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ARBITRATION LAW

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I INTRODUCTION

ARBITRATION AS an alternate dispute resolution (ADR) process is undergoing fast changes globally. Many innovative and combined ADR mechanisms have been introduced in commercial contracts so that dispute resolution would be faster and efficient. The globalization and privatization has also transformed the arbitral process in India during the last two decades. Currently, arbitration involves not only traditional sectors such as construction, maritime and international trade but also emerging sectors such as sports, competition law, consumer law, pharmaceuticals, intellectual property, corporate law, and finance and insurance. However, India still continues to be not a preferred destination for arbitration. This is because of the prevalence of ad-hoc arbitration and lack of well established arbitral institutions. Therefore, the international arbitral community is choosing neutral arbitral destinations such as Singapore and Hong Kong which have well established arbitral institutions and litigant friendly and efficient laws to resolve commercial dispute speedily.[1] In this regard, the efforts of the arbitral community in India to improve the arbitral environment by way of efficient, litigant friendly legal and institutional reforms have come to a naught because of the delay in amending the existing Arbitration and Conciliation Act, 1996. This is in spite of the recommendations for reforming the Act by the Law Commission of India and legal and commercial communities.

In the year under survey the Supreme Court of India by way of interpretation of the provisions of the Act has added new principles in the arbitral jurisprudence in India. The Supreme Court has rendered decisions in the areas such as arbitration agreements, mandatory references, interim reliefs, jurisdiction of arbitral tribunals and conductance arbitration by the arbitral tribunals, and judicial interference with the awards. Some of the principles laid down in these decisions have resulted in slowing down the arbitral process because of the increasing role the courts would have to assume. The Supreme Court has held that matters pertaining to mortgages are outside the purview of arbitral process. The courts have power and duty to

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1 See, Earnest & Young, *Changing Face of Commercial Arbitration in India* (2011).

decide jurisdictional issues when dealing with petitions under sections 8, 9 and 11 of the Act which would take away the power of the arbitrator to rule on his jurisdiction under the principle of *kompetenz-kompetenz,* a well established internationally accepted principle in international commercial arbitration.

II ARBITRATION AGREEMENT

Arbitration agreement is the basic requirement for initiation of arbitration proceedings to resolve disputes. It is the starting point of party autonomy. The need for care in drafting arbitration agreements has been highlighted by all the arbitration institutions. Due to this reason most of the arbitral institutions have model arbitration clause which the institutions recommend to the parties who want to use the service of that particular arbitral institution. The courts are quite often called upon to decide various issues pertaining to arbitration agreements such as whether the particular arbitration clause in a contract satisfies the requirement of a valid arbitration agreement as required under section 7 of the Act, construction of arbitration agreements so as to determine its scope, extent and applicability etc.

Existence of arbitration agreement

Existence of an arbitration agreement is the *sine qua non* to referring any dispute for arbitration. Many contracts contain clauses dealing with resolution of disputes. However, often these clauses were the subject matter of interpretation by courts to determine whether these clauses are arbitration agreements or not at various stages of arbitration proceedings. One such occasion came before the Supreme Court in the year under survey in the context of the appointment of arbitrators under section 11 of the Act. In *State of Orissa* v. *Bhagyadhar Dash*[2] the issue before the Supreme Court was whether the last sentence in the proviso to clause 10 of the conditions of contract between the parties (forming part of the agreements between the state and the contractors) would constitute an arbitration agreement. The said sentence stated as follows: *"In the event of a dispute, the decision of the Superintending Engineer of the Circle will be final".*

This question arose in an application filed under section 11 of the Act by the respondent contractor for appointment of arbitrator. The high court held that this sentence was an arbitration agreement. The appellants challenged the said order before the Supreme Court on the ground that there was no arbitration agreement and, therefore, the application under section 11 of the Act filed by the contractor ought to have been dismissed.

The Supreme Court relying on a series of its earlier decisions[3] held that clause 10 of the agreement showed that it was a clause relating to power of the engineer-in-chief to make additions and alterations in the drawings and specifications, and execution of non-tendered additional items of work (that is items of work which are not found in the bill of quantities or schedule of work). On the question whether

2 (2011) 7 SCC 406.

3 *K K Modi* v. *K N Modi* (1998) 3 SCC 573; *Bihar State Mineral Development Corporation* v. *Encon Builders (IP) Ltd.* 2003 (7) SCC 418; *Jagdish Chander* v. *Ram Chandra* (2007) 5 SCC 719 and *State of Orissa* v. *Damodar Das* (1996) 2 SCC 216 etc.

the last sentence in clause 10 would constitute an arbitration agreement the court held as follows:[4]

> We may next examine whether the last sentence of the proviso to clause 10 could be considered to be an arbitration agreement. It does not refer to arbitration as the mode of settlement of disputes. It does not provide for reference of disputes between the parties to arbitration. It does not make the decision of the Superintending Engineer binding on either party. It does not provide or refer to any procedure which would show that the Superintending Engineer is to act judicially after considering the submissions of both parties. It does not disclose any intention to make the Superintending Engineer an arbitrator in respect of disputes that may arise between the Engineer-in-Charge and the contractor. It does not make the decision of the Superintending Engineer final on any dispute, other than the claim for increase in rates for non-tendered items. It operates in a limited sphere, that is, where in regard to a non-tendered additional work executed by the contractor, if the contractor is not satisfied with the unilateral determination of the rate thereof by the Engineer-in-Charge the rate for such work will be finally determined by the Superintending Engineer. It is a provision made with the intention to avoid future disputes regarding rates for non-tendered item. It is not a provision for reference of future disputes or settlement of future disputes. The decision of superintending Engineer is not a judicial determination, but decision of one party which is open to challenge by the other party in a court of law. The said clause can by no stretch of imagination be considered to be an arbitration agreement. The said clause is not, and was never intended to be, a provision relating to settlement of disputes.

In this regard the court also took note of the fact that the state government had deleted the original arbitration clause 23 from the standard form of the contract which only would show that the government did not want to have an arbitration clause. Thus, this decision highlighted the need for a clear wording in the arbitration agreement expressly stating that the parties intended to settle their disputes by way of arbitration. In the absence of any such clear exposition of intention to arbitrate, a clause relating to resolving of dispute will not constitute arbitration clause.

Validity of an arbitration clause in an unstamped unregistered document which was compulsorily registrable

Unless an arbitration agreement is a valid agreement no reference could be made to arbitration of any dispute covered by it. Therefore, in many arbitration proceedings the validity of the particular terms or clause in the agreement would be an issue. A similar issue arose before the Supreme Court in *M/S SMS Tea Estates P. Ltd.* v. *M/s. Chandmari Tea Co. P. Ltd*.,[5] where the court was called upon to decide in the context of appointment of an arbitrator, the validity of an arbitration clause in

4 *Supra* note 2 at 418-419.

5 2011 (7) SCALE 747.

a compulsorily registrable document which was neither registered nor stamped. In this case, under an unregistered and unstamped lease deed the respondent granted under a lease two tea estates to the appellant for a period of thirty years. The lease deed contained an arbitration clause.

