* **HIGH COURT OF DELHI : NEW DELHI**

\+ **IA No. 11355/2009 & CS (OS) No. 1392/2009**

Bhushan Steel Ltd. ... Plaintiff

Through: Mr. A.S. Chandhiok, Sr. Adv. with Ms. Ranjana Roy Gawai, Mr. Rajiv Jain and Ms. Vasudha Sen, Advs.

Versus

Singapore International Arbitration Centre & Anr. … Defendants

Through: Mr. Sandeep Sethi, Sr. Adv. with Mr. D. Bhatacharya, Mr. Anil Kumar Mishra and Mr. Aditya Jain, Advs.

Decided on : June 04, 2010

Coram:

HON'BLE MR. JUSTICE MANMOHAN SINGH

1. Whether the Reporters of local papers may be allowed to see the judgment? No

2. To be referred to Reporter or not? Yes

3. Whether the judgment should be reported in the Digest? Yes

MANMOHAN SINGH, J.

1. IA No. 11355/2009 has been filed by defendant no. 2 under Order VII Rule 11(d) of the Code of Civil Procedure, 1908 ('CPC' for brevity) for rejection of the plaint. This order shall dispose of the afore-stated application.

2. The present suit has been filed seeking the following reliefs:

> a) declare that the purported arbitration agreement incorporated in the eight (8) Sales Contract executed between the plaintiff and the defendant no. 2 for supply of coated steel coils is vague and indeterminate and hence void and incapable of being enforced;

b) defendant no. 1 has no jurisdiction under the Sales Contracts and arbitration proceedings cannot be commenced or consummated under the aegis of defendant no. 1;

c) declare that the Sales Contract would be interpreted in terms of and governed by Indian Contract Act, 1872 and that the proper or substantive law in the instant case would be Indian Law;

d) grant permanent injunction in favour of the plaintiff and against the defendants and defendant no. 1 restraining them from initiating the arbitration proceedings, pursuant to the purported arbitration notice under the aegis of defendant no. 1;

e) declare that there is no arbitrable dispute between the plaintiff and defendant no. 2.

3. The brief facts leading up to the filing of the present case are that the plaintiff is a Public Limited company duly constituted under the Companies Act, 1956 with national as well as international repute and goodwill in its business of manufacturing steel, iron and allied products. Defendant no. 2 is a corporation existing under the laws of Denmark with its registered office at Denmark. As per the plaint, the parties entered into fourteen Sales Contracts in 2007 according to which defendant no. 2 was to purchase goods from the plaintiff under the terms of the contracts. The quantity and quality of the goods was mentioned in the contracts but the actual specifications were to be determined at the time of placing of order. As per eight of the fourteen contracts, 776 coated steel coils were shipped by the plaintiff to the defendant no. 2 and were duly received by it without any objection between July and November 2007.

4. Invoices for the goods delivered were sent to the defendant no. 2 and the plaintiff for the first time received communication vide

letter dated 16.01.2008 from the said defendant to the effect that the quality of the goods was not as per specification. Despite the complaint being time barred, the plaintiff sent its surveyor to inspect the said defective products and found that none of the so-called 'defective' products were in fact faulty. Further, of the 776 coils which were shipped to the defendant no. 2, only 32 were found.

5. Despite these complaints, defendant no. 2 proceeded to remit advance payment vis-à-vis the goods which were subject matter of the remaining six contracts between the parties and the plaintiff prepared the goods but in the meantime, defendant no. 2 informed the plaintiff that the goods should not be dispatched till further directions. No such direction/ communication has been made to the plaintiff till date, who is at a loss of USD 777297.23 as the products were manufactured on client-based specifications and cannot be sold in the open market.

6. By notice dated 11.06.2008 defendant no. 2 informed the plaintiff that due to the faulty goods supplied by it to the defendant, the plaintiff would be liable to pay to defendant no. 2 a sum of Rs. 4,278,689.88 along with interest @ 12%. The contracts were not cancelled and the plaintiff was called upon to deliver the remaining goods under the said contracts. The plaintiff replied vide letter dated 18.06.2008 stating that defendant no. 2 owed it USD 777297.23 for the goods lying with it and that arbitration proceedings could not be initiated due to the vague terms in which the arbitration clause was worded. Thereafter defendant no. 2 issued another notice dated 05.01.2009 initiating winding up proceedings against the plaintiff and

requesting it to return the advance money paid by defendant no. 2 for the remaining six contracts and also to make a payment for USD 4556.25 with respect to one of the contracts.

7. Defendant no. 2 filed winding up proceedings in this Court which are pending adjudication. Thereafter defendant no. 2 issued a notice of arbitration to the plaintiff invoking the purported arbitration agreement between the parties in respect of the eight sales contracts under which the plaintiff allegedly supplied defective goods.

