

(2018) 10 BOM CK 0162
In the Bombay High Court
Case No : Commercial Appeal No. 181 Of 2017

Katra Holdings Limited

APPELLANT

Vs

Corasair Investments Llc And Ors.

RESPONDENT

Date of Decision : 31-10-2018

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 2(1)(f), 2(2), 9, 27, 30, 31(3), 34, 37, 37(1)(a), 37(3)
Foreign Awards Act, 1961 — Section 9(a), 9(b)

Citation : (2018) 10 BOM CK 0162

Hon'ble Judges : S. C. Dharmadhikari J;B.P.Colabawalla, J

Bench : Division Bench

Advocate : Rafique Dada, Ashish Kamat, Prateek Pai, Viraj Parikh, Amanjhol Anand, Aspi Chinoy, Ankita Singhanian, Yuvraj Choksi, Shital Turukhia, Tushad Cooper, Parikshit Desai, Vikramsinh Yadav, M.S. Krishnan, Krishna Prasad R, Balasaheb Yewale, Yuvraj Choksi, Janak Dwarkadas, Ankita Singhanian, Abjijeet Desai

Final Decision : Dismissed

Judgement

B. P. Colabawalla J.Â

1. Admit. The paper book is dispensed with. By consent of parties, the appeal is made returnable forthwith and heard finally.

2. By this appeal, the appellant challenges the Judgment and Order dated 15th September, 2017 (for short, the "impugned order") passed by the

learned Single Judge (Hon'ble Mr. Justice K. R. Shriram) in an Arbitration Petition filed under Section 34 of the Arbitration and Conciliation Act,

1996 (for short "the Act"). The Petition came to be filed before the learned Single Judge, challenging the award dated 11th September, 2015 by

which the appellant's claim against the respondents was dismissed by the Arbitral Tribunal. The Arbitration Petition was dismissed by the learned

Single Judge only on a preliminary objection raised by the respondents challenging the jurisdiction of this Court. To put it in a nutshell, the jurisdiction of the Court was challenged on the ground that the award being a foreign award and the juridical seat of arbitration being outside India as well as the law governing the arbitration agreement being Foreign Law, Part-I of the Act was impliedly excluded, and therefore, the award could not be challenged under Section 34 of the Act. Since, the preliminary objection was upheld by the learned Single Judge, there is no discussion to the challenge to the award on merits. Even before us, the only challenge that has been raised is with reference to the jurisdictional aspect, namely, whether the award passed by the Arbitral Tribunal could be challenged in this Court under Section 34 of the Act. Before we set out and deal with the legal submissions of the parties, it would be apposite to set out some bare and necessary facts.

3. The appellant is a limited liability company organized under the laws of the Republic of Mauritius and is inter alia engaged in the business of making investments. The appellant was the claimant before the Arbitral Tribunal and the Petitioner before the learned Single Judge. Respondent Nos.1 and 3 are limited liability companies constituted under the laws of the State of Delaware in the United States of America. Respondent No.2, Standard Chartered Bank (Mauritius) Ltd., is a company organized under the laws of the Republic of Mauritius. It is wholly owned by a company registered under the Laws of England and Wales â?" respondent No.5. Respondent No.4 is a Standard Chartered PLC, a public limited Company registered under the Laws of England & Wales and respondent No.5 is the Standard Chartered Bank, an international banking company registered under the Laws of England & Wales.

Respondent No.6 â?" Sub-continental Equities Ltd., is a company organized under the laws of Republic of Mauritius.

4. It is the case of the appellant that the appellant, respondent No.1 and respondent No.2 had entered into an Escrow and Transaction Settlement Agreement dated 12th May, 2007 (for short the â?"Escrow Agreementâ?") primarily for the purpose of placing the equity shares of one Tamilnad Mercantile Bank Ltd. (for short â?"TMBâ?") with purchasers who were compliant with the provisions of Indian Law, particularly the Banking Regulation Act, 1949 (for short the â?"BR Actâ?") and the Foreign Exchange

Management Act, 1999 (for short the "FEMA, 1999") and the rules, regulations, notifications, circulars and guidelines issued thereunder. According to the appellant, under the Escrow Agreement, respondent Nos.1 and 2, acting in concert with respondent Nos.3 to 6, engaged in willful suppression, gross misrepresentation and perpetrated an egregious fraud on the appellant with the primary objective of defeating the sanctity of the Indian Laws which, according to the appellant, govern the Escrow Agreement.

According to the appellant, the respondents circumvented the provisions of the BR Act, FEMA, the RBI Act, the Prevention of Money Laundering

Act, 2002, (for short the "PML Act") and the Securities Exchange Board of India Act, 1992 (for short the "SEBI Act"). In light of these

alleged violations by the respondents, the appellant was constrained to commence arbitration proceedings under the Escrow Agreement inter alia

seeking to unwind the ex-facie illegal transaction. As mentioned earlier, the reliefs sought by the appellant were negated by the Arbitral Tribunal, who

then went on to dismiss the claim made by the appellant and passed its final award dated 11th September, 2015.

5. It was the appellant's case that the Arbitral Tribunal failed to appreciate the respondents' conspiracy and design to defeat the provisions of Indian

Law and other regulatory / statutory provisions which govern the Escrow Agreement. This being the case, the appellant approached this Court under

Section 34 of the Act to set aside the award passed by the Arbitral Tribunal by filing the above Petition. The main ground on which the award was

challenged was that it was in violation of the fundamental policy of Indian Law.

6. When this Arbitration Petition came up for hearing before the learned Single Judge, a preliminary objection was raised by the respondents that this

Court had no jurisdiction to entertain the Arbitration Petition under Section 34 of the Act considering that the juridical seat of arbitration was outside

India and also the law governing the arbitration agreement was Foreign Law, and hence, Part-I of the Arbitration and Conciliation Act, 1996 was

impliedly excluded. This being the case, no challenge could be brought to the award under Section 34 of the Act, was the submission of the respondents.

7. After considering the submissions of the parties as well as the law on the subject, the learned Single Judge upheld this contention and proceeded to

dismiss the Arbitration Petition with costs in the sum of Rs.5 Lacs. The learned Judge directed that the costs be paid within four weeks from the date

of the impugned order by a cheque drawn in favour of the Advocate on record for respondent No.1. It is being aggrieved by this order of the learned

Single Judge that the appellant is before us under Section 37 of the Act.

8. In this factual backdrop, Mr Rafique Dada, learned Senior Counsel appearing on behalf of the appellant, submitted that the learned Single Judge

erred in holding that the juridical seat of the arbitration was New York, New York and the law governing the arbitration agreement was also subject to

the Laws of New York. He therefore submitted that the learned Judge could not have come to the conclusion that the Arbitration Petition filed under

Section 34 of the Act was not maintainable. He submitted that for the purpose of determination of jurisdiction, clauses 15 and 16 of the Escrow

Agreement are relevant. On a complete and meaningful reading of these two clauses, it was apparent that it is Indian Law which applied not only to

the substantive provisions of the contract (save and except the excluded provisions) but also to the arbitration agreement. In other words, according to

Mr. Dada, even the arbitration agreement was governed by Indian Law. This being the case, Mr Dada submitted that New York could never have

been the juridical seat of arbitration and reference to the same in clause 15 was at best, the venue of arbitration.

