HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

S.B. Arbitration Application No. 10/2020

Barminco Indian Underground Mining Services Llp, Through Its General Manager, Commercial And Legal, Having Its Principal Office At - 81/1, Adchini, Sri Aurobindo Marg, New Delhi, Delhi, 110017, Email - Craig.earnshaw@ Barminco.com.au.

----Petitioner

Versus

Hindustan Zinc Limited, Having Its Registered Office At - Yashad Bhawan, Udaipur - 313004, Rajasthan.

----Respondent

For Petitioner(s) : Mr. Nakul Diwan, Sr. Advocate assisted by Mr. Kunal Bishnoi

For Respondent(s) : Mr. Gopal Jain, Sr. Advocate assisted by Dr. Sachin Acharya

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JUSTICE DINESH MEHTA

O R D E R

Reserved on :: 08/07/2020

Pronounced on :: 20/07/2020

Reportable

1. Present application under Section 9 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as "the Act of 1996") has been preferred by the applicant inter-alia praying that the respondent be restrained from invoking or encashing bank

guarantee of rupees five crores, which it had furnished pursuant to contract No.5100024963, executed with the respondent on 11.03.2019.

2. While issuing pre-admission notice on 14.5.2020, a Coordinate Bench of this Court passed an interim order and restrained the respondent from invoking above referred bank guarantee of rupees five crores.

3. A preliminary reply has been filed by the respondent Company whereby objection about maintainability of the present application before the High Court and following ancillary issues have been raised:

> *"(a) the present matter is not an "international Commercial arbitration" under Section 2(1)(f) of the Arbitration and Conciliation Act, 1996;*
>
> *(b) the Applicant has suppressed the fact that the Applicant is an Indian incorporated body;*
>
> *(c) the allegations of fraud against the Respondents are misplaced;*
>
> *(d) the scope of interference by Courts in matters relating to involving bank guarantee is very limited;*
>
> *(e) the Applicant is pursuing divergent stances before this Hon'ble Court and before the Arbitral Tribunal; and*
>
> *(f) the Applicant should have first tried to settle the matter before initiating arbitration proceedings."*

4. Since the objection regarding the maintainability of the present application goes to the very root of the matter and jurisdiction of this Court, it was thought appropriate to decide objections enumerated in clause (a), (b) & (f) para No.3 above, before adverting to other aspects/merit of the application.

5. Mr. Gopal Jain, learned senior counsel, led Dr. Sachin Acharya on behalf of the respondent Company and submitted that the application at hands filed by the applicant is liable to be dismissed for want of jurisdiction, as the jurisdiction to hear the application under Section 9 of the Act of 1996 lies with the Principal Civil Court at Udaipur and not with the High Court.

6. Though maintainability before the High Court was the sheet anchor, other subsidiary and supplementary contentions (not touching upon the merits of the case) were also heard.

7. For the purpose of deciding the preliminary objection, the factual canvas, shorn of unwarranted details is laid hereinunder:-

Facts in a Nutshell

(7.1) The applicant Company - Barminco Indian Underground Mining Services (or "Barminco") is a Limited Liability Partnership (hereinafter referred to as "the LLP"), registered under Limited Liability Partnership Act, 2008 (hereinafter referred to as "the Act 2008" or "LLP Act").

(7.2) On 11.03.2019, the applicant entered into a contract to provide its services for development of Rampura Agucha Mine of the respondent – Hindustan Zinc Limited (HZL).

(7.3) According to the applicant, it had duly deployed its resources, manpower and machinery in terms of the contract with a view to perform the work awarded to it.

(7.4) During the course of performance of the work, applicant raised certain invoices, which were duly paid by the respondent – HZL, whereafter, the invoices for February, 2020 and March, 2020

and the claim raised under the "Force Majeure" and "Change In Law Clauses" of the contract were not paid.

(7.5) As per the averments made in the application, citing that the Contract in question was "financially unviable", the respondent-HZL sought re-negotiation of the terms of the Contract and requested the applicant to reduce the scope of work by 50%.

(7.6) As the applicant refused to accept such offer, the respondent, vide letter dated 19.04.2020, unilaterally terminated the contract w.e.f. 01.05.2020, alleging that the applicant had failed to honour Clause 15.3 of the Contract.

(7.7) The applicant thereafter demanded unpaid amount (Rs.32,17,30,998/-) towards the work already done from the month of January, 2020 to April, 2020.

(7.8) It is alleged by the applicant that as a counter-blast of the applicant's claim, the respondent Company (HZL) vide its letter dated 29.04.2020, raised a claim of Rs.49.69 crores against it.

(7.9) Numerous e-mails were exchanged between the applicant and the respondent, which, for the present purposes are not of much relevance.

(7.10) Apprehending that the respondent – HZL would invoke the bank guarantee of rupees five crores furnished by it, the applicant preferred the present application under Section 9 of the Act of 1996 inter-alia seeking injunction, while apprising the Court that there is an arbitration clause in the form of Clause-16 of the General Terms and Conditions of the Contract, which provides for dispute settlement mechanism through arbitration.

(7.11) Clause 16 reads thus :

"16. ARBITRATION

Any dispute or difference whatsoever arising between the parties out of or relating to the interpretation, meaning, scope, operation or effect of this Agreement or the existence, validity, breach or anticipated breach thereof or determination and enforcement of respective rights, obligations and liabilities of the parties thereto shall be amicably settled first by way of a meeting between senior management representatives of each party. If the dispute is not conclusively settled within a period of twenty-one (21) days from the date of commencement of the meeting between senior management representatives or such further period as the parties shall agree in writing, the dispute shall be referred to and finally resolved by arbitration administered by Singapore International Arbitration Centre ("SIAC") in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ("SIAC" Rules") for the time being in force. The arbitration shall be conducted as follows:

(i) The Arbitration shall be conducted by a forum of three arbitrators with one arbitrator nominated by each Party and the presiding arbitrator selected by the nominated arbitrators.