8. In the present case, the Arbitration Clause reads as under:

> "In the event of any question of dispute arising under the contract, the same shall be referred to the award of arbitrators to be nominated one each by the sellers and buyers within 30 days notice from either side or in the case of arbitrators not agreeing then to the award of an umpire to be appointed by the arbitrators in writing prior to proceeding with the arbitration. The decision of the arbitrators or the umpire as the case may be shall be final and binding on both parties. The arbitration will take place in Singapore as per the international law."

As per the plaintiff, the said arbitration agreement between the parties is vague and unenforceable and therefore, no arbitration proceedings can occur between the parties. Hence the present suit.

9. In the application under consideration, defendant no. 2 has contended that the plaint ought to be rejected based on the following arguments :

(i) The suit is barred by Section 5 of the Arbitration and Conciliation Act, 1996 ('the Act' for short). Defendant no. 2 has contended that the plaintiff has sought to challenge the arbitration clause in the sales contract and not the entire contract and a

declaration to the effect that the arbitration clause in an agreement is null and void cannot be challenged by way of a civil suit as the Civil Court's jurisdiction is very limited as laid out in Section 5 of the Act. While arguing that the limited scope for action under Section 5 of the Act does not allow this Court to interfere in the present matter, learned counsel for the defendants referred to the judgment titled ***Roshan Lal Gupta Vs. Parasram Holdings Pvt. Ltd. & Anr.*** reported as *157 (2009) DLT 712* which can be read as under :

> "5. …..It is not as if the civil Court *per se* does not have jurisdiction to entertain a suit emanating from a transaction subject matter of arbitration agreement. A civil Court cannot dismiss a suit instituted before it, even though found to be subject matter of an arbitration agreement, at the threshold. It is always open to the defendant to the suit to waive, give up and abandon the plea of arbitration and if that were to happen then the suit will continue before the civil Court. …..
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> 20. …..A peremptory Section 5 prohibiting the jurisdiction of Courts save as expressly provided under the Act has also been introduced. If in spite of the said changes, this Court is to hold that a suit is maintainable where the contract containing the arbitration clause is challenged on ground of forgery and the Court in such suit is empowered to injunct arbitration proceedings (as otherwise no purpose would be served by such suit), in my view, it would tantamount to negating the effect of the change in the statute. It may also be noticed that arbitration is normally provided for in commercial agreements and whereunder after the disputes have arisen, one of the parties is always interested in delaying the disposal of the claims of the other. In fact, the parties while providing for arbitration in commercial contracts do so for the reasons of expediency. If notwithstanding the aforesaid material changes between the old and the new Act, it is to be held that a suit as a present one is maintainable, it would give a tool in the hands of the party wanting to delay the disposal of the claims of the other; in each case suits would be instituted and stay of arbitration proceedings would be sought.
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> 25. I, however, have found the question to be no longer *res integra*. A Bench of three-Judge of the Apex Court in

Kvaerner Cementation India Ltd. v. ***Bajranglal Agarwal & Anr.,*** IV (2001) SLT 535=2001 (6) Supreme 265, (and which is unfortunately not reported in the law journals having large circulation and frequently used in the Courts) has held as under:

> "1. These special leave applications are directed against an order of a learned Single Judge of Bombay High Court refusing to interfere with an order of the Civil Court vacating an interim order of injunction granted by it earlier. The suit in question had been filed for a declaration that there does not exist any arbitration clause and as such the arbitral proceedings are without jurisdiction. The learned Single Judge of Bombay High Court came to hold that in view of Section 5 of the Arbitration and Conciliation Act, 1996 read with Section 16 thereof since the Arbitral Tribunal has the power and jurisdiction to make rule on its own jurisdiction, the Civil Court would not pass any injunction against an arbitral proceeding.
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> 2. Mr. Dave, the learned Senior Counsel appearing for the petitioner contends that the jurisdiction of the civil Court need not be inferentially held to be ousted unless any statute on the face of it excludes the same and judged from that angle when a party assails the existence of an arbitration agreement, which would confer jurisdiction on an Arbitral Tribunal, the Court committed error in not granting an order of injunction. There cannot be any dispute that in the absence of any arbitration clause in the agreement, no dispute could be referred for arbitration to an Arbitral Tribunal. But, bearing in mind the very object with which the Arbitration and Conciliation Act, 1996 has been enacted and the provisions thereof contained in Section 16 conferring the power on the Arbitral Tribunal to rule on its own jurisdiction including ruling on any objection with respect to existence or validity of the arbitration agreement, we have no doubt in our mind that the Civil Court cannot have jurisdiction to go into that question. A bare reading of Section 16 makes it explicitly clear that the Arbitral Tribunal has the power to rule on its own jurisdiction even when any objection with respect to existence or validity of the arbitration agreement is raised and a conjoint reading of Sub-sections (2), (4) and (6) of Section 16 would make it clear that such a decision would be amenable to be assailed within the ambit

