2

ARBITRATION LAW

*A Francis Julian**

I INTRODUCTION

IN THIS era of globalization every systems and branches of law have undergone significant changes. The sudden increase in world trade and commercial transactions has propelled the need for effective dispute settlement mechanisms for speedier settlement of disputes. Many countries including China[1] have modernized/westernized their legal systems to face the challenge of globalization. In that process India enacted the Arbitration and Conciliation Act, 1996 (the Act) which is a post-globalization legislation. The very purpose of the Act modeling on the UNCITRAL Model law was to meet the challenges of settling post-globalization international commercial disputes. Though the Act when enacted appeared less complicated, but in practice many inadequacies have come to the fore. The courts have tried to plug many loopholes and in that process the Act has become a complicated piece of legislation to the delight of lawyers, but to the horror of the litigants.

Every year the survey on arbitration law tries to bring out the developments in the arbitral jurisprudence by analysing the various decisions of the apex court. In the year under survey also the same endeavour has been made. The Supreme Court has made pronouncements in different areas of the arbitral law such as the need for binding arbitration agreement between the parties for mandatorily referring parties to arbitration by judicial authorities and on the power of the courts to grant interim relief under the Act when the arbitration proceedings are pending. Like the previous years, this year also the interpretation of the provision relating to the appointment of arbitrator by the chief justice or the Chief Justice of India under section 11(6) of the Act has made significant addition to the law on arbitration. The dichotomy between part I and part II of the Act is slowly disappearing with the equal treatment sought to be given to domestic and foreign awards by the Supreme Court. It has now been held in *Venture Global Engineering* v. *Satyam Computers Services Ltd. & Anr.*[2] that even a foreign award governed by the New York Convention could be challenged in India under section 34

* Senior Advocate, Supreme Court of India & Visiting Faculty, Indian Law Institute.

1 See, Xiuwen, Zhao & Kloppenberg, Lisa A, "Reforming Chinese Arbitration Law and Practices in the Global Economy", 13 *University of Dayton Law Review* 421 (2006).

2 (2008) 4 SCC 190.

of the Act. These developments have significantly altered the Act from being an effective instrument for early resolution of international commercial disputes and India to become a competitor in emerging commercial litigation service market in the aftermath of globalization. Many countries are currently in the process of reforming their arbitration law. Hong Kong has drafted a user-friendly arbitration law to promote Hong Kong as a regional centre for legal services and dispute resolution.[3] Time has come for India also to reform the arbitration law to make it more litigant-friendly to keep in pace with the post-globalisation needs.

II MANDATORY REFERENCE

Section 8 of the Act incorporates one of the cardinal principles of arbitration, namely, the mandatory duty to refer a dispute for arbitration by the judicial authorities before whom proceedings have been initiated in violation of the arbitration agreement between the parties. Similar duty is cast on the judicial authority under section 45 of the Act in a dispute covered by the New York Convention. Though the mandate under these sections is clear, often problems have arisen before courts and other judicial forums on the true scope and ambit of mandatory reference under sections 8 and 45 of the Act. The judicial authorities cannot refer disputes to arbitration when there is no binding arbitration agreement between the parties to the dispute. Therefore, courts are often called upon to decide whether there is a binding arbitration between the parties. The decisions of the Supreme Court discussed below under three different situations have added valuable input into the existing arbitral jurisprudence in India.

Need for a binding arbitration agreement between parties

Domestic arbitration in partnership dispute

In *Atul Singh and Ors* v. *Sunil Kumar Singh and Ors*[4] the Supreme Court had to decide whether there was a need for a binding arbitration agreement between the parties for invoking section 8 of the Act.

In this case, the appellants filed a suit against the respondent and five others for a declaration that the reconstituted partnership deed was illegal, void, and without jurisdiction. The case of the appellant was that by a deed of partnership a partnership firm was formed with the capital invested by the family members of the respondents. Subsequently, the appellants' grandfather was inducted as a partner in the firm. The partnership was again reconstituted in subsequent years. According to the appellants, the respondents again fraudulently reconstituted a new partnership deed excluding the appellants' grandfather without his knowledge or consent. In

3 See, Consultation Paper, Reform of the Law of Arbitration in Hong Kong and Draft Arbitration Bill, Department of Justice (December, 2007) (http://www.doj.gov.hk/eng/public/pdf/arbitration.pdf).

4 (2008) 2 SCC 602.

the suit one of the respondents took out an application under section 8 of the Act to refer the matter for arbitration on the ground that there was an arbitration clause in the newly reconstituted partnership deed.

The trial court dismissed the application on the ground that civil court alone had the jurisdiction to decide on the legality of the newly reconstituted partnership deed. On a civil revision petition, the high court reversed the above order of the trial court and referred the parties to arbitration. The appellants approached the Supreme Court.

The appellants contended before the Supreme Court that the main relief claimed in the suit for declaration that the newly reconstituted partnership deed was illegal and void could only be granted by a civil court and not by an arbitrator and that there was no binding arbitration agreement between the parties since neither the appellants nor their grandfather was a party to the newly reconstituted partnership agreement. The respondents, however, contended that the appellants, in fact, were claiming rendition of accounts and their share in the partnership business for which they were basing their claim on the earlier partnership deeds to which appellants' grandfather was a party and that the said deed contained an arbitration clause.

The issue before the Supreme Court was whether the relief of declaration that the newly reconstituted partnership deed was illegal or void or the cancellation thereof could be granted only by a civil court and not by an arbitrator when neither the appellants nor their grandfather were parties to the said deed which contained an arbitration agreement.

