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

% *Judgment Reserved on: February 15, 2013*
Judgment Pronounced on: March 22, 2013

\+ **OMP No.46/2013**

UNION OF INDIA ..... Petitioner
Through Mr.A.K.Ganguli, Sr.Adv. with Ms.Mamta Tiwari, Ms.Swati Sinha, Ms.Veronica Mohan, Mr.Pranav Vyas, Mr.Prakhar Chauhan, Mr.Kapil Sankhla, Ms.Meghna Sankhla, Mr.Abhijit Sinha, Mr.Debesh Panda & Mr.Chaitanya Safaya, Advs.

versus

RELIANCE INDUSTRIES LTD & ANR ..... Respondents
Through Mr.Mukul Rohatgi, Sr.Adv. with Mr.Madhur Bayar, Adv. for R-1.
Dr.A.M.Singhvi, Sr.Adv. & Mr.N.K.Kaul, Sr.Adv. with Mr.Neil Nildreth, Mr.Avanish, Mr.Karan Luthra, Mr.Kapil Rustagi, Ms.Naomi Chandra & Mr.Rahan Jaitley, Advs. for R-2.

CORAM:
HON'BLE MR. JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. The petitioner-Union of India filed the petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Act") challenging the Final Partial Award dated 12th September, 2012 passed by the Arbitral Tribunal comprising the Chairman and two Members, ordering that the respondents' claim in respect of Royalties, Cess, Service

Tax and CAG Audit are arbitrable, by rejecting the preliminary objections of the petitioner relating to the arbitrability of the said claims as mentioned in the Statement of Claim.

2. The brief facts are that on 22nd December, 1994, two Productions Sharing Contracts (PSCs) came to be executed between the Ministry of Petroleum and Natural Gas, Government of India, Oil and Natural Gas Commission, Reliance Industries Ltd. (respondent No.1) and Enron Oil and Gas India Limited (EOGIL) for the exploration and production of petroleum from the Tapti and Panna Mukta fields respectively. In 2002, BG Exploration and Production India Limited (respondent No.2) acquired the share capital of EOGIL and was substituted in place of EOGIL by amendments to the PSCs. The two contracts were to be operative for a period of twenty five years and would expire only in 2019 unless it is terminated earlier or mutually extended by the parties.

3. The respondents are admittedly parties to the two PSCs relating to the Tapti Gas and Panna Mukta Oil Fields, dated 22nd December, 1994. The petitioner and Oil & Natural Gas Corporation Limited are also parties to the PSCs. The relevant provision of Article 15.1 the PSCs reads as under:-

> "Article 15: Taxes, Royalties, Rentals, etc.
>
> 15.1 The Companies and the operations under this Contract shall be subject to all fiscal legislations of India, except where pursuant to any authority granted to under any applicable law, they are exempt wholly and partly from the application of the provisions of a particular law or as otherwise provided herein….."

4. It is stated in the petition that when the respondents filed their Statement of Claims on 5th August, 2011 raising, *inter-alia*, certain claims with respect to Royalties, Cess, Service Tax and CAG Audit, the petitioner raised the said preliminary objections to the effect that the said claims are

not arbitrable. After filing the written submissions, the Arbitral Tribunal by its Final Partial Award rejected the preliminary objection of the Union of India by order dated 12th September, 2012. It is held by the Arbitral Tribunal that the claims of the respondents in respect of Royalties, Cess, Service Tax and CAG Audit are arbitrable.

5. The arbitral tribunal ordered that the merits of the Tax/Audit Issues, along with certain other disputes, be determined at an 8-day hearing to take place in Hong Kong commencing 4th March, 2013. It has been observed in the partial final award that the said claims relating to recovery of cess, sales tax, royalty are arbitrable in nature and shall be decided as claims in the proceedings. The Procedural Order dated 14th September, 2012 also sets out a timetable for the filing of submissions by the parties for a March 2013 hearing, following which the respondents filed their submissions on 7th December, 2012. The petitioner's submissions in response were filed on 25th January, 2013. On 13th December, 2012, a majority of the arbitral tribunal rendered a second Final Partial Award dated 10th December, 2012 which dealt with the merits of the remaining issues heard at the May 2012 hearing.

6. Challenging the said order by the Union of India, the present petition has been filed which was listed before Court on 22nd January, 2013 when the preliminary objections were raised by the learned Senior counsel appearing on behalf of the respondents that the petition is not maintainable, for the reason that by choosing English law to govern their agreement to arbitrate and expressly agreeing to a London-seated arbitration, the parties have excluded the application of Part I of the Arbitration and Conciliation Act, 1996, therefore, this Court has no jurisdiction to entertain the objections filed by the petitioner under Section 34 of the Act and submits that the

Courts of England and Wales have an exclusive jurisdiction in this regard.

7. The petitioner has invoked the jurisdiction of this Court to entertain the present petition filed under Section 34 of the Act for various reasons; namely, (i) the terms of the PSCs entered would manifest an unmistakable intention of the parties to be governed by the laws of India and more particularly the 1996 Act; (ii) the contracts were signed and executed in India; (iii) the subject matter of the contracts, namely, the Panna Mukta and the Tapti Fields are situated within India; (iv) the obligations under the contracts have been for the past more than 15 years performed within India; (v) the contracts stipulate that they "shall be governed and interpreted in accordance with the laws of India"; (vi) they also provided that "nothing in this contract" shall entitle either of the parties to exercise the rights, privileges and powers conferred upon them by the contract "in a manner which will contravene the laws of India" (Article 32.2); and (vii) the contracts further stipulate that "the companies and the operations under this contract shall be subject to all fiscal legislation of India" (Article 15.1).

8. With regard to the territorial jurisdiction, the respondents have raised the following points in support of their submissions:-

(i) As to the seat of the arbitration:

a. The PSCs were amended by two amendment agreements dated 24th February, 2004 and 10th January, 2005 respectively. The amendment agreement dated 24th February, 2004 sought to amend the seat of arbitration from London to Paris.

b. On 14th September, 2011, the parties to the arbitration agreed that the seat of the present arbitration proceedings would be London, England. As this was not an amendment

to the PSCs but a binding agreement between the parties to the arbitration as to the seat in respect of the current arbitration, the Arbitral Tribunal recorded the consent of the parties in a Final Partial Consent Award rendered by the Arbitral Tribunal on 29th July, 2011 and signed by the petitioner and the respondents. The Final Partial Consent Award states, *inter-alia*, that:

> "*....the juridical seat (or legal place) of arbitration for the purposes of the arbitration initiated under the Claimants' Notice of Arbitration dated 16th December, 2010 shall be London, England."*

(ii) As to the procedural rules governing the arbitration:

a. Article 33.9 of the PSCs provides that arbitration proceedings shall be conducted in accordance with "the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) of 1985".

b. Following the parties' submissions as to whether the reference to "1985" in Article 33.9 of the PSCs was to the 1976 or the 2010 version of the UNCITRAL Arbitration Rules, the Terms of Appointment records the Arbitral Tribunal's finding that the arbitration is subject to the UNCITRAL Arbitration Rules, 1976.

9. The contention of the respondents is that the objections raised by the petitioner are yet to be determined by the Arbitral Tribunal on merit and the same would be considered by the Arbitral Tribunal after considering the evidence at the time of passing the final award, however the petitioner is not agreeable with the submissions of the respondents and its simple answer is

that in respect of Royalties, Cess, Service Tax and CAG Audit since are not arbitrable under the settled law, therefore why the petitioner should be burdened with heavy cost and to spend a valuable time in evidence when the same cannot be decided by the Arbitral Tribunal under the laws. It is submitted by the petitioner that while considering the said objection of the respondents, the Court should also keep in mind the nature of the objections raised by the Union of India in respect of Royalties, Cess, Service Tax and CAG Audit as to whether the claims raised by the respondents in the Statement of Claims are arbitrable or not. In reply to Consent Award dated 14th September, 2011 of the Arbitral Tribunal, designating the seat of arbitration in London, the Consent Award, in no way, affects the obligations of the parties under Article 32 which declares the paramount and overarching mandate of the parties not to act "in a manner which will contravene the laws of India".

10. Mr. A.K. Ganguli, learned Senior counsel appearing on behalf of the petitioner has made his submissions in support of his petition and refuting the objection of the jurisdiction raised by the respondents. The said submissions can be outlined in the following manner:

a) Firstly, Mr. Ganguli argued that the present case involves a question of public policy and the exercise of jurisdiction by this court in relation to the challenge of the award which declares the matters relating to the Royalties, Cess, Service Tax and CAG Audit as arbitrable in England for which statutory framework is provided under Indian laws separately which in turn affects the public policy of India. Therefore, while examining the question as to whether this court has jurisdiction to entertain the challenge to the award under Section 34 of the Act in view of the applicability of provisions of choice of law

under the agreement, this court should also take into consideration that the aspect of arbitrability of the taxes, cess etc. is clearly against the law of land and once the place of performance is in India, the jurisdiction of Indian court necessarily has to be exercised. Thus, the question of jurisdiction of Indian court is connected with the aspect of violation of public policy in India when the matter relates to Indian subjects and taxed which are required to be paid by respondents to Indian government.

b) Secondly, Mr. Ganguli argued that the intention of the parties to an agreement has to be gathered by reading the agreement as a whole. Mr. Ganguli, drawing an aid from the said principle has read over the Articles 32 and 33 of the agreement so as to demonstrate as to how the parties have agreed under the agreement that they shall be subject to Indian laws and Indian fiscal laws. It has been argued that the governing law of the contract is Indian law. It has been further informed by the learned senior counsel for the petitioner that there is a non obstante clause under the agreement which is 32.2 from reading of which, the clear intention of the parties is emerging which is that the acts of the parties cannot violate the laws of India. Thus, the claims which the respondents have submitted before the arbitral tribunal relates to taxes and cess and other royalties for which the different statutes provides for the procedure for levy such taxes clearly violates or bypasses the laws of India and violates clause 32.2 of the agreement.

