MANU/SC/1015/2011

IN THE SUPREME COURT OF INDIA

Civil Appeal No. 7562 of 2011 (Arising out of SLP (C) No. 25624 of 2010)

Decided On: 01.09.2011

Yograj Infrastructure Ltd.
Vs.
Ssang Yong Engineering and Construction Co. Ltd.

Hon'ble Judges:
Altamas Kabir and Cyriac Joseph, JJ.

Acts/Rules/Orders:
Companies Act, 1956; Arbitration and Conciliation Act, 1996 - Sections 2(2), 9, 17, 34, 37, 37 (2) and 42; Indian Arbitration Act, 1940

Cases Referred:
NTPC v. Singer MANU/SC/0146/1993 : (1992) 3 SCC 551; Sumitomo Heavy Industries Ltd. v. ONGC Ltd. and Ors. MANU/SC/0834/1998 : (1998) 1 SCC 305; Bhatia International v. Bulk Trading S.A. MANU/SC/0185/2002 : (2002) 4 SCC 105; Venture Global Engg. v. Satyam Computer Services Ltd. MANU/SC/0333/2008 : (2008) 4 SCC 190; Citation Infowares Ltd. v. Equinox Corporation MANU/SC/0836/2009 : (2009) 7 SCC 220

JUDGMENT

Altamas Kabir, J.

1. Leave granted.

2. The Appellant is a company incorporated under the Companies Act, 1956, while the Respondent is a company incorporated under the laws of the Republic of Korea with its registered office at Seoul in Korea and its project office at New Delhi.

3. On 12th April, 2006, the National Highways Authority of India, New Delhi (NHAI) awarded a contract to the Respondent, S Sang Yong Engineering and Construction Co. Ltd., hereinafter referred to as "SSY", for the National Highways, Sector II Project, Package: ABD-II/C-8, for up gradation to Four Laning of Jhansi-Lakhnadon Section, KM 297 to KM 351 of NH 26 in the State of Madhya Pradesh. The total contract amount was ` 2,19,01,16,805/-. On 13th August, 2006, SSY entered into a Sub-Contract with the Appellant Company for carrying out the work in question. The Work Order of the entire project was granted to the Appellant by the Respondent on back-to-back basis. Clause 13 of the Agreement entered into between the Respondent and the Appellant provided that 92% of all payments for the work done received by the Respondent from NHAI, would be passed on to the Appellant. Clauses 27 and 28 provided for arbitration and the governing law agreed to was the Arbitration and Conciliation Act, 1996. On 31st October, 2006, the Appellant furnished a Performance Bank Guarantee for ` 6,05,00,000/- to the Respondent and it also invested about ` 88.15 crores in the project. Three more Bank Guarantees, totaling ` 5,00,00,000/-, for release of mobilization advance were also furnished by the Appellant on 29th May, 2009. On 22nd September, 2009, the Respondent Company issued a notice of termination of the Agreement, inter alia, on the ground of delay in performing the work under the Agreement.

4. On account of the above, the Appellant filed an application before the District and Sessions Judge, Narsinghpur, Madhya Pradesh, under Section 9 of the Arbitration and Conciliation Act, 1996, praying for interim relief's. A similar application under Section 9 of the above Act was filed by the Appellant before the same Court on 30th December, 2009, also for interim relief's.

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Ultimately, on 20th May, 2010, the dispute between the parties was referred to arbitration in terms of the Agreement and a Sole Arbitrator, Mr. G.R. Easton, was appointed by the Singapore International Arbitration Centre on 20th May, 2010. On 4th June, 2010, the Appellant filed an application before the Sole Arbitrator under Section 17 of the aforesaid Act being SIAC Arbitration No. 37 of 2010, inter alia, for the following relief's:

a. restrain the SSY from encasing Performance Bank Guarantee No. 101BGPGO63040001 dated 31.10.06 of Syndicate Bank, Nehru Place, Delhi of ` 6.05 crores;

b. restrain the SSY from enchasing three Bank Guarantees furnished towards the mobilization advance bearing numbers 101 BGFG 091490001 of ` 1 Crore, 101 BGFG 091490002 of ` 1 Crore and 101 BGFG 091490003 of ` 3 Crores, totaling to ` 5 Crores;

c. direct SSY to release a sum of ` 144,42,25,884/- along with the interest @ 36% till realization of nationalized bank of India for the aforesaid amount and keep it alive till passing of the final Award.

