

**SUPREME COURT OF INDIA**

Union of India

Vs.

Hardy Exploration and Production (India) INC

C.A.No.4628 of 2018

(R.K.Agrawal and Abhay Manohar Sapre,JJ.,)

01.05.2018

**JUDGMENT**

**Abhay Manohar Sapre,J.,**

SLP(C) No.31356 of 2016

1. Leave granted.

2. This appeal arises from the final judgment and order dated 27.07.2016 passed by the High Court of Delhi at New Delhi in FAO No.59 of 2016 whereby the Division Bench of the High Court dismissed the appeal filed by the Union of India (appellant herein) challenging the order dated 09.07.2015 passed by the Single Judge in OMP No.693 of 2013 and order dated 20.01.2016 in Review Petition No.400 of 2015 in OMP No.693 of 2013.

3. In order to appreciate the controversy involved in the appeal, few relevant facts, which lie in a narrow compass, need to be stated hereinbelow.

4. This appeal arises out of the proceedings (OMP 693/2013) filed by the appellant (Union of India) against the respondent-Company under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") wherein the appellant had challenged the legality, validity and correctness of the award made by the arbitrators in respondent's favour in one international commercial arbitration proceeding between the appellant (Union of India) and the respondent (foreign company).

5. The respondent contested the appellant's application by raising several objections. One such preliminary objection, which went to the root of the application, was in relation to the maintainability of appellant's application filed under Section 34 of the Act in Courts in India.

6. According to the respondent, the Indian Courts have no jurisdiction to entertain the appellant's application filed under Section 34 of the Act to challenge the legality and correctness of an award in question.

7. The Single Judge by order dated 09.07.2015 upheld the respondent's preliminary objection and held that keeping in view the terms of the agreement in question coupled with the law laid down by this Court in several decisions governing the issues arising in the case, Indian Courts have no jurisdiction to entertain the application filed by the appellant under Section 34 of the Act to question the legality and correctness of the award in question and accordingly dismissed the appellant's application as being not maintainable in Indian Courts.

8. Since the appellant's application was dismissed on the ground of lack of jurisdiction of the Indian Courts, the Single Judge did not consider it necessary to decide the issues arising in the case on the merits.

9. The appellant (Union of India) felt aggrieved by the order of the Single Judge, filed appeal under Section 37(2) of the Act before the Division Bench of the High Court at Delhi.

10. By impugned judgment, the Division Bench concurred with the reasoning and the conclusion arrived at by the Single Judge and held that the Indian Courts have no jurisdiction to entertain the appellant's application under Section 34 of the Act to question the legality of award rendered in international commercial arbitration proceedings.

11. It is against this order, the Union of India felt aggrieved and has filed the present appeal by special leave in this Court.

12. Heard Mr. Tushar Mehta, learned Additional Solicitor General for the appellant and Dr. Abhishek Manu Singhvi, learned senior counsel for the respondent.

13. At the outset, we may state that Mr. Tushar Mehta, learned ASG appearing for the appellant (Union of India) and Dr. Abhishek Manu Singhvi learned senior counsel appearing for the respondent very ably presented their respective arguments in support of their case. The arguments indeed lasted for few months in intervals with lucidity.

14. In their submissions, both the learned senior counsel argued on almost every issue, which has arisen in the appeal directly, indirectly and even remotely.

15. Learned counsel, in support of their submissions, cited almost every decision of this Court including English Courts decisions which dealt with the subject and the issues arising in this case and made sincere attempt to either distinguish or/and place reliance on them to show how and why these decisions apply to the facts of the case at hand or how and why they do not apply.

16. Learned counsel for the parties mainly cited these cases: *Foreign Cases: Naviera Amazonica Peruana S.A. vs. Compania Internacional De Seguros Del Peru*<sup>1</sup> *Hiscox vs. Outhwaite*<sup>2</sup>, *Union of India vs. McDonnell Douglas Corpn*<sup>3</sup>, *C vs. D*<sup>4</sup>, *C vs. D*<sup>5</sup>, *Braes of Doune Wind Farm (Scotland) Limited vs. Alfred McAlpine Business Services Limited*<sup>6</sup>, *Shashoua and Ors. vs. Sharma*<sup>7</sup> *Sulamerica Cia Nacional De Seguros S.A. & Ors. vs. Enesa*

*Engenharia SA & Ors*<sup>8</sup>, (1) *Enercon GMBH* (2) *Wobben Properties GMBH vs. Enercon (India) Ltd*<sup>9</sup>. *Govt. of India vs. Petrocon India Ltd*<sup>10</sup>. *Indian Cases: National Thermal Power Corporation vs. Singer Co. And Ors*<sup>11</sup>, *Sumitomo Heavy Industries Ltd. vs ONGC Ltd. and Ors*<sup>12</sup>, *Sundaram Finance Ltd. vs. NEPC India Ltd*<sup>13</sup>, *Bhatia International vs. Bulk Trading S.A. and Anr*<sup>14</sup>, *Venture Global Engineering vs. Satyam Computer Services Ltd. & Anr*<sup>15</sup>, *Indtel Technical Services Pvt. Ltd. vs. W.S. Atkins Rail Ltd*<sup>16</sup>, *Bank of India & Anr. vs. K. Mohan Das & Ors*<sup>17</sup>, *Citation Infowares Ltd. vs. Equinox Corporation*<sup>18</sup>, *State of Rajasthan & Anr. vs. Ferro Concrete Construction (P) Ltd.*<sup>19</sup>, *Videocon Industries Limited vs. Union of India and Anr*<sup>20</sup>, *Dozco India Private Ltd. vs. Doosan Infracore Co. Limited*<sup>21</sup>, *Yograj Infrastructure Limited vs. Ssang Yong Engineering and Construction Co. Limited*<sup>22</sup>, *Bharat Aluminium Company vs. Kaiser Aluminium Technical Services INC*<sup>23</sup>, *Enercon (India) Ltd. & Ors. vs. Enercon GMBH & Anr*<sup>24</sup>, *Reliance Industries Limited and Anr. Union of India*<sup>25</sup>, *Harmony Innovation Shipping Ltd. vs. Gupta Coal India Ltd. & Anr*<sup>26</sup>, *Union of India vs. Reliance Industries and Ors*<sup>27</sup>, *Bharat Aluminum Company vs. Kaiser Aluminum Technical Services INC*<sup>28</sup>, *Eitzen Bulk A/S & Ors. vs. Ashapur Minechem Ltd. & Anr*<sup>29</sup>, *Imax Corporation vs E-City Entertainment(India) Pvt. Ltd*<sup>30</sup>, *Roger Shashoua and Ors. vs. Mukesh Sharma & Ors*<sup>31</sup>..