The Supreme Court held that for invoking section 8 of the Act it was absolutely essential that there should be an arbitration agreement between the parties. The court took note of the fact that neither the appellants' grandfather nor the appellants were parties to the newly reconstituted partnership deed and, therefore, section 8 of the Act would not apply to any dispute concerning that partnership deed and that the dispute could not be referred to arbitration. The court further held that the earlier partnership deed could be relied upon and form the basis of the claim of the appellants only when the newly reconstituted partnership deed was declared as illegal and void and that such a declaration could only be granted by a civil court and not by an arbitrator since appellants' grandfather through whom the appellants derive title was not a party to the said deed.

The Supreme Court also supported its decision on the additional fact that neither the original arbitration agreement nor a duly certified copy of the same was filed along with section 8 application, and therefore there was a clear non-compliance of section 8(2) of the Act, which was a mandatory provision. The appeal was, accordingly, allowed.

Application under section 45 of the Act in an international commercial arbitration

Dispute involving affairs of a company

The issue of mandatory reference for arbitration under section 45 of the Act by the Company Law Board (CLB) in a matter involving an international

commercial arbitration relating to the affairs of a company came up before the Supreme Court in *Sumitomo Corporation* v. *CDC Financial Services (M) Ltd*.[5] In this case there was a joint venture agreement (JV) amongst the appellant, Sumitomo Corporation, (SC), and two of the respondents, Punjab Tractors Pvt. Ltd. (PTL) and Sara Mazda Ltd. (SML). The said agreement also contained an arbitration clause. Subsequently, by another agreement the appellant's shareholding in the respondent SML company was enhanced. This agreement also had an arbitration clause. Dispute arose under the JV regarding the rights of PTL to nominate four directors in the board of SML. Consequently, PTL and some other respondents filed a petition before the CLB under sections 397, 398 and 402 of the Companies Act, 1956 complaining oppression and mismanagement by the appellant in the affairs of SML. Before the CLB the appellant filed a petition under section 45 of the Act to refer the dispute for arbitration which was refused. Aggrieved thereby the appellant filed an appeal before the Delhi High Court which was rejected on the ground that it lacked jurisdiction to hear the appeal. Against the said order the appellant approached the Supreme Court.

The issue before the Supreme Court was whether the dispute could be referred by the CLB for arbitration in view of the nature of grievance raised by the appellant before CLB and whether the order passed by CLB under section 45 of the Act could be challenged before the regular appellate court under section 50 of the Act or before the appellate court under section 10-F read with section 10(1)(a) of the Companies Act.

The Supreme Court held that the proceedings under sections 397 and 398 of the Companies Act always relate to the affairs of a company and that unless there was an express arbitration agreement involving the shareholders and the company, one could not bind the shareholders to the arbitration agreement entered into by their company. The court pointed out that the dispute in the case involved shareholding in SML company which was a dispute pertaining to the management of the said company involving the shareholder's rights and that the said dispute was not part of the JV and, therefore, not covered by the arbitration clause in the JV in which the shareholders of SML were not parties.

On the question which was the appellate court for filing appeal against the order of CLB under section 50 of the Act, the Supreme Court held that unlike explanation to section 47, section 50 of the Act does not use the expression "court" *simpliciter*, but qualifies it by the wording "authorized by law to hear appeals from such order". The Supreme Court held that the "court" mentioned under section 50 of the Act was not the court having jurisdiction if the subject matter was a suit where the jurisdiction is determined in accordance with the provisions of sections 16 to 20 of the Civil Procedure Code, 1908 but was the one "authorized by law". Section 50 of the Act provides for the orders which were the subject-matters of appeals

5 (2008) 4 SCC 91.

and the forum to hear the appeals had to be tested with reference to the appropriate law governing the authority or forum which had passed the order and that in the case of CLB, section 10-F read with section 10(1)(a) of the Companies Act provides that the appellate forum was the high court within the jurisdiction of which the registered office of the company in issue was situated. The court further held that ouster of jurisdiction arose only in case of original jurisdiction and that would not apply to appellate jurisdiction as the one under section 50 of the Act and that appeal being statutory remedy and appellate forum should not be decided with reference to the cause of action as applicable to the original proceedings. The court, therefore, held that the appellate forum would be the high court where the registered office of SML was situated, which was the High Court of Punjab and Haryana and not the High Court of Delhi.

Maritime arbitration

In *M/s. Shakti Bhog Foods Ltd.* v. *Kola Shipping Ltd.*[6] the Supreme Court had to decide an application under section 45 of the Act whether there was an arbitration agreement between the parties and whether the same needed to be filed in the court. In this case the appellant was an exporter and the respondent was a shipping company. They entered into a charter party agreement under which the former was to load its cargo in the vessel belonging to the latter at the port of Kakinada. Under the arbitration clause in the charter party agreement the arbitration was to take place in London under the provisions of the English Arbitration Act, 1996. The full quantity of cargo was not loaded in the ship because the appellant's export contract did not materialize. It, therefore, wanted to unload the cargo already loaded into the vessel. Dispute arose between the parties over the demurrage claim by the respondent. After a series of litigation the appellant filed suit against the respondent in the Kakinada court for damages. In the suit the respondent took out an application under section 45 of the Act for referring the dispute for arbitration which was allowed by the Kakinada court. The appellant challenged this order before the High Court of AP but the same was rejected. It, therefore, approached the Supreme Court.

Before the Supreme Court the appellant contended that there was no arbitration clause in existence between the parties and that in the absence of the filing of the arbitration agreement by the respondent application under section 45 was not maintainable.