From the fair reading of the agreement, as per Mr. Ganguli, no inference as to exclusion of the jurisdiction of Indian courts can be drawn by this court when there exists a non obstante clause

precluding the parties to violate Indian laws merely because the juridical seat of the arbitration is in England and arbitration agreement is governed by the laws of England.

c) Thirdly, Mr. Ganguli submitted that the existence of non obstante clause which precludes the parties to exercise their rights and act contrary to laws of India has an overriding effect over and above the other clauses relating to choice of laws by the parties. As per the learned senior counsel that the said clause 32.2 must be given effect to by the courts while drawing any inference as to exclusion or non exclusion of Indian law particularly when the parties have chosen their governing laws and procedural laws under the agreement. The said clause as per Mr. Ganguli clearly shows the intention of the parties is not exclude the Indian laws but to subject themselves to Indian laws which include Indian Arbitration Act. Therefore, the Indian laws are not intended to be excluded by the parties and this court can conveniently exercise it s jurisdiction under Section 34 of the Act of 1996.

Mr. Ganguli, learned Senior counsel relied on the judgment of ***Venture Global Engineering vs. Satyam Computer Systems Ltd***. (2008) 4 SCC 190 wherein Supreme Court in a likewise manner has given effect to the non obstante clause similarly worded in the agreement by finding that Indian laws were not implied excluded in that case and thereby exercising the jurisdiction under the 1996 Act.

d) Fourthly, Mr. Ganguli argued that as per the arbitration clause contained in the agreement, only curial law is the law of England. Therefore, the laws of England are applicable in respect of conduct of the arbitration proceedings before the arbitral proceedings. The

moment award is rendered by the tribunal, the challenge to the said award is amenable to jurisdiction of this court as the same becomes a subject matter of the proper law of the contract.

In order to buttress his submission, Mr. Ganguli relied upon the judgment passed by the Supreme Court in the case of ***Sumitomo Heavy Industries Ltd vs. ONGC Ltd.***, (1998) 1 SCC 305 wherein the Supreme Court has expressed the similar opinion as argued by the counsel for the petitioner.

e) Fifthly, Mr. Ganguli has argued that the issue of arbitrability of the subject matter has to be adjudicated as per the conflict of laws provisions. Even if the governing law to arbitrate was the laws of England and some aspects relating to arbitrability were to be adjudicated by the arbitral tribunal, still the tribunal ought to have taken into consideration the conflict of laws rules which mandate that the governing law of the place of enforcement is necessary to be taken into consideration in order to make the performance of the award valid. In short, it is the submission of the learned counsel for the petitioner that the arbitral tribunal while applying the laws of England in relation to the question of arbitrability cannot remain totally oblivious to the public policy in India. Therefore, if the disputes or claims raised by the respondents are not arbitrable in India, the said aspect ought to have been given due to respect by the arbitral tribunal even if it intended to apply the laws of England. He referred to the claims made in the statement of claims filed by the respondents in relation to seeking declaration of various kinds, exemption, and reimbursement of any Royalty, Cess, Service Tax and CAT Audit. The same read as under:

"**Royalty**

In paragraph 30.3(1)-(4) of the Statement of Claim, the Claimants seek the following relief :

(1) A declaration that, for the purpose of Article 15.6.1, the value of Gas at the wellhead should be calculated by deducting from the sale price at the Delivery Point an amount reflecting all of the costs which are incurred between the wellhead and the Delivery Point-regardless of whether such costs are classified as capital expenditure and regardless of whether such costs are recoverable out of Cost Petroleum under Article 13 of the PSCs.

(2) A declaration that with effect from the date of any partial or final award to the termination of the PSC, and pursuant to Article 15.6.1 of the PSCs, the Government is required to reimburse any excess royalties paid as a result of the exclusion of post-wellhead capital expenditure from wellhead value calculations made pursuant to the Gazette Notification or pay damages in the same amount for failure to procure an exemption in respect of such excess royalties.

(3) A declaration that the Government is liable to reimburse the Claimants pursuant to Article 15.6.1 of the PSCs in respect of any additional royalties imposed and paid by the Claimants since August 2007 as a result of the exclusion of post-wellhead capital expenditure from wellhead value calculations made pursuant to the Gazette Notification.

(4) An award in favour of the Claimants requiring the Government to reimburse the Claimants pursuant to Article 15.6.1 in the sum of US$ 11,413,172 in respect of the additional royalties imposed and paid under protest between August 2007 and March 2011 or pay damages in the same amount for failure to procure an exemption in respect of such additional royalties.

Cess

In paragraphs 38.3(1)-(2) of the Statement of Claim, Claimants seek the following relief :

(1) A declaration that the Government is required to reimburse any cess imposed in excess of the rate specified in Article 15.6.1 of the PSCs and paid by the Claimants or pay damages in the same amount for failure to procure an adjustment of cess under the PSCs or an exemption in respect of such cess.

(2) An award in favour of the Claimants requiring the Government to reimburse the Claimants pursuant to Article 15.6.1 in the sum of Rs.16,79,00,583 in respect of the additional cess imposed between 10th July, 2004 and 31st March, 2011 or pay damages in the same amount for failure to procure an exemption in respect of such cess.

And in paragraphs 38A.3(1)-(2) Claimants seek the following relief :

(1) An order directing the parties to consult in order to make necessary revisions and adjustments to the PSCs to maintain the expected benefit to the Claimants under Article 15.7/15.8 of the PSCs as from 10th July, 2004 by requiring the Government to reimburse any cess paid and/or payable on Oil and Condensate saved and sold from the Panna Mukta and Tapti Fields in excess of Rs.900 per ton.

(2) If the Government fails to agree to the necessary revisions and adjustments to the PSCs referred to in (1) above, an order from the Tribunal requiring the Government to reimburse the Claimants in the sum of Rs.16,79,00,583 in respect of the additional cess imposed between 10th July, 2004 and 31st March, 2011 and requiring the Government to reimburse the Claimants in respect of any cess paid/or payable in excess of Rs.900 per metric ton since 1st April, 2011 and for the remaining duration of the PSC (Pursuant to Article 2 thereof).

Service Tax

In paragraph 40.7(1)-3 and 41.2 of the Statement of Claim, Claimants seek the following relief :

(1) An order directing the parties to consult in order to make necessary revisions and adjustments to the PSCs to maintain the expected benefit to the Claimants under Article 15.7/15.8 of the PSCs by providing for the reimbursement of service tax by the Government.

(2) A declaration that, if the Government fails to agree to the necessary revisions and adjustments the PSCs referred to in (1) above, it is liable to pay damages to restore to the Claimants the economic benefits lost as result of the imposition of service tax on services that fall within the scope of Petroleum Operations with effect from 1st July, 2003 as a result of the Government's failure to procure an exemption in respect of service tax chargeable on the provision of services within the Contractor's Petroleum Operations.

(3) An award of damages in favour of the Claimants (in an amount to be particularized) in respect of the economic benefits lost by the Claimants following the imposition of service tax on services that fall within the scope of Petroleum Operations with effect from 1st July, 2003 as a result of the Government's failure to procure an exemption in favour of the Contractor in respect of such service tax.

CAG Audit

The Respondents have sought the following reliefs in furtherance of their pleadings with respect to CAG audit :

(a) "A declaration that the scope of an audit conducted pursuant to Section 1.9 of Appendix C of the PSCs does not extend to an audit or assessment of the operation performance of the Contractor."

(b) "Appropriate relief concerning disputes arising

from CAG's audit report".

(c) "A declaration that all unresolved audit exceptions and any disputed issues raised by CAG or as a result of the CAG audit are without merit and that no adjustments are required to be made to the Contractor's accounts or statements relating to Petroleum Operations to reflect such exceptions or issues."

Mr. Ganguli has cited the following judgments to substantiate his argument which are reproduced as under:

- ***Associate Electric and Gas Insurance Services Ltd vs. European Reinsurance Co. Of Zurich*** (2003) 1 WLR 1041 wherein the court has held that there is an implied term in the agreement by the parties to perform the award. The award which does not take into consideration the fundamental laws of the place where it is to be performed or given effect to would hinder the implied obligation of the parties to perform the award.
- ***Ralli Bros vs. Compania Naviera Sota y Aznar***, (1920) 2 KB 287 that the laws of the place where the contract is to be performed is to be given consideration by the court adjudicating the dispute in England.
- ***Government of India, Ministry of Finance vs. Taylor & Anr.*** (1955) 2 WLR 303 which lays down that the enforcement of a claim for taxes is an extension of sovereign power of the state and therefore the said sovereign power of the foreign state which is India in this case ought to have given respect by the English court as the rules of private international laws.

- ***Booz Allen and Hamilton Inc vs. SBI Home finance Limited***, (2011) 5 SCC 532 which is a judgment rendered by the Supreme Court of India wherein the court lays down that the rights in rem are not per se arbitrable.
- ***Titagarh Paper Mills Ltd vs. Orissa SEB***, (1975) 2 SCC 436 which declined the arbitration in relation to surcharge leviable under Electricity Supply Act 1948. This judgment is relied in to support the submission that where the tax is leviable as per the statutory mechanism provided under the act, the same cannot be contracted out by the private mechanism of arbitration.
- ***Gujarat UrjaVikas Nigam Ltd vs. Essar Power Ltd.***, (2008) 4 SCC 755 was also relied to support the argument that the statutory mechanism provided under the law cannot be allowed to be bypassed by the private contract between the parties.

f) Mr. Ganguli further argued that the respondents have raised the claim relating to refund of the tax which has been validly collected by the petitioner under the provisions of law. The said claim is totally against the public policy and cannot be contracted out. The said ground is good enough to intervene in the award.

g) Mr. Ganguli has argued that the doctrine of public trust is also applicable to the petroleum products which are natural resources. All the natural resources including the petroleum products are owned by the government and the respondents only act as agent of the government. As the government ownership to the natural resources are subject to public trust doctrine, likewise is the position with the respondents. Therefore, the claims of the respondents ought not to

have been held as arbitrable as the same are contrary to the constitutional mandate and public trust doctrine.

11. By making the aforementioned submissions, Mr. Ganguli, learned Senior counsel for the petitioner concluded his submissions by praying that the objection qua implied ouster of the jurisdiction of Indian courts must be rejected and this court should issue notice in the matter and also interfere with the award passed on 12th September, 2012 by the arbitral tribunal.

