* IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ FAO(OS) No.316/2011 & CM No.11823/2011

Anita Garg ...Appellant through
Mr. C.A. Sundaram, Sr. Adv. with Mr. Narendra M. Sharma, Ms. Malik Gahlot, Mr. Sachin Mittal, Mr. Abhishek Sharma, Ms. Rohini Musa & Mr. Zafar Hayat, Advs.

versus

M/s. Glencore Grain Rotterdam B.V.....Respondent through
Mr. Rajiv Nayyar, Sr. Adv. with Ms. Niti Dixit, Mr. Darpan Wadhwa, Mr. Vidur Bhatia & Ms. Raunaq B. Mathur, Advs. for Respondent No.1

Date of Hearing : July 28, 2011

% Date of Decision: August 11, 2011

CORAM:
* HON'BLE MR. JUSTICE VIKRAMAJIT SEN
HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

1. Whether reporters of local papers may be allowed to see the Judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the Judgment should be reported in the Digest? Yes

VIKRAMAJIT SEN, J.

1. This Appeal assails the Order of the learned Single Judge dismissing the Appellant's Objections under Section 34 of the Arbitration & Conciliation Act, 1996 (A&C Act for short)

challenging both the Interim Award dated 20.6.1997 as well as the Final Award dated 29.7.1997 passed by The London Rice Brokers' Association (LRBA). These Awards have not been challenged for the first time. In the first instance, M/s Shivnath Rai Harnarain (India), a partnership firm, of which the Appellant before us and her husband, Mr. Prem Chand Garg are partners along with others, filed CS(OS) No.1103/1997; it was prayed that the subject contracts containing an Arbitration Clause are void and not binding on the firm. The Respondents had filed CS(OS) No.541/1998 seeking the enforcement of these Awards which was allowed; and by an Order of even date, the said Suit filed by the Firm was dismissed by Reva Khetrapal, J. Our learned Sister, in her Judgment dated 27.11.2008, had ordered that the Final Award shall be deemed to be a decree of this Court. The Partnership Firm carried the matter in Appeal to the Division Bench which held that an appeal was not available from such Orders. This view has found favour with the Apex Court as is evident from a study of **Fuerst Day Lawson Ltd. –vs- Jindal Exports Ltd.** decided on 8.7.2011 which also dismissed Civil Appeal No.5156/2011 arising out of SLP(Civil) 31068/2009.

2. In the interregnum, the Respondents had filed Execution Petition No.72/2009 for execution of the Award in which the

partners were impleaded in their individual names, for the first time. By Order dated 19.4.2010, the learned Single Judge had directed the sale of the shares of Shri Lal Mahal Limited held by Mr. Prem Garg and Mrs. Anita Garg, partners of the said partnership firm Shivnath Rai Harnarian (India). That Order was assailed before the Division Bench in EFA(OS) Nos.15-16/2010 which also came to be dismissed. Taking note of the fact that the Partnership Firm had failed to deposit fifty per cent of the principal amount under the Foreign Awards, in availment of the interim Orders passed by the Hon'ble Supreme Court in the next Special Leave Petition filed by the said Firm, the sale of the shares of the Judgment Debtors in Shri Lal Mahal Limited have been ordered. Although the Partnership Firm, as well as one of its partners, Shri Prem Chand Garg, had resisted Execution Petition No. 72/2009 initiated by the Respondents under Section 49 of the A&C Act, neither of them had taken out proceedings under Section 34 thereof, as has now been attempted by the Appellant before us, namely, Mrs. Anita Garg, wife of Mr. Prem Chand Garg. In the impugned Order, the learned Single Judge has, *inter alia*, held that the action before him was barred from consideration on the principles of *res judicata*. The experience of this High Court is

that the partnership firm and each of its partners is an inveterate and chronic litigant.

3. One of the Objections raised by the Respondents before us is that the Appeal is not maintainable on the strength of the decision of the Supreme Court in ***Videocon*** *–vs- Union of India*, 2011(5) Scale 678, as the parties have specified that "the contract shall be deemed to have been made in England and the construction, validity and performance thereof shall be governed in all respects by English law." We should forthwith mention that the common agent, Jackson Son & Company (London) Ltd., is located in England and hence it is not possible to contend that England has no causal connection with the cause of action. But to this question, we shall revert in a while.

4. We must forthwith analyze ***Bhatia*** *International –vs- Bulk Trading S.A.*, (2002) 4 SCC 105 wherein, as per the agreement between the parties, the arbitral proceedings were to be conducted as per the Rules of the International Chamber of Commerce (ICC); the Seat of Arbitration was stipulated to be in Paris, France. Article 23 of the ICC Rules was under scrutiny. We have perused it. It first reserves the right of the Arbitral Tribunal to pass interim or conservatory measures and secondly preserves, it seems to us, the powers of a judicial authority to do likewise. The argument before Their Lordships

was that since the Seat of Arbitration was in Paris, any interim or conservatory measures could be prayed for only before a competent judicial authority located in France. This was negatived by the Hon'ble Supreme Court on the postulation that Part I of the A&C Act applies to both Domestic as well as International Commercial Arbitration unless, in the case of the latter, Part I had been explicitly or implicitly excluded by the parties. Their Lordships had further clarified that a foreign award is enforceable in India by invoking the provisions of the A&C Act or, significantly, even the CPC. The contract in that case did not so specify.

