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ARBITRATION LAW

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I INTRODUCTION

ARBITRATION PROCESS has been compared to a relay race. The following words of Lord Mustill which has been quoted in the Supreme Court decision in *Adhunik Steels* v. *Orissa Manganese and Minerals (P) Ltd.*[1] aptly describes this process:

> Ideally, the handling of arbitral disputes should resemble a relay race. In the initial stages, before the arbitrators are seized of the dispute, the baton is in the grasp of the court; for at that stage there is no other organization which could take steps to prevent the arbitration agreement from being ineffectual. When the arbitrators take charge they take over the baton and retain until they have made an award. At this point, having no longer a function to fulfill, the arbitrators hand back the baton so that the court can in case of need lend its coercive powers to the enforcement of the award.

Therefore, to have a successful and effective arbitral process there should not be delay at each stage of the arbitral process. The parties should not indulge in dilatory tactics and the institutions involved should also function efficiently. The arbitration law should enable the arbitral process to proceed smoothly and efficiently and discourage dilatory tactics by the parties to prolong the litigation.

A survey of the arbitration decisions rendered by the Supreme Court during 2007 would show that there is a limited success in this regard. The increasing number of cases before the Supreme Court at the first leg of the relay race in the arbitral process, namely, on the appointment of arbitrators would establish this. There are considerable delays in the arbitral process at subsequent stages also. This would clearly show that parties successfully adopt dilatory tactics to prolong the litigation which would defeat the very purpose of enacting the Arbitration and Conciliation Act, 1996 Act (the Act) by adopting the UNCITRAL Model Law.

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1 (2007) 7 SCC 125 at 133-34.

II ARBITRATION AGREEMENT

What is an arbitration agreement?

Section 7 of the Act states that "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen between them in respect of a defined legal relationship, whether contractual or not. What are the essential features of an arbitration agreement has been the subject matter of several litigations both under the 1940 Act and the present Act. In the year under survey the Supreme Court had to deal with this question both under this Act and under the repealed 1940 Act.

Under the current Act the Supreme Court had dealt with the above question in *Jagdish Chander* v. *Ramesh Chander*[2] in the context of an application under section 11 of the Act seeking the appointment of an arbitrator. In that case the appellant and the respondent had entered into a partnership and the deed of partnership contained the following clause:

> If during the continuance of the partnership or at any time afterwards any dispute touching the partnership arises between the partners, the same shall be mutually decided by the partners or shall be referred for arbitration if the parties so determine.

When dispute arose between the parties the first respondent filed an application under section 11 of the Act for the appointment of an arbitrator to decide the dispute in regard to dissolution of the partnership firm. The appellant opposed the said application on the ground that there was no arbitration agreement and that the firm had already ceased to exist. The designated judge held that the relevant clause should be construed liberally and that it was an arbitration clause and appointed an arbitrator. Against the said order the appellant approached the Supreme Court.

The only issue before the Supreme Court was whether the clause under dispute could be construed as an arbitration clause. The court after considering all its earlier decisions in this regard formulated the following principles to determine when a particular clause in an agreement could be treated as an arbitration clause.

(i) The intention of the parties to enter into an arbitration agreement shall have to be gathered from the terms of the agreement. If the terms of the agreement clearly indicate an intention on the part of the parties to the agreement to refer their disputes to a private tribunal for adjudication and a willingness to be bound by the decision of such tribunal on such disputes, it is arbitration agreement. While there is no specific form of an arbitration

2 (2007) 5 SCC 719.

agreement, the words used should disclose a determination and obligation to go to arbitration and not merely contemplate the possibility of going for arbitration. Where there is merely a possibility of the parties agreeing to arbitration in future, as contrasted from an obligation to refer disputes to arbitration, there is no valid and binding arbitration agreement.

(ii) Even if the words "arbitration" and "Arbitral Tribunal" (or "arbitrator") are not used with reference to the process of settlement or with reference to the private tribunal which has to adjudicate upon the disputes, in a clause relating to settlement of disputes, it does not detract from the clause being an arbitration agreement if it has the attributes of elements of an arbitration agreement. They are: (a) The agreement should be in writing. (b) The parties should have agreed to refer any disputes (present or future) between them to the decision of a tribunal. (c) The private tribunal should be empowered to adjudicate upon the disputes in an impartial manner, giving due opportunity to the parties to put forth their case before it. (d) The parties should have agreed that the decision of the private tribunal in respect of the disputes will be binding on them.

(iii) Where the clause provides that in the event of disputes arising between the parties, the disputes shall be referred to arbitration, it is an arbitration agreement. Where there is a specific and direct expression of intent to have the disputes settled by arbitration, it is not necessary to set out the attributes of an arbitration agreement to make it an arbitration agreement. But where the clause relating to settlement of disputes contains words which specifically exclude any of the attributes of the arbitration agreement or contains anything that detracts from an arbitration agreement, it will not be an arbitration agreement. For example, where an agreement requires or permits an authority to decide a claim or dispute without hearing, or requires the authority to act in the interests of only one of the parties, or provides that the decision of the authority will not be final and binding on the parties, or that if either party is not satisfied with the decision of the authority, he may file a civil suit seeking relief, it cannot be termed as an arbitration agreement.

(iv) But mere use of the word "arbitration" or "arbitrator" in a clause will not make it an arbitration agreement, if it requires or contemplates a further or fresh consent of the parties for reference to arbitration. For example, use of words such as "parties can, if they so desire, refer their disputes to arbitration" or "in the event of any dispute, the parties may also agree to refer the same to arbitration" or "if any disputes arise between the parties, they should consider settlement by arbitration" in a clause relating to

> settlement of disputes, indicate that the clause is not intended to be an arbitration agreement. Similarly, a clause which states that "if the parties so decide, the disputes shall be referred to arbitration" or "any disputes between parties, if they so agree, shall be referred to arbitration" is not an arbitration agreement. Such clauses merely indicate a desire or hope to have the disputes settled by arbitration, or a tentative arrangement to explore arbitration as a mode of settlement if and when a dispute arises. Such clauses require the parties to arrive at a further agreement to go to arbitration, as and when the disputes arise. Any agreement or clause in an agreement requiring or contemplating a further consent or consensus before a reference to arbitration is not an arbitration agreement, but an agreement to enter into an arbitration agreement in future.

Applying the above principles the Supreme Court held that the use of the expression "shall be referred for arbitration if parties so determine" in the impugned clause, pertaining to settlement of dispute in the partnership deed between the parties would indicate that the parties were required to reach a decision by application of mind, and so consequentially the impugned clause was not an arbitration agreement. The Supreme Court thus, allowed the appeal and set aside the order of the designated judge.

Survival of arbitration agreement

Most of the arbitration agreements are part of the main contracts containing terms and conditions dealing with other matters. The terms and conditions of the main contracts may govern the relationship between the parties during the duration of the contract. Many times the parties continue their relationship even after the expiry of the duration of the contract. In such cases the question would naturally arise as to whether the arbitration clause would survive or get terminated with the expiry of the original period of contract. In *Bharat Petroleum Corp. Ltd.* v. *The Great Eastern Trading Co.*[3] which is a case arising out of a maritime arbitration, the principal issue was whether in the absence of a fresh agreement between the parties an arbitration clause in a contract of hire (time charter party) could be invoked to resolve the dispute relating to the period after the expiry of the original contractual period. A time charter party was entered into between the appellant, Bharat Petroleum Corporation Ltd (BPCL) and the respondent, Great Eastern Trading Co. (Great Eastern) under which the BPCL hired certain number of vessels owned by the Great Eastern for a period of two years. The charter party contained an arbitration clause to resolve disputes arising under it. After the expiry of the original two years period the ships were continued to be used by the hirer, but no fresh agreement was entered

3 2007(12) SCALE 247.

into in spite of specific request by the Great Eastern. Disputes arose between the parties on the payment of hire during the extended period for two of the ships hired by the BPCL. Great Eastern demanded payment of hire as per the main contract, but BPCL was willing to pay the hire charges only at a revised rate. An arbitral tribunal was constituted, which made an award holding that it had no jurisdiction to hear the dispute as the arbitration clause under the original contract got extinguished once the original period of hire had expired. The respondent challenged the said award before the high court. A single judge set aside the said award on the ground that the arbitral Tribunal had jurisdiction to adjudicate the disputes between the parties as the vessel continued to be hired by the appellant even after the expiry of the agreed period of hire and, therefore, the arbitration agreement had continued to exist. Against this order BPCL approached the Supreme Court.

The issue before the Supreme Court was whether after the expiry of the original and agreed extended periods of hire the charter party had come to an end and that the arbitration agreement between the parties perished with it. The Supreme Court, after taking note of the conduct of BPCL in not responding to specific letters from Great Eastern on the issue of hire charges for the extended period of use, invoked the principle of *sub silentio* and held that though as a general rule an offer is not accepted by mere silence on the part of the offeree, under the factual circumstances of the case the silence coupled with the conduct of BPCL in not responding to specific letters from the Great Eastern would take the form of a positive act. According to the court this would constitute an acceptance of the proposal of the Great Eastern for the continued application of the terms and condition of the original charter party. The court also drew support from certain clauses in the charter party which also provided for the continued application of the terms of the charter party until the vessel was delivered back to the Great Eastern.

III MANDATORY REFERENCE TO ARBITRATION

Under section 8 of the Act a judicial authority before which an action is brought in a matter which is covered by arbitration agreement has a mandatory duty to refer the said dispute for arbitration. However, often disputes covered by arbitration agreements also become part of the proceedings before the high courts while exercising writ jurisdiction under article 226 of the Constitution of India and before the Supreme Court. As the powers exercised by the high court and the Supreme Court are discretionary and wider than other courts, the question had often arisen whether these constitutional courts are also bound by the mandatory duty under section 8 of the Act to refer for arbitration disputes which come up before them while exercising constitutional jurisdiction. Two decisions of the Supreme Court have dealt with this issue and the Supreme Court has upheld the need for referring the disputes covered by arbitration agreements for arbitration and

thus to uphold the cardinal principles of arbitral jurisprudence that party autonomy should be given utmost supremacy.

