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ARBITRATION LAW

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I INTRODUCTION

PARTY AUTONOMY, limited judicial intervention, *Kompetenz-kompetenz*, and fair procedure and impartiality of the arbitral tribunal are some of the important internationally accepted principles in international arbitral jurisprudence. In this globalized era, the Indian arbitral jurisprudence needs to be synchronized with international arbitral jurisprudence if India has to emerge as one of the global leaders in international commercial arbitration. The first step in this direction was taken by the Indian Parliament by enacting the Arbitration and Conciliation Act, 1996 (the Act) a year after India joined the World Trade Organization. To achieve the above avowed object the Act has been modelled after the UNICITRAL Model law on Arbitration and has encapsulated the above basic principles. However, there are deficiencies which have come into lime light in the actual working of the law during last decade. Some of the deficiencies have been pointed out by the Supreme Court of India in *M/s Centrotrade Minerals & Metal Inc.* v. *Hindustan Copper Ltd.*[1] which is as follows:

(i) No provision is made for expediting the awards or the subsequent proceedings in courts where applications are filed for setting aside awards.
(ii) An aggrieved party has to start again from the district for challenging the award.

The Law Commission of India has also in its 176th Report taken note of the deficiencies in the Act and has suggested certain amendments for achieving the objectives originally intended in the form of Arbitration and Conciliation (Amendment) Bill, 2003. However, this proposed amendment bill is yet to become the law.

Meanwhile, in a landmark judgment delivered in 2005 a seven judge bench of the Supreme Court in *SBP & Co.* v. *Patel Engineering Ltd*[2] ("the SBP case") has widened the scope of judicial intervention in arbitration by holding

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1 (2006) 11 SCC 245.
2 (2005) 8 SCC 618.

that the power to appoint an arbitrator is a judicial power. Thus, judicial interpretation of the provisions of the Act plays a major role in achieving the goal of international unification of arbitral jurisprudence.

In the year under survey also the Supreme Court has handed down several land mark decisions interpreting the provisions of the Act, which have significant impact in the development of Indian arbitral law. Some of the issues dealt with by the Supreme Court are with regard to the jurisdiction of courts, scope and validity of arbitration agreements, on mandatory reference, appointment of arbitrators, and the scope of judicial intervention on arbitral awards. The Supreme Court has also dealt with some cases arising out of the repealed Arbitration Act, 1940 ("the 1940 Act"), and the Foreign Awards (Recognition and Enforcement) Act, 1961.

II LETTERS PATENT JURISDICTION

Section 2 (e) of the Act defines the "Court" which would have jurisdiction to entertain various matters under the Act as "the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject matter of the arbitration if the same had been the subject matter of a suit, but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes." For the purpose of determining the original civil jurisdiction this definition, in turn, attracts the relevant provisions of the Code of Civil Procedure (CPC), namely, sections 16 to 20, and the provisions of letters patent in the case of Chartered High Courts of Bombay, Calcutta, and Madras having original civil jurisdiction. The scope of the original civil jurisdiction of the above chartered high courts is being determined on the basis of the relevant provisions of the letters patent, which are wider than the relevant provisions of CPC. In the context of arbitration the question would often arise as to whether the narrow jurisdictional base specified under the CPC or the wider base provided under the letters patent would apply.

In *Jindal Vijayanagar Steel (JSW Steel Ltd.)* v. *Jindal Praxair Oxygen Co. Ltd.*[3] the Supreme Court had to consider the said issue in a matter concerning the letters patent jurisdiction of the Bombay High Court. In this case the appellant, which was in the process of setting up an integrated steel plant, along with another company, incorporated the respondent in Karnataka for the supply of necessary industrial gases to the appellant. The respondent set up an air separation plant (ASP) in Bellary, Karnataka. A pipeline supply agreement (PSA) was entered into between the appellant and the respondent at Bangalore. Several disputes in relation to the implementation of PSA and performance of ASPs arose between the parties. A 'settlement agreement' entered into between the parties was approved by the board of directors of

3 (2006) 11 SCC 521.

both the parties in Bangalore. As dispute arose regarding the interpretation of the obligation of parties under the 'settlement agreement' the respondent invoked the arbitration clause against the appellant. The respondent filed a petition under section 9 of the Act in Bombay High Court seeking interim relief against the appellant. The Bombay High Court served notice to the appellant in Karnataka. The appellant, meanwhile, approached the principal civil judge, Bellary for an injunction restraining the respondent from breaching the various agreements and obtained an order of interim injunction. The respondent objected to the proceedings before the Bellary court which was rejected. The respondent filed appeal before the Karnataka High Court which was allowed holding that the issue of jurisdiction would have to be decided by the Bombay High Court. When the petition under section 9 of the Act was pending before the Bombay High Court, the respondent had transferred its registered office to Mumbai. By the impugned order the Bombay High Court held that it had jurisdiction to entertain the arbitration petition on the ground that under clause 12 of the letters patent[4] the Bombay High Court had jurisdiction to entertain the petition under section 9 of the Act as the respondent was having its corporate office in Bombay from where it was carrying on its business.

The issue before the Supreme Court was whether the Bombay High Court had jurisdiction to entertain the application under section 9 of the Act filed by the respondents. The Supreme Court held that in view of section 120 CPC which had specifically excluded the applicability of sections 16, 17 and 20

4 Clause XII of the letters patent reads as follows:
"*Original Jurisdiction as to suits*: And We do further ordain that the said High Court of Judicature at Bombay, in the exercise of its ordinary original civil jurisdiction, shall be empowered to receive, try, and determine suits of every description, if, in the case of suits for lands or other immovable property such land or property shall be situated, or in all other cases if the cause of action shall have arisen , either wholly, or, in case the leave of the Court shall have been first obtained, in part, within the local limits of the ordinary original jurisdiction of the said High Court or if the defendant at the time of the commencement of the suit shall dwell or carry on business, or personally work for gain, within such limits; except that the said High Court shall not have such original jurisdiction in cases falling within the jurisdiction of the Small Cause Court at Bombay, or the Bombay City Civil Court."

5 S. 20 of CPC reads as follows:
"20. Other suits to be instituted where defendants reside or cause of action arises. Subject to the limitations aforesaid, every suit shall be instituted in a court within the local limits of whose jurisdiction –
(a) the defendant, or each of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, or
(b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, adequate in such institution; or
(c) the cause of action, wholly or in part, arises.
Explanation:- A corporation shall be deemed to carry on business at its sole or principal office in India or, in respect of any place where it has also a subordinate office, at such place."

CPC[5] to chartered high courts, clause 12 of the letters patent would be the relevant provision for determining the ordinary original jurisdiction of the Bombay High Court. The Supreme Court also held that under clause 12 of the letters patent the Bombay High Court would have jurisdiction to entertain an arbitration petition filed under section 9 of the Act even if no cause of action had arisen within its jurisdiction, since the respondent had its office at Mumbai. The Supreme Court specifically rejected the contentions advanced on behalf of the appellants that the jurisdiction under section 2(e) should be interpreted uniformly through out India and in that case the provisions of section 20 CPC should be invoked to interpret clause 12 of the letters patent under which the only test for determining the jurisdiction of the court should be the place where the cause of action had taken place and not the place of carrying on business.

III MANDATORY REFERENCE

Subject matter of arbitration agreement

The ambit and scope of an arbitration agreement would arise before a judicial authority when under section 8 of the Act one of the parties raises an objection to the initiation of the proceedings before the judicial authority on the ground that the subject matter of the dispute is covered by an arbitration agreement and, therefore, request the judicial authority to refer the subject matter of the proceedings to arbitration. The question whether a dispute is covered by the arbitration agreement has to be decided by the judicial authority so that the dispute could be referred to arbitration. In that case the court or judicial authority would be called upon to interpret the arbitration agreement to ascertain as to whether the particular dispute before the court is covered by the arbitration agreement.