d. restrain SSY from removing, shifting, alienating or transferring in any manner either itself or through any of its agents/employees, the plant, machineries, equipments, vehicles and materials, in other words maintain status-quo, till the passing of the final arbitral award;

e. grant any other appropriate interim measures of protection in favour of the Cross-Claimant/applicant, which in the esteemed opinion of this Hon'ble Tribunal are just and proper in the facts and circumstance of the case;

5. The Respondent also filed an application under Section 17 of the above Act before the Sole Arbitrator on 5th June, 2010, for interim relief's. After considering both the applications, the Arbitrator passed an interim order on 29th June, 2010, in the following manner:

1. The Respondent is to immediately release, for use by the Claimant, the items of plant, machinery and equipment (PME) numbered 1,5,7,8,10,19,20,21,22,23 and 32, as listed in Annexure A (Machinery Details) of the Claimant's Application dated 5 June 2010.

2. The Respondent is restrained from creating any third party interest in, or otherwise selling, leasing or charging, the PME or other assets presently located at the work site and/or the camp site and which are owned by the Respondent, without the permission of this Tribunal.

3(i). The claimant is permitted to use the aggregates, which have been identified in Annexure D (engineer's Statement of Materials at Site for September 2009) of the Claimant's Application dated 5 June 2010 as a total quantity of 274,580 cubic meters, for the carrying out of the works in accordance with the terms and conditions of the Main Agreement and the Agreement dated 13 August, 2006 between the parties.

3(ii) The Respondent is to give the Claimant access to the aggregate stockpiles where the abovementioned quantity of material is currently held.

The above interim orders are made with the objective of enabling the construction work on the project to continue while the disputes between the parties are resolved in these arbitration proceedings (ref. Terms or Reference dated 23 June 2010).

The parties have liberty at short notice, if any of the above directions require clarification or amendment in order to ensure proper implementation.

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The Respondent has leave (until 6 July 2010) to make a further application for the provision of security by the claimant in relation to the PME and aggregates.

6. Aggrieved by the aforesaid interim order passed by the learned Arbitrator, the Appellant herein, which was the Respondent before the learned Arbitrator, filed Appeal No. 2 of 2010 on 2nd July, 2010 before the learned District Judge, Narsinghpur, under Section 37(2)(b) of the Arbitration and Conciliation Act, 1996, for setting aside the same. On behalf of the Respondent it was contended in the said appeal that the same was not maintainable before the learned District Judge, Narsinghpur, since the seat of the arbitration proceedings was in Singapore and the said proceedings were governed by the laws of Singapore. Accepting the submissions advanced on behalf of the Respondent, the learned District Judge dismissed the appeal as not maintainable on 23rd July, 2010, without deciding the matter on merits.

7. The Appellant then moved Civil Revision No. 304 of 2010, before the High Court on 26th July, 2010. The same was dismissed by the High Court on 31st August, 2010, against which the Special Leave Petition (now appeal) has been filed.

8. Appearing for the Company, Ms. Indu Malhotra, learned Senior Advocate, submitted that the stand taken on behalf of the Respondent that the PM Es had to remain on site even in case of termination of the Agreement, was without any basis, since after the Agreement dated 13th August, 2006, the parties had agreed in the Meeting held on 23rd September, 2006 that in case of termination of the Agreement between the parties, the Respondent would transfer the PM Es to the Appellant. Ms. Malhotra further clarified that Clause 4 of the Agreement related only to the PM Es and not to the aggregates, since it had been admitted by the Respondent that in case the aggregates were not made available to them, they could buy the same from the open market. It was further clarified that there were only two machines out of 35 machines which formed the subject matter of the interim application, i.e., Hotmix Plant and Crusher, which were in the possession of the Appellant and the value thereof would be approximately ` 7 crores and a sum of ` 7.20 crores had already been deducted by the Respondent towards the repayment of the Arab Bank Loan for the said PM Es. Ms. Malhotra submitted that it was incorrect to say that the Project was stopped because of the Stay Order passed by this Court as the Respondent had further subcontracted the work to Khara and Tarakunde Infrastructure Pvt. Ltd., Ramdin Ultratech Pvt. Ltd. and others. Ms. Malhotra contended that apart from the Hotmix Plant and Crusher all the remaining PM Es had been removed by the Respondent after the passing of the order 29th June, 2010.

