiction to hear the claims of respondent No.1 under the Maintenance Contract because the agreement was between two companies incorporated in India and, therefore, the arbitration must be governed by the laws in India. Hence, it was pleaded by the petitioner that disputes between the petitioner and respondent No.2 could not be decided at any place other than India. The petitioner filed a suit on 26.5.2014 being CS(OS) 1678/2014 against the respondent in this Court seeking to permanently restrain the respondents from pursuing the arbitration proceedings outside India. However, on 14.8.2014 this Court dismissed the petitioner's application for interim

injunction. It is stated that the suit which was subsequently transferred to Patiala House District Courts has been withdrawn by the petitioner.

9. The learned Arbitral Tribunal rejected the petitioner's jurisdictional objection by its partial award dated 2.2.2015. The learned Arbitral Tribunal also issued its partial award on costs on the jurisdictional challenge on 15.12.2015 whereby it ordered the petitioner to pay 80,000 pound sterling as reasonable costs. On the main dispute the learned Arbitral Tribunal on 22.8.2016 passed its award. The award concludes that the Rolling Stock supplied by respondent No.1 under the Supply Contract did not meet the contractual specifications. However, it also noted that the petitioner is not entitled to any compensation for breach of specifications because they have not proved that they suffered any loss as a result of the said breach. Accordingly, the Arbitral Tribunal held that the petitioner's ongoing retention of the Performance Guarantee is unlawful and the petitioner was directed to repay the amount of Euro 4,761,963.50 with interest.

10. Reference may be had to the relevant Arbitration Agreement. Article 22 of the Supply Contract reads as follows:-

> "22.1 In case of disputes, the Parties hereby agree to exhaust all informal senior level determination mechanisms before submitting a request to settle them under the formal dispute resolution system.
>
> 22.2 Any dispute arising in connection with the interpretation or performance of this Contract shall be finally settled by arbitration under the rules of the International Chamber of Commerce, Paris ("ICC"). The arbitration tribunal shall consist of three arbitrators.
>
> One arbitrator shall be nominated by each of the Parties, and the third arbitrator shall be a person nationality and origin other than India or Span [sic], and shall be appointed by the ICC in accordance

with the "Rules of the ICC as Appointing Authority in UNCITRAL or Adhoc Arbitration Proceedings".

22.3 The seat of the arbitration shall be London and the language of the arbitration shall be English.

22.4 Continuation of performance:
Pending final resolution of any dispute, the Parties shall continue to perform their respective obligations hereunder.

22.5 Governing Law & Jurisdiction:

22.5.1 This contract shall be governed by and construed in accordance with the laws of India.

22.6 Survival

22. 6.1 It is expressly stated herein that the provisions of this Article 22 shall survive termination or expiry of this Contract. "

11. Article 14 of the Maintenance Contract reads as follows:-

"DISPUTE RESOLUTION

14.1 In case of disputes, the Parties hereby agree to exhaust all informal senior level determination mechanisms before submitting a request to settle them under the formal dispute resolution system.

14.2 Any dispute arising in connection with the interpretation or performance of this Contract shall be finally settled by arbitration under the rules of the International Chamber of Commerce, Paris ("ICC"). The arbitration tribunal shall consist of three arbitrators.

One arbitrator shall be nominated by each of the Parties, and the third arbitrator shall be a person nationality and origin other than India or Spain, and shall be appointed by the ICC in accordance with the "Rules of the ICC as Appointing Authority in UNCITRAL or Adhoc Arbitration Proceedings".

14.3 The arbitration shall take place in London and the language of the arbitration shall be English.

14.4 The parties expressly exclude the application of Part 1 of the Indian Arbitration and Conciliation Act, 1996.

14.5 Continuation of performance
Pending final resolution of any dispute, the Parties shall continue to perform their respective obligations hereunder.

14. 6 Governing Law & Jurisdiction:

14. 6.1 This contract shall be governed by and construed in accordance with the laws of India.

14. 7 Survival

14. 7.1 It is expressly stated herein that the provisions of this Article 14 shall survive termination or expiry of this Contract."

12. The preliminary issue as framed by this court on 10.01.2017 is as to whether on account of the aforenoted arbitration clauses the petitioner can challenge the arbitration award in this court under Section 34 of the Arbitration Act.