(ii) The language of the mediation and arbitration proceedings shall be English. The seat of arbitration shall be Singapore.

(iii) The award made in pursuance thereof shall be final and binding on the parties."

(7.12) It is asserted in the application that as the Seat of the arbitration is located outside India, it is an International Arbitration, for which the applicant has approached the High Court invoking Section 9 of the Act of 1996 and applied for measures.

8. The applicant has made categorical averments regarding territorial jurisdiction in para-104, 105 and 106 of the application, more particularly jurisdiction of the High Court in order to

maintain the application before the High Court, which are reproduced hereinfra :-

> *"104. The Applicant submits that under with Clause 17 of the Contract, the parties have agreed to the jurisdiction of the Courts at Udaipur. The applicant further submits that the Contract was executed at Udaipur. Further, the Respondent is also situated at Udaipur. Accordingly, a part of the cause of action has arisen at Udaipur.*
>
> *105. The Applicant further submits that the arbitration between the parties herein would be an International Commercial Arbitration in view of the fact that seat of arbitration it outside India i.e. Singapore. Accordingly, in view of Section 2(1)(e)(ii) of the Act, the Applicant has to approach this Hon'ble Court, being the High Court in exercising ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject matter of the arbitration. Section 2(1)(e)(ii) of the Act is as follows :*
>
> *"Court" means-*
>
> *(i) …*
>
> *(ii) in the case of international commercial arbitration, the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, and in other cases, a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court;*
>
> *106. Therefore, the High Court of Rajasthan at Jodhpur would have the necessary territorial jurisdiction."*

Respondent's contentions:

9. Respondent's attack regarding maintainability of the present application mainly rested on four limbs:-

(I) Non-disclosure of material fact*:*

10. Mr. Gopal Jain, learned senior counsel at the outset contended that the present application has been craftily drafted

and not only the fact that the applicant is an LLP registered under the Indian laws has been suppressed, but the certificate of incorporation has also been withheld, with a motive to mislead the Court and further with a purpose of portraying itself to be a body corporate, registered outside India.

11. Mr. Jain fervently argued that had the applicant been bonafide, it would have made a clear disclosure of the fact that it is an LLP, registered under the Act of 2008 – an Indian enactment. It should have ideally placed its certificate of incorporation also, added learned senior counsel. Had it been done, this Court would have easily deciphered or realized that none of the parties are incorporated out of India and thus, would have refrained from passing any order, because the High Court does not have the jurisdiction to hear an application under Section 9 in light of the provisions contained in Section 2(1)(f)(ii) of the Act of 1996.

(II) No negotiation prior to invoking Section 9 *:*

12. Second submission regarding maintainability of the present application under Section 9 of the Act of 1996 was made by learned senior counsel that since no endeavor to settle the dispute amicably or through negotiation was made by the applicant, not only invocation of arbitration as per Clause 16 but the present application under Section 9 also is pre-mature.

13. Advancing his argument further, learned counsel invited Court's attention towards Clause 16 of the Contract and submitted that as per the Arbitration Clause in question, any dispute or difference arising between the parties is required to be first amicably settled by way of meeting between Senior Management

Representatives of each party and in case the dispute does not get settled within a period of 21 days from the date of commencement of the meeting, then only it can be referred to and finally resolved by arbitration.

14. Asserting that the applicant Company has not made any endeavor to get the dispute settled amicably or through negotiation or by way of meeting; with a tinge of disappointment and astonishment, it was submitted by Mr. Jain that much before invocation of the arbitration clause, the applicant company has approached rather rushed to this Court, in an over-anxiety of obtaining interim order, apprehending invocation of bank guarantee.

(III) Order in case of M/s Halliburton Offshore Services Inc. Vs. Vedanta Limited & Anr. vacated :

15. Contending that order dated 20.04.2020 of the Delhi High Court in Halliburton's case had been the basis of granting injunction in applicant's favour, when the matter was first heard by Coordinate Bench of this Court on 14.05.2020, Mr. Jain eagerly apprised the Court that the same has later been vacated by the said High Court on 30.05.2020.

16. It was argued that over-arching reliance, which was placed by the applicant Company on the order dated 20.04.2020 of the Delhi High Court has lost its very existence as the same has been vacated. He went ahead to submit that since the very basis or reason for which the interim order came to be passed in applicant's favour, has ceased to exist, the interim order dated 14.05.2020 granted in applicant's favour should also be vacated.

(IV) Jurisdiction does not vest in the High Court:

17. Mr. Jain, learned senior counsel appearing for the Objector, argued that the arbitration in question cannot be treated to be an International Commercial Arbitration by any stretch of imagination or interpretation, as none of the parties – neither Barminco nor HZL, are a body corporate incorporated in a Country other than India.

18. He invited Court's attention towards Section 2(1)(f) and 2(1)(e) of the Act of 1996 and Section 2(1)(d) and 2(1)(n) of the LLP Act to drive his above point home that the arbitration in question is not an International Commercial Arbitration.

19. It will also not be out of place to reproduce the definitions of expression "body corporate" and "Limited Liability Partnership", given under Section 2(1)(d) and 2(1)(n) of the Act of 2008, respectively :

> *"section 2(1)(d) – "body corporate" means a company as defined in Section 3 of the Companies Act, 1956 (1 of 1956) and includes –*
>
> *(i) a limited liability partnership registered under this Act;*
>
> *(ii) a limited liability partnership incorporated outside India; and*
>
> *(iii) a company incorporated outside India……."*
>
> section 2(1)(n) – "limited liability partnership" means a partnership formed and registered under this Act;"

20. It would not be out of place to keep relevant provisions including Section 2(1)(e) and 2(1)(f) of the Act of 1996 handy, which run as under:

*"**Section 2. Definition**. (1) In this Part unless the context otherwise requires, –*

… … …

… … …

***Section 2(1)(e). "Court" means** -*

(i) In the case of an arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes;

(ii) in the case of international commercial arbitration, the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject matter of the arbitration if the same had been the subject-matter of a suit, and in other cases, a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court;

*"**Section 2(1)(f)**: "international commercial arbitration" means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is –*

(i) an individual who is a national of, or habitually resident in, any country other than India; or

(ii) a body corporate which is incorporated in any country other than India; or

(iii) an association or a body of individuals whose central management and control is exercised in any country other than India; or

(iv) the Government of a foreign country;"

21. Having navigated the Court through the above quoted statutory provisions, Mr. Jain argued that admittedly the applicant Company is a Limited Liability Partnership, incorporated under the LLP Act and thus, a body corporate, duly incorporated in India. He added that, equally undisputed is the fact, that the respondent is a Company registered in India, and since both the parties to the arbitration are body corporates registered in India, the arbitration

in question cannot be said to be an International Commercial Arbitration.

