EMERGING TREND IN THE ENFORCEMENT OF ARBITRATION AWARDS*

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Introduction

THE ARBITRATION Act, 1940 dealt with only domestic arbitration. In so far as international arbitration was concerned, there was no substantive law on the subject. However, enforcement of foreign awards in this country was governed by two enactments, the Arbitration (Protocol and Convention), Act, 1937 and the Foreign Awards (Recognition and Enforcement Act), 1961. These two statutes, in their entirety, except for section 3 (in both statutes) did not deal with international arbitration as such but merely laid down the conditions for 'enforcement of foreign awards' in India. Section 3 of both statutes provided that if any party to an arbitration agreement commences any legal proceeding in any court in India, any party to such legal proceeding may, at any time after appearance and before filing a written statement or taking any other step in the proceeding, apply to the court to stay the proceedings, and the court, unless satisfied that the agreement is null or void, inoperative or incapable of being performed or that there is not, in fact, any dispute between the parties with regard to the matters agreed to be referred, shall make an order staying the proceeding. The Arbitration Act of 1940, though a good piece of legislation, in its actual operation and implementation by all concerned - the parties, the arbitrators, the lawyers and the courts - proved ineffective.

It is not surprising that just about the time when UN General Assembly adopted the UNCITRAL Model Law and recommended the members nations to enact suitable legislation based on the model law, the Supreme Court suggested[1] simplification of the law of arbitration releasing the law from the shackles of technical rules of interpretation.

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1. *Food Corporation of India* v. *Joginderpal Mohinderpal,* (1989) 2 SCC 347.

UNCITRAL Model Law

Unlike trade related laws, UNCITRAL neither considered nor suggested framing of any international substantive law of arbitration. In contrast to the UNCITRAL Model Law relating to Procurement of Goods, Construction and Services (1995), International Credit Transfer (1994) and the Electronic Commerce (1996), the UNCITRAL Model Law on International Commercial Arbitration adopted in 1985 suggested uniformity in the law of arbitral procedures and international commercial arbitration practices. After the General Assembly of the United Nations recommendation, almost all the member countries started considering the possibilities of adoption of legislative measures on the lines suggested by UNCITRAL.

Recourse against arbitral award

Section 34 provides that an arbitral award may be set aside by a court on certain grounds specified therein. The grounds mentioned in clause (a) to sub-section (2) of section 34 entitles the court to set aside an award only if the parties seeking such relief furnishes proof as regards the existence of the grounds mentioned therein. The grounds are: (1) incapacity of a party; (2) arbitration agreement being not valid; (3) the party making the application not being given proper notice of appointment of arbitrator or of the proceedings or otherwise unable to present his case; (4) the arbitral award dealing with the dispute not falling within the terms of submission to arbitration; and (5) composition of the tribunal or the arbitral procedure being not in accordance with the agreement of the parties.

Clause (b) of sub-section (2) of section 34 mentions two grounds which are, however, left to be found out by the court itself. The grounds are: (1) the subject matter of the dispute not capable of settlement by arbitration that is to say, the disputes are not arbitrable; and (2) that the award is in conflict with the public policy of India. All these grounds are common to both domestic as well as international arbitral awards.

Public policy of India

In so far as the ground regarding the award being in conflict with the public policy of India is concerned, the ambit thereof is quite distinct and different and depends upon the nature of the award *i.e.* domestic or international. The Supreme Court in *Renu Sagar*,[2] while construing the

2. *Renu Sagar Power Company Ltd.* v. *General Electric Company,* (1994) Supp. 1 SCC 644.

provisions of section 7 of Enforcement and Recognition of the Foreign Award Act which are *in pari materia* with section 48 of the 1996 Act, held that the Indian courts would be justified in refusing enforcement of a foreign award on the ground that the award is in conflict with the public policy of India, if such enforcement is contrary to (a) the fundamental policy of Indian law; (b) Indian interest; and (c) morality and justice. It was clarified that enforcement of foreign award being governed by the principles of private international law, the doctrine of public policy, as applied in the field of international law alone would be attracted. The court further clarified that a mere infraction of a domestic law *per se* would not amount to a conflict with the public policy of India.