9. On the question of the applicable law in respect of the arbitral proceedings, Ms. Malhotra contended that the Arbitration and Conciliation Act, 1996, enacted in India is the applicable law of arbitration. Ms. Malhotra submitted that in terms of the Agreement arrived at between the parties, it is only the Indian laws to which the Agreement would be subjected. She pointed out that Clause 28 of the Agreement provides that the Agreement would be subject to the laws of India and that during the period of arbitration, the performance of the Agreement would be carried out without interruption and in accordance with its terms and provisions. Accordingly, having explicitly agreed that the Agreement would be subject to the laws of India, from the very commencement of the arbitration till its conclusion, the law applicable to the arbitration would be the Indian law. In other words, all interim measures sought to be enforced would necessarily have to be in accordance with Sections 9 and 37(2)(b) of the 1996 Act.

10. Ms. Malhotra submitted that Clause 27.1, which forms part of Clause 27 of the agreement, which is the arbitration clause, provides that the proceedings of arbitration shall be conducted in accordance with the SIAC Rules. In other words, the provisions of SIAC Rules would apply only to the arbitration proceedings, but not to appeals from such proceedings. Ms. Malhotra submitted that the right to appeal from an interim order under Section 37(2)(b) is a substantive right provided under the 1996 Act and was not governed by the SIAC Rules.

11. Ms. Malhotra also urged that Rule 1.1 of the SIAC Rules, which, inter alia, provides that where the parties agreed to refer their disputes to the SIAC for arbitration, it would be deemed that the parties had agreed that such arbitration would be conducted in accordance with the SIAC Rules. If, however, any of the SIAC Rules was in conflict with a mandatory provision of the

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applicable law of arbitration from which the parties could not derogate, that provision from the applicable law of the arbitration shall prevail. Ms. Malhotra submitted that Rule 32 of the SIAC Rules is one of such Rules which provides that if the seat of arbitration is Singapore, then the applicable law of arbitration under the Rules would be the International Arbitration Act, 2002, of Singapore. However, Section 37(2)(b) of the 1996 Act being a substantive and non-derivable provision, providing a right of appeal to parties from a denial of an interim measure, such a provision protects the interest of parties during the continuance of arbitration and as a consequence, Rule 32 of the SIAC Rules which does not provide for an appeal, is in direct conflict with a mandatory non-derivable provision contained in Section 37(2)(b) of the 1996 Act.

12. Ms. Malhotra then went on to submit that Part I of the 1996 Act had not been excluded by Clause 27 of the Agreement and the 1996 Act would, therefore, apply to the said Agreement. Ms. Malhotra submitted that in the decision of this Court in Bhatia International v. Bulk Trading S.A. MANU/SC/0185/2002 : (2002) 4 SCC 105, which was reiterated in Venture Global Engg. v. Satyam Computer Services Ltd. MANU/SC/0333/2008 : (2008) 4 SCC 190 and Citation Infowares Ltd. v. Equinox Corporation MANU/SC/0836/2009 : (2009) 7 SCC 220, it has been clearly held that where the operation of Part I of the 1996 Act is not expressly excluded by the arbitration clause, the said Act would apply. In any event, in the instant case, Clause 28 of the Agreement expressly provides that the Agreement would be subject to the laws of India and that during the period of arbitration the parties to the Agreement would carry on in accordance with the terms and conditions contained therein. Accordingly, on account of the application of Part I of the 1996 Act, the International Arbitration Act, 2002 of Singapore would have no application to the facts of this case, though, the conduct of the proceedings of arbitration would be governed by the SIAC Rules.