> of Section 34 of the Act. In this view of the matter, we see no infirmity with the impugned order so as to be interfered with by this Court. The petitioner who is a party to the arbitral proceedings may raise the question of jurisdiction of the Arbitrator as well as the objection on the ground of non-existence of any arbitration agreement in the so-called dispute in question and such an objection being raised, the Arbitrator would do well in disposing of the same as a preliminary issue so that it may not be necessary to go into the entire gamut of arbitration proceedings."
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> Thus the question of maintainability of suit need not detain me any further.
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> 26. The question Nos. 1, 2 and 4 of law are thus answered to the effect that a suit for declaration that an agreement containing an arbitration clause is forged, fabricated and unenforceable and thus null and void and for injunction restraining arbitration does not lie and is barred by Section 5 of Arbitration Act and Sections 34 and 41(h) of the Specific Relief Act read with Section 16 of the Arbitration Act."

(ii) The present suit is alleged to be a counter blast to the winding up proceedings filed by defendant no. 2 and an attempt to forestall the arbitration proceedings.

(iii) The plaintiff has acknowledged the documents containing the arbitration clause and has accepted the transaction that occurred between the parties. In such circumstances, the plaintiff can bring its contentions and grievances to the attention of the Arbitration Tribunal under the Arbitration Act and the civil action initiated by the plaintiff by way of the present suit is neither justified nor maintainable.

(iv) The suit is barred by estoppels, acquiescence and waiver as the plaintiff never objected to the arbitration clause at the time of entering into the contract and cannot do so now, after deriving

monetary benefit out of the said contracts.

(v) The suit is also averred to be undervalued and not filed with the requisite court fee.

10. In reply to the above contentions of the defendant no. 2, the learned counsel for the plaintiff has referred to the cases of ***Sukanya Holdings (P) Ltd. Vs. Jayesh H. Pandya,*** *(2003) 5 SCC 531* (paragraphs 10 and 12), ***Garden Financial Ltd. Vs. Prakash Inds. Ltd.,*** *AIR 2002 Bom 8* (paragraph 9), ***P.K. Bajaj Vs. Reminiscent India Television Ltd.,*** *2006 (2) Arb.LR 361 (Del)* while arguing that the application under Order VII Rule 11 on the basis that Section 5 of the Act bars the present suit is not maintainable as a judicial authority can intervene under Sections 8, 45 or 54 of the Act. Since the present suit is with regard to an 'international arbitration', it cannot be held as barred until and unless an application under Section 45 of the Act is filed as Section 5 pertains to only Part I of the Act and the subject matter of the present suit would fall within Part II, being international in character. However, the defendants have evaded filing an application under Section 45 of the Act as then this Court would have to give its finding on the validity of the arbitration agreement which would strike a blow to the defendants as the said agreement is unenforceable.

11. It was further argued that Section 5 does not bar this Court's jurisdiction in the present case and provisions in various statutes were referred to emphasize the difference between an express bar of jurisdiction by statute and Section 5 of the Act. Citing Section 9 of the CPC it was submitted that the Court ought to try this suit as its

jurisdiction is not expressly barred. The following judgments were referred to in this regard, and their relevant extracts can be read as under:

(I) ***Dhulabhai Vs. State of M.P.,****(1968) 3 SCR 662*

> "9. ….. At the very start we may observe that the jurisdiction of the civil courts is all embracing except to the extent it is excluded by an express provision of law or by clear intendment arising from such law. This is the purport of Section 9 of the Code of Civil Procedure."

(II) ***ITI Ltd. v. Siemens Public Communications Network Ltd.,***

(2002) 5 SCC 510

> "10. We do not agree with this submission of the learned counsel. It is true in the present Act application of the Code is not specifically provided for but what is to be noted is: is there an express prohibition against the application of the Code to a proceeding arising out of the Act before a civil court? We find no such specific exclusion of the Code in the present Act. When there is no express exclusion, we cannot by inference hold that the Code is not applicable.
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> 11. It has been held by this Court in more than one case that the jurisdiction of the civil court to which a right to decide a lis between the parties has been conferred can only be taken by a statute in specific terms and such exclusion of right cannot be easily inferred because there is always a strong presumption that the civil courts have the jurisdiction to decide all questions of civil nature, therefore, if at all there has to be an inference the same should be in favour of the jurisdiction of the court rather than the exclusion of such jurisdiction and there being no such exclusion of the Code in specific terms except to the extent stated in Section 37(2), we cannot draw an inference that merely because the Act has not provided CPC to be applicable, by inference it should be held that the Code is inapplicable."