Insofar as domestic awards are concerned, what precisely would be the scope of challenge of an award on the ground of public policy of India remains to be settled as yet. Surely, an adjudicator of a dispute in India, who is required to apply the laws of India in the process of such adjudication, would be bound by such laws. If an award is demonstrably contrary to the law of the land, it would be in conflict with the public policy of India. But then a further question would arise as to the nature of such law, which could be said to comprehend within itself the public policy of India. Would all the plenary legislations fall in this category? Or, would it be open to the courts to scrutinize whether the law, which is alleged to be infringed, is directory or mandatory? Does every provision of law lay down a public policy? Would the subordinate legislations fall in the category of laws for the purpose? And these questions have to be traced right up to the notifications and orders issued under the statutes.

If there were to be two independent statutes dealing with the domestic and international arbitrations, much of these questions could be dealt with more conveniently than the law in the form as it stands at present.

Section 31 of the Act requires the arbitral award to state the reasons upon which it is based unless the parties agree that no reasons are to be given. Section 34, however, does not in turn specify a ground for setting aside an award, which fails to comply with the requirement of stating the reasons upon which it is based.

What is the object of requiring every arbitral award to state reasons upon which it is based? Foremost among the objective is to enable the litigating parties to know why the arbitrator has decided the dispute one way or the other. Secondly, in the event of the challenge to the award, the court could satisfy itself that the arbitrator did apply his mind to the relevant facts and law. The court, however, cannot sit in appeal over such decisions, but in the absence of any application of mind, it would be open to the court to hold that the requirement of stating reasons have not been complied with which should be a ground for setting aside such an award.

Enforcement of arbitral awards governed by part I

Though section 35 declares that an arbitral award is "final and binding" on the parties, it is "subject to" the other provisions contained in part I. In other words, if a party to an award makes an application for setting aside the same under section 34 of the Act, such arbitral award could not be treated as "final and binding" on the parties unless and until the proceedings for setting aside the award stand rejected. Section 36, which deals with enforcement of arbitral award also contemplates that the proceedings for setting aside an arbitral award must come to an end, before the award could be enforced under the Code of Civil Procedure, in the same manner as if it were a decree of the court.

Period of limitation for setting aside of arbitral award

Since enforcement of an award under section 36 is dependent upon the fact whether an application for setting aside the arbitral award has been made in accordance with section 34 and, if no such application is made, the expiry of the time for making such application, it is important to ascertain what precisely is the time frame as contemplated under the Act.

Sub-section (3) of section 34 of the Act provides that the application for setting aside may not be made if three months have elapsed from the date on which the party making that application had received the arbitral award. If any of the parties had made a request to the arbitral tribunal for correction or interpretation of the award or for making an additional arbitral award in accordance with section 33 of the Act, then the said period of three months has to be calculated from the date on which such request had been disposed off by the arbitral tribunal.

The proviso to sub-section (3) of section 34 declares further that if the court is satisfied that the applicant was prevented by *sufficient cause* from making such application within the said period of three months, it may entertain the application within a further period of 30 days *but not thereafter*.

Analysing the provisions contained in sections 34, 35 and 36, the Supreme Court in *Popular Construction Company*,[3] has held that the Limitation Act of 1963 is not applicable in this regard holding that the 1996 Act is a special Act, which alone should govern the issue of limitation.

An additional reason given by the court in support of the said conclusion was that section 34 (1) itself provides that recourse to a court against an arbitral award could be had only by making an application for setting aside

3. *Union of India* v. *Popular Construction Company,* (2001) 8 SCC 470.

such award "in accordance with" sub-section (2) or sub-section (3) thereof. An application filed beyond the period mentioned under section 34(3) would not be an application "in accordance with" that sub-section.

The previous judgment in *Popular Construction* and the effect of exclusion of sections 4 to 24 of the Limitation Act from the purview of proceedings contemplated in the 1996 Act were, however, not considered in this decision.

Enforcement of foreign awards

Part II of the 1996 Act provides for the enforcement of certain foreign awards. Section 44, which deals with New York Convention awards, defines "foreign award" as an arbitral award on differences between persons arising out of legal relationships considered as *commercial* under the law in force in India –

(a) in pursuance of an agreement in writing for arbitration to which the New York Convention applies;

(b) any one of such reciprocal territories as the Central Government may notify in the Official Gazette declaring the territories to which the New York Convention applies.

Section 46 declares when foreign awards are *binding.* It provides that any foreign award that is enforceable shall be treated as binding for all purposes on the persons as between whom it was made.