17. The argument of both the learned senior counsel mainly centered around to one question which, in our opinion, does arise in the appeal, namely, when the arbitration agreement specify the “venue” for holding the arbitration sittings by the arbitrators but does not specify the “seat”, then on what basis and by which principle, the parties have to decide the place of “seat” which has a material bearing for determining the applicability of laws of a particular country for deciding the post award arbitration proceedings.

18. Several other ancillary questions connected with the main question were also urged by the learned senior counsel with the aid of law laid down in the aforementioned cases and the terms of the arbitration agreement in question.

19. Learned counsel for the parties also addressed the Court by pointing out that some decisions which have bearing over the questions arising in this appeal have been rendered by the Constitution Bench, some by Three Judge Bench and remaining by the Two Judge Bench.

20. One of the arguments of Dr. Singhvi, learned senior counsel was that the decision rendered by Three Judge Bench in the case of *Sumitomo Heavy Industries Ltd. vs. ONGC Ltd. & Others (supra)* on which great reliance was placed by Mr. Tushar Mehta, learned ASG has lost its efficacy, though approved by another recent decision of Three Judge Bench in *Bharat Aluminum Company vs. Kaiser Aluminum Technical Services INC (supra)*, for the reason that it was rendered under the Arbitration Act, 1940 which now stands repealed by Arbitration Act, 1996 and secondly, it was rendered in relation to Section 9 of the Foreign Awards (Recognition and Enforcement) Act, 1961 which also now stands repealed by 1996 Act.

21. It was his submission that while approving the ratio of Sumitomo Heavy Industries Ltd. (supra) these two factors which have some relevance on its efficacy do not seem to have been examined in the case of Bharat Aluminum Company (supra) .

22. Dr. Singhvi also urged that what is the effect of UNCITRAL Model Law, when they are made part of the arbitration agreement for deciding the question of “seat” has also not been so far decided in any of the earlier decisions.

23. In our opinion, though, the question regarding the “seat” and “venue” for holding arbitration proceedings by the arbitrators arising under the Arbitration Agreement/International Commercial Arbitration Agreement is primarily required to be decided keeping in view the terms of the arbitration agreement itself, but having regard to the law laid down by this Court in several decisions by the Benches of variable strength as detailed above, and further taking into consideration the aforementioned submissions urged by the learned counsel for the parties and also keeping in view the issues involved in the appeal, which frequently arise in International Commercial Arbitration matters, we are of the considered view that this is a fit case to exercise our power under Order VI Rule 2 of the Supreme Court Rules, 2013 and refer this case (appeal ) to be dealt with by the larger Bench of this Court for its hearing.

24. It is for this reason, we refrain from recording our findings on any of the issues arising in the appeal and leave the questions/issues to be dealt with by the appropriate larger Bench.

25. We, accordingly direct the Registry to place the matter before the Hon'ble the Chief Justice of India for constituting the appropriate Bench for hearing and disposal of this appeal.

<sup>1</sup>(1988) (1) Lloyd's LR 0116

<sup>2</sup>(1992) 1 AC 0562

<sup>3</sup>(1993) 2 Lloyd's LR. 48

<sup>4</sup>(2007) EWCA Civ 1282 (CA)

<sup>5</sup>(2008) 1 Lloyd's LR 239

<sup>6</sup>(2008) EWHC 426 (TCC)

<sup>7</sup>(2009) EWHC 0957 (Comm.),

<sup>8</sup>(2012) EWCA Civ 0638

<sup>9</sup>(2012) EWHC 3711 (Comm),

<sup>10</sup>(2016) SCC Online MYFC 035

<sup>11</sup>(1992) 3 SCC 0551

<sup>12</sup>(1998) 1 SCC 0305

<sup>13</sup>(1999) 2 SCC 0479

<sup>14</sup>(2002) 4 SCC 0105

<sup>15</sup>(2008) 4 SCC 0190

<sup>16</sup>(2008) 10 SCC 0308

<sup>17</sup>(2009) 5 SCC 0313

<sup>18</sup>(2009) 7 SCC 0220

<sup>19</sup>(2009) 12 SCC 0001

<sup>20</sup>(2011) 6 SCC 0161

<sup>21</sup>(2011) 6 SCC 0179

<sup>22</sup>(2011) 9 SCC 0735

<sup>23</sup>(2012) 9 SCC 0552

<sup>24</sup>(2014) 5 SCC 0001

<sup>25</sup>(2014) 7 SCC 0603

<sup>26</sup>(2015) 9 SCC 0172

<sup>27</sup>(2015) 10 SCC 0213

<sup>28</sup>(2016) 4 SCC 0126

<sup>29</sup>(2016) 11 SCC 0508

<sup>30</sup>(2017) 5 SCC 0331

<sup>31</sup>(2017) 14 SCC 0722