12. Per Contra, Mr. Mukul Rohatgi, Mr. Abhishek M. Singhvi and Mr. Neeraj Kishan Kaul, learned Senior counsels have made their submissions in support of the objection as to jurisdiction which can be outlined in the following manner:

a) Learned counsel for the respondents have argued that the present petition under Section 34 is not maintainable as the provisions of Part I has been expressly or impliedly excluded by the parties by choosing their governing law to arbitrate which in the instant case is English law. It has been argued by the learned senior counsel that the consequence of such choice implicitly ousts the applicability of Indian substantive law relating to arbitration which is the Act of 1996.

Learned senior counsel has read over the article 32 and article 33 of the agreement dated 22nd December, 1994 and has submitted that the mere reading of the aforementioned articles clearly provide that the governing law so far as the arbitration agreement is concerned is law of England, therefore the applicability of Indian law is clearly excluded. This court should reject the present challenge to the award as the part I is intended to be excluded under the contract.

b) Learned Senior counsel for the respondents have argued that the petitioner's submission that the jurisdiction of the present court is dependent upon public policy of India is not correct one in as much as the objection of the respondent is concerning the jurisdiction of Indian court as per express choice of law provision under the agreement which has no connection with the merits of the case. Learned senior counsel therefore urged that this court should not consider the merits of the case and should confine the scope of the arguments only on the lack of jurisdiction of the court.

c) Learned Senior counsel for the respondents have contended that there are well settled line of authorities of the Supreme Court as well as of this court which clearly enunciates the law on the subject which is that when the parties had chosen the law of the foreign country as a seat of the arbitration or as a curial law, the arbitration proceedings and the proceedings thereafter are governed by the curial law which in the instant case is law of England. It has been argued that the choosing the seat of arbitration in England is akin to exclusive jurisdiction clause and thus the applicability of Indian law is impliedly excluded.

d) Learned Senior counsel relied upon various decisions passed by the Supreme Court, High Court of Delhi, Mumbai and Gujarat in support of his submissions; the details are as under:-

i) ***Videocon Industries Limited vs. Union of India & Anr.***, (2011) 6 SCC 161: This case involved the Petitioner. It related to a dispute also under a Production Sharing Contract. On the question of whether it had jurisdiction to entertain the said petition under Part I of the 1996 Act, the Supreme Court decided it did not

because the parties had agreed to exclude Part I of the 1996 Act. it held that :

> "the parties had agreed that notwithstanding Article 33.1 (which is almost identical to Article 32.1 of the PSCs and states that the governing law of the PSC is Indian law the arbitration agreement contained in Article 34.12 (which is almost identical to Article 33.12 of the PSCs and states that the arbitration agreement shall be governed by English law) shall be governed by the laws of England. This necessarily implies that the parties had agreed to exclude the provisions of Part I of the Act."

Subsequent to ***Videocon*** (supra), the petitioner in another matter filed a petition before this Court pursuant to Section 34 of the 1996 Act challenging an award of the arbitral tribunal arising out of the same PSC. This resulted in the decision in **The Government of India, Ministry of Petroleum and Natural Gas vs. Cairn Energy India Pty Limited & Ors., O.M.P. 411/2011,** where the Court determined that, in view of **Videocon** (supra)**,** it would not have jurisdiction to entertain the challenge.

ii) **Prima Buidwell Private Ltd. & Ors. vs. Lost City Developments LLC & Ors. OMP 614/210 (**judgment dated 10.08.201): "It is correct that choosing a seat of arbitration is akin to choosing an exclusive jurisdiction clause. Therefore, it is rightly held in the case of A v B (2007) 1 AII E.R. (Comm) 591 "an agreement as to the seat of an arbitration is analogous to an exclusive jurisdiction clause.") Looked I [sic] this light when the

parties by express agreement have agreed that the law juridically controlling the arbitration being English law, the seat of arbitration to be in London and by all references agreeing that the curial law or law which governed the arbitral proceedings that of England and Wales, thus impliedly one can easily say that they have excluded Part I of the Act. Although, it is not expressly excluded." (paragraph 30)

iii) **Dozco India Private Limited vs. Doosan Infracore Company Limited** (2011) 6 SCC 179**:** The Supreme Court held that where the seat of the arbitration was foreign, this was "clearly indicative of the express exclusion of Part I of the Act. If there is such exclusion, then the law laid down in ***Bhatia International v. Bulk Trading S.A. and Anr.*** (supra) must apply holding:

> "In cases of international commercial arbitrations held out of India provisions of Part I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions. In that case the laws or rules chosen by the parties would prevail. Any provision, in part I, which is contrary to or excluded by that law or rules will not apply." (paragraph 12)

iv) **Yograj Infrastructure Limited vs. Ssang Young Engineering and Construction Co. Ltd. (2011) 9 SCC 735:** The Supreme Court held, in an agreement where the parties agreed that the arbitration proceedings would be governed by a foreign curial law, that:

> "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, which was applied subsequently in Venture Global Engg. v. Satyam Computer Services Ltd. and Citation Infowares Ltd. v. Equinox Coprn. 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 the agreement." (paragraph 55)

v) The same view was taken by the High Court of judicature at Bombay in the case of ***Sakuma Export Ltd. vs. Louis Drefus Commodities Suisee S.A.***, decided on 15th November, 2011 in Arb. Petition No.636/2011 and High Court of Gujarat at Ahmedabad in Appeal No.1667/2005 decide3d on 20th July, 2005 in the case of ***Hardly Oil and Gas Limited v. Hindustran Oil Exploration Company Ltd. and Ors.***

e) Learned Senior counsel submits that the effect of the parties' choice of seat of the arbitration is clearly explained in the leading English decision of C v D [2008] 1 Lloyd's Law Rep 239, which is that where the parties to an arbitration agreement have agreed that the seat of the arbitration is to be in an identified location there is an implied agreement on their part that the courts of the place designated as the seat of the arbitration shall exercise supervisory jurisdiction over the arbitration and any challenge to an interim or final award is to be brought only in those courts. This authority has been relied on by subsequent English and Indian authorities including the Indian

Supreme Court bench in the ***Bharat Aluminum*** (supra). The Court of Appeal in ***C v D*** held as follows:

> "16. …the central point at issue which is whether or not, by choosing London as the seat of the arbitration, the parties must be taken to have greed that proceedings on the award should be only those permitted by English law. In my view they must be taken to have so agreed for the reasons given by the judge. ….
>
> 17. It follows from this that a choice of seat for the arbitration must be a choice of forum for remedies seeking to attach the award. … following the decisions of Colman J in A v B [2007] 1 Lloyds Rep 237 and A v B (No. 2) [2007] 1 Lloyds Rep 358 in the first of which that learned judge said (para. 111):-
>
> > "… an agreement as to the seat of an arbitration is analogous to an exclusive jurisdiction clause. Any claim for a remedy going to the existence or scope of the arbitrator's jurisdiction or as to the validity of an existing interim or final award is agreed to be made only in the courts of the place designated as the seat of the arbitration."

f) It is argued by Mr.Singhvi that in the present case, it is agreed that in the present the parties' arbitration agreement is governed by English law. The parties have chosen London as the seat of this arbitration. It follows on the authority ***C v D*** that they have agreed that any challenge to any award is to be brought only in the courts of England. It further follows that the provisions of Part I of the 1996 Act are necessarily excluded as being wholly inconsistent with that agreement. Thus the petitioner is entitled to challenge any award rendered in this arbitration primarily in accordance with Section 67 of the Arbitration Act 1996 of England and Wales, which would entitle

the petitioner to a rehearing of the issue by the English Courts rather than a mere review of the arbitral tribunal's decision (as explained in Russell on Arbitration, 23rd Edition, at paragraph 8-060). The Respondents note that in respect of the Final Partial Award on Arbitrability, the time limit for the petitioner's application under the English Act (of 28 days) has expired and it would have to seek the English Court's discretion to make its application out of time.

g) Learned Senior counsel for the respondents argued that the reliance of the petitioner on the case of ***Venture Global*** (supra) is misplaced as the same does not aid the case of the petitioner. It is submitted that pursuant to the decision in ***Venture Global*** (supra) rendered by Supreme Court, the line of authorities like ***Videocon*** (supra) and decisions subsequent thereto of Supreme Court and this court are all clearly subscribing to the view that express choice of foreign governing law of arbitration agreement, agreement as to foreign seat constitute exclusion of Part I of the Act. Therefore, there is no reason for this court not to follow the line of authorities cited by the respondents rendered subsequent to ***Venture Global*** (supra) as relied upon by the respondents.

h) Learned Senior counsel for the respondents have argued that the mere fact that in ***Bharat Aluminium*** (supra), Supreme Court has laid down that the operation of its judgment is prospectively does not mean that the judgment of ***Venture Global*** (supra) is made applicable till that time to all the cases, on the contrary the Supreme Court has clarified the ***Venture Global*** (supra) number of times in ***Videocon*** (supra) and other line of authorities which this court should follow and ***Venture Global*** (supra) does not assist the case of the petitioner.

i) Learned Senior counsel for the respondents have strenuously relied upon the judgment in ***Videocon*** (supra) by urging that the arbitration clause in the said case was closer to the clause in the instant case, therefore, the view taken by Supreme Court is binding upon this court and should be considered to be followed in this case.

By making the aforementioned submissions, learned counsel for the respondents have concluded their submissions by praying that this court should uphold the objection as to jurisdiction and reject the petition as non-maintainable.

13. I have gone through the petition filed by the petitioner along with the documents and also considered the objection raised by the respondents relating to jurisdiction of this court in view of the applicability of the principles of choice of laws under the agreement. Further, I have also given my careful consideration to the submissions advanced by the learned counsel for the parties at the bar and in the form of written submissions.

14. I think that in order to decide the question whether the parties had intended under the agreement to implied or expressly exclude the applicability of Indian law, it is necessary to carefully examine the relevant clauses under the agreement which are reproduced hereinafter:

"ARTICLE 32
APPLICABLE LAW AND LANGUAGE OF THE CONTRACT

32.1 Subject to the provisions of Article 33.12, this Contract shall be governed and interpreted in accordance with the laws of India.

32.2 Nothing in this Contract shall entitle the Government or 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.

32.3 The English language shall be the language of this Contract and shall be used in arbitral proceedings. All communication, hearings or visual materials or documents relating to this Contract shall be in English.