Section 48 lays down the conditions for enforcement of foreign awards and it provides that enforcement of foreign awards may be *refused* at the request of a party against whom it is revoked, only if that party furnishes to the court proof that–

a) the party was in some incapacity;

b) the party was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was unable to present his case;

c) an award deals with difference not contemplated by or falling within the terms of the submission;

d) the composition of the arbitral authority or arbitral procedure was not in accordance with the agreement of the parties, or with the law of the country where the arbitration took place; or

e) An 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 or under the law of which, that award was made.

Enforcement of the arbitral award may *also* be refused if the court finds that –

a) the subject-matter of difference is not capable of settlement by arbitration under the law of India or

b) the enforcement of the award would be contrary to the *public policy of India.*

Section 49 declares that where the court is satisfied that the *foreign award is enforceable*, the award shall be deemed to be a *decree* of that court.

The Supreme Court, in *Fuerst Day*,[4] has held that a party holding a foreign award can apply for enforcement, but the court, before taking further effective steps for execution of the award, has to proceed in accordance with sections 47 to 49 of the Act. It is one single proceeding with different stages. In the first stage, the court has to decide about the enforceability of the award and once it holds that the foreign award is enforceable, it shall then proceed to take further steps for execution of the same. The court rejected the contention that before an award could be enforced, there should be an independent proceeding regarding its enforcement and, if a decree is obtained in such proceedings, a second proceeding for its execution could then be initiated.

Only convention awards are enforceable

As noticed earlier, section 49 declares that only when the court is satisfied that the foreign award is enforceable in accordance with the Act, shall the award be deemed to be a 'decree' of that court. Though the New York Convention, unlike the Geneva Convention, did not limit its application to arbitral awards made in a territory of one of the contracting parties to which the convention applied and between persons who are subject to the jurisdiction of one of the contracting parties, yet, at the stage of drafting of the convention the dichotomy between the common law and civil law in certain spheres greatly influenced its terms. Article I itself is a prominent example of such influence. It has two clear and distinct parts. The first part reflects the influence of the common law, which provides that the convention shall apply to the foreign arbitral awards made in the territory of a state, other than the state where the recognition and enforcement of such awards are sought. The second part of the article, which reflects the influence of civil law, provides that the convention 'shall apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought'. It is this dichotomy of the two

4. *Fuerst Day Lawson* v. *Jindal Exports Ltd.,* (2001) 6 SCC 356.

sets of legal principles that led to serious divergence of views in the interpretation of the provisions of the convention by the national courts.

The plain language of article I of the convention suggests that the two sentences therein are independent of each other. The first sentence is rather unqualified, and it recognizes any award made in the territory of a state, other than the state where the recognition and enforcement of such awards are sought, to be 'foreign award.' The second sentence clearly indicates that the conditions laid down therein are independent of the first one as it employs the expression 'shall also apply to'. The second sentence, however, subjects enforcement of arbitral awards to the condition that such awards are 'not considered as domestic awards' in the state where the recognition and enforcement are sought.

The question is, whether in spite of the clear language employed in the two sentences in article I of the convention, the second sentence, by implication, limits the operation of the first sentence. If it does, then the further question is, whether in order that an arbitral award could be enforced in the territory of a state, it should satisfy both the conditions. The questions are not capable of easy answers as is evident from various judicial pronouncements.

The issue is further complicated by reason of the provisions contained in article V(1)(e) of the convention. It requires the party against whom recognition and enforcement of an award is sought and who wishes that enforcement of such award be refused, to furnish proof that 'the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of a country in which or under the law of which the award was made.' This provision undoubtedly recognizes that the court of the country in which, or under the law of which, the award is made has the jurisdiction to set aside or suspend the award and that such country is different from the country where the recognition and enforcement of the award is sought. Evidently, it is only in respect of a domestic award rendered in accordance with the law of the country that the courts of that country will have jurisdiction to set aside such awards and not in respect of 'foreign awards' within the meaning of article I of the convention. If that is the correct legal position, the provisions contained in article V(1)(e) undoubtedly create difficulties and contradicts the scope of article 1 of the convention. Many courts have thus attempted to harmonize these provisions by judicial interpretation, which naturally have not shown uniformity in the application of the convention.