Since the respondent forcibly evicted the appellant a dispute arose and the appellant filed an application under section 11(6) of the Act before Chief Justice of the high court. The respondent opposed the said application by contending that the unregistered lease deed for thirty years was invalid under the Transfer of Property Act 1882 and Registration Act, 1908 and that the said lease deed was also not duly stamped and was invalid, unenforceable and not binding under the Indian Stamp Act, 1899; and that, therefore, the arbitration clause, being part of the said lease deed, was also invalid and unenforceable.

The learned Chief Justice of the high court dismissed the appellant's application and held that the lease deed was compulsorily registrable and as the lease deed was not registered, no term in the said lease deed could be relied upon for any purpose and, therefore, the arbitration clause could not be relied upon for seeking reference to arbitration. The high court also held that the arbitration clause could not be termed as a collateral transaction.

The appellant approached the Supreme Court. On the issue whether an arbitration agreement contained in an unregistered (but compulsorily registrable) instrument is valid and enforceable, the Supreme Court observed that under section 49 of the Registration Act a document which is compulsorily registrable, if not registered, will not affect the immovable property comprised therein in any manner and that it will also not be received as evidence of any transaction affecting such property, except as evidence of a contract in a suit for specific performance and as evidence of any collateral transaction which by itself is not required to be effected by registered instrument. The court further held that an arbitration agreement does not require registration under the Registration Act and that even if it is found as one of the clauses in a contract or instrument, it is an independent agreement to refer the disputes to arbitration. The court held that an arbitration agreement in an unregistered but compulsorily registrable document can be acted upon and enforced for the purpose of dispute resolution by arbitration.

On the issue whether an arbitration agreement in an unregistered instrument which is not duly stamped is valid and enforceable the court held that under section 35 of Stamp Act, unless the stamp duty and penalty due in respect of the instrument is paid, a court cannot act upon the instrument, which would mean that it cannot act upon the arbitration agreement also which is part of the instrument.

The court then laid down the procedure to be adopted by courts, where the arbitration clause is contained in a document which is not registered (but compulsorily registrable) and which is not duly stamped:[6]

(i) The court should, before admitting any document into evidence or acting upon such document, examine whether the instrument/document is duly stamped and whether it is an instrument which is compulsorily registrable.

6 *Id.* at 755.

(ii) If the document is found to be not duly stamped, section 35 of Stamp Act bars the said document from being acted upon. Consequently, even the arbitration clause therein cannot be acted upon. The court should then proceed to impound the document under section 33 of the Stamp Act and follow the procedure under sections 35 and 38 of the Stamp Act.

(iii) If the document is found to be duly stamped, or if the deficit stamp duty and penalty is paid, either before the court or before the collector (as contemplated in sections 35 or 40 of the Stamp Act), and the defect with reference to deficit stamp is cured, the court may treat the document as duly stamped.

(iv) Once the document is found to be duly stamped, the court shall proceed to consider whether the document is compulsorily registrable. If the document is found to be not compulsorily registrable, the court can act upon the arbitration agreement, without any impediment.

(v) If the document is not registered, but is compulsorily registrable, having regard to section 16(1)(a) of the Act, the court can de-link the arbitration agreement from the main document, as an agreement independent of the other terms of the document, even if the document itself cannot in any way affect the property or cannot be received as evidence of any transaction affecting such property. The only exception is where the respondent in the application demonstrates that the arbitration agreement is also void and unenforceable, as pointed out in para 8 above. If the respondent raises any objection that the arbitration agreement was invalid, the court will consider the said objection before proceeding to appoint an arbitrator.

(vi) Where the document is compulsorily registrable, but is not registered, but the arbitration agreement is valid and separable, what is required to be borne in mind is that the arbitrator appointed in such a matter cannot rely upon the unregistered instrument except for two purposes, that is (a) as evidence of contract in a claim for specific performance and (b) as evidence of any collateral transaction which does not require registration.

On the issue of appointment of arbitrator, the court held that an unregistered lease deed for a term of thirty years cannot be relied upon to claim or enforce any right under or in respect of such lease, but can be relied upon for the limited purposes of showing that the possession of the lessee is lawful possession or as evidence of some collateral transaction and that even if an arbitrator is appointed, he cannot rely upon or enforce any term of the unregistered lease deed. The court further held that where the arbitration agreement is not void and does not provide for arbitration in regard to all and whatsoever disputes, but provides only for settlement of disputes and differences arising in relation to the lease deed, the arbitration clause though available in theory is of little practical assistance, as it cannot be used for deciding any dispute or difference with reference to the unregistered deed. The court, therefore, after examining the relevant arbitration clause in the agreement held that having regard to the limited scope of the said arbitration agreement (restricting it to disputes in relation to or in any manner touching upon the lease deed), the arbitrator will have no jurisdiction to decide any dispute which does not relate to the lease

deed, that though the arbitrator will have jurisdiction to decide any dispute touching upon or relating to the lease deed, as the lease deed is unregistered, the arbitration will virtually be a non-starter and that a party under such a deed may have the luxury of having an arbitrator appointed, but little else.

III MANDATORY REFERENCE: NATURE AND SCOPE

Section 8 of the Act mandates that if there is an arbitration agreement between the parties a party when approaches a judicial authority ignoring the arbitration agreement the judicial authority has a duty to refer the dispute for arbitration at the request of the opposite party. The only restriction under this section is that the opposite party seeking reference should not have submitted his first statement on the substance of the dispute when he is seeking reference. This is commonly known as the principle of 'mandatory reference' which is to ensure that the arbitration agreement based on party autonomy should be respected by courts. On the context of mandatory reference several issues often have arisen before the court, concerning the scope of enquiry which a judicial authority is called upon to make before referring a dispute for arbitration, the timing and nature of request to be made by the opposite party etc. In this regard, one issue which is being raised before the courts or judicial authority is whether the rule of mandatory reference is mandatory. That is, whether the courts or judicial authority should refer all disputes for arbitration or whether there are certain types of disputes which should be excluded from this reference. In the previous year the Supreme Court had held in *N. Radhakrishnan* v. *Mastero Engineers*[7] that when the dispute involved complicated question of facts and law and involving detailed evidence then the courts need not refer the dispute for arbitration in spite of having an arbitration agreement.

Similarly, in the year under survey the Supreme Court has held in *Booz-Allen & Hamilton Inc.* v. *SBI Home Finance Ltd.*[8] that a mortgage suit cannot be referred for arbitration even when there is an arbitration agreement.

In this case the first respondent financed the purchase of two flats by respondent no. 2 and 3 under separate loan agreements creating security on the flats. Respondents 2 and 3 permitted the appellant to use the two flats under two separate lease and license agreements. A tripartite deposit agreement was also entered into between respondent no.1, respondent no. 2 and 3, and the appellant paid a refundable security deposit to respondents 2 and 3 which also provided for an option for the appellant to renew the license after its expiry. The said agreement contained an arbitration clause. Subsequently dispute arose between the parties because of default committed by respondents 2 and 3 in repayment of the loans to respondent no.1. Respondent no.1, therefore, filed a mortgage suit before the high court against the appellant and respondent 2 and 3 to enforce the security over the flats along with an application against the appellant to vacate the premises. The appellant filed an application under section 8 of the Act to refer the matter for arbitration. However, he also filed a detailed counter in the application filed by the respondent no. 1 to evict the

7 (2010) 1 SCC 72.
8 (2011) 5 SCC 532.

appellant. The high court dismissed the application under section 8 on the ground that there was no arbitration agreement covering the issues raised in the suit and that the appellant by filing a detailed counter to the application filed by respondent no.1 in the suit had already submitted his statement on the substance of the dispute.