In *Mullaperiyar Environmental Protection Forum* v. *Union of India & Ors.*[6] the Supreme Court had to consider the issue as to whether a dispute between two state governments on the question of the height of a dam arising out of a lease agreement could be the subject matter of arbitration. In that case an agreement was entered into on 29.10.1886 between the then Maharaja of Travancore and erstwhile Secretary of State for India in Council under which an extent of 8000 acres of land were leased for execution / preservation of irrigation works called "Periyar project". The lease deed also contained an arbitration clause stating that whenever any dispute or question arises between the lessor and the lessee touching upon the rights, duties or liabilities of either party, it shall be referred to two arbitrators and then to an umpire if they differ. In pursuance of the said agreement, a dam known as the 'Mullaperiyar Dam' was constructed in the year 1887-1895. The reservoir in the dam was filled up to 152 feet as per the agreement. The said agreement was later modified in the year 1970 and the State of Tamil Nadu was allowed to generate electricity from the project and the State of Kerala was given certain fisheries rights. Later a

6 (2006) 3 SCC 643.

leakage occurred in the gallery of the dam. The Central Water Commission (CWC) held meetings with States of TN and Kerala and it was decided that water level should be maintained at 136 feet until further studies on the problem. After a thorough study the CWC felt that certain steps were needed to be taken and thereafter the water height could be raised to 142 feet. The State of Kerala dissented with the decision of CWC and felt that water level should not be allowed to be raised beyond 136 feet. The petitioner, the Mullaperiyar Environmental Protection Forum approached the Supreme Court by way of a writ petition on the issue of the safety of the dam when the water level was raised beyond 136 feet.

In the writ petition the State of Kerala advanced a contention that the matter should be referred to arbitration in view of the arbitration clause in the agreement. Therefore, one of the issues before the Supreme Court was as to whether the disputes are liable to be referred to arbitration. The Supreme Court held that as per the lease deed whenever any dispute or question arises between the lessor and the lessee touching upon the rights, duties or liabilities of either party, it shall be referred to two arbitrators and then to umpire if they differ. According to the Supreme Court the present dispute was not about the rights, duties and obligations concerning the interpretations of any part of the lease agreement, but as to whether the water level in the reservoir could be increased to 142 feet having regard to the safety of the dam and therefore the dispute is not covered by the arbitration clause. On the basis of this interpretation of the arbitration clause the Supreme Court declined to refer the said dispute to arbitration.

Application under order 39 rules 1 and 2, CPC

The scope of the duty of a court while hearing an application filed by a party in a pending suit under order 39 rules 1 and 2 CPC seeking interlocutory injunction restraining the opposite party from initiating arbitration proceedings came up before the Supreme Court in *Ardy International (P) Ltd. & Anr.* v. *Inspiration Clothes & U. & Anr.*[7] In this case the appellants supplied goods to the respondents under certain invoices which contained an arbitration clause stating that any dispute touching the said transaction should be referred to arbitration through Bharat Merchants Chamber. Some disputes arose between the parties. The respondents filed a suit before the city civil court, Calcutta for recovery of certain sums of money from the appellants. Meanwhile, the Bharat Merchants Chamber issued a notice to the respondents calling upon them to appoint its arbitrator and indicated its intention to commence arbitral proceedings. The respondents moved the city civil court by way of an application in the pending suit under order 39 rules 1 and 2 CPC seeking interim relief of injunction restraining the appellants from proceeding with the arbitration, which was dismissed. On appeal by the respondents the high court remanded the matter to the trial court to decide the said application as one filed under section 8 of the Act. The trial court dismissed the said

7 (2006) 1 SCC 417.

application on the ground that there existed a valid arbitration agreement between the parties. On appeal by the respondent, the high court allowed the appeal holding that the endorsement at the foot of the invoice could not have been construed to be an arbitration agreement within the meaning of the Act. Consequently, the interlocutory injunction under order 39 rules 1 and 2 became operative resulting in a restraint order against the commencement of arbitration proceedings. The appellants approached the Supreme Court questioning the said order.

The issue before the Supreme Court was whether such an injunction could be granted in an application under section 8 of the Act. The Supreme Court held that section 8 was not intended to restrain arbitration proceedings before an arbitral tribunal but was intended to achieve the converse result. The court observed that the application originally moved under order 39 rules 1 and 2 of CPC could only have been decided as an application thereunder for whatever it was worth. The Supreme Court further said that once objection to the application under order 39, rules 1 and 2 of CPC was filed by the appellants bringing the existence of an arbitration agreement to the notice of the court, the proceedings could only have been continued within the parameters of section 8 of the Act. The court, consequently, disposed of the matter permitting the appellants to file an application before the trial court under section 8 of the Act and directed the trial court to dispose of the said application after hearing the respondents.

Waiver of reference and submission to jurisdiction of civil courts

Often a valid arbitration agreement would be in existence between two parties, but one of the parties would have approached a court ignoring the said agreement. In such a situation it is the duty of the opposite party to apply to the court under section 8 of the Act that the matter should be referred to arbitration. However, under the Act such an application should be made 'not later than when submitting his first statement on the substance of the dispute'[8]. In case a party fails to make such an application before submitting the first statement on the substance of the dispute then the court would treat that as a submission to the jurisdiction of the court and a waiver of the right to seek a reference to arbitration. The scope of this expression 'not later than when submitting his first statement on the substance of the dispute' and the

8 S. 8 of the Act states as follows:
"8. Power to refer to arbitration where there is an arbitration agreement:
(1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.
(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.
(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made."

corollary issue of what constitutes a waiver came up for consideration before the Supreme Court in *Rashtriya Ispat Nigam Ltd. & Anr.* v. *Verma Transport Co*.[9]

In this case the appellant was a public sector undertaking engaged in the business of manufacturing and marketing of iron and steel products. The respondent was a partnership firm engaged in the business of consignment agents. The appellant entered into a contract with the respondent availing its services. The contract also contained an arbitration clause. The appellant terminated the above contract due to some fraudulent conduct on the part of one of the partners of the firm who later resigned from the firm. The appellant also took steps to black list the respondent firm. Respondent filed a civil suit seeking permanent injunction against the appellant from terminating the contract and blacklisting the firm. The court directed the parties to maintain status quo. The appellant filed its reply to the injunction application and took specific plea that the subject matter of the suit being covered by the arbitration agreement entered into between the parties the said suit was not maintainable. The appellants also filed an application under section 8 of the Act for referring the matter for arbitration. The said application under section 8 was rejected by the trial court on the ground that the appellant by seeking time to file written statement and by filing a reply to the interlocutory application had entered into a defense and subjected themselves to the jurisdiction of the court. The high court also rejected the revision filed against the said order on the ground that the appellant by filing their reply to the interim application had subjected to the jurisdiction of the court. The appellant brought the matter by way of special leave petition before the Supreme Court.

The issue before the Supreme Court was whether the appellant had waived its right to invoke the arbitration clause, and what was the exact scope of the expression 'first statement on the substance of the dispute" in section 8 (1) of the Act. The Supreme Court after making a comparison of the provisions of section 34 of the 1940 Act, and section 45 dealing with New York Convention awards and section 54 dealing with the Geneva Convention awards under the Act and with section 8 of the Act held that under section 8 of the Act the judicial authority must refer the dispute which was the subject matter of arbitration agreement for arbitration subject to the fulfilment of certain conditions. The Supreme Court then held that since the existence of the valid agreement had been admitted and the subject matter of the dispute was covered by the agreement the requisite condition had been fulfilled. The court then reiterated the principle accepted in its earlier judgments that under section 8 of the Act the court had no discretion but to refer the dispute to arbitration once the condition precedent were satisfied unlike under section 34 of the 1940 Act. For that purpose the Supreme Court also said that notice seeking to refer the dispute for arbitration to the opposite party was not a necessary precondition. On the issue as to the exact scope of the expression

9 (2006) 7 SCC 275.