22. Having submitted that the arbitration in question is not an International Commercial Arbitration, he drew Court's attention towards the provisions contained in definition clause 2(1)(e) of the Act of 1996, particularly sub-clause (ii) thereof, and argued that an application under Section 9 of the Act of 1996 does lie before the High Court only in a case of International Commercial Arbitration. He emphasised that as the arbitration in question is purely a domestic arbitration, the jurisdiction lies with the "Principal Civil Court" as per sub-clause (i) and not before the High Court under sub-clause (ii) of Section 2(1)(e) of the Act of 1996, as claimed by the applicant.

23. In support of his argument, learned counsel relied upon the judgment of Hon'ble the Supreme Court rendered in case of ***TDM Infrastructure Pvt. Ltd. Vs. UE Development India Private Limited [(2008) 14 SCC 271]; M/s Larsen & Toubro Ltd. Vs. Mumbai Metropolitan Region [(2019) 2 SCC 271]; P.T.C. Techno Pvt. Ltd. Vs. Samsung India Electronics Pvt. Ltd. [2019 SCC Online Allahabad 3881]*** and submitted that on the basis of the enunciation made by Hon'ble the Supreme Court in the above judgments, the Contract in question and the arbitration in question are not International Commercial Arbitration and thus, the jurisdiction does not vest in the High Court.

Applicant's Response :

24. Mr. Nakul Diwan, learned senior counsel, assisted by Mr. Kunal Bishnoi, responded to the objections raised by Mr. Jain with

equal vehemence. Opposing the respondent's contention regarding non-disclosure of applicant's residential status, he invited Court's attention towards the cause-title (memo of parties) and submitted that the applicant Company had clearly indicated that it is an LLP – Limited Liability Partnership. He took the Court through para-19 of the application and submitted that the fact that the applicant is an LLP incorporated in accordance with the LLP Act has duly been mentioned.

25. It will not be out of place to reproduce para 19 of the application, which runs thus :

> *"19. The Applicant is a limited liability Partnership incorporated in accordance with the Limited Liability Partnership Act, 2008. The Applicant is a part of the Barminco Group of companies which is one of the world's largest hard rock underground mining services operator with operations in Australia, Asia and Africa."*

26. Retorting to Mr. Jain's allegation that his client has tried to mislead the Court, he submitted that such accusation is totally baseless inasmuch as the applicant has enclosed the Limited Liability Partnership agreement between the Barminco India Pvt. PTY Ltd. and Barminco India Holding PTY Ltd. and Clause-B thereof clearly suggests that both these entities are Limited Liability Partnership under the LLP Act. While adding that allegations of non-disclosure and concealment hurled by the respondent are aimed to divert Court's attention from the core issue, he maintained that such allegations have no legs to stand.

27. Adverting to the respondent's second submission regarding failure to go for amicable settlement, learned counsel navigated the Court through various documents placed with the application and submitted that vide letter/communication dated 15.04.2020 (Annexure-A/23), the respondent Company had called the applicant for mutual discussion in a meeting proposed to be held on 15.04.2020 itself. While pointing out that practically no time was allowed for negotiation, he was perturbed when he stated that it was neither practicable nor possible for the applicant to approach and participate in the discussion on such a short notice.

28. While reiterating that the request for negotiation vide letter dated 15.02.2020 was an eye-wash, learned counsel submitted that the respondent Company had not only hustled in issuing notice for termination on 19.04.2020 but had also sent a letter dated 29.04.2020 and demanded a huge amount under various heads.

29. Highlighting the above facts, he argued that it is writ large that the respondent Company has proceeded arbitrarily, vindictively and against the basic business ethics. That apart, the threat of invocation of bank guarantee left the applicant Company with no other alternative but to approach this Court and seek a protection under Section 9 of the Act of 1996, while simultaneously initiating arbitration proceedings in Singapore.

30. Stating that instant application was filed on 12.05.2020 and proceedings for arbitration at Singapore were taken up on 14.05.2020, Mr. Diwan informed that now both the parties have nominated their respective arbitrators and the matter is pending

for appointment of Chairman. Therefore, in light of subsequent development, the efforts of negotiation, which were thwarted rather frustrated by none other than the respondent Company, the objection has been rendered academic, as the stage of negotiation has since passed.

31. With reference to the proposition as to whether an application under Section 9 of the Act of 1996 in the present factual backdrop will lie before this Court or before the Principal Civil Court, Mr. Diwan argued that since parties have chosen Singapore to be the Seat of Arbitration, the arbitration in question cannot be said to be a domestic arbitration governed by Part-I of the Act of 1996. His stance was that in view of embargo contained in sub-section (2) of Section 2 of the Act of 1996, which confines the applicability of Part I to the cases in which the place of arbitration is in India, the definition of International Commercial Arbitration and restrictive definition of Court encapsulated in Section 2(1)(f) & 2(1)(e) of the Act of 1996 respectively does not apply to the present case because of its peculiarity.

32. In a bid to drive his point home, he read sub-section (2) of Section 2 and submitted that except for the provisions of Section 9, 27 and 37(1)(a) and 37 (3) of the Act of 1996, Part-I does not apply in a case where the place of arbitration is outside India.