Article 226 of the Constitution

In *The Empire Jute Co. Ltd. & Ors.* v. *The Jute Corporation of India Ltd. & Anr.*[4] a question arose before the Supreme Court as to whether a high court could in the exercise of its discretionary jurisdiction under article 226 of the Constitution decide a dispute arising out of a contract when there is an arbitration clause in the contract. In this case, the appellant was the owner of a jute mill. The supply, price, and production of raw jute and jute products were regulated by various production control orders issued by the jute commissioner under the "Jute and Jute Textile Control Order, 2000" framed under the Essential Commodities Act, 1955. The jute commissioner issued orders to various jute mill owners directing them to manufacture gunny bags of specified quality after compulsorily purchasing raw jute from respondent no.1, the Jute Corporation of India (the corporation). Consequently, the appellant entered into a contract of sale with the respondent corporation to purchase raw jute, which contained an arbitration clause for settlement of all disputes or differences arising out of the contract. Since the quality of raw jute supplied by the corporation under the contract of sale was of much inferior quality, the appellants did not purchase raw jute from the respondent but on credit from the open market. The appellant apprehending that the respondent may not supply raw jute in future filed a writ petition before the high court under 226 of the Constitution for a declaration that the jute commissioner did not have any power or authority to direct the appellant to compulsorily purchase raw jute from the respondent corporation. In the writ proceedings before the single judge of the high court, the appellant undertook to take delivery of the entire quantity of raw jute covered by the contract and deposited the money towards the price of raw jute. However, disputes arose when the respondent demanded carrying charges for the delay in taking delivery of the jute stocks which was kept with the appellant. In the writ proceedings the single judge held that the appellant was under no obligation to pay the carrying charges mentioned in the agreement. On appeal a division bench of the high court set aside the order of the single judge holding that the respondent corporation was entitled to carrying charges and that the actual amount should be settled between the parties by way of arbitration. Against the said order the appellant approached the Supreme Court.

The issue before the Supreme Court was whether the division bench was justified while exercising writ jurisdiction under article 226 of the Constitution in deciding the disputed question as to whether the respondent corporation was entitled to the carrying charges. Allowing the appeal, the

4 2007(12) SCALE 514.

Supreme Court held that the question whether the respondent was entitled to the carrying charges would depend on the construction of the relevant clauses in the sales contract and that for that purpose certain disputed facts had to be gone into. The court, while reiterating the principle that though the power of judicial review vested with the superior courts had a wide amplitude, held that the same should not be exercised when there was an arbitration clause in the contract and that the high court should have refused to exercise its jurisdiction under article 226 of the Constitution and directed the parties to settle the dispute by way of arbitration. The Supreme Court relied on its two earlier decisions in *M/s. Bisra Stone Lime Co .Ltd etc.* v. *Orissa State Electricity Board and Another*[5] *and Sanjana M. Wig (Ms)* v. *Hindustan Petroleum Corp Ltd.*[6] in which the Supreme Court had laid down the principle that courts would not exercise their discretionary jurisdiction under article 226 of the Constitution to grant relief when there was an alternate forum available to resolve the dispute between the parties.

Article 142 of the Constitution

In *Bharat Sewa Sansthan* v. *UP Electronics Corporation Ltd.*[7] the appellant sansthan, which was a charitable society, had let out its premises to the respondent corporation and to its subsidiary for its use as an office on a monthly rental basis. The rental agreement contained an arbitration clause. Disputes arose regarding the non-payment of rent. The appellant filed a suit in the district court against the respondent for eviction and recovery of arrears of rent. In the said suit the respondent filed an application under section 8 of the Act for referring the dispute for arbitration. The additional district judge rejected the application. The respondent challenged this order by way of a writ petition before the high court which allowed the same and directed the district judge to refer the matter for arbitration and also directed both parties to appoint arbitrators as per the arbitration clause.

The appellant challenged this order before the Supreme Court. When the matter was pending in the Supreme Court, the respondent paid some amount towards arrears of rent and agreed to surrender a portion of the premises. The appellant, therefore, sought the indulgence of the Supreme Court for settlement of the matter by invoking its jurisdiction under article 142 of the Constitution, which was not accepted by the respondent. The Supreme Court held that though the nature and ambit of the power of the Supreme Court under article 142 of the Constitution is to do complete justice between the parties, the said power was conceived to meet situations which could not be effectively and appropriately tackled by the existing provisions of law and that the disputed claims could be appropriately tackled and adjudicated upon by the arbitrators in terms of the arbitration clause. The court, therefore,

5 AIR 1967 SC 127.
6 (2005) 8 SCC 242.
7 (2007) 7 SCC 737.

refused to bypass the provisions of the Act while exercising the power and jurisdiction under article 142 of the Constitution, especially when there were disputes between the parties as to whether the payments made by the respondent were correct. The Supreme Court, thus, upheld the order of the high court referring the matter to arbitration.

Existence of dispute

Section 7 (1) of the Act states that an "arbitration agreement" means an agreement by the parties to arbitration all or certain disputes which has arisen or which arise between them. Therefore, existence of a dispute is a prerequisite for reference to arbitration. In the absence of any dispute arbitration proceeding cannot be initiated. In *Agri- Gold Exims Ltd.* v. *Sri Lakshmi Knits & Woven and Ors.*[8] the question before the Supreme Court was whether there existed a dispute between the parties, which could be referred to arbitration. In this case the appellant and the predecessor in interest of the respondents entered into a memorandum of understanding (MOU) in relation to their export business, which contained an arbitration clause. Disputes and differences arose between the parties. The respondents issued five post-dated cheques to the appellant towards amount due to them in pursuance of a settlement. Two of the cheques were dishonored. Respondents thereupon sent two demand drafts to the appellants without prejudice to their rights and contentions. But before the receipt of said payments, the appellant had filed a suit for money decree in the district court at Vijayawada stating that the cause of action had arisen when the MOU was executed and on the subsequent dates when various transactions took place and when the cheques were dishonored. The respondents neither filed any written statement nor disclosed their defense in the suit but disputed their liability to pay, and filed an application under section 8 of the Act for referring the matter for arbitration as per the MOU. The said application was dismissed by the district court on the ground that there was no dispute in existence between the parties covered by the arbitration clause which could be referred to arbitration as the issue was only with regard to the dishonor of cheques. In revision filed by the respondents the high court directed the parties to take recourse to arbitration under the Act as the suit was not maintainable. The appellant approached the Supreme Court.

The Supreme Court held that the high court was justified in referring the dispute to arbitration as there existed a dispute between the parties within the meaning of the arbitration clause in the MOU and that the dispute was not confined to the non-payment under the two dishonored cheques. The court was of the view that the term "dispute" must be given its general meaning and when a party had only made certain payments without prejudice to its rights that would not constitute admission of liability. The court further said that

8 (2007) 3 SCC 686.

unlike under section 34 of the 1940 Act, section 8 of the Act is preemptory in nature and therefore the court is under an obligation to refer parties to arbitration in terms of the arbitration agreement.

IV INTERIM MEASURE

Under section 9 of the Act a party can approach a court any time before or during the arbitral proceedings or after the award for interim measures such as appointment of guardian, interim custody of goods, securing disputed amount, injunction etc. The general law dealing with interim reliefs, such as the Code of Civil Procedure, 1902 (CPC) and the Specific Relief Act, 1963 also contain provisions dealing with grant of interlocutory orders. Section 9 of the Act does not prescribe the principles to be applied by the courts while granting such interim measures. The Supreme Court had in some decisions laid down the principles applicable while issuing of interim measures by courts.

General principles

The principles applicable under section 9 of the Act while passing interim orders came up for consideration before the Supreme Court in *Adhunik Steels Ltd* v. *Orissa Manganese and Minerals (P) Ltd.*[9] In this case the respondent, Orissa Manganese and Minerals Private Ltd. [OMM (P) Ltd.] entered into an agreement with the appellant, Adhunik Steels Ltd. (Adhunik) for raising manganese ore on its behalf. OMM (P) Ltd. issued a notice to Adhunik purporting to terminate the agreement on the ground that the agreement was hit by section 37 of the Mineral Concession Rules, 1960. Adhunik moved an application before the district court under section 9 of the Act for an injunction restraining OMM (P) Ltd. from terminating the agreement. The district court allowed the application and passed an order restraining OMM (P) Ltd. from giving effect to its letter of termination and from dispossessing Adhunik. Aggrieved by the order, OMM (P) Ltd. filed an appeal before the high court, which allowed the appeal and set aside the order of injunction passed by the district court on the ground that the damages arising out of the breach of contract between the parties could be compensated in terms of money. Against this order Adhunik approached the Supreme Court. OMM (P) Ltd. also approached the Supreme Court against some of the findings of the high court on merits.

Adhunik contended before the Supreme Court that section 9 of the Act stood independent of the other statutes dealing with grant of interlocutory orders, such as order 39 CPC and the Specific Relief Act, 1963 and, therefore, it was entitled to an injunction against termination of the contract in order to preserve *status quo*. The principal question before the Supreme

9 *Supra* note 1.

Court was whether the principles for granting interim orders under the Specific Relief Act and order 39 CPC would be applicable while dealing with an application for interim relief under section 9 of the Act. The Supreme Court held that the granting of interim prohibitory or mandatory injunctions was governed by well-known rules and it was difficult to imagine that the legislature while enacting section 9 of the Act intended to make a provision *dehors* the accepted principles that govern granting of interim injunctions. The court also pointed out that the wording of section 9 of the Act would suggest that the normal rules that govern courts in the grant of interim orders were not sought to be jettisoned by the said provision. The court further stated that it was not possible to keep out the well established concepts such as 'balance of convenience', 'prima facie case', 'irreparable injury' and 'just and convenience' while passing interim measures under section 9 of the Act. On the basis of the above analysis the Supreme Court concluded that it would not be correct to say that the power under section 9 of the Act was totally independent of the well known principles governing the courts while granting interim relief. Since the Supreme Court took the view that the loss to Adhunik arising out of the breach of contract committed by OMM (P) Ltd. could be compensated in terms of money, it passed an order rejecting the prayer for interim injunction against OMM (P) Ltd. from terminating the contract, but granted a limited interim injunction restraining OMM (P) Ltd. from entering into any arrangement for raising the mineral ore with any party other than Adhunik.

Encashment of bank guarantee

The Supreme Court adopted the same approach as above and invoked the settled principles while dealing with an application under section 9 of the Act seeking interim injunction against encashing bank guarantee. In *Mahatma Gandhi Sahakra Sakkare Karkhane* v. *National Heavy Engg. Coop. Ltd. and Anr.*[10] the appellant floated tenders inviting offers for setting up a plant to which respondent submitted its offer, which was accepted by the appellant. In terms of the agreement the respondent furnished a bank guarantee. When some disputes arose on account of delay in commissioning the plant by the respondent, the appellant sent a legal notice putting the respondent on notice of its failure to commission the plant by the schedule date and other revised dates. The respondent filed an application under section 9 of the Act seeking injunction against the appellant restraining it from encashment of bank guarantee. The trial court came to the conclusion that encashment of bank guarantee by the appellant could not be held to be fraudulent or untenable and further held that the respondent had failed to prove that it would suffer irretrievable injustice if the bank guarantee was invoked. The trial court, therefore, dismissed the application. The high court reversed the order

10 (2007) 6 SCC 470.

passed by the trial court and granted injunction restraining the appellant from encashment of the bank guarantee. The appellant approached the Supreme Court against the order passed by the high court.

The issue before the Supreme Court was whether interim injunction under section 9 of the Act could be granted against the encashment of bank guarantee. It reiterated the well established principle that if the bank guarantee furnished was unconditional and irrevocable it would not be open to the bank to raise any objection whatsoever to pay the amount under the guarantee and that the person in whose favour the bank guarantee had been furnished should not be prevented by way of an injunction from enforcing the guarantee on the pretext that the condition for enforcing the bank Guarantee in terms of the agreement entered between the parties had not been fulfilled. The court held that the respondent did not make out any case for grant of injunction restraining the appellant herein from encashing the bank guarantee and, therefore, allowed the appeal.

