IN THE SUPREME COURT OF INDIA

ORDINARY ORIGINAL CIVIL JURISDICTION

**ARBITRATION APPLICATION No.16 of 2006**

M/S. Indtel Technical Services
Pvt.Ltd. ...Appellant

Vs.

W.S. Atkins Rail Ltd. ...Respondents

**O R D E R**

1. By a Memorandum of Understanding, hereinafter referred to as "the Memorandum", entered into between the appellant and the respondent on 11th June, 2002, the parties agreed to collaborate on an exclusive basis for jointly preparing and submitting their tender for work associated with the designing, manufacturing, supply,

installation, test and commissioning contract for the Indian Railways Crashworthiness Project. Pursuant thereto the parties jointly prepared and submitted a tender signed by both the parties on 30.9.2002 in response to a bid invitation by RITES Limited, a Public Sector Undertaking of the Ministry of Railways, on 30.9.2002.

2. After submission of such bid the parties were invited to call upon the respondent on 29.10.2002 for contract negotiation in India, but without any valid or justifiable reason the respondent terminated the Memorandum on 12.11.2002 and on 15.11.2002 unilaterally withdrew the joint bid submitted to RITES without any reference to the applicant. According to the applicant, some of the other terms of the Memorandum dated 11.6.2002 were also breached by the respondent which impelled the applicant to address a letter to the respondent on 23.6.2003 calling upon it to

explain the various defaults committed by it. A request was also made to the respondent to enter into a dialogue to work out the fair level of compensation for the losses suffered by the applicant on account of such breach. The allegations contained in the letter were denied by the respondent by its reply dated 20.8.2003. Several letters were thereafter exchanged between the parties culminating in a legal notice being sent on behalf of the applicant to the respondent to compensate the applicant for the losses incurred by it on account of the unlawful acts of the respondent. The response of the respondent to the legal notice was one of denial and assertion that the respondent had acted fairly and properly in the matter.

3. Since all attempts made by the applicant, including resolution of the dispute through an alternate dispute resolution process and mediation, proved to be abortive, the applicant ultimately filed the present application for the appointment of a sole Arbitrator under Section

11(9) of the Arbitration Act, 1996, as per clause 13(2) of the Memorandum of Understanding dated 11th June, 2002. Inasmuch as, one facet of the dispute between the parties involves the wording of the said clause of the Agreement, the same is reproduced hereinbelow for the sake of reference:

> "CLAUSE 13 – **SETTLEMENT OF DISPUTES**
>
> 13.**1.** This Agreement, its construction, validity and performance shall be governed by and constructed in accordance with the laws of England and Wales;
>
> 13.2 Subject to Clause 13.3 all disputes or differences arising out of, or in connection with, this Agreement which cannot be settled amicably by the Parties shall be referred to adjudication;
>
> 13.3 If any dispute or difference under this Agreement touches or concerns any dispute or difference under either of the Sub Contract Agreements, then the Parties agree that such dispute or difference hereunder will be referred to the adjudicator or the courts as the case may be appointed to decide the dispute or difference under the relevant Sub Contract Agreement and the Parties hereto agree to abide by

> such decision as if it were a decision under this Agreement."

4. On behalf of the appellant company, Mr. S.C. Gupta, learned advocate, submitted that although in the Memorandum the law which was to apply to the construction and performance of the agreement had been mentioned, the venue for such adjudication or arbitration had not been stipulated in the agreement since the choice of venue has obviously been left to the parties. It was submitted that primarily two questions were required to be answered in this matter, namely,:

(i) Whether clauses 13.2 and 13.3 of the Memorandum of Understanding can be construed to be an arbitration agreement; and

(ii) Whether having regard to clause 13.1 of the Memorandum of Understanding indicating that the construction, validity and performance of the agreement would be governed by and constructed in accordance with laws of England and Wales, this Court would have jurisdiction to appoint an Arbitrator under Section 11 of the Arbitration Act, 1996.

