A RELIANCE INDUSTRIES LIMITED & ANR.

v.

UNION OF INDIA

(Civil Appeal No.5765 of 2014)

B MAY 28, 2014

[SURINDER SINGH NIJJAR AND A.K. SIKRI, JJ.]

Arbitration and Conciliation Act, 1996 – ss. 16 and 34 – Applicability of the Act – Arbitration petition u/s. 34 – C *Maintainability of – Parties-appellants entering into two Product Sharing Contracts (PSCs) with the Government of India, providing for exploration and production of petroleum – Disputes between parties regarding payments of royalties, cess, service tax and CAG audit report – Notice of arbitration* D *– Constitution of arbitral tribunal – Under Article 33.12 of PSCs, the venue of arbitration would be London – Amendment in the PSC, by agreement of the parties, Final Partial Consent Award by arbitral tribunal that juridical seat for arbitration would be London, England – Final Partial Award* E *that appellants' claims are arbitrable – Petition u/s. 34 by respondent challenging Final Partial Award – Allowed by High Court holding that the arbitration petition was maintainable – On appeal, held: Petition u/s. 34 is not maintainable – Applicability of Arbitration Act, 1996 to the arbitration* F *agreement has been excluded – It cannot be said that even though the arbitration agreement would be governed by the laws of England and that juridical seat of arbitration would be in London, Part I of the Arbitration Act would still be applicable as the laws governing the substantive contract are Indian* G *Laws – Upon a meaningful reading of the said Articles of the PSC, that the proper law of the contract is Indian Law; proper law of the arbitration agreement is the law of England – Applicability of Arbitration Act, 1996 has been ruled out by a*

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conscious decision and agreement of the parties – In the event, final award is made against the respondent, the enforceability of the same in India, can be resisted on the ground of Public Policy – Remedy against the award will have to be sought in England, where the juridical seat is located – International Commercial Arbitration.

Doctrines/Principles – Principle of separability – Held: Permits the parties to agree that law of one country would govern to the substantive contract and laws of another country would apply to the arbitration agreement.

The appellant and one 'BG' Exploration and Production India Ltd. entered into two Production Sharing Contracts (PSCs) with the Government of India for the exploration and production of petroleum from certain oil fields. Disputes arose between the parties with regard to payment of royalties, cess, service tax and CAG audit report. The appellant issued a notice of arbitration. The arbitral tribunal was duly constituted. Under Article 33.12, the venue of arbitration is in London. Thereafter, on the basis of the amendment in the PSC, by agreement of the parties, the arbitral tribunal made the 'Final Partial Consent Award' that the juridical seat (or legal place) for the purposes of the arbitration shall be London, England. The respondent raised objections relating to the arbitrability of the claims made by the petitioner. By the Final Partial Award, it was held that the petitioners' claims are arbitrable. The respondent filed a petition under Section 34 of the Arbitration and Conciliation Act, 1996 challenging the Final Partial Award. The High Court allowed the petition holding that the governing law of the contract, is the law of India; and that the English law would be applicable only with regard to curial law matters, conduct of the arbitral proceedings; that the question of arbitrability of the claim is a larger question effecting public policy of State and it should be determined by

A applying laws of India; that the intention of the parties under the agreement was always to remain subject to Indian laws and not to contravene them; that an award which is said to be against public policy can be permitted to be challenged in India even though the *seat* of B arbitration is outside India; and that since the appellants are seeking refund of amount of cess, royalties, service tax, all matters of public money in India, the jurisdiction of the Indian courts cannot be excluded. Hence, the instant appeal.

C Allowing the appeal, the Court

HELD: 1. The conclusion arrived at by the High Court that the applicability of Arbitration Act, 1996 to the arbitration agreement has not been excluded, cannot be D upheld. The petition filed by respondents under Section 34 of the Arbitration Act, 1996 in the High Court is not maintainable. The conclusion of the High Court that even though the arbitration agreement would be governed by the laws of England and that *juridical seat* of arbitration E would be in London, Part I of the Arbitration Act would still be applicable as the laws governing the substantive contract are Indian Laws, is overruled and set aside. In the event, a final award is made against the respondent, the enforceability of the same in India, can be resisted on F the ground of Public Policy. The conclusion of the High Court that in the event, the award is sought to be enforced outside India, it would leave the Indian party remediless is without any basis as the parties have consensually provided that the arbitration agreement will be governed by the English law. Therefore, the remedy G against the award will have to be sought in England, where the juridical seat is located. However, since substantive law governing the contract is Indian Law, even the Courts in England, in case the arbitrability is challenged, will have to decide the issue by applying H

Indian Law viz. the principle of public policy etc. as it prevails in Indian Law. [Paras 73, 74] [512-G; 513-A-F] A

2.1. The essential dispute between the parties was as to whether Part I of the Arbitration Act, 1996 would be applicable to the arbitration agreement irrespective of the fact that the *seat* of arbitration is outside India. To find a conclusive answer to the issue as to whether applicability of Part I of the Arbitration Act, 1996 has been excluded, it would be necessary to discover the intention of the parties for which the relevant Articles of the PSC are analyzed. [Para 35] [489-G-H; 490-A] B C

Bhatia International vs. Bulk Trading S.A. & Anr.:**2002 (2) SCR 411: (2002) 4 SCC 105– relied on.**

2.2. Articles 32.1 and 32.2 deal with applicable law and language of the contract as is evident from the heading of the Article which is 'Applicable Law and Language of the Contract'. Article 32.1 provides the proper law of the contract i.e. laws of India. Article 32.2 makes a declaration that none of the provisions contained in the contract would entitle either the Government or the Contractor to exercise the rights, privileges and powers conferred upon it by the contract in a manner which would contravene the laws of India. Article 33 makes very detailed provision with regard to the resolution of disputes through arbitration. The two Articles do not overlap - one (Art.32) deals with the proper law of the contract, the other (Art.33) deals with ADR, i.e. consultations between the parties; conciliation; reference to a sole expert and ultimately arbitration. Under Article 33, at first efforts should be made by the parties to settle the disputes among themselves (33.1). If these efforts fail, the parties by agreement shall refer the dispute to a sole expert (33.2). The provision with regard to constitution of the arbitral tribunal provides that the arbitral tribunal shall consist of three arbitrators (33.4). This article also D E F G H

A provides that each party shall appoint one arbitrator. The arbitrators appointed by the parties shall appoint the third arbitrator. In case, the procedure under Article 33.4 fails, the aggrieved party can approach the Permanent Court of Arbitration at Hague for appointment of an arbitrator B (33.5). Further, in case the two arbitrators fail to make an appointment of the third arbitrator within 30 days of the appointment of the second arbitrator, again the Secretary General of the Permanent Court of Arbitration at Hague may, at the request of either party appoint the third C arbitrator. Thus, the Permanent Court of Arbitration at Hague can be approached for the appointment of the arbitrator, in case of default by any of the parties. This, is a strong indication that applicability of Arbitration Act, 1996 was excluded by the parties by consensus. Further, D the arbitration proceedings are to be conducted in accordance with the UNCITRAL Rules, 1976 (33.9). It is specifically provided that the right to arbitrate disputes and claims under this contract shall survive the termination of this contract (33.10). Article 33.12 provides that *venue* of the arbitration shall be London and that the E arbitration agreement shall be governed by the laws of England. It appears, that by a Final Partial Consent Award, the parties have agreed that the *juridical seat* (or legal place of arbitration) for the purposes of arbitration initiated under the claimants' notice of arbitration shall be F London, England. [Paras 37, 38, 39] [490-G-H; 491-A-H; 492-A-C]

2.3. Upon a meaningful reading of the said Articles of the PSC, that the proper law of the contract is Indian G Law; proper law of the *arbitration agreement* is the law of England. [Para 40] [492-D]

2.4. The submission that the intention of the parties was never to exclude the applicability of Arbitration Act, 1996; and that the expression "laws of India" under H

Article 32.2 would also include the Arbitration Act, 1996, is without any merit. The expression "laws of India" as used in Article 32.1 and 32.2 have a reference only to the contractual obligations to be performed by the parties under the substantive contract i.e. PSC. In other words, the provisions contained in 33.12 are not governed by the provisions contained in Article 32.1. Article 32.1 has been made subject to the provision of Article 33.12. Article 33.12 specifically provides that the arbitration agreement shall be governed by the laws of England. The two Articles are particular in laying down that the contractual obligations with regard to the exploration of oil and gas under the PSC shall be governed and interpreted in accordance with the laws of India. In contra-distinction, Article 33.12 specifically provides that the arbitration agreement contained in Article 33.12 shall be governed by the laws of England. Therefore, the conclusion is inescapable that applicability of Arbitration Act, 1996 has been ruled out by a conscious decision and agreement of the parties. The High Court had no jurisdiction to entertain the petition under Article 34 of the Arbitration Act, 1996.[Para 41] [492-E-H; 493-A-B]

Bhatia International vs. Bulk Trading S.A. & Anr. **2002 (2) SCR 411: (2002) 4 SCC 105 – relied on.**

2.5. Article 33 provides for ADR-its limited application is to dispute resolution through arbitration as opposed to civil litigation. Therefore, there is no violation of 32.2, as Arbitration Act, 1996, in fact signifies Parliamentary sanction of ADR. In fact, Article 32.3 indicates that obligations under PSC and Arbitration Agreement are separate. Hence, it is provided that English shall be the language of the Contract. Followed by the stipulation that English shall also be the law of arbitral proceedings. Therefore, the conclusion of the High Court that PSC is a composite contract is not in tune with the approved provisions of the PSC. This separateness is further

A **emphasized by Article 32.1 by making the provision "subject to the provision of Article 33.12". Laws of India have been made applicable to the substantive contract. Law of England govern the Dispute Resolution Mechanism. Provision for Arbitration is a deliberate** B **election of remedy other than usual remedy of a civil suit. The ADR mechanism under the Arbitral Laws of different nations is legally and jurisprudentially accepted, sanctified by the Highest Law Making Bodies of the member States, signatories to the New York Convention.** C **India is not only a signatory to the New York Convention, but it has taken into account the UNCITRAL Model Laws and the UNCITRAL Rules, whilst enacting the Arbitration Act, 1996. Therefore, it cannot be said that the Law of the Contract is also the Law of the Arbitration** D **Agreement.[Para 42] [493-C-H]**

2.6. Once the parties had consciously agreed that the *juridical seat* of the arbitration would be London and that the arbitration agreement will be governed by the laws of England, it was no longer open to them to contend that E **the provisions of Part I of the Arbitration Act would also be applicable to the arbitration agreement. [Para 43] [494-B, C]**