ARTICLE 33
SOLE EXPERT, CONCILIATION AND ARBITRATION

33.1 The Parties shall use their best efforts to settle amicably all disputes, differences or claims arising out of or in connection with any of the terms and conditions of this Contract or concerning the interpretation or performance thereof.

33.2 Except for matters which, by the terms of this Contract, the Parties have agreed to refer to a sole expert and any other matters which the Parties may agree to so refer, any dispute, difference or claim arising between the Parties hereunder which cannot be settled amicably may be submitted by any Party to arbitration pursuant to Article 33.3. Such sole expert shall be an independent and impartial person of international standing with relevant qualifications and experience appointed by agreement between the Parties. Any sole expert appointed shall be acting as an expert and not as an arbitrator and the decision of the sole expert on matters referred to him shall be final and binding on the Parties and not subject to arbitration. If the Parties are unable to agree on a sole expert, the disputed subject matter may be referred to arbitration.

33.3 Subject to the provisions herein, any unresolved dispute, difference or claim which cannot be settled amicably within a reasonable time may, except for those referred to in Article 33.2, be submitted to an arbitral tribunal for final decision as hereinafter provided.

33.4 The arbitral tribunal shall consist of three

arbitrators. The Party or Parties instituting the arbitration shall appoint one arbitrator and the Party or Parties responding shall appoint another arbitrator and both Parties shall so advise the other Parties. The two arbitrators appointed by the Parties shall appoint the third arbitrator.

33.5 Any Party may, after appointing an arbitrator, request the other Party (ies) in writing to appoint the second arbitrator. If such other Party fails to appoint an arbitrator within forty-five (45) days of receipt of the written request to do so, such arbitrator may, at the request of the first Party, be appointed by the Secretary General of the Permanent Court of Arbitration at the Hague, within forty-five (45) days of the date of receipt of such request, from amongst persons who are not nationals of the country of any of the Parties to the arbitration proceedings.

33.6 If the two arbitrators appointed by the Parties fail to agree on the appointment of the third arbitrator within thirty (30) days of the appointment of the second arbitrator and if the Parties do not otherwise agree, the Secretary General of the Permanent Court of Arbitration at the Hague may, at the request of either Party and in consultation with both, appoint the third arbitrator who shall not be a national of the country of any Party.

33.7 If any of the arbitrators fails or is unable to act, his successor shall be appointed in the manner set out in this Article as if he was the first appointment.

33.8 The decision of the arbitration tribunal and, in the case of difference among the arbitrators, the decision of the majority, shall be final and binding upon the Parties.

33.9 Arbitration proceedings shall be conducted in accordance with the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) of 1985 except that in the event of any conflict between these rules and the provisions of this Article 33, the provisions of this Article 33 shall govern.

33.10 The right to arbitrate disputes and claims under this Contract shall survive the termination of this Contract.

33.11 Prior to submitting a dispute to arbitration, a Party may submit the matter for conciliation under the UNCITRAL conciliation rules by mutual agreement of the Parties. If the Parties fail to agree on a conciliator (or conciliators) in accordance with the rules, the matter may be submitted for arbitration. No arbitration proceedings shall be instituted while conciliation proceedings are pending and such proceedings shall be concluded within sixty (60) days.

33.12 The venue of conciliation or arbitration proceedings pursuant to this Article, unless the Parties otherwise agree, shall be London, England and shall be conducted in the English Language. The arbitration agreement contained in this Article 33 shall be governed by the laws of England. 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.

33.13 The fees and expenses of a sole expert or conciliator appointed by the Parties shall be borne equally by the Parties. Assessment of the costs of arbitration including incidental expenses and liability for the payment thereof shall be at the discretion of the arbitrators."

(For short Article(s) be read as clause(s))

15. Upon the conjoint and meaningful reading of clause 32 and 33 of the agreement, the following aspects relating to intention of the parties can be discerned:

a) Firstly, the reading of article 32.1 itself makes it apparent that subject to article 33.12, the contract shall be governed and interpreted in accordance with the laws of India. Thus, the intention of the parties

primarily is to govern themselves with the laws of India under the contract subject to what has been contained in clause 32.1. Hence, the governing law of the contract or what is known as proper law of the contract is the laws of India. This clause also indicates that the parties never intended to altogether exclude the laws of India so far as contractual rights are concerned.

b) As the article 32.1 has been made subject to clause 33.12, it is necessary to examine as to what has been contained in article 33.12. Article 33.12 makes it clear that the venue of the arbitration unless the parties otherwise agree shall be in London. The arbitration agreement contained in this article 33 shall be governed by the laws of England. This means that the arbitration agreement as contained in article 33 would be governed by the laws of England.

c) There is another clause which is clause 32.2 which provides for that nothing in this contract shall entitle the government or the contractor to exercise the rights, privileges and powers in a manner which will contravene laws of India. This is another indicator of the intention of the parties towards remaining adhered to Indian law and not to exercise any rights or privilege which would contravene laws of India. The existence of the said clause in a way also enables this court to infer as to whether the parties intended to exclude the Indian laws altogether or not.

d) Now, the question comes what is the effect on the intention of the parties by the interplay of clause 32.1, clause 32.2 and clause 33.12. if one reads clause 33.12 carefully, it is true that the parties had intended that the arbitration agreement as contained in clause 33 shall be governed by the laws of the England. But the effect upon intention of

the parties under clause 33.12 should be given to the extent the parties had intended to be governed by the said laws of England and not beyond the same. The unnecessary extension of the scope of operation of article 33.12 would mean that the said article 33.12 would militate against clause 32.1 and clause 32.2 which was never the intention of the parties. This can be seen if one examines the interplay of the said clauses in more depth, which I propose to do in the following manner:

- The first thing which clarifies the intention of the parties is the plain reading of clause 33.12 is that what is governed by the laws of the England is the arbitration agreement as contained in article 33 and not all others matters. Therefore, all the matters relating to arbitration agreement as contained in article 33 shall be governed by the laws of England. A corollary to the same is that excepting the said matters as contained under arbitration agreement in article 33, all other matters shall be governed by the laws of India as per the operation of clause 32.1. Thus, the wording of clause 33.12 itself limit its applicability of law of England relating to the arbitration agreement as contained in article 33 and not beyond the same. Now, If one reads the matters arbitration agreement as contained in article 33, the said matters provide for the aspects relating to appointment procedure, the inability to act, the decision of the arbitrator, the rules of the arbitration, the fee aspect and survival of claims after termination. The said matters as contained in the article 33 do not provide the aspect of challenging the question of arbitrability of the dispute. Therefore, the plain reading of clause 33.12 which only confines the applicability of laws of England in relation to "arbitration agreement contained in this article 33" make it clear that the matters contained in article 33 relating to appointment,

rules of conducting arbitration etc shall be governed by the respective laws of England and UNCITRAL Rules wherever they are applicable which are all in effect matters of curial law for conducting the proceedings. For all other matters, one has to revert back to clause 32.1, which is the proper law of contract which is laws of India. This is the way in which article 32.1 is subjected to article 33.12. Further, if the article 15.1 is read along side with the other article 32 and 33, it is also seen that intention of the parties was that the operations under the agreement shall be subject to fiscal laws of India. Therefore, the exclusion of Indian public policy was not passing through the parties mind at the time of entering the contract.

- Secondly, it is the well settled principle of law that the scope of the clause in the agreement has to be confined to the extent the parties had agreed in the agreement and not beyond the same. Once, the parties had consciously chosen the wordings of clause 33.12 to make it clear that the arbitration agreement contained in article 33 shall be governed by the laws of England, then only the stipulations as contained in article 33 shall be covered within its sweep and not the ones which were never intended to be governed by the said law. Doing the same would mean rewriting the contract which the courts are impermissible in law to do. By choosing the words that the arbitration clause contained in article 33 shall be governed by the laws of England and making it subject to article 32.1, the parties had delimited the applicability of laws of England to the extent of the stipulations as contained in article 33.
- Thirdly, the question of the arbitrability of the claim or dispute is the one which has its nexus with the contravention of the other laws of

the country to which the parties are subject to. In order to arrive at the finding as to whether the claims raised in the arbitration are against the public policy of the state or not, the court should have due to regard to other laws of the state to discern whether the said claims violate the other laws for the time being force. The said question of arbitrability of the dispute or claim has also a close connection with the ability of the parties to contract out privately with some aspects which the law prohibits them to do so. In that context, the question of arbitrability of the claim or dispute cannot be examined solely on the touchstone of applicability of law relating to arbitration of any country specific but applying the public policy governing under the laws of the country, to which the parties have subjected themselves. The resultant effect of the discussion done in this paragraph is that the question of the arbitrability of dispute is not a pure question of applicable law to arbitrate or lexarbitri but is a larger one governing public policy. The said question has to be examined to on the basis of the intention of the parties to be governed by the particular laws of the country coupled with the enquiry that in respect of which laws of the state that the rights and obligations of the parties under the contract have the closest nexus so that the public policy of the said state is not violated.

Accordingly in the instant case, the said question of arbitrability of the claim is not one which can be decided solely by applying the laws of arbitration in England and then by deciding the same as per the public policy under the laws of the England. Applying the public policy of the laws of England would mean that the parties are subjected to other laws of England governing the ability to

contract privately and laws governing rights relating to rem and personem which is actually not the question relating to arbitration law of England but is question relating to substantive law governing the contract. The same was never the intention of the parties under clause 32.1, which in unequivocal terms make it clear that subject to clause 33.12, the governing law of contract shall be laws of India and thus, the ability of the parties to contract out against the public policy has to be examined as per the applicable laws of contract and other laws prohibiting private contract which is the laws of India and not by deciding the same in mechanical terms which is that the lexarbitri is England which would mean that the public policy of England would be looked into and thereby turning a nelson's eye to the public policy of India, which actually governs the entire contract.