5. It was submitted that whenever the jurisdiction of the domestic courts is invoked, the courts have to look to their own laws to see whether they have jurisdiction to take up such matter. It was contended that since in the instant case an application had been made under Section 11 of the Arbitration and Conciliation Act, 1996, it is the said law which has to be treated as the relevant Indian Municipal Law applicable to the instant case.

6. Mr. Gupta urged that a three-Judge Bench of this Court had in Bhatia International vs. Bulk Trading S.A, [2002 (4) SCC 105] held that Part-I of the Arbitration and Conciliation Act, 1996, applies both to domestic and international arbitrations, irrespective of whether the seat of arbitration is in India or not. It was urged that while the present Memorandum was undoubtedly an International Commercial Arbitration, Part-I of the aforesaid Act would still apply thereto and this Court would have

jurisdiction to entertain the application made under Section 11 of the aforesaid Act.

7. It was also urged that, although, the parties had decided that the law relating to the working or an understanding of the Agreement was to be the law of England and Wales, there is nothing in the Memorandum to warrant a conclusion that the seat of arbitration is to be outside India in the Courts of England and Wales or that the parties had mutually excluded the application of any of the provisions of Part-I of the aforesaid Act to the Agreement. It was also submitted that by virtue of the Memorandum, the parties thereto had not ousted the jurisdiction of this Court nor had any express intention to that effect been included in the said Memorandum.

8. Mr. Gupta contended that even with reference to the laws of England and Wales, which is the proper law governing the Arbitration Agreement, the Courts of England and Wales do not have

exclusive jurisdiction to appoint an Arbitrator in the instant dispute having regard to the provisions of Sections 2(f) and 2(8) of the Arbitration and Conciliation Act, 1996. Referring to some of the provisions of the (English) Arbitration Act, 1996, and, in particular, Section 2 thereof, Mr. Gupta submitted that some of the sections of the Act would apply to arbitration proceedings even if the seat of arbitration is outside England and Wales or the Northern Islands, or if no seat is designated or determined, as in the instant case. According to Mr. Gupta, even though the present Arbitration Agreement was to be governed by the Laws of England and Wales, according to the choice of the parties to the Memorandum, the Venue for holding the arbitration did not have to be situated within the jurisdiction of the Courts of England and Wales. Mr. Gupta urged that an almost identical situation had arisen in the case of Bhatia International (supra), where an application made by the respondent therein to

the Third Additional District Judge, Indore, M.P., was under Section 9 of the Arbitration and Conciliation Act, 1996, for grant of certain interim reliefs to restrain the parties from alienating, transferring and creating third party rights, disposing of, dealing with and/or selling their business assets and properties till the matter was decided by the Court. Bhatia International raised a plea as to the maintainability of the said application which was dismissed by the learned Additional District Judge upon holding that the Court at Indore had jurisdiction to entertain the application filed by Bulk Trading S.A. under Section 9 of the above Act and that the same was maintainable.

9. The order of the learned Third Additional District Judge was challenged before the M.P. High Court, Indore Bench, by Bhatia International by way of a writ petition, which was also dismissed by the High Court. The Judgment and Orders, both of the learned

Additional District Judge, Indore, and the Madhya Pradesh High Court, Indore Bench, were challenged before this Court by Bhatia International and it was submitted on its behalf that Part-I of the Arbitration and Conciliation Act, 1996, applies only to arbitrations where the place of arbitration is in India, as has been clearly indicated in Sub-section (2) of Section 2 of the said Act. In the said case, it was also urged on behalf of Bhatia International that Section 2(i)(f) of the Arbitration and Conciliation Act, 1996, defines "International Commercial Arbitration" and that such arbitration could take place either in India or outside India. The submissions made on behalf of Bhatia International were accepted by this Court upon a finding that, although, Section 2 (2) of the Arbitration and Conciliation Act, 1996, provides that Part-I of the Act would apply where the place of arbitration is in India, it did not provide that Part-I would not apply where the place of arbitration is not in

India. It was also held that it was nowhere provided that Part-I of the aforesaid Act would not apply to arbitrations taking place outside India. Accordingly, this Court concluded as follows :-

> "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."