'first statement on the substance of the dispute' contained in section 8 of the Act the Supreme Court stated as follows:

> The expression 'first statement on the substance of the dispute' contained in Section 8 (1) of the 1996 Act must be contra-distinguished with the expression 'written statement'. It employs submission of the party to the jurisdiction of the judicial authority. What is therefore needed is a finding on the part of the judicial authority that the party has waived its right to invoke the arbitration clause. If an application is filed before actually filing the first statement on the substance of the dispute, in our opinion, the party cannot be said to have waived its right or acquiesced itself to the jurisdiction of the court. What is, therefore, material is as to whether the petitioner has filed his first statement on the substance of the dispute or not, if not, his application under Section 8 of the Act, may not be held wholly unmaintainable.

The court then held that under section 8 of the Act what was required was not taking part in a supplemental proceeding but disclosure of the entire substance in the main proceedings. Applying the said principle the Supreme Court held that since the appellant had filed its reply in the incidental or supplementary proceedings only and not in the main proceedings there was no waiver or acquiescence and therefore the subject matter of the dispute should be referred to arbitration.

IV INTERIM MEASURES AND 'CELEBRITY CONTRACTS'

Section 9 of the Act enables parties to approach a civil court invoking its jurisdiction for any interim relief before and during arbitration proceedings and even after the passing of the award under certain circumstances. Though the power of a court to grant interim relief is circumscribed by section 9 of the Act, the exact scope and limit of the power under section 9 has often come up before courts for consideration. Generally, granting of interim relief in any matter though depends on the facts of each case, the conditions for granting interim orders and the principles applicable in granting such interim orders are important areas in the arbitral jurisprudence. The scope and extent of the exercise of such power in an emerging area in the contract law, namely, "celebrity contract", was in issue before the Supreme Court in *Percept D'mark (India) (P) Ltd.* v. *Zaheer Khan and Others.*[10] In this case the appellant, an event management company, and respondent no.1, a cricketer, entered into a 'celebrity contract' by which the appellant was appointed as promotion agents/event managers of respondent no. 1 for three years. Clause 31(b) of the contract imposed an obligation on respondent no.1 that at the time of expiry

10 (2006) 4 SCC 227.

of the contract he should not accept any offer from any third party promotion agents/event managers without first providing the appellant an opportunity to match the second party's offer. The contract contained an arbitration clause which provided for resolution of any dispute arising out of the agreement by way of arbitration. However, at the time of expiry of the contract respondent no.1 entered into a contract with respondent no.2, another promotion agents/ event manager, without giving to the appellant an opportunity to make a matching offer. The appellant approached the Bombay High Court seeking interim relief under section 9 of the Act for an injunction restraining respondent no.1 from enforcing the second contract without resorting to clause 31 (b). A single judge of the high court granted the said relief. On appeal by respondent 1 and 2 a division bench by the impugned order reversed the order of the single judge and dismissed the arbitration petition on the ground that clause 31 (b) was void under section 27 of the Contract Act, 1872 on the ground of restraint of trade.

The issues before the Supreme Court were whether the arbitration petition was maintainable or not and whether the injunction (temporary/permanent) could be granted under section 9 of the Act to enforce a negative covenant. The court held that clause 31 of the agreement dealt with the situation on the expiry of the agreement and that the agreement contained a negative covenant which was not valid and binding after its expiry. The court further held that it was inappropriate to grant an interim injunction to enforce the disputed clause in the contract since it was for the specific performance of a contract of personal, confidential and fiduciary service which was barred by clauses (b) and (d) of section 14 (1) of the Specific Relief Act and also for the specific performance of contract for personal service which could not be specifically enforced. The court further held that the agreement merely provides for an obligation on the respondent to give an opportunity to the appellant to match the offer, if any, received by respondent no.1 from a third party, which clause did not restrict or prohibit respondent no.1 from entering into a contract with a third party. The court further stated that in any event the breach could be compensated by damages and therefore the arbitration petition under section 9 of the Act was not maintainable.

V APPOINTMENT OF ARBITRATORS

The decade old controversy over the nature of the power exercised by the chief justice of a high court in the case of a domestic arbitration and by the Chief Justice of India in the case of an international commercial arbitration in the appointment of arbitrators under section 11 (6) of the Act has been finally set at rest last year by the seven judge constitutional bench of the Supreme Court in the *SBP's* case[11] by holding that it is a judicial power. However, other issues pertaining to the appointment of arbitrators under section 11 (6) of the Act continue to confront the courts while exercising the said judicial

11 *Supra* note 2.

power both in the context of domestic arbitration and international commercial arbitration. Some of the issues which came up for consideration before the Supreme Court in the context of domestic arbitration pertains to what would constitute waiver of the right to appoint an arbitrator, the procedure for appointment of a substitute arbitrator, and the circumstance which would enable the court to exercise the power under section 11 (6) of the Act.

Domestic arbitration : waiver of right to appoint

In *BSNL and Others* v. *Subhash Chandra Kanchan and Another*[12] the appellants and the respondents entered into a contract pursuant to a notice inviting tender by appellant no. 1 for some constructions at Bhubaneshwar. The contract contained an arbitration clause under which in case of dispute the arbitrator was to be appointed by the chief engineer of appellant no. 1. When disputes arose between the parties a notice in terms of arbitration agreement was issued by the respondents. A letter appointing a sole arbitrator was drafted by the managing director of appellant no.1 and dispatched two days later, which was beyond the period of 30 days prescribed under section 11 of the Act. The respondents filed an application before the Orissa High Court purporting to be under section 11 of the Act for the appointment of an arbitrator. A division bench of the high court appointed an arbitrator from panel submitted by the respondent and on the basis of consent given by the counsel for the appellant. Subsequently an application was filed by the appellants under section 151 of CPC to recall the order on the ground that no authority was given to the counsel to give such consent. The high court, however, refused to recall its order on the ground that the consent given by the counsel for the appellants was binding. The appellants approached the Supreme Court against that order.

The issues before the Supreme Court were whether the appellants had waived their rights to appoint an arbitrator and whether the consent given by the junior counsel can be rescinded from.

The Supreme Court took note of the fact that the managing director of appellant no.1 was served with a notice on 7.1.2002 and the letter of appointment of arbitrator was communicated to the respondent on 7.2.2002 by which time the 30 days period contemplated under section 11 of the Act had lapsed. The Supreme Court held that the managing director of appellant no.1 was required to communicate his decision in terms of the arbitration clause in the contract within 30 days and in view of the delay in communicating the decision the appellants had lost their right to appoint an arbitrator. The Supreme Court also held that by giving consent to the appointment by the high court the appellants had waived their right to appoint an arbitrator.

Substitute arbitrator

While section 11 of the Act deals with the appointment of arbitrators at the first instance, section 15 (2) of the Act deals with the procedure for

12 (2006) 8 SCC 279.

substitution of an arbitrator whose mandate has terminated. It provides that 'a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.' The meaning of the words 'rules that were applicable to the appointment of the arbitrator' came up for interpretation before the Supreme Court in *Yashwith Constructions (P) Ltd.* v. *Simplex Concrete Piles India Ltd and Another*.[13] In this case when a dispute arose between the appellant and the respondents, the managing director of the respondent company appointed an arbitrator in terms of the arbitration clause in the agreement. The arbitrator subsequently resigned due to health reasons. He, therefore, appointed another arbitrator. The appellant approached the Chief Justice of the High Court of Andhra Pradesh under section 11(5) read with section 15(2) of the Act praying for the appointment of a substitute arbitrator. The said application was dismissed by the high court on the ground that the managing director of the respondent company was right in appointing the arbitrator and his right was saved by section 15 (2) of the Act. The appellant challenged the said dismissal order by way of writ petition before the Andhra Pradesh High Court. A division bench of the court dismissed it upholding the decision of the chief justice. The appellant approached Supreme Court against the said decision.