The Supreme Court took note of the findings of the lower courts that there was a charter party agreement between the parties and it contained an arbitration clause. The court held that it was clear from section 7 of the Act that the existence of an arbitration agreement could be inferred from a document signed by the parties, or in exchange of letters, telex, telegrams or other means of telecommunication, which provide a record of the

6 (2009) 2 SCC 134.

agreement. The court also pointed out that the appellant had not denied the fact that it had signed the first page of the charter party agreement and that the correspondence between the parties also led to the conclusion that there was indeed a charter party agreement, which existed between the parties. The court also compared section 8 of the Act with section 45 of the Act and highlighted the difference between the two provisions by stating that under section 8 of the Act the applicant has to file the original arbitration agreement whereas under section 45 of the Act there was no such requirement. The appeal was, accordingly, dismissed.

III INTERIM RELIEF UNDER THE ACT

Refusal by the court

The question whether civil court can pass interim orders under section 9 of the Act when already the arbitration proceedings are pending came up for consideration before the Supreme Court in *Gas Authority of India Ltd* v. *Bal Kishen Agarwal Glass Industries Ltd.*[7] In this case there was an agreement between the appellant corporation, Gas Authority of India Ltd (GAIL) and the respondent for the supply of gas to the respondent. The agreement contained an arbitration clause. Before the date of expiry of the agreement, the officials of GAIL inspected the office premises of the respondent and found that gas supply had been tampered with. The appellant, therefore, disconnected the gas supply. The respondent subsequently initiated litigation in different courts but could not succeed in getting the gas supply restored. It finally filed a suit, *inter alia*, praying for directing GAIL to restore the gas supply without demanding any payment or security. In that suit GAIL filed an application under section 8 of the Act for referring the matter for arbitration and an arbitrator was appointed. The trial court directed GAIL to make a fresh proposal to the respondent without imposing any additional terms and conditions. The appellant filed an appeal to the high court challenging the said order which was disposed of by the court by directing GAIL to provide gas supply on certain terms and conditions prescribed by it. Against the said order GAIL approached the Supreme Court.

The appellant contended before the Supreme Court that there was no existing contract between the parties and, therefore, the suit was not maintainable and that since the matter was already pending before the arbitrator, the civil court should not have passed any order and the high court was not justified in practically affirming the order of the trial court except variation of certain conditions. The respondent contended that the appellant had backed out of the proposal after suggesting unreasonable terms of reconnection and due to that it had no option but to institute a civil suit.

The Supreme Court after taking note of the fact that an arbitrator had already been appointed held that since the matter was already pending before

7 (2008) 8 SCC 161.

the arbitrator, he could pass interim orders under section 17 of the Act and the parties could approach him for interim directions.

No interim relief under section 11 (6)

In *Shristi Infrastructure Development Corporation Ltd.* v. *Sunway Construction SDN BHD*[8] the question arose before the Supreme Court in an international commercial arbitration as to whether the Chief Justice of India could pass interim orders while entertaining an application under section 11 (6) of the Act for appointment of an arbitrator.

In this case the petitioner corporation entered into a contract with the respondent-company which is a Malaysian company for construction of a portion of national highway project. The agreement contained an arbitration clause. Dispute arose between the parties in respect of execution of the contract. The petitioner approached the Chief Justice of India for appointment of an arbitrator under section 11 (6) of the Act. It also moved an application for interim relief. The issue before the Supreme Court was whether interim relief could be granted in the proceedings filed under section 11(6) read with section 11(12) of the Act.

The designated judge of the Supreme Court appointed a sole arbitrator on the basis of mutual agreement between the parties. One of the questions that arose before the Supreme Court was whether the Chief Justice of India was a court within the meaning of section 9 of the Act while entertaining an application under section 11(6) of the Act. The judge, however, without deciding the issue whether the Chief Justice of India while entertaining an application under section 11 (6) could pass interim orders granted the petitioner the liberty to approach the arbitrator for seeking the interim measure or protection as warranted by the facts and circumstances in respect of subject-matter of the dispute in terms of section 17 of the Act.

IV APPOINTMENT OF ARBITRATORS

Existence of live arbitrable issue

Waiver and abandonment

In *Tata Industries* v. *Grasim Industries*[9] the issue before the Supreme Court was whether there was a live arbitrable issue between the parties which could be adjudicated by the arbitration tribunal or the claim had been waived or abandoned by the claimant. In this case a shareholders' agreement was entered into between a company under the Tata Group of Industries (Tatas) and a company under the Birla Group of Industries (Birlas) to provide telecommunication services through a single legal entity, IDEA Cellular Limited (IDEA). The said agreement contained, *inter alia*, a confidentiality clause. The Tatas served a termination notice on the Birlas alleging breach

8 (2008) 5 SCC 222.
9 (2008) 10 SCC 187.

of the shareholders agreement by them. The Tatas again served a second termination notice claiming that there was a breach of confidentiality clause by the Birlas. Meanwhile the Tatas received an offer from one Global Communication Services for purchasing its stake in IDEA and hence, they made an offer for the sale of its shareholdings under the 'right of first refusal' clause to the Birlas. The offer notice expressly stated that it was "without prejudice" to both termination notices. The Birlas accepted the offer.

The Tatas, thereafter, approached chief justice of the high court under section 11(6) of the Act for appointment of an arbitrator. However, this application was opposed by the Birlas on the ground that it was an international commercial arbitration and, therefore, the Chief Justice of India alone had powers to constitute the arbitral tribunal under section 11(12). Therefore, the Tatas withdrew the said application from the high court and filed it before the Chief Justice of India.

The Tatas contended that the appointment of arbitral tribunal was necessary for resolving the live dispute between the parties. The Birlas contended that there was no live issue remaining pending between the parties once the shares were sold to the Birlas and that in any event the Tatas had waived and abandoned their claims.

