PETITIONER:
NATIONAL THERMAL POWER CORPORATION

Vs.

RESPONDENT:
SINGER COMPANY AND ORS.

DATE OF JUDGMENT07/05/1992

BENCH:
THOMMEN, T.K. (J)
BENCH:
THOMMEN, T.K. (J)
AGRAWAL, S.C. (J)

CITATION:
1993 AIR 998 1992 SCR (3) 106
1992 SCC (3) 551 JT 1992 (3) 198
1992 SCALE (1)1034

ACT:
Arbitration Act, 1940:
Section 1(2)-Applicability of the Act-International Commercial arbitration agreement-Indian company entering into contract with a foreign company-Arbitration clause contained in the contract-Stipulation that laws in force in India applicable and Courts of Delhi would have exclusive jurisdiction-Rules of conciliation and arbitration of International Chamber of Commerce applicable as agreed upon-Dispute referred to Arbitral Tribunal constituted as per these Rules-Award made in London, the seat of arbitration-Whether the award is governed by the Arbitration Act, 1940.
Foreign Awards (Recognition and Enforcement) Act, 1961:
Sections 2 and 9-International commercial arbitration agreement-Award made in a foreign country-Laws in force in India applicable as agreed upon by parties-Such award-Whether to be regarded as foreign award or domestic award.
Private International Law :
International contracts-Law governing the contract-Parties at liberty to make choice of the law applicable-Substantive as also procedural-In absence of choice, presumption that laws of country where arbitration held applicable-However presumption rebuttable having regard to true intention of parties-Proper law of contract-What is-Doctrine of renvoi-Applicability of.
Words & Phrases :
'Proper Law of Contract'-Meaning of.

HEADNOTE:
The appellant Corporation and Respondent Company entered into two agreements on 17.8.1982 at New Delhi for the supply of equipment,

107

erection and commissioning of certain works in India. It was agreed that the law applicable to the contract would be the laws in force in India and that the Courts of Delhi would have the exclusive jurisdiction. The agreements contained a specific provision that any dispute arising out of the contract should be decided as per the relevant clauses of the General conditions of the contract. According to the General Terms, the Respondent being a

foreign contractor it would be governed by the provisions relating to foreign contractors. It further provided for settlement of disputes amicable, failing which by arbitration which would be conducted by three arbitrators one each to be nominated by the owner and the Contractor and a third to be named by the President of the International Chamber of Commerce (I.C.C.).

A dispute arose between the parties and it was referred to the Arbitral Tribunal constituted in terms of rules of arbitration of the ICC Courts Rules and London was chosen by the ICC Court as the place of arbitration. The Tribunal made an interim award.

The appellant corporation filed an application under the provisions of the Arbitration Act, 1940 before the Delhi High Court for setting aside the said interim award.

The High Court held that the award was not governed by the Arbitration Act, 1940; the arbitration agreement on which the award was made was not governed by the law of India; The award fell within the ambit of the Foreign Awards (Recognition and Enforcement) Act, 1961; London being the seat of arbitration, English Courts alone had jurisdiction to set aside the award; and, that it had no jurisdiction to entertain the application filed under the Arbitration Act, 1940.

Being aggrieved against the High Court's order, the appellant corporation preferred the present appeal by special leave.

On behalf of the appellant, it was contended that the substantive law which governed the arbitration was Indian law and so the competent courts were Indian Courts. It was also contended that even in respect of procedural matters, the concurrent jurisdiction of the courts of the place of arbitration did not exclude the jurisdiction of Indian Courts.

It was contended on behalf of the respondent company that while the

108

main contract was governed by Indian law, as expressly stated by the parties, arbitration being a collateral contract and procedural in nature, it was not necessarily bound by the proper law of the contract, but the law applicable to it must be determined with reference to other factors and the place of arbitration was an important factor. It was further contended that since London was chosen to be the seat of arbitration, English law was the proper law of arbitration, and all proceedings connected with it would be governed by that law and exclusively within the jurisdiction of the English courts; and that the Indian courts had no jurisdiction in matters connected with the arbitration, except to the extent permitted by the Foreign Awards Act for recognition and enforcement of the award.

On the question as to which was the law that governed the agreement on which the award had been made :

Allowing the appeal, this Court,

HELD : 1. The High Court was wrong in treating the award in question as a foreign award. The Foreign Awards Act has no application to the award by reason of the specific exclusion contained in Section 9 of that Act. The award is governed by the laws in force in India, including the Arbitration Act, 1940. [132-C]

2. The expression 'proper law of a contract' refers to the legal system by which the parties to the contract intended their contract to be governed. If their intention is expressly stated or if it can be clearly inferred from the contract itself or its surrounding circumstances, such

intention determines the proper law of the contract. The only limitation on this rule is that the intention of the parties must be expressed bona fide and and it should not be opposed to public policy. Where, however, the intention of the parties in not expressly stated and no inference about it can be drawn, their intention as such has no relevance. In that event, the courts endeavour to impute an intention by identifying the legal system with which the transaction has its closest and most real connection. [118-B, E, F]

Hamlyn & Co. v. Taliskar Distillery, (1891-4) All E.R. 849; Vita Food Products Inc. v. Unus Shipping Co. Ltd., (1939) AC 277 (PC), relied on.

Dicey & Morries : The Conflict of Laws, 11th Edn. Vol. II PP.1161-62, referred to.

109

3. Mere selection of a particular place for submission to the jurisdiction of the courts or for the conduct of arbitration will not, in the absence of any other relevant connection factor with that place, be sufficient to draw an inference as to the intention of the parties to be governed by the system of law prevalent in that place. This is specially so in the case of arbitration. This is particularly true when the place of arbitration is not chosen by the parties themselves, but by the arbitrators or by an outside body, and that too for reasons unconnected with the contract. Choice of place for submission to jurisdiction of courts or for arbitration may thus prove to have little relevance for drawing an inference as to the governing law of the contract, unless supported in that respect by the rest of the contract and the surrounding circumstances. Any such clause must necessarily give way to stronger indications in regard to the intention of the parties. [119 C-G]

Jacobs Marcus & Co. v. The Credit Lyonnais, [1884] 12 Q.B.D. 589 (C.A.); The Fehmarn, (1958) 1 All E.R. 333, relied on.