The principal contention before the Supreme Court was that in the absence of specific provision in the arbitration agreement the managing director of the respondent company had no power to appoint a substitute arbitrator. The Supreme Court held that the gap caused by the absence of a specific provision in the agreement to appoint a substitute arbitrator is filled by section 15 (2) of the Act. This is based on the reasoning that withdrawal of an arbitrator from office for any reason was within the purview of section 15 (1) (a) of the Act, which, therefore, would attract section 15 (2) of the Act and a substitute arbitrator had to be appointed according to the rules that were applicable to the appointment of the original arbitrator who was being replaced. In this connection the Supreme Court held that the term "rules" in section 15 (2) of the Act referred to the provision for appointment contained in the arbitration agreement or any rules of any institution which would refer disputes to arbitration. Thus, the Supreme Court held that section 15(2) of the Act contemplates appointment of a substitute arbitrator according to the 'Rules' that were applicable to the appointment of the original arbitrator who was being replaced and that the term 'rule' referred to in section 15 (2) of the Act obviously refers to the provisions for appointment originally as contained in the arbitration agreement and that it was not confined to an appointment under any statutory rule or rule framed under the Act or under the scheme. The Supreme Court thus upheld the orders of the chief justice and the division bench holding that the appointment by the managing director was valid.

A similar issue came up before the Supreme Court in *National Highway Authority of India and Anr.* v. *Bumihiway DDB Ltd (JV) and Ors.*[14] In that

13 (2006) 6 SCC 204.
14 (2006) 10 SCC 763.

case the appellants entered into an agreement with the respondent for widening and strengthening of a portion of national highway in Orissa. The agreement contained an arbitration clause for resolution of disputes by way of arbitration. The arbitration clause stated that the arbitral tribunal shall consist of three arbitrators, one each to be appointed by the appellants and the respondent and the third arbitrator shall be chosen by the two arbitrators so appointed by the parties who shall act as the presiding arbitrator. It further stated that in case of failure of the two arbitrators appointed by the parties to reach upon a consensus within a period of 30 days from the appointment of the arbitrators appointed subsequently, the presiding arbitrator shall be appointed by the President of Indian Roads Congress (IRC). However, some dispute arose regarding delay in the execution of contract by the respondent contractor. The respondent and the appellant nominated their respective arbitrators. There was a disagreement between the two nominated arbitrators on the appointment of the presiding arbitrator. Respondent 1 filed an arbitration petition under section 11 (6) of the Act before the Orissa High Court praying for the appointment of the presiding arbitrator. The high court appointed the presiding arbitrator who, however, resigned. The high court, therefore, appointed another substitute arbitrator. This was challenged before the Supreme Court on the ground that it was in violation of the arbitration clause in the agreement which provided for the appointment of the presiding arbitrator by the IRC when there was a failure to reach consensus between the arbitrators.

The main issue before the Supreme Court was on the scope of the jurisdiction of the court to appoint a substitute arbitrator on the resignation of the arbitrator considering the specific mandate and mechanism under section 15 (2) of the Act. The other issues before the Supreme Court were as to which was the statutory provision which would come into play on the resignation of an arbitrator, and whether on resignation of one of the arbitrators the exercise of power under section 11(6) of the Act was justified without recourse to the rules of appointment prescribed under the arbitration clause. The Supreme Court held that the high court failed to appreciate that in accordance with section 15(2) of the Act on the termination of the mandate of the presiding arbitrator, the two nominated arbitrators were first required to reach a consensus and on their failure to arrive at a consensus respondent no.2 was authorized to make the appointment of the substitute arbitrator. The Supreme Court placing reliance on the *Yushwith Constructions* case[15] held that withdrawal of an arbitrator from the office for any reason fell within the purview of section 15 (1) (a) of the Act and therefore, section 15 (2) of the Act would be attracted and a substitute arbitrator had to be appointed according to the rules that were applicable for the appointment of the arbitrator to be replaced. The court further held that under section 11 (6) of the Act the court had jurisdiction to make the appointment only when the person including an institution failed to perform any function entrusted to it under that procedure.

15 *Supra* note 14.

The court, therefore, held that in the instant case even in case of a failure between the two arbitrators, unless respondent no.2, the IRC failed to appoint the presiding arbitrator, the high court could not assume jurisdiction under section 11(6) of the Act and that parties were required to comply with the procedure of appointment as agreed to between them.

International commercial arbitration

After the decision in the *SBP* case[16] holding that the nature of the power exercised by the Supreme Court is a judicial power, the question would arise whether the principles laid down by the Chief Justice of India or his designate judge in an international commercial arbitration has any precedentiary value. Therefore, the legal principles evolved in appointment of arbitrators under section 11 (6) of the Act would be part of the arbitral jurisprudence in India and would be binding on the lower courts including the high courts. However, in one case, the Supreme Court has held that the Chief Justice of India acting under section 11 (6) of the Act is not the Supreme Court.

Whether chief justice is a court?

In *Rodemadan India Ltd* v. *International Trade Expo Centre Ltd.*[17] the designated judge of the Supreme Court was confronted with an argument that since the order passed in an application under section 11 (6) of the Act was a judicial one the application should be heard by a bench of at least two judges as per the requirement of order VII rule 2 of the Supreme Court Rules. However, the judge rejected the said contention on the ground that the power exercised by the Chief Justice of India, though a judicial power, the Chief Justice was not acting as the Supreme Court and, therefore, the Supreme Court Rules were not applicable. In this case the respondent company, which had leasehold rights for 90 years over a land, wanted to construct and develop an exhibition centre on the said land. For that purpose negotiations were held between the petitioner company and the respondent company and an executive management agreement was entered into, under which the petitioner company was granted exclusive right to manage the said plot for 10 years from the date vacant possession was handed over to it. The agreement also contained an arbitration clause. When certain disputes arose between the parties the petitioner company filed an application under section 9 of the Act in the Delhi High Court and obtained an order directing the respondent company to maintain 'status quo' with respect to possession and title of the said plot of land. The petitioner company sent a legal notice to the respondent company invoking the arbitration clause. The parties appointed two arbitrators who were unable to arrive at consensus on the presiding arbitrator. An Application was filed under section 11(6) of the Act before the Chief Justice of India.

Before the Supreme Court an objection was advanced that a petition under section 11(6) of the Act needed to be heard by a bench consisting of at least

16 *Supra* note 2.
17 (2006) 11 SCC 651.

two judges in view of order of the Act VII Rule 1. Another issue was whether there was a valid arbitration agreement between the parties since according to the respondent company the original agreement was revoked by the subsequent extraordinary general body meeting (EOGM). The extent of the right of a party to let in evidence to substantiate its stand on the validity of an arbitration agreement also came for consideration since the respondent company wanted to let in oral evidence to substantiate its plea that the original agreement was subsequently not approved in the EOGM. The designated judge referring to the seven bench judgment of the Supreme Court in *SBP* case[18] held that the power under section 11(6) of the Act was the power of a designate referred to under section 11 (6) of the Act but not that of the Supreme Court and that since this was the power of the Chief Justice of India and not the power of the Supreme Court, the requirement under order VII rule 1 of the Supreme Court Rules would have no application. Moreover, the judge held that section 11 (6) of the Act, which was a law made by Parliament within the meaning of article 145 of the Constitution of India had not prescribed any such requirement. The judge also held that Parliament had enacted a law under which the power was exercisable by the Chief Justice or his designate who could be any person or institution but not the Supreme Court. The judge further held that the petitioner had denied that any resolution was passed in the EOGM as alleged by which the management agreement had been repudiated or rendered ineffective and therefore it was not possible to accept the correctness of the disputed documents or to proceed on the footing that there was such a resolution in an EOGM and, therefore, there was a valid arbitration agreement. The judge denied the request for letting in oral evidence to substantiate the stand of the respondent company on the ground that wide discretion had been given to the designated judge in the *SBP*[19] case and, therefore, such request could not be permitted and that the Chief Justice of India was not a trial court. On holding that the jurisdictional requirement to exercise the power of appointment of an arbitrator under section 11 (6) of the Act had been satisfied the judge appointed the presiding arbitrator.

