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ARBITRATION LAW

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I INTRODUCTION

ARBITRATION HAS traditionally been seen as a 'reference to the decision of one or more persons', 'of a particular matter in difference between the parties.'[1] It is a reference of differences, 'for determination after hearing both sides, in a judicial manner by a person or persons other than a court of competent jurisdiction.'[2] In international law, the recognition of the institution of arbitration dates back to the Jay Treaty of 1794 between the United States of America and Great Britain.[3]

The adjudication of disputes by a private person chosen by both the parties has had a long acceptability in the Indian society,[4] but such adjudication gained legal sanctity only under the Regulations promulgated by the East India Company[5] and, thereafter, under the Arbitration Act, 1899 and the Code of Civil Procedure, 1908. The Arbitration Act, 1940 was the first comprehensive legislation that provided for both the substantive as well as the procedural law of arbitration. The 1940 Act, though well intentioned, proved ineffective in its actual operation and implementation.[6]

In 1985, the UN General Assembly adopted the UNCITRAL model law and recommended the member nations to enact suitable legislation based on the model law. Several countries adopted, with or without modification, the model law, largely on account of a phenomenal increase in trans-boundary transactions due to the advent of the newer and more advanced means of communication and information technology (IT). The Arbitration and

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1 *Collinjs* v. *Collins*, 28 LJ Ch 186 (per Romily MR).

2 4 *Halsbury Laws of England* (4th ed.,2004).

3 See J.G. Starke, *Introduction to International Law* 487 (10th ed.,1989).

4 See *F.C.I.* v. *Joginderpal Mohinderpal* (1989) 2 SCC 347 at 352 (**'**In India, there is a long history of arbitration ... Arbitration has a tradition; it has a purpose. ... Hindus recognised decisions of panchayats or bodies consisting of wealthy, influential and elderly men of the community and entrusted them with the power of management of their religious and social functions....').

5 See, for instance, Bengal Regulation I of 1772, Bengal Regulation I of 1781, Bombay Regulation 1 of 1779, Madras Regulation I of 1802, *etc*.

6 See *Guru Nanak Foundation* v. *Rattan Singh and Sons* (1981) 4 SCC 634 at 635.

Conciliation Act, 1996 (26 of 1996) is the Indian adaptation of the model law. It has a rather chequered history, considering that it was passed after promulgation of three Ordinances on the subject.[7] It is intended to provide for greater autonomy in the arbitral process and limit judicial intervention to a narrow circumference than the position obtaining under the previous legal regime.[8]

In the context of the year under survey, it is important to recall this historical backdrop as a large number of decisions arose under the 1940 Act and, in many instances, influenced the interpretation of the 1996 Act.

II ARBITRATION AGREEMENT

Section 10 of the Contract Act, 1872 defines which agreements are contracts. It provides that "all agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void." It also declares that the provisions of the Act shall not affect any law in force "by which any contract is required to be made in writing." This provision expressly recognises the operation of section 2(b) read with section 7(3) of the 1996 Act which requires that "an arbitration agreement shall be in writing." Section 28 of the Contract Act declares that agreements in restraint of legal proceedings are void and it provides, *inter alia*, that every agreement "by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights," is void to that extent. However, exception 1 thereto saves contracts "to refer to arbitration disputes that may arise." Since only "a contract, by which two or more persons agree that any dispute which may arise

7 The President, on 16th January 1996, promulgated the Arbitration and Conciliation Ordinance, 1996 (8 of 1996). This was made effective from 25th January 1996. The Ordinance replaced the Arbitration Act, 1940 with immediate effect and brought into force a new regime of law relating to arbitration on the lines proposed in the Arbitration and Conciliation Bill, 1995. The Ordinance could not, however, be replaced by an Act of Parliament. The second Ordinance, namely the Arbitration and Conciliation (Second) Ordinance, 1996 (11 of 1996) came in its place on 26th March 1996 which too could not be replaced by an Act. Thereafter, the third Ordinance, namely the Arbitration and Conciliation (Third) Ordinance, 1996 (29 of 1996) was brought into force on 26th June 1996. The Arbitration and Conciliation Bill, 1996, was finally passed by both Houses of Parliament and received the President's assent on 16th August 1996.

8 *Konkan Railway Corporation Ltd.* v. *Mehul Construction* (2000) 7 SCC 201. ("A bare comparison of different provisions of the Arbitration Act of 1940 with the provisions of the Arbitration and Conciliation Act, 1996 would unequivocally indicate that 1996 *Act limits the intervention of Court with an arbitral process to the minimum* and it is certainly not the legislative intent that each and every order passed by an authority under the Act would be a subject matter of judicial scrutiny by Courts of Law….").

between them in respect of any subject or class of subjects shall be referred to arbitration," it is important to determine what constitutes an "arbitration agreement."

Section 2(b) of the 1996 Act defines an "arbitration agreement" to mean "an agreement referred to in section 7." Accordingly, in terms of section 7 of the Act, which incorporates Article 7 of the UNCITRAL Model Law, an arbitration agreement "means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not."[9] Sub-sections (2) to (5) of section 7 clarify various facets of an arbitration agreement. A combined reading thereof makes it evident that a very wide definition has been adopted to define an arbitration agreement primarily with the object that agreements that fall within the said definition would enable the parties to seek resolution of their disputes through arbitration rather than through litigation in courts. In fact, section 8 of the Act casts a duty upon "a judicial authority before which an action is brought in a matter which is the subject matter of an arbitration agreement, to refer the parties to arbitration," if a party so applies before such authority "not later than when submitting his first statement on the substance of the dispute."

Since the parties, by executing an arbitration agreement, can virtually oust the jurisdiction of the ordinary courts and compel the other party to have recourse to arbitration for resolution of their disputes, construction of an agreement, which purports to be an arbitration agreement poses considerable challenge. A clause in a multiparty agreement to the following effect became the subject matter of a great legal debate as to whether the provisions thereof constitute an arbitration agreement:

> Implementation will be done in consultation with the financial institutions. For all disputes, clarifications etc, in respect of implementation of this agreement, the same shall be referred to the Chairman, IFCI or his nominees whose decisions will be final and binding on both the groups.

The Supreme Court in *K.K. Modi* v. *K.N. Modi*,[10] construing the said clause, in light of the decision of the Chairman, IFCI, held that it did not

9 S. 2(d) of the 1940 Act defined an arbitration agreement as "a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not." This provision had been interpreted by the Supreme Court in *Union of India* v. *A.L. Rallia Ram* [1964] 3 SCR 164 to mean that "a writing incorporating a valid agreement to submit differences to arbitration is therefore requisite: it is however not a condition of an effective arbitration agreement that it must be incorporated in a formal agreement executed by both the parties thereto, nor is it required to be signed by the parties. There must be an agreement to submit present or future differences to arbitration, this agreement must be in writing, and must be accepted by the parties."

10 (1998) 3 SCC 573.

contemplate arbitration by the Chairman, IFCI, it rather contemplated an expert's decision. The decision rendered by the Chairman, IFCI did not, therefore, amount to an arbitration award. The decision of the court rested on the following reasoning:[11]

> Looking to the scheme of the Memorandum of Understanding and the purpose behind Clause 9, the learned Single Judge, in our view, has rightly come to the conclusion that this was not an agreement to refer disputes to arbitration. It was meant to be an expert's decision. The Chairman, IFCI has designated his decision as a decision. He has consulted experts in connection with valuation and division of assets. He did not file his decision in court nor did any of the parties request him to do so.

Unilateral declaration under a will is not an arbitration agreement

In *Vijay Kumar Sharma alias Manju* v. *Raghunandan Sharma alia Baburam*,[12] an interesting question arose as to whether a stipulation in a will, executed by a testator to the effect that if there was any dispute in regard to the will, the same should be referred to his friend, U.M. Bhandari, Advocate, as the sole arbitrator whose decision shall be final and binding on the parties, would constitute a valid arbitration agreement in terms of section 2(d) read with section 7 of the Act.

The first respondent and the appellant therein were brothers. The respondent had filed a suit against the appellant claiming his share of a portion of an immovable property in Jaipur, bequeathed in his favour under the will executed on 21.10.2003 by their father, who died on 20.10.2005. The appellant was impleaded as the first defendant and the executors of the will were impleaded as defendants two and three, respectively. The appellant in turn filed a civil suit for partition and for separate possession of his share in the ancestral property including the immovable property in Jaipur, which was the subject matter of the will. He had also sought a declaration that the will dated 21.10.2003 propounded by the first respondent was fabricated, null and void. Both the suits were consolidated for trial. The executors filed an application under section 8 of the Act alleging, *inter alia*, that the parties to the two suits were bound by the declaration made by the testator in his will in terms whereof the subject matter of the two suits was covered by the arbitration clause and they should, therefore, be referred to arbitration. The trial court allowed the application and dismissed both the suits. The appellant preferred an appeal before the High Court. A division bench of the High Court, by order dated 14.11.2007, stayed the operation of the order passed by the trial court. The first respondent, however, accepted the decision of the trial court and filed his

11 *Id.* at 589.
12 (2010) 2 SCC 486.

statement of claim before the sole arbitrator named in the will by his father. The appellant appeared before the arbitrator and objected to his jurisdiction to act as an arbitrator. He also challenged the continuation of the arbitrator alleging bias against him. Under these circumstances, the arbitrator withdrew himself from the arbitration whereupon the respondent filed an application under section 11(6) read with sections 14(1)(b) and 15(2) of the Act for appointment of an independent arbitrator. The designate of the Chief Justice allowed the application and appointed an arbitrator to resolve the disputes. It was this order appointing the arbitrator, passed by the learned designate, that came to be challenged before the Supreme Court.

On the question whether during the pendency of appeal before the division bench of the High Court it was not competent for the designate of the Chief Justice to have entertained the application for appointment of the arbitrator under section 11 of the Act, the court held "[T]hat an application under section 11 or section 15(2) of the Act, for appointment of an arbitrator, will not be barred by pendency of an application under section 8 of the Act in any suit, nor will the Designate of the Chief Justice be precluded from considering and disposing of an application under section 11 or 15(2) of the Act."

On the crucial question as to whether the declaration in the will executed by the father of the parties that the disputes in connection with the will would have to be resolved by a named arbitrator, constituted an arbitration agreement under section 7 of the Act, R.V. Raveendran J, speaking for the court, held:[13]

> In this case, admittedly, there is no document signed by the parties to the dispute, nor any exchange of letters, telex, telegrams (or other means of telecommunication) referring to or recording an arbitration agreement between the parties. It is also not in dispute that there is no exchange of statement of claims or defence where the allegation of existence of an arbitration agreement by one party is not denied by the other. In other words, there is no arbitration agreement as defined in section 7 between the parties.

On the further question as to whether unilateral declaration in the will would at all satisfy the requirements of an arbitration agreement contemplated under the Act, the court held that "even if the Will had provided for reference of disputes to arbitration, it would be merely an expression of a wish by the testator that the disputes should be settled by arbitration and cannot be considered as an Arbitrator agreement among the legatees." R.V. Raveendran, J went on to hold:[14]

13 *Id.* at 491.
14 *Ibid.*

> A unilateral declaration by a father that any future disputes among the sons should be settled by an arbitrator named by him, can by no stretch of imagination, be considered as an arbitration agreement among his children, or such of his children who become parties to a dispute. At best, such a declaration can be expression of a fond hope by a father that his children, in the event of a dispute, should get the same settled by arbitration. It is for the children, if and when they become parties to a dispute, to decide whether they would heed to the advice of their father or not. Such a wish expressed in a declaration by a father, even if proved, cannot be construed as an agreement in writing between the parties to the dispute agreeing to refer their disputes to arbitration.

Arbitration agreement inferred from exchange of emails

In *Trimex International FZE Ltd.* v. *Vedanta Aluminium Ltd.*,[15] the question for consideration before the court was whether in the absence of a "signed" agreement between the contracting parties, was it permissible to infer that the parties had entered into a firm and binding contract between themselves, from the series of e-mails exchanged between them, and further, since one of the documents contained an arbitration clause, would such an exchange of e-mails satisfy the requirement of an arbitration agreement being "in writing". The question arose in a petition filed under section 11(6) of the Act by Trimex International FZE Ltd., a company registered in Dubai, for the appointment of an arbitrator in terms of an arbitration agreement contained in clause 6 of the commercial offer (purchase order) dated 15.10.2007 submitted by the petitioner and clause 29 of the agreement exchanged between the parties on 08.11.2007.