12. It has been the argument of the learned counsel for the plaintiff that the present application under Order VII Rule 11 has been

wrongly filed by the defendants and in fact, an application under Section 45 of the Act ought to have been filed.

13. Learned counsel for the plaintiff has contended that an arbitration clause is independent of the underlying contract and the plaintiff's acceptance of the contract cannot be misconstrued as its acceptance/ acquiescence of the vague arbitration clause in view of the separate identity of both.

14. Learned counsel for the plaintiff has argued that its attempt is not to delay the arbitration proceedings contrary to the contention of the defendants and it is in fact contending that since the purported arbitration clause on the basis of which arbitration proceedings have been initiated is vague and unenforceable, the said proceedings have been wrongfully initiated.

15. Per contra, learned counsel for the defendants has argued that the decisions referred by him make it amply clear that Section 5 of the Arbitration Act bars the jurisdiction of a Civil Court in all matters that are covered under Part I of the Act. Further, in view of ***Bhatia International Vs. Bulk Trading S.A.,*** *2002 (4) SCC 105* it is settled law that the provisions of Chapter I of the Arbitration Act will be applicable even to international commercial arbitrations held outside India unless the parties have expressly or impliedly excluded the same.

16. Further, Section 45 of the Act provides that the judicial authority concerned has to refer the parties to arbitration if it is satisfied that the arbitration agreement is valid and enforceable but Section 5 of

the Act bars the intervention of any judicial authority in matters governed under the Act.

17. After hearing both the counsel in detail and having perused the various judgments referred by them as well as the documents filed, it is my opinion that the determinative questions for deciding this application are (a) whether the suit is barred under Order VII Rule 11 (d) of the CPC; (b) whether Section 5 of the Arbitration and Conciliation Act, 1996 bars the jurisdiction of this Court to take cognisance of the present suit and if not, can this Court allow the present proceedings to continue or are the same barred by virtue of any other law 'for the time being in force' as contemplated in Order VII Rule 11 (d).

18. The question is whether a real cause of action has been set out in the plaint or whether the same is illusory and has been averred with the view to avoid falling within the provisions of Order VII Rule 11 CPC. Clever drafting creating illusions of cause of action are not permitted in law and a clear right to sue should be shown in the plaint [See ***T. Arivandandam Vs. T.V. Satyapal,*** *(1977) 4 SCC 467*].

19. The first contention of the plaintiff that the present application under Order VII Rule 11 is not maintainable. I do not agree with the submission of the plaintiff in view of settled law that power can be exercised by the Courts under Order VII Rule 11 of the CPC at any stage of the suit — before registering the plaint or after issuing summons to the defendant at any time before the conclusion of the trial [See ***Saleem Bhai Vs. State of Maharashtra,*** *(2003) 1 SCC 557]*.

20. The second submission vis-à-vis inference in favour of this Court's jurisdiction at all times as pointed out by reliance upon ***Dhulabhai*** (supra) and the averment that the bar under Section 5 of the Arbitration Act is not 'express' as in other statutes and thus cannot oust this Court's jurisdiction can be met by a bare perusal of the provision of Section 5. Section 5 provides that notwithstanding anything contained in any other law for the time being in force, in matters governed by Part I, no judicial authority shall intervene except where so provided in the said Part. To give effect to the ***Dhulabhai*** case (supra), Section 5 must be strictly construed. The provision begins with a non-obstante clause and bars interference by any 'judicial authority' insofar as matters governed by Part I of the Act are concerned. The term 'judicial authority' has not been defined anywhere in the Act, however, in ***Morgan Securities & Credit (P) Ltd. Vs. Modi Rubber Ltd.,*** *(2006) 12 SCC 642* the Supreme Court held in paragraph 52 that *"in its ordinary parlance "judicial authority" would comprehend a court defined under the Act but also courts which would either be a civil court or other authorities which perform judicial functions or quasi-judicial functions."*

Therefore, the plaintiff's argument on this count is unconvincing and meritless.

21. The next contention of the plaintiff that performance of contract by it cannot amount to estoppel, waiver or acquiescence on its part as its objections are only with regard to the arbitration clause and not the entire contract and as per Section 16 of the Arbitration Act the

arbitration agreement/clause is to be treated as independent of the contract is prima facie untenable for the following reasons.