10. Mr. Gupta submitted that all contracts which provide for arbitration and contain a foreign element may involve three relevant systems of law, which include the law governing the substantive contract or the proper law of

contract, or the law governing the agreement to arbitrate, which is the proper law of the arbitration agreement, or the law governing the conduct of the arbitration proceedings which is the curial law. It was submitted that in the present case, the parties had mutually chosen the law of England and Wales to be the proper law of contract and it could, therefore, be contended that the proper law of the arbitration agreement is also the law of England and Wales. He, however, urged that there was nothing in the agreement to indicate that the parties had agreed as to the venue of arbitration. He submitted that the law which was to govern the conduct of arbitration or the curial law, not having been indicated by the parties, the same could be determined only by the Arbitrator. He submitted that when the Arbitrator to be appointed in the instant case, chooses the seat of arbitration, the law relating thereto will govern the law of the conduct of the arbitration proceedings. Mr. Gupta urged that the above

proposition finds full support in the decision of this Court in National Thermal Power Corporation vs. Singer Company & Anr. [1992 (3) SCC 551] where in paragraph 28, it has been observed that questions relating to the jurisdiction of the Arbitrator to decide a particular issue relating to the continuance of an arbitration agreement, its validity, effect and interpretation are determined exclusively by the proper law of the arbitration agreement. The procedural power and duties of the Arbitrator are regulated in accordance with the rules chosen by the parties to the extent that those rules are applicable and sufficient and are not repugnant to the procedural law and practice of the seat of arbitration. It was further observed that the concept of party autonomy in international contracts is respected by all systems of law so far as it is not incompatible with the proper law of the contract or the mandatory procedural rules of the place

where the arbitration is agreed to be conducted or any overriding public policy.

11. It was submitted that since in the instant case the seat of arbitration would have to be determined by the Arbitrator, once he was appointed, the question as to which law would govern the conduct of the arbitration proceedings should not be decided at this stage.

12. On behalf of the appellant it was lastly urged that clauses 13.2 and 13.3 of the Memorandum of Understanding clearly indicates that the intention of the parties to the said Memorandum of Understanding was to have their disputes resolved by arbitration although the expression used in the said clauses is “adjudication”. According to Mr. Gupta, use of the said expression did not detract from the intention of the parties to have their disputes resolved by arbitration. He submitted that the expression “adjudication” had been defined in various legal

dictionaries to mean the act of adjudicating; the process of trying and determining a case judicially; the application of the law to the facts and an authoritative declaration of the result. Learned counsel submitted that in Black's Law Dictionary the expression "adjudication" is defined as being the legal process of resolving of a dispute or the process of judicially deciding a case. Learned counsel submitted that the expressions 'adjudicate' and 'adjudge' have also been defined to mean to rule upon and award judicially.

13. Mr. Gupta urged that having regard to the decision of this Court in Bhatia International (supra), it is beyond question that Part-I of the Arbitration Act, 1996, would also be attracted to the instant case and the application made under Section 11 of the said Act was, therefore, maintainable.

14. Mr. Gupta's submissions that although the proper law of the arbitration agreement had been stipulated in Clause 13.1 to be the laws of England and Wales, such provision did not automatically vest jurisdiction only on the Courts of England and Wales to deal with and decide all issues arising out of arbitration agreement, was denied by Mr. Parag Tripathi, learned Senior counsel for the respondent. It was urged that an application under Section 11 of the Arbitration and Conciliation Act, 1996, is nothing but a step in performance of the arbitration clause and since the performance of the Memorandum is to be governed by the laws of England and Wales, according to the choice of the parties, it is the procedural law of England and Wales which has to be applied to the performance of the arbitration agreement as well. Referring to the decision in the National Thermal Power Corporation case (supra), which had also been referred to by Mr. Gupta, Mr. Tripathi submitted that in the said decision the

views of jurists such as Dicey, Mustill and Boyd and Russel had been reiterated in support of the contention that the overriding principle is that the courts of the country, whose substantive laws govern the arbitration agreement, are competent courts in respect of all matters arising under the arbitration agreement, and the jurisdiction exercised by the courts of the seat of arbitration is merely concurrent and not exclusive and strictly limited to the matter of procedure.

