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UNION OF INDIA

v.

HARDY EXPLORATION AND PRODUCTION (INDIA) INC

(Civil Appeal No. 4628 of 2018)

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MAY 01, 2018

[R. K. AGRAWAL AND ABHAY MANOHAR SAPRE, JJ.]

Arbitration Law – International Commercial Arbitration – Award passed in respondent’s favour in an international commercial arbitration proceeding between the appellant and respondent (foreign company) – Application filed by appellant u/s.34, Arbitration and Conciliation Act, 1996 against the respondent challenging the legality of the award passed – Respondent raised objections inter alia that Indian Courts have no jurisdiction to entertain such application – Objection upheld by High Court – Issue as to when the arbitration agreement specifies the “venue” for holding arbitration sittings by the arbitrators but does not specify the “seat”, then on what basis and by which principle, the parties have to decide the place of “seat” for determining the applicability of laws of a particular country for deciding the post award arbitration proceedings – Held: Though, the question regarding the “seat” and “venue” for holding arbitration proceedings by the arbitrators arising under the Arbitration Agreement/International Commercial Arbitration Agreement is primarily required to be decided keeping in view the terms of the arbitration agreement itself, but having regard to the law laid down by Supreme Court in several decisions, this is a fit case to exercise power under Or.VI, r.2, Supreme Court Rules, 2013 and to refer to a larger Bench – Arbitration and Conciliation Act, 1996 – s.34 – Supreme Court Rules, 2013 – Or.VI, r.2.

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Directing the matter to be placed before the Hon’ble Chief Justice of India for constituting appropriate Bench, the Court

HELD: 1.1 Though, the question regarding the “seat” and “venue” for holding arbitration proceedings by the arbitrators arising under the Arbitration Agreement/International

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Commercial Arbitration Agreement is primarily required to be decided keeping in view the terms of the arbitration agreement itself, but having regard to the law laid down by this Court in several decisions by the Benches of variable strength, and further taking into consideration the submissions urged by the counsels for the parties and also keeping in view the issues involved in the appeal, which frequently arise in International Commercial Arbitration matters, this is a fit case to exercise power under Order VI Rule 2 of the Supreme Court Rules, 2013 and refer this case (appeal) to be dealt with by the larger Bench of this Court for its hearing. [Para 23][670-A-C]

National Thermal Power Corporation v. Singer Co. and Ors. (1992) 3 SCC 551 : [1992] 3 SCR 106 ; Sumitomo Heavy Industries Ltd. v. ONGC Ltd. and Ors. (1998) 1 SCC 305 : [1997] 6 Suppl. SCR 186 ; Sundaram Finance Ltd. v. NEPC India Ltd. (1999) 2 SCC 479 : [1999] 1 SCR 89 ; Bhatia International v. Bulk Trading S.A. and Anr. (2002) 4 SCC 105 : [2002] 2 SCR 411 ; Venture Global Engineering v. Satyam Computer Services Ltd. & Anr. (2008) 4 SCC 190 : [2008] 1 SCR 501 ; Indtel Technical Services Pvt. Ltd. v. W.S. Atkins Rail Ltd. (2008) 10 SCC 308 : [2008] 12 SCR 673 ; Bank of India & Anr. v. K. Mohan Das & Ors. (2009) 5 SCC 313 : [2009] 5 SCR 118 ; Citation Infowares Ltd. v. Equinox Corporation (2009) 7 SCC 220 : [2009] 6 SCR 737 ; State of Rajasthan & Anr. v. Ferro Concrete Construction (P) Ltd. (2009) 12 SCC 1 : [2009] 10 SCR 31 ; Videocon Industries Limited v. Union of India and Anr. (2011) 6 SCC 161 : [2011] 8 SCR 569 ; Dozco India Private Ltd. v. Doosan Infracore Co. Limited (2011) 6 SCC 179 : [2010] 12 SCR 259 ; Yograj Infrastructure Limited v. Ssang Yong Engineering and Construction Co. Limited (2011) 9 SCC 735 : [2011] 14 SCR 301 ; Bharat Aluminium Company v. Kaiser Aluminium Technical Services INC (2012) 9 SCC 552 : [2012] 12 SCR 327 ; Enercon (India) Ltd. & Ors. v. Enercon GMBH & Anr. (2014) 5 SCC 1 : [2014] 2 SCR 855 ; Reliance Industries Limited and Anr. v. Union of