Limits of judicial intervention

The scheme of the 1996 Act apart from the statement of objects and reasons appended to the bill, clearly demonstrates that the Act is intended

to provide for greater autonomy in the arbitral process and limits judicial intervention to a narrow circumference than the position obtained under the previous legal regime. Emphasizing the scope of the new Act, the Supreme Court in *Konkan Railway Corporation Ltd.* v. *Mehul Construction* held:[5]

> [T]o attract the confidence of the international mercantile community and the growing volume of Indian trade and commercial relationship with the rest of the world after the new liberalization policy of the Government, Indian Parliament was persuaded to enact the Arbitration and Conciliation Act of 1996 in UNCITRAL model and, therefore, in interpreting any provisions of the 1996 Act, Courts must not ignore the objects and purpose of the enactment of 1996. A bare comparison of different provisions of the Arbitration Act of 1940 with the provisions of the Arbitration and Conciliation Act 1996 would unequivocally indicate that *1996 Act limits the intervention of Court with an arbitral process to the minimum* and it is certainly not the legislative intent that each and every order passed by an authority under the Act would be a subject matter of judicial scrutiny in Court of Law.

Whether the courts have reminded themselves of this note of caution while dealing with the arbitral process and particularly the arbitral awards, is a question that probably cannot be satisfactorily answered in the affirmative.

Construction of contract

There is a well-recognized distinction between disputes as to the jurisdiction of the arbitrator and the disputes as regards exercise of that jurisdiction. Consequently, there is also a distinction between an error within the jurisdiction and an error in excess of the jurisdiction. It is well accepted that the court cannot substitute its own evaluation of the conclusion of law or fact and hold that the arbitrator acted contrary to the bargain between the parties. In *Sudarshan Trading Co.* v. *Govt. of Kerala,*[6] Sabyasachi Mukharji J had ruled that " by purporting to construe the contract the court could not take upon itself the burden of saying that this was contrary to the contract and, as such, beyond jurisdiction".

This *dicta* has been reiterated in *P V Subba Naidu* v. *Govt of Andhra Pradesh*;[7] *K.R Raveendranathan* v. *State of Kerala*;[8] *HP State Electricity*

5. (2000) 7 SCC 201 at 202 [Emphasis added].
6. (1989) 2 SCC 38.
7. (1998) 9 SCC 407 at 409.
8. (1996) 10 SCC 35.

Board v. *R. J. Shah & Co.*;[9] and *Pure Helium Ltd* v. *ONGC*[10] and in a large number of subsequent pronouncements of the Supreme Court and followed by many other courts. Yet, in a number of cases, the court did take upon itself the task of interpreting the contractual terms and having reached a different conclusion on such interpretation, refused to enforce arbitral awards in which a contrary view is taken.

The *Saw Pipes* case

In *ONGC* v. *Saw Pipes Ltd.*,[11] reiterating several principles of construction of contract and referring to the contractual provisions which were the subject-matter of the arbitral award, the court ruled that "in the facts of the case, it cannot be disputed that if contractual term, as it is, is to be taken into consideration, the award is, on the face of it, erroneous and in violation of the terms of the contract and thereby it violates Section 28(3) of the Act". Culling out the *ratio* from the decisions rendered under the 1940 Act, the court held:[12]

> It is true that if the Arbitral Tribunal has committed mere error of fact or law in reaching its conclusion on the disputed question submitted to it for adjudication then the court would have no jurisdiction to interfere with the award. But, this would depend upon reference made to the arbitrator: (a) if there is a general reference for deciding the contractual dispute between the parties and if the award is based on erroneous legal proposition, the court could interfere; (b) it is also settled law that in a case of reasoned award, the court can set aside the same if it is, on the face of it, erroneous on the proposition of law or its application; (c) if a specific question of law is submitted to the arbitrator, erroneous decision in point of law does not make the award bad, so as to permit its being set aside, unless the court is satisfied that the arbitrator had proceeded illegally.

The decision in *Saw Pipes*, though rendered by a bench of two judges, has far reaching consequences. Firstly, the decision construes the new Act as, in its entirety (sections 2 to 43), laying down only rules of procedures (vide para 8 of the judgment). It rules that "power and procedure are synonymous" and that "there is no distinction between jurisdiction/power and the procedure". Referring to sections 24, 28 and 31 of the Act and

9. (1999) 4 SCC 214 at 225.
10. (2003) 8 SCC 593.
11. (2003) 5 SCC 705.
12. *Id.* at 736.

construing the words "arbitral procedure" in section 34(2)(v) (and after observing that all the provisions appearing in part I of the Act lay down arbitral procedure) it concludes that "the jurisdiction or the power of the Arbitral Tribunal is prescribed under the Act and if the award is *de hors* the said provisions, it would be, on the face of it, illegal".