Videocon Industries Limited vs. Union of India & Anr. F **2011 (8) SCR 569: (2011) 6 SCC 161– relied on.**

Yograj Infrastructure Limited Vs. Ssang Yong Engineering and Construction Company Limited **(2011) 9 SCC 735;** *Enercon (India) Ltd. & Ors. vs. Enercon GMBH & Anr.* **2014(1) Arb.LR 257 (SC) – referred to.**

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A vs. B **2007(1) All ER (Comm) 591;** *M/s Dozco India P. Ltd. Vs. M/s Doosan Infracore Co. Ltd.* **(2009) 3 ALR 162;** *C Vs. D* **[2008] 1 Lloyd's Law Rep 239;** *SulameRica CIA Nacional De Seguros SA vs. Enesa Engenharia* ***SA – Enesa*** H **(2012) WL 14764 – referred to.**

2.7. The submission that the issues involved relate to violation of public policy of India, thus, the applicability of Part I of the Arbitration Act cannot be excluded even if the seat of arbitration is London; that it would make no difference that the arbitration agreement specifically provides for the arbitration agreement to be governed by the Laws of England; that proper law of the contract would be relevant to determine the question as to whether the interim final award would be amenable to challenge under Section 34 of the Arbitration Act, 1996 runs counter to the well settled law in India as well as in other jurisdictions.[Para 57] [501-D-H]

2.8. In the instant case, the parties have by agreement provided that the *juridical seat* of arbitration will be in London. On the basis of the said agreement, necessary amendment has been made in the PSCs. On the basis of the agreement and the consent of the parties, the Arbitral Tribunal has made the "Final Partial Consent Award" fixing the *juridical seat* (or legal place) of arbitration for the purposes of arbitration initiated under the claimants notice of arbitration in London, England. The award also records that any hearing in the arbitration may take place in Paris, France, Singapore or any other location the tribunal considers convenient. Article 33.12 stipulates that arbitration proceedings shall be conducted in English language. It is also agreed by the parties that the terms and conditions of the arbitration agreement in Article 33 of the PSCs shall remain in full force and effect and be applicable to the arbitration proceedings. The arbitration agreement contained in Article 33 shall be governed by the laws of England. A combined effect of all these factors would clearly show that the parties have by express agreement excluded the applicability of Part I of the Arbitration Act, 1996 (Indian) to the arbitration proceedings. [Para 58, 34] [489-F-G; 502-D-G]

A *Venture Global Engineering vs. Satyam Computer Services Ltd.* **2008 (1) SCR 501: (2008) 4 SCC 190 – held inapplicable.**

2.9. In the instant case, there is no danger of violation
B **of any statutory provisions. Prima facie, it appears that there is no challenge to the Gazette Notification. In fact, claim statement shows that the amounts of royalties/cess levied have been paid. Prayer is for reimbursement of the amounts paid, based on Articles 15.6 and 15.7 of the PSC.**
C **There also seems to be a claim for making necessary revisions and adjustment to the contract to off-set the effect of any changes in the law. There is no apparent or so patently obvious violation of Indian Laws in any of these claims. The basis for filing the petition under Section 34 is that the appellants are bound to obey the**
D **Laws of the country. The appellants have nowhere claimed to be exempted from the Laws of India. They claim that the Government of India, party to the Contract, i.e., PSC failed to seek and obtain exemption as stipulated in the contract. Whether or not the claim has substance**
E **is surely an arbitral matter. It is not the case of the appellants that they are not bound by the Laws of India, relating to the performance of the contractual obligations under the PSCs. The arbitration agreement cannot be jettisoned on the plea that award, if made against the**
F **Government of India, would violate Public Policy of India. Merely because the Arbitral Tribunal has held that claims are arbitral does not mean that the claims have been accepted and an award adverse to India has been given. [Para 59] [503-E-H; 504-A-C]**

G **2.10. The High Court failed to distinguish between the law applicable to the proper law of the contract and proper law of the arbitration agreement. The High Court also failed to notice that by now it is settled, in almost all international jurisdictions, that the agreement to arbitrate**
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is a separate contract distinct from the substantive contract which contains the arbitration agreement. This principle of severability of the arbitration agreement from the substantive contract is indeed statutorily recognized by Section 16 of the Arbitration Act, 1996. A bare perusal of the s.16(1) would show that the arbitration agreement is independent of the other terms of the contract. Further, even if the contract is declared *null* and *void*, it would not lead to the foregone conclusion that the arbitration clause in invalid. [Paras 61] [504-D-F; 505-B]

Reva Electric Car Company P. Ltd. vs. Green Mobil **2011 (13) SCR 359: (2012) 2 SCC 93;** *Today Homes and Infrastructure Pvt. Ltd. vs. Ludhiana Improvement Trust and* Anr. **(2013) 7 SCALE 327;** *Enercon (India) Ltd. & Ors. vs. Enercon GMBH & Anr.* **2014(1) Arb.LR 257 (SC);** *World Sport Group (Mauritius) Ltd. Vs. MSM Satellite (Singapore) PTC Ltd.* **Civil Appeal No. 895 of 2014 - referred to.**

2.11. The principle of separability permits the parties to agree that law of one country would govern to the substantive contract and laws of another country would apply to the arbitration agreement. The parties can also agree that even the conduct of the reference would be governed by the law of another country. This would be rare, as it would lead to extremely complex problems. It is expected that reasonable businessman do not intend absurd results. In the instant case, the parties had by agreement provided that the substantive contract (PSC) will be governed by the laws of India. In contradistinction, it was provided that the arbitration agreement will be governed by laws of England. There was no scope for any confusion of the law governing the PSC with the law governing the arbitration agreement. Therefore, the conclusions recorded by the High Court that the applicability of the English Law would be limited in its application only to the conduct of the reference, cannot be accepted. [Para 62, 63] [505-D-G; 506-A]

A **2.12. Article 32.2 would have no impact on the designated juridical seat as well as governing law of the arbitration agreement. This would become evident from a perusal of the Final Partial Consent Award, signed by all the three members of the arbitral tribunal recording** B **that the juridical seat of the arbitration initiated under the Claimant's Notice shall be London, England. [Para 65] [506-F-G]**

2.13. The submissions that the seat of arbitration shall be in India as the PSC is governed by the law of C **India; that laws of India would include the Arbitration Act, 1996, thus, irrespective of the provisions contained in Article 33.12, Arbitration Act, 1996 would be applicable to arbitration proceedings; and that the English law would be applicable only in relation to the conduct of the** D **arbitration upon the passing of the Partial Final Award, cannot be accepted. Article 32.1 itself provides that it shall be subject to the provision of Article 33.12. Article 33.12 provides that the arbitration agreement contained in this Article shall be governed by the laws of England. The** E **term 'laws of England' cannot be given a restricted meaning confined to only curial law. It is permissible under law for the parties to provide for different laws of the contract and the arbitration agreement and the curial law. [Para 66] [506-H; 507-A-D]**

F **2.14. The situation in the instant case was that it was open to the parties to agree that the law governing the substantive contract (PSC) would be different from the law governing the arbitration agreement. Article 32.1 specifically provides that the performance of the** G **contractual obligations under the PSC would be governed and interpreted under the laws of India. So far as the alternative dispute redressal agreement i.e. the arbitration agreement is concerned, it would be governed by laws of England. There is no basis on which the**

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respondents can be heard to say that the applicability of laws of England related only to the conduct of arbitration reference. The law governing the conduct of the arbitration is interchangeably referred to as the *curial law* or *procedural law* or the *lex fori.* It cannot be said that the Arbitration Act, 1996 has not been excluded by the parties by agreement. Thus, the conclusions by the High Court that reference to laws of England is only confined to the procedural aspects of the conduct of the arbitration reference, cannot be approved. [Para 67,71] [507-G-H; 508-A-B; 512-A-B]

M/s Dozco India P. Ltd. Vs. M/s Doosan Infracore Co. Ltd. **(2009) 3 ALR 162 – referred to.**

***Law and Practice of Commercial Arbitration in England*, by Mustill and Boyd, 2nd Edn. – referred to.**

2.15. It cannot be said that since the issues involved relate to the public policy of India, Part I of the Arbitration Act, 1996 would be applicable. Applicability of Part I of Arbitration Act, 1996 is not dependent on the nature of challenge to the award. Whether or not the award is challenged on the ground of public policy, it would have to satisfy the pre-condition that the Arbitration Act, 1996 is applicable to the arbitration agreement. The High Court committed a jurisdictional error in holding that the provisions contained in Article 33.12 is relevant only for the determination of the curial law applicable to the proceedings. The parties by agreement have provided that the *juridical seat* of the arbitration shall be in London. Necessary amendment has also been made in the PSCs, as recorded by the Final Partial Consent Award. Further, the Arbitration Act, 1996 does not define or mention *juridical seat.* The term *'juridical seat'* on the other hand is specifically defined in Section 3 of the English Arbitration Act. Therefore, this would clearly indicate that the parties understood that the arbitration law of England

A **would be applicable to the arbitration agreement. [Para 72] [512-C-F]**

Bharat Aluminium Company Vs. Kaiser Aluminium Technical Services Inc. **2012 (12) SCR 327:(2012)9 SCC 552;** *State of Gujarat & Anr. Vs. Justice R.A. Mehta (Retired) & Ors.* **2013 (1) SCR 1 :(2013) 3 SCC 1– referred to.**

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Tamil Nadu Electricity Board vs. ST-CMS Electric Co. Pvt. Ltd. **(2007) 2 All ER (Comm) 701 – referred to.**

C **Case Law Reference:**

(2007) 2. All ER (Comm) 701	Referred to	Para 21
(2011) 9 SCC 735	Referred to	Para 28
(2009) 3 ALR 162	Referred to	Para 28 50
D 2012 (12) SCR 327	Referred to	Para 28, 29
2013 (1) SCR 1	Referred to	Para 29
2011 (8) SCR 569	Relied on	Para 34, 36, 41
E 2011 (8) SCR 569	Relied on	Para 47,48, 51
(2008) 1 Lloyd's Law Rep 239	Referred to	Para 54
(2012) WL 14764	Referred to	Para 55
F 2008 (1) SCR 501	Held inapplicable	Para 59
2011 (13) SCR 359	Referred to	Para 61
2013 (7) SCALE 327	Referred to	Para 61
G 2014 (1) Arb. LR 257 (SC)	Referred to	Para 61

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5765 of 2014.

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From the Judgment and Order dated 22.03.2013 in OMP No. 46/2013 of the High Court of Delhi at New Delhi. A

Dr. Abhishek Manu Singhvi, Sameer Parekh, Madhur Baya, Faisal SherwaniM, Utsav Trivedi (For Parekh & Co.,), for the Appellant. B

A.K. Ganguli, Abhijeet Sinha, Sangeeta Mandal, Mamta Tewari, Swati Sinha, Mr. Vishal Gehrana (For Mandal & Co.,), for the Respondent.