- Fourthly, another reason which persuades me to take this view is the interplay between clauses 32.1, 32.2 and clause 33.12. Clause 32.1 declares applicable laws governing the contract shall be laws of India subject to clause 33.12. Thereafter clause 33.12 further clarifies that the arbitration agreement contained in clause 33 shall be governed by laws of England. The effect of the same is that excepting the matters contained in clause 33 relating to arbitration agreement, all other matters shall be governed by governing law of contract of India. I have already arrived at the finding that the public policy is more of question of other laws of state rather than arbitration law and also is not the one of the matters contained in article 33 shall be thus governed by the laws of India as per the clause 32.1. Furthermore, the another clause in the agreement which enlightens the intention of the parties in the illuminating terms is the clause 32.2 which is a non

obstante clause making it clear that none of the parties shall exercise any rights, privileges and powers in a manner which will contravene laws of India. The existence of the said clause in the agreement by the opening words "nothing in this contract" gives it a overriding sweep and makes the intention of the parties more than apparent to adhere to laws of India and not to contravene any laws of India. The said laws of India include laws relating to contracts and arbitration. The combined effect of the overriding clause 32.2 read with the article 33.12 would be that the laws of England shall operate in relation to matters contained in article 33 in so far as the same are not inconsistent with the laws of India. Even if the said view is accepted without limiting the scope of article 33 and assuming that the laws of England are to be applicable to the entire arbitration proceedings and proceedings subsequent thereto. Still, the existence of article 32.2 would continue to preclude the parties to contravene laws of India. All these would further make it clear that the intention of the parties was never to oust the Indian laws including part 1 of the Act. Under these circumstances,

Once, the agreement is so clear that the parties shall exercise their rights and obligations as per the laws of India and shall not contravene any laws of India, it passes a human comprehension as to how the parties can subject themselves to public policy of England not to public policy of India by contravening laws of India by violating the clause 32.2 and also how any inference as to implied exclusion of Indian law can be arrived at when the parties have themselves expressed in the contract that they shall not contravene laws of India. Public policy is not a term which is alien and

unconnected to law. The term public policy in its literal sense includes the laws of the state to which the parties had intended to be governed by for its rights and obligation. In the instant cases, the parties have expressly covenanted not to violate the laws of India. Therefore, once the said covenant exists, the question of arbitrability of the claim which is a larger question affecting public policy of state should be determined by applying laws of India and by giving a meaningful effect to clause 32.2 as otherwise, the said clause 32.2 would be rendered otiose. Therefore, no a priori assumption as to implied ouster of the Indian law can be drawn as the parties had themselves agreed not to contravene laws of India.

16. In view of my above analysis, which I have done upon the plain reading of the clauses under the agreement and the interplay between them, I find that the intention of the parties under the agreement was always to remain subject to Indian laws and not to contravene them, further it was only for conducting the arbitration and for the matters contained in the arbitration agreement under clause/Article 33, the parties had intended to govern themselves by the laws of England and not for all other purposes. Consequently, it is difficult to infer any implied exclusion of Indian law by mere reading of clauses of the agreement.

17. Let me now revisit the legal position in the field and also examine the submissions canvassed by the learned counsel for the parties in the light of the same.

18. It is now well settled that in the commercial contract involving a foreign element, the parties to the agreement have the choice so far it relates to the kinds of the legal systems, they intend to be subjected to. Broadly, in the international contracts, the parties choose the following types of laws in

the choice of laws provision in order to exercise their rights and obligations of various kinds under the agreement:

a) Proper law of contract which is the law governing the contract which creates the substantive rights of the parties, in respect of which the dispute has arisen.

b) 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.

c) The curial law, i.e. the law governing the conduct of the individual reference.

Normally, in practice, the proper law of the arbitration agreement is the same as the proper law of the contract as the arbitration agreement forms part of the main contract unless the parties expressly agrees to subject themselves under the different law in relation to agreement to arbitrate. Sometimes, the proper law of the arbitration agreement is the same as the curial law. However, in the rare cases, the three laws may be different depending upon what has been stated in the agreement.

19. In the case of ***Sumitomo Heavy Industries Ltd*** (supra), the Supreme Court has succinctly laid down the kinds of the laws governing the international commercial agreements and their role in determination of the rights of the parties. In the words of Supreme Court, it was held thus:

> "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."

X X X X X X X X X X X

"1. The proper law of the arbitration agreement governs the validity of the arbitration agreement, the question whether a dispute lies within the scope of the arbitration agreement; the validity of the notice of arbitration; the constitution of the tribunal; the question whether an award lies within the jurisdiction of the arbitrator; the formal validity of the award; the question whether the parties have been discharged from any obligation to arbitrate future disputes.

2. The curial law governs' the manner in which the reference is to be conducted; the procedural powers and duties of the arbitrator; questions of evidence; the determination of the proper law of the contract.

3. The proper law of the reference governs; the question whether the parties have been discharged from their obligation to continue with the reference of the individual dispute."

20. Applying the principle of law to the instant case, it can be seen that the proper law of the contract under the agreement is laws of India, the curial law or the rules for conduct of the arbitral proceedings are UNCITRAL Rules and the proper law to the arbitration agreement as contained in clause 33 is the laws of England.

21. Now, in this backdrop of choice of laws made by the parties under the agreement, the objection as to the jurisdiction of Indian court is required to be examined by this court.

22. It is well settled principle of law that the international commercial arbitrations which are held outside India, the provisions of Part-I would apply unless the parties by expressly or impliedly exclude all or any of the provisions of the Act. The courts in India from time to time have applied the said proposition and after reading the clauses of the agreement, arrived at the finding as to whether the parties under the agreement have expressly or impliedly excluded the provisions of Part-I and in the appropriate cases where the answer comes in affirmative directing the parties to approach the forum which they have chosen. The said principle of law was first laid down in the case of Three Bench decision of Supreme Court of India in ***Bhatia International vs. Bulk Trading S. A. & Anr*** (2002) 4 SCC 105 The said decision of Bhatia International (Supra) was rendered in the context of Section 9 of the Act relating to passing off interim measures by the Indian court entertaining the application seeking interim relief against the international commercial arbitration. It was observed by Supreme Court as under:-

> *"32. To conclude we hold that the provisions of Part I would apply to all arbitrations and to all proceedings relating thereto. Where such arbitration is held in India the provisions of Part I would compulsory apply and parties are free to deviate only to the extent permitted by the derogable provisions of Part I.* ***In cases of international commercial arbitrations held out of India provisions of Part I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions. In that case the laws or rules chosen by the parties would prevail. Any provision, in Part I, which is contrary to or excluded by that law or rules will not apply."*** ***(Emphasis Supplied)***

23. It is again reiterated that the said decision was rendered in the context of Section 9 of the Act and the courts have followed this proposition of law from time to time till date relating to agreements which have been executed

prior to September, 2012. The courts have rendered the decision applying the said proposition by inferring in the relevant facts and circumstances of the case as to whether it is a case of express exclusion or it is a case of implied exclusion of provisions of Part-I.

24. In the cases where there is an express provision /stipulation excluding the applicability of Part-I of the Act, the said case becomes a case of express exclusion. However, in a case where there is choice of foreign law which has been made by the parties which is totally unconnected to the applicability of Indian Act and the subject matter and the cause of action is also totally unconnected to the Indian law, the courts have inferred in the relevant cases that the said case becomes a case of implied exclusion as the parties have themselves chosen their respective foreign law under the choice of law provisions in the agreements and no departure is permissible by applying the Indian Act when never intended to do so.

25. Thus, it is a question of fact which has to be examined on case to case basis after reading the agreement meaningfully in order to discern the intention of parties whether the parties actually intended to exclude the applicability of Indian law including the provisions of Arbitration and Conciliation Act altogether impliedly or expressly. No straight jacket formula can be devised in order to draw such inference unless the terms of the agreement are analyzed in order to cull out the real intention of the parties.

26. Pursuant to the decision of ***Bhatia International*** (Supra), the Supreme Court again examined the similar proposition in the case of ***Venture Global Engineering vs. Satyam Computer Services Ltd.*** (2008) 4 SCC 190 in relation to the objection filed under the provisions of Section 34 of the Arbitration and Conciliation Act, 1996 seeking to set aside the Award

passed by foreign court wherein the clause provided that the arbitration shall be held in London Court of International Arbitration and the governing law of the contract was State of Michigan, USA. However, the Supreme Court after analyzing the provisions of the agreement and also applying the dictum of ***Bhatia International*** (Supra) came to the conclusion that the provisions of Indian Act are not altogether excluded. Supreme Court while analyzing the terms of the agreement also considered the *non obstante* clause which provided that the parties shall respect the company law guidelines under the Indian Act and other public policy in India. After analyzing the said *non obstant*e clause, Supreme Court came to the conclusion that the provisions of Indian Act are not excluded. The said contention of Mr. K.K. Vengopal has been accepted by the Supreme Court by recording in the following manner:-

> **"**Mr. K.K. Venugopal, learned senior counsel, next contended that the overriding section 11.05 (c) of the Shareholders Agreement would exclude respondent No.1 approaching the US Courts in regard to enforcement of the Award. Section 11.05 (b) and (c) of the Shareholders Agreement between the parties read as follows:
> (b) This Agreement shall be construed in accordance with and governed by the laws of the State of Michigan, United States, without regard to the conflicts of law rules of such jurisdiction.
> Disputes between the parties that cannot be resolved via negotiations shall be submitted for final, binding arbitration to the London Court of Arbitration.
> (c) 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.
>
> **It was pointed out that the non-obstante clause would override the entirety of the agreement including sub-section (b) which deals with settlement of the dispute by**

arbitration. It was further pointed out that sub-section (c), therefore, would apply to the enforcement of the Award which declares that, notwithstanding that the proper law or the governing law of the contract is the law of the State of Michigan, their 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. In such circumstances, it is the claim of the appellant that necessarily enforcement has to be in India, as mentioned in sub-section (c) which overrides every other section in the Shareholders Agreement. Mr. K.K. Venugopal further pointed out that respondent No.1 totally violated the agreement between the parties by seeking enforcement of the transfer of the shares in the Indian company by approaching the District Court in the United States. On the other hand, Mr. Nariman pointed out that Section 11.05 (b) of the Shareholders agreement alone governs the rights and obligations between the appellant and the first respondent inter se and dispute resolution thereof**. In view of our discussion supra, we agree with the stand of the learned senior counsel for the appellant." (Emphasis Supplied)**

"….Finally, the overriding section 11.5 (c) of the SHA cannot be ignored lightly. As pointed out, the said section would exclude respondent No.1- Satyam Computer Services Ltd. approaching the US Courts in regard to the enforcement of the Award. Section 11.05 (b) and (c) of the Shareholders Agreement between the parties which is relevant has already been extracted in para 23.