The petitioner was engaged in the business of trading in minerals across the world and based on the orders from the purchasers, it used to procure mineral ores from the suppliers, negotiate and finalise shipments with the ship owners and arrange for the shipments across the world. The respondent, a company registered in India, used aluminium ore as one of the major inputs in its operations. On 15.10.2007, the petitioner submitted a commercial offer through e-mail for the supply of bauxite to the respondent, which was accepted by them on 16.10.2007 also through e-mail, confirming the supply of five shipments of bauxite from Australia to Vizag/Kakinada. After a meeting between the parties held in Orissa on 26.10.2007, a formal contract containing a detailed arbitration clause was also sent by the petitioner to the respondent on 08.11.2001. This was accepted by the respondent with some changes and the same was returned to the petitioner the same evening. On 09.11.2007, the petitioner entered into an agreement with Rio Tinto of Australia for the supply of 2,25,000 tonnes of bauxite. On 12.11.2007, the respondent requested the

15 (2010) 3 SCC 1.

petitioner to hold the next consignment until further notice. The next day, the petitioner informed the respondent that it was not possible to postpone the cargo and requested them to sign the purchase order. On 16.11.2007, the petitioner terminated the contract with the respondent, but formally informed the ship owners about the cancellation of the carriage only on 19.11.2007. The ship owners made a claim of US $ 1 million towards commercial settlement. After negotiations, a settlement was arrived at between the ship owners to pay a lump sum of US $ 600,000 to be paid in two instalments. The petitioners paid the said amount in full and final settlement of the claim. Subsequently, the petitioner served a notice of claim-cum-arbitration on the respondent to make good the loss suffered by it immediately or otherwise treat the notice for referring the dispute to arbitration as per clause 29 of the purchase order. On the rejection of the said notice by the respondent, the petitioner filed the application under section 11 for the appointment of an arbitrator.

After analysing the minute to minute correspondence exchanged between the parties through e-mail regarding the offer and the acceptance, P. Sathasivam, J held that the said correspondence clearly established "that both the parties were aware of various conditions and understood the terms and finally the charter was entered into a contract by the parties on 17.10.2007." Rejecting the stand taken by the respondent that there was no agreement "in writing" between the parties because they did not sign such an agreement, the court held that "once the contract is concluded orally or in writing, the mere fact that a formal contract has to be prepared and initialled by the parties would not affect either the acceptance of the contract so entered into or implementation thereof, even if the formal contract has never been initialled" and that even "in the absence of signed agreement between the parties, it would be possible to infer from various documents duly approved and signed by the parties in the form of exchange of e-mails, letter, telex, telegrams and other means of tele-communication."

Repeated arbitrations under the same clause

In *Dolphin Drilling Ltd* v. *ONGC Ltd.*,[16] the court was called upon to consider the question as to whether an arbitration clause once invoked could be invoked again for future disputes arising out of the same agreement. The applicant and the respondent entered into an agreement dated 17.10.2003 for charter hire of a deepwater drilling rig along with services on integrated basis. In terms of the agreement, the applicant was to carry out drilling operations for the respondent. Clause 28 of the agreement contained the arbitration clause as follows:[16a]

> 28.1 Except as otherwise provided elsewhere in the Agreement, if any dispute, difference, question or disagreement or matter … arises

16 (2010) 3 SCC 267.
16a *Id.* at 270.

> between the parties hereto … concerning with the construction, meaning, operation or effect of the Agreement … shall be referred to arbitration.
>
> 28.3 The party desiring the settlement of dispute shall give notice of its intention to go in for arbitration clearly stating *all disputes* to be decided by arbitral tribunal and appoint its own arbitrator and call upon the other party to appoint its own arbitrator within 30 days. …

According to the applicant, though the period of the agreement came to an end in February, 2007, on being called upon by the respondent, it continued to provide further services till April, 2007 for which it was entitled to be paid additionally, on comparable rates, under the agreement. Failing to get any positive response from the respondent despite demands and reminders, the applicant invoked the arbitration clause under the agreement. The application for the appointment for the arbitrator under section 11(6) of the Act was resisted on the ground that the arbitration clause between the parties could not be invoked repeatedly. It was argued that the said arbitration clause had already been invoked by the parties once before pursuant to which an arbitral tribunal had been constituted to resolve the disputes. The said arbitration proceedings were pending and were at the concluding stages. It was argued that the arbitration clause in the agreement could not be interpreted to imply that for every dispute under the contract, the parties could invoke a fresh arbitration. The contention was that all the disputes between the parties should have been referred to the arbitration at one go as repeated arbitration would result in unnecessary financial expenses to the parties.

The plea was based on the words "all disputes" occurring in para 28.3 of the agreement which, it was argued, should be understood to mean "all disputes" under the agreement "that might arise between the parties through out the period of its subsistence." Rejecting the said contention, Aftab Alam J held:[17]

> The words "all disputes" in Clause 28.3 of the agreement can only mean "all disputes" that might be in existence when the arbitration clause is invoked and one of the parties to the agreement gives the arbitration notice to the other. In its present form Clause 28 of the agreement cannot be said to be a one-time measure and it cannot be held that once the arbitration clause is invoked the remedy of arbitration is no longer available in regard to other disputes that might arise in future.

However, having regard to the ill-effects of multiple arbitration proceedings under the same contract, the court observed:[18]

17 *Id.* at 270.
18 *Id.* at 271.

> The issue of financial burden caused by the arbitration proceedings is indeed a legitimate concern but the problem can only be remedied by suitably amending the arbitration clause. In future agreements, the arbitration clause can be recast making it clear that the remedy of arbitration can be taken recourse to only once at the conclusion of the work under the agreement or at the termination/cancellation of the agreement and at the same time expressly saving any disputes/claims from becoming stale or time-barred, etc. and for that reason alone being rendered non-arbitrable.

Non-signatory to arbitration agreement cannot be compelled to arbitrate

In *Indowind Energy Ltd* v. *Wescare (I) Ltd.*,[19] the court was concerned with an interesting question as to whether a subsidiary company, which was not a party to an arbitration agreement, could be held to be bound by an arbitration agreement executed between its holding company and another company. On 24.02.3006, an agreement of sale was entered between Wescare (I) Ltd. ('Wescare') and Subuthi Finance Ltd ('Subuthi'), both companies incorporated under Companies Act, 1956. Subuti was the promoter of Indowind Energy Ltd ('Indowind'). The agreement described Wescare "including its subsidiary RCI Power Ltd." as the "seller/Wescare." It described Subuthi and its nominee as "buyer" and as the promoters of Indowind. Under the agreement, Wescare agreed to transfer to Subuthi certain of its business assets, at a certain consideration partly payable in cash and partly by issue of shares. The said agreement also contained an arbitration clause. The board of directors of both Wescare and Subuthi approved the said agreement. There was, however, no such approval by the board of director of Indowind. Subsequently, when disputes arose between Wescare on the one hand and Subuthi and Indowind on the other, in respect of the said agreement, Wescare filed three petitions under section 9 of the Act against Subhuti and Indowind seeking certain *interim* measures. The said applications were rejected by the High Court on the ground that "as Indowind has not signed nor ratified the agreement dated 24-2-2006, the maintainability of the applications under section 9 of the Act was doubtful."

Wescare filed a petition under section 11(6) of the Act against Subuthi and Indowind for appointment of a sole arbitrator to arbitrate upon the disputes between them in respect of the agreement dated 24.02.2006. Indowind, however, objected to the said application contending that it was not a signatory to the agreement dated 24.02.2006 out of which the disputes arose and which contained the arbitration agreement. The Chief Justice of the High Court, however, allowed the said application holding that Indowind was *prima facie* a party to the arbitration agreement and was, therefore, bound by it even though it was not a signatory. The Chief Justice, in coming to this conclusion,

19 (2010) 5 SCC 306.

was influenced by the fact that Subuthi was one of the promoters of Indowind, and that both of them not only had a common registered office but also common directors. Further, the correspondence emanating from Indowind was signed by the same person who was the signatory to the agreement on behalf of Subuthi, and, by lifting the corporate veil, it could be seen that Subuthi and Indowind were one and the same party.

In appeal, Raveendran J held that Subuthi and Indowind were two independent companies incorporated under the Companies Act, 1956. Each company was a separate independent legal entity and the mere fact that the two companies had common share holders or common board of directors would not make the two companies a single entity. "If the Director who signed on behalf of Subuthi was also a Director of Indowind and if the intention of the parties was that Indowind should be bound by the agreement, nothing prevented Wescare from insisting that Indowind should be made a party to the agreement and requesting the Director, who signed for Subuthi, also to sign on behalf of Indowind." The court further held:[20]

> Wescare referred to several acts and transactions as also the conduct of Indowind to contend that an inference should be drawn that Indowind was a party to the agreement or that it had affirmed and approved the agreement or acted in terms of the agreement. An examination of the transactions between the parties to decide whether there is a valid contract or whether a particular party owed any obligation towards another party or whether any person had committed a breach of contract, will be possible in a suit or arbitration proceeding claiming damages or performance. But the issue in a proceeding under section 11 is not whether there was any contract between the parties or any breach thereof. A contract can be entered into even orally. A contract can be spelt out from correspondence or conduct. But an arbitration agreement is different from a contract. An arbitration agreement can come into existence only in the manner contemplated under section 7. If section 7 says that an arbitration agreement should be in writing, it will not be sufficient for the petitioner in an application under section 11 to show that there existed an oral contract between the parties, or that Indowind had transacted with Wescare, or Wescare had performed certain acts with reference to Indowind, as proof of arbitration agreement.

As regards the scope of enquiry by the learned designate of the Chief Justice under section 11 (6), it was held that "the Chief Justice exercising jurisdiction under section 11 of the Act has to only consider whether there is an arbitration agreement between the petitioner and the respondent(s) in the application under section 11 of the Act. Any wider examination in such a

20 *Id.* at 314.

summary proceeding will not be warranted." Insofar as the issue of existence of an arbitration agreement between the parties, the court held that it was not permissible for the learned Chief Justice or his designate, in a proceeding under section 11, to merely hold that a party is *prima facie* a party to the arbitration agreement and that a party is *prima facie* bound by it. The court held:[21]

> Once a decision is rendered by the Chief Justice or his designate under section 11 of the Act, holding that there is an arbitration agreement between the parties, it will not be permissible for the arbitrator to consider or examine the same issue and record a finding contrary to the finding recorded by the court. … Therefore the prima facie finding by the learned Chief Justice that Indowind is a party to the arbitration agreement is not what is contemplated by the Act.

It is significant that the court declined to follow the decisions of the US Court of Appeals[22] in support of the contention of Wescare that a person, to be bound by an arbitration agreement, need not personally sign the written arbitration agreement as those decisions "did not relate to a provision similar to section 7 of the Indian Act" and were, therefore, of no assistance.

This decision departs from the international trend in commercial arbitration where non-signatories have been held to be "parties" to arbitration agreements applying principles such as agency, equitable estoppel, third party beneficiary, assumption and piercing of corporate veil.[23]

Live issue requiring arbitration

In *Anil Kumar* v. *B.S. Neelkanta*,[24] while the parties were *ad idem* as regards the existence of an arbitration agreement, the respondent opposed the application for the appointment of an arbitrator under section 11(6) by the designate of the Chief Justice on the ground that there was "no live issue requiring resolution by arbitration." D.K. Jain J reiterated the majority view of the bench of seven judges in *SBP & Co.* v. *Patel Engg. Ltd.*[25] that at the stage of a section 11 application, "it may not be possible to decide whether a live claim made is one which comes within the purview of the arbitration clause

21 *Id.* at 315.

22 *Fisser* v. *International Bank*, 282 F 2d 231 (1960); *J.J. Ryan & Sons, Inc.* v. *Rhone Poulenc Textile, S.A.*, 863 F 2d 315 (1988).

23 *See Aloe Vera of America, Inc* v. *Asianic Food (S) Pte Ltd.* (2006) SGHC 78; *Flynt Distributing Co.* v. *Harvey*, 734 F.2d 1389, 1393 (9th Cir. 1984); *FMC Distributing Co.* v. *Murphree*, 632 F.2d 413, 422 (5th Cir. 1980); *Kirno Hill Corp.* v. *Holt*, 618 F.2d 982, 985 (2d Cir. 1980); *Hellenic Investment Fund* v. *Det Norske Veritas*, 464 F.3d 514; *American Bureau of Shipping* v. *Tencara Shipyard S.P.A*, 170 F.3d 349; *Southern Illinois Beverage, Inc.* v. *Hansen Beverage Co.* No.07-CV-391; *Charles O. Grigson* v. *Creative Artists Agency*, L.L.C., 210 F.3d 534.

24 (2010) 5 SCC 407.

25 (2005) 8 SCC 618.

and this question should be left to be decided by the Arbitral Tribunal on taking evidence." and recorded the following conclusions:[26]

> Having examined the whole matter in the light of the aforenoted principles, I am of the opinion that the petition deserves to be allowed. From the material placed on record by the parties, it appears to me that:
>
> (i) there are disputes between the parties on the issues/claim raised by the petitioner and countered by the respondents, including whether the claim still subsists or has been extinguished as alleged by the respondents, which cannot be resolved without evidence;
>
> (ii) there is an arbitration agreement in Clause 41 of the agreement dated 19-1-2004, to which the petitioner is a party along with the respondents. The arbitration agreement is in clear terms and brings within its ambit the disputes sought to be raised by the petitioner; … ;
>
> (iii) the issues/claim raised by the petitioner, on a mere assertion cannot be said to be a dead one without evidence to be produced by the parties in support of and rebuttal thereto, on their respective stands, regarding rights and obligations of the parties under agreements…; and
>
> (iv) the arbitrator is competent under section 16 of the Act to rule on its own jurisdiction, including rule on any objections with respect to existence or validity of the arbitration agreement, on a plea being raised before him that he has no jurisdiction.