13. Ms. Malhotra urged that the High Court had erred in coming to the conclusion that since under Clause 27 of the Agreement, the parties had agreed that the arbitral proceedings would be conducted in accordance with the SIAC Rules and by virtue of Rule 32 thereof, the jurisdiction of the Indian Courts stood ousted. Ms. Malhotra urged that the High Court had failed to appreciate the provisions of Clause 28 of the Agreement while arriving at such a conclusion. Ms. Malhotra reiterated her earlier submissions that Rule 32 of the SIAC Rules is subject to Rule 1.1 thereof which provides that if any of the said Rules was in conflict with the mandatory provision of the applicable law of the arbitration, from which the parties could not derogate, that provision shall prevail. Ms. Malhotra submitted that the finding of the High Court being contrary to the provisions agreed upon by the parties, such finding was liable to be set aside. Ms. Malhotra submitted that the very fact that the Respondents had approached the District Court, Narsinghpur, in India and had filed an application under Section 9 of the 1996 Act therein, indicated that the Respondent also accepted the applicability of the 1996 Act. Ms. Malhotra pointed out that in the application the Respondent has indicated as follows:

> That, the work of Contract, which was executed between the Petitioner and Respondent is well within the jurisdiction of this Hon'ble Court at Narsinghpur. Thus, this Hon'ble Court has jurisdiction to pass an order on this application under Section 9 of the Arbitration and Conciliation Act, 1996.

14. Ms. Malhotra urged that having regard to Section 42 of the 1996 Act, it is in the District Court of Narsinghpur where the application under Section 9 of the Arbitration and Conciliation Act, has been filed which has jurisdiction over the arbitral proceedings at all stages. Ms. Malhotra pointed out that the High Court had erroneously held that Section 42 was not applicable to an appeal and was applicable only for filing an application, without appreciating the wordings of Section 42 which provides that Courts shall have jurisdiction over the arbitral proceedings also. Ms. Malhotra urged that with regard to the said findings of the High Court, the order impugned was liable to be set aside.

15. Ms. Malhotra submitted that the stand of the Respondent that in view of Clause 27 of the Agreement, the law governing the arbitral proceedings would be the SIAC Rules, was not tenable, in view of Clause 28 which without any ambiguity provides that the Agreement would be subject to the laws of India and that during the period of arbitration the parties to the

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Agreement would carry on, in accordance with the terms and conditions contained therein. Accordingly, it is the Arbitration and Conciliation Act, 1996, which would be the proper law or the law governing the arbitration.

16. Ms. Malhotra submitted that apparently there was a misconception in the minds of the learned Judges of the High Court as to the concept of the 'proper law', of the Arbitration Agreement and the 'Curial Law' governing the conduct and procedure of the reference. Ms. Malhotra submitted that while the proper law of the Arbitration Agreement governs the law which would be applicable in deciding the disputes referred to arbitration, the Curial law is the law which governs the procedural aspect of the conduct of the arbitration proceedings. It was urged that in the instant case while the proper law of the arbitration would be the Arbitration and Conciliation Act, 1996, the Curial law would be the SIAC Rules of Singapore. Ms. Malhotra submitted that the said difference in the two concepts had been considered by this Court in Sumitomo Heavy Industries Ltd. v. ONGC MANU/SC/0834/1998 : (1998) 1 SCC 305 and NTPC v. Singer MANU/SC/0146/1993 : (1992) 3 SCC 551, in which the question for decision was what would be the law governing the arbitration when the proper law of the contract and the Curial law were agreed upon between the parties. In the said cases this Court observed that in many circumstances the applicable law would be the same as that of the proper law of contract and the Curial law, but it was not uncommon to encounter the incumbent Curial law in cases where the parties had made an express choice of arbitration in a jurisdiction which was different from the jurisdiction with which the contract had the closest real connection.

17. Ms. Malhotra submitted that in the absence of any express choice, the proper law of the contract would be the proper law of the Arbitration Agreement. Ms. Malhotra submitted that in the instant case, admittedly the proper law of contract is the law of India and since the parties have not expressly made any choice regarding the law governing the Arbitration Agreement, the proper law of contract, namely, the Arbitration and Conciliation Act, 1996, would be the proper law of the Arbitration Agreement. Ms. Malhotra urged that ultimately the right to appeal which is a substantive right under the 1996 Act would be governed by the said Act and the instant appeal, is therefore, liable to be allowed, and the order of the High Court, impugned in the appeal, was liable to be set aside.