33. Sub-section (2) of Section 2 of the Act of 1996 is reproduced hereunder :

> *"(2) This Part shall apply where the place of arbitration is in India:* *emphasis supplied.*

Provided that subject to an agreement to the contrary, the provisions of section 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."

34. Laying emphasis on the opening words of sub-section (2) of Section 2, learned senior counsel submitted that since Part-I is applicable only when place of arbitration is in India, the whole of Part-I would not apply in the present case, as the place of Arbitration is in Singapore.

35. Propelling his arguments further, he tenaciously argued that definition of International Commercial Arbitration given in Section 2(1)(f) is an integral constituent of Part-I of the Act of 1996. Therefore, definition given in Section 2(1)(f) has no application in the present case, given that the place of arbitration is Singapore. He added that once the definition given under Section 2(1)(f) is inapplicable, it cannot be said and held that the arbitration in question is not an International Commercial Arbitration.

36. Mr. Diwan urged that having regard to the fact that the seat of arbitration is in Singapore, the arbitration in question must be treated and held to be an International Commercial Arbitration and as a necessary fall out of such finding, the application under Section 9 of the Act of 1996 be also held maintainable before the High Court and not before the Principal Civil Court.

37. Learned senior counsel relied upon the judgment of MP High Court rendered in case of ***Sassan Power Limited Vs. North***

American Coal Corporation India Pvt. Ltd., 2015 SCC MP 1747 and also informed that same has been affirmed by the Supreme Court in its judgment reported at ***(2016) 10 SCC 813***. Learned counsel also cited the judgment of Delhi High Court in the case of ***GMR Energy Limited Vs. Doosan Power Systems India Pvt. Ltd., 2017 SCC Online Del 11625*** to contend that the arbitration in question is an International Commercial Arbitration and the application under Section 9 of the Act of 1996 will lie before the High Court.

38. Inviting Court's attention towards amendment brought in Section 2(2) of the Act of 1996, he submitted that proviso to sub-section (2) was inserted w.e.f. 23.10.2015, essentially with a view to confer a jurisdiction upon the Courts in India in the cases of International Commercial Arbitration and/or where arbitration takes place outside India.

39. It was further submitted that since the arbitration proceedings are to be held in Singapore, it would result in an award, which would be enforceable in India under Part-II of the Act and thus, the arbitration in question cannot be branded to be a domestic arbitration.

40. It was suggested that considering seat centric legislative intent, the High Court alone, should exercise jurisdiction over an arbitration seated outside India.

41. During the course of submission, Court's attention was invited towards the Law Commission Report, that had suggested amendments to the Arbitration & Conciliation Act, 1996,

particularly para-41 thereof, which is being reproduced for ready reference :-

> *"41. While the decision in Balco is a step in the right direction and would drastically reduce judicial intervention in foreign arbitrations, the Commission feels that there are still a few areas that are likely to be problematic.*
>
> *(i) Where the assets of a party are located in India, and there is a likelihood that that party will dissipate its assets in the near future, the other party will lack an efficacious remedy if the seat of the arbitration is abroad. The latter party will have two possible remedies, but neither will be efficacious. First, the latter party can obtain an interim order from a foreign Court or the arbitral tribunal itself and file a civil suit to enforce the right created by the interim order. The interim order would not be enforceable directly by filing an execution petition as it would not qualify as a "judgment" or "decree" for the purposes of sections 13 and 44A of the Code of Civil Procedure (which provide a mechanism for enforcing foreign judgments)". Secondly, in the event that the former party does not adhere to the terms of the foreign Order, the latter party can initiate proceedings for contempt in the foreign Court and enforce the judgment of the foreign Court under sections 13 and 44A of the Code of Civil Procedure. Neither of these remedies is likely to provide a practical remedy to the party seeking to enforce the interim relief obtained by it.*
>
> *That being the case, it is a distinct possibility that a foreign party would obtain an arbitral award in its favour only to realize that the entity against which it has to enforce the award has been stripped of its assets and has been converted into a shell company.*
>
> *(ii) While the decision in BALCO was made prospective to ensure that hotly negotiated bargains are not overturned overnight, it results in a situation where Courts, despite knowing that the decision in Bhatia is no longer good law, are forced to apply it whenever they are faced*

with a case arising from an arbitration agreement executed pre-BALCO."

42. Responding to Mr. Jain's reliance over the judgments in ***TDM Infrastructure Private Limited*** (supra)***, M/s Larsen & Toubro Ltd.*** (supra) *and* ***P.T.C. Techno Pvt. Ltd.*** *(supra),* Mr. Diwan submitted that all these orders have been passed in exercise of power under Section 11 of the Act of 1996, which have no precedential value, as has been held by Hon'ble the Supreme Court in case of ***State of West Bengal Vs. Associated Contractor, reported in (2015) 1 SCC 32.*** The part of the said judgment he relied upon, reads thus:-

"It is obvious that Section 11(12) (b) was necessitated in order that it be clear that the Chief Justice of the "the High Court" will only be such Chief Justice within whose local limits the Principal Civil Court referred to in Section 2(1)(e) is situate and the Chief Justice of that High Court which is referred to in the inclusive part of the definition contained in Section 2(1)(e). This Sub-section also does not in any manner make the Chief Justice or his designate "court" for the purpose of Section 42. Again, the decision of the Chief Justice or his designate, not being the decision of the Supreme Court or the High Court, as the case may be, has no precedential value being a decision of a judicial authority which is not a Court of Record."

43. Without prejudice to his submission that the application filed by the applicant is maintainable before the High Court, learned counsel alternatively implored that in case the Court comes to a conclusion that it does not have the jurisdiction and the

jurisdiction rests with the Principal Civil Court, the application be sent to the concerned Court or the same be returned to the applicant to be filed in competent court, however, while continuing the interim order dated 14.05.2020, at least for a period of fifteen days.