13. I have heard learned senior counsel for the parties. Learned senior counsel appearing for the petitioner has submitted that in the two Contracts, namely, the Supply Contract and the Maintenance Contract, the governing law has been defined to be Indian law. Therefore, law of the contract and the "closest connection" to the contract gives the only conclusion that the law of arbitration in the present two contracts is Indian law. It is further submitted that the choice of seat by the parties which under the arbitration clauses has been chosen by the parties to be London shall govern the arbitration

proceedings till they continue to be in subsistence. However, after conclusion of the arbitration proceedings the law applicable to the seat expires. It is only the supervisory jurisdiction over the arbitration proceedings which needs to be determined by the choice of the seat. As the law of the city/curial law subsides the governing law and jurisdiction being Indian Law, therefore, applying the proper law of the contract and the closest connection test the law of arbitration would be the Indian law and the courts in India would have jurisdiction to adjudicate the present dispute. Learned senior counsel has relied upon judgments of the Supreme Court in ***National Thermal Power Corporation vs. Singer Company & Ors., (1992) 3 SCC 551*** and of ***Sumitomo Heavy Industries Ltd.vs. ONGC Limited, (1998) 1 SCC 305.*** He has further submitted that the judgment of ***Roger Shashoua vs. Mukesh Sharma, (2017) 14 SCC 722*** would have no application to the facts of the present case.

14. Learned senior counsel appearing for the respondents has vehemently argued that the case of the respondents is squarely covered by the judgment of the Supreme Court in *Roger Shashoua vs. Mukesh Sharma*(supra)**.** He submits that the arbitration clause in the said judgment is virtually identical to the arbitration clause in the present case. In that case the Supreme Court held that the courts in India would not have jurisdiction to entertain objections under section 34 of the Arbitration Act. He has also submitted that in the "anti-arbitration" suit that was filed by the petitioner before this court the petitioner has submitted that the seat of arbitration is London and if the respondents are allowed to pursue the arbitration proceedings in London the provisions of Part I of the Arbitration Act would not be applicable. Hence, it is pleaded that the petitioner themselves have accepted that if the

seat of arbitration is London the provisions of Part I of the Arbitration Act would not apply. He further submits that the petitioner cannot be permitted to approbate and reprobate.

It is further pleaded by learned senior counsel for the respondents that reliance of petitioner on the judgments of the Supreme Court in *National Thermal Power Corporation vs. Singer Company*(supra) and *Sumitomo Heavy Industries Ltd. vs. ONGC Limited*(supra) is misplaced. He submits that both these judgments were passed when the Foreign Awards Act was then in vogue. He submits that the Supreme Court in *Roger Shashoua vs. Mukesh Sharma*(supra) has categorically held that in view of the present statutory provision, the said judgments would have no application.

He further submits that the Supply Contract and the Maintenance Contract pursuant to the arbitration proceedings were entered on 30.06.2008, i.e. prior to 2012. Hence, he submits that in terms of the judgment of the Supreme Court in ***Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552***, the ratio laid down in ***Bhatia International v. Bulk Trading S.A. & Anr., (2002) 4 SCC 105*** would be applicable to this case. He submits that the Supreme Court in the said case of *Bhatia International v. Bulk Trading S.A. & Anr***.**(supra) had categorically held that in a case of international commercial proceedings held outside India, provision of Part-I of the Arbitration Act would apply unless any or all such provisions have been expressly or impliedly excluded. He submits that as the seat of arbitration is London, it is manifest that there is implied exclusion of Part-I of the Arbitration Act. He further submits that as far as Maintenance Agreement is concerned, Clause 14(4) expressly

excludes application of Part- I of the Arbitration Act. Hence, he submits that the present petition would not be maintainable.

15. I may first look at the judgments which have been relied upon by learned senior counsel for the petitioner. In this context reference may be had to the judgment of the Supreme Court in *National Thermal Power Corporation vs. Singer Company*(supra)**.** That was a case pertaining to the Arbitration Act, 1940 and the Foreign Awards (Recognition and Enforcement) Act, 1961. In that case the Agreement between the parties provided that the laws applicable to the Contract shall be the laws enforce in India and the Courts in Delhi shall have exclusive jurisdiction in all matters arising under the contract. The agreement further provided that the arbitration shall be by three Arbitrators, one to be nominated by each party and the third to be named by the President of the ICC, Paris. Arbitration was to be conducted at such place as the Arbitrators may determine. The disputes that arose were referred to an Arbitral Tribunal in terms of the rules of arbitration of ICC Court. The ICC Court chose London to be the place of Arbitration. The Supreme Court held as follows:-

> "22**.** The principle in Rule 58, as formulated by Dicey, has two aspects — (*a*) the law governing the arbitration agreement, namely, its proper law; and (*b*) the law governing the conduct of the arbitration, namely, its procedural law.
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> 23. The proper law of the arbitration agreement is normally the same as the proper law of the contract. It is only in exceptional cases that it is not so even where the proper law of the contract is expressly chosen by the parties. Where, however, there is no express choice of the law governing the contract as a whole, or the arbitration agreement as such, a presumption may arise that the law of the country where the arbitration is agreed to be held is the

proper law of the arbitration agreement. But that is only a rebuttable presumption.