The issue before the designated judge was whether there was a live arbitrable issue or the same had been abandoned or waived by the Tatas when they sold their shares to the Birlas. The judge relied on the principles laid down by the seven judge bench decision of the Supreme Court in *SBP& Co.* v. *Patel Engineering Ltd*[10] (*SBP*) and the subsequent decision in *Shree Ram Mills Ltd* v. *United Premiers (P) Ltd*[11] for the purpose of determining the scope of the jurisdiction of the judge in an enquiry under section 11 (6) and held that the judge had jurisdiction to decide whether there was an arbitration agreement between the parties, and that the claim was not barred by limitation. The judge, therefore, concluded that the only issue remained to be determined was whether there was a live issue in the sense whether the parties had already concluded or recorded their satisfaction of their disputes or whether the parties were still in contest regarding certain issues. The designated judge of the Supreme Court held that when the offer for the purchase of share was accepted by the Birlas, the issue as to whether there was a breach of confidentiality clause on their part was very much alive and that when the Tatas had offered to send two draft share purchase agreements for the sale they had again reiterated that the offer and the acceptance by the Birlas was without prejudice to the notices of termination. The judge also held that the issue could not be held to be dead for the simple reason that even in the subsequent agreements there was a "without prejudice" clause and that too despite the vehement claims and refusals of those claims on the part

10 (2005) 8 SCC 618.
11 (2007) 4 SCC 599.

of the parties. On these findings the designated judge of the Supreme Court allowed the application and appointed an arbitrator.

Valid discharge

In *National Insurance Co. Ltd.* v. *M/s. Boghara Polyfab. Pvt. Ltd.*[12] the appellant and respondent entered into an insurance contract by which the former insured the goods of the latter. The contract contained an arbitration clause. When the insured goods were damaged the respondent lodged a claim under the insurance contract and the appellant paid less than the amount claimed by the respondent. It raised a dispute and filed an application under section 11 (6) for the appointment of arbitrator. The appellant opposed the application on the ground that the respondent had already accepted the payment and, therefore, its liability had been discharged to which the respondent took the stand that the said discharge was vitiated by fraud, undue influence and coercion. The designated judge of the high court appointed an arbitrator. Against the said appointment the appellant approached the Supreme Court.

The issue before the Supreme Court was whether in an application under section 11 (6) the designated judge had jurisdiction to decide the existence of a live claim when one party claimed a valid discharge and the other party disputed the same on the ground of fraud and undue influence.

The Supreme Court relied on the principles laid down in *SBP* and formulated the following principles:

> 17. Where the intervention of the court is sought for appointment of an Arbitral Tribunal under section 11, the duty of the Chief Justice or his designate is defined in SBP & Co. This Court identified and segregated the preliminary issues that may arise for consideration in an application under section 11 of the Act into three categories, that is (i) issues which the Chief Justice or his Designate is bound to decide; (ii) issues which he can also decide, that is issues which he may choose to decide; and (iii) issues which should be left to the Arbitral Tribunal to decide.
>
> 17.1) The issues (first category) which Chief Justice/his designate will have to decide are:
>
> (a) Whether the party making the application has approached the appropriate High Court.
>
> (b) Whether there is an arbitration agreement and whether the party who has applied under section 11 of the Act, is a party to such an agreement.
>
> 17.2) The issues (second category) which the Chief Justice/his designate may choose to decide (or leave them to the decision of the arbitral tribunal) are:

12 (2009) 1 SCC 267.

(a) Whether the claim is a dead (long barred) claim or a live claim.

(b) Whether the parties have concluded the contract/ transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection.

17.3) The issues (third category) which the Chief Justice/his designate should leave exclusively to the arbitral tribunal are :

(i) Whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration).

(ii) Merits of any claim involved in the arbitration.

It is clear from the scheme of the Act as explained by this Court in SBP & Co., that in regard to issues falling under the second category, if raised in any application under section 11 of the Act, the Chief Justice/his designate may decide them, if necessary by taking evidence. Alternatively, he may leave those issues open with a direction to the Arbitral Tribunal to decide the same. If the Chief Justice or his Designate chooses to examine the issue and decides it, the Arbitral Tribunal cannot re-examine the same issue. The Chief Justice/his designate will, in choosing whether he will decide such issue or leave it to the Arbitral Tribunal, be guided by the object of the Act (that is expediting the arbitration process with minimum judicial intervention). Where allegations of forgery/fabrication are made in regard to the document recording discharge of contract by full and final settlement, it would be appropriate if the Chief Justice/ his designate decides the issue."

18. What is however clear is when a respondent contends that the dispute is not arbitrable on account of discharge of the contract under a settlement agreement or discharge voucher or no-claim certificate, and the claimant contends that it was obtained by fraud, coercion or under influence, the issue will have to be decided either by the Chief Justice/his designate in the proceedings under section 11 of the Act or by the arbitral Tribunal as directed by the order under section 11 of the Act. A claim for arbitration cannot be rejected merely or solely on the ground that a settlement agreement or discharge voucher had been executed by the claimant, if its validity is disputed by the claimant.

The Supreme Court held that an arbitration agreement contained in a contract cannot be invoked to seek reference of any dispute to arbitration when the contract was discharged on account of performance, or accord and satisfaction, mutual agreement where the obligations under the contract were fully performed or where the parties by mutual agreement accepted the

performance or where the parties absolved each other from performance. On the basis of the said principles the Supreme Court further held:

> The Chief Justice/his designate exercising jurisdiction under section 11 of the Act will consider whether there was really accord and satisfaction or discharge of contract by performance. If the answer is in the affirmative, he will refuse to refer the dispute to arbitration. On the other hand, if the Chief Justice/his designate comes to the conclusion that the full and final settlement receipt or discharge voucher was the result of any fraud/coercion/undue influence, he will have to hold that there was no discharge of the contract and consequently refer the dispute to arbitration. Alternatively, where the Chief Justice/his designate is satisfied prima facie that the discharge voucher was not issued voluntarily and the claimant was under some compulsion or coercion, and that the matter deserved detailed consideration, he may instead of deciding the issue himself, refer the matter to the arbitral tribunal with a specific direction that the said question should be decided in the first instance.