Appointment when refused

In *You One Engineering & Construction Co. Ltd & Another* v. *National Highways Authority of India (NHAI)*[20] the petitioner was a company incorporated/registered under the laws of Republic of Korea with its registered office at Seoul. The petitioner company entered into a contract for execution of construction work containing an arbitration clause which stated that the arbitration would be an international commercial arbitration and that in case of failure of the two arbitrators appointed by the parties to reach upon a consensus within 30 days from the appointment of second arbitrator, the presiding arbitrator shall be appointed by the President of the Indian Road

18 *Supra* note 2.
19 *Ibid.*
20 (2006) 4 SCC 372.

Congress (IRC). Certain disputes arose between the parties. The respondent gave a notice of termination of the contract. Petitioner company issued a notice of arbitration. Both parties appointed their respective arbitrators. On their failure to appoint the presiding arbitrator within 30 days, the IRC appointed the presiding arbitrator as per the arbitration clause. The petitioner filed a petition under section 11 (6) of the Act before Chief Justice of India contending that the situation has fallen under section 11(6) (c) of the Act as IRC had failed to perform the function entrusted to it under the appointment procedure.

The two issues which came up for consideration before the designated judge were as to what were the pre-requisites for the invocation of jurisdiction of the Chief Justice of India to appoint the arbitrator and what should be the qualification of the arbitrator. The designated judge held that the arbitration agreement clearly stipulated the appointment of the presiding arbitrator by IRC and that according to the agreed procedure the presiding arbitrator had been appointed already by the IRC and, therefore, section 11 (6) of the Act could not be attracted as there was no failure on the part of the institution to perform its function. The Supreme Court further held that the arbitration clause did not stipulate that the arbitrator should have any specific qualification depending on the nature of the dispute and that when the parties had entered into such an agreement with open eyes, it was not open to ignore it while invoking to exercise the powers under section 11(6) of the Act.

Validity of arbitration agreement: severability

In *Shin Satellite Public Co Ltd.* v. *Jain Studios Ltd*.[21] the petitioner company registered under the laws of Thailand, and having its principal office in Thailand was carrying on business in satellites. Respondent was a company duly registered under the Indian Companies Act, 1956 having registered office at Delhi. They entered into an agreement regarding broadcasting services. Clause 23 of the agreement contained an arbitration clause stating that the disputes arising between the parties shall be resolved by arbitration under the rules of UNCITRAL and that the determination by the arbitrator would be treated as "final and binding between the parties" and that the parties had waived all the rights of appeal or objection "in any jurisdiction". Some dispute arose between the parties. Petitioner company sent a letter/notice to the respondent invoking the arbitration clause after nominating its arbitrator. It also filed an application before the Chief Justice of India praying for the appointment of its nominee as the sole arbitrator. The respondent opposed the application and in its reply urged that the arbitration agreement was not legal and valid on the ground that the agreement insofar as taking away the right to challenge the award was opposed to public policy.

The issue before the designated judge was whether the arbitration agreement was legal, valid and enforceable. The designated judge held that the

21 (2006) 2 SCC 628.

objectionable part which takes away the right to challenge the award and conferring finality to the award was clearly severable as it was independent of the dispute being referred to and resolved by an arbitrator. To that extent the agreement was legal and offending part could be separated and severed. Hence after severing the invalid part of arbitration clause non-offending portion of the arbitration clause was upheld and the arbitrator appointed by the petitioner was directed to act as the sole arbitrator.

Bona fide refusal and the right to appoint

In *Groupe Chimique Tunisien SA* v. *Southern Petrochemicals Industries Corpn. Ltd*. [22] the petitioner company was incorporated under the laws of Tunisia. The respondent placed various purchase orders dated 10.11.2000, 17.11.2000, 4.12.2000, 20.12.2000, 13.7.2001. These orders contained particulars as to quantities to be supplied, price, payment terms, shipment particulars etc. All other terms and conditions were as per Fertilizer Association of India (FAI) terms. Clause 15 of FAI terms provided for settlement of disputes by arbitration. The petitioner made the supplies and raised invoices for such supplies. The respondent failed to pay the invoiced amount. The petitioner, therefore, filed a suit in a court in Amman for the recovery of amount due. The respondent contended that the court in Amman had no jurisdiction and that a valid arbitration agreement existed between the parties. The court in Amman dismissed the suit on the ground that it had no jurisdiction to entertain the case. The same was confirmed by an Amman court of appeal. The petitioner company issued notice to the respondent to settle the dispute by arbitration in terms of clause 15 and in turn appointed its arbitrator. It then sent a notice to the respondent calling upon it to appoint its arbitrator within 30 days. On the failure of the respondent to appoint its arbitrator the petitioner company filed an application under section 11 (6) of the Act before the Chief Justice of India for appointment of an arbitrator. The respondent contended before the designated judge that there was no arbitration agreement between the parties and that since the petitioner company had denied the existence of an arbitration agreement before the Jordanian courts it was estopped from claiming that there was one in existence. It was also contended that the claim of the petitioner company should be barred by limitation as the claims were in respect of goods dispatched on various dates mentioned above in the purchase orders and that the disputes were not arbitrable.

The issues before the Supreme Court were that whether there was a valid arbitration agreement between the parties and whether the claim of petitioner was barred by limitation. The designated judge held that the question whether there was an arbitration agreement or not had to be decided with reference to the contract documents and not with reference to any contention raised before a court of law after the dispute had arisen. The judge further held that the latter would have been relevant only if the claim on the existence of the arbitration

22 (2006) 5 SCC 275.

agreement was based on an exchange of statements of claim and defence in which the existence of the agreement was alleged by one party and not denied by another party which would fall under section 7 (4) (c) of the Act.[23] The judge also held that since in the present case, where parties rely on an arbitration clause in reference to a document containing an arbitration clause, it fell under the scope of section 7 (5) of the Act[24] and that there was a valid arbitration agreement between the parties and the reference to the FAI terms in the purchase orders would constitute the arbitration agreement though not mentioned in the invoice. The designated judge further held that the petitioner's claim was not barred by limitation and that the said issue could be considered and decided by the arbitrator under section 16 of the Act. The judge further held that the respondent had not lost its right to appoint an arbitrator though it failed to comply with the demand of the petitioner for appointment within 30 days, since it was under a *bona fide* impression that there was no arbitration agreement and also took note of the fact that the respondent had already nominated an arbitrator.

VI CHALLENGE TO AWARD

Validity of partial awards, additional awards and final awards

Section 2 (e) of the Act does not define an arbitral award but only states that an "arbitral award" includes an interim award. Section 31 of the Act deals with the form and content of arbitral awards. It stipulates not only that the award should be in writing and signed by the members of the arbitral tribunal, but also states that unless agreed otherwise should state the reasons. Sub-section (6) of section 31 of the Act provides that the arbitral tribunal, at any time during the arbitral proceedings, may make an interim arbitral award on any matter with respect to which it may make a final arbitral award. The Act does not mention any other type of awards.