18. Within the fact situation indicated on behalf of the Appellant, Mr. Dharmendra Rautray, learned Advocate, appearing for the Respondent Company, submitted that the issues involved in the present appeal were (i) whether the Indian Courts would have jurisdiction to entertain an appeal under Section 37 of the Arbitration and Conciliation Act, 1996, against an interim order passed by the Arbitral Tribunal with its seat in Singapore; (ii) Whether the "law of arbitration" would be the International Arbitration Act, 2002, of Singapore; and (iii) whether the "Curial law" would be the laws of Singapore?

19. Mr. Rautray submitted that apparently on the alleged failure of the Appellant to complete the work awarded under the contract within the stipulated period of 30 months from the date of commencement of the work, the Respondent had to give an undertaking to the National Highways Authority of India by way of a Supplementary Agreement dated 11th February, 2009, to achieve a monthly rate of progress of work, failing which the aforesaid authority would be entitled to exercise all its rights under the main agreement and even to terminate the same with immediate effect. Mr. Routray submitted that on account of the failure of the Appellant to live up to its commitments, the Respondent who had suffered heavy financial loss and damages on account of such breach, issued notice of termination on 22nd September, 2009, pursuant to Clause 23.2 of the Agreement.

20. Thereafter, the parties entered into settlement talks, as provided for in Clause 26 of the Agreement and signed the minutes of the meeting dated 28th September, 2009. The settlement talks between the parties having failed, the Respondent/claimant, invoked Clause 27 of the Agreement for reference of the disputes to arbitration in accordance with the Singapore International Arbitration Centre Rules (SIAC Rules). The Respondent/claimant filed a Statement of Claim on 16th August, 2010, before the Sole Arbitrator, Mr. Graham Easton, claiming a sum of ` 221,36,91,097/- crores from the Appellant. Both the parties filed applications before the learned Arbitrator seeking interim relief under Rule 24 of the SIAC Rules on 5th June, 2010. In

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their application for interim relief under Rule 24 of the SIAC Rules, the Respondent, inter alia, prayed for release of all plants, machineries and equipment belonging to the Respondent; injunction against the Appellant from removing all plants, machineries, equipment, materials, aggregates, etc., owned by the Respondent from the work site and/or camp site; a restraint order against the Appellant from creating any third party interest or otherwise sell, lease, charge the plants, machineries, equipment, materials, etc., at the work site and/or camp site and to permit the Respondent to use the PM Es and materials, aggregates, etc., for carrying out the works in accordance with the terms and conditions of the main Agreement and the Supplementary Agreement dated 13th August, 2006.

21. The Sole Arbitrator appointed by the SIAC by its order dated 29th June, 2010, directed the Appellant to, inter alia, release for use by the Respondent all plants and equipment. The Appellant was also restrained from creating any third party interest, or otherwise to deal with the properties at the work site and/or camp site and permit the Respondent to use the aggregates of a total quantity of 27,580 cubic meters for carrying out the works. The Sole Arbitrator, while dealing with the applications filed by both the parties under Rule 24 of the SIAC Rules, also recorded that the interim orders were being made with the object of allowing the construction work on the project to continue while the dispute between the parties were resolved in these arbitration proceedings and in order to ensure that the progress of the project was not hampered, while the parties waited for the outcome of the arbitration proceedings.

22. Mr. Routray submitted that the appeal filed by the Appellant before the District Court, Narasinghpur, under Section 37 of the Arbitration and Conciliation Act, 1996, against the abovementioned order of the learned Arbitrator dated 29th June, 2010, was dismissed on 23rd July, 2010, on the ground of maintainability and lack of jurisdiction. The Civil Revision filed against the said order was dismissed by the Madhya Pradesh High Court by its order dated 31st August, 2010. While dismissing the Revision, the High Court, inter alia, observed that under Clause 27.1 of the Agreement, the parties had agreed to resolve their dispute under the provisions of SIAC Rules which expressly or, in any case, impliedly also adopted Rule 32 of the said Rules which categorically indicates that the law of arbitration under the said Rules would be the International Arbitration Act, 2002, of Singapore. The Special Leave Petition, out of which the present appeal arises, has been filed by the Appellant against the said order dated 31st August, 2010.