5. ***Venture Global*** *Engineering –vs- Satyam Computer Services Ltd.* twice engaged the attention of the Hon'ble Supreme Court; in 2008 (AIR 2008 SC 1061) and thereafter in 2010 (2010) 8 SCC 660. The facts of the dispute can be gleaned from the second Report. The Seat of Arbitration was in the United States of America and consequent on the passing of an Award in favour of **Satyam**, execution proceedings were commenced by it in the State of Michigan, United States of America. Thereupon, ***Venture Global*** filed Objections under Section 34 of the A&C Act in Secundrabad, India, predicated on the illegality of the directions relating to the transfer of shareholding. Succinctly stated, the Supreme Court ruled that

since the operation of Part I of the A&C Act had not been excluded by any of the terms in the Arbitration Clause, the proceedings were well-founded. We may mention that Section 11.05(C) of the Shareholders' Agreement provided that – "notwithstanding anything to the contrary in this agreement, the shareholders shall at all times act in accordance with the Companies Act and other applicable Acts/Rules being in force, in India at any time". According to Their Lordships, therefore, Part I of the A&C Act was "applicable to the award in question even though it is a foreign award". It is evident to us that the Apex Court had recognized the distinction between substantive law or the law of contract, and the curial law governing the arbitration which is determined by the 'seat of arbitration', which was Paris.

6. Both these Judgments were discussed by the Supreme Court recently in ***Videocon***. Their Lordships have extracted Articles 33 and 34 of the Production Sharing Contract, which we shall also do for facility of reference:-

> 33.1 Indian Law to govern
> Subject to the provisions of Article 34.12, this Contract shall be governed and interpreted in accordance with the laws of India.
> 33.2 Laws of India not to be contravened
> Subject to Article 17.1 nothing in this Contract shall entitle the Contractor to exercise the rights, privileges

> and powers conferred upon it by this Contract in a manner which will contravene the laws of India.
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> .....
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> 34.12. Venue and Law of Arbitration Agreement
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> The venue of sole expert, conciliation or arbitration proceedings pursuant to this Article, unless the Parties otherwise agree, shall be Kuala Lumpur, Malaysia, and shall be conducted in the English language. Insofar as practicable, the Parties shall continue to implement the terms of this Contract notwithstanding the initiation of arbitral proceedings and any pending claim or dispute. Notwithstanding the provisions of Article 33.1, the arbitration agreement contained in this Article 34 shall be governed by the laws of England.

7. Before we venture further, we must also note that the Arbitration Act, 1996 which is in force in England and Wales and in Northern Ireland, particularly postulates in Section 3 that the seat of arbitration means the juridical seat of arbitration, the significance being, on a perusal of Section 2, that the matters pertaining to the conduct of arbitration shall be regulated by that statute. We mention this for the reason that the provisions pointed to therein prominently pertain to the functioning of the Arbitral Tribunal, the distinction being the passing by the Court of orders under Section 9, or the enforcement of the Award under Section 34. So far as the A&C Act is concerned, Section 20 corresponds to Section 2, *albeit* in

a drastically condensed or compressed form. At first blush, therefore, the Arbitration Clauses have the effect of preserving the laws of India so far as contractual or substantive disputes are concerned and then go on to provide that procedural law pertaining to the conduct of the arbitration shall be English Law. The dichotomy within the law is manifest. We rest our view on the ratio of *National Thermal Power Corporation –vs-* ***Singer*** *Company*, (1992) 3 SCC 551 in which the Arbitration Clause, as a precursor to that in ***Videocon***, specified – "the laws applicable to this contract shall be laws in force in India. The Courts of Delhi shall have exclusive jurisdiction in all matters arising under this contract." The ratio of the Judgment is available in the following passages:-

> 25. The parties have the freedom to choose the law governing an international commercial arbitration agreement. They may choose the substantive law governing the arbitration agreement as well as the procedural law governing the conduct of the arbitration. Such choice is exercised either expressly or by implication. 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 the law of the country in

> which the arbitration is agreed to be held. On the other hand, where the proper law of the contract is expressly chosen by the parties, as in the present case, such law must, in the absence of an unmistakable intention to the contrary, govern the arbitration agreement which, though collateral or ancillary to the main contract, is nevertheless a part of such contract.
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> .....
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> 53. All substantive rights arising under the agreement including that which is contained in the arbitration clause are, in our view, governed by the laws of India. In respect of the actual conduct of arbitration, the procedural law of England may be applicable to the extent that the ICC Rules are insufficient or repugnant to the public policy or other mandatory provisions of the laws in force in England. Nevertheless, the jurisdiction exercisable by the English courts and the applicability of the laws of that country in procedural matters must be viewed as concurrent and consistent with the jurisdiction of the competent Indian courts and the operation of Indian laws in all matters concerning arbitration in so far as the main contract as well as that which is contained in the arbitration clause are governed by the laws of India.

8. There can be no cavil that the A&C Act is an amalgam of (i) our domestic jurisprudence on the facet of arbitration as well as (ii) the Convention on The Recognition and Enforcement of Foreign Arbitral Awards (New York Convention, which can be found in the First Schedule to the A&C Act) and the (iii)

Protocol on Arbitral Clauses (Geneva Protocol 1923 viz. the Second Schedule to the A&C Act) and the Convention of the Execution of Foreign Arbitral Awards (Geneva Convention 1927, namely, the Third Schedule to the A&C Act) and finally to (v) UNCITRAL Model Law on International Commercial Arbitration, 1985. By Article VII of the New York Convention, which is adverted to in Section 44 of the A&C Act, the Geneva Protocol 1923 and the Geneva Convention 1927 ceased to have effect between those contracting States which had acceded thereto. It may be mentioned that less than five sovereign contracting states, *privy* to the Geneva Convention, have yet not become signatories to the New York Convention which 146 countries have presently acceded to. It is palpable that the Geneva Convention is not relevant any more. The A&C Act also consumes the provisions of the Arbitration (Protocol and Convention) Act, 1937 and the Foreign Awards (Recognition and Enforcement) Act, 1961, both of which have been repealed by it. The Foreign Awards (Recognition and Enforcement) Act, 1961 was a separate statute bringing the New York Convention into force in India. Its provisions have been incorporated into the A&C Act and, therefore, the need to repeal the former by the latter was necessitated. The Arbitration (Protocol and Enforcement) Act, 1937 was enacted for the purpose of giving

effect to the Geneva Protocol, 1923 and Geneva Convention, 1927.