22. Section 16 provides in crystal clear terms that an arbitration clause that forms part of a contract shall be treated as an agreement independent of the other terms of the contract for the purpose of the arbitral tribunal ruling on its own jurisdiction including ruling on any objection with respect to the existence and/ or validity of the arbitration agreement. However, having signed and acted upon a contract, a party cannot later rescind from certain terms contained therein by quoting a statutory provision out of context. The various cases referred in this regard by the learned counsel for the plaintiff also accentuate the position laid down by Section 16 as mentioned above by me and therefore, do not aid the plaintiff's argument.

23. Let me now proceed to examine whether Section 5 of the Act applies to the facts and circumstances of the present case. As referred, the bone of contention in this case revolves around Section 5 of the Arbitration and Conciliation Act and its applicability or otherwise on the impending arbitration proceedings.

24. Section 5 of the Arbitration and Conciliation Act, 1996 reads as under:

> **5. Extent of judicial intervention.—**Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.

25. It is thus clear that a Court can intervene only in the event that its intervention is provided for under the Act. One of the main

objects of the Act is to minimise the supervisory role of the courts in the arbitral process. Section 5, as evident, is brought of the new Act to encourage the resolution of disputes expeditiously and in a cost effective manner. Therefore, the extent of judicial intervention is limited by the non-obstante provision of Section 5 of the Act. As per the settled law, the Court should not be obliged to bypass the provisions of the Act in exercise of its power and jurisdiction.

26. Reference may be made in this regard to the case of ***National Agricultural Coop. Marketing Federation India Ltd. v. Gains Trading Ltd.,****(2007) 5 SCC 692* wherein it has been held as under :

> "7**.** Part I of the Act deals with arbitration. Part II deals with enforcement of certain foreign awards. Sub-section (2) of Section 2 provides that Part I of the Act dealing with arbitration shall apply where the place of arbitration is in India. Section 11 dealing with appointment of arbitrators is contained in Part I. As the venue of arbitration is outside India, it is contended by the respondent that entire Part I including Section 11 will not apply and therefore neither the Chief Justice of India nor his designate will have the jurisdiction to appoint the arbitrator. Such a contention is already considered and negatived by this Court in *Bhatia International* v. *Bulk Trading S.A.* This Court has held: (SCC pp. 119 & 123, paras 21 & 32)
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> > "Sub-section (2) of Section 2 provides that Part I would apply where the place of arbitration is in India. To be immediately noted, that it is not providing that Part I shall not apply where the place of arbitration is not in India. It is also not providing that Part I will '*only*' apply where the place of arbitration is in India (emphasis in original). Thus the legislature has not provided that Part I is not to apply to arbitrations which take place outside India. The use of the language is significant and important. The legislature is emphasising that the provisions of Part I would apply to arbitrations which take place in India, but not providing that the provisions of Part I will not apply to arbitrations which take place out of India. The wording of sub-section (2) of Section 2 suggests that the intention of the legislature was to make

> provisions of Part I compulsorily applicable to an arbitration, including an international commercial arbitration, which takes place in India. Parties cannot, by agreement, override or exclude the non-derogable provisions of Part I in such arbitrations. By omitting to provide that Part I will not apply to international commercial arbitrations which take place outside India the effect would be that Part I would also apply to international commercial arbitrations held out of India. But by not specifically providing that the provisions of Part I apply to international commercial arbitrations held out of India, the intention of the legislature appears to be to ally (sic allow) parties to provide by agreement that Part I or any provision therein will not apply. …
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> 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."

27. Various decisions have held the same view and followed the ***Bhatia International*** case (supra) such as ***Max India Limited Vs. General Binding Corporation, Spentex Industries Ltd. Vs. Dunvant S.A. & Anr.,*** *2009 (113) DRJ 397 (DB)* and ***DGS Realtors Pvt. Ltd. Vs. Realogy Corporation***, OMP No. 508/2009 decided on 03.09.2009 by this Court.

28. Ultimately, the controversy has been laid to rest by the decision in ***Venture Global Engineering Vs. Satyam Computer Service Ltd.,*** *(2008) 4 SCC 190* paragraphs 25, 26 and 31 whereof are reproduced below :

> "25. In order to find out an answer to the first and prime issue and whether the decision in *Bhatia International* is an answer