The Supreme Court, on the issue of whether the appellant has submitted his statement on the substance of dispute, held that the issue involved in the suit for the enforcement of mortgage right also formed the subject matter of the arbitration agreement. The court held that not only filing of the written statement in a suit, but also filing of any statement, application, affidavit by a defendant prior to the filing of the written statement would be construed as 'submission of a statement on the substance of the dispute' if by filing such statement/application/affidavit, the defendant shows his intention to submit himself to the jurisdiction of the court and waives his right to seek reference to arbitration, as that mere filing of a reply by a defendant, to an application for temporary injunction/attachment before judgment/ appointment of receiver, could not be considered as submission of a statement on the substance of the dispute, as that is done to avoid an interim order being made against him. The court following the decision in *Rashtriya Ispat Nigam Ltd* v. *Verma Transport Company,*[9] held that the expression 'first statement on the substance of the dispute' contained in section 8(1) of the Act is different from the expression 'written statement', and that the former referred to a submission of the party making the application under section 8 of the Act, to the jurisdiction of the judicial authority; and that what should be decided by the court was whether the party seeking reference to arbitration has waived his right to invoke the arbitration clause. The court also reiterated the principle laid down in the above case that mere contesting an application for temporary injunction by filing a counter would not amount to subjecting oneself to the jurisdiction of the court.

The court then compared the scope of enquiry in an application for reference under section 8 with an application for appointment of an arbitrator under section 11 of the Act and pointed out that the difference between the nature and scope of issues arising for consideration in an application under section 11 of the Act for appointment of arbitrators were far narrower than those arising in an application under section 8 of the Act, seeking reference of the parties to a suit to arbitration. The court said that while considering an application under section 11 of the Act, the Chief Justice or his designate would not embark upon an examination of the issue of arbitrability or appropriateness of adjudication by a private forum, once he finds that there was an arbitration agreement between or among the parties, and should leave the issue of arbitrability for the decision of the arbitral tribunal. The court further held that where the issue of arbitrability arises in the context of an application under section 8 of the Act in a pending suit, all aspects of arbitrability have to be decided by the court seized of the suit, and cannot be left to the decision of the arbitrator. On the issue of mandatory reference the court held that even if there is an arbitration agreement between the parties, and even if the dispute is covered by the arbitration agreement, the court where the civil suit is pending, will refuse an application under section 8 of the Act, and refer the parties to arbitration,

9 2006 (7) SCC 275.

if the subject matter of the suit is capable of adjudication only by a public forum or the relief claimed can only be granted by a special court or tribunal.

The court in this regard said as follows:[10]

> Arbitral tribunals are private fora chosen voluntarily by the parties to the dispute, to adjudicate their disputes in place of courts and tribunals which are public fora constituted under the laws of the country. Every civil or commercial dispute, either contractual or non-contractual, which can be decided by a court, is in principle capable of being adjudicated and resolved by arbitration unless the jurisdiction of arbitral tribunals is excluded either expressly or by necessary implication. Adjudication of certain categories of proceedings are reserved by the Legislature exclusively for public fora as a matter of public policy. Certain other categories of cases, though not expressly reserved for adjudication by a public fora (courts and tribunals), may by necessary implication stand excluded from the purview of private fora. Consequently, where the cause/dispute is inarbitrable, the court where a suit is pending, will refuse to refer the parties to arbitration, under Section 8 of the Act, even if the parties might have agreed upon arbitration as the forum for settlement of such disputes. The well recognized examples of non-arbitrable disputes are : (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; (iii) guardianship matters; (iv) insolvency and winding up matters; (v) testamentary matters (grant of probate, letters of administration and succession certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.

The court, thereafter, pointed out that the Act did not specifically exclude any category of disputes as being not arbitrable, but sections 34(2)(b) and 48(2) of the Act, however, makes it clear that an arbitral award will be set aside if the court finds that "the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force". The court then relied on its earlier decisions for determining the distinction between disputes which are capable of being decided by arbitration, and those which are not, and stated that the following principles have been brought out in three decisions of this court[11] as follows:[12]

> A decree for sale of a mortgaged property as in the case of a decree for order of winding up, requires the court to protect the interests of persons other than the parties to the suit/petition and empowers the court to entertain and adjudicate upon rights and liabilities of third parties (other than those

10 *Supra* note 8 at 546.

11 *Haryana Telecom Limited* v. *Sterlite Industries India Ltd*., 1999 (5) SCC 688; *Olympus Superstructures Pvt. Ltd.* v. *Meena Vijay Khetan,* 1999 (5) SCC 651 and *Chiranjilal Shrilal Goenka* v. *Jasjit Singh,* 1993 (2) SCC 507.

12 *Supra* note 8 at 551.

who are parties to the arbitration agreement). Therefore, a suit for sale, foreclosure or redemption of a mortgaged property, should only be tried by a public forum, and not by an arbitral tribunal. Consequently, it follows that the court where the mortgage suit is pending, should not refer the parties to arbitration.

The court also rejected the contention of the appellant to refer those disputes such as the validity of the claim of the respondent no.1 and the quantum of the claim on the ground that a mortgage suit is not only about determination of the existence of the mortgage or determination of the amount due, but it was also about enforcement of the mortgage with reference to an immovable property and adjudicating upon the rights and obligations of several classes of persons, who have the right to participate in the proceedings relating to the enforcement of the mortgage, *vis-a-vis* the mortgagor and mortgagee and that even if some of the issues or questions in a mortgage suit (as pointed out by the appellant) are arbitrable or could be decided by a private forum, the issues in a mortgage suit cannot be divided. The court therefore held that the suit being one for enforcement of a mortgage by sale, it should be tried by the court and not by an arbitral tribunal. It is submitted that this decision has further limited the scope of arbitration as an alternate dispute resolution mechanism by excluding all disputes involving the rights *in rem.*

IV INTERIM MEASURES

Under section 9 of the Act a party to a dispute can approach a court for interim measure for protection of his interest in the subject matter of dispute. A party can seek such interim remedy from the court at all stages of arbitral proceedings, *i.e.* before the initiation of arbitration proceedings, pendent lite and post award stages. This is intended to safeguard the interest of the party in the subject matter of dispute so that he will not be deprived of the benefit of an award in his favour. The principles to be followed for granting such interim measures by courts have been spelt out as equivalent to the grant of interim relief in a suit under order 39 of the Code of Civil Procedure. Parties to arbitration proceedings therefore approach courts seeking various types of interim measures. On many occasions the parties to arbitration proceedings held outside India approach Indian courts seeking interim measures invoking the principles laid down in *Bhatia International*[13] case wherein the Supreme Court had held that part I of the Act would apply to foreign arbitration proceedings unless parties had expressly excluded its application. Two such cases came up before the Supreme Court in matters pertaining to foreign arbitration proceedings involving interim measures, which are being dealt with below.