Rejoinder arguments :

44. Mr. Jain, learned counsel appearing for the respondent – HZL, in his crisp and concise rejoinder argued that Indian entity incorporated under the Indian laws, more particularly having its business operations in India cannot act in derogation of Indian laws, including the Act of 1996. He submitted that the judgments relied upon by the respondent, which were passed by the Supreme Court in exercise of powers under Section 11 of the Act of 1996 may not be binding, but the interpretation of the statutory provisions given by the Supreme Court is like a guiding pole star.

45. It was lastly submitted that the conduct of the applicant disentitles it from claiming equitable relief. Thus, not only the application merits rejection on the ground of jurisdiction, but interim order passed therein also deserves vacation.

Analysis and Findings :

46. Dealing with the first objection first, this Court feels that the applicant Company should have made clearer and categorical disclosure of the fact that it is an LLP, registered under the Indian laws. The applicant ought to have placed its certificate of incorporation on record as well. Ideally what was expected of the

applicant Company has not been done, so far as pleading part is concerned.

47. However, these lacunae are not fatal to the maintainability of its application in hands.

48. This Court does not find much substance in the submission of Mr. Jain that the applicant Company has deliberately done so, with a view to project itself to be an entity, registered outside India. It cannot be said with certitude that it was done to impress upon this Court that its case is covered by the provisions contained in sub clause (ii) of clause (f) of Section 2(1).

49. In considered opinion of this Court, non-furnishing the requisite information, as was expected from the applicant Company cannot be held to be a material non-disclosure so as to denude or divest it from claiming equitable relief, particularly in the face of the stand the applicant Company has taken: the application under Section 9 of the Act of 1996 will lie before the High Court, as the seat of arbitration is Singapore.

50. Having regard to the averments made in para 105 of the application, it cannot be said that the applicant has deliberately or willfully indulged in concealment. Applicant, therefore, cannot be non-suited on this count, particularly because it has approached the High Court with a plausible argument/reasoning.

51. Second contention of Mr. Jain concerning the question of the maintainability of the application, as the applicant failed to first make attempt to settle the dispute amicably keeping the spirit of Clause 15 and 16 of the Contract, is also equally frail, if not

fallacious. Upon appraisal of the facts and documents on record, this Court finds that the applicant cannot be arraigned of avoiding amicable settlement and/or not resorting to mutual negotiation.

52. The facts are revealing. The respondent Company vide communication dated 15.04.2020 had called upon the applicant for mutual discussion in a meeting fixed on 15.04.2020 itself. No sooner had the respondent invited the applicant for negotiation than it terminated the Contract (on 19.04.2020), practically giving no time to the applicant. In this view of the matter, neither can the applicant be accused of non adherence to the Clause 15/16 nor can its application be held non maintainable on this count.

53. Much was said by the respondent about the interim order dated 20.04.2020 passed by the Delhi High Court in the case of M/s Halliburton Offshore Services Inc. (supra) – it was contended that the applicant had heavily relied upon the interim order passed by Delhi High Court to successfully impress upon the Court that it was entitled for identical injunction. According to Mr. Jain, present interim order came to be passed in light of the order of the Delhi High Court. While informing that the interim injunction passed by the Delhi High Court has been vacated on 29.05.2020, learned counsel for the respondent submitted that the interim order passed in the present case should also follow suit.

54. Having gone through the reasoned interim order passed by the Coordinate Bench on 14.05.2020, this Court is of the considered opinion that the interim order of Delhi High Court in case of M/s Halliburton's case (supra) can not even be said to be in the back of the mind of the Court, much less being a reason to

grant injunction in applicant's favour. The interim order has obviously been passed considering the submissions made and arguments advanced, which are duly penned in the interim order itself.

55. Be, that as it may, since this Court is not pronouncing upon the merit of the application and/or the interim order passed herein and is confining the present order to the extent of deciding the preliminary objections to the extent of its maintainability, it would better deter from making any observation or recording a finding as to whether the interim order in question deserves to be continued or vacated.

56. This Court, however, cannot resist from observing that merely because the interim order, which has been placed as annexure with the application has been vacated, the interim injunction granted in applicant's favour cannot be dissolved.

57. Coming on to the core question, which has cropped up for consideration and further to resolve the conundrum involved in this case, viz. – "What is the true import of expression 'International Commercial Arbitration', given the fact that place and seat of arbitration is in Singapore?" Sprouting from the same stem, equally seminal and significant is the issue, "as to whether present application will lie before the High Court or not?"

58. Before embarking upon the journey, it would be beneficial to bear in mind the principles, which emerge from the reading of the provisions and emanate from various enunciation made by Hon'ble the Apex Court and other High Courts.

59. The Arbitration and Conciliation Act, 1996, which has been enacted on the United Nations Commission on International Trade Law (UNCITRAL) Model Law of International Commercial Arbitration in 1985 applies equally to International Commercial Arbitration and arbitration which is not International Commercial Arbitration, often referred to as Domestic Arbitration. The Act of 1996 deals with both types of arbitration.

60. The Act of 1996 envisages two types of awards based on seat of arbitration. Award passed in furtherance of arbitral proceedings held abroad, is termed as foreign award, else it is classified as domestic award.

61. The distinction between the International Commercial Arbitration and an arbitration which is not International Commercial Arbitration has a bearing or impact essentially on jurisdiction of the Courts in relation to grant of injunction; application for setting aside award and appointment procedure under Section 11 of the Act etc.