Construing the phrase "public policy of India" appearing in section 34(2)(b)(ii), the court held that in a case where the validity of the award is challenged on the ground of being opposed to "public policy of India", a wider meaning ought to be given to the said phrase so that "patently illegal awards" could be set aside. The court distinguished the earlier decision in *Renu Sagar* case[13] on the ground that in the said case the phrase "public policy of India" appearing in section 7(1)(b)(ii) of the Foreign Awards (Recognition and Enforcement) Act, 1961 was construed which necessarily related to enforcement of foreign award after it became final. Though the court accedes that "it is for the Parliament to provide for limited or wider jurisdiction of the court in case where award is challenged", it still holds that, in its view, a wider meaning is required to be given to the phrase "public policy of India" so as to "prevent frustration of legislation and justice". Stating the reasons in support of its view the court held that "giving limited jurisdiction to the court for having finality to the award and resolving the dispute by speedier method would be much more frustrated by permitting patently illegal award to operate. Patently illegal award is required to be set at naught, otherwise it would promote injustice".

This decision had been the subject matter of public debate and criticism in various fora. The Law Commission of India also suggested an amendment to the Act by insertion of explanation II to section 34 of the Act:[14]

> The 'items' permitted by *Renu Sagar* are restricted to–
>
> (i) Fundamental Policy of India
>
> (ii) Interest of India
>
> (iii) Justice or morality
>
> These alone are included in the meaning of the worlds 'public policy', apart from what is contained in the Explanation [S.34(2)(b)(ii)]
>
> ...
>
> This aspect in proposed to be clarified by an Explanation.

13. *Renu Sagar Power Company Ltd.* v. *General Electric Company,* (1994) Supp.1 SCC 644.

14. Law Commission of India, 176th Report on *The Arbitration and Conciliation (Amendment) Bill*, 2001.

ICC award examined on merits

The Supreme Court, in a recent pronouncement,[15] while reaffirming that "it is correct that the Courts should not ordinarily substitute their interpretation (of the contract) for that of the Arbitrator" and that "if the parties with their eyes wide opened have consented to refer the matter to the arbitration, then normally finding of the Arbitrator should be accepted without demur", re-examined the award on its merits and weighed the views expressed therein by the majority and the minority, on the ground which resembles some of the reasonings in the *Saw Pipe* case, though not referred to in the judgment, that "in a case where it is found that the Arbitrator had acted without jurisdiction and has put an interpretation on the clause of the agreement which is wholly contrary to law then in that case there is no prohibition for the courts to set things right.[16] On the question whether majority (of the arbitrators) rightly awarded compensation to the foreign contractors on account of fluctuations in the foreign exchange rates, the court referred to some of the provisions of the contract and distinguishing its earlier decision in *Pure Helium India (P) Ltd.* v. *ONGC*,[17] disagreed with the majority and held that "the minority view taken by the arbitrator, Justice M M Dutt appears to be well founded". The court justified its decision on the ground that it was faced with the peculiar situation that the three arbitrators, out of whom two have taken one view of the matter and the third has taken another view. Noting that the district judge has set aside the award on some issues and the high court has also accepted certain aspects of the majority award and some other aspects of the minority award, the Supreme Court observed:[18]

> Therefore, in the peculiar state of affairs the case, when there is variation of views: the majority award takes one view and the minority award takes another view, the District Judge takes the third view and the High Court takes the fourth view, in the state of these conflicting views, we have to enter into the merit to put an end to the controversy by adjudicating the conflicting views of the various forums.

What is of significance is that the court has reiterated the law which stood firmly established by its earlier decisions that the interpretation of a contract was entirely a matter within the exclusive jurisdiction of arbitral tribunal and that the court ought not to interfere with an award merely

15. *Numaligarh Refinery Ltd.* v *Daelim Industrial Co. Ltd.*, (2007) 8 SCC 466
16. *Id.* at 479 para 17.
17. *Supra* note 10.
18. *Supra* note 15 at 483 para 24.

because, according to the court, another view on such interpretation was possible. It is hoped that the decision in this case would be understood as precedent only in this context, particularly, when the court expressly holds, in the context of award of damages, that it was clearly a matter within the jurisdiction of arbitral tribunal to adopt one of the yardsticks contemplated by the parties in the same contract for assessing the extent of the damages suffered by the contractor due to delayed performance of the contract by the owner.