23. Mr. Routray further submitted that the parties had, inter alia, agreed that the seat of arbitration would be Singapore and that the arbitration proceedings would be continued in accordance with the SIAC Rules, as per Clause 27.1 of the Agreement. It was also agreed that the proper law of the agreement/contract dated 13th August, 2006, between the Appellant and the Respondent would be the Indian law and the proper law of the arbitration would be the Singapore law.

24. Mr. Routray submitted that an application under Section 9 of the 1996 Act was filed before the District Court on 30th December, 2009, prior to the date of invocation of the arbitration proceedings and before the Curial law, i.e., the Singapore law, became operative. On the said application, the District Judge by his order dated 10th March, 2010, directed the applicant to submit its case before the Arbitrator at Singapore. Mr. Routray pointed out that in the present case, the parties had expressly chosen the applicable laws to each legal disposition while entering into the Agreement dated 13th August, 2006. Mr. Routray submitted that the parties had expressly agreed that the proper law of the contract would be the Indian Law, the proper law of the arbitration would be the Singapore International Arbitration Act, 2002 and the Curial law would be Singapore law, since the seat of arbitration was in Singapore. Mr. Routray submitted that as observed by this Court in Sumitomo Heavy Industries Ltd. v. ONGC Ltd. and Ors. MANU/SC/0834/1998 : (1998) 1 SCC 305, the Curial law, besides determining the procedural powers and duties of the Arbitrators, would also determine what judicial remedies are available to the parties, who wished to apply for security for costs or for discovery or who wished to challenge the Award once it had been rendered and before it was enforced.

25. As to the filing of Application under Section 9 by the Appellant before the District Court at Narsinghpur, Mr. Routray submitted that the High Court had correctly held that the proceedings

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had been initiated by the parties in the Court of District Judge, Narasinghpur, before the matter was referred to the Arbitrator and the same was decided taking into consideration such circumstances. However, once the dispute was referred to the Arbitrator, the parties could not be permitted to deviate from the express terms of the Agreement under which the SIAC Rules came into operation.

26. Mr. Routray submitted that the Section 9 application had been filed before the Curial law became operative and in view of the agreement between the parties the Indian Arbitration and Conciliation Act, 1996, would not apply to the arbitration proceedings and the same would be governed by the Singapore laws.

27. Mr. Routray then proceeded to the next important question as to whether choice of the "seat of arbitration" by the parties confers exclusive jurisdiction on the Courts of the seat of arbitration to entertain matters arising out of the contract. Learned Counsel submitted that choice of the seat of arbitration empowered the courts within the seat of arbitration to have supervisory jurisdiction over such arbitration. Mr. Routray has referred to various decisions of English Courts which had laid down the proposition that even if the arbitration was governed by the law of another country, it would not entitle the objector to mount a challenge to the Award in a country other than the seat of arbitration. It is not necessary to refer to the said judgments for a decision in this case.

28. Mr. Routray submitted that the decision of this Court in NTPC v. Singer (supra) relates to the applicability of the Indian Arbitration Act, 1940, and the Foreign Awards (Recognition and Enforcement) Act, 1961, to a foreign award sought to be set aside in India under the provisions of the 1940 Act. It was submitted that the said decisions have no relevance to the question raised in the present case which raises the question as to whether the Indian Courts would have jurisdiction to entertain an appeal under Section 37 of the 1996 Act against an interim order of the Arbitral Tribunal, despite the parties having expressly agreed that the seat of arbitration would be in Singapore and the Curial law of the arbitration proceedings would be the laws of Singapore. Once again referring to the decision in the NTPC case, Mr. Routray submitted that in paragraph 46 of the judgment, this Court had, inter alia, observed that Courts would give effect to the choice of a procedural law other than the proper law of contract only where the parties had agreed that the matters of procedure should be governed by a different system of law. Mr. Routray submitted that in the above-mentioned case, this Court was dealing with a challenge to a "domestic award" and not a "foreign award". Section 9(b) of the Foreign Awards (Recognition and Enforcement) Act, 1961, provides that the said Act would not apply to an award, although, made outside India, but which is governed by the laws of India. Accordingly, all such awards were treated as domestic awards by the 1961 Act and any challenge to the said award, could, therefore, be brought only under the provisions of the 1940 Act. Mr. Routray further submitted that the law of arbitration in the NTPC case (supra) was Indian law as opposed to the facts of the present case, where the parties had agreed that the law of arbitration would be the International Arbitration Act, 2002, of Singapore.