9. Mr. Dada further submitted that on a holistic reading of the Escrow Agreement, the arbitration agreement contained therein was not subjected to

the laws of New York. He submitted that this becomes clear on a perusal of clause 16 of the Escrow Agreement which clearly stipulates that the

Escrow Agreement shall be governed and construed in accordance with the Laws of India (save and except the clauses mentioned therein). He

submitted that the arbitration agreement as set out in clause 15, is not a clause that falls within the exclusion as set out in clause 16. To put it simply,

Mr Dada's argument was that clause 16 specifically provided which clauses of the Escrow Agreement were not to be governed by Indian Law and

clause 15 (which is the arbitration agreement) was not one of them. Mr Dada submitted that clause 16 of the Escrow Agreement clearly indicates that

there was an express inclusion of Part-I of the Arbitration and Conciliation Act, 1996. In this regard he submitted that clause 16, and which according

to Mr Dada would include clause 15, clearly states that Escrow Agreement shall be governed in accordance with the Laws of India. Mr Dada was at pains to point out that clause 16 clarifies that only six clauses of the Agreement (namely, clauses 4.5, 12.3, 14.1.7, 14.1.8, 18.6 and 18.7) were excluded from the application of Indian Law and were subject to New York Law. This language of clause 16 unequivocally demonstrates the intention of the parties to apply Indian Law not only to the substantive provisions of the Escrow Agreement but also to the arbitration agreement, was the submission of Mr Dada. This being the case, it was the submission of Mr Dada that the parties also intended to subject the arbitration to the jurisdiction of Indian Courts. In light of this express inclusion of Part-I of the Act, Mr Dada submitted that this Court under Section 34 of the Act had jurisdiction to entertain and try the Petition filed under Section 34 of the Act to challenge the Arbitral Award.

10. Mr Dada then submitted that the Supreme Court in the case of Sumitomo Heavy Industries Ltd Vs ONGC & Ors. [(1998) 1 SCC 305] (for short "Sumitomo") held that upon conclusion of the arbitration, the Arbitral Tribunal is functus officio and the corresponding authority of the courts administering the curial law ceases. The aspects of enforcement and setting aside are governed entirely by the law governing the arbitration agreement only. According to Mr Dada, since the law governing the arbitration agreement was Indian Law, the Petition for setting aside the arbitration award could lie before this Court under Section 34 of the Act. This being the case, he submitted that the learned Single Judge had gone completely wrong in coming to the conclusion that the law governing the arbitration agreement was Foreign Law, and therefore, Part-I of the Act was impliedly excluded.

11. Mr Dada submitted that in the facts of the present case, the arbitration between the parties was an International Commercial Arbitration as per Section 2(1)(f) of the Act. According to Mr Dada, the Supreme Court in the case of Bhatia International Vs Bulk Trading S.A. [(2002) 4 SCC 105] (for short "Bhatia") held that Part-I of the Act will apply to International Commercial Arbitrations unless it is expressly or impliedly excluded. He further submitted that the Supreme Court in the case of Bharat Aluminium Company Vs Kaiser Aluminium Technical Service Inc. [(2012) 9 SCC

552] (for short â??BALCOâ?) overruled the decision in Bhatia. However, in order to do complete justice, the Supreme Court in the case of BALCO

held that the law laid down in Bhatia will continue to apply to arbitration agreements executed prior to 6th September, 2012 (being the date on which

the Judgment in BALCO was pronounced). According to Mr Dada, in the present matter, the Escrow Agreement which contains the arbitration

clause between the parties was executed on 12th May, 2007. Therefore, in the facts of the present case, the law laid down in Bhatia would continue

to apply, was the submission.

12. In the alternative, Mr Dada submitted that even assuming for the sake of argument that there is no express inclusion of Part-I of the Act and the

principles as laid down in Sumitomo's case are not applicable, even in that event the tests as laid down by the Supreme Court in the case of Union of

India Vs Reliance Industries & Ors. [(2015) 10 SCC 213] (for short â??Reliance IIâ?) would be applicable to determine the express or implied

inclusion.

According to Mr Dada, the Supreme Court in Reliance II held that Part-I of the Act would apply to the International Commercial Arbitrations where:-

(a) The Law governing the arbitration agreement is Indian Law; and

(b) The juridical seat of arbitration is in India or in the facts of the case, the Court cannot arrive at a determination of the juridical seat.

13. The Supreme Court in the case of Reliance II required that both the above conditions need to be satisfied for applicability of Part-I of the Act. He

submitted that in the facts of the present case, both these tests were squarely satisfied. He submitted that in the facts of the present case, the law

governing the arbitration agreement was Indian Law and which was clear from a plain reading of clause 16 of the arbitration agreement as mentioned

above. Mr Dada then submitted that even assuming for the sake of argument that the Escrow Agreement was silent on the law governing the

arbitration agreement, the law governing the contract must be deemed to also apply to the arbitration agreement as stipulated by the Supreme Court in

the case of Sumitomo. Mr Dada submitted that even the nature of the transaction and its close links by its subject matter and structure to India, parties

consciously and intentionally agreed on a shift of governing law from New York Law to Indian Law. Looking to all these submissions, in any event the

first test as laid down in the judgment of Reliance II was squarely satisfied in the facts and circumstances of the present case.

14. As far as the second test as set out in the judgment of Reliance II is concerned (whether juridical seat of arbitration is in India or in the facts of the case, the Court cannot arrive at a determination of the juridical seat), Mr Dada submitted that even this test was satisfied in the present case.

According to Mr Dada, clause 15 was not included as one of the six clauses which were subject to the jurisdiction of the Courts of New York under

clause 16. This intentional omission unequivocally demonstrates the intention of parties to subject the arbitration proceedings to the jurisdiction of

Indian Courts. He submitted that merely because clause 15 stated that the place of arbitration shall be New York or such other place as may be

agreed upon by the parties, does not mean that the juridical seat of arbitration was New York. That was merely a venue of arbitration and not the seat

of arbitration as required by the test laid down by the Supreme Court in the Judgment of Reliance II. He submitted that this is also clear from the facts

that the closest and most real connection to arbitration was with Indian Law and Indian Courts, which was the test that was to be applied as laid down

by the Supreme Court in Enercon India Vs Enercon GmbH [(2014) 5 SCC 1].Â He submitted that in the facts of the present case, the following

factors were relevant to show the closest and most real connection of the arbitration is with Indian Law and Indian Courts:

(a) the entire transaction relates to the sale and purchase of equity shares in an Indian private sector bank, Tamilnad Mercantile Bank (for short

â??TMBâ??);

(b) the Escrow account where the shares were deposited were maintained with Standard Chartered Bank in Mumbai, India;

(c) the transaction arose as a result of and was structured in light of Indian laws, specifically the rules and regulations of the Reserve Bank of India

(â??RBIâ??) under the Banking Regulation Act, 1949 and the Foreign Exchange Management Act, 1999;

(d) One of the primary claims in the arbitration proceedings was that the respondents had colluded to circumvent Indian laws in order to acquire

ownership and control over TMB, as was unequivocally demonstrated by their own internal correspondence.