Encashment of letter of credit

In *Himadri Chemicals Industries Ltd.* v. *Coal Tar Refining Company*[11] the parties entered into an agreement under which the respondent had agreed to supply certain goods to the appellant as per schedule set out in the contract. The agreement contained an arbitration clause. Some disputes arose between the parties. The appellant filed an application under section 9 of the Act seeking an injunction against releasing payment under the letter of credit without first resolving the issue relating to the quality of goods of the second consignment supplied by the respondent to the appellant. The single judge of the high court granted an interim order of *status quo.* The respondent filed an application for vacation of stay. The single judge vacated the interim order of *status quo* granted earlier against which an appeal was preferred by the appellant before a division bench of the high court and the same was dismissed. Aggrieved by this order the appellant approached the Supreme Court.

Dismissing the appeal the Supreme Court once again reiterated the settled principles in the matter of granting injunction against encashment of bank guarantees and letters of credit and stated that in respect of a bank guarantee or a letter of credit which is sought to be encashed by a beneficiary, the bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer in regard to the terms of the contract. Accordingly, it held that courts should be slow in granting orders of injunction to restrain the realization of letter of credit and that the existence of any dispute between the parties to the contract should not be a ground to restrain the enforcement of bank guarantee or letters of credit. However, the Supreme Court also affirmed the two well established

11 (2007) 8 SCC 110.

exceptions, which were cases of fraud and irreparable injury to the applicant.

V APPOINTMENT OF ARBITRATORS

Section 11 of the Act enables the parties to approach the chief justice of the concerned high court (CJ) in the case of a domestic arbitration and the Chief Justice of India (CJI) in the case of international commercial arbitration for appointment of arbitrators when there is a disagreement in constituting the arbitral tribunal between the parties or the arbitrators, or when there is a failure in the procedure for appointing the arbitrator. The nature of power which the CJ or CJI exercises while appointment of arbitrators generated a lot of controversy and resulted in a series of decisions by the Supreme Court. Finally, a seven judge constitution bench of the Supreme Court in *SBP & Co.*[12] settled the law in this regard. Though this decision has laid down principles governing the scope of the power of the CJI and CJs of high courts in the appointment of arbitrators, this section continues to be a source of continuing litigation and various principles are being laid down by courts. In *SBP* the Supreme Court had declared that the power exercised by the CJ or CJI was judicial power and not mere administrative power but the decision would have prospective application. The Supreme Court overruled the earlier decision by a five judges bench in *Konkan Railway Co Ltd* v. *Rani Constructions.*[13] In view of the prospective application of the *SBP* decision, courts had applied the pre-*SBP* legal position in those cases which had arisen before the decision in *SBP* case. For convenience of discussion, these two sets of cases are being dealt with separately.

Pre-SBP cases

Scope of power under section 11

An interesting question as to the jurisdiction of the chief justice or the designated judge under section 11 to determine the questions as to whether there exists an arbitration clause and whether the dispute is covered by the said clause in a pre-*SBP* case came up for consideration in *Maharshi Dayanand University* v. *Anand Coop. L/C Society Ltd. & Another.*[14] In this case the appellant invited tenders for certain civil works. The respondent submitted its tender which was accepted by the appellant. The tender document contained an arbitration clause. Under the tender document, before actual commencement of the work, a detailed agreement was required to be signed between the parties. However, before the execution of such agreement the appellant decided not to proceed with the work. Therefore, the

12 *SBP & Co.* v. *Patel Engineering Ltd.,* (2005) 8 SCC 618.
13 (2002) 2 SCC 388.
14 (2007) 5 SCC 295.

respondent issued a notice to the appellant invoking the arbitration clause in the tender document calling upon the appellant to appoint an arbitrator in terms of that clause on the ground that on acceptance of his tender, the respondent had made arrangements for commencing the work, had put up sheds, had engaged laborers and had procured materials and that because of cancellation of the contract by the appellant the respondent had incurred losses which it was entitled to recover from the appellant. When the appellant did not respond to the said notice, the respondent approached the district court under section 11 of the Act seeking the appointment of an arbitrator. The appellant contended before the district court that there was no valid contract between the parties as the detailed agreement was not signed between them and that the dispute was not covered by any arbitration agreement. The district judge on the basis of the decision in *Konkan Railway Corporation Ltd.* v. *Rani Construction (P) Ltd.*[15] which was in force then, appointed an arbitrator by relying on the arbitration clause, leaving it to the parties to raise all objections, including the objection as to his jurisdiction, before the arbitrator in terms of section 16 of the Act. Feeling dissatisfied the appellant filed a writ petition before the high court which rejected it. The appellant then approached the Supreme Court.

Dismissing the appeal, the Supreme Court held that by para 46 of *SBP* case had saved orders and proceedings prior to the said decision and that since the present case was a pre-*SBP* case, it was not necessary or proper in a section 11 application to go into this question as to the existence and decide the same in these proceedings. The Supreme Court, therefore, left those questions to be decided by the arbitrator since in terms of section 16 of the Act those questions could be raised before the arbitrator.

Post-SBP cases

Condition precedent for invoking section 11 (6)

In *Municipal Corp. Jabalpur* v. *Rajesh Construction Co.*[16] the appellant floated a notice inviting tender for construction of a road. Half of the job was awarded to the respondent and the parties entered into a contract on the same terms and conditions as contained in the tender. Clause 29 in the tender document contained an arbitration clause under which in case of dispute the parties should refer it first to the chief engineer and if they were not satisfied an appeal would lie to an appellate body. If any party was not satisfied by the decision of the appellate body the dispute should be referred to an arbitration board constituted by the appellant and that no reference for arbitration by a contractor would be maintainable unless the contractor had made a deposit towards cost. However, the respondent without making any

15 (2002) 2 SCC 388.
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such deposit filed an application under section 11(6) (c) of the Act before the Chief Justice of the High Court of Madhya Pradesh. The designated judge first directed the parties to appoint an arbitrator in terms of clause 29 of the contract and when the parties failed to appoint, he appointed a retired chief justice of the high court as arbitrator. The appellant approached the Supreme Court.

The Supreme Court held that under section 11 (6) only when one of the parties to the agreement had failed to perform any function entrusted to it, the other party would have the right to approach the appropriate forum to take necessary measures to appoint the arbitrator and that in a situation where the arbitration agreement provides for other measures for securing the appointment of an arbitrator, the same should be followed. The Supreme Court, therefore, held that the designated judge was not justified in appointing a retired chief justice of a high court as sole arbitrator while clause 29 of the agreement had contained an arbitration clause which had specifically stipulated that the appellant should appoint an arbitration board when the respondent furnishes security towards cost. The Supreme Court, therefore, while setting aside the order of the designated judge directed the respondent to deposit the required amount within six weeks and directed the appellant to constitute the arbitration board for resolving the dispute.

Jurisdiction to decide arbitrability

In *Vipin Kumar Gadhok* v. *Ravinder Nath Khanna & Ors.*[17] the appellant and respondent nos. 3 and 4 were carrying on business in partnership under the name and style of 'Matchless Industries of India'. They entered into a partnership agreement with respondent nos. 1 and 2 to carry on business under the name of 'M/s Controls and Matchless Industries'. The agreement contained an arbitration clause. The firm M/s Controls and Matchless Industries was dissolved and certain disputes arose between the parties. Respondent nos. 1 and 2 filed an application under section 11 of the Act to appoint an arbitrator to resolve the dispute. In the application the partnership firm "Matchless Industries of India" was also a party. This was opposed by the appellant. The designated judge of the high court allowed the application and appointed a sole arbitrator with an observation that the question as to whether the disputes were arbitrable or not against "Matchless Industries of India" could be raised before the sole arbitrator and can be decided under section 16 of the Act. The appellant filed a review petition against the order which was dismissed. It took the matter to the Supreme Court.

The issue before the Supreme Court was whether the high court while appointing a sole arbitrator under section 11 of the Act was justified in leaving open the issue of arbitrability as against the firm "Matchless

17 (2007) 10 SCC 623.

Industries of India" to the arbitrator under section 16 of the Act. The Supreme Court after examining the facts on merits found that the firm "Matchless Industries" has been rightly made as a party and therefore modified the order of the high court holding that the arbitrator had no more jurisdiction to examine the said question.

Right of a legal heir

Under section 40 of the Act an arbitration agreement would not be discharged by the death of any party and the arbitration agreement can be enforced by or against the legal representative of the deceased person. The right a legal heir of a deceased partner of a partnership firm to invoke the arbitration clause in a partnership agreement and seek the appointment of an arbitrator under section 11 of the Act came up for consideration before the Supreme Court in *Ravi Parkash Goel* v. *Chandra Prakash Goel & Anr.*[18] In this case the respondents along with the mother of the appellants were carrying on the business of sale and purchase of sanitary goods in the name and style M/s. Kumar and Co., under a partnership deed dated 9.8.1983. Clause 13 of the partnership deed contained an arbitration clause. The appellant's mother died executing a last will in favour of the appellant bequeathing her estates including her interest in the partnership business. Dispute arose when the respondents refused to render accounts to the appellant. The appellant sent a notice to the respondent and when no reply to the notice was received, the former filed an application under section 11 of the Act for appointment of an arbitrator. The designated judge of the high court dismissed the appellant's application on the ground that after the death of the mother of the appellant he had no right to present the application as there was no binding arbitration agreement with the respondents. The appellant approached the Supreme Court.

The issue before the Supreme Court was whether after the death of a partner whether the right to invoke the arbitration clause would survive in the light of section 40 of the Act and sections 46 and 48 of the Partnership Act, 1932. Allowing the appeal the Supreme Court held that under section 40 of the Act an arbitration agreement was not discharged by the death of any party thereto and on such death it was enforceable by or against the legal representatives of the deceased. The court also held that persons claiming under the rights of a deceased person were the legal representative of the deceased party and they had the right to enforce the award and were also bound by it. The court, therefore, held that in view of the provisions of section 46 read with section 48 of the Indian Partnership Act as well as section 40 of the Act, the application for appointment of an arbitrator under the arbitration clause of the partnership deed should have been allowed by the designated judge of the high court.

18 2007 (4) SCALE 562.