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46. Significantly, London was chosen as the place of arbitration by reason of Article 12 of the ICC Rules which reads:
"The place of arbitration shall be fixed by the International Court of Arbitration, unless agreed upon by the parties."
The parties had never expressed their intention to choose London as the arbitral forum, but, in the absence of any agreement on the question, London was chosen by the ICC Court as the place of arbitration. London has no significant connection with the contract or the parties except that it is a neutral place and the Chairman of the Arbitral Tribunal is a resident there, the other two members being nationals of the United States and India respectively.

…

51. In sum, it may be stated that the law expressly chosen by the parties in respect of all matters arising under their contract, which must necessarily include the agreement contained in the arbitration clause, being Indian law and the exclusive jurisdiction of the courts in Delhi having been expressly recognised by the parties to the contract in all matters arising under it, and the contract being most intimately associated with India, the proper law of arbitration and the competent courts are both exclusively Indian, while matters of procedure connected with the conduct of arbitration are left to be regulated by the contractually chosen rules of the ICC to the extent that such rules are not in conflict with the public policy and the mandatory requirements of the proper law and of the law of the place of arbitration. The Foreign Awards Act, 1961 has no application to the award in question which has been made on an arbitration agreement governed by the law of India.

52. The Tribunal has rightly held that the "substantive law of the contract is Indian law". The Tribunal has further held "the laws of England govern procedural matters in the arbitration".

16. Hence, given the clauses in the said Agreement the Supreme Court held that the proper law governing the Arbitration Agreement would be Indian Law and the competent courts of India would have jurisdiction over all matter concerning the arbitration.

17. In *Sumitomo Heavy Industries Ltd.vs. ONGC Limited*(supra) the Supreme Court was dealing with a contract which also stated that the Contract shall be subject to laws in India. The proceedings were to be held at London, UK in accordance with the provision of ICC. The Supreme Court held as follows:-

> "5. The decision rendered by Potter, J. in the Commercial Court is of some importance because the jurisdiction of the English courts was discussed. The learned Judge said:
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> "Before stating my reasons for that conclusion and then turning to the 'frustration' argument, and because questions have arisen as to whether English law or Indian law is appropriate to be applied at various stages of this application, I propose briefly to advert to the various laws potentially applicable to the various aspects of the arbitral relationship which may fall for consideration in cases of this kind.
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> (*1*) The proper law of the underlying contract, i.e., the law governing the contract which creates the substantive rights and obligations of the parties out of which the dispute has arisen.
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> (*2*) The proper law of the arbitration agreement, i.e., the law governing rights and obligations of the parties arising from their agreement to arbitrate and, in particular, their obligation to submit their disputes to arbitration and to honour an award. This includes inter alia questions as to the validity of the arbitration agreement, the validity of the notice of arbitration, the constitution of the tribunal and the question whether an award lies within the jurisdiction of the arbitrator.

(*3*) The proper law of the reference, i.e., the law governing the contract which regulates the individual reference to arbitration. This is an agreement subsidiary to but separate from the arbitration agreement itself, coming into effect by the giving of a notice of arbitration from which point a new set of mutual obligations in relation to the conduct of the reference arise upon lines canvassed in the *Bremer Vulkan Schiffbau Und Maschinenfabrik* v. *South India Shipping Corpn*. [(1981) 1 Lloyd's Rep 253] (Lloyd's Rep at p. 263) and developed by Mr Justice Mustill (as he then was) in *Black Clawson International Ltd.* v. *Papierwerke Waldhof Aschaffenburg A.G.* [(1981) 2 Lloyd's Rep 446] That law governs the question of whether by reason of subsequent circumstance the parties have been discharged (whether by repudiation or frustration) from their obligation to continue with the reference of the individual dispute, while leaving intact the continuous agreement to refer future disputes pursuant to the arbitration agreement.

(*4*) The curial law, i.e., the law governing the arbitration proceedings themselves, the manner in which the reference is to be conducted. It governs the procedural powers and duties of the arbitrators, questions of evidence and the determination of the proper law of the contract.

In respect of many arbitrations, the applicable law will be the same in all four cases. (*1*) will usually be decisive as to (*2*), in the absence of an express contrary choice; (*2*) and (*3*) will very rarely differ. However, as to (*4*), it is not uncommon to encounter the incidence of a different curial law in cases where the parties have made an express choice for arbitration (frequently in London) in a jurisdiction divorced from the jurisdiction with which the contract in (*1*) has most real connection.

In this case, as to (*1*), the parties have made an express choice of Indian law as the proper law of the contract. As to (*2*), it seems to me likely (although it is not necessary finally to decide) that the proper law of the arbitration agreement is similarly Indian law, since the arbitration agreement is part of the substance of the underlying contract and the terms of clause 17.1 are clear in that respect. As to (*3*), it matters not for the purposes of this application

whether the governing law is English or Indian law, because Mr Dunning has conceded before me that there is no material difference between the two so far as applicable to the doctrine of frustration upon which he relies (see also para 7 of the affidavit of Mr Majumdar to that effect).