The court, accordingly, upheld the appointment of the arbitrator on the basis of its finding that *prima facie* there was no accord or satisfaction of the dispute and left it to the parties to raise the issue before the arbitrator and establish the same by letting in evidence for the arbitrator to decide.

Court's power to appoint arbitrator outside arbitration agreement

In *Northern Railways* v. *Patel Engineering Co. Ltd.*[13] a three judge bench of the Supreme Court had to settle the confusion caused by its decisions in *Ace Pipeline Contracts (P) Ltd.* v. *Bharat Petroleum Corporation Ltd*[14] (*Ace Pipeline*) and *Union of India* v. *Bharat Battery Mfg. Co. (P) Ltd*[15] (*Bharat Battery*) in the context of appointment of arbitrator under section 11 (6) of the Act and under section 11 (8) read with other provisions of the Act. The confusion was caused mainly because the apex court in *Bharat Battery* without taking note of certain observations made in the *Ace Pipeline* stated that while making an appointment of an arbitrator under section 11 (6) of the Act the power to appoint the arbitrator in terms of the agreement ceases, while in *Ace Pipeline* it was observed that only in exceptional cases the chief justice can appoint an arbitrator who was not named in the arbitration agreement

The issue before the Supreme Court was whether the chief justice is bound to appoint the arbitrator named in the agreement or any other person having regard to the parameters prescribed under section 11(8) of the Act.

13 (2008) 10 SCC 128.
14 (2007) 8 SCC 684.
15 (2007) 5 SCC 304.

The Supreme Court held that section 11(8) has to be conjointly read with section 11(6) of the Act implying that the chief justice or the person or an institution designated by him in appointing an arbitrator shall have "due regard" to the two cumulative conditions relating to qualifications and other considerations as are likely to secure the appointment of an independent and impartial arbitrator. It was pointed out that section 11 of the Act shows that the emphasis is on the terms of the agreement being adhered to and/or given effect as closely as possible and that the chief justice must first ensure that the remedies provided for are exhausted. The court clarified that appointment of an arbitrator or arbitrators named in the arbitration agreement is not a must, but while making the appointment the twin requirements of sub-section (8) of section 11 of the Act, have to be kept in view, namely, due regard to be given to the qualifications required by the agreement and other considerations as are likely to secure the appointment of an independent and impartial arbitrator.

International commercial arbitration

Indian court's jurisdiction once parties had approached a foreign court

In international commercial arbitrations if the venue for arbitration is in India there would be no difficulty in moving an application under section 11(6) of the Act. But in many instances the venue would be outside India. In such cases the question would arise whether an application under section 11(6) for appointment of the arbitral tribunal is maintainable in India under the Act. In *Shivnath Rai Harnarani* v. *Abdul Gaffar Abdul Rehuman*[16] the question arose before the Supreme Court whether in an international commercial arbitration the parties could approach the Chief Justice of India under section 11 (6) of the Act after the arbitration had already concluded in a foreign country and the award passed by the arbitrator had been set aside by the foreign court.

In this case the parties entered into two contracts in which subsequently a clause for settlement of disputes through Indian Arbitration Council, Delhi was inserted. A dispute arose and the matter was referred to the common agent of the parties before whom they arrived at a settlement which provided that any dispute would be adjudicated solely by the said agent and the venue would be Singapore where the agent was residing or alternatively in UK. The agreement was governed by Indian law and UNCITRAL rules.

Pursuant to the aforesaid agreement, the appellant submitted a claim before the arbitrator. However, the respondents did not participate in the arbitration proceedings. The arbitrator proceeded with the arbitration at Singapore and passed the award in favour of the appellant. The respondents challenged the said award before the High Court of Republic of Singapore,

16 (2008) 5 SCC 135.

inter alia, on the ground of violation of principles of natural justice. The High Court of Singapore set aside the award with a liberty to the parties to apply for fresh arbitration.

One of the parties filed an application before the Chief Justice of India under section 11(6) of the Act for the appointment of an arbitrator contending that agreement was governed by Indian law. The respondent contended that section 11(6) was not applicable inasmuch as the award was passed by the arbitrator at Singapore, that the award had been set aside by the High Court of Singapore with liberty to apply for fresh arbitration and, that therefore, the appropriate court to entertain the application for the appointment of arbitrator was the court at Singapore.

The designated judge of the Supreme Court referred to section 42 of the Act which provides that where with respect to an arbitration agreement any application had been made in a court, that court alone would have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings should be made in that court and in no other. The judge distinguished the instant case from the earlier decision of the Supreme Court in *National Agricultural Marketing Federation India Ltd.* v. *Grains Trading Ltd*[17] and held that since as per the facts of the case, the arbitrator passed the award at Singapore, and the same was set aside by the High Court of Singapore, the court at Singapore alone would have jurisdiction over the arbitral proceedings. Therefore, the judge directed that all applications arising out of that agreement should be made in that court and in no other.

When governing law is a foreign law

In *INDTEL Technical Services Pvt. Ltd.* v. *W.S. Atkins PLC*[18] a memorandum of understanding between the parties provided that the law governing the contract would be that of England & Wales. However, the memorandum was silent on the venue and the law governing the arbitration. When dispute arose one of the parties approached the Chief Justice of India by way of an application under section 11(6) for appointment of an arbitrator. The opposite party raised an objection on the applicability of the Indian Act. The Supreme Court held that even though in the normal circumstances when the agreement between the parties was silent on the law governing the arbitration proceedings, the law which governs the contract would be the applicable law. However, the judge took note of the decision of the Supreme Court in *Bhatia International* v. *Bulk Trading S.A. and Anr*[19] (*Bhatia International*) and held that applying the above principle even in the case of an international commercial arbitration when the seat of the arbitration is India part I of the Act would apply and that, therefore, the application for

17 (2007) 5 SCC 692.
18 (2008) 10 SCC 308.
19 (2002) 4 SCC 105.

appointment of an arbitrator was maintainable. The judge, thus, appointed an arbitrator.