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- A *India (2014) 7 SCC 603 : [2014] 6 SCR 456 ; Harmony Innovation Shipping Ltd. v. Gupta Coal India Ltd. & Anr. (2015) 9 SCC 172 : [2015] 2 SCR 697 ; Union of India v. Reliance Industries and Ors. (2015) 10 SCC 213 : [2015] 10 SCR 85 ; Bharat Aluminum Company v. Kaiser Aluminum Technical Services INC (2016) 4 SCC 126 : [2016] 1 SCR 364 ; Eitzen Bulk A/S & Ors. v. Ashapur Minechem Ltd. & Anr. (2016) 11 SCC 508 : [2016] 2 SCR 634 ; Imax Corporation v. E-City Entertainment(India) Pvt. Ltd. (2017) 5 SCC 331 : [2017] 4 SCR 833 ; Roger Shashoua and Ors. v. Mukesh Sharma & Ors. (2017) 14 SCC 722 – referred to.*
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- D *Naviera Amazonica Peruana S.A. v. Compania Internacional De Seguros Del Peru (1988) (1) Lloyd’s Law Reports 116 ; Hiscox v. Outhwaite (1992) 1 AC 562 ; Union of India vs. McDonnell Douglas Corpn. (1993) 2 Lloyd’s Law Rep. 48 ; C v. D (2007) EWCA Civ 1282 (CA); C v. D (2008) 1 Lloyd’s Law Rep 239 ; Braes of Doune Wind Farm (Scotland) Limited v. Alfred McAlpine Business Services Limited (2008) EWHC 426 (TCC) ; Shashoua and Ors. v. Sharma (2009) EWHC 957 (Comm.) ; Sulamerica Cia Nacional De Seguros S.A. & Ors. v. Enesa Engenharia SA & Ors. (2012) EWCA Civ 638 ; (1) Enercon GMBH (2) (India) Ltd. (2012) EWHC 3711 (Comm Wobben Properties GMBH v. Enercon); Govt. of India v. Petrocon India Ltd. (2016) SCC Online MYFC 35 – referred to.*
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Case Law Reference

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|---|---------------------|-------------|---------|
| | [1992] 3 SCR 106 | referred to | Para 16 |
| G | [1997] 6 Suppl. SCR | referred to | Para 16 |
| | [1999] 1 SCR 89 | referred to | Para 16 |
| | [2002] 2 SCR 411 | referred to | Para 16 |
| | [2008] 1 SCR 501 | referred to | Para 16 |
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UNION OF INDIA v. HARDY EXPLORATION AND
PRODUCTION (INDIA) INC

665

[2008] 12 SCR 673	referred to	Para 16	A
[2009] 5 SCR 118	referred to	Para 16	
[2009] 6 SCR 737	referred to	Para 16	
[2009] 10 SCR 31	referred to	Para 16	B
[2011] 8 SCR 569	referred to	Para 16	
[2010] 12 SCR 259	referred to	Para 16	
[2011] 14 SCR 301	referred to	Para 16	
[2012] 12 SCR 327	referred to	Para 16	C
[2014] 2 SCR 855	referred to	Para 16	
[2014] 6 SCR 456	referred to	Para 16	
[2015] 2 SCR 697	referred to	Para 16	D
[2015] 10 SCR 85	referred to	Para 16	
[2016] 1 SCR 364	referred to	Para 16	
[2016] 2 SCR 634	referred to	Para 16	E
[2017] 4 SCR 833	referred to	Para 16	
(2017) 14 SCC 722	referred to	Para 16	

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4628
of 2018.

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From the Judgment and Order dated 27.07.2016 of the High Court
of Delhi at New Delhi in FAO No. 59 of 2016.

Tushar Mehta, ASG, K.R. Sasiprabhu, Rajat Nair, Somiran Sharma,
Srijan Sinha, Ms. Kanu Agarwal, Advs. for the Appellant.

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Ameet Naik, Rishi Agrawala, Abhishek Kale, Harshwardan Jha,
Karan Luthra, Ms. Devika Mohan, E.C. Agrawala, Advs. for the
Respondent.

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- A The Judgment of the Court was delivered by
ABHAY MANOHAR SAPRE, J. 1. Leave granted.
- B 2. This appeal arises from the final judgment and order dated 27.07.2016 passed by the High Court of Delhi at New Delhi in FAO No.59 of 2016 whereby the Division Bench of the High Court dismissed the appeal filed by the Union of India (appellant herein) challenging the order dated 09.07.2015 passed by the Single Judge in OMP No.693 of 2013 and order dated 20.01.2016 in Review Petition No.400 of 2015 in OMP No.693 of 2013.
- C 3. In order to appreciate the controversy involved in the appeal, few relevant facts, which lie in a narrow compass, need to be stated hereinbelow.
- D 4. This appeal arises out of the proceedings (OMP 693/2013) filed by the appellant (Union of India) against the respondent-Company under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “the Act”) wherein the appellant had challenged the legality, validity and correctness of the award made by the arbitrators in respondent’s favour in one international commercial arbitration proceeding between the appellant (Union of India) and the respondent (foreign company).
- E 5. The respondent contested the appellant’s application by raising several objections. One such preliminary objection, which went to the root of the application, was in relation to the maintainability of appellant’s application filed under Section 34 of the Act in Courts in India.
- F 6. According to the respondent, the Indian Courts have no jurisdiction to entertain the appellant’s application filed under Section 34 of the Act to challenge the legality and correctness of an award in question.
- G 7. The Single Judge by order dated 09.07.2015 upheld the respondent’s preliminary objection and held that keeping in view the terms of the agreement in question coupled with the law laid down by this Court in several decisions governing the issues arising in the case, Indian Courts have no jurisdiction to entertain the application filed by the appellant under Section 34 of the Act to question the legality and correctness of the award in question and accordingly dismissed the appellant’s application as being not maintainable in Indian Courts.
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8. Since the appellant's application was dismissed on the ground of lack of jurisdiction of the Indian Courts, the Single Judge did not consider it necessary to decide the issues arising in the case on the merits. A