As to (*4*), the curial law, it seems to me plain that it is the law of England. There is, it is true, no express choice of curial law. However, there is a clear requirement that the arbitration proceedings be held in London. In the absence of express agreement there is a strong prima facie presumption that the parties intend the curial law to be the law of the 'seat' of the arbitration, i.e., the place at which the arbitration is to be conducted, on the ground that that is the country most closely connected with the proceedings. See Mustill and Boyd, 2nd Edn., p. 64."

…….

11. The conclusion that we reach is that the curial law operates during the continuance of the proceedings before the arbitrator to govern the procedure and conduct thereof. The courts administering the curial law have the authority to entertain applications by parties to arbitrations being conducted within their jurisdiction for the purpose of ensuring that the procedure that is adopted in the proceedings before the arbitrator conforms to the requirements of the curial law and for reliefs incidental thereto. Such authority of the courts administering the curial law ceases when the proceedings before the arbitrator are concluded.

12. The proceedings before the arbitrator commence when he enters upon the reference and conclude with the making of the award. As the work by Mustill and Boyd aforementioned puts it, with the making of a valid award the arbitrator's authority, powers and duties in the reference come to an end and he is "*functus officio*" (p. 404). The arbitrator is not obliged by law to file his award in court but he may be asked by the party seeking to enforce the award to do so. The need to file an award in court arises only if it is required to be enforced, and the need to challenge it arises if it is being enforced.

The enforcement process is subsequent to and independent of the proceedings before the arbitrator. It is not governed by the curial or procedural law that governed the procedure that the arbitrator followed in the conduct of the arbitration.

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15. We think that our conclusion that the curial law does not apply to the filing of an award in court must, accordingly, hold good. We find support for the conclusion in the extracts from Mustill and Boyd which we have quoted earlier. Where the law governing the conduct of the reference is different from the law governing the underlying arbitration agreement, the court looks to the arbitration agreement to see if the dispute is arbitrable, then to the curial law to see how the reference should be conducted, "and then returns to the first law in order to give effect to the resulting award".

16. The law which would apply to the filing of the award, to its enforcement and to its setting aside would be the law governing the agreement to arbitrate and the performance of that agreement. Having regard to the clear terms of clause 17 of the contract between the appellant and the first respondent, we are in no doubt that the law governing the contract and the law governing the rights and obligations of the parties arising from their agreement to arbitrate, and, in particular, their obligation to submit disputes to arbitration and to honour the award, are governed by the law of India; nor is there any dispute in this behalf. Section 47 of the Indian Arbitration Act, 1940, reads thus:

"47. *Act to apply to all arbitrations*.—Subject to the provisions of Section 46, and save insofar as is otherwise provided by any law for the time being in force, the provisions of this Act shall apply to all arbitrations and to all proceedings thereunder:

Provided that an arbitration award otherwise obtained may with the consent of all the parties interested be taken into consideration as a compromise or adjustment of a suit by any court before which the suit is pending."

17. The only other statute which is required to be considered in the context of the provisions of Section 47 of the 1940 Act is the Foreign Awards (Recognition and Enforcement) Act, 1961. For the purposes of determining whether the provisions of the 1940 Act are subject to the provisions of the 1961 Act, Section 9 is relevant. It reads thus:

"9. *Saving*.—Nothing in this Act shall—
(*a*) prejudice any rights which any person would have had of enforcing in India of any award or of availing himself in India of any award if this Act had not been passed; or
(*b*) apply to any award made on an arbitration agreement governed by the law of India."

By reason of Section 9(*b*), the 1961 Act does not apply to any award made on an arbitration agreement governed by the law of India. The 1961 Act, therefore, does not apply to the arbitration agreement between the appellant and the first respondent. The 1940 Act applies to it and, by reason of Section 14(2) thereof, the courts in India are entitled to receive the award made by the second respondent. We must add in the interests of completeness that it is not the case of the appellant that the High Court at Bombay lacked the territorial jurisdiction to do so."

Hence, the court came to the conclusion that for enforcement of the award and for setting aside the same, it is the law governing the arbitration that would apply. As the law governing the contract and the law governing the rights and obligations arising from the contract to arbitrate in that case was Indian Law, the Arbitration Act, 1940 was held to be applicable.