Absence of an arbitration agreement

In *BSNL* v. *Telephone Cables Ltd.*,[27] the Supreme Court held that, in the absence of a valid arbitration agreement between the parties, the designate, acting under section 11 of the Act, could not refer them to arbitration. Analysing the bid documents and the entire process of the bidding which led to the placing of the purchase orders by the respondents with the petitioners, the court held that there did not exist a valid arbitration agreement in terms of section 7 of the Act to enable the parties to invoke the jurisdiction of the court under section 11 of the Act. Raveendran J held:[28]

> [O]nly when a purchase order was placed, a "contract" would be entered; and only when a contract was entered into, the general conditions of contract including the arbitration clause would become a part of the contract. If a purchase order was not placed, and

26 *Supra* note 24 at 415.
27 (2010) 5 SCC 213.
28 *Id.* at 221.

> consequently the general conditions of contract (Section III) did not become a part of the contract, the conditions in Section III which included the arbitration agreement, would not at all come into existence or operation. In other words, the arbitration clause in Section III was not an arbitration agreement in praesenti, during the bidding process, but a provision that was to come into existence in future, if a purchase order was placed.
>
> In this case, the dispute raised is in regard to a claim for Rs 10,61,28,000 as damages on account of BSNL not placing a purchase order, that is loss of profit @ Rs 200 per CKM for a quantity of 5.306 LCKM. Obviously the respondent cannot invoke the arbitration clause in regard to that dispute as the arbitration agreement was non-existent in the absence of a purchase order.

The court, accordingly, held that in the absence of an arbitration agreement, the application under section 11 of the Act was not maintainable. In view of this categorical finding, the question as to whether the respondents, having already availed of the public law remedy, could still be entitled to seek a remedy by way of arbitration did not survive, yet the court made certain pertinent observations advocating that in the realm of commerce, the public sector deserved to be put at par with the private sector to provide a level playing field. The court noted that "a public undertaking is required to ensure fairness, non-discrimination and non-arbitrariness in their dealings and decision-making process. Their action is open to judicial review and scrutiny under the Right to Information Act, 2005. They are required to take out advertisements and undergo elaborate and time-consuming selection processes, whether it is purchase of materials or engaging of contractors or making appointments. Just to ensure that everyone is given a fair and equal opportunity, public undertakings are required to spend huge amounts and enormous time in elaborate tender processes." On the other hand, a "competing private undertaking can go straight into market and negotiate directly and get the same material." In this context, the court observed:[29]

> Public undertakings to avoid being accused of mala fides, bias or arbitrariness spend most of their time and energy in covering their back rather than in achieving development and progress. When courts grant stay, the entire projects or business ventures stand still or get delayed. Even if ultimately the stay is vacated and the complaint is rejected as false, the damage is done as there is enormous loss to the public undertaking in terms of time and increase in costs. The private sector is not open to such scrutiny by courts. When the public sector is tied down by litigations and controls, the private

29 *Id.* at 224.

> sector quietly steals a march, many a time at the cost of the public sector. We are not advocating less of judicial review. We are only pointing out that if the public sector has to survive and thrive, they should be provided a level playing field. How and when and by whom is the question for which answers have to be found, be that as it may.

Allegations of fraud and serious malpractices

In *N. Radhakrishnan* v. *Maestro Engineers*,[30] the court was confronted with the question as to whether the court of first instance, having found that the parties did enter into an arbitration agreement and the subject matter of the dispute also squarely fell within the purview of the arbitration clause in the partnership deed, was justified in not relegating the parties to arbitration in terms of section 8(2) of the Act on the ground that the dispute, which would have to be arbitrated upon, related to allegations of fraud and serious malpractices allegedly indulged into by the respondents. Chatterjee J, affirming the decision of the High Court, declining to relegate the parties to arbitration, observed that "the appellant had made serious allegations against the respondents alleging them to commit malpractices in the account books and manipulate the finances of the partnership firm, which, in our opinion, cannot be properly dealt with by the arbitrator." In coming to this conclusion, the court relied on the decision in *Abdul Kadir Shamsuddin Bubere* v. *Madhav Prabhakar Oak*,[31] wherein, construing the provisions of section 34 of the 1940 Act, the court had held that "there is no doubt that where serious allegations of fraud are made against a party and the party who is charged with fraud desires that the matter should be tried in open court, that would be a sufficient cause for the court not to order an arbitration agreement to be filed and not to make the reference."

Effect of amalgamation of companies upon arbitration agreements

In *Geo-Group Communications Inc.* v. *IOL Broadband Ltd.*,[32] the question before the court was whether the subject matter of dispute between

30 (2010) 1 SCC 72.

31 [1962] 3 SCR 702, s. 34 of the 1940 Act which was before the court for construction read as under:

> 34. *Power to stay legal proceedings where there is an arbitration agreement*- Where any party to an arbitration agreement or any person claiming under him commences any legal proceedings against any other party to the agreement or any person claiming under him in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time before filing a written statement or taking any other steps in the proceedings, apply to the judicial authority before which the proceedings are pending to stay the proceedings; *and if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement* and that the applicant was, at the time when the proceedings were commenced and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, such authority may make an order staying the proceedings.

32 (2010) 1 SCC 562.

the parties pertaining to allotment of shares in terms of share subscription and share holders agreement, which contained an arbitration clause, squarely fell within the terms of the said agreement and whether such disputes were arbitrable or whether the remedy for the non-transfer of shares lay in proceedings under section 111-A of the Companies Act, 1956. The applicant Geo-Group Communications Inc., a US based company, entered into a share subscription and shareholders agreement (SHA) with the Exatt Technologies (Exatt'), an Indian company, for supply of certain equipment to it for the price specified or, alternatively, equity shares of Exatt as specified. The applicant supplied the equipment. Subsequently, Exatt entered into a scheme of amalgamation with the respondent IOL Broadband, an Indian company, in terms whereof all the liabilities, duties, obligations and guarantees of Exatt stood transferred to the respondent company. The scheme was approved by the High Court. The case of the applicant was that on the sanction of the scheme, it was entitled to be allotted proportionate number of equity shares of the respondent company as a shareholder of Exatt. But, as the shares were never issued, the applicant invoked the arbitration clause under the SHA.

The respondent resisted the invocation of the arbitration clause on the ground that the applicant having already admitted the allotment and issuance of equity shares by Exatt under the SHA, the only dispute raised by the applicant was that of non-allotment of shares under the amalgamation scheme which arose not under SHA but under the scheme and could, therefore, be addressed to the company court and not to the arbitrator under the arbitration clause of the SHA. Allowing the application for the appointment of an arbitrator Panchal J held:[33]

> There is no manner of doubt that the respondent Company is the successor-in-interest of Exatt. After amalgamation of Exatt with the respondent, all the liabilities and obligations of Exatt, including those mentioned in SHA dated 1-12-2005 stood transferred, in law, to the respondent Company. This position of law was fairly admitted by the learned counsel for the respondent at the time of hearing of the application. Even Clause 3.3 of the scheme of amalgamation inter alia specifically provides that the respondent Company will be bound by all the obligations and liabilities of any nature of Exatt. Therefore, Clause 11.7 of SHA dated 1-12-2005 is applicable to the respondent Company in the same manner as it was applicable to Exatt.
>
> On the facts of the case, it is held that there exists a valid arbitration agreement between the parties. It is an admitted position that shares have not been issued by the respondent to the applicant and reason stated by the respondent for not issuing/allotting shares to the applicant is that the applicant was not a member of Exatt. The grievance of the applicant relates to non-payment of consideration for

33 *Id.* at 570.

> supply of equipment to Exatt under SHA dated 1-12-2005. The further dispute raised by the applicant relates to non-issuance of shares by the respondent in terms of amalgamation scheme entered into between Exatt and the respondent Company. Thus the disputes are very much live and surviving.

As to the question whether the dispute raised by the applicant was arbitrable or not, the designate of the Chief Justice of India held:[34]

> The dispute raised by the applicant is in respect of non-transfer of shares of Exatt by the respondent to the applicant under SHA dated 1-12-2005. This dispute is an arbitrable dispute because of Clause 11.7 of SHA. This is not a dispute which arises under the scheme of amalgamation and, therefore, the contention that the present issue, which arises out of the scheme of amalgamation, should be addressed to the Company Court that sanctioned the scheme of amalgamation, or that the applicant should approach the Company Tribunal under section 111-A of the Companies Act, is devoid of merits.

Reference to arbitration in the absence of an arbitration agreement

In *Afcons Infrastructure Ltd.* v. *Cherian Varkuy Construction Co.(P) Ltd.*,[35] the question was whether section 89 of the Code empowered the courts to refer the parties to a suit, to an arbitration without their consent.[36] The court was of the view that if the section was to be read and implemented in its literal senses, it would be a trial judge's nightmare. The section, the court observed, puts the cart before the horse and laid down an impractical, if not impossible, procedure under sub-section (1) and had mixed up definitions in sub-section (2). But, in spite of these defects, the object behind it, the court noted, was laudable and sound.

As to the question whether the parties could be referred to arbitration without their consent, the court noted that arbitration was an adjudicatory dispute resolution process by a private forum governed by the provisions of

34 *Id.* at 571.

35 (2010) 8 SCC 24.

36 S. 89, CPC reads: *Settlement of disputes outside the Court.- (1)* Where it appears to the court that there exist elements of a settlement which may be acceptable to the parties, the court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observation of the parties, the court may reformulate the terms of a possible settlement and refer the same for-

(a) arbitration;
(b) conciliation
(c) judicial settlement including settlement through Lok Adalat; or
(d) mediation.

(2) Where a dispute had been referred-

(a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act.

the Act. The Act itself made it clear there could be reference to arbitration only if there was an arbitration agreement between the parties. If there was pre-existing agreement between the parties, in all probability, even before the suit reached the stage of examination of parties by the courts, the matter would have already been referred to arbitration either by invoking section 8 or section 11 of Act. And, there would have been no need to have recourse to arbitration under the section 89 of the Code. Section 89, therefore, presupposes that there is not a pre-existing arbitration agreement between the parties. The court further held that even if there was no pre-existing agreement, the parties to the suit could agree for arbitration when the choice of the ADR processes was offered to them by the court under section 89. Such agreement could be, by means of a joint memo or joint application or joint affidavit before the court, or by record of the agreement by the court in the order sheet signed by the parties. Once such an agreement was in writing, the matter could be referred to the arbitration under section 89 of the Code and, on such reference, the provisions of the 1996 Act would apply to such arbitration. The case would then go outside the stream of the court permanently and would not come back to the court.

However, if there was no agreement between the parties for reference to arbitration, the court could not refer the matter to arbitration under section 89 of the Code. This was clear from the provisions of the Act. A court had no power, authority or jurisdiction to refer unwilling parties to the arbitration if there was no arbitration agreement between them. Even though the Supreme Court had itself consistently held that section 89 of the Code mandates reference to the ADR processes, reference to the arbitration under section 89 of the Code could only be with the consent of the parties, not otherwise. In conclusion, the court held that where there was no pre-existing arbitration agreement between the parties, the consent all the parties to the suit would be necessary for referring the subject matter of the suit to the arbitration.

III APPOINTMENT OF ARBITRATOR

One of the fundamental principles which lays the foundation for arbitration and its acceptance as the means to secure resolution of disputes between parties, is "party autonomy." The provisions of the 1996 Act which incorporate the UNCITRAL model law with modifications, fully recognise this principle. The principle of "party autonomy", however, does not connote unrestricted and unchartered rights to the parties. It does not confer complete freedom to the parties to exclude a system of law. Thus, wherever the law recognises the principle of "party autonomy", the statutory recognition thereof is expressed by various phrases including the expression "unless otherwise agreed by the parties."

One of the pillars of the principle of "party autonomy" is the right of the parties to choose their own arbitrator. In fact, the entire law of arbitration is built on this basic premise of "party autonomy." Sub-section (1) of section 11, in recognition of this salutary principle, declares that a person of any

nationality may be appointed an arbitrator "unless otherwise agreed by the parties." Sub-section (2) of section 11 also recognises that the parties are free to agree on a procedure for appointing the arbitrator. Sub-section (3) prescribes the procedure for appointing an arbitrator but that procedure could be invoked only if the parties had failed to provide for the same by agreement. Since a party, in spite of having agreed upon the choice of arbitration and the procedure for the appointment of arbitrator, may still fail to adhere to the terms of their agreement and thus frustrate the very purpose of the arbitration agreement sub sections (5) and (6) of section 11 provide for appointment of arbitrators in such eventuality by the Chief Justice or any person or institution designated by him upon a request of a party to the arbitration agreement. Sub-section (9) of section 11 provides that in the case of appointment of a sole or third arbitrator in an international commercial arbitration, the Chief Justice of India or the person or institution designated by him may appoint an arbitrator of a nationality other than the nationality of the parties, where parties belong to different nationalities.

The nature of the power of the Chief Justice or his nominee to appoint an arbitrator in terms of section 11 of the Act had been the subject matter of several judicial pronouncements expressing conflicting views until the pronouncement by a bench of seven judges in *SBP & Co.*,[37] wherein the court summarised the nature and scope of the power of the Chief Justice of the High Court or the Chief Justice of India thus:

(i) The power exercised by the Chief Justice of the High Court or the Chief Justice of India under section 11(6) of the Act is not an administrative power. It is a judicial power.

(ii) The power under section 11(6) of the Act, in its entirety, could be delegated, by the Chief Justice of the High Court only to another Judge of that Court and by the Chief Justice of India to another Judge of the Supreme Court.