9. The UNCITRAL Model Law on International Commercial Arbitration, as its name explicitly suggests, concerns itself only with International Commercial Arbitration. This is also evident from the Resolution 40/72 adopted by the United Nations General Assembly which states, *inter alia*, that "the General Assembly, ... Convinced that the Model Law, together with the convention on the Recognition and Enforcement of Foreign Arbitral Awards and the Arbitration Rules of the United Nations Commission on International Trade Law recommended by the General Assembly in its resolution 31/98 of 15 December, 1976, significantly contributes to the establishment of a unified legal framework for the fair and efficient **settlement of disputes arising in international commercial relations**". As on date, there are around 80 countries who have adopted the Model Law. We must immediately underscore that all these Instruments do not deal with domestic arbitration at all. The A&C Act, however, borrows heavily, almost verbatim, from the UNCITRAL Model Law, but as has become evident in the last fifteen years, fails to clearly and unambiguously distinctively deal with domestic and foreign arbitrations.

10. Article 253 of the Constitution of India lays down that Parliament has power to make any law for the whole or any part of territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body. Article 253 starts with a *non obstante* clause and it is for this reason that the Supreme Court has clarified in *S. Jagannath –vs- Union of India*, (1997) 2 SCC 87 that the Union is competent to legislate with respect to State subjects insofar as may be necessary for implementing its obligations. However, in order to metamorphose treaty obligation into binding law, domestic legislation is required to be enacted. It is this process that gives effect to treaties and international agreements which have been consented to by the Executive. Article 51 of the Constitution of India however, enjoins the State to (a) promote international peace and security; (b) maintain just and honourable relations between nations; (c) **foster respect for international law and treaty obligations in the dealings of organised peoples with one another**; and (d) encourage settlement of international disputes of arbitration. Drawing on these Directive Principles, Courts can give weightage to treaties and international agreements wherever it encounters play in the joints. This is not possible as soon as domestic law

comes into force in respect of treaties and international agreements. We say this because it appears to us that with the enactment of the A&C Act, it may no longer be possible to advert to or be guided by the UNCITRAL Model Law or the New York Convention or the Geneva Convention. It appears to us that Parliament was not fully alive to need to clearly provide for domestic as well as international commercial arbitration. Hence, manifold and myriad conundrums have manifested themselves over the years on the question whether the A&C Act fully and comprehensively covers every aspect of domestic as well as international commercial arbitration. In the absence of separate legislations clearly differentiating between these two distinct aspects of arbitration law, the A&C Act has perforce to be pressed into service for regulating both regimes. The A&C Act commences with a clarification that it consolidates and amends the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards. Part-I, therefore, with no possible alternative, must cover all hues of hues of international commercial arbitration. On this simple premise, one need not look into various Sections to come to the same conclusion.

11. It is apparent that whilst Chapter-I and II deal with arbitration agreements and clauses, Chapter-III – composition of arbitral tribunal, Chapter-IV – jurisdiction of arbitral tribunals, Chapter-V – conduct of arbitral proceedings and Chapter-VI – making of arbitral awards and termination of proceedings relate to the conduct of arbitral proceedings. The succeeding Chapters VII to X do not directly concern themselves with the conduct of arbitration. It is salutary to keep in perspective this distinction in order to fully appreciate the difference in the so-called 'law of contract' in contradistinction to the 'law of arbitration'. It is our understanding that the law of arbitration or *lex arbitri* should invariably correspond with the seat of Arbitration unless the contract otherwise specifies. We find the following paragraphs of the treatise - **Russell on Arbitration**, Gearing. M, Gill. J, Sutton. D; Twenty Third Edition; Thomson Sweet & Maxwell; at pg.213, para 5-072), germane and worthy of reproduction:-

> "Determining the "seat" of an arbitration is extremely important for a number of reasons. First, it will usually (but not necessarily) be where meetings or hearings will take place. What happens if the tribunal holds hearings elsewhere contrary to the express agreement of the parties? To hold the hearings in another country would render any award subject to challenge for serious irregularity, provided substantial injustice could be

> demonstrated. To hold the arbitration in a location different from, but within the same country as, that expressly agreed between the parties will not necessarily do so. In many cases, however, the parties will either be willing to vary their agreement so as to allow the hearing to be held elsewhere or, if the arbitration is subject to institutional rules, they may empower the tribunal to do so. Second, the seat of arbitration is important because it establishes the curial law of the arbitration and may determine each of the procedural law applicable to the arbitration, the law of the arbitration agreement, and the proper law of the substantive contract".

12. The divisions of this dichotomy, that is between substantive law and procedural law, must be determined in the context of the A&C Act. Does Part I embrace both genre of law? It is arguable that Chapters – III to VI, that is, Sections 10 to 33, deal with the functioning of the Arbitral Tribunal and hence corresponds to procedural law pertaining to the Arbitral Tribunal; the term curial law is rampantly used to indicate procedural law. This term, in other legal parlance, alludes also to courts or judicial tribunals, hence causing some confusion. We think curial law or procedural law or *lex arbitri* to be interchangeable especially in view of these observations to this effect in commercial Arbitration, Mustill & Boyd Second Edition:-

The second group of obligations, consisting of what is generally referred to as the 'curial law' of the arbitration, concerns the manner in which the parties and the arbitrator are required to conduct the reference of a particular dispute. According to the English theory of arbitration, these rules are to be ascertained by reference to the express or implied terms of the agreement to arbitrate. This being so, it will be found in the great majority of cases that the curial law, i.e. the law governing the conduct of the reference, is the same as the law governing the obligation to arbitrate. It is, however, open to the parties to submit, expressly or by implication, the conduct of the reference to a different law from the one governing the underlying arbitration agreement. In such a case, the court looks first at the arbitration agreement to see whether the dispute is one which should be arbitrated, and which has validly been made the subject of the reference; it then looks to the curial law to see how that reference should be conducted; and then returns to the first law in order to give effect to the resulting award.