The Judgment of the Court was delivered by C

SURINDER SINGH NIJJAR, J. 1. Leave granted.

2. This appeal is directed against the judgment of the High Court of Delhi at New Delhi rendered in OMP No.46 of 2013 dated 22nd March, 2013. By the aforesaid judgment, the Delhi D High Court has allowed the petition filed by the respondent under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Arbitration Act, 1996'), challenging the Final Partial Award dated 12th September, 2012. By the aforesaid Award, the objection raised by the Union E of India relating to the arbitrability of the claims made by the petitioner in respect of Royalties, Cess, Service Tax and CAG Audit have been rejected.

3. Before we discuss the legal issues, it would be pertinent F to make a very brief note of the relevant facts.

4. The parties had entered into Two Production Sharing Contracts dated 22nd December, 1994 (as amended by Amendment Agreement No.1 and Amendment Agreement No.2) (hereinafter referred to as "PSC" or "PSCs") as and when G appropriate. These two PSCs provide for the exploration and production of petroleum from the Mid and South Tapti Fields (hereinafter referred to as "Tapti" or "Tapri Field") and for the exploration and production of petroleum from Panna and Mukta Fields which shall be hereinafter referred to either as "Panna H

A Mukta" or "Panna Mukta fields". The two PSCs shall be referred to "Tapti PSC" and "Panna Mukta PSC," respectively.

5. One of the PSCs was entered into with Reliance Industries Limited (RIL), the appellant, a body corporate established under the laws of India. It is a major Indian B multinational and the largest private sector company in India, with interests in activities including exploration and production of oil and gas, petroleum refining and marketing petrochemicals, textiles, retail and special economic zones. The other PSC was entered into with BG Exploration and C Production India Limited ("BG"), a body corporate established under the laws of the Cayman Islands. It is a company forming part of BG Group, an international energy group headquartered in the United Kingdom with business operations in numerous countries. In 2002, BG Group acquired the share capital of D Enron Oil and Gas India Limited (EOGIL, a company formerly part of the Enron group of companies). Upon its acquisition on 15th February, 2003, the name of EOGIL was changed to BG Exploration and Production India Limited.

E 6. ONGC is a state-owned oil and gas company in India in which the Government of India holds a 74.14 % equity stake. It produces various petroleum products including crude oil, natural gas and LPG. These three companies are together defined as the "Contractor" (in the PSCs Clause 1.23).

F 7. The two PSCs provide a detailed procedure for Alternative Dispute Redressal Mechanisms. Articles 32 and 33 of the PSCs are relevant for this purpose. These Articles provide as under :

G **"Article 32 – Applicable Law and Language of the Contract –**

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

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32.2 Nothing in this Contract shall entitle the Government or the Contractor to exercise the rights, privileges and powers conferred upon it by this Contract in a manner which will contravene the laws of India.

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

Article 33 – Sole Expert, Conciliation and Arbitration :

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

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

33.3 Subject to the provisions herein, any unresolved dispute, difference or claim which cannot be settled

A amicably within a reasonable time may, except for those referred to in Article 33.2, be submitted to an arbitral tribunal for final decision as hereinafter provided.

33.4 The arbitral tribunal shall consist of three arbitrators. The Party or Parties instituting the arbitration shall appoint B one arbitrator and the Party or Parties responding shall appoint another arbitrator and both Parties shall so advise the other Parties. The two arbitrators appointed by the Parties shall appoint the third arbitrator.

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

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

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

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

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

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

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

33.12 The venue of conciliation or arbitration proceedings pursuant to this Article, unless the Parties otherwise agree, shall be London, England and shall be conducted in the English Language. The arbitration agreement contained in this Article 33 shall be governed by the laws of England. Insofar as practicable, the Parties shall continue to implement the terms of this Contract notwithstanding the initiation of arbitral proceedings and any pending claim or dispute.

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

8. In accordance with Article 33.12, the arbitral proceedings were to be held in London as the neutral venue. At the time of entering into the PSCs, none of the parties were

A domiciled in U.K. In fact, subsequently, the venue of the arbitral proceedings was shifted to Paris and again re-shifted to London. Consequently on 24th February, 2004, the parties to the PSCs entered into an agreement amending the PSCs, whereby it was stated that :-

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"4. Applicable Law and Arbitration :

Except the change of venue/seat of Arbitration from London to Paris, the Articles 32 and 33 of the Contract shall be deemed to be set out in full in this Agreement
C mutatis mutandis and so that references therein to the Contract shall be references to this Agreement."

9. It appears that certain disputes and differences have arisen between the parties, under or in connection with the
D PSCs. Consequently, the appellant issued a notice of arbitration dated 16th December, 2010. The disputes, differences and claims are common to both the Tapti PSC and Panna & Mukta PSC. The appellant claims that all attempts to resolve the disputes with the respondent amicably through
E correspondences and meetings have failed. The disputes, differences and claims arising out of or in connection with the PSCs have been summarized in paragraph 6 of the notice of arbitration.

10. Pursuant to the aforesaid notice, the arbitral tribunal
F was duly constituted on 29th July, 2011. Under Article 33.12, the *venue* of arbitration is in London. The parties confirmed the term of appointment of the Arbitral Tribunal on 29th July, 2011, signed by the Chairman on 15th August, 2011. A substantive hearing was held between 21st May, 2012 to 29th May, 2012
G in Singapore. Thereafter, on the basis of the amendment made in the PSC as noticed above, by agreement of the parties, the arbitral tribunal made the "Final Partial Consent Award" on 14th September, 2011. In the aforesaid award, it is recorded as under :

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"3. Final Partial Award as to Seat

3.1 Upon the agreement of the Parties, each represented by duly authorized representatives and through counsel, the Tribunal hereby finds, orders and awards:

(a) That without prejudice to the right of the Parties to subsequently agree otherwise in writing, the juridical seat (or legal place) of arbitration for the purposes of the arbitration initiated under the Claimants' Notice of Arbitration dated 16th December, 2010 shall be London, England.

(b) That any hearings in this arbitration may take place in Paris, France, Singapore or any other location the Tribunal considers may be convenient.

(c) That, save as set out above, the terms and conditions of the arbitration agreements in Article 33 of the PSCs shall remain in full force and effect and be applicable in this arbitration."

11. This Consent Award was duly signed by Mr. Christopher Lau SC (Chairman), Mr. Peter Leaver QC (Co-arbitrator) and Mr. Justice B.P. Jeevan Reddy (Co-arbitrator).

12. Pursuant to Clause 28 of the terms of appointment, the Chairman of the Tribunal is empowered to make interlocutory orders and consult other members of the tribunal if he considers appropriate or one of the parties requests that a decision be given by the whole tribunal. Various directions/ orders/ clarifications were made by the Chairman, with the concurrence of the other members of the tribunal. Pursuant to the above directions/orders/clarifications, the claimants / Appellants served upon the tribunal its statement of claim and amendment to the statement of claim dated 5th August, 2011 and claimants' revised amendment to the statement of claim dated 19th January, 2012. Similarly, the Respondent served upon the

A Tribunal its statement of defence dated 31st January, 2012 and additional statement on behalf of Respondent dated 10th April, 2012 pursuant to procedural order dated 13th March, 2012. The aforesaid procedural order dated 13th March, 2012 as amended by directions dated 15th May, 2012 set out the list B of issues (the May 2012 issues) to be heard and be determined by the tribunal at the hearing fixed to commence on 21st May, 2012 and to conclude on 29th May, 2012 ("the May 2012 hearing"). The parties served upon each other witness statement of their witnesses. The documents relied upon by both C the parties were also placed on record.

13. The Partial Final Award dated 12th September, 2012 records the claimant's claims for relief as set out in Section E of the Statement of the Scheme. Paragraph 30.3 of the Statement of Claim reads as follows:-

D

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

F

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

H (3) a declaration that the Government is liable to reimburse

the Claimants pursuant to Article 15.6.1 of the PSCs in respect of any additional royalties imposed and paid by the Claimants since August 2007 as a result of the exclusion of post-wellhead capital expenditure from wellhead value calculations made pursuant to the Gazette Notification.

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

14. In the alternative, the appellants claimed the reimbursement pursuant to Article 15.7 and 15.8 of the relevant PSCs (as the case may be), the relief prayed for was as under :

"(a) directing the parties to consult in order to make the necessary revisions and adjustments to the PSCs so as to maintain the expected benefit to the Claimants as from August 2007 by requiring the respondent to reimburse any excess royalties payable following the issuance of the Gazette Notification;

(b) consequential declaratory relief; and

(c) an award in damages in the same amount as are claimed in paragraph 30.3(4) of the Statement of Claim."

15. The third set of relief claimed by the appellant is set out in paragraph 30.3 of the Statement of Claim and is as follows :

"(1) a declaration that payment of royalties under the PSCs should be made by 15 February in respect of the period 1 July to 31 December and by 15 august in respect of the

A period 1 January to 30 June.

(2) a declaration that, provided royalties are paid within the timeframes specified in (1) no interest is payable under the terms of the PSCs and any interest otherwise imposed is to be reimbursed by the Government.

B

(3) a declaration that, in the event royalties are paid after the timeframes specified in (1), any interest in excess of LIBOR plus one percentage point is to be reimbursed by the Government.

C

(4) a declaration that the Government is liable to reimburse the claimants pursuant to Article 15.6.1 of the PSCs in respect of any additional royalties or interest imposed which does not accord with the principles outlined at (1) to (3) above.

D

(5) an award in favour of the claimants requiring the Government to reimburse the Claimants pursuant to Article 15.6.1 in the sum of Rs.7,26,00,532 in respect of the additional royalties imposed in relation to royalty payments made between 1995 to 2002."

E

16. As noticed earlier, the aforesaid reliefs were claimed by the appellant under Article 15.6.1, which is as under:-

F

"15.6.1 – The constituents of the (claimants) shall be liable to pay royalties and cess on their participating interest share of Crude Oil and Natural Gas saved and said in accordance with the provisions of this Agreement. The royalty on oil saved and sold will be paid at RS. 481 per metric ton and cessan oil saved and said will be paid at Rs.900 per metric ton. Royalty on Gas saved and said will be paid at ten per cent (10%) of the value at wellhead. No cess shall be payable in response of Gas. Royalty and cess shall not exceed the herein above amounts throughout the term of the contract. Royalty and cess shall be payable in

G

H

Indian Rupees. Any such additional payment shall be made by the (respondent)" A

17. Further the relief is claimed under Article 15.8 of the Tapti PSC which is in identical terms of Article 15.7 in the Panna Mukta PSC, which is as under : B

"15.8 – If any change in or to any Indian law, rule or regulation by any authority results in a material change to the economic benefits accruing to any of the parties to this contract after the effective date, the parties shall consult promptly to make necessary revisions and adjustments to C the contract in order to maintain such expected benefits to each of the parties."