(iii) In case of designation of a Judge of the High Court or of the Supreme Court, the power that is exercised by the designated Judge would be that of the Chief Justice as conferred by the statute.

(iv) The Chief Justice or the designated Judge will have the right to decide the preliminary aspects as indicated in the earlier part of this judgment. These will be his own jurisdiction to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or arbitrators. The Chief Justice or the designated Judge would be entitled to seek the opinion of an institution in the matter of nominating an arbitrator qualified in terms of section 11(8) of the Act

37 *SBP & Co.*, *supra* note 25

if the need arises but the order appointing the arbitrator could only be that of the Chief Justice or the designated Judge.

(v) Designation of a District Judge as the authority under section 11(6) of the Act by the Chief Justice of the High Court is not warranted on the scheme of the Act.

(vi) Once the matter reaches the Arbitral Tribunal or the sole arbitrator, the High Court would not interfere with the orders passed by the arbitrator or the Arbitral Tribunal during the course of the arbitration proceedings and the parties could approach the Court only in terms of section 37 of the Act or in terms of section 34 of the Act.

(vii) Since an order passed by the Chief Justice of the High Court or by the designated Judge of that Court is a judicial order, an appeal will lie against that order only under Article 136 of the Constitution to the Supreme Court.

(viii) There can be no appeal against an order of the Chief Justice of India or a Judge of the Supreme Court designated by him while entertaining an application under section 11(6) of the Act.

(ix) In a case where an Arbitral Tribunal has been constituted by the parties without having recourse to section 11(6) of the Act, the Arbitral Tribunal will have the jurisdiction to decide all matters as contemplated by section 16 of the Act.

(x) Since all were guided by the decision of this Court in *Konkan Rly. Corpn. Ltd.* v. *Rani Construction (P) Ltd.*[38] and orders under section 11(6) of the Act have been made based on the position adopted in that decision, we clarify that appointments of arbitrators or Arbitral Tribunals thus far made, are to be treated as valid, all objections being left to be decided under section 16 of the Act. As and from this date, the position as adopted in this judgment will govern even pending applications under section 11(6) of the Act.

(xi) Where District Judges had been designated by the Chief Justice of the High Court under section 11(6) of the Act, the appointment orders thus far made by them will be treated as valid; but applications if any pending before them as on this date will stand transferred, to be dealt with by the Chief Justice of the High Court concerned or a Judge of that Court designated by the Chief Justice.

(xii) The decision in *Konkan Rly. Corpn. Ltd.* v. *Rani Construction (P) Ltd.*[39] is overruled [40]

This decision, on the one hand, resolved the conflicting view expressed in several pronouncements as regards the nature of the power exercised by the Chief Justice or his designate in a proceeding under section 11(6) of the Act,

38 (2002) 2 SCC 388.
39 *Ibid.*
40 *SBP & Co.*, *supra* note 25

but, on the other, it also contributed to further anomalies in the working of the statute. While sub-sections (4), (5), (6), (7), (8) and (9) contemplate, *inter alia,* that on the failure of the parties to act upon the appointment procedure agreed upon by them, the Chief Justice or "any person" or "institution" designated by him could appoint an arbitrator on the request of a party to such an agreement, the said decision rendered the provision totally redundant and otiose. Since the nature of power of appointment of an arbitrator having been declared to be an exercise of "judicial power" and not an "administrative power", neither a person nor an institution could be designated by the Chief Justice to exercise such powers as "judicial powers" could not be vested in them, by delegation of the powers of the Chief Justice. This completely sets at naught the recognition of the role of institutional arbitrations in India.

The other serious anomaly which directly resulted from the decision was the denudation of the powers of all judicial officers including district judges who had been delegated the powers of appointment of arbitrators by the Chief Justices of some of the High Courts. The consequence of this was that in every single case of failure of the parties to appoint an arbitrator, the other party would have to resort to only the seat of the Chief Justice of the High Court of the concerned state, irrespective of nature of the disputes and the financial stakes involved. In other words, even for small claims, the High Court will have to be approached to seek appointment of an arbitrator at considerable cost. This has dealt with a severe blow to arbitration being perceived as an alternate dispute resolution (ADR) mechanism and has, in effect, countered the objective of section 89 of the Code as inserted by Act 46 of 1999 and which had been considered by the Supreme Court itself as a salutary move to reduce the congestion of dockets in the civil courts of all jurisdictions and, hence, the court rather took pains in *Salem Advocate Bar Assn. (II)* v. *Union of India*[41] to fill in all the gaps in the said provisions of law, as enacted by the Parliament.

Appointment of an outside arbitrator

In *Denel (Pty) Ltd.* v. *Bharat Electronics Ltd.*,[42] the question for consideration before the court was whether the applicant, having entered into an arbitration agreement and having agreed to the person named therein to be appointed as the arbitrator to adjudicate upon the disputes between the parties, could request the Chief Justice of India or his nominee in a section 11 proceeding to appoint someone else whom the court considered independent and impartial to act as the arbitrator in place of the named arbitrator.

The petitioner, Denel (Pty) Ltd., had entered into a contract with the respondent, a Government of India undertaking, for supplying various electrical equipments. The contract in question (purchase order) provided, *inter alia*,

41 (2005) 6 SCC 49.
42 (2010) 6 SCC 394.

in clause (1) thereof, for arbitration in case of disputes between the parties and provided that such disputes be referred to the named arbitrator - the managing director of the respondent company or his nominee. It was the case of the petitioner that it had complied with the terms of the contract and supplied the requisite electrical equipments. The respondent, however, declined to pay for the same "only on the ground, that, they are prohibited from making any payments to the petitioner by the Ministry of Defence, Government of India vide its Letter/Communication dated 21-4-2005." The petitioner approached the Chief Justice of India under section 11(6) of the Act contending, *inter alia*, that since the arbitration clause provided for appointment of the managing director or his nominee as the arbitrator instead of a mutually agreed independent arbitrator, the said provision was invalid, but since the parties had agreed that their disputes be resolved by arbitration, the Chief Justice or his designate should appoint an independent arbitrator. The petitioner relied upon the earlier decision of the court in *Indian Oil Corpn. Ltd.* v. *Raja Transport (P) Ltd.*,[43] wherein it was held that "if any circumstance exists to create a reasonable apprehension about the impartiality or independence of the agreed or named arbitrator, then the court has the discretion not to appoint such a person." The respondent, however, relied upon the decision of the court in *Bhupinder Singh Bindra* v. *Union of India*,[44] wherein it was held that "it is settled law that court cannot interpose and interdict the appointment of an arbitrator, whom the parties have chosen under the terms of the contract unless legal misconduct of the arbitrator, fraud, disqualification, etc. is pleaded and proved. It is not in the power of the party at his own will or pleasure to revoke the authority of the arbitrator appointed with his consent. There must be just and sufficient cause for revocation."[45]

Dattu, J, allowing the application, appointed a former judge of the Supreme Court to act as the sole arbitrator to adjudicate upon the dispute between the parties and held:[46]

> However, considering the peculiar conditions in the present case, whereby the arbitrator sought to be appointed under the arbitration clause, is the Managing Director of the Company against whom the dispute is raised (the respondents). In addition to that, the said Managing Director of Bharat Electronics Ltd. which is a "government company", is also bound by the direction/instruction issued by his superior authorities. It is also the case of the respondent in the reply to the notice issued by the respondent, though it is liable to pay the amount due under the purchase orders, it is not in a position to settle

43 (2009) 8 SCC 520.
44 (1995) 5 SCC 329.
45 *Id.* at 330.
46 *Denel (Pty) Ltd.*, *supra* note 42 at 400.

> the dues only because of the directions issued by the Ministry of Defence, Government of India. It only shows that the Managing Director may not be in a position to independently decide the dispute between the parties.

Prospective application of SBP

The decision of the Supreme Court in *A.P. Tourism Development Corpn. Ltd.* v. *Pampa Hotels Ltd.*[47] arose out of an interesting background. The appellant therein had moved an application under section 11 for the appointment of an arbitrator in terms of the arbitration agreement entered into between the parties. The learned designate accordingly appointed an arbitrator on 16.08.2005. The designate, following the law laid down in *Konkan Railway Corporation Ltd.*[48] (which then held the field), held that he was not acting in a judicial but only in an administrative capacity and, hence, he could not adjudicate upon the question of existence of the arbitration agreement. It was this order that was under challenge before the court.

A seven judge bench of the Supreme Court in *SBP & Co.*,[49] in the meantime**,** overruled the decision in *Konkan Railway Corporation Ltd.*[50] The decision in *SBP & Co.*[51] was rendered on 26.10.2005, a few weeks after the impugned decision of the designate appointing the arbitrator on 16.08.2005. The decision in *SBP & Co.*[52] was, however, to apply only prospectively. The court had therein itself held:

> Since all were guided by the decision of this Court in *Konkan Railway Corporation Ltd.* v. *Rani Construction Pvt. Ltd.*[53] and orders under section 11(6) of the Act have been made based on the position adopted in that decision, we clarify that appointments of arbitrators or arbitral tribunals thus far made, are to be treated as valid, all objections being left to be decided under section 16 of the Act. As and from this date, the position as adopted in this judgment will govern even pending applications under section 11(6) of the Act.

It was in this background that the court was to consider the question as to who should decide whether there was an existing arbitration agreement between the parties. Should it be the Chief Justice or his designate before making an appointment under section 11 or the arbitrator so appointed in terms of section 16? It was contended before the court that when the decision

47 (2010) 5 SCC 425.
48 *Konkan Railways*, *supra* note 38.
49 *SBP & Co.*, *supra* note 25.
50 *Konkan Railways*, *supra* note 38.
51 *SBP & Co.*, *supra* note 25.
52 *Ibid.*
53 *Konkan Railways*, *supra* note 38.

in *SBP & Co.*[54] was rendered, the time for filing the special leave petition under article 136 against the impugned order of the designate had not expired and, therefore, the proceedings should be considered to be pending to which the decision of *SBP & Co.*[55] would apply. The appellants contended that even though the order of the designate was rendered on 16.08.2005, much before the decision in *SBP & Co.*[56] on 26.10.2005, *i.e.* (which was to have only prospective application) but the SLP against the order was filed and leave was granted much later. Therefore, the appeal should be considered as a continuation of the application under section 11 or as a pending matter, to which the decision in *SBP & Co.*[57] would apply even though the designate had appointed the arbitrator much before the decision was rendered.

The court, however, rejected this submission and noted that the position, as had been contended by the appellant, would have been there had there been a statutory provision for appeal and *SBP & Co.*[58] had directed that even pending matters be governed by it. However, as section 11(7) made the decision of the designate final, there was no right of appeal against the decision. Further, *SBP & Co.*[59] had categorically directed that it would have no application to instances where the appointment of the arbitrator had already been made. The court was, therefore, of the view that the decision in *Konkan Railway Corporation Ltd.*[60] would continue to govern the proceedings and the question as to the existence of the arbitration agreement would have to be decided by the arbitrator himself under section 16. Interestingly, despite holding so, the court went on to observe that "the arbitrator will have to decide the issue as to whether there is an arbitration agreement, with reference to the legal position explained by us in regard to the existence of arbitration agreement. Though such an exercise by the arbitrator will only be an academic exercise having regard to our decision in this case."

Time period for appointment of an arbitrator

In *BSNL* v. *Dhanurdhar Champatiray*,[61] pursuant to the notice inviting tenders issued by BSNL, work for the construction of various types of staff quarters was entrusted to the respondent. The contract contained an arbitration clause, in terms whereof the chief engineer, telecommunication/ postal department in charge of the work at the time of dispute, was to be appointed as the sole arbitrator. Subsequently, when disputes arose between the parties, the respondent requested the chief engineer to appoint an arbitrator to adjudicate the disputes between the parties in terms of the

54 *SBP & Co.*, *supra* note 25.
55 *Ibid.*
56 *Ibid.*
57 *Ibid.*
58 *Ibid.*
59 *Ibid.*
60 *Konkan Railways*, *supra* note 38.
61 (2010) 1 SCC 673.

arbitration clause in the agreement. But since the chief engineer did not respond despite repeated requests, the respondent filed an application under section 11(6) of the Act for the appointment of an independent arbitrator. In the meanwhile, the chief engineer appointed one Gurbaux Singh, principal chief engineer (arbitration) as the arbitrator to adjudicate upon the disputes between the parties. The Chief Justice of the High Court allowed the application and appointed a senior advocate of the Orissa High Court as the sole arbitrator. This order, appointing the arbitrator, came to be challenged before the Supreme Court.

The question for determination before the court was whether the period of 30 days as contemplated under section 11(5) of the Act, within which the chief engineer of BSNL was required to appoint the arbitrator was mandatory, and, if so, whether he had lost the opportunity to appoint an arbitrator on the expiry of the "30 day" period, more so when the respondent had already moved the Chief Justice with an application under section 11(6) for the appointment of an arbitrator

The question whether the period of 30 days was a mandatory period, on the expiry of which the party which was contractually entitled to appoint the arbitrator automatically forfeits its right to do so, had been the subject matter of several pronouncements by the Supreme Court. In view of the conflicting opinions expressed by different benches of the court, the matter stood referred to a larger bench of three judges.[62] The larger bench of the court approved the decision in *Datar Switchgears Ltd.* v. *Tata Finance Ltd.*,[63] where it was held:

> So far as cases falling under section 11(6) are concerned such as the one before us no time limit has been prescribed under the Act, whereas a period of 30 days has been prescribed under section 11(4) and section 11(5) of the Act. In our view, therefore, so far as section 11(6) is concerned, if one party demands the opposite party to appoint an Arbitrator and the opposite party do not make an appointment within 30 days of the demand, the right to appointment does not get automatically forfeited after expiry of 30 days. 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, which would be sufficient. In other words, in cases arising under section 11(6), if the opposite party has not made an appointment within 30 days of demand, the right to make appointment is not forfeited but continues, but an appointment has to be made before the former files application under section 11 seeking appointment of an Arbitrator. Only then the right of the opposite party ceases.