The possibility that the different aspects of the arbitral relationship may be governed by different laws will also exist where the arbitration is conducted in a country other than the one whose laws govern the agreement to arbitrate. Here, the *lex fori* may be relevant not only because the choice of country A as the location of the reference may justify the inference that the parties wish the law of country A to govern the conduct of the dispute, but also because the law of that country may have imperative provisions which the

courts will apply to the reference, irrespective of any choice by the parties as to the law governing the contract or the rules which are to be followed.

It may therefore be seen that problems arising out of an arbitration may, at least in theory, call for the application of any one or more of the following laws—

1. The proper law of the contract, i.e. the law governing the contract, which creates the substantive rights of the parties, in respect of which the dispute has arisen.
2. The proper law of the arbitration agreement, i.e. the law governing the obligation of the parties to submit the disputes to arbitration, and to honour an award.
3. The curial law, i.e. the law governing the conduct of the individual reference.

13. After the Award is pronounced by an arbitral tribunal, it becomes *functus officio*. Provisions assailing the legal proprietary of the Award must, therefore, partake of the nature of the substantive law or the proper law of the contract. If this distinction and dichotomy is not always kept in mind, difficulties will invariably be encountered, as has also been observed in Law and Practice of International Commercial Arbitration Alan Redfern and Martin Hunter Third Edition:

> First, as a glance at the list will show, there is an obvious prospect of conflict between the *lex arbitri* and a different system of law that may be equally relevant. Consider, for example, the question of arbitrability, that is to say, whether or not the subject-matter of the dispute is capable of being resolved by arbitration. The

concept of arbitrability is basic to the arbitral process. The New York Convention and the Model Law refer explicitly to disputes that are "capable of being resolved by arbitration", which impliedly recognizes that, as a matter of law, some disputes may not be capable of being so resolved. Whether or not a particular dispute is legally "capable of being resolved by arbitration" is in effect a matter of public policy; but it is a matter on which states may well differ, with some taking a more restrictive attitude than others. Thus, a claim may be arbitrable under the law governing the arbitration agreement and under the *lex arbitri* but not under the law of the place of enforcement. An award on such a dispute, although validly made under the lex arbitri, might prove to be unenforceable under the New York Convention.

Secondly, the effective conduct of an international commercial arbitration may depend upon the provisions of the law of the place of arbitration. This dependence may be illustrated by considering provisions of the local law for judicial assistance in the conduct of the arbitration. Even if the arbitrators have the power to order interim measures of protection, such as orders for the preservation and inspection of property, they are unlikely to have the power to enforce such orders – particularly if the property in question is in the possession of a third party. For this, it will be necessary to turn to national courts for assistance.

The third and final point to be made is that the choice of a particular place of arbitration may have

> important and unintended consequences. This is because the law of that place may confer powers on the courts or on the arbitrators that were not expected by the parties. An example of this is the power to consolidate arbitrations. Whether or not a court or arbitral tribunal has the power to consolidate two or more arbitrations that involve the same basic issues of fact or law is a controversial question discussed further in Chapter 3. In the present context, it is only necessary to note that such power may exist under the *lex arbitri*; and this may come as a disagreeable surprise to a party who does not wish to have other parties joined in its arbitration.

14. It seems to us, premised on this analysis, that in any international commercial arbitration, the parties can indicate that the curial law or procedure to be followed by the Arbitral Tribunal should conform to laws in a particular country and the substantive law or law of the contract should adhere to the law prevailing in different country. Pragmatism would prompt that curial law should invariably correspond to where the 'seat of arbitration' is located.

15. It may be difficult to reconcile the penultimate paragraph of ***Videocon***, extracted below, with ***Singer***, which has held the filed for over a quarter century**–**

> 19. In the present case also, the parties had agreed that notwithstanding Article 33.1, the arbitration agreement contained in Article 34 shall be governed

> by laws of England. This necessarily implies that the parties had agreed to exclude the provisions of Part I of the Act. As a corollary to the above conclusion, we hold that the Delhi High Court did not have the jurisdiction to entertain the petition filed by the Respondents under Section 9 of the Act and the mere fact that the Appellant had earlier filed similar petitions was not sufficient to clothe that High Court with the jurisdiction to entertain the petition filed by the Respondents.

16. We are not unmindful that in International Commercial Arbitration it is commonplace that the hearings may change from place to place within a country. This has also been provided in Article 16(2) of the United Nations Commission on International Trade Law Arbitration Rules (Resolution 31/98 adopted by the General Assembly on December 15, 1976). Article 16(2) states that – "The arbitral tribunal may determine the locale of the arbitration within the country agreed upon by the parties. It may hear witnesses and hold meetings for consultation among its members at any place it deems appropriate, having regard to the circumstances of the arbitration". **Russell on Arbitration** (2-107) also accepts that "meeting or hearings may take place in several countries, without changing the seat". Arbitration Clauses mentioning venue, place or seat of arbitration to be in country A, whilst

simultaneously stipulating the applicability of the laws of country B, must logically be construed only as clarifying that hearings can also be conducted in that particular situs. In such cases, only Courts of country A will have jurisdiction over disputes pertaining to the function of the Arbitral Tribunal.