Arbitration Act and Electricity Act, 2003

In *Gujarat Urja Vikas Nigam Ltd* v. *Essar Power Ltd*[20] a question arose before the Supreme Court whether a section 11 application for appointment of arbitrator under the Act by the chief justice was maintainable to resolve a dispute between the licensee and an electricity generating company in the light of the specific statutory provision contained in the Electricity Act, 2003.

In this case the appellant and respondent had entered into a power purchase agreement which contained an arbitration clause to resolve their disputes through arbitration. Subsequently, the Electricity Act, 2003 came into force which empowered the state commission constituted under it, *inter alia*, to "adjudicate upon the disputes between the licensees and generating companies and to refer any disputes for arbitration"[21]. The said Act also made its provisions having overriding effect over other laws.[22] When dispute arose between the parties which could not be settled amicably, the respondent licensee filed a petition under section 11 (6) for the appointment of an arbitrator. The appellant, however, approached the Gujarat Electricity Commission for the resolution of the dispute under the Electricity Act. The designate judge of the High Court of Gujarat appointed a sole arbitrator. The appellant, therefore, approached the Supreme Court challenging the said order.

The main issue before the Supreme Court was whether in the application under section 11 (6) an arbitrator could be appointed when under the Electricity Act, 2003 only the state commission is given the power to decide the disputes between the parties or to appoint an arbitrator.

The Supreme Court after interpreting the provisions of the Electricity Act and applying the *Mimansa* rules of statutory interpretation held that the provisions of the Electricity Act had overriding effect over the Arbitration Act. The court pointed out that the Electricity Act being a special Act the arbitration provisions in the said Act would prevail over the Arbitration Act which is a general Act. The court also held that under the Electricity Act only the state commission had the power to either decide the dispute by itself or to refer the dispute to arbitration by the arbitrator appointed by it. The court, therefore, set aside the order appointing the arbitrator by the high court and left the matter to be decided either by the state commission or the arbitrator appointed by it.

20 (2008) 4 SCC 755.

21 S. 86 (1) (f).

22 S. 174: Act to have overriding effect:-Save as otherwise provided in Section 173, the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.

Remedy against an order passed under section 11(6) of the Act in a pre-SBP case

In *Punjab Agro Industries Corpn. Ltd.* v. *Kewal Singh Dhillon*[23] the Supreme Court had to clarify in a pre-*SBP* case the remedy available to a party who wanted to challenge an order passed by a principal civil judge in an application for appointment of arbitrator under section 11(6) of the Act. The confusion was created because in *SBP* a constitutional bench of the Supreme Court had held that the chief justice has to designate only a judge of the high court to discharge his function under section 11 of the Act and that the order passed by the designated judge was a judicial order and was final. However, before the *SBP* decision the chief justice of the high court had designated a principal civil judge as the designated judge.

In this case, the principal civil judge before whom an application under section 11(6) of the Act was filed had dismissed the application for appointment of arbitrator. The appellant in this case challenged the order of the principal civil judge by way of a writ petition under article 227 of the Constitution before the high court. The high court dismissed the said writ petition on the ground that in view of the decision in *SBP* the order of the civil judge was a judicial order which was not amenable to be challenged under article 227 of the Constitution. Against the said order the appellant approached the Supreme Court by way of special leave petition.

The Supreme Court, however, reiterated the principles laid down in the decision in *SBP* that the order passed under section 11(6) of the Act was a judicial order and that the said order could be challenged only by way of a special leave petition before the Supreme Court. The court held that the remedy available to the aggrieved party against an order passed by the principal civil judge or a district judge in a pre-*SBP* case was to challenge the said order by way of a writ petition under article 227 of the Constitution.

Post-SBP and need to decide jurisdictional issues

In *Ludhiana Improvement Trust* v. *Today Homes*[24] the designated judge of the high court in a post-SBP application under section 11(6) of the Act following the decision in *Konkan Railway Corporation Ltd.* v. *Rani Constructions (P) Ltd*[25] (*Konkan Railway*) appointed an arbitrator while leaving the issue whether there was a valid arbitration agreement between the parties to be decided by the arbitrator. The decision in *Konkan Railways* had been overruled by the Supreme Court in *SBP*. The Supreme Court remitted the application under section 11 (6) of the Act for appointment of the arbitrator for fresh consideration by the high court for the purpose of deciding the question whether there was a valid arbitration agreement between the parties.

23 (2008) 10 SCC 128.
24 (2008) 10 SCC 715.
25 (2002) 2 SCC 388.

Chief justice's power to appoint an arbitrator when arbitration agreement provides for disputes to be decided by arbitration tribunal constituted under the 1940 Act

In *Mahipatlal Patel* v. *Chief Engineer*[26] the question before the Supreme Court was whether an arbitrator could be appointed under section 11(6) of the Act when the arbitration clause in the agreement provides for the dispute to be decided by an arbitration tribunal constituted under the Arbitration Act, 1940.

In this case, the arbitration clause in the agreement entered into between the parties stated that all disputes arising out of the agreement should be referred to arbitration by the arbitration tribunal constituted by the state government consisting of three members to be appointed as per the procedure set out in the agreement. In an application under section 11(6) of the Act for the appointment of an arbitrator the chief justice of the high court passed an order that under section 85 of the Act the Arbitration Act of 1940, had been repealed, but the said repeal did not affect the jurisdiction of the arbitration tribunal constituted by the state government to decide the dispute and, therefore, disallowed the application for appointment of arbitrator, and consequently directed the parties to approach the said arbitration tribunal constituted by the state government. Aggrieved thereby, the petitioner has approached the Supreme Court by way of special leave petition.