18. The four preliminary objections raised by the Union of India before the Arbitral Tribunal are as follows :- D

(1) The Claimants' claims in regard to royalties (paragraph 14.1 of the Statement of Defence) are not arbitrable;

(2) The Claimants' claims in respect of cess E (paragraph 14.2 of the Statement of Defence) are not arbitrable;

(3) The Claimants' claims in respect of service tax (paragraph 14.3 of the State of Defence) are not F arbitrable; and

(4) The Claimants' claims in respect of the Comptroller and Auditor General's ("CAG") audit (paragraph 20.10 of the Statement of Defence) are not arbitrable. G

19. The aforesaid preliminary objections are raised for, for inter alia, the following reasons :-

"(a) the Claimants' claim entail a challenge to the validity H

A of the Oilfields (Regulation and Development) Act, 1948 ("the ORD Act") and of the powers exercised under it;

(b) the claimants cannot contract out of such legislation and any agreement to that effect would be void and
B unenforceable by virtue of Section 23 of the Indian Contract Act, 1872;

(c) the Claimants cannot avoid the effect of the legislation by relying on the doctrine of estoppel;

C (d) any dispute in respect of royalties should be referred to arbitration under Rule 33 of Petroleum and Natural Gas Rules 1959 ("the PNG Rules");

(e) there will likely be a defence to enforcement of any award in India under Article V(2)(b) of the New York
D Convention as a matter of the public policy of India;

(f) since any award has to be enforced in India, this Tribunal ought not to enter into or adjudicate questions/issues relating to royalties in view of Rule 33 of the PNG Rules
E and the decisions of the *Indian Supreme Court in Nataraj Studios vs. Navarang Studios* (1981) 1 SCC 523,*Amrit Banaspati Co. Ltd. vs. State of Punjab* (1992) 2 SCC 411 and *Mafatlal Industries Ltd. vs. Union of India* (1997) 5 SCC 536; and

F

(g) were the Tribunal to do so in reliance on *Tamil Nadu Electricity Board v. ST-CMS Electric Co Pvt. Ltd.* (2007) 2 All ER (Comm) 701, it would be contrary to the law as laid down by the English Court of Appeal in Ralli Bros v. CIA Navleria (1920) 2 KB 287."

G

20. The respondents also contended that the Arbitral Tribunal cannot, or ought not, to go into or adjudicate the questions raised by the appellants (claimants) with respect to royalties; and leave the parties, if they choose, to seek the
H necessary relief before the specific forums created under the

Oilfields (Regulation and Development) Act, 1948 and the Petroleum and Natural Gas Rules, 1956. A

21. The appellants (the claimants) on the other hand submitted that the issue of arbitrability is governed by the law of the *seat* of arbitration. The *seat* of the arbitration being England, the issue of arbitrability is governed by the English Law. It was also submitted that although challenge to the validity of the terms of PSC is governed by Indian Law (Article 32.1 of the PSC), nevertheless it falls within the jurisdiction of the tribunal just as any other substantive dispute. The appellants relied upon the judgment in *Tamil Nadu Electricity Board v. ST-CMS Electric Co. Pvt.*[1] *Ltd.* It was also submitted that the reliefs claimed are founded, only, on contractual rights. Further, whether or not any of those contractual rights are vitiated by Section 23 of the Indian Contract Act, 1872 is a question of substance and accordingly a dispute as to the underlying merits of the claim. The case of the appellants (claimants) assumes that respondent is entitled to rely on the relevant legislation but the claims of the appellants are purely contractual in nature. B C D

22. Upon consideration of the entire matter, the arbitral tribunal in the final award concluded as under : E

Summary of Conclusions – Formal Final Partial Award –

"6.1 The Tribunal, having carefully considered the documentary evidence, the oral evidence and the submissions of the Claimants and the respondent, and rejecting all submissions to the contrary, hereby makes, issues and publishes this Formal Final Partial Award and for the reasons set out above FINDS, AWARDS, ORDERS AND DECLARES that the Claimants' claims in respect of royalties, cess, service tax and CAG audit are arbitrabe. F G

6.2. In stating its conclusion on the four arbitrability issues

1. (2007) 2 All ER (Comm) 701. H

A identified in Section A of the List of issues for the May 2012 Hearing, the Tribunal wishes to make it clear that it is expressing no opinion on the merits of the parties' respective submissions which were made during the May 2012 Hearing. Subject to further order in the meantime, the
B merits of those issues will be decided in the March, 2013 Hearing."

23. Union of India challenged the aforesaid award before the High Court of Delhi in OMP No.46 of 2013. The respondents invoked the jurisdiction of the High Court under Section 34 of
C the Arbitration Act for various reasons namely, (i) the terms of the PSCs entered would manifest an unmistakable intention of the parties to be governed by the laws of India and more particularly the Arbitration Act 1996; (ii) the contracts were signed and executed in India; (iii) the subject matter of the
D contracts, namely, the Panna Mukta and the Tapti Fields are situated within India; (iv) the obligations under the contracts have been for the past more than 15 years performed within India; (v) the contracts stipulate that they "shall be governed and interpreted in accordance with the laws of India"; (vi) they also
E provided that "nothing in this contract" shall entitle either of the parties to exercise the rights, privileges and powers conferred upon them by the contract "in a manner which will contravene the laws of India" (Article 32.2); and (vii) the contracts further stipulate that "the companies and the operations under this
F Contract shall be subject to all fiscal legislation of India" (Article 15.1).

24. The appellant raised preliminary objection to the maintainability of the arbitration petition primarily on the ground
G that by choosing English Law to govern their agreement to arbitration and expressly agreeing to London seated arbitration, the parties have excluded the application of Part I of the Arbitration Act, 1996. It was submitted that the High Court of Delhi had no jurisdiction to entertain the objection filed by the Union of India under Section 34 of the Arbitration Act, 1996.
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It was emphasized that Courts of England and Wales have exclusive jurisdiction to entertain any challenge to the award. It was pointed out that the PSCs were amended on two occasions. On 24th February, 2004, PSC was sought to be amended to change the *seat* of arbitration from London to Paris. However, on 14th September, 2011, the parties to the arbitration agreed that the *seat* of the present arbitration proceedings would be London, England. This agreement is recorded in the Final Partial Consent Award rendered by the arbitral tribunal on 29th July, 2011. As noticed earlier, the final partial consent award provided that the *juridical seat* or *legal place* of arbitration for the purpose of arbitration initiated under the claimants notice of arbitration dated 16th December, 2011 shall be London, England. Article 33.9 of the PSC provides that the arbitration shall be conducted in accordance with the UNCITRAL Rules, 1985. However, subsequently it was recorded in the award that the applicable rules shall be the UNCITRAL Arbitration Rules, 1976. It was also submitted on behalf of the appellants that the objections raised by the UOI are yet to be determined by the tribunal on merits and shall be considered after considering the evidence at the time of rendering the final award.

25. Upon consideration of the entire matter, the High Court has held that undoubtedly the governing law of the contract i.e. proper law of the contract is the law of India. Therefore, the parties never intended to all together exclude the laws of India, so far as contractual rights are concerned. The Laws of England are limited in their applicability in relation to arbitration agreement contained in Article 33. This would mean that the English Law would be applicable only with regard to the curial law matters i.e. conduct of the arbitral proceedings. For all other matters, proper law of the contract would be applicable. Relying on Article 15(1), it has been held that the fiscal laws of India cannot be derogated from. Therefore, the exclusion of Indian public policy was not envisaged by the parties at the time when they entered into the contract. The High Court further held that

A to hold that the agreement contained in Article 33 would envisage the matters other than procedure of arbitration proceedings would be to re-write the contract. The High Court also held that the question of arbitrability of the claim or dispute cannot be examined solely on the touchstone of the applicability B of the law relating to arbitration of any country but applying the public policy under the laws of the country to which the parties have subjected the contract to be governed. Therefore, according to the High Court, the question of arbitrability of the dispute is not a pure question of applicable law of arbitration C or *lex arbitri* but a larger one governing the public policy. The High Court then concluded that public policy of India cannot be adjudged under the laws of England. Article 32.1 specifically provides that laws of India will govern the obligations of the parties in the PSCs. The High Court also concluded that the D effect of the interplay of Article 32.1 and Article 32.2 and 33.12 leads to the conclusion that law of England shall operate in relation to matters contained in Article 33 in so far as they are not inconsistent with the law of India. Since the question of arbitrability of the claim is a larger question effecting public policy of State it should be determined by applying laws of India. E This would give a meaningful effect to Article 32.2, otherwise it would be rendered otiose. On the basis of the aforesaid plain reading, according to the High Court, the conclusion is that the intention of the parties under the agreement was always to remain subject to Indian laws and not to contravene them. It is F further held that Article 33 was confined to conducting the arbitration in accordance with the laws of England and not for all other purposes. Relying on the judgment of this Court in *Bhatia International Vs. Bulk Trading S.A. & Anr.*[2], it has been held that Part I of the Arbitration Act, 1996 would be applicable G as there is no clear express or implied intention of the parties to exclude the applicability of the Arbitration Act, 1996. The High Court also relies on the judgment of this Court in *Venture Global Engineering Vs. Satyam Computer Services Ltd.*[3], in

2. (2002) 4 SCC 105.

H 3. (2008) 4 SCC 190.

support of the conclusion that the Delhi High Court has jurisdiction to entertain and adjudicate the petition under Section 34 of the Arbitration Act, 1996. Since, according to High Court, the dispute raised by the appellant relate to public policy of India, the petition under Section 34 of the Arbitration Act is maintainable. The High Court also gives additional reasons for concluding that the petition to challenge final partial award is maintainable. According to the High Court, the disputes involved rights *in rem*. Therefore, due regard has to be given to Indian laws. An award which is said to be against public policy can be permitted to be challenged in India even though the *seat* of arbitration is outside India. The High Court also took support from the doctrine of public trust with regard to natural resources. Since the appellants are seeking refund of amount of cess, royalties, service tax, all matters of public money in India, the jurisdiction of the Indian courts cannot be excluded. The High Court concludes that there is no reason why the public money be allowed to invested for seeking adjudication of the claims which may be eventually found to be impermissible to be enforced. Finally, the High Court declined to consider the law laid down by the Constitution Bench of this Court in **Bharat Aluminium** on the basis that the operation of the judgment has been made prospective by the court. The final conclusion has been given in paragraph 59 which is as under:

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

A 26. It is this judgment of the High Court which is subject matter of this appeal.