4. Where the parties have not expressly or impliedly selected the proper law, the courts impute an intention by applying the objective test to determine what the parties would have as just and reasonable persons intended as regards the applicable law had they applied their minds to the question. The Judge has to determine the proper law for the parties in such circumstances by putting himself in the place of a "reasonable man". For this purpose the place where the contract was made, the form and object of the contract, the place of performance, the place of residence or business of the parties, reference to the courts having jurisdiction and such other links are examined by the courts to determine the system of law with which the transaction has its closest and most real connection. The expression 'proper law' refers to the substantive principles of the domestic law of the chosen system and not to its conflict of laws or rules. [120 A-C; 121 A-B]

The Assunzione, (1954) p.150, (C.A.); Mount Albert Borough Council v. Australasian Temperance and General Mutual Life Assurance Society Ltd., (1938) A.C. 224 (P.C.), relied on.

Dicey & Morris : The Conflict of Laws, 11th Edn., Vol. I pp.534-535; Vol. IIp.1164, referred to.

5. Where, there is no express choice of the law governing the contract as a whole, or the arbitration agreement as such, a presumption may arise

110

that the law of the country where the arbitration is agreed to be held is the proper law of the arbitration agreement.

But that is only a rebuttable presumption. [121 G-H]

Whitworth Street Estates (Manchester) Ltd. v. James Miller & Partners Ltd., 1970 AC 583. referred to.

Dicey & Moris : The Conflict of Laws, 11th Edn. Vol.I p.539, referred to.

6. The validity, effect and interpretation of the arbitration agreement are governed by its proper law. Such law will decide whether the arbitration clause is wide enough to cover the dispute between the parties. Such law will also ordinarily decide whether the arbitration clause binds the parties even when one of them alleges that the contract is void, or voidable or illegal or that such contract has been discharged by breach or frustration. [122-B]

Heyman & Anr. v. Darwins Ltd., 1942 (1) All E.R. 337, referred to.

7. The parties have the freedom to choose the law governing an international commercial arbitration agreement. They may choose the substantive law governing the arbitration agreement as well as the procedural law governing the conduct of the arbitration. Where the proper law of the contract is expressly chosen by the parties, as in the present case, such law must, in the absence of an unmistakable intention to the contrary, govern the arbitration agreement. [122 D-E]

8. The proper law of the contract in the present case being expressly stipulated to be the laws in force in India and the exclusive jurisdiction of the court in Delhi in all matters arising under the contract having been specifically accepted, and the parties not having chosen expressly or by implication a law different from the Indian law in regard to the agreement contained in the arbitration clause, the proper law governing the arbitration agreement is indeed the law in force in India, and the competent courts of this country must necessarily have jurisdiction over all matters concerning arbitration. Neither the rules of procedure for the conduct of arbitration contractually chosen by the parties viz., the I.C.C. Rules nor the mandatory requirements of the procedure followed in the court of the country in which the arbitration is held can in any manner supersede the overriding jurisdiction and control of the Indian law and the Indian courts. [123 F-H; 124-A]

111

Bank Mellat v. Helliniki Techniki SA, (1983) 3 All E.R. 428, referred to.

International Chamber of Commerce Arbitration, 2nd Ed. (1990); Commercial Arbitration, 2nd Ed., Allen Redfern and Martin Hunter, Law & Practice of International Commercial Arbitration, 1986; Russel on Arbitration 20th Ed. (1982); Cheshire & North's Private International Law, 11th Ed. (1987), referred to.

9. The procedural powers and duties of the arbitrators, are matters regulated in accordance with the rules chosen by the parties to the extent that those rules are applicable and sufficient and are not repugnant to the retirements of the procedural law and practice of the seat of arbitration. The concept of party autonomy in international contract is respected by all systems of law so far as it is not incompatible with the proper law of the contract or the mandatory procedural rules of the place where the arbitration is agreed to be conducted or any overriding public policy. [124 B-D]

10. An award rendered in the territory of a foreign State may be regarded as a domestic award in India where it is sought to be enforced by reason of Indian law being the

proper law governing the arbitration agreement in terms of which the award was made. The Foreign Awards Act, incorporating the New York Convention, leaves no room for doubt on the point. [125-E]

ICC Rules of Arbitration, 1988; Craig, Park and Paulsson : International Chamber of Commerce Arbitration, 2nd Ed. (1990), referred to.

11. The difference between an ad hoc arbitration and an institutional arbitration, is not a difference between one system of law and another; for whichever is the proper law which governs either proceeding, it is merely a difference in the method of appointment and conduct of arbitration. Either method is applicable to an international arbitration, but neither is determinative of the character of the resultant award, namely, whether or not it is a Foreign Award as defined under the Foreign Awards Act, 1961. [125-H, 126 A-B]

12. An arbitration agreement may be regarded as a collateral or ancillary contract in the sense that it survives to determine the claims of the parties and the mode of settlement of their disputes even after the breach or

112

repudiation of the main contract. But it is not an independent contract, and it has no meaningful existence except in relation to the rights and liabilities of the parties under the main contract. It is a procedural machinery which is activated when disputes arise between parties regarding their rights and liabilities. The law governing such right and liabilities is the proper law of the contract, and unless otherwise provided, such law governs the whole contract including the arbitration agreement, and particularly so when the latter is contained not in a separate agreement, but, as in the present case, in one of the clauses of the main contract. [129 A-C]

Heyman & Anr. v. Darwins Ltd. 1942 (1) All E.R. 337, Brember Vulkan Schiffbau Und Maschinenfabrik v. South India Shipping Corpn., 1981 (1) all E.R. 289, relied on.

Mustil & Boyd: Commercial Arbitration, 2nd Ed. (1989), referred to.

13. In a proceeding such as the present which is intended to be controlled by a set of contractual rules which are self-sufficient and designed to cover every step of the proceeding, the need to have recourse to the municipal system of law and the courts of the place of arbitration is reduced to the minimum and the courts of that place are unlikely to interfere with the arbitral proceedings except in cases which shock the judicial conscience. [130 C-E]

Bank Mellat v. Helliniki Techniki SA, (1983) 3 All E.R. 428, referred to.