Existence of live claim

The power to enquire into the issues as to the existence and validity of arbitration clause in an agreement and on the existence of a live claim while appointing an arbitrator by the chief justice (CJ) under section 11 of the Act came up for consideration in *Shri Ram Mills Ltd.* v. *Utility Premises (P) Ltd.*[19] In this case, the appellant company which became sick was ordered to be wound up in terms of the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985. On approaching the Board for Industrial and Financial Reconstruction, a rehabilitation scheme was worked out whereby Industrial Development Bank of India was appointed as an operating agency under the scheme. The asset sale committee constituted under the scheme approved the sale of 1.20 lakhs sq. ft FSI owned by the appellant company to the respondent for a total sale consideration of Rs. 21.60 crores and accordingly an agreement came to be executed between the parties on 27.4.1994. Since, the appellant company could make available only an extent of 86,725 sq ft FSI a second agreement came to be executed between the parties on 18.07.1994 under which the appellant company agreed to allow the respondent to develop an additional portion of an extent of 2500 sq. m of land. Both these agreements contained arbitration clauses. However, this additional land had been reserved by the Bombay Municipal Corporation (BMC) for the construction of a primary school. The appellant company undertook to provide alternate property to BMC to shift the proposed school site at the cost of the respondent. This agreement was followed by a tripartite agreement dated 9.11.1994 between the appellant company, the respondents and a third party, Bhupendra Capital and Finance Ltd. (BCFL) under which 50% of the interest of the appellant company was transferred to the third party. Since there was no consensus on the cost of shifting of the proposed school site, the agreement dated 18.07.1994 was cancelled by another agreement dated 22.6.1996 and it was agreed that the respondent and BCFL had no claim under the agreement dated 18.07.1994. There were subsequent litigations between the parties in different forums which did not result in any significant orders. Meanwhile, the respondent served a notice on the appellant dated 11.6.2002 invoking the arbitration clause under agreements dated 27.4.1994 and 18.07.1994. Subsequently, under a memorandum of understanding (MoU) dated 19.1.2005 the parties agreed to settle their differences amicably by which the respondent agreed to accept Rs. 1.20 crores and the appellant company agreed to execute the necessary conveyance deed in favour of the respondent for an area of 86,725sq ft of FSI only. This MoU was subsequently cancelled by the respondent, who invoked the arbitration clause under the earlier agreements and issued a notice of arbitration. The appellant company denied any liability under the agreements in view of the MoU. However, the respondent filed an application

19 (2007) 4 SCC 599.

under section 11 (6) of the Act before the Bombay High Court for the appointment of an arbitrator. The designated judge rejected issues raised by the appellant company that no live claim there was in existence and the claim was barred by limitation. The designated judge appointed an arbitrator. Against the said appointment the appellant company approached the Supreme Court.

The main contention of the appellant before the Supreme Court was that there was no live issue left between the parties as the controversy had become dead in view of the MoU dated 19.1.2005 and that the claim, if any, of the respondent under the agreement dated 27.4.1994 had become barred by limitation. The respondent on the other hand contended that these issues should be decided by the arbitrators and not by an application under section 11 of the Act. The issue before the Supreme Court was on the scope of the jurisdiction of a designated judge after the *SBP* decision in a section 11 application to decide whether there was a live issue to be arbitrated between the parties and whether the claim was barred by limitation. The court relying on the *SBP* decision held that it was for the propose of putting the arbitration proceeding in motion by appointing an arbitrator that the designated judge had to give findings in respect of the existence of the arbitration clause, territorial jurisdiction, existence of live issue and limitation and that unless there was a finding on these issues the arbitration proceedings could not be commenced. It further held that the CJ had to examine whether the claim put forth was a dead one or in the sense whether the parties concerned had recorded satisfaction on their financial claims. On the question of limitation also the court observed that it being a mixed question of facts and law the CJ had to record his satisfaction that *prima facie* the claim had not become dead by the lapse of time or that any party to the agreement had not slept over its rights beyond the time permitted by law to agitate those issues covered by the agreement. It further stated that once the CJ had come to a finding that there existed a live issue, then this finding would also include the finding that the claims of the parties were not barred by limitation. The court, therefore, upheld the order passed by the designated judge on the ground that the facts of the case did not suggest that there was a full and final settlement between the parties in respect of the claims in question.

Failure of a party to appoint arbitrator

Section 11 of the Act dealing with the appointment of an arbitrator gives freedom to the parties to appoint the arbitrator and the procedure to be followed in the appointment. However, when there is any disagreement or failure of the procedure in the appointment then the aggrieved party can move the CJ for the appointment of the arbitrator. Under sub-section (4) a party who has received a request from the opposite party has to appoint an arbitrator within 30 days from the receipt of the said request. Similarly, in the case of a sole arbitrator sub-section (5) of section 11 provides that when the party receiving the request from the opposite party within 30 days can

move the CJ for appointment of an arbitrator. Under sub-section (6) of section 11 when there is a failure in the agreed procedure for appointment of arbitrators the aggrieved party can move the CJ for appointment of the arbitrator. However, sub-section (6) does not provide the limitation period of 30 days. The Supreme Court in *Datar Switchgear Ltd.* v. *Tata Finance Ltd.*[20] had held that though section 11 (6) does not contain the 30 days limitation for the appointment of arbitrator as in section 11 (4) and (5) of the Act a party receiving a request from the opposite side has to make appointment within 30 days and if he fails to do so and if the opposite party moves the CJ the other party loses his right to make appointment.

A similar question arose before the Supreme Court in *Union of India* v. *Bharat Battery Manufacturing Co.(P) Ltd.*[21] In this case the appellant had invited tender for the supply of battery secondary lead acid which contained an arbitration clause which provided for the appointment of a sole arbitrator by the Director General of Supplies and Disposals. The tender submitted by the respondent was accepted. When disputes arose between the parties the respondent issued notice to the appellant for appointment of an arbitrator. However, the appellant did not respond to the notices and did not appoint any arbitrator. It, therefore, filed an application under section 11 (6) of the Act before the designated judge of the high court. Thereafter, the appellant appointed an arbitrator as per the arbitration clause in the tender. The designated judge, however, allowed the application and appointed another person as arbitrator on the ground that once the notice period provided for under the arbitration clause for appointment of the arbitrator had elapsed and section 11(6) application has been filed by the party seeking appointment of an arbitrator, the other party which had the power to appoint under the arbitration clause cannot resurrect the said clause. The appellant approached the Supreme Court against the said appointment contending that the appointment made by the designated judge was contrary to the arbitration agreement. Dismissing the appeal the Supreme Court held that under section 11 (6), if one party demands the opposite party to appoint an arbitrator and the opposite party did not make an appointment within 30 dys of the demand, the right to appoint does not get automatically forfeited but continues, but the appointment has to be made before the former files an application under section 11 (6). The court relied on its earlier decisions in *Punj Lloyd Ltd.* v. *Petronet MHB Ltd*[22] and *Datar Switchgears Ltd.* v. *Tata Finance Ltd.*[23] It, therefore, rejected the contention of the appellant and upheld the order of the designated judge on the ground that in that case the appellant had made the appointment of his arbitrator only after the respondent had filed an application under section 11 (6) of the Act.

20 (2000) 8 SCC 151.
21 (2007) 7 SCC 684.
22 (2006) 2 SCC 638.
23 *Supra* note 18.

A similar issue also arose in another case before the Supreme Court in *Ace Pipeline Contracts (P) Ltd.* v. *Bharat Petroleum Corpn. Ltd.*[24] In this case the arbitration clause in the contract between the parties provided that the director (marketing) of the respondent corporation (BPCL) or any of his nominees should act as the arbitrator. Differences arose between the appellant and the respondent, and so invoking the above clause the appellant sent a written request dated 21-7-2005 to the director (marketing) of the respondent to refer the matter for arbitration, along with a request to have the matter adjudicated by a former judge of the Supreme Court in order to remove any justifiable doubts as to the independence or impartiality of the arbitrator. It was further stated in that request that on receiving the communication from the respondent the name of such a former Judge would be suggested by the appellant. Since the respondent did not appoint any arbitrator even after one month, the appellant on 22.8.2005 filed an application under sections 11(5) and (6) of the Act before the designated judge of the high court for appointment of an arbitrator. Meanwhile, on the same day a sole arbitrator was appointed by the director (marketing) of the respondent corporation, and intimation in this regard was received by the appellant on 26.8.2005. The respondent contested the application filed by the appellant before the designated judge of the high court on the ground that there was no delay on their part in appointing the arbitrator, in accordance with the agreement, and that it acted with urgency. The main contention of the appellant was that the appointment of the arbitrator was done by the director (marketing) of the respondent after the expiry of period of 30 days, whereby it had ceased to have any right to appoint any arbitrator. The designated judge of the high court proceeded to treat the application before it as one under section 11(6) and held that the appointing authority under the agreement had acted with urgency and that therefore, the situation for invoking section 11 (6) had not arisen. The appellant approached the Supreme Court.

The Supreme Court following its earlier decision in *Datar Switchgears Ltd.* v. *Tata Finance Ltd*[25] refused to read the limitation of 30 days in section 11(6) of the Act as the same was not prescribed therein, and reiterated the position that the right to appoint an arbitrator does not get automatically forfeited after expiry of 30 days, and if the opposite party makes an appointment even after 30 days of the demand, but before the first party has moved the court under section 11 that would be sufficient. Expressing its anguish on the delays in making appointment by the parties entrusted with the task of appointing arbitrators, the Supreme Court stated that courts were competent to issue *mandamus* in exercise of powers under section 11(6) in the event of failure of authorities to appoint arbitrators

24 (2007) 5 SCC 304.
25 (2000) 8 SCC 151.

within the reasonable time. The Supreme Court observed that normally the choice of the arbitrator be adhered to as per the terms of the arbitration clause and the arbitrator(s) named therein should be appointed except in exceptional cases for reasons to be recorded or where both parties agree for common name. However, in the present case the Supreme Court did not allow the appellant to wriggle out of the situation that if any person of the respondent was appointed arbitrator he will not be impartial or objective, on the ground that he Appellant had entered into the agreement with respondent with open eyes. However, the court observed that if the appellant did not feel that the arbitrator so appointed has not acted independently or impartially, or has suffered from some bias, it could always make an application under section 34 to set aside the award. On the basis of the above reasons the Supreme Court dismissed the appeal, and upheld the order of the single judge of the high court in which the aforementioned application of the appellant was dismissed by him after holding that it cannot be said that the appointing authority did not act with due dispatch, and situation had not arisen to invoke provisions of section 11(6) of the Act.

Institutional arbitration and section 11 (6)

Often arbitration agreements provide for arbitration through the arbitral institutions. To facilitate arbitration in a smooth way these arbitral institutions frame rules governing the procedure for conducting arbitrations. Often for the sake of convenience these rules are adopted by parties to govern *ad hoc* arbitrations. Therefore, some arbitration agreements provide that the parties would appoint the arbitrators and the procedure to be followed by the arbitral tribunal would be governed by the rules of arbitration of a particular arbitral institution. However, often there would be confusion on the wording in an arbitration agreement as to whether the parties only wanted the rules of the arbitral institution to be applied in an *ad hoc* arbitration. The Supreme Court had to deal with both types of arbitration clauses in the two cases below.

In *Iron & Steel Co. Ltd.* v. *Tiwari Roadlines*[26] the appellant and the respondent entered into a transportation contract under which the latter was to transport steel materials from former's stockyard to various parts of the country. There was an arbitration clause in the contract under which in case of dispute the dispute had to be resolved in accordance with the rules of arbitration of the Indian Council of Arbitration (ICA). The respondent had given a performance bank guarantee and when disputes arose the appellant encashed the bank guarantee. The respondent without approaching the ICA filed an application under section 11 (6) of the Act before the city civil court, Hyderabad for the appointment of an arbitrator under section 11 of the Act. The city civil court appointed a retired judicial officer as the arbitrator.