(a) Jurisdiction of Indian courts to entertain section 9 petition in a foreign arbitration proceedings

In *Videocon Industries Limited* v. *Union of India,*[14] the Supreme Court had to decide the questions whether the Delhi High Court could entertain the petition

13 (2002) 4 SCC 105.
14 (2011) 6 SCC 161.

filed by the respondents under section 9 of the Act for grant of a declaration that Kuala Lumpur (Malaysia) is the contractual and juridical seat of arbitration and for the issue of a direction to the arbitral tribunal to continue the hearing at Kuala Lumpur in terms of the arbitration clause in the contract between the parties.

In this case a Production Sharing Contract (PSC) was executed between respondent no. 1 on the one hand and a consortium of four companies including the appellant on the other, in terms of which the latter was granted an exploration license and mining lease to explore and produce hydro carbon resources owned by respondent no. 1. Subsequently, some substitution and reorganization among the four companies took place. The PSC had arbitration clause which is extracted below:[15]

> 33.1 *Indian Law to Govern*
>
> Subject to the provisions of article 34.12, this contract shall be governed and interpreted in accordance with the laws of India.
>
> 33.2 *Laws of India not to be contravened*
>
> Subject to article 17.1 nothing in this contract shall entitle the Contractor to exercise the rights, privileges and powers conferred upon it by this contract in a manner which will contravene the laws of India.
>
> 34.3 *Unresolved disputes*
>
> Subject to the provisions of this contract, the Parties agree that any matter, unresolved dispute, difference or claim which cannot be agreed or settled amicably within twenty one (21) days may be submitted to a sole expert (where article 34.2 applies) or otherwise to an arbitral tribunal for final decision as hereinafter provided.
>
> 34.12. *Venue and Law of Arbitration Agreement*
>
> The venue of sole expert, conciliation or arbitration proceedings pursuant to this Article, unless the Parties otherwise agree, shall be Kuala Lumpur, Malaysia, and shall be conducted in the English language. Insofar as practicable, the parties shall continue to implement the terms of this contract notwithstanding the initiation of arbitral proceedings and any pending claim or dispute. Notwithstanding the provisions of Article 33.1, the arbitration agreement contained in this article 34 shall be governed by the laws of England.
>
> 35.2 *Amendment*
>
> This contract shall not be amended, modified, varied or supplemented in any respect except by an instrument in writing signed by all the Parties, which shall state the date upon which the amendment or modification shall become effective.

15 *Id*. at 164.

Disputes arose between the respondents and the appellant and the same were referred to an arbitral tribunal under clause 34.3 of the PSC. The arbitral tribunal fixed the date of hearing at Kuala Lumpur (Malaysia), but due to outbreak of epidemic SARS, the arbitral tribunal shifted the venue of its sittings to Amsterdam in the first instance and, thereafter, to London by consent of parties. Thereafter, several proceedings were held by the arbitral tribunal at London which resulted in passing a partial award. Respondent no. 1 challenged a partial award by filing a petition in the High Court of Malaysia at Kuala Lumpur. On being noticed, the appellant questioned the maintainability of the case before the High Court of Malaysia by contending that in view of clause 34.12 of the PSC only the English courts have the jurisdiction to entertain any challenge to the award. After filing the petition before the High Court of Malaysia, the respondents made a request to the tribunal to conduct the remaining arbitral proceedings at Kuala Lumpur, but their request was rejected and it was declared that the remaining arbitral proceedings will be held in London.

At that stage, the respondents filed a petition under section 9 of the Act in Delhi High Court for stay of the arbitral proceedings and also a petition questioning the award. The appellant objected to the maintainability of the petition on the ground that the courts in India do not have the jurisdiction to entertain the challenge to the arbitral award. The single judge of the Delhi High Court overruling the objection of the appellant held that the said high court has the jurisdiction to entertain the petition filed under section 9 of the Act. The court relied on the judgment of the Supreme Court in *Bhatia International* v. *Bulk Trading S.A*.[16] holding that the provisions of part-I of the Act would apply to international commercial arbitrations held outside India, unless the parties by agreement express or implied, exclude all or any of its provisions.

The appellant approached the Supreme Court against the said order. In the appeal the appellant contented that the *Bhatia International* case had been erroneously applied and that the reliefs prayed for in the petition could not have been granted under section 9 of the Act on the ground that stay of arbitral proceedings was beyond the scope of that section. The respondents on the other hand contented that as per the arbitration agreement which was binding on all the parties to the contract, a conscious decision was taken by them that Kuala Lumpur would be the seat of any intended arbitration; Indian law as the law of the contract and English law as the law of arbitration would be applicable and, that mere fact that the arbitration was held outside Kuala Lumpur due to the outbreak of epidemic SARS, the venue of arbitration cannot be said to have been changed from Kuala Lumpur to London.

The Supreme Court first considered the question whether Kuala Lumpur was the designated seat or juridical seat of arbitration that had been shifted to London. The court referring to the sections 3 and 53 of the English Arbitration Act, 1996 and judgment of the Supreme Court in *Dozco India P. Ltd.* v. *Doosan Infracore Co. Ltd.*[17] held that under the English law the seat of arbitration would mean the juridical

16 (2002) 4 SCC 105.
17 2010 (9) UJ 4521 (SC).

seat of arbitration, which could be designated by the parties to the arbitration agreement or by any arbitral or other institution or person empowered by the parties to do so or by the arbitral tribunal, if so authorized by the parties. While there was no such provision in the Act under which the arbitral tribunal could change the juridical seat of arbitration which, as per the agreement of the parties, was Kuala Lumpur, a mere change in the physical venue of the hearing from Kuala Lumpur to Amsterdam and London did not amount to change in the juridical seat of arbitration.

On the issue, whether the Delhi High Court could entertain the petition filed by the respondents and on the applicability of part I of the Act the court after referring to its earlier decisions in[18] held as follows:[19]

> In the present case also, the parties had agreed that notwithstanding article 33.1, the arbitration agreement contained in article 34 shall be governed by laws of England. This necessarily implies that the parties had agreed to exclude the provisions of part I of the Act. As a corollary to the above conclusion, we hold that the Delhi High Court did not have the jurisdiction to entertain the petition filed by the Respondents under section 9 of the Act and the mere fact that the appellant had earlier filed similar petitions was not sufficient to clothe that high court with the jurisdiction to entertain the petition filed by the respondents.

On the said findings the Supreme Court allowed appeal and set aside the order of high court and dismissed the petitions filed by the respondents under section 9 of the Act.