27. We have heard the learned counsel for the parties.

28. Learned senior counsel for both the parties have made
B very elaborate oral submissions. These submissions have been summed up and supplemented by the written submissions. Dr. Singhvi appearing for the appellants submitted that once the English Law is selected as the proper law of arbitration, the applicability of Arbitration Act, 1996 would be ruled out. He
C submits that the High Court has wrongly intermingled the issues relating to the challenge to the arbitral proceedings or the arbitration award with the merits of the disputes relating to the underlying contract. According to him, even if the law laid down in *Bhatia International* (supra) is applicable, the arbitral tribunal
D would apply the provisions contained in the Indian Contract Act. But the English Courts will have jurisdiction over the control and supervision of the arbitration including, challenge to the arbitral award. In support of his submission, Dr. Singhvi relies on *Videocon Industries Limited Vs. Union of India & Anr*[4]. He has
E also relied on *Yograj Infrastructure Limited Vs. Ssang Yong Engineering and Construction Company Limited*[5], *M/s Dozco India P. Ltd. Vs. M/s Doosan Infracore Co. Ltd.*[6], *Bharat Aluminium Company Vs. Kaiser Aluminium Technical Services Inc*[7].

F 29. Dr. Singhvi submitted that the reliance placed by the High Court on *Venture Global Engineering* (supra) is misplaced. In that case, the Court was not concerned with a clause such as Article 32.1 of the PSC, which has to be interpreted subject to the provisions contained in Article 33.12.
G According to Dr. Singhvi, the ratio of *Venture Global*

4. (2011) 6 SCC 161.
5. (2011) 9 SCC 735.
6. (2009) 3 ALR 162.
H 7. (2012) 9 SCC 552.

Engineering (supra) has lost its efficacy as it has been overruled by the Constitution Bench in *Bharat Aluminium Company* (supra). Dr. Singhvi then submitted that the concern shown by the High Court for Indian public policy was wholly misplaced and erroneous. The High Court has failed to appreciate that Article 32.1 and 32.2 deal only with the proper law of the contract and not with the proper law of the arbitration agreement. The High Court has erroneously distinguished the ratio of law laid down in *Videocon Industries Limited* (supra) on the ground that although the arbitration clause therein was the same but the question of public policy had not been addressed by the Court. Relying on *State of Gujarat & Anr. Vs. Justice R.A. Mehta (Retired) & Ors.*[8], Dr. Singhvi submitted that even if the issue of public policy was not particularly raised or addressed, the judgment in *Videocon Industries Limited* (supra) still be a binding precedent. According to him, whilst concluding that the parties did not intend to exclude the applicability of the Arbitration Act, 1996 to the arbitration agreement, the High Court has erroneously held that it was necessary for the parties to exclude not only the provisions of the Arbitration Act but also specifically plead that public policy is also excluded. According to the learned senior counsel, Article 15.6.1 has no relevance for the determination of the question as to whether the Arbitration Act, 1996 will apply to the arbitration, which is being held in London.

30. Mr. A.K. Ganguly, learned senior counsel appearing for Union of India submits that the decision in this case has been correctly rendered by the High Court based on the law laid down by this Court in **Bhatia International** and *Venture Global Engineering* (supra) as the arbitration agreement is pre **BALCO**. He submits that in order to determine whether Arbitration Act, 1996 is excluded, the contract had to be seen as a whole. Here, the contract is in India, for the work to be done in India over 25 years; secondly, it deals with natural

8. [(2013) 3 SCC 1.

A resources, Union of India is a trustee of these resources for the citizens of India. London was designated as the seat of arbitration only to provide certain measure of comfort level to the foreign parties. The contract can not be read in such a way as to exclude the Arbitration Act, 1996. The High Court has B correctly concluded that arbitrability had to be decided by taking into consideration Indian Laws, which would include the Indian Arbitration Act and not under the English Arbitration Act, 1996. He emphasized that the present proceedings relate to the interpretation of the contract, which is of national importance C to develop the oil rich areas in the Indian Coasts. He points out that under the PSC, the contractor has agreed to be always mindful of the rights and interests of India in the conduct of petroleum operations [Article 7.3(a)]. Mr. Ganguly also relied on Article 32.1 and 32.2 and submitted that Contract is to be D governed and interpreted in accordance with laws of India. He points out that there is a negative covenant in Article 32.2, wherein Government or the contractor are not entitled to exercise the rights, privileges, and powers conferred under the PSC in a manner which will contravene laws of India. Mr. Ganguly further pointed out that the High Court has correctly E applied the law laid down by this court in *Bhatia International* and *Venture Global Engineering* (supra). He also objected to the additional documents, which are sought to be relied upon by the petitioners in I.A. No. 7 of 2014. He submitted that none of these documents were on the record before the High Court F and can not be permitted to be relied on for the first time in this Court. He, therefore, submitted that I.A. No. 2 ought to be dismissed. He submitted that similar request was made before the High Court, which was rejected.

G 31. Mr. Ganguly emphasized that the issues raised by the Union of India are of public law and not purely contractual as sought to be projected by the appellants. He points out that the appellants have sought a number of reliefs with respect to CAG Audit. It is a challenge to the conclusions recorded by the CAG H Audit and such a challenge would not be arbitrable. It is further

submitted by him that the issues raised with regard to royalty is also not arbitrable as it is not a commercial issue. He has distinguished the judgment of this Court in *Videocon Industries Limited* (supra) on the basis that the issue with regard to the public law was not considered by the Court in that judgment.

32. As noticed earlier, both the learned senior counsel have also submitted written submissions. Primarily, the submissions made in the Court have been reiterated and, therefore, reference will be made to the same as and when necessary.

33. We have considered the submissions made by the learned counsel for the parties.

34. Before we analyze the submissions made by the learned senior counsel for both the parties, it would be appropriate to notice the various factual and legal points on which the parties are agreed. The controversy herein would have to be decided on the basis of the law declared by this Court in *Bhatia International* (supra). The parties are agreed and it is also evident from the Final Partial Consent Award dated 14th September, 2011 that the *juridical seat* (or legal place) of arbitration for the purposes of the arbitration initiated under the Claimants' Notice of Arbitration dated 16th December, 2010 shall be London, England. The parties are also agreed that hearings of the Notice of Arbitration may take place at Paris, France, Singapore or any other location the Tribunal considers may be convenient. It is also agreed by the parties that the terms and conditions of the arbitration agreement in Article 33 of the PSCs shall remain in full force and effect and be applicable to the arbitration proceedings.

35. The essential dispute between the parties is as to whether Part I of the Arbitration Act, 1996 would be applicable to the arbitration agreement irrespective of the fact that the *seat* of arbitration is outside India. To find a conclusive answer to

A the issue as to whether applicability of Part I of the Arbitration Act, 1996 has been excluded, it would be necessary to discover the intention of the parties. Beyond this parties are not agreed on any issue.

B 36. We are also of the opinion that since the ratio of law laid down in *Balco* (supra) has been made prospective in operation by the Constitution Bench itself, we are bound by the decision rendered in *Bhatia International* (supra). Therefore, at the outset, it would be appropriate to reproduce the relevant ratio of **Bhatia International** in paragraph 32 which is as under C :-

> **"32.** To conclude, we hold that the provisions of Part I would apply to all arbitrations and to all proceedings relating thereto. Where such arbitration is held in India the D provisions of Part I would compulsorily 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."

37. In view of the aforesaid, it would be necessary to F analyze the relevant Articles of the PSC, to discover the real intention of the parties as to whether the provisions of Arbitration Act, 1996 have been excluded. It must, immediately, be noticed that Articles 32.1 and 32.2 deal with applicable law and language of the contract as is evident from the heading of G the Article which is "Applicable Law and Language of the Contract". Article 32.1 provides the proper law of the contract i.e. laws of India. Article 32.2 makes a declaration that none of the provisions contained in the contract would entitle either the Government or the Contractor to exercise the rights, privileges H and powers conferred upon it by the contract in a manner which

would contravene the laws of India. A

38. Article 33 makes very detailed provision with regard to the resolution of disputes through arbitration. The two Articles do not overlap - one (Art.32) deals with the proper law of the contract, the other (Art.33) deals with ADR, i.e. consultations between the parties; conciliation; reference to a sole expert and ultimately arbitration. Under Article 33, at first efforts should be made by the parties to settle the disputes among themselves (33.1). If these efforts fail, the parties by agreement shall refer the dispute to a sole expert (33.2). The provision with regard to constitution of the arbitral tribunal provides that the arbitral tribunal shall consist of three arbitrators (33.4). This article also provides that each party shall appoint one arbitrator. The arbitrators appointed by the parties shall appoint the third arbitrator. In case, the procedure under Article 33.4 fails, the aggrieved party can approach the Permanent Court of Arbitration at Hague for appointment of an arbitrator (33.5). Further, in case the two arbitrators fail to make an appointment of the third arbitrator within 30 days of the appointment of the second arbitrator, again the Secretary General of the Permanent Court of Arbitration at Hague may, at the request of either party appoint the third arbitrator. In the face of this, it is difficult to appreciate the submission of the respondent – Union of India that the Arbitration Act, 1996 (Part I) would be applicable to the arbitration proceedings. In the event, Union of India intended to ensure that the Arbitration Act, 1996 shall apply to the arbitration proceedings, Article 33.5 should have provided that in default of a party appointing its arbitrator, such arbitrator may, at the request of the first party be appointed by the Chief Justice of India or any person or Institution designated by him. Thus, the Permanent Court of Arbitration at Hague can be approached for the appointment of the arbitrator, in case of default by any of the parties. This, in our opinion, is a strong indication that applicability of Arbitration Act, 1996 was excluded by the parties by consensus. Further, the arbitration proceedings are to be conducted in accordance with the B C D E F G H

A UNCITRAL Rules, 1976 (33.9). It is specifically provided that the right to arbitrate disputes and claims under this contract shall survive the termination of this contract (33.10).

39. 1The Article which provides the basis of the controversy herein is Article 33.12 which provides that *venue* of the arbitration shall be London and that the arbitration agreement shall be governed by the laws of England. It appears, as observed earlier, that by a Final Partial Consent Award, the parties have agreed that the *juridical seat* (or legal place of arbitration) for the purposes of arbitration initiated under the claimants' notice of arbitration dated 16th December, 2010 shall be London, England.