26 (2007) 5 SCC 703.

The appellant challenged the said order by way of writ petition before the high court which was dismissed. The appellant challenged the order of the high court before the Supreme Court on the ground that as per the agreement only ICA had to appoint the arbitrator and, therefore, the court had no power to appoint the arbitrator unless the ICA had failed to do the same.

The Supreme Court held that since there was an agreed procedure for resolution of disputes by arbitrator in accordance with the rules of arbitration of the ICA, sections 11(3), (4) and (5) had no application and that the respondents should have made efforts to have the dispute settled by arbitration through ICA. The Supreme Court also took note of the conduct of the respondent in straightway moving an application under section 11 before the designated authority, without following the agreed procedure for appointing an arbitrator for settling the dispute by arbitration as contemplated by section 11(2) and held that when there was no allegation that any one of the contingencies enumerated in section 11(6) (a) or (b) had occurred, the application moved by the respondent was clearly not maintainable and the court had no jurisdiction to entertain such an application and pass any order.

In *C.M.C. Ltd.* v. *Unit Trust of India & Ors.*[27] the appellant, CMC Ltd, entered into an agreement with the respondent, the Unit Trust of India (UTI), for a technology upgrade project for the latter. The said agreement contained an arbitration clause which stated that arbitration proceeding shall be conducted in accordance with the rules prescribed by the ICA. When disputes arose between the parties the respondent issued notice to the appellant invoking arbitration clause and named an arbitrator suggesting to accept him as a sole arbitrator. The appellant replied stating that the parties had agreed to follow the rules of ICA by incorporating the said rules by reference in the arbitration clause and since respondent no.1 had not acted in terms of the said rules, the appellant regretted its inability to accept the stand of the respondent or to appoint an arbitrator in terms of the arbitration agreement. Respondent no. 1, therefore, moved the chief justice of the high court under section 11 (6) of the Act for the appointment of an arbitrator who along with the arbitrator already appointed by respondent no.1 could appoint a presiding arbitrator. The appellant opposed the said application on the ground that as per the arbitration agreement only ICA could appoint the arbitrators. The designated judge of the high court held that on a true construction of the arbitration agreement, the right or duty to appoint or name an arbitrator rested with the parties to the contract and what was provided for in the arbitration agreement was only that the arbitral tribunal should follow the rules of ICA while conducting the arbitration and that the arbitration agreement did not contemplate the appointment of the arbitrator as per the rules of the ICA or only from the panel of arbitrators

27 (2007) 10 SCC 751.

maintained by the ICA. The appellant, CMC Ltd. approached the Supreme Court against the said order.

The only issue before the Supreme Court was whether the appointment of the arbitrators is governed by the rules of the ICA or not. The Supreme Court on a comparison of the arbitration clause in the agreement with the model arbitration clause provided under the ICA rules held that the arbitration clause in the contract only provides for the appointment of arbitrators by the parties and not by the ICA and that since the parties were free to adopt the manner of the appointment of arbitrators the arbitration clause empowering the parties to appoint the arbitrators should be upheld, though the arbitration tribunal could follow the procedure prescribed under the rules of the ICA.

International commercial arbitration

Precondition to exercise of power to appoint arbitrator

In *DHV BV* v. *Tahal Consulting Engg. Ltd. (Israel) & Another*[28] an agreement was signed between the petitioner, which is a company registered in Netherlands on the one hand and respondent no.1, another foreign company based in Israel and respondent no. 2 a state government entity, on the other hand, for providing management consultancy and technical assistance services for the Tamil Nadu Water Reserves Consolidation Project. There were also sub-contractors for providing sub-consultancy who were also parties to the contract along with the petitioner. As per the contract the state government was to bear the tax liabilities of all consultants and sub-consultants. The contract was duly performed and the petitioner received all payments in respect of all invoices raised by them for the services rendered. However, some disputes arose between the parties on the payment made by the petitioner towards the tax liabilities of the sub-consultants. The petitioner issued legal notices to the respondents asking them to settle the dispute amicably in terms of the general conditions of the main contract. However, the respondents denied their liability on the ground that the contract had already come to an end. The petitioner, therefore, issued another notice demanding reference of the disputes to the sole arbitrator in terms of clause 8.2 of the main contract. The respondents refused to refer the disputes to arbitration. The petitioner, thereafter, filed an application under section 11 (6) of the Act for the appointment of an arbitrator by the Chief Justice of India.

The issue before the designated judge of the Supreme Court was the jurisdiction to decide the question whether there was an enforceable arbitration agreement between the parties. The designated judge relying on the decision in the *SBP's* case held that the function performed by the CJ or his nominee under section 11 of the Act was a judicial function and that in

28 (2007) 8 SCC 321.

order to set in motion the arbitral procedure, the CJ or his designate had to decide the issues if raised, regarding territorial jurisdiction and existence of arbitration agreement between the parties and that he could also decide whether the claim was a dead one in the sense that whether the parties had already concluded the dispute by recording satisfaction. Applying the above principles the designated judge held that as per the terms of the contract, certain obligations had continued to exist even after the performance of the contract and that the clauses in the contract pertaining to those claims would be enforceable as against the respondent state even after the expiry of the contract after completion of the services and making payment. The judge also held that there was an enforceable arbitration agreement between the parties and appointed a retired judge of the Supreme Court as an arbitrator.

Appointment of arbitrator when fraud vitiates the agreement

In *India Household and Health Care Ltd.* v. *LG Household & Health Ltd.*[29] an agreement was allegedly entered into by the petitioner and the respondent on 8.5.2004 which contained an arbitration clause. Subsequently the respondent disputed that the said agreement was preceded by a memorandum of understanding (MoU) dated 1.11.2003 and the said purported MoU and license agreement dated 8.5.2004 were vitiated by fraud of a very large magnitude perpetrated through a criminal conspiracy hatched between the appellants and officers of the respondent. The respondent also filed a suit in the high court wherein an absolute injunction dated 21.01.2006 was granted restraining the parties concerned from directly or indirectly acting on the so called MoU and the agreement or deriving any benefit from them.

The petitioner, however, filed an application before the Chief Justice of India under section 11(5) and (6) of the Act for appointing an arbitrator on the purported failure of the respondent to appoint an arbitrator in spite of notice dated 15.4.2005 sent by the appellant. The respondent opposed the application on the ground that the arbitration agreement was vitiated by fraud and that the said issue needed to be decided in the light of the decision in *SBP* case.

The designated judge held that where the existence of an arbitration agreement could be found, the courts would construe the agreement in such a manner so as to uphold the arbitration agreement, and that when a question of fraud was raised, the same had to be considered differently since fraud would vitiate all solemn acts. It was also held that a contract under the Act would mean a valid contract and that an arbitration agreement would mean an agreement which is enforceable by law. The judge relied on para 39 of the *SBP* case for the purpose of holding that the power of the CJI or the designated judge under section 11 of the Act was a judicial one and drew a

29 (2007) 5 SCC 510.

distinction between those contracts containing arbitration clauses which were vitiated by fraud from the rest of the contracts which were vitiated by nullity, and pointed out the difference that in the former cases even the arbitration clause would be vitiated, whereas in the latter cases the arbitration clauses would survive. The judge, therefore, held that the arbitrator had no jurisdiction to rule on his own jurisdiction under section 16 of the Act. The judge also took note of the fact that already the High Court, Madras had granted an injunction against the petitioner from relying on the agreement and that comity among courts would require that such an order should be respected. The judge, therefore, rejected the application under section 11 (6) as not maintainable at the relevant time.

Appointment of presiding arbitrator as per arbitration clause

In *You one Maharia –JV* v. *N.H.A.I*[30] the petitioner entered into a contract with the respondent for laying down a four-way highway in different parts of India. The agreement contained an arbitration clause in the contract, which provided for the appointment of three arbitrators, two by the parties and the third by consensus by the two arbitrators and that in case of failure of the two arbitrators appointed by the parties to reach upon a consensus, the presiding arbitrator "shall be appointed by the Council of IRC". When a dispute arose between the parties each party appointed their respective arbitrators and they reached a stalemate on the appointment of the presiding arbitrator. At this stage the petitioner filed a petition under section 11 (6) of the Act invoking the power of the CJI to appoint a person not below the rank of at least a former chief justice of a high court or a retired Supreme Court judge since the petitioner had already appointed a former Chief Justice of India as its arbitrator. The respondent, however, opposed the application by contending that as per the terms of the arbitration clause only the council of IRC is competent to appoint the presiding arbitrator.

The designated judge relied on the arbitration clause in the agreement which specifically stated that in case of the failure of the two arbitrators appointed by the parties to reach upon a consensus the presiding arbitrator should be appointed by the Council of IRC. Therefore, the judge held that the presiding arbitrator should be appointed by the Council of IRC and not by the CJI under section 11 (6) of the Act. The judge also took note of the fact that the point was already concluded by an earlier decision of the Supreme Court in *You One Engg. & Construction Co. Ltd.* v. *National Highway Authority of India*.[31]

Vagueness of claim and appointment of arbitrator

In *CITI Bank N.A* v. *TLC Marketing PLC & Anr.*[32] a tripartite agreement

30 (2007) 7 SCC 704.
31 (2006) 4 SCC 372.
32 2007 (11) SCALE 675.

was entered into between the petitioner, Citi Bank and respondent no.1, TLC Marketing PLC (TLC), and respondent no.2, Wunderman India Private Ltd. (WIPL) under which the respondents agreed to manage a scheme called "Fly for Sure" programme for Citi Banks credit card customers. The said agreement also contained an arbitration clause for resolution of disputes. Disputes arose between the petitioner and the respondents due to which the petitioner terminated the agreement and invoked the arbitration clause for resolution of disputes by suggesting the appointment of a former Chief Justice of India as the sole arbitrator. The respondents did not agree to this and in turn wanted a panel of three arbitrators to be appointed to resolve the dispute. The petitioner approached the CJI under section 11 (6) of the Act. The respondents opposed the application on the ground that there was no dispute in existence between the parties as the petitioner had only made vague assertions of existence of disputes and that the petitioner had not sent any valid notice invoking the arbitration clause. It was also contended by the respondents that in any event a panel of three arbitrators should be appointed.

The issue before the designated judge was whether the petitioner had made out a case for appointment of an arbitrator invoking the arbitration clause. Disposing the application the designated judge held the disputes arising out of the arbitration agreement between the parties were covered under the definition of "International Commercial Arbitration" in terms of section 2 (f) of the Act. He further held that the parties had entered into an arbitration agreement as provided under section 10(1) of the Act which did not provide for the number of arbitrators and under section 10 (2) in the absence of such determination the disputes would be resolved by a sole arbitrator. The judge also held on the basis of the correspondence between the parties that there was a dispute between the parties which needed to be arbitrated. The judge also took note of the fact that the respondents had never disputed the existence of the arbitration clause. The judge, therefore, appointed a former judge of the Supreme Court as the sole arbitrator.