The issue before the Supreme Court was whether by virtue of section 85 of the Act the arbitral tribunal constituted by the state government could still decide the dispute. The court took note of the fact that the arbitration tribunal constituted by the state government after the repeal of the 1940 Act ceased to exist and, therefore, the dispute could not be referred to the said tribunal which was not in existence in the eye of law. It, therefore, remitted the matter to the designated judge of the high court to decide the application under section 11(6) of the Act for the appointment of an arbitrator.

V APPLICABILITY OF SECTION 14 OF LIMITATION ACT TO ARBITRATION

In *Gulbarga University* v. *Mallikarjun S. Kodagali & Anr*[27] the question raised before the Supreme Court was whether section 14 of the Limitation Act, 1963 was applicable to arbitration proceedings. Section 14 states that if a party had, in good faith, prosecuted a matter in a court which had no jurisdiction then the said period is excluded for the purpose of calculating the period of limitation under the Limitation Act. However, section 29 (2) of the Limitation Act provides that if any other period has been prescribed under a special enactment for moving an application or otherwise then that period of limitation would govern the proceedings under that Act, and not the provisions of the Limitation Act. Section 43 of the Act

26 (2008) 12 SCC 64.
27 (2008) 13 SCC 539.

clearly states that the Limitation Act, shall apply to arbitration as it applies to the proceedings in the court. Under section 34 (3) of the Act a period of three months has been prescribed for setting aside the award on any of the grounds mentioned in sub-section (2) of section 34 with another 30 days period for condonation of delay. However, in the Act there is no such provision similar to section 14 of the Limitation Act. Therefore, the question before the Supreme Court was whether by virtue of sub-section (2) of section 29 of the Limitation Act, section 14 of the said Act is applicable in arbitration matters or not.

The Supreme Court referring to its earlier decisions in *Union of India* v. *M/s. Popular Constructions Company*[28] and *National Aluminium Co. Ltd.* v. *Pressteel & Fabrications (P) Ltd*,[29] held that the Act did not expressly exclude the applicability of section 14 of the Limitation Act and that the prohibitory provision had to be construed strictly. The court pointed out that in the present case under section 34 of the Act by virtue of sub-section (3) only the application for filing and setting aside the award a period has been prescribed as three months and delay can be condoned to the extent of 30 days and to that extent the applicability of section 5 of the Limitation Act would stand excluded, but there was no provision in the Act which excluded operation of section 14 of the Limitation Act. The court further said that if two Acts could be read harmoniously without doing violation to the words used therein, then there was no prohibition in doing so. The Supreme Court, thus, harmoniously interpreted the provisions of both the statutes and reached the conclusion that section 29 (2) of the Limitation Act was applicable only where there was a provision subsisting which prescribed the period of limitation and that it did not prohibit the application of section 14 in the light of the wordings of section 43 of the Arbitration and Conciliation Act, 1996.

The identical question which arose in *Consolidated Engineering Enterprises* v. *Principal Secretary, Irrigation Department & Ors.*[30] before another bench of the Supreme Court, it reiterated the above principle.

VI CHALLENGE TO AWARDS

Refusal to interfere

In *ONGC* v. *Atwood Oceanic International*[31] the appellant entered into an agreement with the respondent for carrying out drilling operations in offshore waters of India and for rendering other related services. The agreement contained an arbitration clause. At the time, when the agreement was entered into, the provisions of the Income Tax Act, 1961 were not applicable beyond the territorial waters of India, i.e., beyond the limit of 12 nautical miles. On 31.3.1983, the Government of India issued a notification

28 (2001) 8 SCC 470.
29 (2004) 1 SCC 540.
30 (2008) 7 SCC 169.
31 (2008) 11 SCC 267.

under the Territorial Waters, Continental Shelf, Exclusive Economic Zone, and other Maritime Zones Act, 1976 extending the provisions of the 1961 Act to the Continental Shelf and Exclusive Economic Zone of India w.e.f. 1.4.1983 with some modifications. The respondent, thereafter, forwarded an invoice to the appellant claiming that pursuant to the notification dated 31.3.1983, issued by the Government of India, there was a change in the Indian income tax law which had resulted in the employees of the respondent becoming liable for Indian income-tax and consequently, under the employment contract, the respondent had incurred additional liability for payment of personal income-tax which the respondent claimed under the terms of contract had to be reimbursed by the appellant. The appellant refuted that claim and took up the stand that it was not liable to reimburse the personal tax dues due to change in law by way of extension of the tax jurisdiction to offshore areas. The dispute was referred to arbitration. The arbitrator's award was in favour of the respondent, which was upheld by the high court.

The Supreme Court held that the jurisdiction of the Supreme Court to interfere in an award in such matters was very limited and dismissed the appeal. It also held that since the tax law had been changed and the respondent had paid tax on behalf of its employees, cost of contract had increased and to that extent, the respondent was entitled to reimbursement of the same from the appellant under the terms of contract.

Setting aside arbitral awards under section 34: Ignoring the terms of contract

The Supreme Court in *Delhi Development Authority* v. *R.S. Sharma & Co., New Delhi*[32] has decided on the scope of section 34 of the Act by which the court could set aside an arbitral award. This case is significant because it comprehensively lays down the unenumerated grounds for setting aside arbitral awards and determines the scope of section 34(2) of the Act.