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

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

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

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

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

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

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

Foreign Cases: Naviera Amazonica Peruana S.A. vs. Compania Internacional De Seguros Del Peru (1988) (1) Lloyd's Law Reports 116, **Hiscox vs. Outhwaite** (1992) 1 AC 562, **Union of**

- A **India vs. McDonnell Douglas Corpn.** (1993) 2 Lloyd's Law Rep. 48, **C vs. D** (2007) EWCA Civ 1282 (CA), **C vs. D** (2008) 1 Lloyd's Law Rep 239, **Braes of Doune Wind Farm (Scotland) Limited vs. Alfred McAlpine Business Services Limited** (2008) EWHC 426 (TCC), **Shashoua and Ors. vs. Sharma** (2009) EWHC 957 (Comm.),
- B **Sulamerica Cia Nacional De Seguros S.A. & Ors. vs. Enesa Engenharia SA & Ors.**, (2012) EWCA Civ 638, **(1) Enercon GMBH (2) Wobben Properties GMBH vs. Enercon (India) Ltd.** (2012) EWHC 3711 (Comm), **Govt. of India vs. Petrocon India Ltd.** (2016) SCC Online MYFC 35.
- C **Indian Cases: National Thermal Power Corporation vs. Singer Co. And Ors.** (1992) 3 SCC 551, **Sumitomo Heavy Industries Ltd. vs ONGC Ltd. and Ors.** (1998) 1 SCC 305, **Sundaram Finance Ltd. vs. NEPC India Ltd.** (1999) 2 SCC 479, **Bhatia International vs. Bulk Trading S.A. and Anr.**(2002) 4 SCC 105, **Venture Global Engineering vs. Satyam Computer Services Ltd. & Anr.** (2008) 4 SCC 190, **Indtel Technical Services Pvt. Ltd. vs. W.S. Atkins Rail Ltd.**, (2008) 10 SCC 308, **Bank of India & Anr. vs. K. Mohan Das & Ors.**, (2009) 5 SCC 313, **Citation Infowares Ltd. vs. Equinox Corporation** (2009) 7 SCC 220, **State of Rajasthan & Anr. vs. Ferro Concrete Construction (P) Ltd.** (2009) 12 SCC 1, **Videocon Industries Limited vs. Union of India and Anr.** (2011) 6 SCC 161,
- E **Dozco India Private Ltd. vs. Doosan Infracore Co. Limited** (2011) 6 SCC 179, **Yograj Infrastructure Limited vs. Ssang Yong Engineering and Construction Co. Limited** (2011) 9 SCC 735, **Bharat Aluminium Company vs. Kaiser Aluminium Technical Services INC** (2012) 9 SCC 552, **Enercon (India) Ltd. & Ors. vs. Enercon GMBH & Anr.** (2014) 5 SCC 1, **Reliance Industries Limited and Anr. Union of India** (2014) 7 SCC 603, **Harmony Innovation Shipping Ltd. vs. Gupta Coal India Ltd. & Anr.**, (2015) 9 SCC 172, **Union of India vs. Reliance Industries and Ors.**(2015) 10 SCC 213, **Bharat Aluminum Company vs. Kaiser Aluminum Technical Services INC** (2016) 4 SCC 126, **Eitzen Bulk A/S & Ors. vs. Ashapur Minechem Ltd. & Anr.** (2016) 11 SCC 508, **Imax Corporation vs E-City Entertainment(India) Pvt. Ltd.** (2017) 5 SCC 331, **Roger Shashoua and Ors. vs. Mukesh Sharma & Ors.**, 2017 (14) SCC 722.
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17. The argument of both the learned senior counsel mainly centered around to one question which, in our opinion, does arise in the appeal, namely, when the arbitration agreement specify the “venue” for holding the arbitration sittings by the arbitrators but does not specify the “seat”, then on what basis and by which principle, the parties have to decide the place of “seat” which has a material bearing for determining the applicability of laws of a particular country for deciding the post award arbitration proceedings.

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

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

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

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

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

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

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

Divya Pandey

Directions to place the matter before the Hon’ble CJI for constituting appropriate Bench.