The validity of various types of awards, termed as 'partial award', 'additional award', and 'final award' came up for consideration before the Supreme Court in *McDermott International Inc.* v. *Burn Standard Co. Ltd. And Others*.[25] In this case Oil and Natural Gas Commission (ONGC) appointed the respondent, Burn Standard Co. Ltd (BSCL), for fabrication, transportation and installation of six off shore platforms. The said contracts contained

23 S. 7 (4) reads as follows:
"An arbitration agreement is in writing if it is contained in –
(a) A document signed by parties;
(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or
(c) an exchange of statement of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other."

24 S. 7 (5) of the Act reads as follows:
"The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause as part of the contract."

25 (2006) 11 SCC 181.

arbitration clause. BSCL in turn entered into a technical collaboration agreement with the appellant, McDermott International Inc. (MII) containing separate arbitration clause. Disputes arose between the BSCL and MII. MII invoked the arbitration clause and filed a petition under section 11 (6) of the Act before the Calcutta High Court, which eventually resulted in the appointment of a sole arbitrator to resolve the dispute. The arbitrator considered 15 claims and passed a 'partial award' in favour of MII with respect to all claims except claim nos. 6, 8 and 9. Decision on these claims was deferred for four months so as to enable BSCL to dispose of all claims raised by MII in the meanwhile which had arisen before reference to arbitration. The BSCL subsequently rejected these claims. MII filed an application before the sole arbitrator under section 33 of the Act to pass an award with respect to certain claims not decided. The arbitrator passed an 'additional award' on these claims. Subsequently, the sole arbitrator dealt with claims 6, 8 and 9 and passed a 'final award' in favour of MII. Against the awards BSCL filed an application under section 34 of the Act challenging the award before the Calcutta High Court from which the matter finally came to the Supreme Court.[26]

The BSCL apart from challenging the merits of the partial, additional and final awards under various heads also contended that the arbitrator had no jurisdiction to pass a partial award which was not contemplated under the Act.

The main issue before the Supreme Court was whether the award was contrary to the terms of the contract and in violation of public policy or against substantive laws in India. Other issue was whether adjudication had been made on claims on which there was no dispute and that the award was vitiated by internal contradictions.

On the validity of partial award the Supreme Court held that the expression "partial" and "interim" was interchangeable. An interim award was not one in respect of which a final award could be made, but it may be the final award at the interim stage. The court also held that section 33(4) of the Act[27] empowers the arbitral tribunal to make additional award in respect of matters presented during the arbitral proceedings but omitted from the arbitral award and that a claim could also be made through correspondence or in meeting. For raising a claim based on breach of contract, no invoice was required to be drawn. On merits of the claims the court held that it was within the domain of the arbitrators to decide which formula should be followed to assess damages. The court further held that it was within the jurisdiction of the arbitrator to interpret the contract and that the court would not interfere unless it was found that there was a bar on the face of the award. It also held that the arbitrator was the final authority on facts and the finding of facts rendered by an arbitrator would not be interfered with. The court also upheld the power of arbitrator to award interest during pre-award, *pendente lite*, and post award period and stated that it has power under article 142 to reduce the rate of interest.

26 The judgment is silent about the decision of the Calcutta High Court and how MII had become the appellant before the Supreme Court.

Limitation

Section 34 of the Act prescribes a period of three months from the receipt of the award to a party to file an application raising objections against an award in a court. However, an additional period of 30 days is provided for condoning the delay in filing the application if sufficient cause is shown for not filing objection within the three months period. Section 43 of the Act prvides that the Limitation Act, 1963 shall apply to arbitrations as it applies to proceedings in court. Section 14 of the Limitation Act provides for the exclusion of the time taken in proceedings *bona fide* in a court without jurisdiction. In view of the specific period prescribed under the Act for challenging an award, the question arose before the Supreme Court in *State Of Goa* v. *Western Builders*[28] as to what extent section 14 of the Limitation Act would be applicable to the Act.

In this case, a dispute arose between M/s Western Builders and the State of Goa. A sole arbitrator was appointed who gave an award against the State of Goa. Aggrieved by this award the State of Goa filed a petition under sections 30 and 33 of the 1940 Act before the civil judge (senior division), who held that the Act alone was applicable and under which that court had no jurisdiction. Thereafter, the State of Goa filed a petition under section 34 of the Act before the district judge, South Goa along with an application under section 14 read with section 5 of the Limitation Act for condonation of delay caused by filing the petition before civil judge (senior division). The application was rejected by the district court. The state preferred an appeal in the High Court of Bombay under section 37(1) (b) of the Act which held that section 14 of the Limitation Act was not applicable in view of section 34(3) of Act.

The issue before the Supreme Court was whether section 14 of the Limitation Act was applicable to the Act or not. The court held that whenever two enactments were overlapping on the same area the courts should be cautious in interpreting those provisions. The extent of exclusion was, however, really a question of construction of each particular statute and the general principles applicable were subordinate to the actual words used by the legislature. The court further held that section 14 of the Limitation Act was applicable to the Act in view of section 43 of the Act. The court also held that the Act did not expressly prohibit the application of section 14 of the Limitation Act to arbitration proceedings and that the applicability of section 5 of the Limitation Act would stand excluded in view of section 29 (2), which excluded the extent the area already covered under the Act.

A similar question as in the previous case again came up before the Supreme Court in *United India Insurance Co. Ltd.* v. *J.A.Infra Structure (P)*

27 S. 33 (4) reads as follows:
"Unless otherwise agreed by the parties, a party with notice to the other party, may request, within thirty days from the receipt of the arbitral award, the arbitral tribunal to make an additional arbitral award as to claims presented in the arbitral proceedings but omitted from the arbitral award."

28 (2006) 6 SCC 239.

Ltd.[29] In this case the respondent was insured with the appellant company which was the insurer. When dispute arose between the parties, the respondent invoked the arbitration clause as per condition 7 of the policy. Both parties appointed their respective arbitrators. The two arbitrators appointed the presiding arbitrator. There were two awards one by majority and other by minority awarding different sums in favour of the respondent. Aggrieved by the awards passed by the arbitrators the appellant filed an arbitration petition under section 34 of the Act in the Bombay High Court. The high court dismissed the arbitration petition for want of jurisdiction. The appellant, thereafter, filed a fresh petition under section 34 read with section 14 of the Limitation Act before the district court, Nagpur which dismissed the petition on the ground of limitation. Aggrieved by the dismissal, the appellant preferred a writ petition before the Nagpur bench of the Bombay High Court which dismissed the same. Aggrieved by the said decision, the appellant filed an appeal in the Supreme Court.

The issue before the Supreme Court was as to whether the principle under section 14 of the Limitation Act was applicable to arbitration proceedings. Following the decision in *Western Builders* case[30] that section 14 of the Limitation Act was applicable in arbitration cases also the Supreme Court held that the order passed by the high court should be set aside and the matter was remitted to the district court to decide the objection under section 34(3) of Act.

Patent illegality

In *Hindustan Zinc Ltd* v. *Friends Coal Carbonization*[31] the appellant invited tenders for supply of 'coke'. The respondent submitted its offer which was accepted by the appellant and placed a purchase order on the respondent for supply of 15,000 mg of coke. Clause 13 of the purchase order provided for settlement of dispute by arbitration. Some dispute arose between the parties. An arbitral tribunal was constituted which passed an award in favour of the respondent. The appellant filed an application under section 34 of the Act in the court of additional district judge, Udaipur praying that the award be set aside. The appellant's main contention was that the award was contrary to the price escalation clause contained in the contract. The trial court set aside the award on the ground that it was not in terms of the contract and modified the amount awarded in favour of the respondent. On appeal filed by the respondent the High Court of Rajasthan restored the award of arbitrators on the ground that the court could not have interpreted the terms of the contract or interfered with the award on the basis that the award was contrary to the specific terms of contract. Appeal was filed in the Supreme Court against the decision of the high court by the appellant.