15. All these factors clearly show that the closest and the most real connection of the arbitration was with Indian Law and Indian Courts, was the submission of Mr. Dada. Mr Dada submitted that the place of arbitration being stipulated as New York or any other place agreed to by the parties in clause 15 of the Escrow Agreement, only refers to the venue or physical location of the arbitration and not the juridical seat. According to Mr Dada this was further made clear considering that clause 15 stated that the place of arbitration shall be New York or any other place as may be agreed upon by the Arbitrating Parties. This clearly indicates that New York was only the venue of the arbitration and was not the juridical seat. Since New York was not the juridical seat and the law applicable to the arbitration agreement was Indian Law, according to Mr Dada, both tests as laid down by the Supreme Court in the case of Reliance II were clearly satisfied and hence the learned Single Judge could not have come to the conclusion that Part-I of the Act was impliedly excluded. For all these reasons, Mr Dada submitted that there was a serious legal infirmity in the order of the learned Single Judge, which required our interference in appeal under Section 37 of the Act.

16. On the other hand, Mr Chinoy, learned Senior Counsel appearing on behalf of respondent No.1 submitted that there is no merit in the arguments canvassed by Mr Dada. He submitted that clause 15 of the Escrow Agreement deals with Dispute Resolution whereas clause 16 deals with the Governing Law. Mr Chinoy submitted that clause 15.1 clearly stipulates that the arbitration shall be conducted according to the Commercial Arbitration Rules of the American Arbitration Association. The place of arbitration shall be New York, New York or such other place as may be agreed upon by the Arbitrating Parties. In the facts of the present case, Mr Chinoy submitted that the appellant, in view of this clause, initiated the arbitration in New York and which was also held in New York, USA. This arbitration was initiated and conducted under the Commercial Arbitration Rules of the American Arbitration Association. Mr. Chinoy submitted that Rule 52(c) of the American Arbitration Rules stipulates that the parties to an arbitration under these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof. According to Mr Chinoy, the arbitration being situated in New York, USA, Federal Arbitration Act was ipso jure the

law applicable to the arbitration/ arbitration proceedings. This apart, it was also not in dispute that the award was made in New York and the Federal

Arbitration Act contains provisions for challenging an award made in USA, was the submission. He submitted that by looking to all this, it was clear

that considering that the arbitration was conducted in New York and was initiated and conducted under the Commercial Arbitration Rules of the

American Arbitration Association, the applicability of Part-I of the Act was necessarily/impliedly excluded.

17. Mr Chinoy, then submitted that this was also the understanding of the contract by the appellant. He submitted that respondent Nos. 3 to 6 were not

parties to the arbitration agreement contained in clause 15 of the Escrow Agreement. Despite this, the appellant purported to join respondent Nos.3 to

6 as parties to the arbitration proceedings. Respondent Nos.3 to 6, therefore, moved an application before the Arbitral Tribunal objecting to the

Arbitral Tribunal's jurisdiction. In response to the said application, the appellant filed its response on 28th November, 2012 and in paragraphs 118 and

119 thereof specifically relied on the Federal Arbitration Act, USA and stated that although these respondents were not express signatories to the

amended arbitration agreement, the Tribunal nonetheless was bound to arbitrate the dispute under the Federal Arbitration Act and the prevailing New

York Law. Further it was the appellant's own case in its post-hearing brief dated 15th May, 2015 that the joinder of parties to arbitration is a

procedural matter to be considered under US Law. Looking to all this, Mr Chinoy submitted that even the appellant correctly understood that the

arbitration agreement and the arbitration proceedings before the Arbitral Tribunal were to be governed by US Law. This being the case, it was futile

for the appellant to now submit that the arbitration agreement was governed by Indian Law. Whether the arbitration agreement was to be governed by

Indian Law or US Law was a matter of choice of the parties. This choice was clearly spelt out not only from what was stated in clause 15 of the

Escrow Agreement but also from the understanding of the appellant and as set out earlier. This being the case, the appellant cannot be allowed to

approbate and reprobate in this fashion by once stating before the Arbitral Tribunal that US Law was applicable and then by stating before this Court

that Indian Law would govern even the arbitration agreement, was the submission of Mr. Chinoy.

18. Mr Chinoy, also placed reliance on the decision of the Supreme Court in the case of Reliance II and submitted that when the Court comes to the conclusion that the juridical seat of arbitration is outside India, or law other than Indian Law governs the arbitration agreement, Part-I of the Act would be excluded by necessary implication. Mr Chinoy submitted that on a reading of the decision of the Supreme Court in the case of Reliance II, only those cases in which the arbitration agreements stipulate that the seat of the arbitration is in India or on facts a judgment cannot be reached on the seat of arbitration as being outside India, would continue to be governed by the principles laid down in Bhatia. Mr. Chinoy brought to our attention that in the matter of Reliance II, the Supreme Court also rejected the reliance placed on an earlier Supreme Court decision in the case of National Thermal Power Corporation Vs. Singer Company & Ors. [(1992) 3 SCC 551] (for short â??NTPC Vs Singerâ?) by pointing out that the decision of the Supreme Court in NTPC Vs Singer was in the context of Section 9(b) of the Foreign Awards Act, 1961 which stipulated that the award made in respect of the contract governed by Indian Law would not be considered as a Foreign Award. In this regard, Mr. Chinoy brought to our attention paragraph 13 of the judgement in the case of Reliance II.

19. As far as the seat of arbitration is concerned, Mr Chinoy submitted that in the present case, the arbitration clause provides that the place of arbitration shall be New York, New York. He submitted that Mr Dada's argument that the arbitration clause did not stipulate New York, New York as a seat of arbitration was completely answered by a decision of the Supreme Court in the case of Roger Shashoua & Ors. Vs Mukesh Sharma [(2017) 14 SCC 722] (for short â??Roger Shashouaâ?). In fact in that case, the clause stipulated that the venue of the arbitration will be London U.K. and the governing law was to be Indian Law. In the case of Roger Shashoua the Supreme Court came to a finding that since there was an express designation of the arbitration venue and there was no designation of any alternative place of seat, and since the arbitration agreement provided that a supranational body of Rules would govern the arbitration, the necessary conclusion would be that the â??venueâ? of the Arbitration was the juridical seat. In conclusion, the Supreme Court in Roger Shgahsoua's case held that London UK would be the juridical seat of the arbitration and

consequently the award could not be challenged under Section 34 of the Act. For all these reasons, Mr Chinoy submitted the learned Single Judge has

correctly applied the legal principles settled by the Supreme Court in various decisions and thereafter came to the conclusion that this Court had no

jurisdiction to entertain the challenge to the arbitral award under Section 34 of the Act, as Part-I of the Act was impliedly excluded. This being the

case, he submitted that no interference was called for by us in an appeal under Section 37 of the Act.

20. Mr Dwarkadas, learned Senior Counsel appearing on behalf of respondent No.6, basically adopted the arguments of Mr Chinoy. Mr Dwarkadas

submitted that in the present case the Dispute Resolution was contained in clause 15 of the Escrow Agreement. Clause 15.1 provides that:-

(a) the arbitration shall be conducted according to the Commercial Arbitration Rules of the American Arbitration Association; and

(b) the place of arbitration shall be New York. Clause 16 of the Escrow Agreement provides that the substantive law governing the contract would be Indian Law.