14. If the parties had agreed that the proper law of the contract should be the law in force in India, but had also provided for arbitration in a foreign country, the laws of India would undoubtedly govern the validity, interpretation and effect of all clauses including the arbitration clause in the contract as well as the scope of the arbitrators' jurisdiction. It is Indian law which governs the contract, including the arbitration clause, although in certain respects regarding the conduct of the arbitration proceedings the foreign procedural law and the competent courts of that country may have a certain measure of control. [130 F-G]

International Tank and Pipe SAK v. Kuwait Aviation Fueling Co. KSC, (1975) 1 All E.R. 242, relied on.

15. The choice of the place of arbitration was, as far

as the parties are concerned, merely accidental in so for as they had not expressed any

113

intention in regard to it and the choice was made by the ICC Court for reasons totally unconnected with either party to the contract. On the other hand, apart from the expressly stated intention of the parties, the contract itself, including the arbitration agreement contained in one of its clauses, is redolent of India and matters Indian. The disputes between the parties under the contract have no connection with anything English, and they have the closest connection with Indian laws, rules and regulations. Any attempt to exclude the jurisdiction of the competent courts and the laws in force in India is totally inconsistent with the agreement between the parties. [131 A, B, C]

16. All substantive rights arising under the agreement including that which is contained in the arbitration clause are governed by the laws of India. In respect of the actual conduct of arbitration, the procedural law of England may be applicable to the extent that the ICC Rules are insufficient or repugnant to public policy or other mandatory provisions of the laws in force in England. Nevertheless, the jurisdiction exercisable by the English courts and the applicability of the laws of that country in procedural matters must be viewed as concurrent and consistent with the jurisdiction of the competent Indian courts and the operation of Indian laws in all matters concerning arbitration in so for as the main contract as well as that which is contained in the arbitration clause are governed by the laws of India. [131 - H; 132 - A,B]

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1978 of 1992.

From the Judgment and Order dated 12.2.1991 of the Delhi High Court in FAO (OS) No. 102 of 1990.

Shanti Bhushan, Dr. A.M. Singhvi, C.Mukhopadhaya, J.C. Seth, O.P. Mittal, Sudarsh Menon and G.G. Malhotra for the Appellant.

S.K. Dholakia, O.P. Sharma, D.C. Singhania, Ms. Nanita Sharma, Hari Menon, P. Piwany and R.K. Gupta for the Respondents.

The Judgment of the Court was delivered by

THOMMEN, J. Leave granted.

The National Thermal Power Corporation (the 'NTPC') appeals

114

from the judgment of the Delhi High Court in FAO (OS) No. 102/90 dismissing the NTPC's application filed under sections 14,30 and 33 of the Arbitration Act, 1940 (No. X of 1940) to set aside an interim award made at London by a tribunal constituted by the International Court of Arbitration of the International Chamber of Commerce (the "ICC Court") in terms of the contract made at New Delhi between the NTPC and the respondent the Singer Company (the 'Singer') for the supply of equipment, erection and commissioning of certain works in India. The High Court held that the award was not governed by the Arbitration Act, 1940; the arbitration agreement on which the award was made was not governed by the law of India; the award fell within the ambit of the Foreign Awards (Recognition and Enforcement) Act, 1961 (Act 45 of 1961) (the 'Foreign Awards Act'); London being the seat of arbitration, English Courts

alone had jurisdiction to set aside the award; and, the Delhi High Court had no jurisdiction to entertain the application filed under the Arbitration Act, 1940.

The NTPC and the Singer entered into two formal agreements dated 17.8.1982 at New Delhi. The General Terms and Conditions of Contract dated 14.2.81 (the 'General Terms') are expressly incorporated in the agreements and they state :

> "the laws applicable to this Contract shall be the laws in force in India. The Court of Delhi shall have exclusive jurisdiction in all matters arising under this Contract." (7.2)

The General Terms deal with the special responsibilities of foreign contractors and Indian contractors. The Singer being a foreign contractor, is governed by the provisions relating to the foreign contractors. The General Terms further provide for settlement of disputes by amicable settlement, failing which by arbitration.

Sub-clause 6 of clause 27 of the General Terms deals with arbitration in relation to an Indian contractor and sub-clause 7 of the said clause deals with abitration in respect of foreign contractor. The latter provision says:

> "27.7. In the event of foreign Contractor, the arbitration shall be conducted by three arbitrators, one each to be nominated by the Owner and the Contractor and the third to be named by the President of the International Chamber of Commerce, Paris. Save as above all Rules of Cancellation and Arbitration
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> 115
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> of the International Chamber of Commerce shall apply to such arbitrations. The arbitration shall be conducted at such places as the arbitrators may determine."

In respect of an Indian Contractor, sub-clause 6.2 clause 27 says that the arbitration shall be conducted at of New Delhi in accordance with the provisions of the Arbitration Act, 1940. It reads :

> "27.6.2. The arbitration shall be conducted in accordance with the provisions of the Indian Arbitration Act, 1940 or any statutory modification thereof. The venue of arbitration shall be New Delhi, India."

The General Terms further provide :

> "the Contract shall in all respects be construed and governed according to Indian laws." (32.3).

The formal agreements which the parties executed on 17.8.82 contain a specific provision for settlement of disputes. Article 4.1 provides :

> "4.1. Settlement of Disputes : It is specifically agreed by and between the parties that all the differences or disputes arising out of the contract or touching the subject matter of the contract, shall be decided by process of settlement and arbitration as specified in clause 26.0 and 27.0 excluding 27.61.1 and 27.6.2., of the General Conditions of the Contract."

Being a foreign contractor, the provisions of sub-clause 6 of clause 27 of the General Terms are not applicable to the Singer, but the other provisions of clause 27 govern the present contract. Accordingly, the dispute which arose between the parties was referred to an Arbitral Tribunal constituted in terms of the rules of arbitration of the ICC Court (the 'ICC Rules'). In accordance with Article 12 of those Rules, the ICC Court chose London to be the

place of arbitration.