18. I may note that the Constitution Bench of the Supreme Court in *Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc.*(supra) specifically noted that the judgment of the Supreme Court in *National Thermal Power Corporation vs. Singer Company & Ors.*(supra) in

view of the amendments to the Arbitration Act is rendered irrelevant under Arbitration Act, 1996. The relevant paras of the said judgment read as follows:

> "91. We are of the opinion that the Section has been intentionally deleted, whereas many other provisions of the 1961 Act have been retained in the Arbitration Act, 1996. If the provision were to be retained, it would have been placed in Part II of the Arbitration Act, 1996. In our opinion, there is no link between Section 2(7) of the Arbitration Act, 1996, with the deleted Section 9-B of the 1961 Act. It was by virtue of the aforesaid provision that the judgments in Singer Co. and Ors. (supra) and ONGC v. Western Co. of North America (supra) were rendered. In both the cases the foreign awards made outside India were set aside, under the 1940 Act. By deletion of Section 9-B of the 1961 Act, the judgments have been rendered irrelevant under the Arbitration Act, 1996. Having removed the mischief created by the aforesaid provision, it cannot be the intention of the Parliament to reintroduce it, in a positive form as Section 2(7) of the Arbitration Act, 1996. We, therefore, see no substance in the additional submission of Mr.Sorabjee.
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> 92. We agree with Mr. Salve that Part I only applies when the seat of arbitration is in India, irrespective of the kind of arbitration. Section 2(7) does not indicate that Part I is applicable to arbitrations held outside India.
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> 93. We are, therefore, of the opinion that Section 2(7) does not alter the proposition that Part I applies only where the "seat" or "place" of the arbitration is in India.
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> .....
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> 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."

19. To the same effect is the judgment of the Supreme Court in the case of ***Union of India v. Reliance Industries Ltd. & Ors., (2015) 10 SCC 213.*** In the said case the Supreme Court held as follows:

> "13. It can be seen that this Court in Singer's case did not give effect to the difference between the substantive law of the contract and the law that governed the arbitration. Therefore, since a construction of Section 9(b) of the Foreign Awards Act led to the aforesaid situation and led to the doctrine of concurrent jurisdiction, the 1996 Act, while enacting Section 9(a) of the repealed Foreign Awards Act, 1961, in Section 51 thereof, was careful enough to omit Section 9(b) of the 1961 Act which, as stated hereinabove, excluded the Foreign Awards Act from applying to any award made on arbitration agreements governed by the law of India.
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> 14. This being the case, the theory of concurrent jurisdiction was expressly given a go-by with the dropping of Section 9(b) of the Foreign Awards Act, while enacting Part-II of the Arbitration Act, 1996, which repealed all the three earlier laws and put the law of arbitration into one statute, albeit in four different parts."

It is manifest from a reading of the two judgments noted above, i.e., *Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc.*(supra) and *Union of India v. Reliance Industries Ltd. & Ors.*(supra) that the judgment of *National Thermal Power Corporation vs. Singer Company & Ors.*(supra) has no application after enactment of the Arbitration Act, 1996. Hence, reliance of the petitioner on the said judgment of the Supreme Court, i.e., *National Thermal Power Corporation vs. Singer Company & Ors.*(supra) is misplaced.

20. I may also look at the latest judgment of a Three Judge Bench of the Supreme Court in ***Union of India v. Hardy Exploration and Production (India) INC, 2018 SCC OnLine 1640***. In the said judgment, the Supreme

Court had clarified that principles laid down in *Sumitomo Heavy Industries Ltd.vs. ONGC Limited*(supra) would have no applicability to the controversy under the present Act. The court held as follows:

> "23. In IMAX Corporation (supra), interpreting the arbitration clause and the ICC Rules and referring to earlier precedents, the Court ruled:-
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> > "39. If in pursuance of the arbitration agreement, the arbitration took place outside India, there is a clear exclusion of Part I of the Arbitration Act. In the present case, the parties expressly agreed that the arbitration will be conducted according to the ICC Rules of Arbitration and left the place of arbitration to be chosen by ICC. ICC in fact, chose London as the seat of arbitration after consulting the parties. The arbitration was held in London without demur from any of the parties. All the awards i.e. the two partial final awards, and the third final award, were made in London and communicated to the parties. We find that this is a clear case of the exclusion of Part I vide Eitzen Bulk A/S, and the decisions referred to and followed therein."
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> 24. In Roger Shashoua (supra), apart from dealing with the concept of precedents, the two-Judge Bench also scanned the anatomy of the arbitration clause and held:-
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> > "…the distinction between the venue and the seat remains. But when a court finds that there is prescription for venue and something else, it has to be adjudged on the facts of each case to determine the juridical seat. As in the instant case, the agreement in question has been interpreted and it has been held that London is not mentioned as the mere location but the courts in London will have the jurisdiction, another interpretative perception as projected by the learned Senior Counsel is unacceptable."
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> 25. We may now focus on the discussion and the ultimate conclusion in Sumitomo Heavy Industries Ltd. (supra) and how the

later decisions under the 1996 Act perceived the same. In Bharat Aluminium Corporation (supra) (BALCO-II), the three-Judge Bench dealt with the decisions in Sumitomo Heavy Industries Ltd (supra) and Reliance Industries Limited (supra) and noted thus:-

> "13. Sumitomo is of no avail to the appellant. In Sumitomo, there was no specific choice on the law of arbitration agreement and this Court held that in absence of such choice, the law of arbitration agreement would be determined by the substantive law of the contract. That is not the case in this agreement."