62 *Northern Railway Administration, Min. of Railways* v. *Patel Engineering Co. Ltd.* (2008) 10 SCC 240.

63 (2000) 8 SCC 151.

The court further ruled that though the Chief Justice may be competent to appoint an independent arbitrator on the failure of the party which was bound under the arbitration clause to appoint one "but while making the appointment the twin requirements of sub-section (8) of section 11 have to be kept in view, considered and taken into account. If it is not done, the appointment becomes vulnerable."[64] In *BSNL*,[65] the court found that the designate of the Chief Justice had failed to consider the twin requirements mentioned in section 11(8) and remanded the matter back to the High Court.

Appointment of a substitute arbitrator

In *NBCC Ltd.* v. *J.G. Engg. (P) Ltd.*,[66] the court was concerned with the question as to when does the arbitrator "fail to act without undue delay" so as to warrant the conclusion that the mandate of the arbitrator stood terminated in terms of section 14(1)(a) of the Act and whether upon such termination of mandate, the court could appoint a substitute arbitrator which it considered appropriate

The arbitration clause in the contract between the parties enabled the arbitrator to extend the time for making and publishing the award by mutual consent of the parties. The parties accordingly, by mutual consent, agreed to extend the time till 31st August, 2005 for making and publishing the award which was further extended by the parties till 30th September, 2005. But the arbitrator, having failed to do so, the respondent moved the High Court to terminate the mandate of the arbitrator as he had failed to conclude the proceedings within the time fixed by the parties. The High Court terminated the mandate of the arbitrator as he had failed to conclude the proceedings within the time fixed by the parties. The court also appointed Chittatosh Mookherji J (former Chief Justice of High Court of Bombay) as the sole arbitrator to adjudicate upon the disputes between the parties. This order came to be challenged before the Supreme Court. The court noted an interesting fact with regard to the proceedings before the High Court thus:[67]

> Quite interestingly, it has come to our notice that the arbitrator in question had appeared before the High Court and submitted that the award was ready but the same could not be published on account of the interim order passed by the same restraining him from publishing it. There was, however, no order of the Court restraining the arbitrator

64 S. 11(8) provides: "The Chief' Justice or the person or institution designated by him, in appointing arbitrator, shall have due regard to-
(a) any qualifications required of the arbitrator by the agreement of the parties and
(b) other considerations as are likely to secure the appointment of an independent and impartial arbitrator."

65 *BSNL*, *supra* note 62.

66 (2010) 2 SCC 385.

67 *Id.* at 390.

> from publishing the award till almost three months after the expiry of the time fixed by the mutual consent of the parties to make and publish the award prior to the interim order passed by the High Court.

The Supreme Court agreed with the reasoning adopted by the High Court:[68]

> A perusal of the arbitration agreement quite clearly reveals that the arbitrator has the power to enlarge the time to make and publish the award by mutual consent of the parties. Therefore, it is obvious that the arbitrator has no power to further extend the time beyond that which is fixed without the consent of both the parties to the dispute. It is an admitted position that the respondent did not give any consent for extension of time of the arbitrator. Thus given the situation, the arbitrator had no power to further enlarge the time to make and publish the award and therefore his mandate had automatically terminated after the expiry of the time fixed by the parties to conclude the proceedings.

As to the second question before the court, *i.e.* appointment of a substitute arbitrator, the court held:[69]

> that the aforesaid decision in *Northern Railway*,[70] Arijit Pasayat J observed that the High Court in the said case did not appear to have focused on the requirement to have due regard to the qualifications required by the agreement or other conditions necessary to secure the appointment of an independent and impartial arbitrator. In the aforesaid decision, this Court also concluded that since the requirement of sub-section (8) of section 11 was not at all dealt with by the High Court in its order, the appointment of an arbitrator without dealing with sub-section (8) of section 11 of the Act became vulnerable and accordingly, such appointment must be set aside. Similar is the position in this case. In this case also, before appointing an arbitrator under section 11(6) of the Act, the High Court had failed to take into consideration the effect of section 11(8) of the Act as was done in *Northern Railway*."[70a]

The court accordingly remanded the matter back to the High Court for fresh adjudication taking into consideration the mandate of section 11(8) of the Act.

68 *Id.* at 391.
69 *NBCC Ltd.*, *supra* note 66 at 397.
70 (2008) 10 SCC 240.
70a *Ibid.*

Appointment of arbitrator when the arbitration agreement allegedly stood superseded

In *Sirajuddin Kasim* v. *Paramount Investments Ltd.*,[71] the petitioner approached the designate of the Chief Justice of India under section 11(6) of the 1996 Act after disputes arose between the parties. The petitioner, Sirajuddin Kasim, was the director of the petitioner no. 2 company incorporated under the laws of Singapore. It, *inter alia,* dealt and traded in "cotton, timber, logging, acquisition, operation and sale of oil and gas assets, mining of manganese and other metals." The respondent, on the other hand, was a company incorporated under the laws of Mauritius. The respondent was engaged, *inter alia,* in the business of making investments by way of equities in private and public companies on a negotiated basis. It was the understanding between the parties that the respondent would procure farm out transactions of oil and gas blocks for the petitioner company. The respondent made an investment in the petitioner no. 2 company owned by the first petitioner and acquired around 25 per cent shares in the company. The parties entered into a share holders agreement (SHA) which contained an arbitration clause and a named arbitrator - "Mr Santosh Gadia, Chartered Accountant." Subsequently, disputes arose between the parties regarding the working of the SHA. On 23.04.2008, a settlement agreement was executed between the first petitioner and the respondent. The petitioner no. 2 company was, however, not a party to the said agreement. The settlement agreement also fell through and further disputes cropped up between the parties. The respondent filed a suit in Singapore for the enforcement of the settlement agreement which was decreed *ex parte* and further proceedings for enforcement thereof were pending.

At that stage, the petitioner approached the Chief Justice of India by filing an application under section 11 for appointment of an arbitrator in terms of the SHA between the parties to adjudicate the disputes. The application for appointment was opposed on the ground, *inter alia,* that the SHA was superseded by the subsequent settlement agreement which had been the subject matter of a suit for specific performance in Singapore and had been decreed in favour of the respondent. Thus, the question of appointment of the arbitrator did not arise. The designate of the Chief Justice of India, Asok K. Ganguly J allowed the application and appointed a former judge of the Supreme Court to act as the sole arbitrator, *inter alia,* on the grounds that:[72]

> In the instant case admittedly Petitioner No. 2 is neither a party to the settlement agreement nor was he impleaded in the suit … the petitioners have alleged that there was economic duress in the matter of execution of the settlement agreement. Therefore, this Court is of the opinion whether rights of the parties under SHA have been

71 (2010) 8 SCC 557.
72 *Id.* at 562.

> superseded by the subsequent settlement agreement may be an arbitrable issue and that issue can be examined by the arbitrator….In this case there are disputes between the parties and there is a valid arbitration clause and the clause has been invoked prior to the filing of the suit. It is also not in dispute that the arbitration procedure between the parties has failed. Therefore, this Court cannot accept the contention of the respondent as there is valid invocation of the arbitration clause prior to the filing of suit by the respondent.

Appointment of arbitrator in respect of international commercial arbitrations held outside India

The decision in *Dozco India* v. *Doosan Infracore*[73] related to an international commercial arbitration. M/s Dozco India Pvt. Ltd., a company incorporated in India, in a proceeding under section 11(6) of the Act sought appointment of an arbitrator on the failure of the respondent to respond to its notice dated 01.03.2007 for appointment of an arbitrator to resolve the disputes between the parties. Under a distributorship agreement executed between the parties, the petitioner was to be the exclusive distributor of the respondent in India and Bhutan for its products like excavators, wheel loaders, *etc*. Article 23 of the agreement dealing with governing laws, provided that the agreement shall be "governed by or construed in accordance with the laws of the Republic of Korea". The arbitration clause in the said agreement provided that all disputes arising in connection with this Agreement shall be finally settled by arbitration in Seoul, Korea (or such other place as the parties may agree in writing), pursuant to the rules of agreement then in force of the International Chamber of Commerce.

Contesting the application filed under section 11(6) of the Act, the respondent contended that the Chief Justice of India or his designate had no jurisdiction to appoint an arbitrator by invoking the power under section 11(6) of the Act, *inter alia*, on the ground that the legal seat of the arbitration as agreed between the parties being in Seoul, Korea, the proper law of the contract as also the arbitration agreement being Korean law, and the arbitration proceedings being required to be conducted in accordance with the rules of the international chamber of commerce, the proceedings under section 11(6) would not be maintainable.

The petitioner, however, sought to contend that in view of the law laid down in *Bhatia International*,[74] *Indtel Technical Services*[75] and *Citation Infowares*,[76] even if an international commercial arbitration is held out of India and be governed by foreign law, provisions of part I of the Act would still apply unless by agreement, the parties exclude applicability of all or any of the provisions of part I of the Act.

73 JT 2010 (12) SC 198.
74 *Bhatia International* v. *Bulk Trading* (2002) 4 SCC 105.
75 *Indtel Technical Services* v. *W.S. Atkins Rail Ltd*. (2008) 10 SCC 308.
76 *Citation Infowares* v. *Equinox Corporation* (2009) 7 SCC 220.

Sirpurkar J, being the designate of the Chief Justice of India, construing the provisions of the agreement between the parties, noticed that "If we see the language of Article 23.1 in the light of the Article 22.1, it is clear that the parties had agreed that the disputes arising out of the Agreement between them would be finally settled by the arbitration in Seoul, Korea. Not only that, but the rules of arbitration to be made applicable were the Rules of International Chamber of Commerce. This gives the prima facie impression that the seat of arbitration was only in Seoul, South Korea". Reiterating the law laid down in *Bhatia International*[77] to the effect that "in cases of international commercial arbitrations held out of India provisions of Part I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions. In that case the laws or rules chosen by the parties would prevail. Any provision, in Part I, which is contrary to or excluded by that law or rules will not apply", Sirpurkar J held that the language in articles 22 and 23 of the contract is clearly indicative of the express exclusion of part I of the Act and, hence, the petition under section 11(6) was dismissed as not maintainable.[78]

IV AWARD OF INTEREST

Divergent views had been expressed in judicial pronouncements for decades on the jurisdiction of the arbitral tribunal to award interest.[79] These views were based on the *ratio* of *Irrigation Engineer (Balimela)* v. *Abhaduta Jena*,[80] which was overruled in *Irrigation Dept., Govt. of Orissa* v. *G.C. Roy*[81] by a constitution bench of five judges. The constitution bench upheld the

77 In *Bhatia International*, the question was whether an application filed under s. 9 of the Act in the court of the third additional district judge, Indore by the foreign party against the appellant praying for *interim* injunction restraining the appellant from alienating, transferring and/or creating third party rights, disposing of, dealing with and/or selling their business assets and properties, was maintainable. The additional district judge held that the application was maintainable, which view was affirmed by the High Court. The Supreme Court, reaffirming the decision of the High Court, held that an application for *interim* measure can be made to the courts of India, whether or not the arbitration takes place in India. The court went on to hold that "the arbitration not having taken place in India, all or some of the provisions of Part I may also get excluded by an express or implied agreement of parties. But if not so excluded, the provisions of Part I will also apply to "foreign awards."

78 *Supra* note 74.

79 For instance, see *State of Orissa* v. *C.P. Ghosh*, AIR 1991 SC 426; *State of Orissa* v. *Uchchhaba Pradhan* (1991) 1 SCC 446 and *Shakambari & Co*. v. *Union of India*, 1993 Supp (1) SCC 487.

80 (1988) 1 SCC 418.

81 (1992) 1 SCC 508. The court explained that the question of award of interest by the arbitrator may arise in respect of three different periods, namely: (i) for the period commencing from the date of dispute till the date the arbitrator enters upon the reference, (ii) for the period commencing from the date of arbitrator's entering

power of the arbitrator to award interest *pendente lite* when the agreement was silent. The reasons, that persuaded the court, were:[82]

> Where the agreement between the parties does not prohibit grant of interest and where a party claims interest and that dispute (along with the claim for principal amount or independently) is referred to the arbitrator, he shall have the power to award interest *pendente lite*. This is for the reason that in such a case it must be presumed that interest was an implied term of the agreement between the parties and therefore when the parties refer all their disputes - or refer the dispute as to interest as such - to the arbitrator, he shall have the power to award interest. This does not mean that in every case the arbitrator should necessarily award interest pendente lite. It is a matter within his discretion to be exercised in the light of all the facts and circumstances of the case, keeping the ends of justice in view.