It is significant that the parties have expressly stated that the law which governs their contract, i.e., the proper law of the contract is the law in force in India and the courts of Delhi have exclusive jurisdiction in all matters arising under the contract. One of the clauses of the Contract deals with arbitration (clause 27 of the General Terms).

116

The point for consideration is whether the High Court was right in rejecting the appellant's application filed under the provisions of the Arbitration Act, 1940 and in holding that the award which was made in London on an arbitration agreement was not governed by the law of India and that it was a foreign award within the meaning of the Foreign Awards Act and beyond the jurisdiction of the Indian Courts except for the purpose of recognition and enforcement under the latter Act.

The award was made in London as an interim award in an arbitration between the NTPC and a foreign contractor on a contract governed by the law of India and made in India for its performance solely in India. The fundamental question is whether the arbitration agreement contained in the contract is governed by the law of India so as to save it from the ambit of the Foreign Awards Act and attract the provisions of the Arbitration Act, 1940. Which is the law which governs the agreement on which the award has been made ?

Mr. Shanti Bhushan, appearing for the NTPC, submits that admittedly the proper law of the contract is the law in force in India. The arbitration agreement is contained in a clause of that contract. In the absence of any stipulation to the contrary, the contract has to be seen as a whole and the parties must be deemed to have intended that the substantive law applicable to the arbitration agreement is exclusively the law which governs the main contract, although, in respect of procedural matters, the competent courts in England will also be, concurrently with the Indian courts, entitled to exercise jurisdiction over the conduct of arbitration. But occasions for interference by the courts in England would indeed be rare and probably unnecessary in view of the elaborate provisions contained in the ICC Rules by which the parties have agreed to abide. The substantive law governing arbitration, which concerns questions like capacity, validity, effect and interpretation of the contract etc., is Indian law and the competent courts in such matters are the Indian courts. Even in respect of procedural matters, the concurrent jurisdiction of the courts of the place of arbitration does not exclude the jurisdiction of the Indian courts.

Mr. S. K. Dholakia appearing for the Singer, on the other hand, submits that the arbitration agreement is a separate and distinct contract, and collateral to the main contract. Although the main contract is governed by the laws in force in India, as stated in the General Terms, there is no

117

express statement as regards the law governing the arbitration agreement. In the circumstances, the law governing the arbitration agreement is not the same law which governs the contract, but it is the law which is in force in the country in which the arbitration is being conducted. Counsel accordingly submits that the Delhi High Court is right in saying that the saving clause in section 9 of the Foreign Awards Act has no application to the award in

question made in London by an Arbitral Tribunal constituted in accordance with the ICC Rules. Counsel submits that the High Court has rightly held that the impugned award falls under the Foreign Awards Act and it is not liable to be challenged on the alleged grounds falling under sections 14, 30 and 33 of the Arbitration Act, 1940.

Counsel says that the award, having been made in London in terms of the ICC Rules to which the parties have submitted, is governed by the provisions of the New York Convention, as incorporated in the Foreign Awards Act, and its enforeability in India can be resisted only in the circumstances postulated under that Act, and the Delhi High Court has rightly rejected the petition invoking the jurisdiction of that court in terms of the Arbitration Act, 1940.

Mr. Dholaka does not dispute that the substantive right of the parties under the Contract are governed by the law of India. His contention, however, is that while the main contract is governed by Indian law, as expressly stated by the parties, arbitration being a collateral contract and procedural in nature, it is not necessarily bound by the proper law of the contract, but the law applicable to it must be determined with reference to other factors. The place of arbitration is an important factor. London having been chosen in accordance with the ICC Rules to be the seat of arbitration, English law is the proper law of arbitration, and all proceedings connected with it are governed by that law and exclusively within the jurisdiction of the English courts. He denies that the Indian courts have any jurisdiction in matter connected with the arbitration, except to the extent permitted by the Foreign Awards Act for recognition and enforcement of the award.

Dicey & Morris in The conflict of Laws, 11th edn., Vol. II ('Dicey') refer to the 'proper law of a contract' thus :

> "Rule 180 - The term 'proper law of a contract' means the system of law by which the parties intended the contract to be
>
> 118
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> governed or, where their intention is neither expressed nor to be inferred from the circumstances, the system of law with which the transaction has its closest and most real connection." (pages 1161-62)

The expression 'proper law of a contract' refers to the legal system by which the parties to the contract intended their contract to be governed. If their intention is expressly stated or if it can be clearly inferred from the contract itself or its surrounding circumstances, such intention determines the proper law of the contract. In the words of Lord Herchell, L.C. :

> "...In this case, as in all such cases, the whole of the contract must be looked at, and the contract must be regulated by the intention of the parties as appearing from the contract. It is perfectly competent to those who, under such circumstances as I have indicated, are entering into a contract, to indicate by the terms which they employ which system of law they intend to be applied to the construction of the contract, and to the determination of the rights arising out of the contract".
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> Hamlyn & Co. v. Talisker Distillery, (1891-4) All E.R. 849 at 852.

Where, however, the intention of the parties is not

expressly stated and no inference about it can be drawn, their intention as such has no relevance. In that even, the courts endeavour to impute an intention by identifying the legal system with which the transaction has its closest and most real connection.

The expressed intention of the parties is generally decisive in determining the proper law of the contract. The only limitation on this rule is that the intention of the parties must be expressed bona fide and it should not be opposed to public policy. In the words of Lord Wright :-

> ".....where there is an express statement by the parties of their intention to select the law of the contract, it is difficult to see

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Rule 180 is further elucidated by Dicey in the sub-rules. Sub-rule (1) reads :- Sub-rule (1) - When the intention of the parties to a contract,as to the law governing the contract, is expressed in words, this expressed intention, in general, determines the proper law of the contract."

119

> what qualifications are possible, provided the intention expressed is bona fide and legal, and provided there is no reason for avoiding the choice on the ground of public policy....."
> Vita Food Products Inc. v. Unus Shipping Co. Ltd., (1939) AC 277, 290 (PC).