(b) Jurisdiction of Indian courts to entertain an appeal under the Act against an interim order passed by foreign arbitral tribunal

In *Yograj Infras. Ltd.* v. *Ssang Yong Engineering & Constrn. Co. Ltd.*,[20] the Supreme Court has held that an appeal under section 37 (1) of the Act was not maintainable against an order passed by an arbitration tribunal in Singapore under the Singapore International Arbitration Centre (SIAC) Rules. In this case the appellant, an Indian company, entered into a back to back sub-contract with the respondent, a South Korean Company, for carrying out work relating to the upgradation of a highway project, which was awarded by the national highway authority of India to the respondent. Clauses 27 of the sub-contract provided that all disputes should be resolved by arbitration to be conducted in English in Singapore in accordance with the Singapore International Arbitration Centre (SIAC) Rules. Clause 28 provided that the agreement shall be subject to the laws of India. Pursuant to the sub-contract, the appellant executed various performance bank guarantees (PBGs) in favour of the respondent. Disputes arose between the parties when the respondent terminated the sub-contract before the completion of the work by the

18 *Bhatia International* v. *Bulk Trading S.A, Supra* note 16; *Venture Global Engineering* v. *Satyam Computer Services Limited* (2008) 4 SCC 190 and *Hardy Oil and Gas Limited* v. *Hindustan Oil Exploration Company Ltd.* (2006) 1 GLR 658.

19 *Supra* note 14 at 177.

20 (2011) 9 SCC 735.

appellant. In terms of the arbitration clause in the sub-contract the dispute was referred to a sole arbitrator appointed by SIAC. The appellant filed an application before the sole arbitrator under section 17 of the Act restraining the respondent from encashing the PBGs, for interim payment and other reliefs. The respondent also filed an application seeking interim relief. The sole arbitrator passed some interim orders with a view to enabling the continuation of the construction work on the project pending the arbitration proceedings.

The appellant challenged the above orders before a district court in India by way of appeal under section 37(2) (b) of the Act, which was opposed by the respondent on the ground that the said appeal was not maintainable before the learned district court in India, since the seat of the arbitration proceedings was in Singapore and the said proceedings were governed by the laws of Singapore. The learned district judge dismissed the appeal as not maintainable without deciding the matter on merits. The appellant then moved the high court by way of a revision which was also dismissed on the ground that as per clause 27 of the agreement, the parties had agreed that the arbitral proceedings would be conducted in accordance with the SIAC rules and by virtue of rule 32 thereof, the jurisdiction of the Indian courts stood ousted. The appellant approached the Supreme Court.

The Supreme Court on the basis of the agreement between the parties that the arbitration law of Singapore would govern the curial law applicable held:[21]

> Clause 27.1 made it quite clear that the curial law which regulates the procedure to be adopted in conducting the arbitration would be the SIAC Rules. There is, therefore, no ambiguity that the SIAC Rules would be the curial law of the arbitration proceedings. It also happens that the parties had agreed to make Singapore the seat of arbitration. After clause 27.1 indicate that the arbitration proceedings were to be conducted in accordance with the SIAC Rules.

On the contention of the respondent that part I of the Act would be applicable and, therefore, the appeal under section 37 (1) of the Act would be maintainable the court held that part I would have no application once the parties had agreed by virtue of clause 27.1 of the agreement that the arbitration proceedings would be conducted in Singapore, i.e., the seat of arbitration would be in Singapore, in accordance with the SIAC rules and that rule 32 of the SIAC rules provided that the law of arbitration would be the International Arbitration Act, 2002, where the seat of arbitration is in Singapore. On the basis of the above finding the Supreme Court dismissed the appeal.

V APPOINTMENT OF ARBITRATORS

Section 11 of the Act provides for the appointment of arbitrators by the Chief Justice of the high court in the case of a domestic arbitration and by the Supreme Court in the case of an international commercial arbitration. Appointment of arbitrator has been one of the most contentious stages of the arbitral process under

21 *Id*. at 748.

the Act. The role of the court in this area has assumed significance after the decision of the seven judge bench of the Supreme Court in *S.B.P. & Company* v. *Patel Engineering Ltd*.[22] In this case the Supreme Court had held that at the stage of appointment of the arbitrator the chief justice or his designate has to decide on the preliminary issues such as the existence and validity of the arbitration agreement. Each year such cases form a major part of the decisions under the Act by the Supreme Court. The year under survey also is not an exception and the Supreme Court had to decide several cases involving appointment of arbitrators in which such incidental questions such as the existence of the arbitrable dispute, applicability of the arbitration agreement in case of a non-party etc come up for reconsideration.

Existence of arbitrable dispute

In *Union of India* v. *M/s. Master Construction Co.*[23] the Supreme Court held that when the claimant had received the payment on the basis of a 'no claim certificate' there was no arbitrable dispute and an arbitrator could not be appointed. In this case a dispute arose between the appellant and the respondent contractor under a construction contract awarded by the appellant in favour of the respondent. The work was said to have been completed by the respondent and a completion certificate was issued. The respondent furnished no-claim certificates and the final bill was signed and payment on the final bill was released to him. Thereafter, the bank guarantee given by him was also released but immediately after release of the bank guarantee, on that very day, the respondent wrote to the appellants withdrawing the `no-claim certificates' and also lodged certain claims. The respondent requested the appellant to appoint an arbitrator in terms of the arbitration clause in the contract. However, no arbitrator was appointed by the appellant. The respondent made an application under section 11 of the Act before the chief justice of the high court who referred the dispute to arbitration. The appellant approached the Supreme Court against the said order.

The appellant contented that in view of the 'no-claim certificate' there was no arbitrable issue between the parties. The respondent, on the other hand, contented that the said 'no claim certificate' was obtained under coercion and, therefore, there was an arbitrable issue.

Relying on the principle laid down by the Supreme Court in *Boghara Polyfab Pvt. Ltd.*[24] the Supreme Court held that in a case where the claimant contends that a discharge voucher or no-claim certificate had been obtained by fraud, coercion, duress or undue influence and the other side contests the correctness thereof, the chief justice/his designate must look into this aspect to find out at least, *prima facie*, whether or not the dispute was bona fide and genuine. It further held that where the dispute raised by the claimant with regard to validity of the discharge voucher or no-claim certificate or settlement agreement, *prima facie,* appears to be lacking in credibility, there may be no necessity to refer the dispute for arbitration at all. The court also stated that it cannot be overlooked that the cost of arbitration

22 (2005) 8 SCC 618.
23 (2011) 12 SCC 349.
24 (2009) 1 SCC 267.

is quite huge - most of the time, it runs into six and seven figures, and that it might not be proper to burden a party, who contends that the dispute is not arbitrable on account of discharge of the contract, merely because plea of fraud, coercion, duress or undue influence had been taken by the claimant. The court further held that a bald plea of fraud, coercion, duress or undue influence was not enough and the party who sets up such plea must *prima facie* establish the same by placing material before the chief justice/his designate. And that if the chief justice/his designate finds some merit in the allegation of fraud, coercion, duress or undue influence, he may decide the same or leave it to be decided by the arbitral tribunal and on the other hand, if such plea is found to be an after-thought, make-believe or lacking in credibility, the matter must be set at rest then and there.

Applying the above principles the court held that on the fact of the case there was no evidence of fraud or coercion and on the ground allowed the appeal and set aside order of the chief justice.

No appointment of arbitrator without deciding the existence of arbitration agreement

In *Bharat Rasiklal Ashra* v. *Gautam Rasiklal Ashra,*[25] the Supreme Court had to decide the question when the arbitration agreement between the parties was denied by the respondent, whether the chief justice or his designate, in exercise of power under section 11 of the Act, can appoint an arbitrator without deciding the question whether there was a binding arbitration agreement between the parties, after leaving it open to be decided by the arbitrator.