In *Hindustan Construction Company Ltd.* v. *State of J&K*,[83] drawing from the aforesaid reasoning, it was held that an arbitrator was also competent to award interest for the period commencing with the date of award to the date of decree or date of realisation, whichever was earlier.[84] Moreover, after commencement of the Interest Act, 1978, the arbitrator has the power and jurisdiction to award interest for the period between the making of reference to the arbitrator and his entering upon the reference.[85] Any ambiguity as regards payment of interest in the post-award stage was put to rest in *State of Orissa* v. *B.N. Agarwalla*,[86] which held that if the award was filed in court and the decree was passed in terms thereof, it was for the court to determine whether interest should be awarded from the date of the decree and, if so, what should be rate of interest. Following *B.N. Agarwalla*, in *State of U.P.* v. *Harish Chandra and Co.*,[87] it was held that the arbitrator had the power to award interest for the pre-reference period after commencement of the Interest Act, 1978 when cause of action for the reference arose. The law on the jurisdiction of the arbitrator to award interest for the pre-reference period under the general law or on equitable principles (although such claim may not strictly fall within

upon reference till the date of making the award; and (iii) for the period commencing from the date of making of the award till the date the award is made the rule of the court or till the date of realisation, whichever is earlier. The constitution bench clarified that it was concerned only with the second of the three aforementioned periods.

82 *Id.* at 533.

83 (1992) 4 SCC 217.

84 *See Indian Hume Pipe Co. Ltd.* v. *State of Rajasthan* (2009) 10 SCC 187 at 189; *Ram Nath International Construction (P) Ltd.* v. *State of U.P.* (1997) 11 SCC 645.

85 *Sudhir Brothers* v. *Delhi Development Authority* (1996) 1 SCC 32.

86 (1997) 2 SCC 469.

87 (1999) 1 SCC 63.

the provisions of the Interest Act, 1839) was authoritatively laid down by a five judge constitution bench in *Executive Engineer, Dhenkanal Minor Irrigation Division* v. *N.C. Budharaj*,[88] which held that in the absence of any specific stipulation or prohibition in the contract to claim or grant any such interest, the arbitrator appointed, with or without the intervention of the court, has jurisdiction to award interest on the sums found due and payable, for the pre-reference period. The decision in *Abhaduta Jena*,[89] which had been overruled in *G.C. Roy* only on the issue of award of interest *pendente lite,* was overruled on the issue of award of interest for the pre-reference period too.

In *Port of Calcutta* v. *Engineers-De-Space-Age*,[90] the court held that even though a contract may contain a prohibition on grant of interest, such a prohibition must be strictly construed and if it is found that the arbitrator was not prohibited from awarding interest *pendente lite*, it is within his jurisdiction to interpret the clause of the contract to decide whether such interest could be awarded by him or not.

The 1996 Act expressly recognises the power of the arbitral tribunal to award interest at "such rates as it deems reasonable, on the whole or any part of the money". In other words, the award of interest is upon a money awarded in favour of a party and thus, would be treated as incidental or collateral to the sum awarded. As far as the period for which the arbitral tribunal is empowered to award interest, clause (a) of section 31(7) provides that such a period could be "the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made". As far as award of interest in the post-award period is concerned, clause (b) of section 31(7) provides that "a sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of eighteen per cent per annum from the date of the award to the date of payment." The controversy on most issues pertaining to payment of interest by an arbitrator appears to have been set to rest by an Act of Parliament. However, some issues under the 1940 Act remain, which were dealt with by the Supreme Court in the year under survey.

Interest upon interest

In *State of Haryana* v. *S.L. Arora & Co.*,[91] the question before the Supreme Court was whether an arbitral tribunal has been authorised by section 31(7) of the Act to award interest upon interest from the date of the pronouncement of award till the date of final payment. In this case, the arbitrator had awarded an amount of Rs. 14,94,000/- with interest to the respondents. The operative portion of the award provided as under:

88 (2001) 2 SCC 721.
89 *Abhaduta Jena*, *supra* note 81.
90 (1996) 1 SCC 516.
91 (2010) 3 SCC 690.

> "I award Rs. 14.94 lacs (Rupees Fourteen Lacs Ninety Four Thousands only) along with interest at the rate of 12% with effect from 19.12.1990 till the date of award in favour of M/s. S.L. Arora and Company, 5E-10, Bunglow Plot, N.I.T., Faridabad (Claimant) to be paid by the Haryana PWD B&R Branch Department (respondent). In case *the total amount of award together with this interest* is not paid within 30 days from the date of making this award, future interest shall be paid @ 18% per annum on the sums due to the claimant from the date of award upto the actual date of payment...."

Pursuant to an execution being levied by the respondents, the appellants paid a sum of Rs. 44,59,587/- which was made up of Rs. 14.94 lacs plus interest thereon at the rate of 12 per cent *per annum* from the date of the reference to the date of the award plus interest at the rate of 18 per cent *per annum* from the date of the award till the final payment. According to the appellants, the said payment was in full and final settlement of the monies due under the award. However, the respondents moved an application for modification of the amount claimed in the execution petition on the ground that due to inadvertence, a lesser amount had been claimed. It was contended that future interest at the rate of 18 per cent *per annum* "on the sums due to the claimant from the date of Award up to the actual date of payment" included interest not only on the principal amount awarded but also interest upon the 12 per cent interest they had been held entitled to. Challenging the said order before the Supreme Court, the appellants contended that under the Act, the arbitrator had not been authorised to award 'interest upon interest' and that in any case the arbitrator had not awarded interest upon interest but only on the principal amount.

Raveendran J, analysing the provisions of section 31(7), held that "in the absence of any provision for interest upon interest in the contract, the arbitral tribunals do not have the power to award interest upon interest, or compound interest, either for the pre-award period or for the post-award period." The court rejected certain observation in *Uttar Pradesh Cooperative Federation Limited* v. *Three Circles*[92] to the effect "that interest awarded on the principal amount up to the date of award becomes the principal amount and therefore award of future interest therein does not amount to award of interest on interest, is *per incuriam* due to an inadvertent erroneous assumption." The court further felt that there was some confusion as to what section 31(7) authorises and what it does not authorise and, therefore, it attempted to set out the legal position regarding award of interest by the arbitral tribunals thus:[93]

92 (2009) 10 SCC 374.
93 *S.L. Arora*, *supra* note 91 at 700.

> The Act does away with the distinction and differentiation among the four interest-bearing periods, that is, pre-reference period, pendente lite period, post-award period and post-decree period. Though a dividing line has been maintained between pre-award and post-award periods, the interest- bearing period can now be a single continuous period the outer limits being the date on which the cause of action arose and the date of payment, subject however to the discretion of the Arbitral Tribunal to restrict the interest to such period as it deems fit.
>
> Clause (b) of section 31(7) is intended to ensure prompt payment by the award-debtor once the award is made. The said clause provides that the "sum directed to be paid by an arbitral award" shall carry interest at the rate of 18% per annum from the date of award to the date of payment if the award does not provide otherwise in regard to the interest from the date of the award. This makes it clear that if the award grants interest at a specified rate up to the date of payment, or specifies the rate of interest payable from the date of award till the date of payment, or if the award specifically refused interest, clause (b) of section 31 will not come into play. But if the award is silent in regard to the interest from the date of award, or does not specify the rate of interest from the date of award, then the party in whose favour an award for money has been made, will be entitled to interest at 18% per annum from the date of award. He may claim the said amount in execution even though there is no reference to any post-award interest in the award. ... The higher rate of interest is provided in clause (b) with the deliberate intent of discouraging award-debtors from adopting dilatory tactics and to persuade them to comply with the award.

Bar on awarding interest

There are two decision of the court in the year under survey which dealt with the express prohibition under the contract on the grant of interest by the arbitrator. The first decision - *Madnani Construction Corpn (P) Ltd.* v. *Union of India*[94] was rendered under the 1940 Act. In this case, the High Court, on the question of the grant of interest, had held that the relevant clause 16(2) of the contract contained a prohibition on the grant of interest. The said clauses read as under:

> 16. (2) No interest will be payable upon the earnest money or the security deposit or amounts payable to the contractor under the contract, but government securities deposit in terms of sub-clause (1) of this clause will be repayable (with) interest accrued thereon

94 (2010) 1 SCC 549.

The arbitration proceedings which were challenged before the court arose under the 1940 Act which, unlike the 1996 Act did, not contain a provision enabling the arbitrator to award interest. Section 29 of the 1940 Act only enabled the arbitrator to award interest from the date of the decree. The arbitrator's power to award interest with respect to proceedings under the 1940 Act was governed by the provisions of the Interest Act, 1978.[95] The proviso to section 3(3) of the said Act provides that its provisions with respect to payment of interest do not govern where the payment of interest is barred by agreement. It was in this context that clause 16(2) of the contract gained relevance. The court was, however, of the opinion that there was nothing in the said clause prohibiting the arbitrator to award interest and hence the High Court was not right in interfering with the arbitrator's award on interest. In coming to this conclusion, the court took support from the decision in *Board of Trustees for the Port of Calcutta* v. *Engineers-De-Space-Age*,[96] where it had been held that a clause in the contract, that prohibits the grant of interest, has to be strictly construed for the simple reason that a person who has a legitimate claim is entitled to payment within a reasonable time and if the payment had been delayed, beyond a reasonable time, he can legitimately claim to be compensated for that delay whatever nomenclature one may give to his claim.

In *Sree Kamatchi Amman Constructions* v. *Railways*,[97] which arose under the 1996 Act, the question before the court was whether despite an express bar regarding award of interest in the contract between the parties, the tribunal could award interest for the period between the date of the cause of action and the date of the award. Considering the scheme of the Act with regard to the award of interest, the court held that in view of the bar under the contract, the arbitral tribunal was justified in refusing to award interest from the date the cause of action arose till the date of the award. The court declined to place reliance on the decision discussed above, namely *Madnani Construction Corpn. (P) Ltd*.,[98] as in its opinion, "the decisions rendered under the old Act may not be of assistance to decide the validity of grant of interest under the new Act."

V RECOURSE AGAINST AN ARBITRAL AWARD

Section 34 of the Act provides both the procedural limitations as well as the grounds on which recourse could be had to a court against an arbitral award. Sub-section (1) of section 34 provides that recourse to a court against an arbitral award could be had "only" by an application for setting aside an award in accordance with the sub-sections (2) and (3) thereof. The mandate

95 S. 2(a): 'court' includes a tribunal and an arbitrator.
96 (1996) 1 SCC 516.
97 (2010) 8 SCC 767.
98 *Madnani Constructions*, *supra* note 94.

of section 5 that "no judicial authority shall interfere except where so provided in this part" read with the provisions of section 34 amply demonstrate that recourse to a court against an arbitral award is permitted strictly in accordance with the provisions of the Act and section 34 in particular. Sub-section (2) lays down the grounds on which an arbitral award could be set aside. A two-judge bench of the Supreme Court in *Venture Global Engg*. v. *Satyam Computer Services Ltd.*,[99] reiterating its decision in *Bhatia International*,[100] has held that an award made in England through a arbitral process conducted by the London Court of International Arbitration, though a foreign award, part I of the 1996 Act would be applicable to such award and, hence, the courts in India would have jurisdiction both under section 9 and section 34 of the Act and entertain a challenge to its validity.[101] Sub-section (3) prescribes the period of limitation within which recourse to court against such an arbitral award could be had. Section 40(3) of the Act provides that "the Limitation Act, 1963 (36 of 1963), shall apply to arbitrations as it applies to proceedings in court" and also lays down certain other rules of limitation applicable to both the arbitral process as well as the proceedings before the court. Sub-section (3) of section 34 of the Act providing a specific period of limitation for the purpose of recourse to court against an arbitral award has to be construed as prescribing a special period of limitation as opposed to the general law of limitation laid down under the Limitation Act, 1963. Sub-section (3) of section 34 provides that an application to set aside an arbitral award may not be made after "three months" have elapsed from the date on which the party making

99 (2008) 4 SCC 190.

100 *Bhatia International* v. *Bulk Trading* (2002) 4 SCC 105.

101 The factual background of the case was this: The dispute between Venture Global Engineering (VGE), a company incorporated in USA and Satyam Computer Services (Satyam) which held 50 per cent shares each in Satyam Venture Engineering Company Limited (SVES) jointly floated by them was referred to arbitration of a sole arbitrator appointed by the London Court of International Arbitration and an award made in England. The award directed Venture to transfer its 50 per cent shares in SVES to Satyam. Satyam which filed a petition before the US District Court in Michigan for recognition and enforcement of the award which was contested by Venture. Venture filed a civil suit in the city civil court, Secunderabad, seeking a declaration for setting aside the award and for a permanent injunction on the transfer of shares under the award. The city civil court, though initially granted an order of injunction at the intervention of Satyam, finally rejected the plaint. An appeal preferred by the Venture before the High Court of Andhra Pradesh was also unsuccessful. Venture, therefore, approached the Supreme Court. It was contended *inter alia* that part I of the Act would also apply to foreign awards and hence the courts in India had jurisdiction to entertain a challenge to the validity of the award and that in view of the over-riding provision contained in the shareholders agreement, Satyam cannot approach the US courts for enforcement of the award. On behalf of the Satyam, it was contended that since the award made in England was a foreign award, no suit or other proceedings can lie against such award in view of section 44 of the Act and that an application for setting aside such an award under section 34 of the Act could not lie in any event.

the application had received the arbitral award. The proviso thereto, however, empowered the court to entertain an application for setting aside of an arbitral award within a further period of thirty days, if it was satisfied that the applicant was prevented by sufficient case from making the application within the period of three months, but "not thereafter".