In the absence of an express statement about the governing law, the inferred intention of the parties determines that law. * The true intention of the parties in the absence of an express selection, ha to be discovered by applying " sound ideas of business, convenience and sense to the language of the contract itself". Jacobs Marcus & Co., v. The Credit Lyonnais, (1884) 12 Q.B.D. 589, 601 (CA). In such a case, selection of courts of a particular country as having jurisdiction in matters arising under the contract is usually, but not invariably, be an indication of the intention of the parties that the system of law followed by those courts is the proper law by which they intend their contract to be governed. However, the mere selection of a particular place for submission to the jurisdiction of the courts or for the conduct of arbitration will not, in the absence of any other relevant connecting factor with that place, be sufficient to draw an inference as to the intention of the parties to be governed by the system of law prevalent in that place. This is specially so in the case of arbitration, for the selection of the place of arbitration may have little significance where it is chosen, as is often the case, without regard to any relevant or significant link with the place. This is particularly true when the place of arbitration is not chosen by the parties themselves, but by the arbitrators or by an outside body, and that too for reasons unconnected with the contract. Choice of place for submission to jurisdiction of courts or for arbitration may thus prove to have little relevance for drawing an inference as to the governing law of the contract, unless supported in that respect by the rest of the contract and the surrounding circumstances. Any such clause must necessarily give way to stronger indications in regard to the intention of the parties. See The Fehmarn, (1958) 1 All E.R. 333.

Dicey's sub-rule (2) of rule 180 reads :-

"Sub-rule (2) - When the intention of the parties to a contract with regard to the law governing the contract

is not expressed in words, their intention is to be inferred from the terms and nature of the contract, and from the general circumstances of the case, and such inferred intention determines the proper law of the contract."

120

Where the parties have not expressly or impliedly selected the proper law, the courts impute an intention by applying the objective test to determine what the parties would have as just and reasonable persons intended as regards the applicable law had they applied their minds to the question. * The judge has to determine the proper law for the parties in such circumstances by putting himself in the place of a "reasonable man". He has to determine the intention of the parties by asking himself "how a just and reasonable person would have regarded the problem", The Assunzion (1954) P. 150,176 (CA); Mount Albert Borough Council v. Australasian Temperance and General Mutual Life Assurance Society Ltd. (1938) A.C. 224, 240 (P.C.)

For this purpose the place where the contract was made, the form and object of the contract, the place of performance, the place of residence or business of the parties, reference to the court having jurisdiction and such other links are examined by the courts to determine the system of law with which the transaction has its closest and most real connection.

The position in these respects is summarised by the Privy Council in Mount Albert Borough Council v. Australasian Temperance and General Mutual Life Assurance Society, Limited, (1938) A.C. 224 at 240:-

> "The proper law of the contract means that law which the English or other Court is to apply in determining the obligations under the contract .....It may be that the parties have in terms in their agreement expressed what law they intend to govern, and in that case prima facie their intention will be effectuated by the Court. But in most cases they do not do so. The parties may not have thought of the matter at all. Then the Court has to impute an intention, or to determine for the parties what is the proper law which, as just and reasonable persons, they ought or would have intended if they had thought about the question when they made the contract.....".

Dicey's sub-rule (3) of rule 180 reads :-

"Sub-rule (3) - When the intention of the parties to a contract with regard to the law governing it is not expressed and cannot be inferred from the circumstances, the contract is governed by the system of law with which the transaction had its closest and most real connection."

121

Proper law is thus the law which the parties have expressly or impliedly chosen, or which is imputed to them by reason of its closest and most intimate connection with the contract. It must, however, be clarified that the expression 'proper law' refers to the substantive principles of the domestic law of the chosen system and not to its conflict of laws rules. The law of contract is not affected by the doctrine of renvoi. See Dicey, Vol. II, p.1164.

In a case such as the present, there is no need to draw any inference about the intention of the parties or to impute any intention to them, for they have clearly and categorically stipulated that their contract, made in India

and the courts in Delhi are to 'have exclusive jurisdiction in all matters arising under this contract' (cl. 7) The cardinal test suggested by Dicey in rule 180 is thus fully satisfied.

As regards the governing law of arbitration, Dicey says :

> "Rule 58-(1) The validity, effect and interpretation of an arbitration agreement are governed by its proper law.
> (2) The law governing arbitration proceedings is the law chosen by the parties, or, in the absence of agreement, the law of the country in which the arbitration is held." (Vol I, Pages 534-535).

The principle in rule 58, ass formulated by Dicey, has two aspects (a) the law governing the arbitration agreement, namely, its proper law; and (b) the law governing the conduct of the arbitration, namely, its procedural law.

The proper law of the arbitration agreement is normally the same as the proper law of the contract. It is only in exceptional cases that it is not so even where the proper law of the contract is expressly chosen by the parties. Where, however, there is no express choice of the law govening the contract as a whole, or the arbitration agreement as such, a presumption may arise that the law of the country where the arbitration is agreed to be held is the proper law of the arbitration agreement. But that is only a rebuttable presumption. See Dicey, Vol I, p. 539; see the observation in Whitworth Street Estates (Manchester) Ltd. v. James Miller & Partners Ltd.,

122

1970 AC 583, 607, 612 and 616)

The validity, effect and interpretation of the arbitration agreement are governed by its proper law. Such law will decide whether the arbitration clause is wide enough to cover the dispute between the parties. Such law will also ordinarily decide whether the arbitration clause binds the parties even when one of them alleges that the contract is void, or voidable or illegal or that such contract has been discharged by breach or frustration. See Heyman & Anr. v. Darwins, Ltd 1942 (1) All E.R. 337. The proper law of arbitration will also decide whether the arbitration clause would equally apply to a different contract between the same parties or between one of those parties and a third party.

The parties have the freedom to choose the law governing an international commercial arbitration agreement. They may choose the substantive law governing the arbitration agreement as well as the procedural law governing the conduct of the arbitration. such choice is exercised either expressly or by implication. Where there is no express choice of the law governing the contact as a whole, or the arbitration agreement in particular, there is, in the absence of any contrary indication a presumption that the parties have intended that the proper law of the contract as well as the law governing the arbitration agreement are the same as the law of the country in which the arbitration is agreed to be held. On the other hand, where the proper law of the contract is expressly chosen by the parties, as in the present case, such law must, in the absence of an unmistakable intention to the contrary, govern the arbitration agreement which, though collateral or ancillary to the main contract, is nevertheless a part of such contract.