62. Proviso to sub-section (2) of Section 2 has been incorporated vide Section 3 of the Amendment Act, 2015 w.e.f. 23.10.2015 with a view to confer jurisdiction upon the courts of India in the matters relating to Section 9, 27, 37(1)(a) and 37 (3) of the Act of 1996, when the place of arbitration is outside India. Prior to amendment, in case of International Commercial Arbitration, when the place of arbitration was outside India, the courts were confronted with an inherent inhibition in the teeth of provisions of Section 2 of the Act of 1996, if they were to grant injunction. The Supreme Court in the case of ***Bharat Aluminium Company &***

Ors. etc. Vs. Kaiser Aluminium Technical Service Inc. & Ors. etc., reported in (2012) 9 SCC 552 has concluded as under :

> *"194. In view of the above discussion, we are of the considered opinion that the Arbitration Act, 1996 has accepted the territoriality principle which has been adopted in the UNCITRAL Model Law. Section 2(2) makes a declaration that Part I of the Arbitration Act, 1996 shall apply to all arbitrations which take place within India. We are of the considered opinion that Part I of the Arbitration Act, 1996 would have no application to international commercial arbitration held outside India. Therefore, such awards would only be subject to the jurisdiction of the Indian courts when the same are sought to be enforced in India in accordance with the provisions contained in Part II of the Arbitration Act, 1996. In our opinion, the provisions contained in the Arbitration Act, 1996 make it crystal clear that there can be no overlapping or intermingling of the provisions contained in Part I with the provisions contained in Part II of the Arbitration Act, 1996."*

63. With a view to cure the lacuna, the proviso has been inserted in sub-section (2) of Section 2, so as to enable the courts of law in India to deal with the applications under Section 9, 27, 37(1)(a) and 37(3) of the Act of 1996.

64. After insertion of proviso to sub-section (2) of Section 2, the provisions of Section 9, 27, 37(1)(a) and 37(3) of the Act have been made applicable to International Commercial Arbitration, even if the place of arbitration is outside India.

65. Learned senior counsel for the respondent – HZL has cited judgments of Hon'ble the Supreme Court in the case of TDM Infrastructure (supra) and M/s Larsen & Toubro (supra) in support of his contention that the Courts have refused to hold identical arbitrations to be International Commercial Arbitration. A perusal of the judgments so cited reveals that in those cases, the seat of arbitration was New Delhi and Bombay respectively. The arbitrations in question were held not to be 'International Commercial Arbitration', as both the parties had Indian nationality.

66. It would not be out of place to reproduce relevant extracts of the judgments cited -

(a) para No.19 of the judgment in case of **TDM Infrastructure** (supra):

> *"**19**. Determination of nationality of the parties plays a crucial role in the matter of appointment of an arbitrator. A company incorporated in India can only have Indian nationality for the purpose of the Act. It cannot be said that a company incorporated in India does not have an Indian nationality. Hence, where both parties have Indian nationalities, then the arbitration between such parties cannot be said to be an international commercial arbitration."*

(b) para 18 of the judgment in case of **M/s Larsen & Toubro** (supra):

> *"**18**. this being the case, coupled with the fact, as correctly argued by Shri Divan, that the Indian company is the lead partner, and that the Supervisory Board constituted under the consortium agreement makes it clear that the lead*

partner really has the determining voice in that it appoints the Chairman of the said Board (undoubtedly, with the consent of other members); and the fact that the Consortium's office is in Wadala, Mumbai as also that the lead member shall lead the arbitration proceedings, would all point to the fact that the central management and control of this Consortium appears to be exercised in India and not in any foreign nation."

67. Both the judgments cited by Mr. Gopal Jain, do not provide a direct answer to the question, which this Court is seized of.

68. The facts of this case are a bit peculiar - the seat of arbitration, so also the venue of the arbitration proceedings is Singapore, whereas the contracting parties hail from India. The award, if passed, would obviously be a foreign award and not a domestic award.

69. The issue, which the Court is faced with in the present case is, which Court will have jurisdiction to entertain an application under Section 9 of the Act of 1996 – will it be High Court or the Principal Civil Court? given the fact that seat and venue of arbitration is Singapore.

70. To answer the question as to whether this Court is invested with the jurisdiction to entertain an application under Section 9 of the Act of 1996, one would obviously advert to the definition of term "Court", as given under Section 2(1)(e) of the Act of 1996. A bare look at the definition of the expression "Court" suggests that in case of arbitration other than International Commercial Arbitration, the term "Court" means Principal Civil Court of original jurisdiction in a district and includes High Court in exercise of its

ordinary original civil jurisdiction. Whereas in case of International Commercial Arbitration, High Court has been prescribed as the Court, even if it does not have original civil jurisdiction.

71. Therefore, to ascertain as to whether the High Court has the jurisdiction to entertain an application under Section 9 of the Act of 1996, one has to firstly find out, as to whether the arbitration in question is an International Commercial Arbitration or not.

72. The term "International Commercial Arbitration" has been expressly defined in clause (f) of Section 2(1). This definition, which is nationality centric definition, clearly suggests that an arbitration to be termed or treated as an International Commercial Arbitration, the agreement has to have at least one foreign party or a company whose nationality is other than that of India.

73. Two judgments of the Supreme Court namely, TDM Infrastructure Pvt. Ltd. (supra) and M/s Larsen & Toubro were cited by Mr. Jain, precedential value whereof was doubted by Mr. Diwan on the ground that they were passed by the Supreme Court in exercise of power under Section 11 of the Act of 1996, which jurisdiction was administrative in nature until the recent amendment. Mr. Diwan relied upon judgments in the case of ***State of West Bengal Vs. Associated Contractors; (2015) 1 SCC 32*** to contend that the judgment of TDM (supra) and Larsen & Toubro (supra) are not binding. On the issue of binding precedential value of the judgments in question, this Court is of the view that the adjudication made by the Supreme Court under Section 11 may be administrative in nature, but the interpretation

of the provision made therein can always be relied and this Court can gather guidance from the exposition of law. They may be treated to be not binding, only when other contrary view on judicial side is available.

74. May be, that in the present factual backdrop, since seat and venue of arbitration is Singapore, the award passed (if any), would be a foreign award and the same will be executable in accordance with the provisions of Part-II of the Act of 1996. But merely because the award is to be executed in accordance with Part-II of the Act of 1996, the arbitration by itself cannot be treated to be an International Commercial Arbitration. To be an International Commercial Arbitration, the prerequisite conditions enumerated in sub-clause (i) to (iv) of Section 2(1)(f) are required to be satisfied.