The court in *Union of India* v. *M/s Popular Construction Co.*,[102] construing the proviso to section 34(3) read with section 5 of the Limitation Act, had ruled that an application filed beyond the period mentioned under section 34(3) would not be an application "in accordance with" sub-sections (2) and (3) of section 34 and, consequently, by virtue of section 34(1), recourse to the court against the arbitral award could not be had beyond the period prescribed. The court further held that the phrase "but not thereafter" used in the proviso to sub-section (3) "would amount to an express exclusion within the meaning of section 29(2) of the Limitation Act, and would therefore bar the application of section 5 of that Act." The court went on to observe that "had the proviso to section 34 merely provided for a period within which the court could exercise its discretion, that would not have been sufficient to exclude sections 4 to 24 of the Limitation Act because 'mere provision of a period of limitation in howsoever peremptory or imperative language is not sufficient to displace the applicability of section 5."

But then the question remains as to how should the period of three months prescribed in section 34(3) be computed? The Act does not provide how the said period is to be calculated. The expression "month" appearing in sub-section (3), though capable of being construed as either a "calendar month" or a "lunar month", has been interpreted as denoting a "calendar month."[103]

Computation of the period of three months

An interesting question arose in *State of H.P.* v. *Himachal Techno Engineers*[104] with respect to the interpretation of section 34(3) of the Act. The court therein was required to determine whether the period of three months as provided for under the section could be counted as "90 days". The High Court had, for the purpose of calculating the period of limitation, taken "90 days" for the period of three months as stipulated under the Act. The Supreme Court, in appeal, holding this view to be erroneous held that "a 'month' does not refer to a period of thirty days, but refers to the actual period of a calendar month." Where the month is April, June, September or November, the period of the month would be thirty days and where the

102 (2001) 8 SCC 470.

103 *Union of India* v. *Wishwa Mittar Bajaj & Sons*, 2007 (2) Arb LR 404 (Del.), wherein it was held that "the expression 'three months' in s. 34(3) has to be construed as three calendar months from the date on which the signed award made by the arbitrator was delivered to the party."

104 (2010) 12 SCC 210.

month is January, March, May, July, August, October or December, the period of the month would be thirty-one days. Where the month is February, the period would be twenty-nine days or twenty-eight days depending upon whether it is a leap year or not.

The court, relying on the decision of the House of Lords in *Dodds* v. *Walker*,[105] held that in calculating the period of a month or a specified number of months that had elapsed after the occurrence of a specified event, such as the giving of a notice, the general rule was that the period would end on the corresponding date in the appropriate subsequent month, irrespective of whether some months are longer than others. The court thus concluded that when the period prescribed is three months (as contrasted from 90 days) from a specified date, the period would expire in the third month on the date corresponding to the date upon which the period starts. And accordingly, depending upon the months, it may mean 90 days or 91 days or 92 days or 89 days.

Incidentally, the court was also concerned with the date of commencement of the limitation period for challenging an arbitral award. In terms of section 34 (3), the limitation period has to be calculated "from the date on which the party making that application has received the arbitral award." In this context, the court observed that in case of a statutory body or a corporation, the award has to be received by the person who has knowledge of the proceedings and who would be the best person to understand and appreciate the award and, accordingly, "when the award is delivered or deposited on a non-working day, the date of such physical delivery is not the date of receipt of the award by the party" and the date of receipt of the award would only be the next working day.

Amendment to the application beyond the limitation period

In *State of Maharashtra* v. *Hindustan Construction Co. Ltd.*,[106] the court was concerned with the question whether incorporation of additional grounds by way of an amendment in the application to set aside an arbitral award under section 34 tantamounts to filing a fresh application in all circumstances. The court held that if that were to be treated so, it would follow that no amendment in the application for setting aside the award howsoever material or relevant it may be for consideration by the court, can be added nor existing ground amended after the expiry of the prescribed period of limitation although the application for setting aside the award had been made in time. This, in the court's opinion, could not have been the intention of the legislature while enacting section 34. In coming to this conclusion, the court was also influenced by the provisions of section 34(2)(b) which enable the court to set aside an award if it finds the subject matter of the dispute not capable of

105 (1981) 2 All ER 609 (HL).
106 (2010) 4 SCC 518.

settlement by arbitration or the arbitral award being in conflict with the public policy of India.

The court was further of the opinion that the rule in *L.J. Leach & Co. Ltd.* v. *Jardine Skinner & Co.*[107] and *Pirgonda Hongonda Patil* v. *Kalgonda Shidgonda Patil*[108] that "courts would as a rule decline to allow amendments if a fresh claim on the proposed amendments would be barred by limitation on the date of application but that would be a factor for consideration in exercise of the discretion as to whether leave to amend should be granted but that does not affect the power of the court to order it" if that is required in the interest of justice should be applied when the application for amendment of grounds in the application for setting aside the arbitral award under section 34 or the amendment of the ground of appeal under section 37 of the Act is sought for.

The decision in *Venture Global Engg.* v. *Satyam Computer Services Ltd.*[109] arose out of quite an interesting background. In its first round of litigation when the matter had reached the Supreme Court in *Venture Global Engg*. v. *Satyam Computer Services Ltd.*,[110] it had been held that a foreign award could be challenged under section 34 of the Act and the matter, in the light of the said finding, was remanded back to the trial court. During the pendency of the proceedings, the chairman and the founder of the respondent confessed that the balance sheets of the first respondent had been fraudulently inflated and, as a result, their financial statements could no longer be considered accurate and reliable. In the light of these developments, the appellant filed an application before the trial court to bring certain facts on record and also to file additional pleadings in respect of the same. The application was allowed by the trial court. The High Court, however, reversed the decision holding that under the Act, a party could only set aside the arbitral award if an application for the same was made within a period of three months (extendable by another 30 days) from the date of the making of the award and that new grounds to challenge the award could not be introduced after the expiry of the period of limitation.

When the matter reached the Supreme Court, the court had by then rendered its decision in *Hindustan Construction Co. Ltd.*[111] It was, however, contended before the court that the grounds which were sought to be incorporated by way of an amendment, were not at all relevant to the setting aside of award and did not even come within the concept of public policy as incorporated under section 34. It was contended that the Explanation to the said provision had to be strictly construed and the expression "fraud in the making of the award" must be confined to mean only fraud committed before the arbitrator in the course of the arbitral proceeding. It was urged that the

107 [1957] SCR 438.
108 [1957] SCR 595.
109 (2010) 8 SCC 660.
110 *Venture Global Engg.*, *supra* note 100.
111 *Hindustan Construction Co. Ltd.*, *supra* note 107.

facts, subsequent to the delivery of the award, would not be relevant for the said purpose.

The said contentions were, however, not acceptable to the court as, in its opinion, "fraud being of 'infinite variety' may take many forms, and secondly, the expression 'the making of the award' will have to be read in conjunction with whether the award 'was induced or affected by fraud'." In the court's view, the facts, which surfaced subsequent to the making of the award but have a nexus with the facts constituting the award, are relevant to demonstrate that there has been fraud in the making of the award. Concealment of relevant and material facts, which should have been disclosed before the arbitrator, was an act of fraud. Holding otherwise, "would defeat the principle of due process and would be opposed to the concept of public policy incorporated in the Explanation."

Allowing the application for amendment of the petition to set aside the award, the court held **"**that the facts concealed must have a causative link. And if the concealed facts, disclosed after the passing of the award, have a causative link with the facts constituting or inducing the award, such facts are relevant in a setting-aside proceeding and the award may be set aside as affected or induced by fraud."

Nature of proceedings under section 34 and appeals

In *Snehadeep Structures (P) Ltd.* v. *Maharashtra Small-Scale Industries Development Corpn. Ltd.*,[112] the court was concerned with the question whether the expression "appeal" used in section 7 of the Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 included within its fold an application to set aside an arbitral award filed under section 34 of the 1996 Act. Section 7 reads:

> 7. *Appeal.*—No appeal against any decree, award or other order shall be entertained by any court or other authority unless the appellant (not being a supplier) has deposited with it seventy-five per cent of the amount in terms of the decree, award or, as the case may be, other order in the manner directed by such court or, as the case may be, such authority.

The said section mandated the pre-deposit of 75 per cent of the amount awarded before an appeal against an award could be made. It was contended before the court that the term appeal appearing the said section included an application for setting aside an arbitral award under section 34 and, therefore, before moving such an application the respondent was required to deposit 75 per cent of the award amount. The respondent, on the other hand, contended that the 1996 Act treated appeals and applications separately under two distinct

112 (2010) 3 SCC 34.

chapters, namely Chapter 8 and Chapter 9, respectively. Further, the Act itself contains specific provisions for awarding interest, and being a special enactment, it would prevail over the Interest Act, 1978.

The court, however, was of the view that, as far as interest on delayed payments to small scale industries was concerned, the Interest Act was a special legislation with respect to other statutes including the Arbitration Act. The court, in support, placed reliance on the preamble to the Interest Act which aims "to provide for and regulate the payment of the interest on the late payment of interest on delayed payments to small scale and ancillary industrial undertaking and for matters connected therewith or incidental there to." The court also referred to section 4 of the Interest Act which sets out the liability of the buyer towards the supplier "notwithstanding anything contained in any agreement between the buyer and the supplier or in any law for the time being in force" The court, therefore, came to the conclusion that the Interest Act was a special legislation as far as the liability to pay interest was concerned and section 31(7) of the 1996 Act would have no application thereto. The court also made reference to section 6(1) of the Interest Act which empowers the suppliers to whom the payments were due to recover them by way of suit or any other proceedings. Further, section 6(2) stated that any dispute could be resolved by reference to the industrial facilitation council which shall conduct arbitration and conciliation proceeding in accordance with the 1996 Act and, therefore, any other proceedings "contemplated under section 6(1) undoubtedly include arbitration proceedings as well." Thus, the right context in which the meaning of the term "appeal" should be interpreted was in the Interest Act itself and, therefore, the meaning of the term under the Arbitration Act was not relevant for the purposes of construction under section 7(1) of the Act. Accordingly "keeping in mind the language of section 7, object of the legislation and the contextual meaning of the term "appeal", the court was of the view" that the term "appeal" appearing in section 7 of the Interest Act should include an application under section 34 as well"

This decision, however, has serious implications. If the provisions of section 34 of the Act are construed to be in the nature of proceedings by way of "appeal", the provisions of order XLI of the Civil Procedure Code, 1908 (Code) may well be invoked which will throw open a flood gate of proceedings contemplated under various provisions of the Code. The foremost would be the question of application of provisions of rule 22 which provides for filing of cross objections, *etc*. The said provision, as amended by the Amendment Act No. 104 of 1976, provides that any respondent, though he may not have appealed from any part of the decree, may not only support the decree but may also state that a finding against him in the court below be held in his favour and may also take any cross-objection to the decree. It would, therefore, be open to the respondent in a proceeding under section 34 to challenge that the validity of those portions of the award which are against him without adhering to the period of limitation prescribed in sub section (3) of section 34 in as much cross objections could be filed "within one month from the date of service on

him … of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow."

It may be noticed that, unlike section 41 of the 1940 Act which provided that "the provisions of - the Code of Civil Procedure, 1908, (5 of 1908) shall apply to all proceedings before the Court, and to all appeals, under this Act", the 1996 Act does not contain any such provision. The Supreme Court has, however, taken the view that, in the absence of any express exclusion, the provision of the Code would nonetheless apply to proceedings under the 1996 Act.[113]

VI SETTING ASIDE AN ARBITRAL AWARD

Though the court, way back in the year 2000, had declared that the "courts must not ignore the objects and purpose of the enactment of 1996 Act… [and] that the 1996 Act limits the intervention of Court with an arbitral process to the minimum and it is certainly not the legislative intent that each and every order passed by an authority under the Act would be a subject matter of judicial scrutiny by courts of law",[114] yet a scrutiny of the cases in the last decade may lead one to conclude to the contrary. Interestingly, none of the decisions rendered in the year under survey dealt with the challenge to an arbitral award under the 1996 Act. All cases dealing with a challenge to an arbitral award arose only under 1940 Act.

Ravindra Kumar Gupta & Co v. *Union of India*,[115] while dealing with an arbitral award challenged under section 30 of the 1940 Act, reiterated that the courts cannot hear an objection against an award as an appellate court "as the arbitrator is the final arbiter of the dispute referred to him" and also reiterated the view pronounced in an earlier decision that the "phraseology 'error apparent on the face of the record' does not itself, however, mean and imply closer scrutiny of the merits of documents and materials on record".[116] The court, therefore, set aside the decision of the High Court by which an arbitral award awarding certain sums claimed by the contractor for losses suffered on account of hold ups and delays on the part of the owner was set aside on the ground that the employee had refuted the claim and had contended that the delay in execution of work was due to default of the contractor himself as he had not employed sufficient labourers. The court also felt that the decision in *ONGC Ltd.* v. *SAW Pipes Ltd.*[117] supported its view and extracted the following passage from the said decision:

113 See *MCD* v. *International Security & Intelligence Agency Ltd.* (2004) 3 SCC 250; *ITI Ltd.* v. *Siemens Public Communications Network,* 2002 5 SCC 510.
114 *Konkan Railway Corporation Ltd.* v. *Mehul Construction* (2000) 7 SCC 201.
115 (2010) 1 SCC 409.
116 *Arosan Enterprises Ltd.* v. *Union of India* (1999) 9 SCC 449.
117 (2003) 5 SCC 705 at 736.