Whereas, as stated above, the proper law of arbitration (i.e., the substantive law governing arbitration) determines

the validity, effect and interpretation of the arbitration agreement, the arbitration proceedings are conducted, in the absence of any agreement to the contrary, in accordance with the law of the country in which the arbitration is held. On the other hand, if the parties have specifically chosen the law governing the conduct and procedure of arbitration, the arbitration proceedings will be conducted in accordance with that law so long as it is not contrary to the public policy or the mandatory requirements of the law of the country in which the arbitration is held. If no such choice has been made by the parties,

123

expressly or by necessary implication, the procedural aspect of the conduct of arbitration (as distinguished from the substantive agreement to arbitrate) will be determined by the law of the place or seat of arbitration. Where, however, the parties have, as in the instant case, stipulated that the arbitration between them will be conducted in accordance with the ICC Rules, those rules, being in many respect self-contained or self-regulating and constituting a contractual code of procedure, will govern the conduct of the arbitration, except insofar as they conflict with the mandatory requirements of the proper law of arbitration, or of the procedural law of the seat of arbitration. See the observation of Kerr, LJ. in Bank Mellat v. Helliniki Techniki Sa., (1983) 3 All E.R. 428. See also Craig, Park and Paulsson, International Chamber of Commerce Arbitration, 2nd ed. (1990). To such an extent the appropriate courts of the seat of arbitration, which in the present case are the competent English courts, will have jurisdiction in respect of procedural matters concerning the conduct of arbitration. But the overriding principle is that the courts of the country whose substantive laws govern the arbitration agreement are the competent courts in respect of all matters arising under the arbitration agreement, and the jurisdiction exercised by the courts of the seat of arbitration is merely concurrent and not exclusive and strictly limited to matters of procedure. All other matters in respect of the arbitration agreement fall within the exclusive competence of the courts of the country whose laws govern the arbitration agreement. See Mustil & Boyd, Commercial Arbitration, 2nd ed.; Allen Redfern and Martin Hunter, Law & Practice of International Commercial Arbitration, 1986; Russel on Arbitration, Twentieth ed., 1982; Cheshire & North's Private International Law, eleventh ed. (1987).

The proper law of the contract in the present case being expressly stipulated to be the laws in force in India and the exclusive jurisdiction of the courts in Delhi in all matters arising under the contract having been specifically accepted, and the parties not having chosen expressly or by implication a law different from the Indian law in regard to the agreement contained in the arbitration clause, the proper law governing the arbitration agreement is indeed the law in force in India, and the competent courts of this country must necessarily have jurisdiction over all matters concerning arbitration. Neither the rules of procedure for the conduct of arbitration contractulally chosen by the parties (the ICC Rules) nor the mandatory requirements of the procedure followed in the courts of the country in which the arbitration is held can in any manner supersede the overriding

124

jurisdiction and control of the Indian law and the Indian courts.

This means, questions such as the jurisdiction of the arbitrator to decide a particular issue or the continuance of an arbitration or the frustration of the arbitration agreement, its validity, effect and interpretation are determined exclusively by the proper law of the arbitration agreement, which, in the present case, is Indian Law. The procedural powers and duties of the arbitrators, as for example, whether they must hear oral evidence, whether the evidence of one party should be recorded necessarily in the presence of the other party, whether there is a right of cross-examination of witnesses, the special requirements of notice, the remedies available to a party in respect of security for costs or for discovery etc. are matters regulated in accordance with the rules chosen by the parties to the extent that those rules are applicable and sufficient and are not repugnant to the requirements of the procedural law and practice of the seat of arbitration. The concept of party autonomy in international contracts is respected by all systems of law so far as it is not incompatible with the proper law of the contract or the mandatory procedural rules of the place where the arbitration is agreed to be conducted or any overriding public policy.

The arbitration agreement contained in the arbitration clause in a contract is often referred to as a collateral or ancillary contract in relation to the main contract of which it forms a part. The repudiation or breach of the main contract may not put an end to the arbitration clause which might still survive for measuring the claims arising out of the breach and for determining the mode of their settlement. See Heyman & Anr. v. Darwins, Ltd., (1942) 1 All E.R. 337; Bremer Vulkan Schiffbau Und Maschinenfabrik v. South India Shipping Corpn., (1981) 1 All E.R. 289. See also Mustil & Boyd, Commercial Arbitration, 2nd ed. (1989).

The arbitration agreement may provide that all disputes which may arise between the parties will be referred to arbitration or it may provide that a particular dispute between the parties will be submitted to the jurisdiction of a particular arbitrator. The arbitration clause may identify the arbitrator or arbitrators and the place of arbitration or it may leave such matters to be determined by recourse to the machinery of an institutional arbitration, such as the ICC, or the London Court of International Arbitration or the American Arbitration Association or similar institutions.

125

Clause 27 of the General Terms of the Contract shows that it was the intention of the parties that disputes with a foreign contractor should be referred to arbitration in accordance with the ICC Rules; while disputes with an Indian contractor should be settled by arbitration in New Delhi on an ad hoc basis.

The ICC Rules are made specifically applicable in respect of disputes with a foreign contractor because of the special nature of the contract. One of the parties to such a contract being a foreigner, questions of private international law (or conflict of laws) may arise particularly as regards arbitral proceedings conducted in a foreign territory. In respect of an Indian contractor, the transaction as well as the dispute settlement process are completely localised in India and in the Indian legal system and there is no scope for interference by a foreign system of law with the arbitral proceedings.

An international commercial arbitration necessarily involves a foreign element giving rise to questions as to

the choice of law and the jurisdiction of courts. Unlike in the case of persons belonging to the same legal system, contractual relationships between persons belonging to different legal systems may give rise to various private international law questions such as the identity of the applicable law and the competent forum. An award rendered in the territory of a foreign State may be regarded as a domestic award in India where it is sought to be enforced by reason of Indian law being the proper law governing the arbitration agreement in terms of which the award was made. The Foreign Awards Act, incorporating the New York Convention, leaves no room for doubt on the point.