40. We are of the opinion, upon a meaningful reading of the aforesaid Articles of the PSC, that the proper law of the contract is Indian Law; proper law of the *arbitration agreement* is the law of England. Therefore, can it be said as canvassed by the respondents, that applicability of Arbitration Act, 1996 has not been excluded?

41. It was submitted by Mr. Ganguly that the intention of the parties was never to exclude the applicability of Arbitration Act, 1996. It is submitted that the expression "laws of India" under Article 32.2 would also include the Arbitration Act, 1996. This submission is without any merit. In our opinion, the expression "laws of India" as used in Article 32.1 and 32.2 have a reference only to the contractual obligations to be performed by the parties under the substantive contract i.e. PSC. In other words, the provisions contained in 33.12 are not governed by the provisions contained in Article 32.1. It must be emphasized that Article 32.1 has been made subject to the provision of Article 33.12. Article 33.12 specifically provides that the arbitration agreement shall be governed by the laws of England. The two Articles are particular in laying down that the contractual obligations with regard to the exploration of oil and gas under the PSC shall be governed and interpreted in accordance with the laws of India. In contra-distinction, Article 33.12 specifically

provides that the arbitration agreement contained in Article 33.12 shall be governed by the laws of England. Therefore, in our opinion, the conclusion is inescapable that applicability of Arbitration Act, 1996 has been ruled out by a conscious decision and agreement of the parties. Applying the ratio of law as laid down in *Bhatia International* **(supra)** it would lead to the conclusion that the Delhi High Court had no jurisdiction to entertain the petition under Article 34 of the Arbitration Act, 1996.

42. Article 33 provides for ADR – its limited application is to dispute resolution through arbitration as opposed to civil litigation. Therefore, there is no violation of 32.2, as Arbitration Act, 1996, in fact signifies Parliamentary sanction of ADR. In fact, Article 32.3 indicates that obligations under PSC and Arbitration Agreement are separate. Hence, it is provided that English shall be the language of the Contract. Followed by the stipulation that English shall also be the law of arbitral proceedings. Therefore, the conclusion of the High Court that PSC is a composite contract is not in tune with the approved provisions of the PSC. This separateness is further emphasized by Article 32.1 by making the provision "subject to the provision of Article 33.12". Laws of India have been made applicable to the substantive contract. Law of England govern the Dispute Resolution Mechanism. Provision for Arbitration is a deliberate election of remedy other than usual remedy of a civil suit. The ADR mechanism under the Arbitral Laws of different nations is legally and jurisprudentially accepted, sanctified by the Highest Law Making Bodies of the member States, signatories to the New York Convention. India is not only a signatory to the New York Convention, but it has taken into account the UNCITRAL Model Laws and the UNCITRAL Rules, whilst enacting the Arbitration Act, 1996. Therefore, it would not be possible to accept the submission of Mr. Ganguly that the Law of the Contract is also the Law of the Arbitration Agreement.

A 43. In our opinion, it is too late in the day to contend that the seat of arbitration is not analogous to an exclusive jurisdiction clause. This view of ours will find support from numerous judgments of this Court. Once the parties had consciously agreed that the *juridical seat* of the arbitration B would be London and that the arbitration agreement will be governed by the laws of England, it was no longer open to them to contend that the provisions of Part I of the Arbitration Act would also be applicable to the arbitration agreement. This Court in the case of *Videocon Industries Ltd.* **(supra)** has C clearly held as follows :-

> "33. In the present case also, the parties had agreed that notwithstanding Article 33.1, the arbitration agreement contained in Article 34 shall be governed by laws of England. This necessarily implies that the parties had D agreed to exclude the provisions of Part I of the Act. As a corollary to the above conclusion, we hold that the Delhi High Court did not have the jurisdiction to entertain the petition filed by the respondents under Section 9 of the Act and the mere fact that the appellant had earlier filed similar E petitions was not sufficient to clothe that High Court with the jurisdiction to entertain the petition filed by the respondents."

44. In coming to the aforesaid conclusion this Court F interpreted similar if not identical provisions contained in the arbitration agreement. The provision with regard to proper law of the contract and the arbitration agreement was as follows :

> **3.** For the sake of convenience, the relevant clauses of Articles 33, 34 and 35 of the PSC are extracted below:

G

> "33.1. *Indian law to govern.*—Subject to the provisions of Article 34.12, this contract shall be governed and interpreted in accordance with the laws of India.

H 33.2. *Laws of India not to be contravened.*—Subject to

Article 17.1 nothing in this contract shall entitle the contractor to exercise the rights, privileges and powers conferred upon it by this contract in a manner which will contravene the laws of India.

* * *

34.3. *Unresolved disputes.*—Subject to the provisions of this contract, the parties agree that any matter, unresolved dispute, difference or claim which cannot be agreed or settled amicably within twenty-one (21) days may be submitted to a sole expert (where Article 34.2 applies) or otherwise to an Arbitral Tribunal for final decision as hereinafter provided.

* * *

34.12. *Venue and law of arbitration agreement.*—The venue of sole expert, conciliation or arbitration proceedings pursuant to this article, unless the parties otherwise agree, shall be Kuala Lumpur, Malaysia, and shall be conducted in the English language. Insofar as practicable, the parties shall continue to implement the terms of this contract notwithstanding the initiation of arbitral proceedings and any pending claim or dispute. Notwithstanding the provisions of Article 33.1, the arbitration agreement contained in this Article 34 shall be governed by the laws of England.

* * *

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

45. We are of the opinion that in the impugned judgment

A the High Court has erred in not applying the ratio of law laid down in *Videocon Industries Ltd.* **(supra)** in the present case. The first issue raised in *Videocon Industries Limited* **(supra)** was as to whether the seat of arbitration was London or Kuala Lumpur. The second issue was with regard to the Courts that B would have supervisory jurisdiction over the arbitration proceedings. Firstly, the plea of **Videocon Industries Limited** was that the seat could not have been changed from Kuala Lumpur to London only on agreement of the parties without there being a corresponding amendment in the PSC. This plea C was accepted. It was held that seat of arbitration cannot be changed by mere agreement of parties. In Paragraph 21 of the judgment, it was observed as follows:-

> **"21.** Though, it may appear repetitive, we deem it necessary to mention that as per the terms of agreement, D the seat of arbitration was Kuala Lumpur. If the parties wanted to amend Article 34.12, they could have done so only by a written instrument which was required to be signed by all of them. Admittedly, neither was there any agreement between the parties to the PSC to shift the E juridical seat of arbitration from Kuala Lumpur to London nor was any written instrument signed by them for amending Article 34.12. Therefore, the mere fact that the parties to the particular arbitration had agreed for shifting of the seat of arbitration to London cannot be interpreted F as anything except physical change of the venue of arbitration from Kuala Lumpur to London."

46. The other issue considered by this Court in *Videocon Industries Limited* **(supra)** was as to whether a petition under Section 9 of the Arbitration Act, 1996 would be maintainable G in Delhi High Court, the parties having specifically agreed that the arbitration agreement would be governed by the English Law. This issue was decided against Union of India and it was held that Delhi High Court did not have the jurisdiction to entertain the petition filed by Union of India under Section 9 of H the Arbitration Act.

47. In the present appeal, this Court is also considering the issue as to whether the petition under Section 34 of the Arbitration Act, 1996 filed by Union of India in Delhi would be maintainable. The parties have made the necessary amendment in the PSCs to provide that the juridical seat of arbitration shall be London. It is also provided that the arbitration agreement will be governed by laws of England. Therefore, the ratio in *Videocon Industries Limited* (supra) would be relevant and binding in the present appeal.

48. The aforesaid judgment (Videocon) has been rendered by this Court upon consideration of *Venture Global Engineering* (supra). Venture Global Engineering and Videocon Industries Ltd. are both judgments delivered by two-Judge Bench. In our opinion, the factual and legal issues involved in the Videocon Industries case are very similar to the controversy involved in the present appeal. The Arbitration Agreement in this appeal is identical to the arbitration agreement in Videocon Industries. In fact, the factual situation in the present appeal is on a stronger footing than in *Videocon Industries Limited* (supra). As noticed earlier, in Videocon Industries, this Court concluded that the parties could not have altered the seat of arbitration without making the necessary amendment to the PSC. In the present appeal, necessary amendment has been made in the PSC. Based on the aforesaid amendment, the Arbitral Tribunal has rendered the Final Partial Consent Award of 14th September, 2011 recording that the juridical seat (or legal place) of the arbitration for the purposes of arbitration initiated under the Claimant's Notice of Arbitration dated 16th December, 2010 shall be London, England. Furthermore, the judgment in Videocon Industries is subsequent to Ventura Global. We are, therefore, bound by the ratio laid down in *Videocon Industries Limited* (supra).

49. We may also point out that the judgment in Videocon Industries has been followed on numerous occasions by a number of High Courts. This apart, the judgment of this Court

A in Videocon Industries Ltd. also reflects the view taken by the Courts in England on the same issues. In the case of *A Vs. B*[9] considering a similar situation, it has been held as follows :

> *""..... an agreement as to the seat of an arbitration is*
> B *analogous to an exclusive jurisdiction clause. Any claim for a remedy..... as to the validity of an existing interim or final award is agreed to be made only in the courts of the place designated as the seat of arbitration." (emphasis supplied).*

50. This Court in *Dozco India Ltd.* (supra) again reiterated the principle of law laid down in *Sumitomo Heavy Industries Ltd.* (supra), wherein the law was very clearly enunciated in Para 16:

> "The law which would apply to the filing of the award, to its enforcement and to its setting aside would be the law governing the agreement to arbitrate and the performance of that agreement.".

This judgment is rendered by a three-Judge Bench.

51. It is noteworthy that the judgment in Sumitomo was not dissented from in Bhatia International on which the judgment in Venture Global is based. This again persuades us to follow the law laid down in *Videocon* (supra).

52. Again this Court in Yograj Infrastructure (two-Judge Bench) considered a similar arbitration agreement. It was provided that the arbitration proceedings shall be conducted in English in Singapore in accordance with the Singapore International Arbitration Centre (SIAC) Rules. (Clause 27.1). Clause 27.2 provided that the arbitration shall take place in Singapore and be conducted in English language. This Court held that having agreed that the seat of arbitration would be Singapore and that the curial law of the arbitration proceedings

9. 2007 (1) All E.R (Comm) 591.

would be SIAC Rules, it was no longer open to the appellant to contend that an application under Section 11(6) of the Arbitration Act, 1996 would be maintainable.

53. This judgment has specifically taken into consideration the law laid down in *Bhatia International* (supra) and *Venture Global* (supra). The same view has been taken by Delhi High Court, Bombay High Court and the Gujarat High Court, in fact this Court in Videocon has specifically approved the observations made by the Gujarat High Court in Hardy Oil (supra).