21. Mr Dwarkadas submitted that assuming for the sake of argument that by reason of clause 16 and the proviso thereto, the law governing the

arbitration agreement is Indian Law, even then it did not mean that the curial law applicable to the arbitration proceedings would be Indian Law. He

submitted that firstly there is no ambiguity in clause 15 that the parties have agreed on the place of arbitration to be New York. In the present case,

the place of arbitration was nothing but the seat of arbitration. He submitted that in the case of Reliance II, the Supreme Court while interpreting

BALCO, as well as paragraph 32 of Bhatia, categorically held that even in cases governed by the Bhatia principle, it is only where the Court (a) on

the facts of the case comes to a determination that the juridical seat is outside India; or (b) where the law other than Indian Law governs the

arbitration agreement, then Part-I of the Act would be excluded by necessary implication. Mr Dwarkadas, therefore, submitted that even in cases

where the agreement may be governed by the principle laid down in Bhatia's case, once it is determined that the seat of arbitration was outside

India, provisions of Part-I of the Act would be excluded and a challenge to an award rendered in such arbitration would not be capable of being

entertained in Indian Courts. He submitted that on a plain reading of clauses 15 and 16 of the Escrow Agreement, it was clear that the seat of

arbitration was outside India and hence Part-I of the Act was excluded by necessary implication.

22. Mr Dwarkadas then submitted that this was also clear from the fact that the appellant themselves had considered New York, New York to be the

seat of arbitration as well as US Law being the law governing the arbitration agreement. He submitted that it is settled law that the conduct of the

parties is a good guide to interpret an agreement and in this regard reliance was placed on a decision of the Supreme Court in the case of Godhra

Electricity Co. Vs. The State of Gujarat [(1975) 1 SCC 199]. He submitted that the question with regard to the determination of the seat and the law

governing the arbitration agreement was a matter of contract rather than law, which has to be gathered from interpretation of the agreement and the

conduct of parties. He, therefore, submitted that there was no question of the appellant then arguing that there cannot be any estoppel against Law /

Statute. He submitted that the appellant itself had invoked arbitration in New York and applied the provisions of the Federal Arbitration Act, USA and

the prevailing New York law. This was clear when the appellant opposed the application filed by respondent Nos.3 to 6. In response to that

application, the appellant clearly stated that the Federal Arbitration Act and the prevailing New York Law applied, and therefore, opposed the

application filed by respondent Nos.3 to 6. According to Mr Dwarkadas such conduct of the appellant clearly demonstrated its intention and

understanding of the agreement that the juridical seat was New York and the arbitration agreement was governed by U.S. Law. In fact, the final

termination notice issued by the appellant on 16th March, 2012 invoking arbitral proceedings in terms of clause 15 of the agreement, according to Mr

Dwarkadas, clearly mentions that the appellant shall seek relief in aid of arbitration from the Courts of the State of New York. He submitted that even

in the statement of claim filed by the appellant in the arbitration proceedings, the appellant clearly stated that it intended to commence separate court

proceedings in New York. He submitted that all this material was in fact placed before the learned Single Judge in the affidavit-in-reply dated 30th

August, 2016 filed by respondent No.1 to which no rejoinder was filed by the appellant. These facts have not been controverted by the appellant at all.

Looking to all this material, Mr Dwarkadas submitted that it was quite clear that even the appellant interpreted and understood clause 15 of the Escrow Agreement (dealing with Dispute Resolution) to be governed by U.S. Law and the juridical seat of arbitration being New York. For all these reasons, Mr Dwarkadas also submitted before us that the learned Single Judge correctly came to the conclusion that Part-I of the Act was impliedly excluded and hence he had no jurisdiction to entertain the above Arbitration Petition. In consequence thereto, he submitted that there was no merit in the appeal and the same ought to be dismissed.

23. We have heard the learned counsel for parties at length and have perused the papers and proceedings in the appeal including the impugned order passed by the learned Single Judge. The issue that we are called upon to decide are basically twofold. Firstly, we have to determine whether the juridical seat was outside India, and secondly, whether the law governing the arbitration agreement was Foreign Law or Indian Law. To understand this controversy, it would be apposite to set out clauses 15 and 16 of the Escrow Agreement as it is on the interpretation of these two clauses that the outcome of the appeal will be determined. Clauses 15 and 16 reads thus:

15. DISPUTE RESOLUTION.

15.1 Each of Corsair, Katra and the Escrow and Transaction Settlement Agent (the "Arbitrating Parties") agree to negotiate in good faith to resolve any dispute, difference or claim among the Arbitrating Parties arising out of or in connection, with this Agreement, including the construction, validity, execution, performance, termination or breach hereof. If negotiations do not resolve such dispute, difference or claim to the reasonable satisfaction of the Arbitrating Parties within 15 (fifteen) Business days of their initiation, then the Arbitrating Parties shall submit to binding arbitration. The arbitration shall be conducted according to the Commercial Arbitration Rules of the American Arbitration Association. The place of arbitration shall be New York, New York or such other place as may be agreed upon by the Arbitrating Parties. The Arbitrating Parties shall attempt to agree upon one arbitrator, but if they are unable to agree, each of Arranger, Corsair and the Escrow and Transaction Settlement Agent shall appoint an arbitrator and the total number of arbitrators shall be three. Expenses of the arbitrator(s) shall be divided equally between the Arbitrating Parties to

such arbitration.

Judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof, and shall be enforceable against the

Arbitrating Parties in accordance with the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, as amended.

15.2 The arbitrators shall issue a written statement of their award detailing the facts and reasons upon which their decision was based.

15.3 Any reference of any dispute, difference or claim to arbitration under this Agreement shall not affect the performance by the Arbitrating Parties

of their respective obligations under this Agreement other than the obligations relating to the dispute, difference or claim referred to arbitration.

16. GOVERNING LAW.

This Agreement shall be governed by and construed in accordance with the laws of India; provided, however, that, in the case of Clauses 4.7, 12.3,

14.1.7, 14.1.8, 18.6 and 18.7 hereof and this proviso, New York law shall apply notwithstanding any conflicts of law principles thereof, and each of

Corsair, Arranger, BroadStreet and Gupta irrevocably and unconditionally (severally) agree to the application of New York law and submission to

New York jurisdiction with respect to such Clauses (in accordance with, without limitation, Sections 5-1401 and 5-1402 of the General Obligations

Law of the State of New York).

24. Clause 15 of the Agreement clearly stipulates that the arbitration shall be conducted according to the Commercial Arbitration Rules of the

American Arbitration Association. It further stipulates that the place of arbitration shall be New York, New York or such other place as may be

agreed upon by the Arbitrating Parties. It is not in dispute before us that the place agreed between parties was in New York, New York and the

appellant initiated the arbitration proceedings in New York. What is also important to note is that clause 15 provides that the judgment upon the Award

rendered by the Arbitrator may be entered in any Court having jurisdiction thereof and shall be enforceable against the Arbitrating Parties in

accordance with the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards as amended.

25. Thereafter, clause 16 deals with the Governing Law and states that this agreement shall be governed by and construed in accordance with the

laws of India; provided further, that, in case of clauses 4.7, 12.3, 14.1.7, 14.1.8, 18.6 and 18.7 and the proviso thereof, New York Law shall apply

notwithstanding any conflicts of law principles thereof, and each of Corsair, Arranger, BroadStreet and Gupta irrevocably and unconditionally agree to

the application of New York Law and submission to New York jurisdiction with respect to such clauses.