Applicability of Indian Act

In *Aurohill Global Commodities Ltd.* v. *Maharashtra STC Ltd.*[33] in a section 11 application before the designated judge of the Supreme Court in an international commercial arbitration the issue was which law would govern the arbitral proceedings. The petitioner was a company registered in Cyprus. It was to supply billets to the respondent and a draft purchase order was issued by the respondent which was accepted by the petitioner. There was an arbitration clause in the purchase order by which the parties agreed to settle the disputes by arbitration in London and in accordance with the Rules of Arbitration of Great Britain. The agreement also provided that only British courts have exclusive jurisdiction to decide all matters, disputes and

33 (2007) 7 SCC 120.

controversies relating to the contract including those relating to arbitration proceedings. When disputes arose between the parties, the petitioner by its legal notice to the respondent sought settlement of disputes by arbitration after expressing its willingness to be governed by the Indian Arbitration and Conciliation Act, 1996 and the Indian Contract Act, 1972 and also sought the appointment of an arbitrator. The respondent refused to agree to the request on the ground that there was no valid contract between the parties though it stated that in principle it would be willing to be guided by the Indian Act. The petitioner filed a petition under section 11 (5) and (6) of the Act before the Chief Justice of India. The respondent opposed the petition on the ground that there was no concluded contract and that only the British laws would be applicable.

The issues before the designated judge was as to whether the draft purchase order issued by the respondent had acquired the character of a concluded contract and whether the respondent had waived its right to have the arbitration proceedings to be governed by the British Rules of Arbitration. On the first question the designated judge relied on an earlier decision of the Supreme Court in *Bhatia International* v. *Bulk Trading S.A*[34] which had stated the principle that unless specifically excluded by agreement between the parties part I of the Act would be applicable to international commercial arbitrations held outside India. The judge held that the petition was maintainable on the ground that the alleged contract was an international transaction and therefore he had the power to appoint an arbitrator and it was within the power of the arbitral tribunal under section 16 to decide on the question as to whether the draft purchase order had acquired the character of a concluded contract and whether the contract was *non est*. On the second question on the applicable law of arbitration the judge held that on a conjoint reading of various clauses of the agreement it was clear that the procedural law applicable to the arbitration proceedings was the British Rules of Arbitration; that the letter addressed by the advocate to the respondent concurred only in principle with the offer made by the petitioner to be guided by the Indian Arbitration and Conciliation Act, 1996, insofar as the procedural law was concerned and that the said letter would not constitute a waiver of the respondent's right to be governed by the terms of the arbitration agreement. In the circumstances, the judge held that parties should abide by the terms of the alleged contract and that it was not possible to substitute the British Rule of Arbitration by the 1996 Act. The judge thus disposed of the petition without appointing any arbitrator.

In *National Agricultural Co. Op. Marketing Federation India Ltd.* v. *Gains Trading Ltd.*[35] the petitioner and the respondent entered into an agreement by which the latter agreed to buy iron fines from the former at FOB price of US $50 per dry MT. The contract contained an arbitration

34 (2002) 4 SCC 105.
35 (2007) 5 SCC 692.

clause under which disputes should be referred to and finally resolved by arbitration in Hong Kong in accordance with the provisions of the Act or any other statutory modification, enactment or amendment thereof for the time being in force. When some dispute arose between the parties, the petitioner by a notice through its counsel invoked the arbitration clause and furnished a panel of three names to the respondent, to which it refused to comply with. The petitioner approached the Chief Justice of India by way of an application under section 11 of the Act. According to the contentions raised, the following questions arose for consideration:

i) Whether an arbitration clause comes to an end, if the contract containing such arbitration agreement, was abrogated?
ii) Whether section 11 of the Act is inapplicable in regard to the arbitrations which are to take place outside India?
iii) Whether the appointment of the arbitrator and the reference arbitration are governed by the laws in force in Hong Kong and not by the Arbitration and Conciliation Act, 1996?

The judge on the first question pointed out the well established principle in arbitral jurisprudence that the arbitration clause stands independent of the main contract which had been statutorily recognized under section 16 (1) of the Act and held that the arbitration agreement had to be treated as an agreement independent of the main agreement and that a decision that a contract is null and void should not entail *ipso jure* the invalidity of the arbitration clause. The judge further relying on the principles laid down by the Supreme Court in *Bhatia International* v. *Bulk Trading S.A*[36] answered other questions by holding that when an international commercial arbitration is held in India the provisions of part-I would compulsorily apply and the parties are free to deviate only to the extent permitted by the derogable provisions of part-I. In cases of international commercial arbitrations held outside 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 and provisions in part-I, which is contrary to or excluded by that law or rules, would not apply in the latter case. The judge pointed out that the arbitration clause in the said case had made it clear that the matter in dispute should be referred to and finally resolved by arbitration in accordance with the provisions of the Act or any statutory modification, enactment or amendment thereof and the venue of arbitration should be Hong Kong. Merely because the parties had agreed that the venue of arbitration should be Hong Kong, it would not follow that laws in force there should apply and, therefore, the provisions of the Act would apply.

36 (2002) 4 SCC 105.

VI ARBITRAL TRIBUNAL: JURISDICTION AND TERMINATION

Estoppel by conduct after participating in arbitration proceedings

In *Krishna Bhagya Jala Nigam Ltd.* v. *G. Harischandra Reddy & Anr.*[37] an agreement was entered into between the appellant Jala Nigam and the respondent concerning construction of an irrigation scheme which contained a clause for settlement of disputes by the chief engineer. The respondent raised certain disputes and called upon the chief engineer of the appellant to act as an arbitrator under clause 29 of the contract. The chief engineer refused to act as an arbitrator on the ground that the contract did not provide for arbitration. However, in a petition filed by the respondent under section 11 of the Act the high court directed him to act as an arbitrator and gave an award in favour of the respondent. Aggrieved by the award the appellant filed an application under section 34(2) (v) of the Act before the principal civil judge who confirmed the said award. The appellant filed an appeal under section 37(1) (b) of the Act before the high court which was dismissed. It approached the Supreme Court.

The appellant contended before the Supreme Court that the clause for settlement of dispute by the chief engineer was not an arbitration clause and the parties could not have conferred jurisdiction even by consent and therefore the award was without jurisdiction. The main issue before the Supreme Court was whether the clause in question was an arbitration clause. It held that when a party had consented to arbitration by the arbitral tribunal and participated in the arbitration proceedings without questioning the jurisdiction of the arbitral tribunal it cannot later on take the plea that there was no arbitration clause. Moreover, the court pointed out that in this case the appellant did not challenge the order of the high court appointing the arbitrator to resolve the dispute between the parties which had become final. It, therefore, held that when both the parties accepted that an arbitration clause existed in the agreement and they proceeded on that basis, one party cannot for the first time in the first appeal before the high court raise a plea that there was no arbitration clause under section 37(1) (b) of the Act.

VII CHALLENGES TO AWARDS

Period of limitation to challenge an award

The time limit to challenge an interim award came up for consideration before the Supreme Court in *State of Arunachal Pradesh* v. *M/s Damani Construction.*[38] In this case the respondent entered into an agreement with the public works department of the appellant, the State of Arunachal Pradesh,

37 (2007) 2 SCC 322.
38 (2007) 10 SCC 742.

for the execution of certain works relating to the construction of road bridges. The works were to be completed within two calendar years from the date of their commencement. Certain disputes arose between the parties pertaining to the execution of the works contract. The said dispute was referred to arbitration. The arbitrator passed an interim award in favour of the respondent. The appellant state wrote a letter to the arbitrator for review of the award and also sought clarification of certain portions of the award. The arbitrator replied that he had no jurisdiction to entertain the request for review of the award. Meanwhile the respondent filed an application for execution of the said award before the deputy commissioner. The appellant also filed an application before the same authority to set aside the award under section 34 of the Act along with an application under section 5 of the Limitation Act to condone the delay in filing the said application on the ground that the period of limitation would commence from the date of disposal of the review petition by the arbitrator. The deputy commissioner dismissed the said application on the ground that it was barred by limitation as it was beyond the period of three months and the extended period of one month as provided under section 34 (3) of the Act. The said order was challenged by way of a writ petition before the high court. The high court relying on section 34 of the Act that an application for setting aside the award should be filed within 90 days and in the instant case there was a delay of seven months in filing the application from the date of the interim award and six months from the date of the order of the arbitrator refusing to review the said award dismissed the writ petition.

The State of Arunachal Pradesh approached the Supreme Court by way of appeal which was dismissed. It was held that the interim award was final with regard to the claims raised therein and, therefore, the application for review of the award filed by the appellant was totally misconceived. The court pointed out that the interim award had determined the amount after discussing the claims in detail and calculated the amount under each of the claims and that there was no confusion in this award. It held further that the application for review of the award was totally misconceived as it would not fall within the purview of section 33 of the Act. Therefore, the reply sent by the arbitrator would not provide any fresh cause of action for the appellant state to file an application after a delay of more than seven months.

Award against specific terms of contract

In *Security Printing and Minting Corpn. of India Limited and Anr.* v. *M/s Gandhi Industrial Corpn.*[39] appellant no. 2, prior to 1966, was importing its entire requirement of gummed stamp paper from foreign countries. In 1967 the respondent established a pilot plant for the manufacture of gummed stamp paper. In spite of that the appellant had been

39 2007 (12) SCALE 488.

floating tenders for gummed stamp paper which was unsuccessfully challenged by the respondent in writ proceedings. A tender was again floated by the appellant in 1996 and an agreement in the form of a memorandum of understanding (MoU) was reached between the parties, for offering the work exclusively to the respondent for a period of 10 years so as to enable it to optimally utilize the capacity of its plant. The said MoU contained an arbitration clause. Since the appellant placed orders with others the respondent filed a writ petition and also an application under section 11 of the Act before the high court, in which with the consent of the parties a retired judge of the high court was nominated as the sole arbitrator. The dispute between the parties was as to whether the respondent was entitled to the Modvat credit availed by it or whether it should be passed on to the appellant. The arbitrator made an award in favour of the respondent. The appellant filed an application under section 34 of the Act before the single judge, who upheld the award made by the arbitrator. An appeal was preferred before the division bench of the high court, which was dismissed. The appellant approached the Supreme Court.

The issue before the Supreme Court was whether the appellant was entitled to get the benefits of Modvat credit. Allowing the appeal the Supreme Court held that courts are very slow in interfering with the finding and interpretation given by the arbitrator in an award, but if any perverse order is passed, then the courts were not powerless to interfere. The court referred to the specific provision in the contract that the respondent was not entitled to the Modvat and that even though it had objected to the specific clause in the contract to that effect, the appellant never had agreed to modify the same. According to the court the specific term in the contract would prevail over the tender terms and, therefore, the contention of the respondent relying on the tender terms that it was entitled to the Modvat credit was without any substance. Thus, the Supreme Court set aside the award passed by the arbitrator as contrary to the specific terms of the contract.