The ICC Rules provide for settlement by arbitration of business dispute of an international character. They furnish an institutionalised procedure of arbitration. These Rules being a self-contained or a self-regulating code, they operate more or less independently of judicial interference in the conduct of arbitration, except in so far as they conflict with the mandatory requirements of the governing system of the proper law or the procedural law of the place of arbitration. Party-autonomy in international business is thus the guiding principle of the self-regulating mechanism envisaged by the Rules, and interference by any Court with the actual conduct of arbitration is to a large extent avoided.

The difference between an ad hoc arbitration and an institutional

126

arbitration is not a difference between one system of law and another; for whichever is the proper law which governs either proceeding, it is merely a difference in the method of appointment and conduct of arbitration. Either method is applicable to an international arbitration, but neither is determinative of the character of the resultant award, namely, whether or not it is a foreign award as defined under the Foreign Awards Act, 1961.

Where the ICC Rules apply, there is generally little need to invoke the procedural machinery of any legal system in the actual conduct of arbitration. These Rules provide for the submission of request for arbitration, the appointment of arbitrators, challenge against the appointment, pleadings, procedure, selection of the place of arbitration, terms of reference, time limit for award, cost, finality and enforceability, and similar matters of procedure (Article 11 of the ICC Rules). The parties are free under the ICC Rules to determine the law which the arbitrator shall apply to the merits of the dispute. In the absence of any stipulation by the parties as to the applicable law, the arbitrators may apply the law designated as the proper law by the Rules of Conflict which they deem to be appropriate (Article 13 of the ICC Rules). These and other provisions contained in the ICC Rules make them a self-contained and self-regulating system, but subject to the overriding powers of the appropriate national courts.*

A 'foreign award', as defined under the Foreign Awards Act, 1961 means an award made or on after 11.10.1960 on differences arising between persons out of legal relationships, whether contractual or not, which are considered to be commercial under the law in force in India. To qualify as a foreign award under the Act, the award should have been made in pursuance of an agreement in writing for arbitration to be governed by the New York convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, and not to be governed by the law of India. Furthermore such an award should have been made

outside India as having made reciprocal provisions for enforcement of the Convention. These are the conditions which must be satisfied to qualify an award as a 'foreign award' (S.2 read with S.9).

See ICC Rules of Arbitration, 1988; See also Craig, Park and Paulsson, International Chamber of Commerce Arbitration, 2nd ed. (1990).

127

An award is 'foreign' not merely because it is made in the territory of a foreign State, but because it is made in such a territory on an arbitration agreement not governed by the law of India. An award made on an arbitration agreement governed by the law of India, though rendered outside India, is attracted by the saving clause in S.9 of the Foreign Awards Act and is, therefore, not treated in India as a 'foreign award'.

A 'foreign award' is (subject to section 7) recognised and enforceable in India 'as if it were an award made on a matter referred to arbitration in India' (S.4). Such an award will be ordered to be filed by a competent court in India which will pronounce judgment according to the award (S.6).

Section 7 of Foreign Awards Act, in consonance with Art. V of the New York Convention which is scheduled to the Act, specifies the conditions under which recognition and enforcement of a foreign award will be refused at the request of a party against whom it is invoked.

A foreign award will not be enforced in India if it is proved by the party against whom it is sought to be enforced that the parties to the agreement were, under the law applicable to them, under some incapacity, or, the agreement was not valid under the law to which the parties have subjected it, or, in the absence of any indication thereon, under the law of the place of arbitration; or there was no due compliance with the rules of fair hearing; or the award exceeded the scope of the submission to arbitration; or the composition of the arbitral authority or its procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the place of arbitration; or 'the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, of under the law of which, that award was made'. The award will not be enforced by a court in India if it is satisfied that the subject matter of the award is not capable of settlement by arbitration under Indian law or the enforcement of the award is contrary to the public policy.

The Foreign Awards Act contains a specific provision to exclude its operation to what may be regarded as 'domestic award' in the sense of the award having been made on an arbitration agreement governed by the law of India, although the dispute was with a foreigner and the arbitration was held and the award was made in a foreign State.

128

Section 9 of this Act says :-

> "Nothing in this Act shall
> (a) .....
> (b) apply to any award made on an arbitration agreement governed by the law of India."

Such an award necessarily falls under the Arbitration Act, 1940, and is amenable to the jurisdiction of the Indian Courts and controlled by the Indian system of law just as in the case of any other domestic award, except that the proceedings held abroad and leading to the award were in

certain respects amenable to be controlled by the public policy and the mandatory requirements of the law of the place of arbitration and the competent courts of that place.

It is important to recall that in the instant case the parties have expressly stated that the laws applicable to the contract would be the laws in force in India and that the courts of Delhi would have exclusive jurisdiction 'in all matters arising under this contract'. They have further stated that the 'Contract shall in all respects be construed and governed according to Indian laws'. These words are wide enough to engulf every question arising under the contract including the disputes between the parties and the mode of settlement. It was in Delhi that the agreement was executed. The form of the agreement is closely related to the system of law in India. Various Indian enactments are specifically mentioned in the agreement as applicable to it in many respects. The contract is to be performed in India with the aid of Indian workmen whose conditions of service are regulated by Indian laws. One of the parties to the contract is a public sector undertaking. The contract has in every respect the closest and most real connection with the Indian system of law and it is by that law that the parties have expressly evinced their intention to be bound in all respects. The arbitration agreement is contained in one of the clauses of the contract, and not in a separate agreement. In the absence of any indication to the contrary, the governing law of the contract (i.e., in the words of Dicey, the proper law of the contract) being Indian law, it is that system of law which must necessarily govern matters concerning arbitration, although in certain respects the law of the place of arbitration may have its relevance in regards to procedural matters.

129

It is true that an arbitration agreement may be regarded as a collateral or ancillary contract in the sense that it survives to determine the claims of the parties and the mode of settlement of their disputes even after the breach or repudiation of the main contract. But it is not an independent contract, and it has no meaningful existence except in relation to the rights and liabilities of the parties under the main contract. It is a procedural machinery which is activated when disputes arise between parties regarding their rights and liabilities. The law governing such rights and liabilities is the proper law of the contract, and unless otherwise provided, such law governs the whole contract including the arbitration agreement, and particularly so when the latter is contained not in a separate agreement, but, as in the present case, in one of the clauses of the main contract.