54. The effect of choice of seat of arbitration was considered by the Court of Appeal in *C Vs. D*[10]. This judgment has been specifically approved by this Court in Balco (supra) and reiterated in *Enercon* (supra). In *C Vs. D* (supra), the Court of Appeal has observed:-

"Primary Conclusion

16. I shall deal with Mr Hirst's arguments in due course but, in my judgment, they fail to grapple with the central point at issue which is whether or not, by choosing London as the seat of the arbitration, the parties must be taken to have agreed that proceedings on the award should be only those permitted by English law. In my view they must be taken to have so agreed for the reasons given by the judge. The whole purpose of the balance achieved by the Bermuda Form (English arbitration but applying New York law to issues arising under the policy) is that judicial remedies in respect of the award should be those permitted by English law and only those so permitted. Mr Hirst could not say (and did not say) that English judicial remedies for lack of jurisdiction on procedural irregularities under sections 67 and 68 of the 1996 Act were not permitted; he was reduced to saying that New York judicial remedies

10. [2008] 1 Lloyed's Rep 239.

A were also permitted. That, however, would be a recipe for litigation and (what is worse) confusion which cannot have been intended by the parties. No doubt New York law has its own judicial remedies for want of jurisdiction and serious irregularity but it could scarcely be supposed that
B a party aggrieved by one part of an award could proceed in one jurisdiction and a party aggrieved by another part of an award could proceed in another jurisdiction. Similarly, in the case of a single complaint about an award, it could not be supposed that the aggrieved party could complain
C in one jurisdiction and the satisfied party be entitled to ask the other jurisdiction to declare its satisfaction with the award. There would be a serious risk of parties rushing to get the first judgment or of conflicting decisions which the parties cannot have contemplated."

D 55. The aforesaid observations were subsequently followed by the High Court of Justice Queen's Bench Division, Commercial Court (England) in *SulameRica CIA Nacional De Seguros SA v. Enesa Engenharia SA – Enesa*[11]. In laying down the same proposition, the High Court noticed that the
E issue in this case depends upon the weight to be given to the provision in Condition 12 of the insurance policy that "the seat of the arbitration shall be London, England." It was observed that this necessarily carried with it the English Court's supervisory jurisdiction over the arbitration process. It was
F observed that "this follows from the express terms of the Arbitration Act, 1996 and, in particular, the provisions of Section 2 which provide that Part I of the Arbitration Act, 1996 applies where the seat of the arbitration is in England and Wales or Northern Ireland. This immediately establishes a strong
G connection between the arbitration agreement itself and the law of England. It is for this reason that recent authorities have laid stress upon the locations of the seat of the arbitration as an important factor in determining the proper law of the arbitration agreement."

H 11. (2012) WL 14764.

56. In our opinion, these observations are fully applicable to the facts and circumstances of this case. The conclusion reached by the High Court would lead to the chaotic situation where the parties would be left rushing between India and England for redressal of their grievances. The provisions of Part I of the Arbitration Act 1996 (Indian) are necessarily excluded; being wholly inconsistent with the arbitration agreement which provides "that arbitration agreement shall be governed by English law." Thus the remedy of the respondent to challenge any award rendered in the arbitration proceedings would lie under the relevant provisions contained in Arbitration Act, 1996 of England and Wales. Whether or not such an application would now be entertained by the courts in England is not for us to examine, it would have to be examined by the Court of Competent Jurisdiction in England.

Public Policy:

57. Mr. Ganguly has vehemently argued that the issues involved here relate to violation of public policy of India. Therefore, the applicability of Part I of the Indian Arbitration Act cannot be excluded even if the seat of arbitration is London. It would also, according to Mr. Ganguly, make no difference that the arbitration agreement specifically provides for the arbitration agreement to be governed by the Laws of England. According to Mr. Ganguly, proper law of the contract would be relevant to determine the question as to whether the interim final award would be amenable to challenge under Section 34 of the Arbitration Act, 1996. In our opinion, the aforesaid submission of the learned counsel runs counter to the well settled law in India as well as in other jurisdictions. As noticed earlier, Mr. Ganguly has submitted that the disputes in relation to royalties, cess, service tax and the CAG audit report are not arbitrable. In support of this submission, he relies on the provisions contained in Article 15.1 read with Article 32.2. Relying upon these two Articles, Mr. Ganguly submitted that the obligation with regard to taxes, royalties, rentals etc. are not purely

A contractual, they are governed by the relevant statutory provisions. He, therefore, placed strong reliance on the judgment in *Venture Global* **(supra)** in support of his submission that since the disputes are not arbitrable, the award cannot be enforced under Part II of the Arbitration Act, 1996 B but is amenable to challenge under Section 34 of the Act. It would be appropriate to point out that the judgment in Venture Global is in two parts. The first part is based on Bhatia International Ltd., wherein it is held as follows :-

C "**32.** .....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."

D

58. In this case, the parties have by agreement provided that the *juridical seat* of arbitration will be in London. On the basis of the aforesaid agreement, necessary amendment has been made in the PSCs. On the basis of the agreement and E the consent of the parties, the Arbitral Tribunal has made the "Final Partial Consent Award" on 14th September, 2011 fixing the *juridical seat* (or legal place) of arbitration for the purposes of arbitration initiated under the claimants notice of arbitration dated 16th December, 2010 in London, England. To make it F even further clear that the award also records that any hearing in the arbitration may take place in Paris, France, Singapore or any other location the tribunal considers convenient. Article 33.12 stipulates that arbitration proceedings shall be conducted in English language. The arbitration agreement contained in G Article 33 shall be governed by the laws of England. A combined effect of all these factors would clearly show that the parties have by express agreement excluded the applicability of Part I of the Arbitration Act, 1996 (Indian) to the arbitration proceedings.

H

59. We are also unable to agree with Mr. Ganguly that Part I of the Arbitration Act, 1996 (Indian) would be applicable in this case, in view of the law laid down by this Court in *Venture Global Engineering* (supra). In our opinion, even the second part of the ratio in Venture Global Engineering (supra) from paragraph 32 of the judgment onwards would not be applicable to the facts and circumstances of this case. Firstly, in our opinion, all the disputes raised by the petitioners herein are contractual in nature. Secondly, the performance of any of these obligations would not lead to any infringement of any of the laws of India *per se*. Thirdly, the non-obstante clause which was under consideration in Venture Global is non-existent in the present case. In Venture Global, the court was concerned with direct violation of Foreign Exchange Management Act. The actions of the respondents therein would also have been contrary to various provisions of the Companies Act in the event the shares were to be transferred in accordance with the award. Therefore, this Court was persuaded to take the view that inspite of the applicability of Part I having been excluded as the seat of arbitration was outside nonetheless Part I would apply as the transfer of the shares would be against the laws of India and, therefore, violate public policy. In our opinion, such circumstances do not exist in the present case as there is no danger of violation of any statutory provisions. Prima facie, it appears that there is no challenge to the Gazette Notification. In fact, claim statement shows that the amounts of royalties/cess levied have been paid. Prayer is for reimbursement of the amounts paid, based on Articles 15.6 and 15.7 of the PSC. There also seems to be a claim for making necessary revisions and adjustment to the contract to off-set the effect of any changes in the law. We fail to see any apparent or so patently obvious violation of Indian Laws in any of these claims. The basis for filing the petition under Section 34 is that the Appellants are bound to obey the Laws of the country. The appellants have nowhere claimed to be exempted from the Laws of India. They claim that the Government of India, party

A to the Contract, i.e., PSC has failed to seek and obtain exemption as stipulated in the contract. Whether or not the claim has substance is surely an arbitral matter. It is not the case of the appellants that they are not bound by the Laws of India, relating to the performance of the contractual obligations under B the PSCs. In view of what we have said earlier, it is not possible to sustain the conclusion reached by the High Court. The arbitration agreement can not be jettisoned on the plea that award, if made against the Government of India, would violate Public Policy of India. Merely because the Arbitral Tribunal has C held that claims are arbitral does not mean that the claims have been accepted and an award adverse to India has been given. We, therefore, have no hesitation in rejecting the submission made by Mr. Ganguly. For the same reasons, we are unable to sustain the conclusions reached by the High Court of Delhi.

D 60. Another good reason for not accepting or approving the conclusions reached by the High Court is that it has failed to distinguish between the law applicable to the proper law of the contract and proper law of the arbitration agreement. The High Court has also failed to notice that by now it is settled, in E almost all international jurisdictions, that the agreement to arbitrate is a separate contract distinct from the substantive contract which contains the arbitration agreement. This principle of severability of the arbitration agreement from the substantive contract is indeed statutorily recognized by Section 16 of the F Indian Arbitration Act, 1996. Section 16(1) specifically provides as under:-

> "**16.Competence of arbitral tribunal to rule on its jurisdiction.-** (1) The arbitral tribunal may rule on its own G jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,—
>
> (a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms H of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause."

61. A bare perusal of the aforesaid would show that the arbitration agreement is independent of the other terms of the contract. Further, even if the contract is declared *null* and *void*, it would not lead to the foregone conclusion that the arbitration clause in invalid. The aforesaid provision has been considered by this Court in a number of cases, which are as follows:-

> *Reva Electric Car Company P. Ltd. Vs. Green Mobil.*[12], *Today Homes and Infrastructure Pvt. Ltd. Vs. Ludhiana Improvement Trust and Anr.*[13], *Enercon (India) Ltd. & Ors. Vs. Enercon GMBH & Anr.*[14], *World Sport Group (Mauritius) Ltd. Vs. MSM Satellite (Singapore) PTC Ltd.* [Civil Appeal No. 895 of 2014]

62. This principle of separability permits the parties to agree: that law of one country would govern to the substantive contract and laws of another country would apply to the arbitration agreement. The parties can also agree that even the conduct of the reference would be governed by the law of another country. This would be rare, as it would lead to extremely complex problems. It is expected that reasonable businessman do not intend absurd results. In the present case, the parties had by agreement provided that the substantive contract (PSC) will be governed by the laws of India. In contradistinction, it was provided that the arbitration agreement will be governed by laws of England. Therefore, there was no scope for any confusion of the law governing the PSC with the law governing the arbitration agreement. This principle of

12. (2012) 2 SCC 93.

13. 2013 (7) SCALE 327.

14. 2014 (1) Arb. LR 257 (SC)

A severability is also accepted specifically under Article 33.10 of the PSC, which is as under:-

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

B 63. We are, therefore, unable to uphold the conclusions recorded by the High Court that the applicability of the English Law would be limited in its application only to the conduct of the reference. For the same reasons, we are unable to accept the submissions made by Mr. Ganguly on this issue.