26. Having said this, we shall now examine as to whether the arbitration agreement as contained in clause 15.1 was governed by the Laws of India or

whether it was governed by Foreign Law. Clause 15 of the Escrow Agreement which deals with Dispute Resolution, clearly stipulates that firstly

negotiations have to be carried out between the arbitrating parties to resolve any dispute or differences or claim arising out of or in connection with the

Escrow Agreement including the construction, validity, execution, performance, termination or breach thereof. If the negotiations do not resolve such

dispute then the Arbitrating Parties shall submit to a binding arbitration. Thereafter, clause 15.1 clearly stipulates that the arbitration shall be conducted

according to the Commercial Arbitration Rules of the American Arbitration Association. It further states that the place of arbitration shall be New

York, New York or such other place as may be agreed upon by the Arbitrating Parties. Clause 15.1 thereafter goes on to stipulate that the judgment

upon the award rendered by the arbitrator may be entered in any Court having jurisdiction thereof and shall be enforceable against the Arbitrating

Parties in accordance with the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Since, the arbitration was initiated

and conducted under the Commercial Arbitration Rules of the American Arbitration Association, it would be relevant to refer to these rules. Rule 52

deals with Applications to Court and Exclusion of Liability. It reads thus:

R.52. Applications to Court and Exclusion of Liability.

(a) No judicial proceedings by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate.

(b) Neither the AAA nor any arbitrator in a proceeding under these rules is a necessary or proper party in judicial proceedings relating to the arbitration.

(c) Parties to an arbitration under these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any

federal or state court having jurisdiction thereof.

(d) Parties to an arbitration under these rules shall be deemed to have consented that neither the AAA nor any arbitrator shall be liable to any party in

any action for damages or injunctive relief for any act or omission in connection with any arbitration under these rules.

(e) Parties to an arbitration under these rules may not call the arbitrator, the AAA, or AAA employees as a witness in litigation or any other

proceeding relating to the arbitration. The arbitrator, the AAA and AAA employees are not competent to testify as witnesses in any such

proceeding.â??

27. What can be seen from Rule 52(c) is that, the parties to an arbitration governed by these rules shall be deemed to have consented that judgment

upon the arbitration award may be entered in any federal or state court having jurisdiction thereof. Another rule which to our mind would be important

to take note of, would be Rule

46 which deals with form of award and reads thus:

â??R.46. Form of Award.

(a) Any award shall be in writing and signed by a majority of the arbitrators. It shall be executed in the form and manner required by law.

(b) The arbitrator need not render a reasoned award unless the parties request such an award in writing prior to appointment of the arbitrator or unless

the arbitrator determines that a reasoned award is appropriate.â??

28. What Rule 46 stipulates is that the award shall be signed by the majority of the arbitrators. The arbitrator need not render a reasoned award unless

the parties request such an award in writing prior to appointment of the arbitrator or unless the arbitrator determines that a reasoned award is

appropriate. To put it in a nutshell this rule contemplates that an award under the Commercial Arbitration Rules of the American Arbitration

Association need not be a reasoned award. We must make note that this is in stark contrast to section 31(3) of the Arbitration and Conciliation Act,

1996 which mandates that the arbitral award shall state the reasons upon which it is based unless (a) the parties have agreed that no reasons are to be

given, or (b) the award is an arbitral award on agreed terms under Section 30. To put it in a nutshell, the arbitration award under Section 31(3) of the

Act is required to be a reasoned award unless the parties agree otherwise or is an award that is passed on agreed terms as contemplated under

Section 30. It is not in dispute that the impugned award was passed by the Arbitral Tribunal by applying the provisions of the Commercial Arbitration

Rules of the American Arbitration Association. This being the case, we find that Mr Chinoy is correct in submitting that the Federal Arbitration Act

was ipso jure the law applicable to the arbitration / arbitration proceedings. As mentioned earlier, Rule 52(c) clearly stipulates that the parties to an

arbitration shall be deemed to have consented that the judgment upon the arbitration award may be entered in any federal or state court having

jurisdiction thereof. Having consented and submitted to the jurisdiction of U.S. Law, we do not think that Mr Dada is correct in submitting that the

arbitration award is governed by the Laws of India.

29. One must not lose sight of the fact that the parties are free to choose which law would apply to the arbitration agreement. This is a matter of

contract. Taking this into consideration, we think that it would be also very relevant to see how the parties themselves understood and interpreted

clauses 15 and 16 of the Escrow Agreement. It is not in dispute that respondent Nos.3 to 6 were not parties to the arbitration agreement contained in

clause 15. Despite this, the appellant purported to join respondent Nos.3 to 6 as parties to the arbitration proceedings. Thereafter, respondent Nos.3 to

6 moved an application before the Arbitral Tribunal objecting to the Arbitral Tribunal's jurisdiction over them. In response to the said application, the

appellant filed its reply dated 28th November, 2012 wherein the appellant took a categorical stand that respondent Nos.3 to 6, though not expressly

being signatories to the amended Escrow Agreement, the Tribunal was nonetheless bound to arbitrate this dispute under the Federal Arbitration Act

and the prevailing New York Law. Further, in its post-hearing brief dated 15th May, 2015, the appellant clearly stated that "the joinder of parties to

arbitration is a procedural matter, to be considered under U.S. Law". From what we have stated, it is quite clear that the appellant itself understood

clauses 15 & 16 in such a way that the arbitration agreement would be governed by U.S. Law.

30. We are unable to agree with Mr Dada that the appellant's reliance on the Federal Arbitration Act is irrelevant and immaterial for determination of

the law applicable to the arbitration agreement. We find no merit in the argument of the appellant that the reliance placed by the respondents about the conduct of the appellant cannot confer jurisdiction and which according to Mr Dada, is a well settled proposition. As stated earlier, the appellant

themselves had relied upon the Federal Arbitration Act to substantiate the joinder of respondent Nos.3 to 6 to the Arbitration Proceedings. Having

done so, it was clear that the appellant herein and all throughout, were also of the view that the law governing the arbitration agreement was U.S.

Law. It is only now, and when the petition was filed under Section 34 of the Act that the appellant takes a stand that Indian Law governs the

arbitration agreement. We are clearly of the view that this is another factor and on the basis of the interpretation of the appellant itself that the law

governing the arbitration agreement was U.S. Law and not the Indian Law. We, therefore, do not think that the actions of the appellant to justify and

substantiate the joinder of respondent Nos.3 to 6 to the arbitration proceedings is irrelevant as contended by Mr Dada. It is not in dispute that the

parties by contract can choose the law applicable to the arbitration agreement.

This being the case, how the parties understood the contract is certainly a very relevant factor that would be taken into consideration before coming to

the conclusion as to which law applies to the arbitration agreement. This being the case, we are clearly of the view that the arbitration agreement was

not governed by Indian Law as contended by Mr Dada but was governed by U.S. Law.

31. Before concluding this issue, we must mention that Mr Dada has relied upon clause 16 of the Escrow Agreement to contend that Indian Law was

expressly made applicable to the arbitration agreement. Mr Dada submitted that clause 16 deals with the Governing Law and clearly stipulates that the

Escrow Agreement is governed by and to be construed in accordance with the laws of India. He submitted that clause 16 only excluded clauses 4.7,

12.3, 14.1.7, 14. 1.8, 18.6 and 18.7 from the applicability of Indian Law. He submitted that clause 15 (which deals with Dispute Resolution) was not

excluded from the applicability of the Indian Law. This being the case, he submitted that the learned Single Judge erred in coming to the conclusion

that U.S. Law applied to the arbitration agreement.