In this case the appellant and the first respondent and their grandfather entered into a partnership deed. When disputes arose in the partnership business, the first respondent, claiming that subsequently two new partnership deeds were executed by the parties which contained arbitration clauses, sent a letter to the appellant stating that he had already nominated his arbitrator in terms of the arbitration clause and therefore requested the appellant to nominate his arbitrator. The appellant sent a reply stating that he had not signed any new partnership deeds and the said documents were forged documents and not binding on him and that therefore the question of appointing an arbitrator in terms of the said documents did not arise.

The first respondent filed an application before the chief justice under section 11 of the Act alleging that disputes had arisen between appellant and first respondent, who were the partners of the second respondent firm governed by the subsequent partnership deeds and that clause 12 thereof provided for settlement of disputes by arbitration. He, therefore, prayed that the person named in his notice, as his arbitrator, be appointed as the sole arbitrator in terms of the arbitration agreement contained in the partnership deed. The appellant resisted the said petition by filing detailed objections denying the existence of an arbitration agreement.

The learned designate of the chief justice allowed the application under section 11 of the Act and appointed an arbitrator. The appellant approached the Supreme Court against the said order. The Supreme Court relied on its earlier decisions[26]

25 AIR 2011 SC 3562.

26 *S.B.P. & Company* v. *Patel Engineering Ltd.,* 2005 (8) SCC 618 and *National Insurance Company Ltd.* v. *Boghara Polyfab Pvt. Ltd*., 2009 (1) SCC 267.

and held that where the intervention of the court is sought for appointment of an arbitral tribunal under section 11, the duty of the chief justice or his designate had been defined in *SBP & Company* case in which the court had identified and segregated the preliminary issues that may arise for consideration into three categories, that is (i) issues which the chief justice or his designate is bound to decide; (ii) issues which he can also decide, that is issues which he may choose to decide; and (iii) issues which should be left to the arbitral tribunal to decide. The court pointed out that it was clear from the said two decisions that the question whether there was an arbitration agreement had to be decided only by the chief justice or his designate and should not be left to the decision of the arbitral tribunal and that it was because of the question whether there was arbitration agreement was a jurisdictional issue and unless there was a valid arbitration agreement, the application under section 11 of the Act would not be maintainable and the chief justice or his designate would have no jurisdiction to appoint an arbitrator under section 11 of the Act.

The court further observed as follows:[27]

> It is well settled that an arbitrator can be appointed only if there is an arbitration agreement in regard to the contract in question. If there is an arbitration agreement in regard to contract A and no arbitration agreement in regard to contract B, obviously a dispute relating to contract B cannot be referred to arbitration on the ground that contract A has an arbitration agreement. Therefore, where there is an arbitration agreement in the partnership deed dated 12.6.1988, but the dispute is raised and an appointment of arbitrator is sought not with reference to the said partnership deed, but with reference to another partnership deed dated 19.5.2000, unless the party filing the application under section 11 of the Act is able to make out that there is a valid arbitration clause as per the contract dated 19.5.2000, there can be no appointment of an arbitrator.

The court also dealt with the apprehension of the first respondent that if the chief justice or his designate was required to examine the allegations of fabrication and forgery made by a party in regard to the contract containing the arbitration agreement, before appointing an arbitrator under section 11 of the Act, the proceedings under the said section would cease to be a summary proceeding, and become cumbersome and protracted, necessitating recording of evidence, thereby defeating the object of the Act. The court pointed out that the apprehension had no relevance or merit and that the existence of a valid and enforceable arbitration agreement was a condition precedent before an arbitrator can be appointed under section 11 of the Act and that when serious allegations of fraud and fabrication were made, it was not possible for the court to proceed to appoint an arbitrator without deciding the said issue which related to the very validity of the arbitration agreement. The court, therefore, held that the fact that the allegations of fraud, forgery and fabrication were likely to involve recording of evidence or involve

27 *Supra* note 25 at 3566.

some delay in disposal, were not grounds for refusing to consider the existence of a valid arbitration agreement.

The Supreme Court for the above reasons set aside the order of the high court appointing an arbitrator and remitted the matter to the high court for deciding the questions whether the deed was forged or fabricated and whether there was a valid and enforceable arbitration agreement between the parties.

No appointment against a non-party

In *Deutsche Postbank Home Fin .Ltd.* v. *Taduri Sridhar*[28] an agreement for sale was entered into by the first respondent with the owner and the developer of a property. The appellant sanctioned a housing loan to the first respondent for the purchase of are apartment to be built and a loan agreement was entered into between them. In pursuance of the agreement for sale the first respondent paid the entire sale price to the developer through the appellant. Thereafter, the land-owners and the developer executed a registered sale deed, conveying to the first respondent, an undivided share in the land with the semi finished apartment and on the same day the first respondent entrusted the construction of the unfinished flat to the developer under a construction agreement under which the developer acknowledged the receipt of the total cost of construction, from the first respondent and agreed to complete the construction of the apartment and deliver the same to the first respondent. Clause 7 of the said construction agreement between the first respondent and the developer provided for arbitration.

There was delay in delivery of the flat by the developer which resulted in a dispute. The first respondent filed a petition under section 11 of the Act before the designated judge of the high court, for appointment of an arbitrator. In the said petition, the appellant was brought into the dispute, for the first time, by impleading him as a respondent along with the developer. The said petition was resisted by the appellant contending that it had nothing to do with the dispute between first respondent and developer; and that the application under section 11 of the Act was not maintainable against him, and that he was not a party to the arbitration agreement. The designate judge on the ground that the construction agreement had an arbitration clause allowed the application and appointed an arbitrator. The appellant challenged the same before the Supreme Court.

The Supreme Court relying upon its earlier decisions[29] held that the existence of an arbitration agreement as defined under section 7 of the Act was a condition precedent for exercise of power to appoint an arbitrator/arbitral tribunal, under section 11 of the Act by the chief justice or his designate. The court further held that it was not permissible to appoint an arbitrator to adjudicate the disputes between the parties in the absence of an arbitration agreement or mutual consent and that the arbitration agreement relied upon by the first respondent to seek appointment of arbitrator, was clause (7) of the construction agreement in which the appellant was

28 (2011) 11 SCC 375.

29 *Jagdish Chander* v. *Ramesh Chander* (2007) 5 SCC 719; *Yogi Agarwal* v. *Inspiration Clothes* (2009) 1 SCC 372 and *S. N. Prasad* v. *Monnet Finance Ltd.* (2011) 1 SCC 320.

not a party. Therefore, the court held that the disputes between the first respondent and the developer could not be arbitrated under the loan agreement. The Supreme Court thus reversed the order of the designate judge of the high court appointing an arbitrator in so far as the appellant was concerned.

Jurisdiction to decide on the issue of *res judicata*

In *Indian Oil Corp.Ltd.* v. *M/s. SPS Engineering Ltd*.,[30] the question before the Supreme Court was whether the designated judge can reject an application of appointment of an arbitrator under section 11 of the Act on the ground that the claim was barred by *res judicata*. In this case the appellant entered into a contract with the respondent for a construction work. The respondent failed to execute the said work within the contractual time. Therefore, the appellant terminated the contract. Disputes arose between the parties and an arbitrator was appointed, who made an award under which he awarded a sum of money towards the claims of respondent. The arbitrator also awarded a sum towards the counter claim made by the appellant. However, the appellant's claim for payment for extra work was rejected by the arbitrator on the ground that there was no proper evidence. After adjusting the amounts awarded to each other the arbitrator directed the appellant to pay the balance to the respondent with 12% interest.