17. Indian jurisprudence does not permit parties to prescribe the court which has to decide their disputes even though the nominated forum has no jurisdiction otherwise. We need not go further than ***ABC Laminart*** *–vs- A.P. Agencies*, AIR 1989 SC 1239 which clarifies that parties may select one of many courts provided the selected court has jurisdiction to entertain disputes – that the cause of action must arise within the territorial jurisdiction of that court, or the defendant must reside in the territorial jurisdiction of that court or immovable property must be so located. When this procedural jurisprudence is kept in perspective, it becomes difficult for any court to acquiesce in the vesting of jurisdiction in a court which does not conform to ***ABC Laminart***. How would an Indian Court rule in a set of circumstances where a court lacking all vestiges of jurisdiction moderates the functioning of an Arbitral Tribunal. It would also tantamount to giving an imprimatur to an attempt to exclude the attracted or enforceable law of one country and in its stead to make laws of a third unrelated and

unconnected country applicable. Under Sections 34 or 48, it is arguable that the Award would be held to fall foul of the public policy of India. In ***Videocon***, the Arbitration Clause recorded that the venue of arbitration would be in Kuala Lumpur, unless otherwise agreed to by the parties. The Clause also mentions that "the arbitration agreement contained in this Article 34 shall be governed by the laws of England". Section 20 of the A&C Act, which simply speaks of "place of arbitration" is not as legally precise as Section 3 of the English Arbitration Act which defines the seat of arbitration to mean the "juridical seat" of arbitration. Accordingly, since the parties in ***Videocon*** had agreed that the laws of England would be applicable, they had, in actuality, nominated London as the Seat of Arbitration. In the event, arbitral proceedings had been conducted in London and the jurisdictional constraints and rigours were, therefore, met so far as invocation of English law was concerned. It is not possible for the Videocon Arbitration Clause to be interpreted differently, that is, that whilst the Seat of Arbitration was Kuala Lumpur, English Law would nevertheless apply between the parties. If all arbitral proceedings were to be conducted only in Kuala Lumpur, it would be absurd and impractical for the parties to reach London for orders adjunctory to the arbitration, like summoning of witnesses etc. However, if

parties have agreed that proceedings are to be held in London as well as Kuala Lumpur amongst other venues, it would be sensible to restrict the parties to only one Court. We, once again, emphasize that the English Law would only apply to any disputes or clarifications emanating from all the proceedings of the Arbitral Tribunal held within its territorial sway. We hasten to clarify this point since in ***Videocon*** it was specifically recorded that the contract was regulated by the Indian law. Section 34 of the A&C Act comes into relevance only after the Arbitral Tribunal has pronounced its Award and thereupon renders itself *functus officio*. Ergo, the Arbitration Clauses mentioning the 'Seat of Arbitration' or the 'Juridical Seat of Arbitration' would automatically result in the laws of that country to be applicable between the parties, so far as the conduct of the Arbitral Tribunal is concerned.

18. A reading of the subject Arbitration Clause before us in this Appeal leaves us in no manner of doubt that so far as *lex arbitri* or the curial law is concerned, the parties have agreed that only the laws of England are attracted. We say this because the disputes are subject to arbitration of the London Rice Brokers' Association (LRBA). We shall now reproduce Clauses 11 and 14 of the present Contract to fully appreciate

the rival contentions, especially as regards the exclusion of Indian law, that is, Part I of the A&C Act:-

> 11. Any dispute arising on this Contract shall be referred for settlement to the Arbitration by two Members of this Association's Panel of Arbitrators or their Umpire, being also a Member of this Panel. Each party to appoint one Arbitrator and having the right to reject one nominee. In the event of any party omitting to nominate an Arbitrator within ten days of receipt of notice of appointment of an Arbitrator by the other party, or of the Arbitrators failing to agree on the appointment of an Umpire, the Committee of the London Rice Brokers Association, in either case, shall have power to appoint one forthwith, who shall act on behalf of and as if nominated by the party or parties in default. Claims for arbitration other than Arbitration on quality shall be made and the Claimant's Arbitrator shall be nominated not later than 90 days after the expiry of the contract period of shipment or not later than 90 days from the date of final discharge of the ship at port of destination whichever period may last expire. The parties to the Arbitration shall have the right of appealing against any Award (except on questions of law) within thirty days from the date of Award to the London Rice Brokers Association, whose decision shall be final. Any payments arising out of the Award are to be made within 30 days of the date hereof.
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> .....

> 14. Domicile- The Contract shall be deemed to have been made in England and the construction, validity and performance thereof shall be governed in all respects by English Law. Any dispute arising out of or in connection therewith shall be submitted to arbitration in accordance with the Rules of the London Rice Brokers' Association. The serving of proceedings upon any party by sending same to their last known address together with leaving a copy of such proceedings at the office of the London Rice Brokers' Association shall be deemed good service, rule of law or equity to the contrary notwithstanding.

19. Clause 14 completely answers any argument of lack of jurisdiction because it states that the Contract shall be deemed to have been made in England.

20. The importance, *vis-à-vis* the general applicability and interpretation of the A&C Act raised by Mr. Sundaram, have convinced us on analyzing the law in some detail. This, however, is not in disregard of the gravamen of the impugned Order as well as the Preliminary Objection raised on behalf of the Respondent, namely, that the principle of *res judicata* bars consideration of Objections under Section 34 of the A&C Act.

21. In the impugned Order, the learned Single Judge has noted that a partnership firm is a compendium of its partners liable even to the extent of the personal assets of the partners. The Firm had filed CS(OS) No.1103/1997 for seeking

Declaration that the Arbitration Clause is null and void and had also defended CS(OS) No.541/1998 for deeming the Award to be a decree of the Court or making the Award Rule of Court as under Arbitration Act, 1940 by means of which the Respondents had set the Execution of the Award in motion. Both these Suits were decided against the Appellant. Thereupon, the Respondents filed Execution Petition No.72/2009 which was allowed and the Appeal assailing the Order was also dismissed by the Division Bench by an Order dated 6.11.2010. The learned Single Judge has predicated his views on *Krishna Pillai Raghavan Pillai –vs- Karthiayani Amma Sarasamma*, AIR 1969 Kerala 26 (DB) and *Her Highness Maharani Mandalsa Devi –vs- M. Ramnarain (P) Ltd.*, (1965) 3 SCR 421 : AIR 1965 SC 1718. The learned Single Judge has also noted that the Objections under Section 34 of the A&C Act had not been filed by the Partnership Firm. Relying on Explanation-IV to Section 11 of the CPC, which states that – "any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit", the learned Single Judge held that the recourse by one of its partners to Section 34 of the A&C Act was not available. We agree with the reasoning contained in the impugned Order,

even though it is our persuasion that the A&C Act has been derogated from by the parties.