Significantly, London was chosen as the place of arbitration by reason of Article 12 of the ICC Rules which reads :

> "The place of arbitration shall be fixed by the International Court of Arbitration, unless agreed upon by the parties."

The parties had never expressed their intention to choose London as the arbitral forum, but, in the absence of any agreement on the question, London was chosen by the ICC Court as the place of arbitration. London has no significant connection with the contract or the parties except that it is a neutral place and the Chairman of the Arbitral Tribunal is a resident there, the other two members being nationals of the United State and India respectively.

The decisions relied on by counsel for the Singer do not support his contention that the mere fact of London

being the place of arbitration excluded the operation of the Arbitration Act, 1940 and the jurisdiction of the courts in India. In James Miller & Partners Ltd. v. Whitworth Street Estates (Manchester) Ltd. (1970) AC 583, the parties had not expressly stated which law was to govern their contract. On an analysis of the various factors, the House of Lords held that in the absence of any choice of the law governing arbitration proceedings, those proceedings were to be considered to be governed by the law of the place in which the arbitration was held, namely, Scotland because it was that system of law which was most closely connected with the proceedings. Various links with Scotland, which was the place of performance of the contract, unmistakably showed that the arbitral proceedings were to be governed by the law of Scotland,

130

although the majority of the learned Law Lords (Lords Reid Wilberforce dissenting on the point) held that, taking into account certain other factors, the contract was governed by English law. That case is no authority for the proposition that, even where the proper law of the contract is expressly stated by the parties, and in the absence of any contrary indication, a different law governed arbitration. The observations contained in that judgment do not support the contention urged on behalf of the Singer that merely because London was designated to be the place of arbitration, the law which governed arbitration was different from the law expressly chosen by the parties as the proper law of the contract.

It is true that the procedural law of the place of arbitration and the courts of that place cannot be altogether excluded, particularly in respect of matters affecting public policy and other mandatory requirements of the legal system of that place. But in a proceeding such as the present which is intended to be controlled by a set of contractual rules which are self-sufficient and designed to cover every step of the proceeding, the need to have recourse to the municipal system of law and the courts of the place of arbitration is reduced to the minimum and the courts of that place are unlikely to interfere with the arbitral proceedings except in cases which shock the judicial conscience. See the observations of Kerr LJ in Bank Mellat v. Helliniki Techniki SA, (1983) 3 All E.R. 428.

Courts would give effect to the choice of a procedural law other than the proper law of the contract only where the parties had agreed that matters of procedure should be governed by a different system of law. If the parties had agreed that the proper law of the contract should be the law in force in India, but had also provided for arbitration in a foreign country, the laws of India would undoubtedly govern the validity, interpretation and effect of all clauses including the arbitration clause in the contract as well as the scope of the arbitrators' jurisdiction. It is Indian law which governs the contract, including the arbitration clause, although in certain respect regarding the conduct of the arbitration proceedings the foreign procedural law and the competent courts of that country may have a certain measure of control. See the principle stated by Lord Denning, M.R. in International Tank and Pipe SAK v. Kuwait Aviation Fueling Co. KSC, (1975) 1 All E.R. 242.

The arbitration clause must be considered together with the rest of

131

the contract and the relevant surrounding circumstances. In the present case, as seen above, the choice of the place of

arbitration was, as far as the parties are concerned, merely accidental in so far as they had not expressed any intention in regard to it and the choice was made by the ICC Court for reasons totally unconnected with either party to the contract. On the other hand, apart from the expressly stated intention of the parties, the contract itself, including the arbitration agreement contained in one of its clauses, is redolent of India and matters Indian. The disputes between the parties under the contract have no connection with anything English, and they have the closest connection with Indian laws, rules and regulations. In the circumstances, the mere fact that the venue chosen by the ICC Court for the conduct of arbitration is London does not support the case of the Singer on the point. Any attempt to exclude the jurisdiction of the competent courts and the laws in force in India is totally inconsistent with the agreement between the parties.

In sum, it may be stated that the law expressly chosen by the parties in respect of all matters arising under their contract, which must necessarily include the agreement contained in the arbitration clause, being Indian law and the exclusive jurisdiction of the courts in Delhi having been expressly recognised by the parties to the contract in all matters arising under it, and the contract being most intimately associated with India, the proper law of arbitration and the competent courts are both exclusively Indian, while matters of procedure connected with the conduct of arbitration are left to be regulated by the contractually chosen rules of the ICC to the extent that such rules are not in conflict with the public policy and the mandatory requirements of the proper law and of the law of the place of arbitration. The Foreign Awards Act, 1961 has no application to the award in question which has been made on an arbitration agreement governed by the law of India.

The Tribunal has rightly held that the 'substantive law of the contract is Indian law'. The Tribunal has further held 'the laws of England govern procedural matters in the arbitration'.

All substantive rights arising under the agreement including that which is contained in the arbitration clause are, in our view, governed by the laws of India. In respect of the actual conduct of arbitration, the procedural law of England may be applicable to the extent that the ICC

132

Rules are insufficient or repugnant to the public policy or other mandatory provisions of the laws in force in England. Nevertheless, the jurisdiction exercisable by the English courts and the applicability of the laws of that country in procedural matters must be viewed as concurrent and consistent with the jurisdiction of the competent Indian courts and the operation of Indian laws in all matters concerning arbitration in so far as the main contract as well as that which is contained in the arbitration clause are governed by the laws of India.

The Delhi High Court was wrong in treating the award in question as a foreign award. The Foreign Awards Act, has no application to the award by reason of the specific exclusion contained in Section 9 of that Act. The award is governed by the laws in force in India, including the Arbitration Act, 1940. Accordingly, we set aside the impugned judgment of the Delhi High Court and direct that Court to consider the appellant's application on the merits in regard to which we express no views whatsoever. The appeal is allowed in the above terms. We do not, however,

make any order as to costs.

G.N. Appeal allowed.

133

JUDIS