Bhatia International and its aftermath

The decision in *Bhatia International* v. *Bulk Trading S.A.*[19] though was not concerned with enforcement of arbitral award, certain principles laid down therein with regard to application of the provisions contained in part I of the Act in respect of arbitration proceedings that are held in Paris in accordance with the Rules of the International Chamber of Commerce (ICC), have far reaching consequences.

In *Bhatia International* the question was whether an application filed under section 9 of the Act in the court of the third Additional District Judge, Indore by the foreign party against the appellant praying for interim injunction restraining the appellant from alienating transferring and/or creating third party rights, disposing of, dealing with and/or selling their business assets and properties, was maintainable. The ADJ held that the application was maintainable, which view was affirmed by the high court. The Supreme Court, reaffirming the decision of the high court, held that an application for interim measure can be made to the courts of India, whether or not the arbitration takes place in India or abroad. The court went on to hold that "the arbitration not having taken place in India, all or some of the provisions of part I may also get excluded by an express or implied agreement of parties. But if not so excluded the provisions of part I will also apply to 'foreign awards'. The opening words of sections 45 and 54, which are in part II, read 'notwithstanding anything contained in Part I'. Such an *non obstante* clause had to be put in because the provisions of part I apply to part II".

Rejecting the contention of the appellant that an award made in an arbitral proceeding held in a non-convention country could not be enforced in India, the court observed that a party could not be "left completely remediless".

The court concluded, "the provisions of Part I would apply to all arbitrations and to all proceedings relating thereto. Where such arbitration

19. (2002) 4 SCC 105.

is held in India the 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".

These observations in *Bhatia International* have led to conflicting views expressed by different high courts as regards the available recourse against an award rendered abroad following the Rules of International Court of Arbitration of the International Chamber of Commerce.

A division Bench of the Calcutta High Court in *White Industries Australia Ltd* v. *Coal India Ltd.*[20] held that an award published and rendered in accordance with ICC Rules in Paris (though the proceedings were held, for the convenience of the parties, in London) could be challenged in a proceeding initiated in a court in India under section 34 of the Act since the contract between the parties stipulated that the "agreement shall be subject to and governed by the laws in force in India except that the Indian Arbitration Act of 1940 shall not apply". A division bench speaking through A K Patnaik CJ of Chhattishgarh High Court in *Bharat Aluminium Company Limited* v. *Kaiser Aluminium Technical Services, Inc.,*[21] however, took a contrary view.

Venture Global Engineering v. *Satyam Computer Services*

Recently, a two-judge bench of the Supreme Court,[22] reiterating its decision in *Bhatia International* held that a award made in England through a arbitral process conducted by the London Court of International Arbitration, though a foreign award, part I of 1996 Act would be applicable to such award and hence the courts in India would have jurisdiction both under section 9 and section 34 of the Act and entertain a challenge to its validity. It is of some significance that both in *Bhatia International* as well as in *Venture Global Engineering* case, the provisions under the Arbitration Act invoking the provisions contained in part-I thereof had been initiated by foreign parties against the Indian parties, though the proceedings of the arbitration were held abroad and the culmination of which undoubtedly were foreign awards.

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20. (2004) 2 CLJ 197.

21. AIR (2005) Chhat 21.

22. *Venture Global Engineering* v. *Satyam Computers Services,* 2008(1) SCALE 214.