22. The Appellant has sought to overcome the objection of *res judicata* by contending that the learned Single Judge has equated the exercise of jurisdiction under Section 48 with that under Section 34 of the A&C Act also. While appreciating that there may be a slight difference in the ambit and scope of the two Sections, we cannot ignore the fact that the Firm had not availed of its right to file Objections under Section 34 of the A&C Act, assuming that this provision had not been derogated from. We entirely agree with the conclusion of the learned Single Judge that these Objections filed by the Appellant, a partner of the Firm, are patently time barred. Viewed from either standpoint, therefore, the Objections could not be entertained.

23. Mr. Sundaram has also submitted that the decision of the Division Bench in *Bharat Sanchar Nigam Limited –vs- Haryana Telecom*, 2010(172) DLT 280 is of assistance to the Appellant for the reason that it has mandated that the Award should be personally served on the party concerned. The learned Single Judge, however, has held that a signed copy of the Award was served on the Partnership Firm and constituted adequate notice to each of its partners, as envisaged in Section 24 of the

Partnership Act, 1932 [see *Ashutosh –vs- State of Rajasthan*, (2005) 7 SCC 308]. Hence, the learned Single Judge, *inter alia*, concluded that the Objections under Section 34 of the A&C Act, having been preferred after the statutory period, were time barred. The SLP filed against **Bharat Sanchar Nigam Limited** has been dismissed obviously because of the decision in *State of Maharashtra –vs- Ark Builders Private Limited*, (2011) 4 SCC 616.

24. We now come to the second argument raised by Mr. Sundaram, learned Senior Counsel for the Appellant, viz. that inasmuch as the Arbitral Tribunal consisted of two Arbitrators, the Award is illegal and *non est*. Section 10 of the A&C Act ordains that the parties are free to determine the number of arbitrators, provided that such number shall not be an even number. Section 15 of the English Act 1996 reads as under:-

> **15 The arbitral tribunal**
>
> (1) The parties are free to agree on the number of arbitrators to form the tribunal and whether there is to be a chairman or umpire.
>
> (2) Unless otherwise agreed by the parties, an agreement that the number of arbitrators shall be two or any other even number shall be understood as requiring the appointment of an additional arbitrator as chairman of the tribunal.

(3) If there is no agreement as to the number of arbitrators, the tribunal shall consist of a sole arbitrator.

25. We have read Clause 11 of the LRBA Contract which is equivalent to the Arbitration Clause between the parties. It merely states that disputes shall be referred for settlement to the arbitration of two members. There is nothing in this Clause which precisely or concisely indicates that arbitration by only two arbitrators was in contemplation. The annals of arbitration laws in England are quite possibly the reason for the failure to consciously prohibit a two person Arbitral Tribunal or to insist upon an odd number of persons, because prior to 1996 this was statutorily permissible. Section 15 of the English Act, 1996 makes the appointment of a Chairman or Umpire optional except where the Arbitral Tribunal comprises two or any other even number. In substance, therefore, there is similitude in the provisions of Indian as well as English Law. Schedule I of the English Act clarifies that Section 15 is not mandatory. There is a recommendation of the Law Ministry that Section 10 of the A&C Act should be made mandatory by the device of the introduction of an Explanation.

26. In ***Videocon***, the prayer under Section 9 of the A&C Act was for stay of arbitral proceedings which were underway in London. Two questions immediately arose – firstly whether the

Delhi High Court had jurisdiction to pass such an order under Section 9 of the A&C Act, and secondly whether the stay of arbitral proceedings was contemplated under that provision. It is beyond cavil that the powers of the Court under Section 9 of the A&C Act and that of the Arbitral Tribunal under Section 17 of the A&C Act are the same so far as interim measures of protection are concerned. A holistic reading of the A&C Act leads to the conclusion that once arbitral proceedings have commenced, courts should abjure interference with their progress. Section 5 boldly states that notwithstanding anything contained in any other law in matters governed by Part I, no judicial authority shall intervene except where so provided in this Part. Section 13(5) similarly rules out assailing a challenge to the procedure of the Arbitral Tribunal till the award is published and can thereupon be challenged under Section 34 of the A&C Act. Section 16(6) is also of like nature and provides remedy for a ruling of the Administrative Tribunal on its own jurisdiction only by way of Objections under Section 34 of the A&C Act. Section 9 makes no mention of stay of proceedings of the Arbitral Tribunal. Therefore, clearly this prayer was not available, even assuming that the Delhi High Court enjoyed territorial jurisdiction over the *lis*.

27. The decision in *Narayan Prasad* ***Lohia*** *–vs- Nikunj Kumar Lohia*, (2002) 3 SCC 572 must now be analyzed threadbare. In that case, an Award was pronounced by an Arbitral Tribunal comprising two Arbitrators which was assailed on the ground that it was contrary to Section 10 of the A&C Act which stipulates that while the parties are free to determine the number of Arbitrators, such number shall not be an even number. The rationale behind this provision is immediately obvious - it strives to eradicate the possibility of a 'hung' Arbitral Tribunal. ***Lohia*** was rendered during the regime of *Konkan Railway Corporation Limited –vs- Rani Construction (P) Ltd.*, (2002) 2 SCC 388 which stands overruled by the Seven-Judge decision in ***SBP*** *& Co. –vs- Patel Engineering Ltd.*, (2005) 8 SCC 618, which enunciates that the exercise under Section 11 of the A&C Act is not purely administrative or ministerial in character. Accordingly, the Court which is called upon to appoint an Arbitral Tribunal is enjoined to return at least a *prima facie* opinion on whether – (i) it possesses jurisdiction in the sense that the party making the motion has approached the right High Court; (ii) that there is a valid arbitration agreement in terms of Section 7 of the A&C Act; (iii) that the applicant before the Court is a party to the arbitration agreement and (iv) that there is a dispute/live claim subsisting