> to the same, let us go into the details regarding the suit filed by the appellant as well as the relevant provisions of the Act. The appellant VGE filed OS No. 80 of 2006 on the file of the Ist Additional District Court, Secunderabad, for a declaration that the award dated 3-4-2006 is invalid, unenforceable and to set aside the same. Section 5 of the Act makes it clear that in matters governed by Part I, no judicial authority shall intervene except where so provided. Section 5 which falls in Part I, specifies that no judicial authority shall intervene except where so provided. The Scheme of the Act is such that the general provisions of Part I, including Section 5, will apply to all Chapters or Parts of the Act.
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> 26. Section 2(5) which falls in Part I, specifies that "this Part shall apply to all arbitrations and to all proceedings relating thereto". It is useful to refer to Section 45 which is in Part II of the Act which starts with non obstante clause, namely, "Notwithstanding anything contained in Part I or in the Code of Civil Procedure…." Section 52 in Chapter I of Part II of the Act provides that "Chapter II of this Part shall not apply in relation to foreign awards to which this Chapter applies". As rightly pointed out, the said section does not exclude the applicability of Part I of the Act to such awards.
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> 31. On close scrutiny of the materials and the dictum laid down in the three-Judge Bench decision in *Bhatia International* we agree with the contention of Mr K.K. Venugopal and hold that paras 32 and 35 of *Bhatia International* make it clear that the provisions of Part I of the Act would apply to all arbitrations including international commercial arbitrations and to all proceedings relating thereto. We further hold that where such arbitration is held in India, the provisions of Part I would compulsorily apply and parties are free to deviate to the extent permitted by the provisions of Part I. It is also clear that even in the case 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. We are also of the view that such an interpretation does not lead to any conflict between any of the provisions of the Act and there is no lacuna as such. The matter, therefore, is concluded by the three-Judge Bench decision in *Bhatia International*."

29. From the above it is clearly indicated that Part I is also to apply to international commercial arbitrations which take place outside India.

30. A Division Bench of this Court has dealt with the point involved in the present case in the case of ***Spentex Industries Ltd. Vs. Dunvant S.A. & Anr.,*** *2009 (113) DRJ 397 (DB)* which is squarely applicable given the four corners of this matter.

31. In the case of **DGS Realtors Pvt. Ltd.** (supra) a Learned Single Judge of this Court examined all the leading cases cited by the parties as well as certain additional cases referred by the counsel in that case and distinguished several of the cases so referred. A close reading of the said judgment reveals that the interpretation of 'express or implied exclusion' of Part I of the Arbitration Act as given in **Max India** (supra) has been more finely defined by reference to the constituents of the so called 'exclusion'. From a scrutiny of the judgment it appears that for Part I of the Arbitration Act to be applicable to the purported arbitration/ dispute, the parties ought to have failed to do one or all of the following :

(a) There must be no agreement as to what would be the governing law of the contract, governing law being presumed to be the law of arbitration also;

(b) There must be no agreement as to the place of arbitration; and/or,

(c) It must be shown that if no interim action is taken, a party will be left remediless.

32. The contention of the plaintiff is that the arbitration clause is vague and therefore void and unenforceable due to several reasons

which have been mentioned in the plaint as well as put forward during the course of hearing and the suit cannot be held as barred until and unless an application under Section 45 of the Act is filed as the subject matter of the present suit would fall within Part II of the Act. The observations in paragraphs 66 and 111 of ***Shin-Etsu Chemicals Vs. Aksh Optifibre,*** *(2005) 7 SCC 234* have been relied upon in this regard. The vagueness in the clause has been attributed to the use of the words and the condition of "international law" being the governing law.

33. It does not lie in the mouth of the plaintiff to say that the agreement between the parties or any part thereof including the arbitration clause ought not be relied upon etc. as the said agreement in its entirety has been attached with the invoices sent to the defendant no. 2 by the plaintiff itself.

34. In the present case, the arbitration clause reads as under :

> "In the event of any question of dispute arising under the contract, the same shall be referred to the award of arbitrators to be nominated one each by the sellers and buyers within 30 days notice from either side or in the case of arbitrators not agreeing then to the award of an umpire to be appointed by the arbitrators in writing prior to proceeding with the arbitration. The decision of the arbitrators or the umpire as the case may be shall be final and binding on both parties. The arbitration will take place in Singapore as per the international law."

35. The scheme of the Act is clear in this regard. It is settled law that once it is held that there is a valid arbitration agreement between the parties, the suit would not be maintainable as the genesis of the entire dispute raised in the plaint is that there is no agreement. Section 45 can

be resorted to if there are disputes between the parties as to the validity of the arbitration agreement.

36. Section 45 provides that when a judicial authority is seized of an action in a matter in respect of which the parties have an agreement of arbitration, the judicial authority at the request of one party to the arbitration shall refer the dispute to arbitration unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

37. Let me refer to the Part II of the Singapore Arbitration laws i.e. the International Arbitration Act, Chapter 143A, Section 5 (2) (a) which is squarely applicable to the facts of the present case which provides that *"an arbitration is international if at least one of the parties to an arbitration agreement, at the time of the conclusion of the agreement, has its place of business in any State other than Singapore"*. Further, Section 5 (2) (b) (i) of the same Act provides that an arbitration will be international also if *"the place of arbitration is determined in, or pursuant to, the arbitration agreement".* The present arbitration clause under consideration clearly mentions that the place of arbitration will be Singapore.