32. We are unable to agree with this submission for the simple reason that it is

now all well settled that even though the arbitration clause may be contained in the main agreement, it is to be treated as a separate agreement altogether and in fact even survives termination of the main agreement as provided in the Arbitration and Conciliation Act, 1996. The Arbitration Agreement is a stand alone agreement. Either it can be in a separate document providing that the parties agree to submit the dispute that arise between them under another agreement to arbitration, or in the main agreement itself the arbitration clause can be incorporated. In either situation, the arbitration agreement is an agreement by itself. This is well settled, but if one needs to refer to any authority on this subject it would be apposite to refer to the observations of the Supreme Court in the case of SMS Tea Estates (P) Ltd. v. Chandmari Tea Co. (P) Ltd. [(2011) 14 SCC 66]. Paragraphs 12 & 13 of this decision read thus:-

12. When a contract contains an arbitration agreement, it is a collateral term relating to the resolution of disputes, unrelated to the performance of the contract. It is as if two contracts—one in regard to the substantive terms of the main contract and the other relating to resolution of disputes—had been rolled into one, for purposes of convenience. An arbitration clause is therefore an agreement independent of the other terms of the contract or the instrument. Resultantly, even if the contract or its performance is terminated or comes to an end on account of repudiation, frustration or breach of contract, the arbitration agreement would survive for the purpose of resolution of disputes arising under or in connection with the contract.

13. Similarly, when an instrument or deed of transfer (or a document affecting immovable property) contains an arbitration agreement, it is a collateral term relating to resolution of disputes, unrelated to the transfer or transaction affecting the immovable property. It is as if two documents—one affecting the immovable property requiring registration and the other relating to resolution of disputes which is not compulsorily registerable—are rolled into a single instrument. Therefore, even if a deed of transfer of immovable property is challenged as not valid or enforceable, the arbitration agreement would remain unaffected for the purpose of resolution of disputes arising with reference to the deed of transfer.

33. As noted earlier clause 15 and which is the arbitration agreement between

parties, clearly stipulates that the Arbitrating Parties shall submit to a binding arbitration and the arbitration shall be conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association and the place of arbitration shall be New York, New York or such other place as may be agreed upon by the Arbitrating Parties. This being the case, we are clearly of the view that clause 16 of the Escrow Agreement which provides only certain clauses that would be governed by New York Law, would not take within its ambit the arbitration agreement contained in clause 15. This is for the simple reason that clause 15 is the arbitration agreement and is an agreement by itself though contained in the Escrow Agreement. To put it differently, clause 16 would apply to the main agreement (the Escrow Agreement) and not clause 15 thereof which is the arbitration agreement and in law is a separate and a stand alone agreement from the main agreement. This is why, and correctly so, we find no reference to clause 15 as one of the clauses being excluded from the application of Indian Law. We, therefore, find that this argument of Mr Dada also needs to be rejected. We may hasten to add that it would be totally different if the arbitration agreement was completely silent on which law would apply to it. In such a situation, it could possibly be argued that the law governing the main contract would also govern the arbitration agreement. However, that is not the case before us.

34. We find that the facts of the present case clearly fall within the ratio laid down by the Supreme Court in the case of Yograj Infrastructure Ltd. Vs.

Ssang Yong Engineering & Construction Co. Ltd [2011(9) SCC 735] and thereafter as clarified in Yograj Infrastructure Ltd. Vs. Ssang Yong

Engineering & Construction Co. Ltd. [2012(12) SCC 359]. In the case of Yograj, the Supreme Court also held that once the parties had specifically

agreed that the arbitration proceedings would be continued in accordance with Foreign Law, the decision in Bhatia would no longer apply. In fact the

decision in Yograj was followed by a Division Bench of this Court to which one of us was a party (B. P. Colabawalla J.), in the case of Harkirat

Singh Vs. Rabobank International Holding [(2015) SCC OnLine Bom 605 : (2015) 5 Bom. C.R. 9]. We must also mention that the SLP filed

from this Division Bench judgment in the case of Harkirat Singh was also dismissed by the Supreme Court on 12th May, 2016.

35. We also find that the present case is covered by another decision of the Supreme Court in the case of Reliance II. The Supreme Court in this case

was considering a case of a foreign seated arbitration where the arbitration agreement was prior to the judgment of the Supreme Court in the case

BALCO. The Supreme Court, after discussing the law on the subject, at paragraph 21 held as under:

“21. The last paragraph of BALCO [BALCO v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810]

judgment has now to be read with two caveats, both emanating from para 32 of Bhatia International [Bhatia International v. Bulk Trading S.A., (2002)

4 SCC 105] itself “that where the Court comes to a determination that the juridical seat is outside India or where law other than Indian law governs

the arbitration agreement, Part I of the Arbitration Act, 1996 would be excluded by necessary implication. Therefore, even in the cases governed by

the Bhatia [Bhatia International v. Bulk Trading S.A., (2002) 4 SCC 105] principle, it is only those cases in which agreements stipulate that the seat of

the arbitration is in India or on whose facts a judgment cannot be reached on the seat of the arbitration as being outside India that would continue to be

governed by the Bhatia [Bhatia International v. Bulk Trading S.A., (2002) 4 SCC 105] principle. Also, it is only those agreements which stipulate or

can be read to stipulate that the law governing the arbitration agreement is Indian law which would continue to be governed by the Bhatia [Bhatia

International v. Bulk Trading S.A., (2002) 4 SCC 105] rule.”

36. As can be seen from this decision, the Supreme Court held that where the Court comes to the determination that the juridical seat is outside India

OR where Foreign Law governs the arbitration agreement, Part-I of the Arbitration and Conciliation Act, 1996 would be excluded by necessary

implication. The Supreme Court opined that, therefore, even in the cases governed by the Bhatia principle it was only those cases in which the seat of

arbitration was in India or on whose facts a judgment could not be reached on the seat of arbitration being outside India, that would continue to govern

by the judgment of Bhatia. The Supreme Court also held that it is only those agreements which stipulate or can be read to stipulate that the law

governing the arbitration agreement is Indian Law, it would continue to be governed by the principles laid down in Bhatia's case.

37. Having said this, we shall now turn our attention to what was the juridical seat of the arbitration. In this context, if one refers to clause 15, it clearly

stipulates that the place of the arbitration shall be New York, New York or such other place as may be agreed upon by the Arbitrating Parties. Mr

Dada submitted that what the agreement provides was only the venue of the arbitration and seat of arbitration was not fixed under clause 15.

38. We are unable to agree with this submission. On a plain reading of clause 15, it is clear that the place of arbitration referred to in clause 15 is the

seat of arbitration. The parties expressly chose to have the place of arbitration in New York. This being the case, juridical seat of arbitration was New

York. In fact, the appellant themselves invoked arbitration and submitted themselves to the jurisdiction of New York. This being the case, we do not

think that Mr Dada is correct in his submission that the place of arbitration referred to in clause 15 was merely a venue and not a seat of arbitration.

In this regard it would be apposite to refer to Section 2(2) [and which falls in Part II of the Arbitration and Conciliation Act, 1996] which reads

thus:

“(2) This Part shall apply where the place of arbitration is in India:

“Provided that subject to an agreement to the contrary, the provisions of sections 9, 27 and clause (a) of sub-section

(1) and sub-section (3) of section 37 shall also apply to international commercial arbitration, even if the place of arbitration is outside India, and an

arbitral award made or to be made in such place is enforceable and recognized under the provisions of Part II of this Act.”