which is capable of being arbitrated upon. If these four concomitants are present, the Court has to be satisfied that conditions have been disclosed for the exercise of powers under Section 11(6) of the A&C Act. Mr. Sundaram, learned Senior Counsel for the Appellant, has endeavoured to persuade us that in view of ***SBP***, ***Lohia*** is no longer a good law. This is palpably for the reason that the ratio of ***Lohia*** is practically fatal to the Appellant's cause which is to the effect that the Award rendered by an arbitral tribunal comprising of an even number of arbitrators is illegal and, therefore, liable to be set aside under Section 34 of the A&C Act. Secondly, Mr. Sundaram has also sought to dilute the conclusion that Section 10 of the A&C Act is a derogable provision. We are unable to agree with him on both points. As we have already mentioned, ***SBP*** is concerned only with the important question as to whether the exercise under Section 11 of the A&C Act is administrative or judicial in nature. It does not even touch upon Section 10 of the A&C Act. For this simple reason, the opinion in ***Lohia*** that Section 10 is a derogable provision continues to hold the field. If Section 10 is not derogable, the necessity of having to consider whether a contract can prescribe an Arbitral Tribunal of even number could not arise, because jurisprudentially parties cannot contract contrary to a statute. The dialectic for

the holding that Section 10 is not 'mandatory' [the word used in Schedule-I of the English statute, viz. Arbitration Act, 1996] is to be found in paragraph 16 of the Judgment. Their Lordships observed that "it is no longer open to contend that, under Section 16, a party cannot challenge the composition of the Arbitral Tribunal before the Arbitral Tribunal itself. Such a challenge must be taken, under Section 16(2), not later than the submission of the statement of defence. Section 16(2) makes it clear that such a challenge can be taken even though the party may have participated in the appointment of the arbitrator and/or may have himself appointed the arbitrator. Needless to state a party would be free, if it so chooses, not to raise such a challenge. Thus, a conjoint reading of Sections 10 and 16 shows that an objection to the composition of the Arbitral Tribunal is a matter which is derogable. It is derogable because a party is free not to object within the time prescribed in Section 16(2). If a party chooses not to so object there will be a deemed waiver under Section 4." Proceeding on the understanding that it is not mandatory that the Arbitral Tribunal must comprise odd numbers, Their Lordships went on to hold that the contract must be given effect to. However, since Section 10 of the A&C Act, at the very least, recommends that the Arbitral Tribunal should not consist of an even number,

the Apex Court opined that the parties were, notwithstanding their agreement, empowered to raise this objection at the very threshold under Section 16(2) of the A&C Act, but are barred from doing so once an Award is pronounced. It was on this legal progression, since no objection had been raised on the score of the Arbitral Tribunal consisting of even number of persons, that the Supreme Court upheld the Award even though it was pronounced by an Arbitral Tribunal comprising only two persons.

28. Mr. Sundaram has contended that the provisions of law that are in force in England, germane to the controversy before us, have not undergone any change. He has referred to the English Arbitration Act, 1950, of which Section 8(1) reads as follows:-

> Unless a contrary intention is expressed therein, every arbitration agreement shall, where the reference is to two arbitrators, be deemed to include a provision that the two arbitrators may appoint an umpire at any time after they are themselves appointed and shall do so forthwith if they cannot agree.

Subsequent amendments did not incorporate any change to these provisions, as has been impressed upon us by Mr. Sundaram. His submission is the same in respect of English Arbitration Act, 1979. However, Mr. Nayyar, learned Senior

Counsel for Respondent No.1, is quick to point out that the submission of Mr. Sundaram is clearly wrong on a reading of Section 6 of the English Arbitration Act, 1979 which read as follows:-

> S.6. Minor amendments relating to awards and appointment of arbitrators and umpires.—(1)In sub-section (1) of Section 8 of the principal Act (agreement where reference is to two arbitrators deemed to include provision that the arbitrators shall appoint an umpire immediately after their own appointment)—
> (a) for the words "shall appoint an umpire immediately" there shall be substituted the words "may appoint an umpire at any time"; and
> (b) at the end there shall be added the words "and shall do so forthwith if they cannot agree".

29. The law that was prevailing in England upto 1996 had, therefore, been amended by the 1979 Act in one extremely important significance, namely, that the Arbitrators had the option to postpone the appointment of an umpire till such time that it became evident that unanimity of opinion on the Arbitral Tribunal had become illusory. A bare reading of Section 10 of the A&C Act could possibly convey a contrary impression until the import of the conclusions in ***Lohia*** is appreciated, namely, that Section 10 is derogable and not mandatory. The position, therefore, in England, as well as in India, is that whilst the expectation of Parliament is that the Arbitral Tribunal should

logically comprise an odd number of persons, the contrary may still obtain. We must now unravel the agreement between the parties on this nodus.

30. ***Videocon*** copiously refers to ***Bhatia*** to predicate that parties can, expressly or impliedly, exclude the whole of Part I of the A&C Act regardless of whether the provisions are non-derogable or otherwise. ***Bhatia***, however, dealt with the question of whether interim measures under Section 9 of the A&C Act could be granted by Indian Courts even in respect of international commercial arbitrations, the venue of which was outside India. The answer was that this was so possible. That is the ratio of ***Bhatia***. Their Lordships were not called upon to definitively or comprehensively indicate which of the provisions of Part I are non-derogable. Since the composition of the Arbitral Tribunal predates its creation and functioning, determination of its legality remains with the Court, as has been laid down authoritatively in ***SBP***. Their Lordships have prescribed that the Court is duty-bound to return at least a *prima facie* finding on this point. Of course, if the Court is of the opinion that the Arbitral Tribunal is *prima facie* properly constituted, it can refer the parties to the Arbitral Tribunal which will finally rule on that question. In this analysis, Section 9 as well as Section 34 of the A&C Act fall in the domain of

Courts of law, although restricted powers, similar to Section 9, are also reposed on the Arbitral Tribunal by virtue of Section 17.