15. Mr. Tripathy submitted that the decision in the aforesaid case supports the proposition that when the parties to the contract, do not express any choice with regard to the law governing the contract or the arbitration agreement in particular, a presumption has to be drawn that the parties intended that the proper law of the contract as well as the law governing the arbitration agreement would be the same as the law of the country which is the seat of

arbitration. But when the parties expressly choose the proper law of the contract, as in the instant case, in the absence of a clear intention such law must govern the arbitration agreement also though it is collateral and ancillary to the main contract.

16. Mr. Tripathi urged that similarly where the seat of arbitration is indicated, then, unless there is an indication to the contrary, it will be deemed that the place where the proper law governing the arbitration proceedings is in force is the place chosen by the parties to be the seat of arbitration as well. Learned counsel referred to the decision of the Court of Appeal in Naviera Amazonica Peruana S.A. vs. Compania internacional De Seguros Del Peru, reported in Lloyd's Law Reports [1988 (Vol.I) 116), wherein it was held that while interpreting an arbitration clause the use of the phrase "arbitration agreeing to the conditions of laws of London" means that the

arbitration was to be held in London, not by the implication of some additional term, but by giving to those words their ordinary commercial meaning.

17. Mr. Tripathi submitted that in this case also since the parties had stipulated the law which was to govern the Memorandum, but had not indicated the seat of arbitration, in keeping with the consistent views expressed by the Courts and jurists, it must be held that the seat of arbitration must necessarily be the Courts of England and Wales. Mr. Tripathy submitted that consequently this court has no jurisdiction to entertain the applicant's petition under Section 11(9) of the Arbitration and Conciliation Act, 1996, and the same was liable to be dismissed.

18. Mr. Tripathy also urged that the expression "may be referred to arbitration" or "can be referred to arbitration" have consistently been held by the Indian Courts to be antithetical to the

concept of arbitration. Reference was made to various decisions on this count as well. Regarding use of the expression "adjudication", Mr. Tripathy submitted that a final decision arrived in such adjudication proceedings would not make it a valid arbitration agreement. He urged that unless it is the clear intention of the parties that arbitration is to be the only forum for adjudication of disputes, the requirement of a valid arbitration clause is not fulfilled.

19. In support of his aforesaid submission, Mr. Tripathy referred to decisions of various High Courts and also the decision of this Court in Jagdish Chander v. Ramesh Chander, [2007 (5) SCC 719], wherein while dealing with the provisions and scope of Sections 7, 8 and 11 of the Arbitration and Conciliation Act, 1996, with reference to Section 89 of the Code of Civil Procedure, this Court held that the existence of an arbitration agreement, as defined under

Section 7 of the above Act, is a condition precedent for exercise of power for appointment of the Arbitrator/Arbitral Tribunal, under Section 11 of the aforesaid Act. Mr. Tripathy pointed out that while arriving at such conclusion, this Court laid down certain tests to decide as to what would constitute an arbitration agreement, namely, (i) that the intention of the parties to enter into an arbitration agreement would have to be gathered from the terms of the Agreement; (ii) that even if the words "arbitration" and "arbitrator" are not used in a clause relating to settlement of disputes with reference to the process of such agreement or with reference to the private tribunal which is to adjudicate upon the disputes, it does not detract from the clause being an arbitration agreement if it has the attributes and elements of an arbitration agreement. Conversely, the mere use of the words 'arbitration' or 'arbitrator" in a clause will not make it an arbitration agreement, if it

requires or contemplates a further or fresh consent of the parties for reference to arbitration.