26. It laid emphasis on Reliance Industries Limited (II) (supra) and opined that an application under Section 34 of the 1940 Act was not maintainable.

27. In view of the aforesaid development of law, there is no confusion with regard to what the seat of arbitration and venue of arbitration mean. There is no shadow of doubt that the arbitration clause has to be read in a holistic manner so as to determine the jurisdiction of the Court. That apart, if there is mention of venue and something else is appended thereto, depending on the nature of the prescription, the Court can come to a conclusion that there is implied exclusion of Part I of the Act. The principle laid down in Sumitomo Heavy Industries Ltd. (supra) has been referred to in Reliance Industries Limited (II) and distinguished. In any case, it has no applicability to a controversy under the Act. The said controversy has to be governed by the BALCO principle or by the agreement or by the principle of implied exclusion as has been held in Bhatia International."

21. Hence, it is manifest that the said judgment relied upon by the petitioner, namely, *Sumitomo Heavy Industries Ltd. vs. ONGC Limited* (supra) in view of the enactment of the Arbitration Act, 1996 would also have no application to the facts of this case.

22. I may now look at the judgment of the Supreme Court in the case of *Roger Shashoua & Ors. Vs. Mukesh Sharma*(supra). Learned senior counsel

appearing for the respondents has strongly relied upon the said judgment of the Supreme Court. I may only note that on 21.3.2017 on the request of the petitioner this matter was adjourned noting that the petitioner relies upon the judgment of this court in ***Mukesh Sharma vs. Roger Shashoua & Ors., 231 (2016) DLT 14*** where in appeal arguments have been heard by the Supreme Court and orders have been reserved. On 22.5.2017 when this matter again came up, learned senior counsel for the respondents had submitted that the judgment relied upon by learned counsel for the petitioner has no application to the facts of the present case.

23. Learned senior counsel for the respondents has vehemently argued that the judgment of the Supreme Court in the said case i.e. *Roger Shashoua & Ors. vs. Mukesh Sharma*(supra) deals with identical facts and rejects similar contentions as raised by the petitioner. I may note that the arbitration clause which was subject matter of interpretation in the said judgment reads as follows:-

> "2. .....
> 14.1 In the event, a dispute arise in connection with the validity, interpretation, implementation or breach of any provision of this agreement, the parties shall attempt in the first instance, to resolve such dispute through negotiations within thirty (30) days from a party making a request therefore. In the event, the dispute is not resolved through negotiations or such negotiations do not commence within thirty (30) days of a written request on his behalf, either party may refer the dispute to arbitration. Each party shall nominate one arbitrator and in the event of any difference between the two arbitrators, a third arbitrator/umpire shall be appointed. The arbitration proceedings shall be, in accordance with the rules of the conciliation and arbitration of International Chamber of Commerce, Paris.

14.2 Proceedings in such arbitration shall be conducted in the English language.

14.4 The venue of arbitration shall be London, United Kingdom.
....."

"17.6 Governing Law
This Agreement shall be governed by and construed in accordance with the laws of India."

24. The Supreme court in the light of the above clause in *Roger Shashoua vs. Mukesh Sharma*(supra*)* held as follows:-

"45. It has to be borne in mind that the larger Bench gave emphasis on the aforesaid facts and further took note of the fact that the said judgment had relied upon C v. D [C v. D, 2008 Bus LR 843: 2007 EWCA Civ 1282 (CA)]. Thereafter, as is manifest, the larger Bench has adverted to in detail the judgment in C v. D [C v. D, 2008 Bus LR 843: 2007 EWCA Civ 1282 (CA)]. That apart, the Court has referred to Union of India v. McDonnell Douglas Corpn. [Union of India v. McDonnell Douglas Corpn., (1993) 2 Lloyd's Rep 48] and Naviera Amazonica Peruana S.A. v. Compania International de Seguros del Peru [Naviera Amazonica Peruana S.A. v. Compania International de Seguros del Peru, (1988) 1 Lloyd's Rep 116 (CA)] and concluded thus: (BALCOcase [BALCO v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552: (2012) 4 SCC (Civ) 810], SCC p. 618, paras 115-117)

> "115. Upon consideration of the entire matter, it was observed in Sulamérica case [Sulamérica Cia Nacional de Seguros SA v. Enesa Engenharia SA – Enesa, 2012 EWHC 42 (Comm)] that "In these circumstances it is clear to me that the law with which the agreement to arbitrate has its closest and most real connection is the law of the seat of arbitration, namely, the law of England" (para 14). It was thereafter concluded by the High Court that the English law is the proper law of the agreement to arbitrate (para 15).

116. The legal position that emerges from a conspectus of all the decisions, seems to be, that the choice of another country as the seat of arbitration inevitably imports an acceptance that the law of that country relating to the conduct and supervision of arbitrations will apply to the proceedings.