The factual background of the case was thus: Venture Global Engineering (VGE), a company incorporated in USA had entered into a joint venture with Satyam Computer Services (Satyam) to constitute an Indian company - Satyam Venture Engineering Company Limited (SVES). The two companies had equal shares *i.e*. 50-50 in the joint venture (SVES). They had also entered into share holder's agreement, which *inter alia* provided that "the share holders shall at all times act in accordance with the Company Act and other applicable Act/Rules being enforced in India at any time". In February 2005, disputes arose between the parties, which were referred to sole arbitration of Paul Hannon, appointed by the London Court of International Arbitration and the award made in England, directed Venture to transfer its 50% shares in SVES to Satyam. Satyam filed a petition before the US District Court, Eastern District Court of Michigan for recognition and enforcement of the award, which was contested by Venture. Venture filed a civil suit in the court of the First Additional Chief Judge, City Civil Court, Secunderabad, seeking a declaration for setting aside the award and for a permanent injunction on the transfer of shares under the award. The city civil court, though initially, granted an order of injunction, at the intervention of Satyam, finally rejected the plaint. An appeal preferred by Venture before the High Court of Andhra Pradesh, was also unsuccessful. Venture, therefore, approached the Supreme Court. Relying upon the decision in *Bhatia International*,[23] contending *inter alia* that in terms of the declaration of law by Supreme Court, part I of the Act would also apply to foreign awards and hence the courts in India had jurisdiction to entertain a challenge to the validity of the award and that in view or the over-riding provision contained in the share holder's agreement, Satyam cannot approach the US courts for enforcement of the award. On behalf of the Satyam, it was contended that since the award was made in England and thus was a foreign award, no suit or other proceedings can lie against such award in view of section 44 of the Act and that an application for setting aside such an award under section 34 of the Act could not lie in any event. A two-judge bench, which heard the case, felt that *Bhatia International* decided the principal issue namely that since the parties did not, by agreement, exclude the provision of part-I of the Act from being made applicable to arbitration proceedings in England, the provisions of part-I would apply even to foreign award and hence the courts in India can entertain a challenge to the validity of such an award. Accepting the contentions of Venture, the court held:[24]

23. *Supra* note 19.
24. *Supra* note 22 at 226-27.

> That the provisions of Part I of the Act would apply to all arbitrations including international commercial arbitrations and to all proceedings relating thereto. We further hold that where such arbitration is held in India, the provisions of Part-I would compulsorily apply and parties are free to deviate to the extent permitted by the provisions of Part-I. It is also clear that even in the case 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. We are also of the view that such an interpretation does not lead to any conflict between any of the provisions of the Act and there is no lacuna as such.

The reason, which persuaded the court that a challenge to foreign award can lay in India, was the fact that an award, which is otherwise opposed to public policy of India and thus not enforceable even under the New York Convention, can be enforced, by a party by seeking its enforcement of such an award in another country. It is in view of such apprehension, the court observed:[25]

> In any event, to apply Section 34 to foreign international awards would not be inconsistent with Section 48 of the Act, or any other provision of Part II as a situation may arise, where, even in respect of properties situate in India and where an award would be invalid if opposed to the public policy of India, merely because the judgment-debtor resides abroad, the award can be enforced against properties in India through personal compliance of the judgment-debtor and by holding out the threat of contempt as its being sought to be done in the present case. In such an event, the judgment-debtor cannot be deprived of his right under Section 34 to invoke the public policy of India, to set aside the award. [As observed earlier], the public policy of India includes – (a) the fundamental policy of India; or (b) the interests of India; or (c) justice or morality; or (d) in addition, it it is patently illegal. This extended definition of public policy can be by-passed by taking the award to a foreign country for enforcement.

Both the cases of *Bhatia International & Venture* only proved the proverbial truth that 'bad cases make bad laws'. Another interesting feature is that in both cases, it was the foreign party who sought to invoke the jurisdiction of the Indian courts in respect of arbitration proceedings held abroad and awards made there.

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25. *Id.* at 225.

Conclusion

Though the General Assembly of the United Nations recommended in 1985 that the major nations should give due consideration to the model law on international commercial arbitration, in view of the desirability of existence of uniformity of law of arbitral procedures and the special need of international commercial arbitration practice, it is only after India opened its economy and undertook several measures of economic reforms in the early 90's, coupled with the development in the international trade and commerce with the increasing role of GATT and later WTO, that it became imperative for India to devise a new legal regime relating to both domestic and international commercial arbitration.

The important questions which ought to have been addressed then and which must be addressed now is, whether it will be more advantageous to have two sets of arbitration laws, one dealing with the domestic and the other dealing with international commercial arbitration, and whether by doing so India will gain some advantage, or is it more advantageous to retain the existing legislative framework and merely to update the law in the light of the experiences gained.

We should not have a dogmatic approach while considering these questions. The questions must be considered in the light of the ground realities and our experiences.