75. Applicant being an LLP is a body corporate in India in terms of clause (i) of Section 2(1)(d) read with Section 2(1)(n) of LLP Act. It is therefore a body corporate having Indian nationality. The respondent – Company is admittedly an Indian Company. Hence, none of the parties to the contract is a body incorporated outside India. This being the position, the arbitration in question cannot be termed as International Commercial Arbitration, as it does not satisfy the conditions cataloged in clause (i) to (iv) of Section 2(1)(f).

76. The judgment of Delhi High Court in the case of GMR Energy Ltd. (supra) and that of Madhya Pradesh High Court in the case of Sassan Power Ltd. (supra), which were cited by Mr. Diwan, hardly lend any support to the cause of his client. Dealing with almost

identical facts, the High Courts in these cases have held that seat of arbitration being abroad, Part-I of the Act of 1996 will not apply, as mandated by sub-section (2) of Section 2 of the Act. There can be no two opinion about coverage of the arbitration in question under Part-II of the Act. The bone of contention or main controversy in the present case is, as to whether the arbitration between the parties is an International Commercial Arbitration or not? and further since Part-I of the Act is not applicable, whether the definition clause being its integral component, can be resorted to or not.

77. Main reason for maintaining the present application in the High Court as per the applicant is, because the seat and place of arbitration is in Singapore. No statutory provision or case law was brought to the notice of the Court, which provides that an application under Section 9 of the Act of 1996 will be laid before the High Court, in a case where the seat of arbitration is not in India.

78. It appears that the applicant has preferred the present application before this Court under misconception that this Court exercises ordinary original civil jurisdiction, which is evident from following excerpt of para No.105 of its application "… … … to approach this Hon'ble Court, being the High Court exercising ordinary original jurisdiction … … …". It may be noted that Rajasthan High Court does not possess original civil jurisdiction and it is conferred with only appellate civil jurisdiction by the Rajasthan High Court Ordinance, 1949. Hence, it cannot be

treated to be a Court as per sub-clause (i) of clause (e) of Section 2(1) of the Act of 1996.

79. A close and conjoint reading of the provisions contained in Section 2(1)(e) & 2(1)(f) of the Act of 1996 makes it abundantly clear that for the purpose of determining the jurisdiction of the court with respect to an application under Section 9 of the Act of 1996, the sole factor to be looked at, is, as to whether the arbitration in question is International Commercial Arbitration or not. The seat of arbitration and/or place of arbitration is absolutely inconsequential, rather irrelevant for the purpose of determining the jurisdiction of the Court. May be in a contract having place of arbitration abroad, the award would be a foreign award; such being the case, if a party seeks to challenge the award or prefer an application for setting aside the award, the seat/venue may be relevant, but then in that case, the Courts in India per-se would not be available as forum.

80. It was vehemently argued by Mr. Diwan that according to sub-section (2) of Section 2, Part-I of the Act is applicable only in the event of place of arbitration being in India. In other words, his argument was that since place of arbitration, in the present case, is Singapore, Part-I of the Act of 1996 does not apply and, therefore, definition of International Commercial Arbitration given in Section 2(1)(f) of the Act of 1996, which forms part of Part I of the Act of 1996 cannot be held applicable.

81. In considered opinion of this Court, the argument put forth by Mr. Diwan is paradoxical and self defeating, to say the least. Not only that the reasoning behind the argument is flawed, it

would also lead to anomalous and disastrous results, if not absurd. If the preposition as advanced by the applicant is accepted and it is held that Part-I of the Act of 1996, including what has been contained in Section 2 of the Act of 1996 is inoperative or inapplicable in the present case, as the place of arbitration is Singapore, the very foundation of his novel argument falls flat on the ground. The reasons are set out hereinafter

82. It is noteworthy that sub-section (2) of Section 2 of the Act is not divorced of Part-I. If his argument is accepted, then, entire Part-I, which envelopes within its fold Section 2(1) – the definition clause gets eclipsed or becomes non-est in the cases, where the place of arbitration is out of India.

83. In the cases, where the place of arbitration is outside India, obviously, procedure and other provisions contained in Part I do not apply. It will be too far fetched to hold or even to contend that the definition clause of the Act of 1996 also will not apply, simply because place of arbitration is not in India, particularly when, both the parties are incorporated in India and substance and substratum of the dispute emanates from Indian laws.

84. According to this Court, the whole of the definition clause being the soul of an Act cannot be held inapplicable to a particular part of the Act, especially in the contextual facts. That apart, the definition clause is determinative of the expressions used in the Act. If argument advanced by Mr. Nakul Diwan is brought to logical end, and expression "International Commercial Arbitration" given in clause (f) is to be held inapplicable, then, which arbitration will be an International Commercial Arbitration, will be

an impossible question to be answered. Besides this, one fails to comprehend as to how can the applicant, thereafter, rely upon definition of expression "Court' given in the selfsame Part-I itself – clause (e) of Section 2(1) of the Act of 1996, to maintain its application before any Court, let alone High Court?

85. One has to bear in mind the statutory position that Part-II of the Act does not have a separate definition clause of its own to govern the arbitration having place outside India. As such, if the argument advanced by the applicant were to be accepted, and Section 2(1)(f) of the Act namely definition of 'Internal Commercial Arbitration' were to be excluded, then according to this Court, it cannot be done selectively – in that case, the whole of the definition clause will have to be ignored or held inapplicable.

86. This Court is firmly of the view that it could never be the intention of the Legislature to eschew applicability of the definition clause for Part II, while incorporating sub-section (2) of Section 2 of the Act, particularly when no definition or interpretation clause has been separately provided for Part-II or other parts.

87. It is noteworthy that Section 2 of the Act, which contains various definitions, uses the opening words:

"2(1) **In this part**, unless the context otherwise requires -"

Similar is the language used in sub-section (2) of Section 2, which reads thus:-

"2(2) **This part** shall apply where the place of Arbitration is in India."

**emphasis supplied*

Generally definition clause is not restrictive of its applicability to a particular part – it applies to whole of the Act. Use of expression 'Part' in opening words of the definition clause has resulted in somewhat confusing, if not conflicting situation – it gives an impression as if the definition clause is not applicable to remaining parts of the Act, except Part-I.