The appellant dissatisfied with the rejection of his claim for the extra cost in execution of the contract work, approached to the high court under section 11 of the Act for the appointment of the arbitrator. The high court dismissed the said application holding that the application was misconceived, barred by *res judicata*, and *mala fide*. Against the said order the appellant approached the Supreme Court.

On the question whether the claim was barred by *res judicata* the Supreme Court held that such question did not arise for consideration in a proceeding under section 11 of the Act, that such an issue would have to be examined only by the arbitral tribunal since a decision on *res judicata* required consideration of the pleadings as also the claims/issues/points and the award in the first round of arbitration, in *juxtaposition* with the pleadings and the issues/points/claims in the second arbitration. The court then pointed out that the limited scope of section 11 of the Act did not permit such examination of the maintainability or tenability of a claim either on facts or in law and that it was for the arbitral tribunal to examine and decide whether the claim was barred by *res judicata*. The court also said that there can be no threshold consideration and rejection of a claim on the ground of *res judicata*, while considering an application under section 11 of the Act.

On the question of limitation the court on a perusal of the order of the designate, held that the designate has clearly exceeded his limited jurisdiction under section 11 of the Act, by deciding that the claim for extra cost, though covered by the arbitration agreement was barred by limitation and by the principle of *res judiata* and that he was also not justified in terming the application under section 11 of the Act as 'misconceived and *mala fide*'. The court further said that the designate should have avoided the risks and dangers involved in deciding an issue relating to the tenability of the claim without necessary pleadings and documents, in a

30 (2011) 3 SCC 507.

proceeding relating to the limited issue of appointing an arbitrator and that it was clear that the designate committed a jurisdictional error in dismissing the application filed by the appellant under section 11 of the Act, on the ground that the claim for extra cost was barred by *res judicata* and by limitation. The court categorically stated that the consideration of an application under section 11 of the Act, did not extend to consideration of the merits of the claim or the chances of success of the claim. The court, therefore, appointed an arbitrator to decide the issues.

International commercial arbitration and appointment when there was an accord and satisfaction

In *M/s. Cauvery Coffee Traders, Mangalore* v. *M/S. Hornor Resources (Intern.) Co. Ltd*.[31] the Supreme Court was called upon to decide whether an arbitrator should be appointed when the dispute between the parties had been settled already. In this case a purchase contract was entered into and executed by and between the applicant and the respondent under which a dispute arose as the respondents alleged that the goods supplied by the applicant were not as per the contract. The purchase agreement also contained an arbitration clause. The respondents resorted to clause 5 of the purchase agreement, regarding price adjustment and offered to pay a lesser amount of money than the money demanded by the applicant and the offer so made by the respondent was accepted by the applicant and agreed to receive the amount offered by the respondents as a full and final settlement. But subsequently, the applicant wrote a letter to the respondents claiming full amount which was originally demanded by the applicant less the money already paid towards full and final settlement. As the applicant received no positive response from the respondent, the applicant filed an application under section 11(5) and (9) of the Act before the Chief Justice of India for appointment of an arbitrator to adjudicate the disputes/differences which had arisen between the parties. The applicant sought the appointment of an arbitrator in a third country preferably Singapore or Australia. The respondents opposed the application contending that the applications themselves were not maintainable as the purchase agreement should be dealt with under part-II and not under part-I of the Act and that, therefore, the applications under section 11(5) & (9) of Act were not maintainable. The respondents also claimed that there had been a complete settlement between the parties and the applicants had accepted the full and final settlement as suggested by the respondents.

The designated judge of the Supreme Court of India, on the issue of maintainability of the application relied on the earlier decision by the court in *Bhatia International* v. *Bulk Trading S.A*[32] and held that the provisions of part I of the Act would be equally applicable to international commercial arbitrations held outside India, unless any of the said provisions are excluded by agreement between the parties expressly or by implication and since in the case there was no such exclusion the application was maintainable. On the issue of accord and satisfaction the learned designated judge after relying on the principles laid down by the court in its earlier

31 2011 (10) SCALE 419.
32 *Supra* note 16.

judgements[33] held that in case a final settlement has been reached amicably between the parties even by making certain adjustments and without any misrepresentation or fraud or coercion, then, the acceptance of money as full and final settlement/ issuance of receipt or vouchers etc. would conclude the controversy and it was not open to either of the parties to lay any claim/demand against the other party.

The court then observed as follows:[34]

> The applicants have not pleaded that there has been any kind of misrepresentation or fraud or coercion on the part of the respondents. Nor it is their case that payment was sent by the respondents without any settlement/agreement with the applicants, and was a unilateral act on their part. The applicants reached the final settlement with their eyes open and instructed their banker to accept the money as proposed by the respondents. Proposal itself was on the basis of clause 5 of the purchase contract which provided for *price adjustment*. For a period of three months after acceptance of the money under the full and final settlement, applicants did not raise any dispute in respect of the agreement of price adjustment. In such a fact situation, the plea that instructions were given by the applicants to the banker erroneously, being, afterthought is not worth acceptance. The transaction stood concluded between the parties, not on account of any unintentional error, but after extensive and exhaustive bilateral deliberations with a clear intention to bring about a quietus to the dispute. These negotiations, therefore, are self- explanatory steps of the intent and conduct of the parties to end the dispute and not to carry it further.

The designate judge also held that the applicant had elected to accept the payments already made by the respondents and that the applicants cannot take a complete somersault and agitate the issue that the offer made by the respondents had erroneously been accepted. The court, therefore, held that no dispute survived and dismissed the applications.

VI ARBITRAL PROCEEDINGS

Scope of reference and the jurisdiction of the arbitral tribunal to decide on the counter claim

The arbitration is an alternate dispute resolution mechanism and the arbitral tribunal is a substitute for the regular court. Therefore, the jurisdiction of the arbitral tribunal is restricted to those matters which have been referred to it for decision in terms of the arbitration agreement between the parties. If the arbitral tribunal travels beyond the terms of reference and renders an award then the award would be vitiated

33 *Nathani Steels Ltd.* v. *Associated Constructions*, 1995 Supp (3) SCC 324; *State of Maharashtra* v. *Nav Bharat Builders,* 1994 Supp (3) SCC 83; *M/s. P.K. Ramaiah & Company* v. *Chairman & Managing Director NTPC* (1994) Supp. 3 SCC 126; *National Insurance Company Limited* v. *M/s. Boghara Polyfab Private Limited*, AIR 2009 SC 170 and *R.L. Kalathia* v. *State of Gujarat* (2011) 2 SCC 400.