117. It would, therefore, follow that if the arbitration agreement is found or held to provide for a seat/place of arbitration outside India, then the provision that the Arbitration Act, 1996 would govern the arbitration proceedings, would not make Part I of the Arbitration Act, 1996 applicable or enable the Indian courts to exercise supervisory jurisdiction over the arbitration or the award. It would only mean that the parties have contractually imported from the Arbitration Act, 1996, those provisions which are concerned with the internal conduct of their arbitration and which are not inconsistent with the mandatory provisions of the *English procedural law/curial law*. This necessarily follows from the fact that Part I applies only to arbitrations having their seat/place in India."

…....

68. It is submitted by Mr Dwivedi, learned Senior Counsel appearing for the appellants that the nature of the language employed in the aforesaid clauses clearly lay the postulate that the arbitration shall be carried only in London and the seat of arbitration shall be in London. Apart from relying upon the decision in *Enercon (India) Ltd.* [*Enercon (India) Ltd.* v. *Enercon GmbH*, (2014) 5 SCC 1 : (2014) 3 SCC (Civ) 59] for the said purpose, he has copiously referred to the Rules of Conciliation and Arbitration of the International Chamber of Commerce. Per contra, Mr Chidambaram would submit that the arbitration agreement clearly lays down with regard to the venue and as has been held by this Court, venue cannot be equated with the seat/place of arbitration. As we perceive, the clause relating to the arbitration stipulates that the arbitral proceedings shall be in accordance with the ICC Rules. There is a clause in the SHA that the governing law

of SHA would be laws of India. The aforesaid agreement has already been interpreted by the English courts to mean that the parties have not simply provided for the location of hearing to be in London.

69. It is worthy to note that the arbitration agreement is not silent as to what law and procedure is to be followed. On the contrary, Clause 14.1. lays down that the arbitration proceedings shall be in accordance with the Rules of Conciliation and Arbitration of ICC. In *Enercon (India) Ltd.*[*Enercon (India) Ltd.* v. *Enercon GmbH*, (2014) 5 SCC 1 : (2014) 3 SCC (Civ) 59], the two-Judge Bench referring to *Shashoua case* accepted the view of Cooke, J. that the phrase "venue of arbitration shall be in London, UK" was accompanied by the provision in the arbitration clause or arbitration to be conducted in accordance with the Rules of ICC in Paris. The two-Judge Bench accepted the Rules of ICC, Paris which is supranational body of Rules as has been noted by Cooke, J. and that is how it has accepted that the parties have not simply provided for the location of hearings to be in London. To elaborate, the distinction between the venue and the seat remains. But when a court finds that there is prescription for venue and something else, it has to be adjudged on the facts of each case to determine the juridical seat. As in the instant case, the agreement in question has been interpreted and it has been held that London is not mentioned as the mere location but the courts in London will have the jurisdiction, another interpretative perception as projected by the learned Senior Counsel is unacceptable.

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72. It is apposite to note that the said decision has been discussed at length in Union of India v. Reliance Industries Ltd. [Union of India v. Reliance Industries Ltd., (2015) 10 SCC 213 : (2016) 1 SCC (Civ) 102] The Court, in fact, reproduced the arbitration clause in Singer Co.[NTPC v. Singer Co., (1992) 3 SCC 551] and referred to the analysis made in the judgment and noted that notwithstanding the award, it was a foreign award, since the substantive law of the contract was Indian law and the arbitration

law was part of the contract, the arbitration clause would be governed by Indian law and not by the Rules of International Chamber of Commerce. On that basis the Court held in Singer Co. [NTPC v. Singer Co., (1992) 3 SCC 551] that the mere fact that the venue chosen by the ICC Court or conduct of the arbitration proceeding was London, does not exclude the operation of the Act which dealt with the domestic awards under the 1940 Act. The two-Judge Bench in Reliance Industries Ltd. [Union of India v. Reliance Industries Ltd., (2015) 10 SCC 213: (2016) 1 SCC (Civ) 102] quoted para 53 of Singer Co.[NTPC v. Singer Co., (1992) 3 SCC 551] and thereafter opined: (Reliance Industries case[Union of India v. Reliance Industries Ltd., (2015) 10 SCC 213: (2016) 1 SCC (Civ) 102]

"13. It can be seen that this Court in Singer case [NTPC v. Singer Co., (1992) 3 SCC 551] did not give effect to the difference between the substantive law of the contract and the law that governed the arbitration. Therefore, since a construction of Section 9(b) of the Foreign Awards Act led to the aforesaid situation and led to the doctrine of concurrent jurisdiction, the 1996 Act, while enacting Section 9(a) of the repealed Foreign Awards Act, 1961, in Section 51 thereof, was careful enough to omit Section 9(b) of the 1961 Act which, as stated hereinabove, excluded the Foreign Awards Act from applying to any award made on arbitration agreements governed by the law of India.