The issue before the Supreme Court was as to whether the award, which was contrary to the terms of contract, was liable to be interfered with by the

29 (2006) 8 SCC 21.
30 *Supra* note 29.
31 (2006) 4 SCC 445.

court. The Supreme Court following its earlier decision in *ONGC* v. *Saw Pipes*[32] held that an award could be set aside if it was contrary to the fundamental policy of Indian law, interest of India, justice or morality, and in addition, if it was patently illegal which illegality must go into the root of the matter. On the basis of the above principles the court held that such awards would be open to interference by the court under section 34 (2)(b)(ii) of the Act as being patently illegal and being apposed to public policy. Therefore, the appeal was allowed on the ground that the award was against the terms of the contract, and the judgment of high court was set aside restoring that of trial court.

Two tier arbitration awards

Arbitration is the most prominent among the alternate dispute resolution mechanisms in the world. The main backbone of arbitration is the principle of party autonomy. The common thread which runs through the Act is maximum party autonomy and minimum court intervention. The pary's freedom to choose the arbitral tribunal and the arbitral procedure to be followed are preserved in the Act which is modelled after the UNICITRAL model law. In view of the object behind the law to provide a speedier mode for settlement of disputes, technicalities are reduced to the minimum and parties are given more freedom to choose the arbitral tribunal. In this context courts are confronted with the question of deciding as to when does party autonomy end and when does court's intervention begin. One such question, as we have already seen above, came up in *Shin Satellite Public Co Ltd.* v. *Jain Studios Ltd*[33] in which the question arose was as to whether parties can make the award final and binding by contracting out of further court's intervention. The Supreme Court held that such finality clauses were invalid and opposed to public policy, but instead of declaring the entire contract as null and void the court invoked the doctrine of severability and severed the faulty portion in the agreement and upheld the remaining clause.

One another question which also arose in this context was the validity of two-tier arbitration clauses by which parties create a second forum outside the courts to review the award. Such forums are already prevalent in international commercial arbitrations, especially, under the arbitrations conducted under the auspices of the International Chamber of Commerce (ICC). This issue arose before the Supreme Court in *M/s Centrotrade Minerals & Metal Inc.* v. *Hindustan Copper Ltd.*[34] In this case M/s Centrotrade, the appellant, and Hindustan Copper Ltd. (HCL), the respondent, entered into a contract for sale of copper concentrate to be delivered at Kandla port. The seller as per the terms of the contract was required to submit a quality certificate from an internationally reputed assayer, mutually acceptable to the parties. Clause 14 of the contract contained an arbitration clause which provides as follows:

32 (2003) 5 SCC 705.
33 *Supra* note 22.
34 *Supra* note 1.

> All disputes or differences whatsoever arising between the parties out of, or relating to, the construction, meaning and operation or effect of the contract or breach thereof shall be settled by arbitration in India through the arbitration panel of the Indian Council of Arbitration. If either party is in disagreement with the arbitration result in India, either party will have the right to appeal to a second arbitration in London, UK in accordance with the rules of conciliation and arbitration of the International Chamber of Commerce in effect on the date hereof and the results of this second arbitration will be binding on both the parties. Judgment upon the award may be entered in any court in jurisdiction.

Consignments were delivered and payments were made. However, a dispute arose between the parties as regard the weight of concentrate copper. The respondent, Centrotrade invoked the arbitration clause. The arbitrator appointed by the Indian Council of Arbitration made a NIL award. The respondent, Centrotrade, invoked 2nd part of the arbitration agreement and filed an appeal. The arbitrator in London made the award in favour of Centrotrade. During the pendency of the arbitration proceedings in London, the respondent, HCL, filed a suit in the court of Khetri, Rajasthan for a declaration that the second arbitration was null and void. The trial court refused to grant any interim injunction, which was also confirmed by the district court in the appeal filed by HCL. Against that order HCL filed a revision to the High Court of Rajasthan which was allowed. The Centrotrade moved the Supreme Court against the order of the Rajasthan High Court. The apex court vacated the order of interim injunction. The London arbitrator passed an award in favour of Centrotrade upholding the arbitration clause as valid and reversed the earlier award on merits. The appellant, HCL made an application under section 48 of the Act in the court of district judge, Alipore questioning the award and also filed a suit for declaring the second award as null and void. The Centrotrade meanwhile filed an application in the form of an execution petition to execute the award which was allowed by a single judge of the Calcutta High Court. On appeal a division bench reversed the order of the single judge holding that the two successive awards are mutually destructive, that the second award though binding was not enforceable, and that the second award was not a 'foreign award' within the meaning of the Act. On further appeal by Centrotrade, a two judge bench of the Supreme Court gave a split decision leaving the issue wide open.

The issue before the Supreme Court was as to whether the validity of a two tier arbitration agreement could be upheld having regard to the provisions of the Act. Other issue which also arose before the Supreme Court was whether the second award was a 'foreign award' or a 'domestic award. One of the judges of the Supreme Court (S.B. Sinha J) held that though a two tier arbitration would be permissible under the arbitration statutes that were in force before the Act, the Act contemplated an award being made either a domestic award or a foreign award and did not contemplate an award being an

admixture of both awards and that the grounds for questioning domestic award and a foreign award were different. The judge further held that the concept of provision for an appeal before another forum from an award and that too when a part of the award would be domestic award and another part would be a foreign award was not contemplated under the Act. The judge further held that an arbitration agreement opposed to the provisions of law would be opposed to public policy and that the first award made by Indian arbitrator became a decree upon the expiry of the period challenging the same and therefore the second award in terms of the ICC rules was not valid and could not be enforced.

The second judge (Tarun Chatterjee, J) , however, took a contrary view by holding that the second part of the arbitration clause providing for foreign arbitration by ICC was in the nature of an appeal and that the award made by the ICC arbitrator was a foreign award and not a domestic award as rightly held by the single judge of the high court. The judge further held that since the respondent had not been given proper opportunity to present its case, the award made by the ICC arbitrator was set aside and the ICC arbitrator was directed to pass fresh award within three months.

VII THE 1940 ACT

Though the 1996 Act had repealed the 1940 Act, awards made under the 1940 Act still continue to be the subject matter of challenge and court decisions. The principles evolved in those decisions are also relevant and, therefore, any survey of arbitration law would be incomplete without including the principles laid down in those decisions.

In *Rajasthan State Road Transport Corpn.* v.*Indag Rubber Ltd*.[35] an agreement was executed between the respondent company and the appellant corporation for the purchase of a tyre processing and retreading plant and materials. The agreement contained a warranty clause giving a guaranteed performance by the respondent. The agreement also contained an arbitration clause. Dispute arose between the parties regarding the failure of retreading tyres to maintain the guaranteed performance. The appellant corporation claimed from the respondent compensation plus damages on account of the failure to maintain the guaranteed level of performance and interest. The respondent denied its liability. A sole arbitrator was appointed who gave an award granting compensation in favour of the appellant corporation, but declined to award damages. On the arbitrator filing the award, the district judge, Jaipur city made it a rule of the court. The respondent company filed an appeal before the high court to set aside the award. A single judge of the High Court of Rajasthan after elaborately considering the evidence of the case reversed the order of the district judge and remanded the matter. The appellant corporation then filed the appeal before the Supreme Court.

35 (2006) 7 SCC 700.

The issue before the Supreme Court was as to whether the single judge had power of an appellate court to examine the award. The Supreme Court held that a court cannot sit as a court of appeal and disturb the findings of fact recorded by the arbitrator after considering all the materials on record.