The non-obstante clause would override the entirety of the agreement including sub-section (b) which deals with settlement of the dispute by arbitration. Sub-section (c), therefore, would apply to the enforcement of the Award which declares that, notwithstanding that the proper law or the governing law of the contract is the law of the State of Michigan, their 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. **Necessarily,**

> **enforcement has to be in India, as declared by this very section which overrides every other section in the Shareholders Agreement**. Respondent No.1, therefore, totally violated the agreement between the parties by seeking enforcement of the transfer of the shares in the Indian company by approaching the District Courts in the United States."(Emphasis Supplied)

27. From the bare reading of the observations made by Supreme Court in ***Venture Global*** (Supra), it is apparent that the Supreme Court after analyzing the agreement wherein the governing law and the curial law was of State of Michigan, came to the conclusion after analysing the non obstante clause that the despite the proper law/ governing law and curial law being different, their applicability is confined to the aspect of conducting the arbitration proceedings. The purpose of keeping the non obstante clause to adhere to the laws of India would be defeated if the Indian courts are to arrive at the finding that the Indian laws are implicitly excluded. The Supreme Court in ***Venture Global*** (supra) thus made a distinction between the challenge to the award which is a matter of enforcement and the stages anterior to the passing of the award which are the subject matter of the applicability of governing law and curial law. The said distinction was carved out by the Supreme Court in order to give effect to the non obstante clause which was overriding in the sweep. Likewise, in the instant case, I have formed the view upon the conjoint reading of article 32 and 33 that the lex arbitri/governing law to arbitrate and its applicability is confined to what has been contained in article 33 and for all other matters one has to revert back to governing laws of India which is by operation of clause 32.1 and 32.2 as a non obstante clause. Therefore, the said view of mine is in consonance with the view of ***Venture Global*** (Supra)

28. It is thus a question of the intention of the parties under the agreement rather than a mere decision in a mechanical manner that the choice of foreign law implicitly excludes the Indian law which is apparent from the decision of ***Venture Global*** (Supra).

29. Thereafter, the Supreme Court time and again has examined the similar proposition in the context of Section 9 of the Act as well as Section 11 of the Act and its applicability in the cases of international commercial arbitrations. In the case involving of choice of law provisions, the Supreme Court in the appropriate cases applied the same very principle of ***Bhatia International*** (supra) and came to the conclusion by analyzing the intention of parties and in cases where there is clear cut case of implied ouster of Indian Act is made out, the courts have not hesitated to relegate the parties to foreign courts when it comes to entertaining the application seeking interim measures against the international commercial arbitrations.

30. One such cases of this nature was ***Videocon Industries Ltd. vs. Union of India & Anr.***. In the said case, the clause relating to choice of law was as under:-

> ***"****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.*
>
> *34.3 Unresolved Disputes*

Subject to the provisions of this Contract, the Parties agree that any matter, unresolved dispute, difference or claim which cannot be agreed or settled amicably within twenty one (21) days may be submitted to a sole expert (where Article 34.2 applies) or otherwise to an arbitral tribunal for final decision as hereinafter provided.

34.12. Venue and Law of Arbitration Agreement

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.

35.2 Amendment

*This Contract shall not be amended, modified, varied or supplemented in any respect except by an instrument in writing signed by all the Parties, which shall state the date upon which the amendment or modification shall become effective.***"**

31. It is noteworthy to mention that the said decision of ***Videocon*** (supra) was rendered in the context of Section 9 of the Act which is seeking a stay of proceedings before the foreign arbitral tribunal rather than on the ground challenge of the award on the grounds of public policy. In the said case, the Court was only concerned with the interim measures and in the entire judgment; there is no discussion of public policy of India except quoting the excerpts of ***Venture Global*** (supra). There was no contention that public policy of India is violated was raised and was never adjudicated upon by the Indian court and the court never analyzed the *non obstante* clause in the

manner done in the ***Venture Global*** (supra) and rightly so as court was not confronted with the said proposition relating to public policy and inquiry was only confined to entertaining the application under Section 9 of the Act and in the said context, Supreme Court in Videocon came to the conclusion after analyzing ***Bhatia International*** (supra) and other line of judgments passed by Supreme Court that the provisions of part 1 of Act are implicitly excluded as the parties had agreed to be governed by the laws of England which necessarily implies that Delhi High Court again have jurisdiction to entertain the application under Section 9 of the Act. The Supreme Court in the said decision has observed that while affording relief under Section 9 of Indian Arbitration Act, 1996 lost the anvils of party autonomy and sanctity of the Arbitral Tribunal – the hallmarks of any Arbitration – are jeopardised. The object underlying the grant of interim measures under Section 9 is to facilitate and subserve any ongoing Arbitral proceeding. The distinction between entertaining of application under Section 9 and under Section 34 is relevant as while entertaining the petition under Section 34 of the Act, the court has to necessarily examine the question relating to public policy which is not germane in the cases involving petition under Section 9 and that is why the approach of the Supreme Court in the cases which are decided pursuant to ***Bhatia International*** (supra) and ***Venture Global*** (supra) were all the cases relating to Section 9 petitions where they were not invited to examine whether there is public policy violated and consequently has not analyzed the provisions of agreement in the context of public policy of India perspective which has been done in the case of ***Venture Global*** (supra).

32. The distinction between entertaining of application under Section 9 and under Section 34 is relevant as while entertaining the petition under Section 34 of the Act, the court has to necessarily examine the question

relating to public policy of state which is not germane in the cases involving petition under Section 9 and that is why the approach of the Supreme Court in the case of ***Venture Global*** (supra) decided pursuant to ***Bhatia International*** (supra) was slightly distinct than the other cases which were all the cases relating to Section 9 petitions where they were not invited to examine whether there is public policy violated and consequently, the Supreme Court in such cases has not analyzed the provisions of agreement in the context of public policy of India perspective which has been done in the case of ***Venture Global*** (supra).

33. It is argued by Mr. Ganguli that in ***Videocon*** (supra), Article 33.2 of PSC there was not identical to the provisions of the PCs in the present case. Article 33.2 these were expressly made "subject to Article 17.1". The implications of this were neither contended by any of the parties nor considered by the Court. Further Article 33.2 was not at all discussed by the Court. Since there is no discussion in the judgment with regard to the scope of Article 33.2, the arguments advanced by the respondents with regard to implications of the Article are without any substance. Thus, the decision in ***Videocon*** (supra) cannot therefore be treated as a precedent for the present case which would largely depend on the interpretation of Article 32.2 of the PCSs.

There is force in the submission of Mr. Ganguli as all the decisions relied upon by the respondents relate to proceedings under Section 9 which would fall within the realm of the Curial Law. Proceedings under Section 34 stand on a completely different footing than proceedings under any other provisions of Part I. This has been said by the Supreme Court in ***Venture Global*** (supra) when it made a distinction relating to matters of enforcement which also covered and included challenges to the award where public

policy and the matters where curial law and governing law is applicable by applying the Indian laws to the former and laws of foreign state to the later.

34. Likewise, in the case of **Yograj Infrastructure** (supra), Supreme Court again decided a similar case which was concerned with Section 9 of the Act and applying the dictum of ***Bhatia International*** (supra) line of authorities came to the conclusion that proper law of agreement could not be applied arbitral proceedings as the parties had chosen SIAC rules of Singapore as curial law, Seat of Arbitration is in Singapore and therefore at the stage of pendency of arbitration proceedings before the International Forum, the provisions of Indian Act cannot trigger.

35. Again, in the said case of ***Yograj*** (supra), the court was not concerned with the violation of public policy in India. There was no occasion for the court to analyze whether the court to examine the dichotomy between foreign public policy and public policy in India and the choice of forum done by the parties in order to violate the Indian laws and the question that whether the court should refrain from entertaining the challenge to the award when there is clear intentions in the agreement emerging from the clauses that the parties are required to respect and follow the Indian laws. This aspect has been well settled and analyzed by the Supreme Court in the case of ***Venture Global*** (supra) in the context of Section 34 petition and in no other case. Consequently the cases which are decided on ***Bhatia International*** (supra) line of authorities even the later cases like Videocon or Yograj are all the ones which stand on slightly different footing as they all pertain to Section 9 petition as well as are not dealing with the aspects of violation of public policy and the effect of the intention of the parties coming from the agreement to adhere to Indian laws. Unlike all these cases, the decision of ***Venture Global*** (supra) does exactly the same inquiry in the

context of Section 34 and holds that when there is clear cut intention emerging from the agreement that laws of India are not to be violated in the form of non obstante clause, provisions of Part-I cannot be said to be implicitly excluded atleast for the matters relating to challenge of the award and the enforcement matters.

36. Once, it is realized that the decisions on the ***Bhatia International*** (Supra) line of authorities which are decided in the context of Section 9 petition as the same pertain to pre-arbitral and pre award stage are distinct from that of Section 34 petitions where the challenge is laid on the grounds of the public policy and the court being a judicial authority cannot easily overlook public policy, the said decisions decided on ***Bhatia International*** (supra) line of authorities are clearly distinguishable and have no application to the instant case as no inference as to implied exclusion can be drawn by merely perusing the choice of law provisions under the agreement. One has to read the clauses of the agreement holistically and accord meaningful reading to them so as to discern the intention of the parties as to whether they intended to exclude the Indian laws altogether or not.

37. After carefully reading the clauses 32 and 33, I have already arrived at the finding that there is a clear non obstante clause which binds the parties to abide by the laws of India and not to exercise any rights and obligations under the agreement in contravention to laws of India. Till the time, the said clause exists, it cannot be inferred that the parties intended to exclude the Indian law which include Arbitration Act altogether. The said view gets fortified by the view taken by the Supreme Court in ***Venture Global*** (supra) wherein the court was concerned with the objections under Section 34 and was deciding the question of public policy under the agreement containing similarly worded non- obstante clause giving over-ridding effect.