39. Section 2(2) of the Act falls in Part II of the Act and stipulates that Part II shall apply where the place of arbitration is in India. The proviso

to Section 2(2) [and which was inserted by Act 3 of 2016 w.r.e.f. 23rd October, 2015], clearly carves out an exception as to which provisions of Part

II would apply even though the place of arbitration was outside India. Those provisions are Sections 9, 27, 37(1)(a) and 37(3) of the said Act. From

a plain reading of these provisions, two things become clear. Firstly, even the Act clearly stipulates that Part II would apply only where the place of

arbitration is in India. Secondly, the proviso to Section 2(2) also clearly stipulates that even though the place of arbitration may be outside India, the

provisions of Section 9, 27, 37(1)(a) and 37(3) would also apply to International

Commercial Arbitrations. This is subject to an agreement to the contrary. What is important to note is that Section 34 and which falls within Part - I and deals with challenge to the arbitral award, does not find place in the proviso. In other words, what the proviso makes explicit is that even if the place of arbitration is outside India and it is an International Commercial Arbitration, then also, only Sections 9, 27, 37(1)(a) and 37(3) of Part I of the Act would continue to apply to such an arbitration. No other provision of Part I of the Act would apply where the place of arbitration was outside India.

40. If we were to apply section 2(2) alongwith its proviso to the facts of the present case, we find that even in clause 15.1 [the clause regarding Dispute Resolution] clearly stipulates that the place of arbitration shall be New York, New York or such other place as agreed upon by the arbitrating parties. It is not in dispute that the arbitration was in fact initiated by the appellant in New York and was thereafter held in New York under the Commercial Arbitration Rules of the American Arbitration Association. This being the case and without anything more, we find that the reference to place of arbitration in clause 15.1 of the Escrow Agreement was clearly the seat of arbitration which was outside India. This being our conclusion, and when one reads this with the proviso to Section 2(2) of the Act, it becomes abundantly clear that a challenge to such an award could not have been brought before this Court under Section 34 of the Act which falls within Part I. Once we come to this conclusion, then clearly, neither the seat of arbitration was in India and nor the law governing the arbitration agreement was Indian Law. If this is the case and as mentioned earlier, this is also how the parties understood it, then Part-I of the Arbitration and Conciliation Act, 1996, was impliedly excluded. Corollary to this is that the appellant could not have approached the Courts in India under Section 34 of the Act to challenge the award.

41. Whilst on this subject, we would also like to take note of the decision of the Supreme Court in the case of EITZEN Bulk A/S Vs. Ashapura Minechem Ltd. and Anr. [(2016) 11 SCC 508] (for short EITZEN Bulk). The Supreme Court in paragraph 34 of this decision has clearly held that as a matter of fact, mere choosing of a juridical seat of arbitration attracts the law applicable to said location. In other words, the Supreme Court

held that it would not be necessary to specify which law would apply to the arbitration proceedings, since the law of that particular country would

apply ipso jure. To buttress this finding the Supreme Court relied upon a passage from Redfern and Hunter on International Arbitration. Paragraphs 34

& 35 of this decision reads thus:

“34. As a matter of fact the mere choosing of the juridical seat of arbitration attracts the law applicable to such location. In other words, it would

not be necessary to specify which law would apply to the arbitration proceedings, since the law of the particular country would apply ipso jure. The

following passage from Redfern and Hunter on International Arbitration contains the following explication of the issue:

“It is also sometimes said that parties have selected the procedural law that will govern their arbitration, by providing for arbitration in a particular

country. This is too elliptical and, as an English court itself held more recently in *Breas of Doune Wind Farm* it does not always hold true. What the

parties have done is to choose a place of arbitration in a particular country. That choice brings with it submission to the laws of that country, including

any mandatory provisions of its law on arbitration. To say that the parties have “chosen” that particular law to govern the arbitration is rather like

saying that an English woman who takes her car to France has “chosen” French traffic law, which will oblige her to drive on the right-hand side

of the road, to give priority to vehicles approaching from the right, and generally to obey traffic laws to which she may not be accustomed. But it

would be an odd use of language to say this notional motorist had opted for “French traffic law”. What she has done is to choose to go to France.

The applicability of French law then follows automatically. It is not a matter of choice. Parties may well choose a particular place of arbitration

precisely because its *lex arbitri* is one which they find attractive. Nevertheless, once a place of arbitration has been chosen, it brings with it its own

law. If that law contains provisions that are mandatory so far as arbitration are concerned, those provisions must be obeyed. It is not a matter of

choice any more than the notional motorist is free to choose which local traffic laws to obey and which to disregard.”

35. In this view of the matter, the judgment of the Gujarat High Court holding that Ashapura's objections under Section 34 of the Arbitration Act are

tenable before a court in India, that is, the court at Jamkhambhali, Gujarat is contrary to law. The proceedings under Section 34, which occurs in Part

I, are liable to be dismissed as untenable. The civil appeals of Eitzen are liable to succeed and are, therefore, allowed. The judgment of the Bombay

High Court dated 3-12-2015 [Eitzen Bulk A/S v. Ashapura Minechem Ltd., 2015 SCC OnLine Bom 5909 : (2016) 1 Bom CR 466] enforcing the

foreign award under Part II of the Arbitration Act is correct and liable to be upheld.â??

42. We must mention that even this Court in Harkirat Singh has relied upon the very same passage from Redfern and Hunter on International

Arbitration that has been relied upon by the Supreme Court in the case of EITZEN Bulk.

43. Mr Dada, faced with all the aforesaid decisions of the Supreme Court submitted that all these decisions have been referred to a larger bench in the

case of Union of India Vs. Hardy Exploration and Production (India) Inc. [(2018) 7 SCC 374]. He therefore submitted that the issue is still at large

before the Supreme Court. Firstly, we must mention that merely because an issue has been referred to a larger bench will not in any way prevent us

from deciding the present issue. In any event, after this judgement was reserved on 14thâ?? September, 2018, we found that the reference made to

a larger bench in Hardy Exploration has been decided by a three Judge Bench of the Supreme Court vide its decision dated 25th September, 2018

[2018 SCC OnLine SC 1640]. In view thereof, and after we noticed the three Judge Bench of the Supreme Court in Hardy Exploration, we placed

this matter on board on 25th October, 2018 to give an opportunity to the parties to address us on this decision, though earlier a full hearing was over

and the judgment was reserved. Accordingly, Mr Dada as well as Mr Chinoy have addressed us on the decision of the larger bench of the Supreme

Court in Hardy Exploration.