A similar issue was involved in *Numaligarh Refinery Ltd.* v. *Daelim Industrial Co. Ltd.*[40] In this case the appellant, Numaligarh Refinery Ltd. (NRL) through its consultant invited global quotations for building a cogeneration captive power plant for its petroleum refinery at Numaligarh in Assam. Respondent, Daelim Industrial Co. Ltd), (DIC) with its consortium partner Turbotecnica SPA of Italy was selected in the global bid. Three contract agreements were signed between the parties which contained an arbitration clause. In the course of the execution of the project, disputes arose between the parties and, therefore, in terms of clause 9 (6) of the agreement, DIC referred the matter for arbitration before the International Chamber of Commerce (ICC) under its International Court of Arbitration

40 (2007) 8 SCC 466.

Rules, 1988. Each party appointed its respective arbitrator and the ICC nominated a third arbitrator-cum-chairman to constitute the arbitral tribunal. The tribunal gave an award in favour of the respondent. Aggrieved by the award, the appellant filed an application under section 34 of the Act in the court of the district judge and the award was set aside. On appeal to the high court, it accepted some items of the majority award and some items of the minority award.

Due to the conflicting views on the subject, the Supreme Court examined the merit of each claim in order to put an end to the controversy. The court, relying on its various judgments held that courts should not sit in appeal and normally should not interfere with the views of the arbitrator in interpretation of the terms of agreements interpreted by the arbitrator when the arbitrator is appointed with the consent of parties. Reiterating the legal proposition as enunciated in its various pronouncements, the Supreme Court held that if parties with their eyes wide open have consented to refer the matter to arbitration, then normally the finding of the arbitrator should be accepted without demur; but added a caveat, that where it was found that the arbitrator had acted without jurisdiction and had adopted an interpretation on the clause of the agreement wholly contrary to law then there was no prohibition for the courts to set things right. Thus, in the instant case the court dealt with all the claims on merits, as aforesaid, and modified the order of the high court granting certain sums of money while allowing some of the claims.

Appointment of arbitrator contrary to agreed procedure

In *Gas Authority of India Ltd. and Anr.* v. *Keti Construction (I)Ltd.*[41] the appellant, Gas Authority of India Ltd. (GAIL) awarded four contracts for its projects relating to construction of offshore platforms to the respondent. The contract entered into by the parties contained an arbitration clause. When certain disputes arose under the contract the appellant referred the dispute for arbitration to N.N.Goswami, a former judge of the Delhi High Court. The respondent disputed the appointment of the arbitrator but did not raise the plea before him. The arbitrator gave an *ex parte* "no claim award" in favour of the appellant. The respondent filed an application under section 34 of the Act in the Delhi High Court challenging the said award, on the ground that the arbitrator was not appointed as per the procedure agreed by the parties. The single judge upheld the award and accordingly dismissed the application. The respondent preferred an appeal before the division bench of the high court under section 37 of the Act, which allowed the appeal and set aside the award made by the arbitrator.

The appellant approached the Supreme Court which held that where a party who had received notice of arbitration and did not raise a plea of lack

41 (2007) 5 SCC 38.

of jurisdiction before the arbitral tribunal, must make out a strong case with good reasons why it did not do so if it had chosen to move an application under section 34(2) (a)(v) of the Act by raising the plea that the composition of the arbitral tribunal was not in accordance with the procedure agreed upon between the parties. It held that there had been compliance with the appointment procedure under the agreement, and that no reasons had been given by the respondent for not having raised the question of jurisdiction before the arbitrator despite ample and repeated notices and opportunities to appear, given by the arbitrator. The court, therefore, justified the dismissal of the application filed by the respondent under section 34(2) (a) (v) of the Act as affirmed by the single judge.

VIII APPELLATE JURISDICTION UNDER THE ACT

Partial award and appeal

The issue of maintainability of an appeal under section 37 of the Act against a partial award came up before the Supreme Court in another case in *National Thermal Power Corporation Ltd.(NTPC)* v. *Siemens At Keingesellschaft.*[42] In this case the appellant NTPC entered into an agreement with the respondent for setting up a certain project which also contained an arbitration clause. When certain disputes arose between the parties, in order to sort out the disputes they held a meeting. In the meeting the respondent undertook to rectify the grievances of NTPC whereas the NTPC agreed to look into the claims raised by the respondent with a more positive approach. The NTPC failed to fulfil its promise. Subsequently, the respondent made a reference to the International Court of Arbitration of the International Chamber of Commerce for the settlement of disputes and its claim for compensation. NTPC besides filing its defense raised certain counterclaims. The respondent resisted the claims of the appellant on the ground that the counterclaims were not arbitrable. The arbitral tribunal made a partial award and held that the claim of the respondent was maintainable while the counterclaims of NTPC were not admissible.

Aggrieved by the partial award, NTPC approached the high court by filing an application to set aside the award. The high court held that the partial award is an award of interim nature deciding the counterclaims of NTPC finally on merits and that the same could not be an order passed under section 16 (2) or 16 (3) of the Act which deal with the jurisdiction of the arbitral tribunal. It further held that, in any case, decision on the question of jurisdiction in the negative would fall within the ambit of appealable orders under section 37(2) a of the Act and that, therefore, the appeal was not maintainable.

42 (2007) 4 SCC 451.

NTPC filed an appeal in the Supreme Court which dismissed it on the ground that the matter did not involve any question regarding the jurisdiction of the arbitral tribunal and therefore, the Appellant NTPC could not bring its case under section 16(2) and (3) by raising the question of jurisdiction so as to enable it to approach the high court directly under section 37(2). It, therefore, held that no direct appeal would lie in the high court and that the remedy of NTPC was to challenge the award in the appropriate forum.

IX ENFORCEMENT OF AWARDS

Enforcement of cross awards under CPC

Rule 18 of order 21 CPC deals with the procedure to be followed for executing cross decrees in different suits and rule 19 of order 21 of CPC deals with the procedure to be followed by the executing court when in the same decree there are cross claims. In *N.R. Constructions (P) Ltd.* v. *Ram Badan Singh*[43] the Supreme Court had to deal with the question whether the provisions of rules 18 and 19 of order 21 of CPC could be invoked to enforce two cross awards. In this case the appellant and the respondent had entered into a partnership deed with the purpose that the respondents could do certain works which the appellant had obtained. Their disputes resulted in several arbitral awards rendered by the same arbitral tribunal. The arbitral tribunal among other awards gave an award dated 19.4.1997 in favour of the appellant and another dated 25.11.2000 in favour of the respondent. The appellant filed execution case no. 5 of 2003 for enforcement of award dated 19.4.1997, and the respondent filed execution case no. 2 of 2001 for the enforcement of award dated 25.11.2000. An objection under section 47 CPC was filed by the respondent in the former execution case, which was dismissed but, the civil revision preferred by the respondent against it was admitted by the high court; however, no stay of execution was granted. Thereafter, the appellant filed an application under order 21 rules 18 and 19 CPC read with section 36 of the Act in the latter execution case for adjustment of amount and for recording of full satisfaction of the amount, which was dismissed by the executing court. Subsequent civil revision filed before the High Court of Jharkhand at Ranchi questioning this order of the executing court was also dismissed, and consequentially the appeal by way of special leave was preferred to the Supreme Court.

The issue before the Supreme Court was whether order 21 rules 18 and 19 could be invoked in the case of cross awards. It pointed out that the execution application filed by the appellant was neither for execution of cross decrees in separate suits for the payment of money in between parties nor was for execution of a decree in which the parties were entitled to

43 (2007) 11 SCC 19.

recover sums of money from each other. The court, therefore, dismissed the appeal on the ground that in the instant case the applications were in respect of two awards in the same arbitration case and as such the provisions of rules 18 and 19 of order 21 CPC were not applicable.

X THE ARBITRATION ACT, 1940

What is an arbitration agreement?

In *Punjab State* v. *Dina Nath*[44] the issue before the Supreme Court was whether the clause in a contract was an arbitration agreement or not, particularly in the absence of the words "arbitrator" and "arbitration" in the said clause. The said clause said, "Any dispute arising between the department and the contractor/society shall be referred to the Superintending Engineer, Anandpur Sahib, Hydel Circle No. 1, Chandigarh for orders and his decision will be final and acceptable/binding on both the parties." In this case the parties entered into a contract to execute some construction work. During the period of execution of works in terms of work order the appellant made payments to the respondent. Even after the completion of the works neither final measurements was made nor were final bills prepared. The respondent issued a notice calling upon the appellant to refer the disputes to an arbitrator as per clause 4 of the work order. Since the appellants did not appoint an arbitrator, the respondent filed an application under section 20 of the 1940 Act before an additional senior subordinate judge seeking appointment of an arbitrator. The appellant opposed the application on the ground that there was no arbitration agreement and that the claim was barred by limitation. The judge held that the disputed clause in the work order should be construed as an arbitration agreement within the meaning of section 2(a) of the Act; and that the application filed under section 20 of the Act was filed within the period of limitation, as the cause of action arose from the date the final notice of demand was sent which was well within the period of three years from the date of filing the application as contemplated under article 137 of the Limitation Act, 1963. The judge allowed the said application and referred the dispute for the decision of the abovementioned engineer. However, on appeal by the aggrieved appellant, the additional district judge reversed the order of the additional senior sub-judge on both the issues, and allowed the appeal. Thereafter the respondent filed a civil revision petition in the high court which was allowed by its impugned order, and the order of the additional senior sub-judge was restored. The appellant approached the Supreme Court against the said order.

The Supreme Court applying the definition of "arbitration agreement" in section 2(a) of the 1940 Act held, *inter alia*, that an arbitration agreement need not be in any particular form; and the main requirement should be

44 (2007) 5 SCC 28.

whether parties had agreed that in case of any dispute between them in respect of the subject-matter of the contract, such dispute should be referred to arbitration. Discussing its various judgments including, applying the test laid down in *K.K. Modi* v. *K.N. Modi*[45] to determine when a clause could be construed to be an arbitration agreement the Supreme Court held that an arbitration agreement existed in the present case. Before concluding, the court also dealt with the question of limitation in filing of the application under section 20 in the instant case, and it upheld the decision of additional senior sub-judge, as upheld by the high court.

Choice of court's jurisdiction

In *Jatinder Nath* v. *M/s Chopra Land Developers Pvt. Ltd. & Ors.*[46] the parties entered into an agreement and agreed to construct a housing complex in New Delhi. Parties agreed to refer the disputes to arbitration and it was further agreed that Faridabad court shall have jurisdiction in case of any dispute between the parties. Dispute arose between the parties and appellant herein requested for reference to the named arbitrator. Arbitrator entered upon reference; however, on the date of hearing neither respondent nor arbitrator was present. Appellant filed a petition under section 20 of the Act in the Delhi High Court and prayed that an independent arbitrator be appointed and matter may be referred for arbitration. Thereafter, the arbitrator fixed the matter for hearing and passed an *ex parte* award against the appellant. The respondent filed an application under section 14 of the Act for filing the award in court of Faridabad to make it rule of court. Trial court rejected the application and held that is view of section 31(4) of the 1940 Act Faridabad court had no territorial Jurisdiction to pass the decree in terms of the award. Aggrieved by this order the respondent moved the Delhi High Court by way of a civil revision application which was subsequently allowed, and it was held that the Delhi High Court was not a competent court as the parties had chosen to confer exclusive jurisdiction upon the Faridabad court. The high court found section 20 CPC applicable to the present case. Against the said order the appellant approached the Supreme Court.