38. On a separate note, The Division Bench of this court in the case **Anita Garg vs M/S. Glencore Grain Rotterdam B.V.** in case of FAO(OS) No.316/2011 decided on 11 August, 2011 after noticing the Bhatia Line of Authorities uptil the decision of ***Videocon*** (supra) has proceeded to record a strong note of exception in which case, the jurisdiction of the national court cannot be considered to be ousted so far as it relates to challenges pertaining to awards, the said exception is the question of arbitrability especially in cases where there is an apparent conflict with the public policy of governing law to arbitrate and public policy relating to governing law of contract which is also the law of the place of the performance. The Division Bench speaking through Vikramajit Sen, J. observed thus:

> "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**."

(**Emphasis Supplied**)

The afore quoted observations of Division Bench of this court in ***Anita Garg*** (supra) fortifies the view taken in the instant case which is that there exists such exceptional cases where the national courts have to come to rescue more so when it relates to question of arbitrability of the claims in cases the concept of public policy varies in lex arbitri and in lex fori. The instant is case is one such exceptional case.

39. At this stage, it is relevant to examine the contentions of the counsel for the respondents. Mr. Abhishek Singhvi, learned Senior counsel for the respondents has read over the clauses of the agreements in the several cases decided by Supreme Court from time to time on Bhatia line of authorities as discussed above. Dr. Singhvi submits that the most closer clause amongst the same is worded in the case of ***Videocon*** (supra) and therefore this court should follow the decision in the case of Videocon by inferring that the laws of India are implicitly excluded. He excluded that this court should consider the principle of law laid down in the case and not the facts.

40. On the first blush, the argument of Dr. Singhvi seems to be attractive, however once it is analyzed properly in view of the discussion done above, the said submission does not hold any water for the simple reason that it is true that the arbitration clause in the case of Videocon was closer, but the said decision was pertaining the inference as to exclusion of Indian law at pre-award stage. The decision of Videocon nowhere addresses the aspect of operation of non-obstante clause to abide by the laws of India. I have already discussed above as to how these factors make the case of Videocon decided on the principle of ***Bhatia International*** (supra) distinguishable. Therefore, once the decision of ***Videocon*** (supra) is distinguishable on facts, the same cannot be applied in the different set of facts and circumstances.

41. It is well settled principle of law that the judgment is a decision on the proposition which emerges therefrom and not the one which can be logically deduced therefrom. Kindly see the judgment passed in the case of ***Davinder Singh and Others Vs. State of Punjab & Others***, (2010) SCC 88 and ***P.S. Sathappan (Dead) By LRs Vs. Andhra Bank Ltd. & Ors.*** decided on 7 October, 2004 by Supreme Court.

42. As was said by Lord Chancellor Halsbury in Quinn v. Leathern, H.L. (I.) 1901, 495,

> "..... there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. **The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the**

law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all."
(**Emphasis Supplied**)

43. Likewise, it is equally well settled that the judgments of the superior courts are not be read as Euclid theorems so as to conduct as arithmetical calculation in the form of decision making and unless they actually fit in the facts and circumstances. The inch of facts here and there makes a lot of difference in the applicability of the case and precedential value of the said decision. (***Bharat Petroleum Corporation Ltd. & Another vs. N.R. Vairamani another*** (AIR 2004 SC 4778) and in ***Bhavnagar Bhavnagar University vs. Palittana Sugar Mills Pvt. Ltd.*** (2003) 2 SCC 111 (at paragraph 59))

44. Applying the said principle of laws to the present case, it can be seen that once in the judgment rendered in the case of ***Videocon*** (supra), the supreme court was not concerned with the question of implied exclusion of Indian law in the context of violation of public policy of India and therefore had no occasion to consider the non-obstante clause and arriving at any inference on the basis of the said clause, (though the similarly worded clause did exist in the said case), it cannot be said that the decision of ***Videocon*** (supra) is an authority on the said question.

45. It is true that the basic underlying idea behind that the choice of laws provisions existing under the international commercial agreement seems to be more or less the same, which is that the choice of the parties should be respected. It is equally true that even the ***Venture Global*** (supra) case has been decided by the Supreme Court on the basis of the said principle of law laid down in ***Bhatia International*** (supra) case which was the case of Section 9. But, still the difference in Venture Global case and the subsequent

line of authorities is that ***Venture Global*** (supra) case draws an intention of the parties from the agreement by reading the agreement clause by clause in the context of public policy of India and deals with the said contention and draws the significant distinction of post award stages and pre award stages which has also been noticed by Division Bench of this court in ***Anita Garg*** (supra). However, in all other cases, no such discussion exists in view of no occasion for the court to discuss the same. Therefore, the said cases are distinguishable and as such not applicable to the instance case. Thus, there exists no reason not to follow a decision of Apex court which is more closer on facts than that of the ones which are remote on facts. Accordingly, the submission of the Dr. Singhvi is rejected.

46. The next contention of the respondents which requires consideration is that the import of clause 32.2 is not the same as the learned counsel for the petitioner is attempting to give, which means that the said clause would not have overriding operation. It has been argued by Mr. Mukul Rohatgi, learned Senior counsel for the respondents that the meaning of the said clause/Article 32.2 is that the arbitral tribunal while construing the agreement would take into consideration that there is no violation of the Indian laws. As per Mr. Rohatgi, the mere fact that there is a clause 32.2 which is cautioning the parties not to violate Indian laws does not mean that the parties intended to be governed by the Indian law. Therefore, the import which Mr. Ganguli provides for the said clause is not correct. As per the learned Senior counsel for the respondents, the parties have chosen their laws in relation to agreement to arbitrate which is the law of England and accordingly shall be continued to be governed by the said law.

47. I have examined the submission made by Mr. Rohatgi and the same cannot be accepted. The reasons for the said rejection are as under:

a) Firstly, the opening words of article 32.2 which provide "nothing in this contract" make it clear that the said clause is unaffected by the other clauses contained in the agreement. The said wordings itself give a kind of overriding sweep to the said clause over and above the other clauses. The existence of the said clause in the agreement is not merely a kind of caution which can be considered by the tribunal alongside the application of foreign laws, but is an indicator that for whatsoever may be the reason the parties to the agreement shall not exercise the rights and powers under the agreement which will contravene the laws of India. Thus, the intention of the parties which is emerging from the reading of the clause which has been consciously inserted under the head of applicable law in the agreement is that the parties shall not violate the laws of India. The said powers under the agreement include powers to arbitrate which has been conferred by this agreement. The laws of India include the arbitration laws of India, contract laws, taxation laws. The said clause 32.2 is not subject to 33.12 unlike 32.1 which has been made subject to 33.12. Therefore, it cannot be said that the clause 32.2 is subject to 33.12 unlike 32.1 which has been made subject to 33.12. It cannot be said that the clause 32.2 is subject to arbitration agreement which is a distinct agreement within the main agreement. In sharp contradistinction to the same, the clause use the words "nothing in this contract" which is invariably interpreted as an overriding clause. Accordingly, it cannot be said that the existence of the said clause 32.2 has no bearing on the inference as to the implied exclusion of Indian laws including Part I of the Act when the parties themselves agree not to violate Indian laws which is a public policy of India.

b) Secondly, the argument that once there is a choice of law in relation to agreement to arbitrate is provided which is law of England, this court should readily infer exclusion of Indian law cannot be accepted. This is due to the reason that the parties have chosen law of the England in relation to agreement to arbitrate. The role of the laws in relation to agreement to arbitrate which is curial law in the instant case is confined uptil the passing of award and not thereafter as per the decision of ***Sumitomo*** (supra) which has been further approved by ***Dosco*** (supra). The same has been witnessed above in the case of ***Venture Global*** (supra) and ***Anita Garg*** (supra). However, this court is concerned with the interim award which is an award within the meaning of the Act. The challenge to the proceedings after passing of the award under the Act cannot be construed to be impliedly excluded when the operation of the curial law or law as to agreement to arbitrate ends upon the passing of the award. This is more so, when there is a clear indicator under the agreement in the form of Article 32.2 which states that the parties shall not violate any laws in India. All this would mean that parties never intended to exclude the provisions of Part I of the Act altogether even though curial law was the law of England, when they themselves agreed not to violate laws of India which is fundamental public policy in India. Furthermore, the agreement pertains to the projects which are required to be executed in India. The most of the parties under the agreement are Indian. The performance of obligations by the parties is intended to be in India. The parties have chosen to abide by the laws of India. The governing law of contract is of India. Therefore, there is no reason to infer the exclusion of Part 1 when this contract direct, realistic and more closer

connection with India than any other country which is the test to draw inference as to intention of the parties to exclude any law.

c) Thirdly and most importantly, this controversy has been put to rest by the Supreme Court in the case of ***Venture Global*** (supra) where the court under similar circumstances in the context of the Section 34 objections considered the non obstante clause similarly worded under the said agreement even though the curial law and governing law was altogether of foreign state and still applied Bhatia international and has held that the provisions of the Part 1 are not excluded after analyzing the intention of the parties. The said case has been discussed above in detail.

d) Fourthly, I have also discussed above that the choice of law in relation to arbitration agreement is confined to the agreement contained in clause 33. If one has to read the said clause in isolation without reading clause 32.2 together, then the exclusion which can be inferred by the operation of the said clause is in relation to matters contained in clause 33 which are all matters of curial law. All these matters are the ones which have role to play in the conduct of arbitration proceedings and end at the passing of the award and not the ones which are concerned with challenge or the violation. The issue of the arbitrability of the dispute under the challenge is something which is not forming part of clause 33 and thus no exclusion of Indian law can be inferred when there exists clause 32.2 which specifically provides for not to contravene Indian laws.

e) Fifthly, it has been put to Mr. Rohatgi, learned Senior counsel that if what Mr. Ganguli is propounding is not the meaning of clause 32.2, then how the effect can be given to clause 32.2 by operation of laws

of England. In answer to the same, Mr. Rohatgi stated that the courts in England can entertain the said challenge to the impugned award and would decide the matter taking into the consideration that the laws of India are not violated there. All this would mean that the learned counsel for the respondent believes that the courts in England would decide the question of the arbitrability of the dispute by taking into the consideration public policy in India.