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64. In 1982, the Government provided a model Production Sharing Contract to potential bidders, which provided a governing law clause, which read as follows:-

D "32.1 This contract shall be governed and interpreted in accordance with laws of India."

This was specifically amended and incorporated in the present PSCs signed on 22nd December, 1994 and provided that the governing law clause (32.1) would be E "subject to the provision of Article 33.12".

65. Considering the aforesaid two provisions, it leaves no manner of doubt that Article 32.2 would have no impact on the designated juridical seat as well as governing law of the F arbitration agreement. This would become evident from a perusal of the Final Partial Consent Award dated 14th September, 2011, signed by all the three members of the arbitral tribunal recording that the juridical seat of the arbitration initiated under the Claimant's Notice dated 16th December, 2010 shall be London, England. Therefore, we are unable to G accept the conclusion reached by the Delhi High Court and the submission made by Mr. Ganguly that Arbitration Act, 1996 (Part I) would be applicable to the arbitration agreement.

66. Mr. Ganguly has next sought to persuade us that the H seat of arbitration shall be in India as the PSC is governed by

the law of India. According to Mr. Ganguly, laws of India would include the Arbitration Act, 1996. Therefore, irrespective of the provisions contained in Article 33.12, Arbitration Act, 1996 would be applicable to arbitration proceedings. The English law would be applicable only in relation to the conduct of the arbitration upto the passing of the Partial Final Award. We are unable to accept the aforesaid submissions of Mr. Ganguly. As noticed earlier, Article 32.1 itself provides that it shall be subject to the provision of Article 33.12. Article 33.12 provides that the arbitration agreement contained in this Article shall be governed by the laws of England. The term 'laws of England' cannot be given a restricted meaning confined to only curial law. It is permissible under law for the parties to provide for different laws of the contract and the arbitration agreement and the curial law. In Naviera Amazonica SA (supra), the Court of Appeal in England considered an agreement which contained a clause providing for the jurisdiction of the courts in Lima, Peru in the event of judicial dispute and at the same time contained a clause providing that the arbitration would be governed by the English Law and the procedural law of arbitration shall be the English Law. The Court of Appeal observed as follows :-

> "All contracts which provide for arbitration and contain a foreign element may involve three potentially relevant systems of law: (1) the law governing the substantive contract; (2) the law governing the agreement to arbitrate and the performance of that agreement; (3) the law governing the conduct of the arbitration. In the majority of cases all three will be the same. But (1) will often be different from (2) and (3). And occasionally, but rarely (2) may also differ from (3)."

67. From the above, it is evident that it was open to the parties to agree that the law governing the substantive contract (PSC) would be different from the law governing the arbitration agreement. This is precisely the situation in the present case. Article 32.1 specifically provides that the performance of the

A contractual obligations under the PSC would be governed and interpreted under the laws of India. So far as the alternative dispute redressal agreement i.e. the arbitration agreement is concerned, it would be governed by laws of England. There is no basis on which the respondents can be heard to say that B the applicability of laws of England related only to the conduct of arbitration reference. The law governing the conduct of the arbitration is interchangeably referred to as the *curial law* or *procedural law* or the *lex fori.* The delineation of the three operative laws as given in *Naviera Amazonica* (supra) has C been specifically followed by this Court in the case of *Sumitomo* (supra). The court also, upon a survey, of a number of decisions rendered by the English Courts and after referring to the views expressed by learned commentators on International Commercial Arbitration concluded that:-

D "16. The law which would apply to the filing of the award, to its enforcement and to its setting aside would be the law governing the agreement to arbitrate and the performance of that agreement."

E 68. In coming to the aforesaid conclusion, this Court relied on a passage from Law and Practice of Commercial Arbitration in England, 2nd Edn. by Mustill and Boyd which is as under :

F "An agreed reference to arbitration involves two groups of obligations. The first concerns the mutual obligations of the parties to submit future disputes, or an existing dispute to arbitration, and to abide by the award of a tribunal constituted in accordance with the agreement. It is now firmly established that the arbitration agreement which G creates these obligations is a separate contract, distinct from the substantive agreement in which it is usually embedded, capable of surviving the termination of the substantive agreement and susceptible of premature termination by express or implied consent, or by H repudiation or frustration, in much the same manner as in

more ordinary forms of contract. Since this agreement has a distinct life of its own, it may in principle be governed by a proper law of its own, which need not be the same as the law governing the substantive contract.

The second group of obligations, consisting of what is generally referred to as the 'curial law' of the arbitration, concerns the manner in which the parties and the arbitrator are required to conduct the reference of a particular dispute. According to the English theory of arbitration, these rules are to be ascertained by reference to the express or implied terms of the agreement to arbitrate. This being so, it will be found in the great majority of cases that the *curial law, i.e., the law governing the conduct of the reference*, is the same as the law governing the obligation to arbitrate. It is, however, open to the parties to submit, expressly or by implication, the conduct of the reference to a different law from the one governing the underlying arbitration agreement. *In such a case, the court looks first at the arbitration agreement to see whether the dispute is one which should be arbitrated, and which has validly been made the subject of the reference, it then looks to the curial law to see how that reference should be conducted and then returns to the first law in order to give effect to the resulting award.*

* * *

It may therefore be seen that problems arising out of an arbitration may, at least in theory, call for the application of any one or more of the following laws—

1. *The proper law of the contract, i.e., the law governing the contract which creates the substantive rights of the parties, in respect of which the dispute has arisen.*

2. *The proper law of the arbitration agreement, i.e.,*

A *the law governing the obligation of the parties to submit the disputes to arbitration, and to honour an award.*

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

B

* * *

1. The proper law of the arbitration agreement governs the validity of the arbitration agreement, the question

C *whether a dispute lies within the scope of the arbitration agreement; the validity of the notice of arbitration; the constitution of the tribunal; the question whether an award lies within the jurisdiction of the arbitrator; the formal validity of the award; the question whether the parties*

D *have been discharged from any obligation to arbitrate future disputes.*

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

E *determination of the proper law of the contract.*

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

F dispute.

* * *

In the absence of express agreement, there is a strong prima facie presumption that the parties intend the curial

G law to be the law of the 'seat' of the arbitration, i.e., the place at which the arbitration is to be conducted, on the ground that that is the country most closely connected with the proceedings. So in order to determine the curial law in the absence of an express choice by the parties it is

H

first necessary to determine the seat of the arbitration, by construing the agreement to arbitrate." A

69. The same legal position is reiterated by this Court in *Dozco* **(supra)**. In paragraph 12 of the judgment, it is observed as follows : B

> **"12.** In the backdrop of these conflicting claims, the question boils down to as to what is the true interpretation of Article 23. This Article 23 will have to be read in the backdrop of Article 22 and more particularly, Article 22.1. It is clear from the language of Article 22.1 that the whole agreement would be governed by and construed in accordance with the laws of The Republic of Korea. It is for this reason that the respondent heavily relied on the law laid down in *Sumitomo Heavy Industries Ltd.* v. *ONGC Ltd.*[6] This judgment is a complete authority on the proposition that the arbitrability of the dispute is to be determined in terms of the law governing arbitration agreement and the arbitration proceedings have to be conducted in accordance with the curial law. This Court, in that judgment, relying on *Mustill and Boyd*: *The Law and Practice of Commercial Arbitration in England*, 2nd Edn., observed in para 15 that where the law governing the conduct of the reference is different from the law governing the underlying arbitration agreement, the court looks to the arbitration agreement to see if the dispute is arbitrable, then to the curial law to see how the reference should be conducted, "and then returns to the first law in order to give effect to the resulting award". In para 16, this Court, in no uncertain terms, declared that the law which would apply to the filing of the award, to its enforcement and to its setting aside would be the law governing the agreement to arbitrate and the performance of that agreement. C D E F G

70. We are in respectful agreement with the aforesaid judgment. H

71. In view of the aforesaid binding precedent, we are unable to accept the submission of Mr. Ganguly that the Arbitration Act, 1996 has not been excluded by the parties by agreement. For the same reasons, we are unable to approve the conclusions reached by the Delhi High Court that reference to laws of England is only confined to the procedural aspects of the conduct of the arbitration reference.

72. We are also unable to agree with the submission of Mr. Ganguly that since the issues involved herein relate to the public policy of India, Part I of the Arbitration Act, 1996 would be applicable. Applicability of Part I of Arbitration Act, 1996 is not dependent on the nature of challenge to the award. Whether or not the award is challenged on the ground of public policy, it would have to satisfy the pre-condition that the Arbitration Act, 1996 is applicable to the arbitration agreement. In our opinion, the High Court has committed a jurisdictional error in holding that the provisions contained in Article 33.12 is relevant only for the determination of the curial law applicable too the proceedings. We have already noticed earlier that the parties by agreement have provided that the *juridical seat* of the arbitration shall be in London. Necessary amendment has also been made in the PSCs, as recorded by the Final Partial Consent Award dated 14th September, 2011. It is noteworthy that the Arbitration Act, 1996 does not define or mention *juridical seat*. The term *'juridical seat'* on the other hand is specifically defined in Section 3 of the English Arbitration Act. Therefore, this would clearly indicate that the parties understood that the arbitration law of England would be applicable to the arbitration agreement.

73. In view of the aforesaid, we are unable to uphold the conclusion arrived at by the Delhi High Court that the applicability of Arbitration Act, 1996 to the arbitration agreement in the present case has not been excluded.

74. In view of the above, we hold that:

(i) The petition filed by respondents under Section 34 of the Arbitration Act, 1996 in the Delhi High Court is not maintainable. A

(ii) We further over-rule and set aside the conclusion of the High Court that, even though the arbitration agreement would be governed by the laws of England and that *juridical seat* of arbitration would be in London, Part I of the Arbitration Act would still be applicable as the laws governing the substantive contract are Indian Laws. B C

(iii) In the event, a final award is made against the respondent, the enforceability of the same in India, can be resisted on the ground of Public Policy.

(iv) The conclusion of the High Court that in the event, the award is sought to be enforced outside India, it would leave the Indian party remediless is without any basis as the parties have consensually provided that the arbitration agreement will be governed by the English law. Therefore, the remedy against the award will have to be sought in England, where the juridical seat is located. However, we accept the submission of the appellant that since substantive law governing the contract is Indian Law, even the Courts in England, in case the arbitrability is challenged, will have to decide the issue by applying Indian Law viz. the principle of public policy etc. as it prevails in Indian Law. D E F

75. In view of the above, the appeal is allowed and the impugned judgment of the High Court is set aside. G

Nidhi Jain Appeal allowed.