The issue before the Supreme Court was whether the application filed by the respondent under section 14 of the 1940 Act before the Faridabad court was maintainable on the ground of want of territorial jurisdiction. The Supreme Court upheld the decision of the Delhi High Court that the latter was not the competent court as the parties had chosen to confer exclusive jurisdiction upon the Faridabad court and therefore section 31(4) was not applicable and the Faridabad court alone had jurisdiction to entertain and try the application filed by the respondent under section 14 of the 1940 Act. The Supreme Court on the basis of the peculiar facts of the case set aside the *ex-*

45 (1998) 3 SCC 573.
46 (2007) 11 SCC 453.

parte order of the trial court at Faridabad which made the award the rule of the court, and remanded the matter to the trial court to decide the application of respondent under sections 14 to 17 of the Act on merits in accordance with law.

Condonation of inordinate delay in challenging award

In *D. Gopinathan Pillai* v. *State of Kerala*[47] the Supreme Court had an opportunity to address the question of manner of condoning the inordinate delay in filing an application under section 37 of the 1940 Act to set aside an arbitral award. In this case delay in filing the above application by the respondent state against the appellant was of 3320 days, when article 118 of the Limitation Act, 1963 provided the limitation period of 30 days for the same. The sub-judge condoned the above inordinate delay on the ground that the state should not be penalised for the fault of the officers though he found that officers of the state had committed gross negligence in not filing the objection for a long period of 3320 days. Further, the appellant filed a civil revision petition before the high court which was also dismissed. The appellant approached the Supreme Court by special leave.

While allowing the appeal, the Supreme Court affirmed the well settled legal principle in this regard, that the delay should not be condoned without assigning any reasonable, satisfactory, sufficient and proper reason; and not on merely sympathetic ground. Since, the court found in this case, that both the courts had miserably failed to comply and follow the principle laid down by it in a catena of cases, it set aside the order of the sub-judge and that of the high court.

Award contrary to terms of contract

The decision in *Food Corporation of India* v. *Chandu Construction*[48] concerns section 30 of the 1940 Act, which deals with the misconduct by an arbitrator. The appellant, Food Corporation of India (FCI) undertook construction of certain godowns and issued notice inviting tenders for construction. The respondents submitted their bid which was accepted by the appellant, and subsequently a formal contract was executed between the appellant and the respondents. As per the terms of the contract the work was to be completed within 10 months from the 30th day of the issue of orders, and the time was essence of the contract. The contract contained an arbitration clause. The respondents could not complete work within the stipulated time, which was once extended, and the appellant finally terminated the contract. The respondents invoked the arbitration agreement and requested the appellant to appoint an arbitrator, which on not being done instituted a suit in the high court for appointment of an arbitrator. The high court appointed an arbitrator who gave an award in favour of the respondent.

47 (2007) 2 SCC 322.
48 (2007) 4 SCC 697.

The appellant in turn filed a petition in high court for setting aside the award, and with consent of the parties the award was set aside and the matter was remitted for arbitration afresh. This time also an award was rendered in favour of the respondents. The appellant challenged the award under section 30 of the 1940 Act before the high court mainly in respect of claim 9 which was allowed by the arbitrator. Both the single judge and the division bench of the high court rejected the challenge. The division bench also did not allow the appellant to raise a issue pertaining to award of interest by the arbitrator for the first time before it. Appellant approached the Supreme Court.

The issue before the Supreme Court was whether the award was liable to be set aside with regard to claim 9 when it was contrary to the terms of the contract. The court reiterated the settled law that the arbitrator being a creature of the agreement between the parties has to operate within the four corners of the agreement and if he ignores the specific terms of the contract, it would be a question of jurisdictional error on the face of the award, falling within the ambit of legal misconduct which could be corrected by the court. It further reiterated that if the arbitrator commits an error in the construction of contract, that was an error within his jurisdiction but, if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error. Thus, on analysing various pertinent terms of the contract between the parties the court concluded, that the same was executed in accordance with the CPWD specifications, and the cost of sand, for which a certain sum of money was awarded by allowing the abovementioned claim 9, was not included in the quoted rates in the tender document which the respondents submitted with open eyes; and having accepted the agreement both, they and the arbitrator were bound by it. The Supreme Court thus allowing the appeal, and setting aside the award to the extent it pertained to claim 9 opined that in this case the arbitrator had misdirected and misconducted himself by manifestly ignoring the clear stipulation in the contract by awarding extra payment for supply of sand, and thus outstepped the confines of the contract.

Award in accordance with terms of contract

In *BOC India Ltd.* v. *Bhagwati Oxygen Ltd.*[49] the appellant and another entered into an agreement in order to facilitate the respondent to import components for setting up a 25 ton per day oxygen plant. The appellant and the respondent also entered into a contract for erection, installation and commissioning of the said plant. A tripartite agreement was signed and purchase orders were issued by the respondent to the appellant. The respondent also agreed to pay interest on margin money and reimburse the same. The work was completed and the appellant raised a final invoice. The

49 (2007) 9 SCC 503.

respondent also raised a claim and sought refund from the appellant, when the refund was not made the respondent filed an application under sections 8 and 33 of the 1940 Act for the appointment of an arbitrator in the High Court at Calcutta. An arbitrator was subsequently appointed and he was replaced by another arbitrator who awarded a sum of Rs. 24,92,165 with interest at 12% on the amount in favour of the respondent. The appellant filed an application under section 30 of the 1940 Act to set aside the award in the high court which was dismissed by a single judge. An appeal preferred by the appellant before the division bench of the high court was also dismissed. The appellant approached the Supreme Court.

In the Supreme Court the appellant challenged the impugned judgment of the division bench only with respect to a particular claim 9 which was also allowed by the arbitrator on the ground that the award in question was contrary to the findings of the arbitrator himself, and so the arbitrator had misconducted himself. The main contention of the appellant was that allowing claim 9 in favour of the respondent was contrary to the terms of the award. The Supreme Court did not concur with the above contention of the appellant on the ground that the arbitrator after having duly considered the statement of claim, the terms and conditions of the contract, and the material documents produced by parties, which were available on record had rendered the award and therefore the award was made rightly in favour of the respondent.

Challenge to a non-speaking award

In *Engineers Syndicate* v. *State of Bihar*[50] the Supreme Court had to deal with the scope of challenge of a non-speaking award. In this case the arbitrator had made a non-speaking award in favour of the appellant awarding a consolidated and lump sum amount along with interest at the rate of 12% per annum till the date of realisation. This award was upheld by a sub-judge and was affirmed later by the high court, against which the respondent preferred an appeal to the supreme court which directed the sub-judge to dispose of the objection of the respondent state on merits. Pursuant to this order of the Supreme Court, the sub-judge set aside the award on the ground that the award failed to refer the claims itemwise and this was in turn affirmed by the high court. Against this order the appellant approached the Supreme Court.

The issue before the Supreme Court was on the scope of interference by courts in a non-speaking award. It followed the decision of the constitutional bench in *Raipur Development Authority* v. *Chokhamal Contractors*[51] where it was categorically held that it was not open to the high court to speculate where no reasons are given by the arbitrator, as to what impelled him to arrive

50 (2007) 3 SCC 99.
51 (1989) 2 SCC 721.

at his conclusion. It, therefore, allowed the appeal on the ground that the courts have no power to probe into the mental process by which the arbitrator had reached his conclusion where it was not disclosed by the terms of the award; and the power of the court to set aside the award was held to be restricted to only those grounds set out in section 30.

In the instant case the court did not find any cause to interfere with the judgment of the high court which it found to be well-considered, and dismissed the appeals on several grounds including, *inter alia*, that the high court had decided the matter strictly in accordance with the earlier remand order of the Supreme Court; the high court had not entered into any finding regarding the respective claims of the parties but set aside the award of the umpire only on ground of legal *mala fides*; and the high court conclusively found that the respondent contractor was not responsible for any breach of contract. However, the Supreme Court also appointed a sole arbitrator, with consent of the parties, to enable the parties to agitate before him any claim under the contract which might have survived; and directed the arbitrator to file his award in the Supreme Court itself.

Scope of interference in a non-speaking award

In *Markfed Vanaspati & Allied Industries* v. *Union of India*[52] the respondent Union of India issued tenders for the purchase of certain categories of oils in different quantities, to which the appellant submitted an offer. The offer of the appellant was accepted by the respondent and a tender was issued. However, the appellant failed to supply oil as per the delivery schedule, and consequently the contract was cancelled and the appellant resorted to the *force majeure* clause in the contract. The dispute which arose because of the failure of the appellant was referred to a sole arbitrator who rendered a non-speaking award, which was published and subsequently made rule of the court by a single judge of the high court. Aggrieved by this the appellant preferred FAO (OS) before the division bench of the high court which was also dismissed; and hence the appeal by special leave was preferred before the Supreme Court.

The Supreme Court affirming the judgment of the single judge held that the *force majeure* clause could not be attracted to the facts and circumstances of this case as the ban was on the use of rapeseed oil for manufacturing vanaspati but manufacture of rapeseed oil, as was to be done by the appellant, was not debarred or restricted. Secondly, the Supreme Court after discussing its various earlier decisions held that it was a consistent view taken by it that scope of interference in a non-speaking award was extremely limited; and that courts should not probe into the mental process of the arbitrator and should endeavour to support a non-

52 (2007) 7 SCC 679.

speaking award provided it adhered to the parties' agreement and was not invalidated due to arbitrator's misconduct. In the present case the Supreme Court did not interfere with the award and judgments of the courts below; and thus dismissed the appeal.

XI CONCLUSION

The survey of the various decisions of the Supreme Court rendered in 2007 would show that the court had dealt with various issues arising out of the Arbitration and Conciliation Act, 1996 and the repealed 1940 Act. The court has laid down law on the topics such as what is an arbitration agreement, on mandatory reference for arbitration by courts, appointment of arbitrators under section 11 of the Act, scope of challenging an award under the Act and enforcement of awards. These decisions have made very valuable addition to the existing arbitral jurisprudence. One notable feature of this survey is that the increasing number of cases before the Supreme Court on the appointment of arbitrators has raised some cause for concern because litigation at the initial stage itself would prolong the arbitral process. This would defeat the very purpose of enacting the 1996 Act after the UNCITRAL Model Law. Delay not only defeats justice, but in the field of international commercial arbitration it would chase away foreigners and others who are interested in making India an international arbitration center.