31. On the basis of our study of precedents and of treatise on this subject, some of the conclusions that we have arrived at are as follows:-

(a) Law of arbitration, as it has developed globally, recognizes that there is a difference between the law of contract and the law governing the conduct of the Arbitral Tribunal.

(b) Parties are empowered to nominate which national laws will govern either or both these divisions.

(c) For pragmatic reasons, the seat of arbitration or the juridical seat of arbitration or the place of arbitration or the venue of arbitration, if specified in a contract, will also indicate the parties' choice of the curial law pertaining to the conduct of the Arbitral Tribunal's proceedings. In the case of any inconsistency, courts must read out the stipulations as to the venue or seat of arbitration as being one among several places where the Arbitral Tribunal conducts its workings.

(d) At least, so far as India is concerned, the selection of the law that will be applied to the resolution of disputes must be one amongst many other forums which would possess jurisdiction, because of the ratio of ***ABC Laminart***.

(e) We reiterate that the A&C Act has not been properly worded or conceived of. Part I thereof contains provisions which relate to the law of the contract as

well as to the curial law moderating workings of the Arbitral Tribunal. Sections 9 and 34 do not pertain to curial law. So far as Section 9 is concerned, it predates the form of the Arbitral Tribunal; Section 34 is attracted to events post the publication of the award where the Arbitral Tribunal has already been rendered *functus officio*. If a contract stipulates that the functioning of the Arbitral Tribunal shall be governed by laws in a foreign country, whereas the substantive or contract law will be governed by Indian laws, Section 9 as well as Section 34 will be maintainable.

(f) Broadly speaking, the curial law is contained in Chapters III to VI, whereas proper law of the contract is covered in large measure in the other Chapters of Part I.

(g) Section 10 is a derogable provision. Even so, it may be open to a party to object the first instance since the contract for an even number of arbitrators would be contrary to the statute.

32. We have carefully considered the correspondence exchanged between the adversaries before us which witnesses the formation or emergence of a contract; as also whether the parties had, at all, considered the application of the laws of only one particular country for a total adjudication of their disputes. The correspondence does not throw any light on this subject. Assuming that Clauses 11 and 14 apply to the parties concerned, they have unequivocally agreed that English law

will apply, unlike in ***Videocon*** where there was a reservation to the effect that Indian law govern that transaction. Therefore, in the case before us our conclusion is that Part I of the A&C Act has been specifically excluded by the parties.

33. Clause 14, in terms, refers to the Arbitration and Appeal Rules of the LRBA. Rule 9 lays down that in the event of the arbitrators failing to agree, an umpire shall be appointed by them, such umpire to be a member of LRBA's Panel of Arbitrators. There is substance in the argument of Mr. Nayyar, learned Senior Counsel for the Respondent, that if the English Arbitration Act, 1996 were to be applied, Section 15(2) thereof enables the parties to derogate from the general prescription of having an odd number of persons comprising the Arbitral Tribunal. The effect of Rule 9 would be that the parties have agreed that an additional arbitrator would have to be appointed, as Chairman of the Tribunal, only in the event that the two arbitrators or the even number of arbitrators do not arrive at a unanimous decision. We are not persuaded by Mr. Sundaram that the composition of the Arbitral Tribunal falls foul of Section 10 of the A&C Act and, therefore, deserves to be set aside under Section 34 of the A&C Act (which provision is not available) or be declared null and void, inoperative or incapable of being performed, by virtue of

Section 48 of Part II of the A&C Act. It must be noted that the Arbitration was initiated/invoked on 25.9.1995 when the extant law was to the effect that the parties were bestowed with discretion as to the number of persons who could form the Arbitral Tribunal. As already mentioned, the [English] Arbitration Act, 1979 removed the words "**shall** appoint an arbitrator immediately" and substituted it with the words "**may** appoint an umpire at any time" and this was the reason why Mr. Nayyar had vehemently submitted that the correct sequence of the amendments to the English Law had not been disclosed by learned Senior Counsel for the Appellant.

34. Finally, we need not to consider the argument that a fraud had been perpetrated by the Agent of the Partnership Firm, namely, Jackson Son & Company (London) Ltd.. The contention articulated by Mr. Sundaram is that the correspondence exchanged by the parties, from which a contract had emerged, does not contain any arbitration clause. Once again, the principles of constructive *res judicata* would apply inasmuch as this ground ought to have been raised in the previous proceedings under Section 48 of the A&C Act. We are unable to agree with the contention raised on behalf of the Appellant. Parties in the rice business are well aware that the resolution of disputes is always through the arbitration under

the aegis of LRBA. In any event, Reva Khetrapal, J., in the impugned Order dated 27.11.2008, has recorded the finding that the Plaintiff before her, which is the Respondent Company, had "discharged the burden placed upon him of proving that the award sought to be enforced is a genuine foreign award based on a foreign agreement for arbitration ….". A partner of a firm, such as the Appellant, cannot re-agitate an issue which has already been raised or could have been raised and decided by the Firm. This argument is also devoid of merit and is rejected.

35. In this analysis, we find no merit in the Appeal which is dismissed. CM No.11823/2011 is also dismissed. Keeping in view the multitudinous litigation filed by the Partnership Firm and separately by each of its partners, which has exhausted several days of this High Court, we quantify costs at ₹ 2,00,000/- payable by the Appellant to the Respondents.

(VIKRAMAJIT SEN)
JUDGE

(SIDDHARTH MRIDUL)
JUDGE

August 11, 2011
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