48. I find that the view taken by the English court in this respect is not the same as to what has been stated by Mr. Rohatgi. The courts in England are inclined to decide the challenge of the award on the grounds of against public policy on the basis of Public policy subsisting in England and not in India. This has been the view prevalent in England.

49. In the case of ***Tamil Nadu Electricity Board vs. St- CMS Electric Company***, (2007) 2 All E R 701, the Queen's Bench Division of the English court observed in the case where the governing law of the contract was Indian law and the governing law of arbitration was the law of England that the English court while construing the violation of the laws is concerned with the English public policy and nothing else. The courts observation in this context reads as under:

> " As to the first suggestion, Indian law is expressly excluded from the separate arbitration agreement. Furthermore, it is nothing to the point if, under Indian law, the proper law of the PPA, the dispute in question cannot be decided other than by an Indian tribunal or Indian statutory body, according to Indian law. That is an irrelevance to an English Court, the court of the seat of the arbitration, dealing with an arbitration provision specifically governed by English law. Whether or not a foreign court would insist on its own jurisdiction or the jurisdiction of a statutory tribunal in India in matters of this kind is an irrelevance. This is made plain from the decisions in Akai Pty

> Ltd .Peoples Insurance Co. Ltd (1998) 1 LLR 90 at 98, OT Africa Line Ltd v. Magic Sportswear Corp (2006) All ER Comm 557. The **parties have agreed to arbitration in accordance with English law and it is by that law alone that the ambit of the arbitration provision can be determined, as a matter of construction. To delve into the proper law of the PPA to seek for any provision mandatorily applicable by that law to the issue of jurisdiction is impermissible."**
>
> (Emphasis Supplied)
>
> "Despite the argument of TNEB to the contrary, it is in my judgment clear as a matter of English law and the application of English conflict of laws principles, that Indian law has no relevance to the issue that I have to decide, therefore, unless questions of English public policy are involved, or there is an issue about enforcing in a friendly foreign state, performance of contract contrary to the laws of the state."

50. It is thus clear that the courts in England while entertaining the challenge to the award on the ground of public policy are no where concerned with the public policy of India. If there is a conflict between the public policy in England with that of public policy in India, then the courts in England would not hesitate to declare the dispute arbitrable with a fewer exceptions in case it is permissible under the English Public Policy. Thus, it is highly doubtful as to how the courts in England are able to give effect to the said clause 32.2 which has been intention of the parties under the agreement to not to contravene laws of India. This is another reason as to why the inference as to exclusion of Indian law cannot be made.

51. For all these reasons stated above, the contention of the learned Senior counsel for the respondents cannot be accepted.

52. I have already observed above that issue of the arbitrability is not a pure question of the arbitration law but is a larger question of public policy

which involves rights in rem or rights in personem and the violation of the laws of the state. The said view also finds place in the book titled as Redfern and Hunter on International Arbitration by Nigel Blackaby, Constantine Partasides with Alan Redfern and Martin Hunter, Fifth Edition, Oxford University Press, which is often quoted by the courts in India in the arbitration cases. The learned author in the said book observes that the issue of the arbitrability involves the adherence to the law of the place of seat of the arbitration, governing law of the arbitration agreement, law of the place of the performance of the contract, law of the state or state entity if the agreement is with the state. While taking into the consideration of all these relevant laws, the issue of the arbitrability should be decided. In the words of the learned author, it was observed thus:

> "2.115 – **If the issue of arbitrability arises, it is necessary to have a regard to the relevant laws of the different states that are or may be concerned. These are likely to include the law governing the party involved, where the agreement is with a state, or state Entity, the law governing the arbitration agreement, the law of the seat of the arbitration and the law of the ultimate place of the enforcement of the award.**" (Emphasis Supplied)

53. From the bare reading of the aforesaid excerpt from the said book, it is clear that issue of the arbitrability of the dispute involves giving due regard to the laws of the state, where the agreement is with the state, the laws of the place of the enforcement of the award. If the said view of the author is applied to the instant case, it is clear that the laws of the state including India cannot be altogether ignored even if there is a choice of law in agreement to arbitrate when it comes to question of arbitrability. If the English courts have already maintained that they are not concerned with the

Indian law when there is a choice of the law of the place of seat of arbitration and agreement to arbitrate in the cases of conflicting public policies, then it cannot be said that the laws of the state including India can be given a complete goby by refusing to entertain the challenge by the national courts when the position in law of international commercial arbitration is also that the due regard should be given to the laws of the state when the state is the party to the agreement. In the instant case, it is apparent that Union of India is the party to the agreement, therefore laws of India are necessarily have to be given due regard. The clause 32.2 is equally evocative of the same when it clearly provides an overriding effect that Indian laws are not to be contravened while exercising rights and privileges. Under these circumstances, if English courts would not entertain the said challenge, it is for the Indian courts to come to rescue to uphold the law and preserve its public policy and more so when the international law relating to commercial arbitration is also giving hint towards respecting the laws of the state where the state is the party to the agreement. This is yet another reason why no implied exclusion can be inferred in the case of the present kind.

54. The argument may be made that if it is matter of enforcement of the award, then the decision upon the said claims which are alleged to be non arbitrable by the petitioner can be given by the learned arbitration tribunal by due application of law under the agreement and objection as to public policy can be entertained at the later stage while seeking enforcement of the award as the same is available when the awards come for an enforcement before the courts in India. I find that the said argument cannot be acceptable atleast in the case of the present nature. It has been seen above that the laws of the state, where the state is the party ought to be respected while discerning the aspect of arbitrability. Once, I have found that the terms of

the contract do not clearly ousts the Indian laws but rather provide overriding clause to the said effect to respect Indian laws. I think it would be futile exercise to relegate the parties to first obtain an award which is seemingly against the public policy subject to objections of the respondents and await for the enforcement. I am of the view that once, the Indian laws are not readily inferred to be ousted, there is no reason to defer the question of the arbitrability by outrightly rejecting the objections at this stage. Furthermore, the courts have also entertained the challenges in such cases including the case of ***Venture Global*** (supra) and noted exceptions of this nature. There is no reason to depart from the said views

55. There is yet another reason for not following the approach of deference on the question of public policy in the case of the present nature which is that the respondents in the instant case is seeking refund of the amount of the taxation, cess, royalty, service tax etc. that are all a matter of public money in India. The union of India is party to the said agreement and will continue with the arbitration in English court. There is no reason why the public moneys are allowed to be invested for seeking adjudication of the claims which may be eventually impermissible to be enforced and why not the statutory scheme under the laws of India should be adhered to. The said view of mine is my prima facie view considering the vehement objection of lack of jurisdiction raised by the respondents. Thus, the said question raised by the petitioner requires examination even at this stage subject to other objections of the respondents opposing the ground of public policy.

56. Learned counsel for the respondents have argued that the decision of the ***Bhatia International*** (supra) and ***Venture Global*** (supra) is not a good law in view of the decision rendered in the case of ***Bharat Aluminum Company v. Kaiser Aluminum Technical Services Inc.*** (2012) 9 SCC 552

by the Supreme Court wherein the Supreme Court has overruled the views taken by it in the ***Bhatia International's*** case and ***Venture Global's*** case. Learned counsel for the respondents has argued that the Supreme Court has aptly explained in the said judgment that the provisions of the part 1 cannot be applied in the case where the parties have chosen the express choice of laws in relation to the agreement to arbitrate. It has been argued that the courts of the countries, the laws of whose have been chosen as curial laws as well laws to arbitrate are competent to entertain the challenge laid upon the said award. The passages of the Judgment in ***Bharat Aluminum*** (supra) has been relied upon extensively more particularly paras 116, 117, 144, 145 and 154, 194 and 195 and it has been argued that this court should not accept the reasoning of ***Venture Global*** (supra).

57. I have examined the submission raised by the learned counsel for the respondents by placing reliance upon the judgment of ***Bharat Aluminum*** (supra). However, the Constitutional Bench of Supreme Court itself recorded in the concluding paragraph of the judgment that the applicability of the said judgment shall be prospective and not retrospective. It has also been taken due note that the agreements executed on and after the date of the judgment of ***Bharat Aluminum*** (Supra) shall be governed by the said law and the decisions of ***Bhatia International*** and ***Venture Global*** (supra) continue to operate and hold the field so far as it relates agreements which are executed prior to the date of the decision which is 6th September 2012. In the words of Constitutional Bench speaking through S.S. Nijjar J., it has been observed thus:

> "197. The judgment in Bhatia International was rendered by this court on 13.3.2002. Since then, the aforesaid judgment has been followed by all the High Courts as well as by this court on numerous occasions. In fact, the judgment in

> Venture Global Engg, has been rendered on 10.1.2008 in terms of the ratio of the decision in Bhatia International. **Thus, in order to do complete justice, we hereby order, that the law now declared by this court shall apply prospectively, to all the arbitration agreements executed hereafter."** (Emphasis Supplied)

58. Once the Supreme Court has resorted to its powers as envisaged under Article 142 of the Constitution by observing that the law declared by this court shall apply prospectively to all arbitration agreements executed hereafter in the form of prospective overruling, it would be highly improper if this court applies the law declared in ***Bharat Aluminum*** (supra) in the case involving the arbitration agreement which was executed on 22nd December, 1994. Therefore, the decision of ***Bharat Aluminum*** (supra) would not have any applicability in the instant case as the reasoning contained in the said decision and law evolved therefrom is declared to be applied prospectively by Supreme Court. Consequently, the submission of the learned counsel for the respondents cannot be accepted.

59. No submission on the part of the respondents remains unaddressed. I have already observed that upon testing the instant case on the principles of law laid down in the case of ***Bhatia International*** (supra) as well as ***Venture Global*** (supra), no inference as to express or implied exclusion of the Part 1 of the Arbitration and Conciliation Act, 1996 can be drawn. Resultantly, the objection raised by the respondents relating to lack of jurisdiction of Indian court on the count of express choice of laws provisions cannot be sustained as Indian laws including provisions of Part 1 of the Act are not expressly nor impliedly excluded. The said objection is therefore rejected.

OMP No.46/2013

Issue notice. Reply be filed within four weeks. Rejoinder thereto be filed within two weeks thereafter. List for hearing on 1st July, 2013.

(MANMOHAN SINGH)
JUDGE

MARCH 22, 2013