88. This Court does not have slightest of doubt that in case, the interpretation sought to be given by the applicant is accepted, it would lead to anomaly, incongruity and absurdity.

89. The Book 'Principles of Statutory Interpretation' by Justice G.P. Singh (14th Edition – 2016 Lexis Nexis – page 158) contains an extraction of four conditions, which should exist to depart from the plain meaning of the Statute from the judgment of House of Lords in the case of ***Stock Vs. Frank Jones (Tipton) Ltd.: (1978) 1 AII ER 948, page 954***. It will be of immense use to reproduce relevant part hereinfra:

> "… a court would only be justified in departing from the plain words of the statute when it is satisfied that: *(1)* there is clear and gross balance of anomaly; *(2)* Parliament, the legislative promoters and the draftsman could not have envisaged such anomaly, could not have been prepared to accept it in the interest of a supervening legislative objective; *(3)* the anomaly can be obviated without determent to such legislative objective; *(4)* the language of the statute is susceptible of the modification required to obviate the anomaly."

90. It is pertinent to note that above principle has been approved and applied by the Apex Court in the case of ***Afcons Infrastructure Ltd. Vs. Cherian Varkey Construction Company: (2010) 8 SCC 24*** (at page 36).

91. With a view to obviate the anomaly or incongruity taking cue from the principle noticed in para No. 89 above, duly approved by the Apex Court in **Afcons' case (supra)**, the word 'Part' used in Section 2(1) is required to be read as 'Act'. If that is done, not only the present incongruity will be taken care of and the provisions of the Act, particularly the definition clause will be given its true and full meaning and play.

92. Upon reading of expression "Part" used in sub-section (1) of Section 2 as "Act", the definition clause will naturally be applicable to the entire Act, notwithstanding the expression used in sub-section (2) of Section 2. Then, it cannot be said that since place of arbitration is not in India, the definition clause is not applicable or that it cannot be read.

93. The case before this Court is a bit peculiar. As the seat and place of arbitration is Singapore, it cannot be said that the arbitration is a domestic arbitration. Nor can it be said that the award which would be passed will be a domestic award. It is a third situation – where the arbitration is not International Commercial Arbitration, but the award will be a foreign award.

94. As an upshot of the discussion foregoing, this Court deduces thus:

(i) An arbitration agreement can result in Foreign award to be covered by Part-II, yet the arbitration can be an arbitration other than International Commercial Arbitration.

(ii) the definition clause given in Section 2(1) of the Arbitration & Conciliation Act, 1996 applies to whole of the Act and is not confined to Part-I thereof.

(iii) If an arbitration is not an International Commercial Arbitration, the expression 'Court' would mean Principal Civil Court or the High Court having original civil jurisdiction as per clause (i) of Section 2(1)(e).

95. As there is no quarrel about the fact that the applicant is incorporated under the provisions of the LLP Act, whereas the respondent is a company registered under the Indian Companies Act, 1956. Nationality, natural habitation or residence of both the parties is unquestionably Indian/India. The nationality being the sole determining or decisive factor, which in the present case, of both the contracting parties is, Indian, it cannot be said that the arbitration in question is an International Commercial Arbitration.

96. Since the arbitration in question is not an International Commercial Arbitration, going by the definition of expression "Court", encapsulated in clause (e) of Section 2(1), there remains no doubt that the case at hands will fall within the sweep of sub-clause (i) of clause (e), to the exclusion of sub-clause (ii).

97. This Court upon appraisal of facts and analysis of law, concludes that for the purpose of the Act of 1996, the "Court" in this case would be Principal Civil Court. It is only such Court,

which is conferred with the jurisdiction to deal with present application.

98. Although, according to the provisions of the Act of 1996, the present application would lie before the Principal Civil Court, but while giving the final verdict and consequential direction, this Court cannot, but be oblivious of the provisions of the Commercial Court Act, 2015.

99. According to Section 10(3) of the Commercial Court Act, 2015, all arbitration matters are required to be dealt with by the Commercial Court of the District. As noticed earlier, Rajasthan High Court does not exercise original civil jurisdiction nor any commercial division of the Rajasthan High Court has been constituted. Hence, the present application would lie before the competent Commercial Court, having territorial jurisdiction to deal with the disputes/issues arising in this case, which in the present case is Udaipur, as per para 104 of the application, reproduced in para 8 of this judgment.

:: <u>Conclusion and Directions</u> ::

100. Objection regarding maintainability of the instant application before this Court is, accepted.

101. It is hereby held that Rajasthan High Court is not endowed with or clothed with the jurisdiction to entertain and hear the present application under Section 9 of the Act of 1996. The jurisdiction to hear the present application, as per clause 2(1)(e)(i) of the Act of 1996 read with Section 10(3) of the Commercial Courts Act, 2015 vests in Commercial Court, Udaipur.

102. Keeping the spirit of the provisions of Rule 10 and 10-A of Order VII of the Code of Civil Procedure in mind, the application filed by the applicant M/s Barminco Indian Underground Mining Services LLP is hereby ordered to be returned to it.

103. Both the parties shall appear before the Commercial Court, Udaipur on 31.07.2020. The applicant shall either file fresh application or the application, which would be returned to it, by 31.07.2020.

104. The applicant will be required to pay requisite/deficit Court fee (if any).

105. The concerned court shall fix the next date(s) with the consent of the parties, albeit subject to its convenience and hear the application itself or consider the prayer for interim relief afresh, as deemed expedient.

106. The interim order dated 14.05.2020 shall continue till 14.08.2020, whereafter the order of the Court concerned shall govern the rights of the parties.

107. Any fact noticed or observation made herein will be treated to be a prima facie observation of this Court and the same shall not be construed to be binding in any manner upon the court, deciding the application.

108. Application stands disposed of for statistical purposes.

109. No order as to costs.

(DINESH MEHTA), J

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