> In the light of the aforesaid decisions, in our view, there is much force in the contention raised by the learned Counsel for the appellant. However, the learned senior counsel Mr. Dave submitted that even if the award passed by the arbitral tribunal is erroneous, it is settled law that when two views are possible with regard to interpretation of statutory provisions and/or facts, the Court would refuse to interfere with such award.

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

It is indeed gratifying that in the court's view the decision in *SAW Pipes Ltd.*[118] fell in line with the well settled principles of law and in fact did not make any departure therefrom as is generally perceived. In *SAW Pipes Ltd*.,[119] the court ruled that "in the facts of the case, it cannot be disputed that if the contractual term, as it is, is to be taken into consideration, the award is, on the face of it, erroneous and in violation of the terms of the contract and thereby it violates section 28(3) of the Act." Culling out the *ratio* from the decisions rendered under the 1940 Act, the court held:[119a]

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

118 *Supra* note 115 at 415.
119 *Ibid*.
119a *Ibid.*

The decision in *SAW Pipes Ltd.*,[120] though rendered by a bench of two judges, has far reaching consequences. The decision construes the 1996 Act as, in its entirety (sections 2 to 43), laying down only rules of procedures. It rules that "power and procedure are synonymous" and that "there is no distinction between jurisdiction/power and the procedure". Referring to sections 24, 28 and 31 of the Act and construing the words "arbitral procedure" in section 34(2)(v) (and after observing that all the provisions appearing in part I of the Act lay down arbitral procedure), it concludes that "the jurisdiction or the power of the Arbitral Tribunal is prescribed under the Act and if the award is de hors the said provisions, it would be, on the face of it, illegal."

Construing the phrase "public policy of India" appearing in section 34(2)(b)(ii), the court held that in a case where the validity of the award is challenged on the ground of being opposed to "public policy of India", a wider meaning ought to be given to the said phrase so that "patently illegal awards" could be set aside. The court distinguished the earlier decision in *Renu Sagar*[121] on the ground that in the said case, the phrase "public policy of India" appearing in section 7(1)(b)(ii) of the Foreign Awards (Recognition and Enforcement) Act, 1961 was construed which necessarily related to enforcement of foreign award after they became final. Though the court accedes that "it is for the Parliament to provide for limited or wider jurisdiction of the court in case where award is challenged", it still holds that, in its view, a wider meaning is required to be given to the phrase "public policy of India" so as to "prevent frustration of legislation and justice". Stating the reasons in support of its view the court held:[121a]

> [G]iving limited jurisdiction to the court for having finality to the award and resolving the dispute by speedier method would be much more frustrated by permitting patently illegal award to operate. Patently illegal award is required to be set at naught, otherwise it would promote injustice.

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

> For the purposes of this section, clause (b) of sub-section (2) of section 48 and clause (e) of sub-section (1) of section 57, "public policy of India" or "Contrary to public policy of India" means

120 *Ibid*.

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

121a *Supra* note 117 at 727.

> contrary to : (i) fundamental policy of India, or (ii) interests of India, or (iii) "justice or morality.

In *State of Rajasthan* v. *Nav Bharat Construction Co. (2)*,[122] the Supreme Court held that while exercising its jurisdiction to set aside an award under section 30, the court is not empowered to re-appreciate the evidence and examine the correctness of the conclusions arrived at by the umpire. The said jurisdiction is not appellate in nature and the award passed by the umpire could not be set aside on the ground that it was erroneous. The court observed that "it is not open to the court to interfere with the award merely because in the opinion of the court, another view is equally possible."

In *Amaravati District Central Coop Bank Ltd* v. *United India Fire & General Insurance co.*[123] the court was concerned with the interpretation of the terms of the insurance policy concerning banker's immunity. The court, while reiterating the principles laid down by a constitution bench in *General Assurance Society Ltd.* v. *Chandumull Jain*[124] that "in interpreting documents relating to a contract of Insurance, the duty of the court is to interpret the words in which the contact is expressed by the parties, because it is not for the court to make a new contract, however reasonable, if the parties have not made it themselves." Raveendran, J, while upholding the decision of the High Court, setting aside the arbitral award on the ground that the interpretation put up on the "Excess" clauses in the Insurance policy was erroroneous, held:[125]

> The award of the arbitrator is liable to be set aside as there is a clear error apparent on the face of the award. The award is a speaking award. It extracts the relevant clauses of the insurance policy including the excess clause. It then proceeds to put an interpretation thereon which is contrary to the express words of the contract and opposed to the well recognised insurance practices and principles. Hence the award was rightly set aside by the High Court.

In *Rashtriya Chemical and Fertilizers Ltd.* v. *Chowgule Bros.*,[126] the dispute involved the interpretation of clause 2.03 of notice inviting tender issued by the appellant, a Government of India undertaking for "allotment of clearing, forwarding, handling and stevedoring jobs at Mormugao Port initially for a period of one year commencing from 15th January 1983 upto 14th January 1984 but extendable at the option of the appellant for a further period of one year on the same terms and conditions except statutory increases in the wages of Dock labourers." The respondent alleged "that pursuant to a settlement

122 (2010) 2 SCC 182.
123 (2010) 5 SCC 294.
124 [1966] 3 SCR 500.
125 *Amaravati District Central Coop Bank Ltd.*, *supra* note 124 at 305.
126 (2010) 8 SCC 563.

between the M.D.L.B. and the Dock workers, the respondent had incurred an additional amount of Rs. 24.74 lakhs towards increase in the wages payable to such workers. A claim for reimbursement of the said amount was accordingly made by the respondent-company in terms of a legal notice served upon the appellant on its behalf, which claim was refuted by the appellant on the strength of Clause 2.03 of Schedule II to the notice inviting tenders forming part of the contract between the parties." The appellant's case, on the other hand, was "that the rates at which the contract was initially awarded had to remain firm throughout the period of one year from the date of award and were not subject to any escalation whatsoever. Rates for the extended period were also similarly to remain firm throughout the extended period subject to any statutory revision up to 15th January, 1984 being taken into consideration. Any subsequent increase in the wages payable to the Dock labourers granted retrospectively by the M.D.L.B. was according to the appellant wholly inconsequential."

The award was set aside by the single judge of the High Court. The division bench of the court, however, reversed the decision of the single judge and upheld the award as in its view that "the interpretation placed upon Clause 2.03 of the contract between the parties by the majority of the arbitrators was a logical interpretation which could provide a sound basis for the Award made by them." On further appeal to the Supreme Court, Thakur J held:[127]

> The contract does not, in our opinion, envisage settlement or revision of the rate by reference to any stage post-commencement of the extended period. Even otherwise a contract for the extended period could become effective only if rates applicable to that period are settled or are capable of being ascertained. Rates actually determined or determinable by reference to 15th January, 1984, the date when the extended period commenced, could include revision in wages made up to that date. Any revision in the wages of the dock labourers which the M.D.L.B. may have ordered subsequent to 15th January, 1984 would have no relevance even if such revision was made retrospectively from the date of the commencement of the extended period. The Note makes it abundantly clear that revision granted retrospectively would be of no consequence whatsoever.

It is evident from this pronouncement that the thin line of distinction between an error while acting within jurisdiction and one while acting outside gets blurred quite often and, consequently, leads to dilution of the principle that it is well within the jurisdiction of the arbitrator to interpret the terms of the contract as desired by the parties and that the court, while scrutinising an

127 *Id.* at 569.

award, would not interfere with such an interpretation even if in its view the terms of the contract are susceptible to another interpretation.[128]

There is a well recognized distinction between disputes as to the jurisdiction of the arbitrator and the disputes as regards exercise of that jurisdiction. Consequently, there is also a distinction between an error within the jurisdiction and an error in excess of jurisdiction. It is well accepted that the court cannot substitute its own evaluation of the conclusion of law or fact and hold that the arbitrator acted contrary to the bargain between the parties.

VII CONCLUSION

The 1996 Act was brought into force unfortunately by an Ordinance which denied all the stakeholders to have a threadbare discussion and debate on many of the crucial issues concerning the law of arbitrations. One such issue, in the author's opinion, is whether there should be two separate statutes governing arbitrations - one for domestic arbitrations and the other dealing exclusively with international commercial arbitration. The statute dealing with international commercial arbitration could be a legitimate adoption of the UNCITRAL model law. The statute dealing with domestic arbitration would, however, require considerable variations from the model law in view of the special requirements of domestic arbitrations. International arbitrations, even if held in India, are generally conducted in metropolitan cities; it would be in the interest of such arbitrations to limit the jurisdiction of the courts in respect of such arbitrations by confining exclusive jurisdiction to a few designated High Courts covering each region of the country. This would not only be conducive to a satisfactory and quick disposal of international arbitration proceedings, but also help in creating a specialised bar and bench in the realm of international arbitrations.

On the other hand, if domestic arbitration is to serve as an effective alternate dispute resolution mechanism (ADR), jurisdiction must be conferred on all courts to deal with all aspects of arbitration - from the appointment of an arbitrator to recourse against an arbitral award. A serious and anomalous situation has now arisen under the present legal system by, on the one hand, conferring exclusive jurisdiction for the appointment of an arbitrator on the Chief Justice of the High Court or his nominee, who could only be a High Court

128 *See Sudarshan Trading Co.* v. *Govt. of Kerala* (1989) 2 SCC 38 ("by purporting to construe the contract the court could not take upon itself the burden of saying that this was contrary to the contract and, as such, beyond jurisdiction"); see also *P.V. Subba Naidu* v. *Govt. of Andhra Pradesh* (1998) 9 SCC 407 at 409. *K.R Ravindernathan* v. *State of Kerala* (1998) 9 SCC 410; *HP State Electricity Board* v. *R. J. Shah & Co.* (1999) 4 SCC 214 at 225 and *Pure Helium Ltd* v. *ONGC* (2003) 8 SCC 593.

judge as was ruled in *SBP & Co.,*[129] and, on the other, conferring the jurisdiction for setting aside an arbitral award on all courts within whose pecuniary and territorial jurisdiction the dispute arises and the award is made.

Further, the Ordinance failed to incorporate the language of Article 1(2) of the UNCITRAL model law which provided that "the provisions of this law, except Articles 8, 9, 35 and 36, apply *only* if the place of arbitration is in the territory of this State." A faithful reproduction of the model law in clause 2(2) of the Ordinance and the 1996 Act could have avoided the strenuous construction put on the provisions of part I of the Act by the Supreme Court in *Bhatia International*[130] to confer jurisdiction upon the courts in India to provide *interim* relief in terms of section 9 in respect of arbitration proceedings held outside India. Had the draftsmen paid adequate attention, the strain upon the statute would have been avoided and could never have been stretched to even subjecting foreign awards to proceedings for setting aside under section 34[131] or, for that matter, putting a strange construction on the phrase "public policy" as a ground for challenging an arbitral award.[132]

The Government of India, through the Ministry of Law and Justice, has circulated a consultation paper on the 'Proposed Amendments to the Arbitration and Conciliation Act, 1996'[133] proposing to amend at least a few provisions of the Act to overcome the judicial interpretation placed upon the statute which has been perceived to be counterproductive to the growth of arbitration in India. One would expect that the government bring forth these amendments before the Parliament without any further loss of time. The consultation paper has been discussed and debated in many fora throughout the country and the input from all the stakeholders is now with the government which could profitably be utilised for the purpose. The Parliament should not lose this opportunity of at least partially rectifying the conundrums that have

129 *SBP & Co.*, *supra* note 25, wherein it was held that "since the intention of the statute was to entrust the power to the highest judicial authorities in the State and in the country, we have no hesitation in holding that the *Chief Justice cannot designate a district judge to perform the functions under Section 11(6) of the Act*. This restriction on the power of the Chief Justice on designating a district judge … flows from the scheme of the Act."

130 (2002) 4 SCC 105, wherein the court highlighting the omission of the word "only" in s. 2(2) of the Act observed: "thus Article 1(2) of the UNCITRAL Model Law uses the word "only" to emphasize that the provisions of that law are to apply if the place of arbitration is in the territory of that State." Significantly, in s. 2(2), the word "only" has been omitted. The omission of this word changes the whole complexion of the sentence. The omission of the word "only" in s. 2(2) indicates that this sub-section is only an inclusive and clarificatory provision. As stated above, it is not providing that provisions of part I do not apply to arbitrations which take place outside India.

131 See *Venture Global Engg.*, *supra* note 100

132 See *Saw Pipes*, *supra* note 119.

133 Government of India, Ministry of Law & Justice, *Proposed Amendments to the Arbitration & Conciliation Act, 1996: A Consultation Paper* (2010) available at http://lawmin.nic.in/la/consultationpaper.pdf.

crept in due to inadequate attention being paid to the law at the time of its initial enactment and by reason of the subsequent judicial pronouncements thereon - an opportunity the Parliament had missed originally when the new regime of the law of arbitration came to be introduced by the process of executive law making by the President issuing three successive Ordinances before Parliament mechanically approved the same to bring into force the present Arbitration and Conciliation Act, 1996.