29. Mr. Routray urged that by virtue of Clause 27 of the Agreement dated 13th August, 2006, and by accepting the SIAC Rules, the parties had agreed that Part I of the Arbitration and Conciliation Act, 1996, would not apply to the arbitration proceedings taking place in Singapore. According to Mr. Routray, the said decision was reiterated in the Terms of Reference that the arbitration proceedings would be governed by the laws of Singapore. Mr. Routray further urged that even in the decision relied upon by the Appellant in the case of Bhatia International, this Court had held that parties by agreement, express or implied, could exclude all or any of the provisions of Part I of the 1996 Act. Consequently, in Bhatia International this Court had held that exclusion of Part I of the 1996 Act could be by virtue of the Rules chosen by the parties to govern the arbitration proceedings.

30. As far as applicability of Section 42 of the 1996 Act is concerned, the Jabalpur Bench of the Madhya Pradesh High Court had held that by express agreement parties had ousted the jurisdiction of the Indian Courts, while the arbitration proceedings were subsisting. Accordingly, the jurisdiction of the Indian Courts stood ousted during the subsistence of the arbitration proceedings and, accordingly, it is only the laws of arbitration as governed by the SIAC Rules

which would govern the arbitration proceedings along with the procedural law, which is the law of Singapore.

31. In order to appreciate the controversy that has arisen regarding the applicability of the provisions of Part I of the Arbitration and Conciliation Act, 1996, to the proceedings being conducted by the Arbitrator in Singapore in accordance with the SIAC Rules, it would be necessary to look at the arbitration clause contained in the agreement entered into between the parties on 13th August, 2006. Clause 27 of the Agreement provides for arbitration and reads as follows:

> 27. Arbitration.
>
> 27.1 All disputes, differences arising out of or in connection with the Agreement shall be referred to arbitration. The arbitration proceedings shall be conducted in English in Singapore in accordance with the Singapore International Arbitration Centre (SIAC) Rules as in force at the time of signing of this Agreement. The arbitration shall be final and binding.
>
> 27.2 The arbitration shall take place in Singapore and be conducted in English language.
>
> 27.3 None of the Party shall be entitled to suspend the performance of the Agreement merely by reason of a dispute and/or a dispute referred to arbitration.

32. Clause 28 of the Agreement describes the governing law and provides as follows:

> This agreement shall be subject to the laws of India. During the period of arbitration, the performance of this agreement shall be carried on without interruption and in accordance with its terms and provisions.

33. As will be seen from Clause 27.1, the arbitration proceedings are to be conducted in Singapore in accordance with the SIAC Rules as in force at the time of signing of the agreement. There is, therefore, no ambiguity that the procedural law with regard to the arbitration proceedings, is the SIAC Rules.