44. The facts of Hardy Exploration would reveal that a challenge was laid before the Delhi High Court to the award made by the Arbitrators in Kuala

Lumpur under section 34 of the Act. The challenge to the said award was contested mainly on the ground that the Courts in India did not have

jurisdiction to entertain the challenge under section 34 of the Act. This contention was accepted by the learned Single Judge as well as the Division

Bench of the Delhi High Court. This is how the matter first came up before the Supreme Court and was thereafter referred to the larger bench. The

larger bench, whilst deciding Hardy Exploration, referred to all the judgments that we have been referred to herein and thereafter in paragraph 39 (of

the SCC OnLine SC Report) inter alia noted that the terms 'place' and 'seat' are used interchangeably. When only the term 'place' is

stated and mentioned and no other condition is postulated, it is equivalent to 'seat' and that finalizes the facet of jurisdiction. The Supreme Court

further held that however, if a condition precedent is attached to the term 'place', the said condition has to be satisfied so that the 'place'

can become equivalent to 'seat'. Paragraph 39 of the said judgment reads thus :-

39. The word 'determination' has to be contextually determined. When a 'place' is agreed upon, it gets the status of seat which

means the juridical seat. We have already noted that the terms 'place' and 'seat' are used interchangeably. When only the term

'place' is stated or mentioned and no other condition is postulated, it is equivalent to 'seat' and that finalises the facet of jurisdiction. But

if a condition precedent is attached to the term 'place', the said condition has to be satisfied so that the place can become equivalent to seat. In

the instant case, as there are two distinct and disjunct riders, either of them have to be satisfied to become a place. As is evident, there is no

agreement. As far as determination is concerned, there has been no determination. In Ashok Leyland Limited and State of T.N.²⁹, the Court has

reproduced the definition of 'determination' from Law Lexicon, 2nd Edition by Aiyar, P. Ramanatha and Black's Law Dictionary, 6th Edition.

The relevant paragraphs read thus:

"Determination or order."The expression 'determination' signifies an effective expression of opinion which ends a controversy or a

dispute by some authority to whom it is submitted under a valid law for disposal. The expression 'order' must have also a similar meaning,

except that it need not operate to end the dispute. Determination or order must be judicial or quasi-judicial. Jaswant Sugar Mills Ltd. v. Lakshmi

Chand (Constitution of India, Article 136).

A 'determination' is a 'final judgment' for purposes of appeal when

the trial court has completed its adjudication of the rights of the parties in the action. *Thomas Van Dyken Joint Venture v. Van Dyken*.⁴⁵

45. What we find that is in the facts of the case in *Hardy Exploration*, the Supreme Court, after considering the arbitration clause and Article 20 of the UNCITRAL Model Law on International Commercial Arbitration, came to the conclusion that in the facts of that case, since only the venue was

Kuala Lumpur and it was not the "seat", the Courts in India had jurisdiction to entertain the challenge the award under section 34 of the Act. We

must mention here that in the case of *Hardy Exploration* the arbitration agreement / clause was completely silent on which law was to govern the arbitration agreement. This is clear from paragraph 30 of this decision where the arbitration clause has been reproduced.

46. On reading paragraph 39 of this decision (and as reproduced by us above), we think that the controversy before us is now completely put to rest.

In the facts of the present case, clause 15.1 clearly stipulates that the "place" of arbitration shall be New York or such other "place" as

agreed to by the parties. It is not in dispute that the arbitration was initiated by the Appellant in New York and arbitration took place in New York.

The award was also passed in New York. There was no condition precedent attached to the term "place" in clause 15.1. This being the case and

as set out by the Supreme Court in paragraph 39 of its decision in *Hardy Exploration*, the term "place" of arbitration would be equivalent to

"seat" of arbitration. We therefore find that even on the strength of this decision, the "seat" of arbitration in the facts before us was clearly

New York. To put it differently, the "seat" of arbitration was not in India but was outside India. This being the case, Part I of the Act was

clearly excluded.

47. As far as the reliance placed by Mr Dada on the decision of the Supreme Court in the case of *Sumitomo* is concerned, we find that this decision

has absolutely no application to the facts and circumstances of the present case. As rightly submitted by Mr Chinoy, in the case of *Sumitomo*, the

Supreme Court has held that upon the conclusion of the arbitration (that is on the passing of the award) the Arbitral Tribunal becomes *functus officio*

and the corresponding authority of the courts administering the curial law ceases. On aspects of enforcement and setting aside, they are entirely

governed by the law governing the arbitration agreement only. Firstly, we must mention that in the case of Sumitomo the Supreme Court was interpreting the provisions of the Arbitration Act, 1940 and not the provisions of the Arbitration and Conciliation Act, 1996, which in fact, are quite different from the earlier Arbitration Act. Secondly, the decision in Sumitomo has been discussed in great detail by the larger bench of the Supreme Court in the case of Hardy Exploration and the Supreme Court (in paragraph 11 thereof) has clearly held that the principles laid down in Sumitomo were in no way applicable to the concept of determination of jurisdiction. This has been again reiterated in paragraph 27 wherein it is held that Sumitomo has no applicability to a controversy under the 1996 Act. We therefore find that no assistance can be derived by Mr. Dada from the decision of the Supreme Court in the case of Sumitomo.

48. Even otherwise, assuming for the sake of argument that this judgment would apply, the same certainly does not fit into the facts and circumstances of the present case. Even assuming that the Curial Law ceases to apply after passing of the award, the Supreme Court in the case of Sumitomo has held that the law governing the arbitration agreement would continue to apply even after the passing of the award. In the facts of the present case, we have categorically found that the law governing the arbitration agreement was U.S. Law. This being the case, even if the ratio laid down in Sumitomo were to apply, in the facts of present case, we find that this judgment does not support the case of the appellant. We must point out that the Supreme Court in the case of EITZEN Bulk (in paragraph 34 thereof) has clearly laid down the law that once the party chooses the juridical seat of arbitration, the law applicable to said location / seat is automatically attracted and the law of that particular country would apply ipso jure. We, therefore, find that the reliance placed by Mr Dada on the decision of the Supreme Court in the case of Sumitomo is wholly misplaced.

49. Similarly we find that the reliance placed by Mr Dada on the decision of the Supreme Court in the case of NTPC Vs. Singer is also wholly misplaced. In fact this judgment of NTPC Vs. Singer was considered by the Supreme Court in Reliance II wherein the Court pointed out that the case of NTPC Vs. Singer was decided in the context of Section 9(b) of the Foreign Awards Act, 1961 which stipulates that the award made in respect of

the contract governed by Indian Law would not be considered a foreign award. The Supreme Court in Reliance II held that NTPC Vs. Singer was no

longer applicable as it did not give effect to the difference between the substantive law of the contract and the law that governed the arbitration. The

Supreme Court held that since the construction of Section 9(b) of Foreign Awards Act, 1961 led to the doctrine of concurrent jurisdiction, the 1996 Act,

while enacting Section 9(a) of the repealed Foreign Awards Act, 1961 (in Section 51 of the 1996 Act), was careful enough to omit Section 9(b) of the

1961 Act, which excluded the Foreign Awards Act, 1961 from applying to any award made on arbitration agreements governed by the Laws of India.

In these circumstances, we find that the reliance placed by Mr Dada on NTPC Vs. Singer is also wholly misconceived.

50. To sum it up in a nutshell, in the facts and circumstances of the present case, once the juridical seat of arbitration is outside India, and also

the law governing the arbitration agreement is Foreign Law, then clearly, Part-I of the Arbitration and Conciliation Act, 1996 is

impliedly excluded. This being the case, we find that the learned Single Judge was absolutely correct in holding that the award passed by the Arbitral

Tribunal, in the facts and circumstances of the present case, could not be challenged before this Court, under Section 34 of the Act.

51. In view of the foregoing discussion, we find no merit in this appeal. It is accordingly dismissed. However, in the facts and circumstances of the

case there shall be no order as to costs.