38. Further, by virtue of Section 3(1) which provides that the Model Law shall have the force of law in Singapore, Article 5 of the UNCITRAL Model Law on International Commercial Arbitration shall apply which expressly excludes the jurisdiction of this Court as it provides that *"in all matters governed by this law, no court shall intervene except where so provided by this law."* It appears to me that

the words international law shall mean what they are intended to mean in the UNCITRAL Model Law on International Commercial Arbitration as the said Model Law has also been the premise and guiding light for the provisions of the Indian Arbitration Act.

39. Moreover, the Division Bench in appeal in ***Max India Ltd*** (supra) in paragraphs 28 and 30 (i) held as under:

> "28. There is a fundamental and practical difference between the court proceedings on the one hand and the arbitration on the other. Should the parties wish to opt for arbitration with regard to a particular contract, in practice the decision must be taken where the contract is drafted and a clause must be inserted in the form of a contractual provision. No doubt, parties may agree for arbitration even if originally not agreed to, even after the dispute has actually arisen. However, generally and particularly in international arbitrations, important feature of arbitration is to decide before hand for settlement of disputes that may arise, through means of arbitration. In contrast, it is well known that courts are available to hear a case even in the absence of a particular clause referring to their jurisdiction. Another peculiar feature of arbitration, particularly international, is that parties may not only chose the arbitral forum which shall decide the dispute, but also the law that would govern the contract and also the arbitration proceedings. Whereas the territorial jurisdiction of a particular Court is governed by law, namely, Sections 16 to 24 of the Code of Civil Procedure, in case of international arbitration the litigating parties may agree to confer the jurisdiction on a particular arbitral tribunal as well as particular courts, including applicable law.
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> 30. In National Thermal Power Corporation v. Singer Company (supra) also the Apex Court held that in international commercial arbitration agreement the parties have liberty to make choice, expressly or by necessary implication of the proper or substantive law as well as procedure law to be applicable. The Court also held that in the absence of express choice, a presumption arises that the laws of a country where the arbitration is to be held would be the proper law which presumption, of course, is rebuttable having regard to the true intention of the parties. The principles which are culled out from the reading of this judgment can be summarized as under:

(a) to (h) xxxxxxxx

i) The arbitration proceedings are to be conducted in accordance with the law of the country in which the arbitration is held unless the parties have specifically chosen the law governing the conduct and procedure of arbitration. Normally, the appropriate courts of the seat of arbitration will have jurisdiction in respect of procedural matters concerning the conduct of arbitration.

(j) to (l) xxxxxxxx"

40. These principles were acknowledged by the Apex Court in the case of ***Modi Entertainment Network and Anr. Vs. WSG Cricket PTE Ltd.,*** *(2003) 4 SCC 341* which reads as under:

> "26. A plain reading of this clause shows that the parties have agreed that their contract will be governed by and be construed in accordance with English law and they have also agreed to submit to the non-exclusive jurisdiction of English courts (without reference to English conflict of law rules). We have already observed above that recitals in regard to submission to exclusive or non-exclusive jurisdiction of a court of choice in an agreement are not determinative. However, as both the parties proceeded on the basis that they meant non-exclusive jurisdiction of the English courts, on the facts of this case, the court is relieved of the interpretation of the jurisdiction clause. Normally, the court will give effect to the intention of the parties as expressed in the agreement entered into by them except when strong reasons justify disregard of the contractual obligations of the parties. In *Donohue case* although the parties to the agreement stipulated to submit to the exclusive jurisdiction of the English courts, the House of Lords found that it would not be in the interests of justice to hold the parties to their contract as in that case strong reasons were shown by the respondent. It was felt necessary that a single trial of all the claims of the parties by one forum would be appropriate and as all the parties to the New York proceedings were not parties to the agreement stipulating exclusive jurisdiction of the English court and as all the claims before the New York court did not arise out of the said contract so they could not have been tried in the English court. It was urged that in the circumstances parallel proceedings — one in England and another in New York — would have to go on which might result in inconsistent decisions. Those facts were considered as strong reasons to

decline to grant anti-suit injunction though the parties had agreed to the exclusive jurisdiction of the English court."