34. Clause 27.2 makes it clear that the seat of arbitration would be Singapore.

35. What we are, therefore, left with to consider is the question as to what would be the law on the basis whereof the arbitral proceedings were to be decided. In our view, Clause 28 of the Agreement provides the answer. As indicated hereinabove, Clause 28 indicates that the governing law of the agreement would be the law of India, i.e., the Arbitration and Conciliation Act, 1996. The learned Counsel for the parties have quite correctly spelt out the distinction between the "proper law" of the contract and the "curial law" to determine the law which is to govern the arbitration itself. While the proper law is the law which governs the agreement itself, in the absence of any other stipulation in the arbitration clause as to which law would apply in respect of the arbitral proceedings, it is now well-settled that it is the law governing the contract which would also be the law applicable to the Arbitral Tribunal itself. Clause 27.1 makes it quite clear that the Curial law which regulates the procedure to be adopted in conducting the arbitration would be the SIAC Rules. There is, therefore, no ambiguity that the SIAC Rules would be the Curial law of the arbitration proceedings. It also happens that the parties had agreed to make Singapore the seat of arbitration. Clause 27.1 indicates that the arbitration proceedings are to be conducted in accordance with the SIAC Rules. The immediate question which, therefore, arises is whether in such a case the provisions of Section 2(2), which indicates that Part I of the above Act would apply, where the place of arbitration is in India, would be a bar to the invocation of the provisions of Sections 34 and 37 of the Act, as far as the present arbitral proceedings, which are being conducted in Singapore, are concerned.

36. In Bhatia International (supra), wherein while considering the applicability of Part I of the

1996 Act to arbitral proceedings where the seat of arbitration was in India, this Court was of the view that Part I of the Act did not automatically exclude all foreign arbitral proceedings or awards, unless the parties specifically agreed to exclude the same.

37. As has been pointed out by the learned Single Judge in the order impugned, the decision in the aforesaid case would not have any application to the facts of this case, inasmuch as, the parties have categorically agreed that the arbitration proceedings, if any, would be governed by the SIAC Rules as the Curial law, which included Rule 32, which categorically provides as follows:

> Where the seat of arbitration is Singapore, the law of the arbitration under these Rules shall be the International Arbitration Act (Cap. 143A, 2002 Ed, Statutes of the Republic of Singapore) or its modification or reenactment thereof.

38. Having agreed to the above, it was no longer available to the Appellant to contend that the "proper law" of the agreement would apply to the arbitration proceedings. The decision in Bhatia International v. Bulk Trading S.A. MANU/SC/0185/2002 : (2002) 4 SCC 105, which was applied subsequently in the case of Venture Global Engg. v. Satyam Computer Services Ltd. MANU/SC/0333/2008 : (2008) 4 SCC 190 and Citation Infowares Ltd. v. Equinox Corporation MANU/SC/0836/2009 : (2009) 7 SCC 220, would have no application once the parties agreed by virtue of Clause 27.1 of the Agreement that the arbitration proceedings would be conducted in Singapore, i.e., the seat of arbitration would be in Singapore, in accordance with the Singapore International Arbitration Centre Rules as in force at the time of signing of the Agreement. As noticed hereinabove, Rule 32 of the SIAC Rules provides that the law of arbitration would be the International Arbitration Act, 2002, where the seat of arbitration is in Singapore. Although, it was pointed out on behalf of the Appellant that in Rule 1.1 it had been stated that if any of the SIAC Rules was in conflict with the mandatory provision of the applicable law of the arbitration, from which the parties could not derogate, the said mandatory provision would prevail, such is not the case as far as the present proceedings are concerned. In the instant case, Section 2(2) of the 1996 Act, in fact, indicates that Part I would apply only in cases where the seat of arbitration is in India. This Court in Bhatia International (supra), while considering the said provision, held that in certain situations the provision of Part I of the aforesaid Act would apply even when the seat of arbitration was not in India. In the instant case, once the parties had specifically agreed that the arbitration proceedings would be conducted in accordance with the SIAC Rules, which includes Rule 32, the decision in Bhatia International and the subsequent decisions on the same lines, would no longer apply in the instant case where the parties had willingly agreed to be governed by the SIAC Rules.

39. With regard to the effect of Section 42 of the Arbitration and Conciliation Act, 1996, the same, in our view was applicable at the pre-arbitral stage, when the Arbitrator had not also been appointed. Once the Arbitrator was appointed and the arbitral proceedings were commenced, the SIAC Rules became applicable shutting out the applicability of Section 42 and for that matter Part I of the 1996 Act, including the right of appeal under Section 37 thereof.

40. We are not, therefore, inclined to interfere with the judgment under appeal and the appeal is accordingly dismissed and all interim orders are vacated.

41. There will be no order as to costs.

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