14. This being the case, the theory of concurrent jurisdiction was expressly given a go-by with the dropping of Section 9(b) of the Foreign Awards Act, while enacting Part II of the Arbitration Act, 1996, which repealed all the three earlier laws and put the law of arbitration into one statute, albeit in four different parts."

25. Hence, the Supreme Court came to a conclusion that the distinction between venue and the seat of arbitration remains in such matters. However, where a court finds that there is a prescription for venue and something else

it has to be adjudged upon on the facts of each case to determine the juridical seat. The facts of the present case are identical to that of the case of *Roger Shashoua vs. Mukesh Sharma*(supra)**.** The arbitration clause in the said case provides for the venue of arbitration to be London, U.K. The arbitration proceedings are to be held in accordance with the Rules of ICC, Paris. The governing law for the agreement is the Indian law. Hence, the facts as can be seen are virtually identical to the facts of the present case. In the Supply Contract herein the seat of arbitration has been noted to be London. The governing law is the law of India. The arbitration proceedings are to be conducted under the rules of ICC, Paris. Regarding the Maintenance Contract the only difference is that it specifically excludes part I of the Arbitration Act. It also holds that the place of arbitration shall be London. Given the commonality of facts in the present case with the facts which are subject matter of the judgment in the case of *Roger Shashoua vs. Mukesh Sharma* (supra) it becomes quite clear that the dicta of said judgment is applicable to the facts of the present case. Accordingly, this court would not have jurisdiction to entertain the present petition.

26. The matter may be looked upon from another perspective. As noted above, the constitution Bench of the Supreme Court in *Bharat Aluminium Company vs. Kaiser Aluminium Technical Services Inc*.(supra) held as follows:-

> "194. In view of the above discussion, we are of the considered opinion that the Arbitration Act, 1996 has accepted the territoriality principle which has been adopted in the UNCITRAL Model Law. Section 2(2) makes a declaration that Part I of the Arbitration Act, 1996 shall apply to all arbitrations which take place within India. We are of the considered opinion that Part I of the Arbitration Act, 1996 would have no application

to international commercial arbitration held outside India. Therefore, such awards would only be subject to the jurisdiction of the Indian courts when the same are sought to be enforced in India in accordance with the provisions contained in Part II of the Arbitration Act, 1996. In our opinion, the provisions contained in the Arbitration Act, 1996 make it crystal clear that there can be no overlapping or intermingling of the provisions contained in Part I with the provisions contained in Part II of the Arbitration Act, 1996.

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."

27. In view of the above judgment, as the agreement in the present case was executed prior to the aforesaid judgment of the Supreme Court the dicta of the Supreme Court in *Bhatia International vs. Bulk Trading S.A. & Anr*. (supra) would continue to apply. The Supreme Court in the said case i.e. *Bhatia International vs. Bulk Trading S.A. & Anr.* (supra) held as follows:-

> "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.'

28. The above judgment of the Supreme Court was noted later by the Supreme Court in the case of *Union of India v. Reliance Industries Ltd. & Ors.*(supra). The Supreme Court in the said judgment held as follows:

> "18. It is important to note that in para 32 of Bhatia International 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 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. This is now well settled by a series of decisions of this court [see Videocon Industries Ltd. v. Union of India, Dozco India (P) Ltd. v. Doosan Infracore Co. Ltd., Yograj Infrastructure Ltd. v. Ssang Yon Engg. and Construction Col. Ltd., the very judgment in

this case reported in Reliance Industries Ltd. v. Union of India and a recent judgment in Harmony Innovation Shipping Ltd. v. Gupta Coal India Ltd.].

.....

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."

Hence, the Supreme Court concluded above that Part-I of the Arbitration Act, 1996 would not apply if it had been excluded either expressly or by necessary implication. Where the juridical seat of the arbitration is outside India or the law governing the arbitration agreement is a law other than Indian law, Part 1 of the Arbitration Act by necessary implication will be excluded.

29. Coming back to the facts of this case. As far as the Supply Contract is concerned, it is categorically stated that the seat of arbitration would be London. It is manifest that it would imply exclusion of Part I of the Arbitration Act. Similarly, as far as the Maintenance Contract is concerned, the same categorically excludes Part I of the Arbitration Act, 1996. In my opinion, the said clauses clearly show that the parties intend exclusion of Part I of the Arbitration Act, 1996. Hence, even otherwise, keeping in view

the dicta of the Supreme Court in *Bhatia International vs. Bulk Trading S.A. & Anr.*(supra) it is clear that this court would not have jurisdiction to adjudicate the present petition.

30. In my opinion, keeping in view the above arbitration clause, Part I of the Arbitration Act, 1996 could not be applicable to the facts of this case. The present petition is not maintainable and is accordingly dismissed.

(JAYANT NATH)
JUDGE

OCTOBER 25, 2018/n/v