41. The question of applicability of law has been extensively discussed by the Apex Court by referring various decisions in the case of ***Shreejee Traco (I) Pvt. Ltd. Vs. Paperline International Inc.*** reported in *(2003) 9 SCC 79,* paragraph 7 of which reads as under:

> "7. In *National Thermal Power Corpn.* v. *Singer Co.* a question arose as to the applicability of Indian law when one of the contracting parties was a foreigner. Though the case is pre-1996, certain observations made therein are apposite. In case of conflict of laws, the Supreme Court of India has opined that for arbitration, the selection of the place of arbitration may have little significance where it is chosen, as is often the case, without regard to any relevant or significant link with the place. This is particularly true when the place of arbitration is not chosen by the parties themselves, but by the arbitrators or by the outside body, and that too for reasons unconnected with the contract. It would be different if choice of place for submission for the arbitration is supported by the rest of the contract and surrounding circumstances which may be treated as stronger indication in regard to the intention of the parties. *Dicey & Morris on The Conflict of Laws* (11th Edn., Vol. II) was cited with approval wherein the learned authors state inter alia that the law governing arbitration proceedings is the law chosen by the parties, or, in the absence of agreement, the law of the country in which the arbitration is held. In the absence of express choice of the law governing the contract as a whole or the arbitration agreement as such having been exercised by the parties, 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. The presumption is rebuttable. The parties have the freedom to choose the law governing an international commercial arbitration agreement. Where there is no express choice of the law governing the contract as a whole, or the arbitration agreement in particular, there is, in the absence of any contrary indication, a presumption that the parties have intended that the proper law of the contract as well as the law governing the arbitration agreement are the same as law of the country in which the arbitration is agreed to be held. There is nothing in the contract or correspondence between the parties to rebut the ordinary presumption and spell out an intention of the parties that they intended proper law of India to govern

> arbitration in spite of the place of arbitration having been agreed to be at New York."

42. The governing law, in the case at hand, is clearly submitted to be 'international law' the meaning of which has been discussed above at length. The place or venue of the arbitral proceedings is also clearly mentioned to be the SIAC which is at Singapore.

43. It is evident from above that the arbitration clause in the sales contract clearly provides the governing law as well as the place of arbitration in case of disputes between the parties. The 'International Law' which is stated to be applicable to the dispute clearly excludes this Court's jurisdiction in the present matter.

44. In the case of Citation ***Infowares Ltd. Vs. Equinex Corporation,*** *(2009) 7 SCC 220* in paragraph 25 of the judgment, it is stated that the law of arbitration is normally the same as the proper law of the contract and it is only in exceptional cases that it is not so, even where the proper law of contract is expressly chosen by the parties; it was further held that there is a presumption that the law of the country where the arbitration is agreed to be held is the proper law of arbitration.

45. It has been rightly observed by the Apex Court in the case of ***Secur Industries Ltd. Vs. Godrej and Boyce Mfg. Co. Ltd.*** reported in *AIR 2004 SC 1766* paragraph 11 which is reproduced below:

> "11. The "Part" referred to in this sub-section is Part I of the 1996 Act which deals with domestic arbitrations. The proceedings before the Council, therefore, are proceedings under the 1996 Act, pursuant to a deemed agreement between the parties to the dispute. With the applicability of Part I of the 1996 Act in all its force, the extent of judicial intervention in

arbitrations is limited by the non obstante provisions of Section 5 of the 1996 Act, which stipulate:

> "5. Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part."

The City Civil Court was right in its approach when it said that the court could only intervene in respect of matters expressly provided for in the 1996 Act. The validity of the proceedings before the arbitral tribunal is an issue which the Council, and not the court, could decide under Section 16 of the 1996 Act. Sub-section (1) of Section 16 opens with the words "the arbitral tribunal may rule on its jurisdiction ...". It has been held by this Court that the arbitral tribunal's authority under Section 16 is not confined to the width of its jurisdiction but goes to the very root of its jurisdiction. [*Konkan Rly. Corpn. Ltd.* v. *Rani Construction (P) Ltd.*] Therefore, the Council can go into the question whether its authority had been wrongly invoked by the appellant and it is open to it to hold that it had no jurisdiction to proceed with the matter."

46. After having gone through the arbitration clause in the present case, I do not prima facie find that the impugned clause is null or void or inoperative or incapable of being performed due to the reason that the plaintiff itself has relied upon this clause and has taken advantage of it.

47. In the present case, it is evident that the parties by agreement have expressly and impliedly excluded the provisions of the Arbitration and Conciliation Act, 1996. Thus, the suit is not maintainable.

48. With these observations, I allow the application of the defendant no.2 and reject the plaint. No cost.

49. Since the interim order was continued for certain duration of time, therefore, the operation of this order shall remain stayed for a period of four weeks.

MANMOHAN SINGH, J.

JUNE 04, 2010
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