Arbitration of family disputes

In *Hari Shankar Singhania & Ors.* v. *Gaur Hari Singhania & Ors.*[36] a partnership firm was formed by three brothers of a family, owning considerable amount of immovable properties, which were brought into the firm's business. In 1987 pursuant to a family settlement the firm was dissolved by way of a dissolution deed. Under the dissolution deed, clause 13 enabled the parties to go for arbitration in case there was a dispute among them. Disagreement arose among the parties regarding distribution of the immovable properties under the dissolution deed. Each of the three groups appointed a nominee to work out an arrangement for the purpose of distribution of the properties. However, they could not arrive at any agreement and the last exchange of letter took place on 29.9.1989. The appellant filed an application under section 20 of the 1940 Act in the high court for the appointment of an arbitrator which it dismissed on the ground of limitation since 50 days had elapsed beyond three years from the date when the right to apply had accrued. Hence, the appellants came to the Supreme Court by special leave petition.

The issue before the Supreme Court was whether the Limitation Act 1963 was applicable to the 1940 Act and also as to when the right to apply had accrued. The Supreme Court held that article 137 of the Limitation Act applied to the said application under section 20 of the 1940 Act, and hence the said application had to be filed within a period of three years from the date on which the right to apply had accrued. On the second issue the court held that the right to file the application accrued when differences or disputes arose between the parties to the arbitration agreement i.e. when they failed to resolve that matter themselves. The Supreme Court held that it was a well settled policy of law that in the first instance always efforts should be made to promote a settlement between the parties wherever possible and partcularly in family disputes. The court further held that article 137 should be construed in such a way that when parties were in dialogue and even if differences had surfaced it should not be treated that a limitation under article 137 had commenced. The court, therefore, held that the right to apply under section 20 of the 1940 Act had accrued to the appellants only on the last correspondence between the parties and the period of limitation started from the date of last communication between the parties. The court, therefore, held that the application under section 20 of the 1940 Act was within time. Hence it appointed a retired judge of the Supreme Court, to resolve their claims.

The court then made a detailed pronouncement on the importance of family settlements and how the same should be treated differently from any other formal commercial settlements. The court said that family settlments

36 (2006) 4 SCC 658.

generally meet the approval of courts provided they were entered into *bona fide* and that special equity principles should apply in such cases. The court then stressed the need for settlement in the present case in view of the long pending difference among the parties.

VIII FOREIGN AWARDS (RECOGNITION & ENFORCEMENT) ACT, 1961

In *Dresser Rand S.A.* v. *Bindal Agro Chem. Ltd. and K.G.Khosla Compressors Ltd.*[37] the respondent Bindal wanted to invite global tenders for the supply of various equipments and materials for its Shahjahanpur fertilizer project. The tender document contained general terms and conditions of the purchase contract by Bindal, termed as 'General Conditions of Purchase'. It sent a letter to the appellant, Dresser Rand (DR) as to whether it was interested in supplying the necessary equipments. Meetings were held between the representatives of DR and Bindal. DR gave its comments/modification to the terms and conditions termed as "Revision 4", which was later initialled by the representatives of both the parties. It was presumed that the changes were also agreed to be part of the 'General Condition of Purchase' of Bindal. Representatives of Bindal delivered two letters described as "Letter of Intent" on the letter head of K. G. Khosla Compressors, (KGK), respondent no. 2, stating its intentions to place order for some equipment. There was a delay in placing the orders. DR by communication advised Bindal that there would be a price increase of 4.5 per cent apart from corresponding delay in the supply. However, in the meantime Bindal proposed to purchase the equipment from another company and not from DR. DR informed Bindal that it had repudiated the contract between them and that it intended to refer the dispute to arbitration by the International Chamber of Commerce (ICC). Since no response was received from Bindal, it lodged a request with ICC claiming certain sum of money as compensation for breach of contract. The ICC issued notice to Bindal and KGK. They, through their counsel, denied the existence of any arbitration agreement and filed separate suits in the Delhi High Court for a declaration that there was no arbitration agreement and for an injunction restraining DR from proceeding with the arbitration. DR filed an application under section 3 of the Foreign Awards (Recognition & Enforcement) Act, 1961 for stay of the suit.

A single judge of the high court passed an order of interim injunction in favour of Bindal and KGK restraining DR from proceeding with the arbitration. The judge also held that there was no arbitration agreement between the parties and dismissed the application filed by DR. A division bench on appeal filed by DR upheld the order of the single judge holding that there was no valid arbitration agremment. DR approached the Supreme Court against the order passed by the division bench.

37 (2006) 1 SCC 751.

The issues before the Supreme Court were as to whether there was an arbitration agreement in existence between DR and Bindal, and between DR and KGK. The Supreme Court, following its earlier decision in *Renusagar Power Co. Ltd. v General Electric Co.*,[38] held that the question whether there was an arbitration agreement or not squarely fell for the decision of the court under section 3 of the Foreign Awards (Recognition & Enforcement) Act, 1961 and would have to be finally decided by the court. The court further held that the correspondence exchanged between the parties shows that there was nothing expressly agreed between the parties and no concluded enforceable and binding agreement came into existence between them and, therefore, the acceptance of the modification to the general conditions of purchase did not bring into existence any arbitration agreement to settle disputes between the parties. The Supreme Court also held that the correspondence between Bindal and DR would clearly indicate that the letters of intent were only a step leading to purchase orders and were not, by themselves purchase orders, that the letter of intent only indicated the party's intention to enter into a contract with the other party in future, that it did not bind either party, and therefore, did not provide for arbitration.

IX CONCLUSION

The above survey shows that the Supreme Court has laid down several decisions interpreting various provisions of the Act in the areas such as jurisdiction of courts, validity and scope of arbitration agreements, mandatory reference, appointment of arbitrators, form and content of awards, and scope of challenge to awards. The principles laid down in these judicial decisions have added to the development of arbitral jurisprudence in India. However, it is doubtful to what extent these principles have contributed to the unification of the arbitral jurisprudence in globalized world, where arbitration as a mode of settlement of disputes plays a major role, especially in the context of diluted national borders and increased global trade in goods and services. India also is aspiring to emerge as a global power in transactions relating to international trade in goods and services. In this context, a modern, vibrant, and efficient arbitration law which is in tune with international developments is very important if India has to emerge as a center for international arbitration. The hesitant approach of the courts may be justified because of the balance required to be struck not only between domestic arbitration and international arbitration but also between party autonomy and judicial intervention. This hesitancy is more than clearly visible in the split decision of the Supreme Court in the year under survey in the context of examining the validity of two-tier arbitrations under the Indian law in *M/s Centrotrade Minerals & Metal Inc.* v. *Hindustan Copper Ltd.*[39]

38 (1984) 4 SCC 679.
39 *Supra* note 1.

Indian legal system having a maternal connection with the UK legal system, it is relevant, in this context, to note the appreciation of UK Arbitration Act by the American Bar Association (ABA) after it completed a decade. The ABA in 2005 stated as follows:[40]

> The Act provides a comprehensive, substantive and procedural regime for international arbitration. Because the English arbitration regime recognises and supports party autonomy and facilitates enforcement of English awards in foreign jurisdictions by giving a simple procedure to turn an award into a judgment of the English High Court, parties in international commercial transactions would be well-advised to consider England as a most attractive option for constituting the seat of their arbitrations.

Again, a current review of the UK Act in November 2006 concluded that no amendment to the Act is required at present.[41] Thus, it is necessary for Parliament to step in and carry out the necessary amendments to the Act as suggested by the 176th Report of the Law Commission after having a thorough review of the Act in action in conformity with the latest international developments.

40 "The UK Arbitration Regime: Jurisdictional Considerations", 2005 ABA Annual Meeting, Section on Litigation, August 4-7, 2005; International Arbitration from the U.S. Perspective.

41 "Report on the Arbitration Act, 1996", November, 2006; Prepared for the Commercial Court Users' Committee, the British Maritime Law Association, the London Shipping Law Centre and other bodies.