20. Mr.Tripathy submitted that any ambiguity and vagueness in the arbitration clause would render the same invalid as had been held by the Calcutta High Court in (i) ITC Classic Finance Ltd. vs. Grapco Mining and Co. Ltd, [AIR 1997 Cal. 397] and (ii) Teamco Private Ltd. vs. T.M.S. Mani, [AIR 1967 Cal. 168]. Mr. Tripathy urged that both clauses 13.2 and 13.3 are somewhat vague on the question of reference and the finality of the decision in the adjudication proceedings.

21. It was contended that the expressions "construction, validity and performance" used in clause 13.3 of the Memorandum is a decisive indication that the intention of the parties was to give exclusive jurisdiction to the procedural

law of England and Wales even in respect of the appointment of an Arbitrator.

22. In concluding, Mr. Tripathy attempted to distinguish the decision in Bhatia International's case (supra) by submitting that the law laid down in the said decision was not attracted to the facts of the instant case as in the said decision it had only been held that Part-I of the Arbitration and Conciliation Act, 1996, would apply to International Commercial Arbitrations unless there was a specific agreement either expressed or implied to the contrary. Mr. Tripathy contended that since the parties had clearly expressed their intention in clause 13(i) of the Memorandum of Understanding that the law of England and Wales was to be the proper law in respect of the Memorandum, it must necessarily follow that it was the intention of the parties that the arbitral proceedings should also be subject to the jurisdiction of the Courts of England and Wales.

23. It appears that after the conclusion of the hearing of this case, another decision of the House of Lords in Lesotho Highlands Development Authority vs. Inpregilo SpA, [2005 UKHL 43], came to the notice of the respondent where a reference to the juridical seat of the arbitration had been made and it was observed that the determination of the juridical seat of arbitration as England is the gateway to the powers of the Tribunal spelt out in many provisions of the English Arbitration Act, 1996.

24. Although, the matter has been argued at great length and Mr. Tripathy has tried to establish that the decision of this Court in Bhatia International's case (supra) is not relevant for a decision in this case, I am unable to accept such contention in the facts and circumstances of the present case. It is no doubt true that it is fairly well-settled that when an arbitration agreement is silent as to the law

and procedure to be followed in implementing the arbitration agreement, the law governing the said agreement would ordinarily be the same as the law governing the contract itself.

The decisions cited by Mr. Tripathy and the views of the jurists referred to in the National Thermal Power Corporation case (supra) support such a proposition. What, however, distinguishes the various decisions and views of the authorities in this case is the fact that in the Bhatia International case (supra) this court laid down the proposition that notwithstanding the provisions of Section 2(2) of the Arbitration and Conciliation `Act, 1996, indicating that Part-I of the said Act would apply where the place of arbitration is in India, even in respect of International Commercial agreements, which are to be governed by laws of another country, the parties would be entitled to invoke the provisions of Part-I of the aforesaid Act and consequently the application made under Section 11 thereof would be maintainable.

25. The decision in the Bhatia International case (supra) has been rendered by a Bench of Three Judges and governs the scope of the application under consideration, as it clearly lays down that the provisions of Part-I of the Arbitration and Conciliation Act, 1996, would be equally applicable to International Commercial arbitrations held outside India, unless any of the said provisions are excluded by agreement between the parties expressly or by implication, which is not so in the instant case.

26. Furthermore, from the wording of clause 13.2 and clause 13.3 I am convinced, for the purpose of this application, that the parties to the Memorandum intended to have their disputes resolved by arbitration and in the facts of this case the petition has to be allowed.

27. Accordingly, Justice B.N. Srikrishna, is appointed as sole arbitrator to arbitrate upon

the disputes which have arisen betweens the parties hereto as set out in sub-paragraphs (a) to (h) of paragraph 19 of the present application. The sole Arbitrator will be entitled to decide upon the procedure to be adopted in the arbitral proceedings, the sittings of the arbitral proceedings and to also settle his fees in respect thereof. The sole Arbitrator shall make positive efforts to complete the arbitration proceedings and pass his award with expedition.

**……J.**

**(ALTAMAS KABIR)**

**New Delhi**

**Dated: 25.08.2008**