The appellant, Delhi Development Authority (DDA) had contracted with the respondent, R.S. Sharma "for carrying the out work for development of land". The agreement contained an arbitration clause. Disputes arose between the respondent and the DDA, *inter alia*, on the liability of DDA to compensate the respondent for the extra material procured from a particular place. The dispute was referred to an arbitrator, who passed the award in July 1992 in favour of the respondent. The respondent filed a suit in the same year for making the award a rule of the court. A single judge of the Delhi High Court set aside the award with respect to claim nos. 1 to 3 as well as additional claim nos. 1 to 3 and made the remaining part of the award a rule of the court and awarded interest @ 12% p.a. from the date of the decree till the date of payment by DDA. Aggrieved by the judgment of the single judge, the company filed an appeal before the division bench which set aside the

32 2008 (13) SCC 80.

order to the extent it dealt with claim nos. 1 to 3 and also awarded interest @ 12% p.a. from the date of decree till the date of payment on the entire amount as awarded by the arbitrator. Aggrieved by the said judgment, the appeal was filed by DDA before the Supreme Court wherein it was contended that the arbitrator went beyond the scope of the contract by ignoring clause 3.16 of the contract. By doing so, the award suffered from an error apparent on the face of the record and was liable to be set aside in terms of section 34(2) of the Act.

The Supreme Court in its judgment quoted extensively from its previous decisions and decided the question as to whether the award was liable to be set aside for ignoring a term of the contract.[33] The court held that DDA had merely made it necessary for the claimant to satisfy the terms and conditions contained in the tender and the letter and had not ordered the claimant to procure stones from a particular place. The cost of work under the contract was irrespective of the source of the stone. Further, the arbitrator had not granted any reason as to why he accepted the claim as to extra cartage for the stones procured from the particular place and had failed to consider clause 3.16 of the contract. The court concluded that the award suffered from an error apparent on the face of the record and was contrary to the contract between the parties, and set aside the judgment of the division bench.

Challenge to foreign award under section 34

The right to challenge a foreign arbitral award under section 34 of the Act came up for consideration before the Supreme Court in *Venture Global Engineering* v. *Satyam Computers Services Ltd. & Anr.*[34] The appellant, Venture Global Engineering (VGE), was a company incorporated in USA having its office in Michigan. Respondent no.1 Satyam Computer Services Limited (SCSL) was a company registered in India having its office at Secunderabad. They entered into a joint venture agreement to constitute a new company named Satyam Venture Engineering Services Ltd. (SVES), the respondent no. 2 in which both the appellant and respondent no. 1 held equal equity shareholding. Another shareholders agreement (SHA) was also executed between the parties on the same day which provided that their disputes which could not be resolved amicably should be referred to arbitration. When certain disputes arose between the parties, SCSL filed a request for arbitration before the London Court of International Arbitration which appointed a sole arbitrator, who passed an award in its favour. It filed a petition before the United States District Court, Eastern District Court of Michigan (US Court) to recognize and enforce the award. VGE objected to the enforcement on the ground that it was in violation of Indian laws and public policy. It then filed a suit before the Ist Additional Chief Judge, City Civil Court, Secunderabad seeking a declaration to set aside the award and

33 Cls. 3.16 in this case.
34 (2008) 4 SCC 190.

permanent injunction on the transfer of shares under the award. The district court passed an ad-interim *ex parte* order of injunction, *inter alia*, restraining SCSL from seeking or effecting the transfer of shares. Challenging the said order, SCSL filed an appeal before the High Court of Andhra Pradesh. It admitted SCSL's appeal and directed interim suspension of the order of the district court but made it clear that SCSL would not effect the transfer of shares until further orders. SCSL filed a petition for rejection of the plaint which the trial court allowed. VGE filed an appeal before the high court against the said order. It dismissed the appeal holding that the award cannot be challenged even if it is against the public policy and in contravention of statutory provisions. Against the said order, VGE preferred appeal by way of special leave petition.

It was contended before the Supreme Court on behalf of VGE that the apex court had already held in *Bhatia International* that part I of the Act applied to foreign awards, that it could be challenged in Indian courts and that the enforcement was in violation of Indian laws and public policy. SCSL contended that in view of section 44 of the Act and the terms of the agreement, no suit or proceedings would lie in India to set aside the award, which is a foreign award, and that no application under section 34 of the Act would lie.

The Supreme Court following its decision in *Bhatia International* held that part I of the Act was applicable to the award in question even though it was a foreign award the court observed as follows:[35]

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

35 *Id.* at 207-08.

The court further justified its decision on the ground that the effort of SCSL was to avoid enforcement of the award under section 48 of the Act which would have given the VGE the benefit of the Indian public policy rule and for avoiding the jurisdiction of the courts in India though the award had an intimate and close nexus to India in view of the fact that, (a) the company was situated in India; (b) the transfer of the "ownership interests" should be made in India under the laws of India; and (c) all the steps necessary had to be taken in India before the ownership stood transferred. The court further held that, therefore, if SCSL was not prepared to enforce the award in spite of this intimate and close nexus to India and its laws, the appellant would certainly be not deprived of the right to challenge the award in Indian courts. The court also drew support from the fact that a specific clause in the SHA also prohibited the parties from enforcing the award in a foreign court. The Supreme Court, consequently, made clear that if it was found that the court in which the appellant had filed a petition challenging the award was not competent and having jurisdiction, the same should be transferred to the appropriate court.

VII CONCLUSION

The survey of the apex court decisions of the year 2008 on the arbitration law shows that the decisions have made significant additions to the existing law on arbitration. These developments are in the area of mandatory reference to arbitration, the power of court to give interim relief, applicability of Limitation Act to arbitration proceedings and the scope of challenge to both domestic and international awards. In spite of these developments the arbitration law as it currently exists needs review to deal with the requirements of the fast changing post-globalisation era.