34 *Supra* note 31 at 430.

because the arbitral tribunal had exceeded its jurisdiction. Therefore, the pleadings of parties and scope of reference is an important aspect of arbitral process. However, the arbitration agreement being the source of jurisdiction of the arbitral tribunal to decide on the scope and subject matter of dispute the ultimate document to which recourse should be made to determine the scope of the arbitral tribunal's jurisdiction is the arbitration agreement. Therefore, questions such as the exact scope of reference, the jurisdiction of the arbitral tribunal to travel beyond the reference and rely on the arbitration agreement, and the stage at which the parties to make their claims have arisen before the Supreme Court. In *State Of Goa* v. *M/s. Praveen Enterprises*[35] the Supreme Court had to decide the validity of an award made by the arbitrator on a counter claim raised for the first time before the arbitrator. The question that arose before the Supreme Court was whether the respondent in an arbitration proceedings was precluded from making a counter-claim, unless it had served a notice upon the claimant requesting that the disputes relating to that counter-claim be referred to arbitration and the claimant had concurred in referring the counter claim to the same arbitrator; and/or it had set out the said counter claim in its reply statement to the application under section 11 of the Act and the chief justice or his designate refers such counter claim also to arbitration.

In this case under an agreement the appellant entrusted a construction work to the respondent. Clause 25 of the agreement provided for settlement of disputes by arbitration, relevant portions of which are extracted below:[36]

> Except where otherwise provided in the contract, all questions and disputes relating to the meaning of the specifications, designs, drawings and instructions herein before mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim right matter or thing whatsoever, in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions orders or these conditions or otherwise concerning the works, or the execution or failure to execute the same whether arising during the progress of the work or after the completion or abandonment thereof shall be referred to the sole arbitration of the person appointed by the Chief Engineer, Central Public Works Department in charge of the work at the time of dispute. It is a term of contract that the party invoking arbitrations shall specify the dispute or disputes to be referred to arbitration under this clause together with the amount or amounts claimed in respect of each such disputes.

The contractor did not complete the work even by the extended date of completion and the contract was terminated by the appellant. The respondent filed an application under section 11 of the Act for appointment of an arbitrator and a sole arbitrator was appointed. In reply to the respondent's claim statement, the appellant filed its reply with a counter claim. The arbitrator made an award after rejecting the claim of the respondent and allowing the counter claim made on behalf

35 2011 (7) SCALE 131.
36 *Id*. at 134-135.

of the appellant. The respondent challenged the award under section 34 of the Act, insofar as rejection of its other claims and the award made on counter claim of the appellant. The court upheld the award in rejecting the claims of the respondent but accepted the objection raised by the respondent in regard to award made on the counter claim. The court held that the arbitrator could not enlarge the scope of the reference and entertain either fresh claims by the claimants or counter claims from the respondent.

The appellant challenged the said judgment by filing an arbitration appeal before the high court. The high court held that the counter claims were bad in law as they were never placed before the court by the appellant (in the proceedings under section 11 of the Act for appointment of arbitrator) and they were not referred by the court to arbitration. The high court held that in such circumstances arbitrator had no jurisdiction to entertain a counter claim. The said judgment of the high court was challenged before the Supreme Court.

The appellant contended before the Supreme Court that in the absence of a bar in the arbitration agreement, it was entitled to raise its counter claims before the arbitrator, even though it had not raised them in its statement of objections to the proceedings under section 11 of the Act. After considering the relevant provisions of the Act and the Indian Limitation Act and the earlier decisions of the court,[37] the court summarized the emerging position in the following words:

(a) Section 11 of the Act requires the chief justice or his designate to either appoint the arbitrator/s or take necessary measures in accordance with the appointment procedure contained in the arbitration agreement. The chief justice or the designate is not required to draw up the list of disputes and refer them to arbitration. The appointment of arbitral tribunal is an implied reference in terms of the arbitration agreement.
(b) Where the arbitration agreement provides for referring all disputes between the parties (whether without any exceptions or subject to exceptions), the arbitrator will have jurisdiction to entertain any counter claim, even though it was not raised at a stage earlier to the stage of pleadings before the arbitrator.
(c) Where, however, the arbitration agreement requires specific disputes to be referred to arbitration and provides that the arbitrator will have the jurisdiction to decide only the disputes so referred, the arbitrator's jurisdiction is controlled by the specific reference and he cannot travel beyond the reference, nor entertain any additional claims or counter claims which are not part of the disputes specifically referred to arbitration.

The court then pointed out that the arbitration clause in that case contemplated all disputes being referred to arbitration by a sole arbitrator and that though the arbitration clause required the party invoking arbitration to specify the dispute/s to

37 *SBP & Co.* v. *Patel Engineering Ltd*, 2005 (8) SCC 618; *National Insurance Co. Ltd.* v. *Boghara Polyfab Private Ltd.,* 2009 (1) SCC 267 and *Indian Oil Corporation Ltd.* v. *Amritsar Gas Service,* 1991(1) SCC 533.

be referred to arbitration, it did not require the appointing authority to specify the disputes or refer any specific disputes to arbitration nor required the arbitrator to decide only the referred disputes and that it did not bar the arbitrator deciding any counter claims. The court, therefore, held that in the absence of agreement to the contrary, the counter claims by the Appellant were maintainable and arbitrable.

Arbitrator has no jurisdiction to rule on his jurisdiction after the appointment under section 11

One of the foundations of arbitral process is the principle of *kompetenze-kompetenze,* which is the power of the arbitrator to rule on his own jurisdiction. Under this principle all questions pertaining to the jurisdiction of the arbitral tribunal has to be decided by the arbitral tribunal itself. This principle has been evolved with the view to reduce court intervention in the arbitral process so that there will be speedier resolution of disputes. This principle has been incorporated in section 16 of the Act in which it has been clearly provided that the arbitral tribunal may rule on its own jurisdiction. However, after the decision of the seven judge bench of the Supreme Court in *SBP's* case the exclusive jurisdiction of the arbitral tribunal to rule on its jurisdiction got considerably eroded. In the said case the Supreme Court has clearly held that in an application for appointment of arbitrator under section 11 of the Act the chief justice or his designate has to decide several jurisdictional issues such as existence, validity and arbitrability issues. One such case arose before the Supreme Court in *M/s. Aps Kushwaha (SSI Unit)* v. *Municipal Corporation of Gwalior,*[38] in which the Supreme Court has held that an arbitrator appointed under section 11 has cannot go into his own jurisdiction.

In this case, the respondent issued a work order under a work contract which was governed by the general rules and directions for the guidance of the contractor. Clause 29 of the above rules provided for settlement of disputes by arbitration. When disputes arose at the instance of the appellant an arbitrator was appointed by the chief justice of the high court under section 11(6) of the Act. The arbitrator made an award directing the respondents to pay certain sum of money to the appellant with interest from the date of the award till date of payment.

The respondents challenged the award under section 34 of the Act and raised a preliminary objection that the sole arbitrator had no jurisdiction as the dispute had to be decided by statutory arbitral tribunal to be constituted under a state law which was applicable in the matter. The district court rejected the said preliminary objection. The review petition filed by the respondents seeking review of said order was also dismissed by the learned district judge. In the meanwhile the appellant also filed a review application seeking review of the order by which the designate of the chief justice appointed the arbitrator under section 11(6) of the Act. The said review petition was also dismissed.

The respondent challenged the orders of rejection of preliminary objection and dismissal of review application before the high court in arbitration appeal. The high court allowed the appeal and set aside the orders of the district court holding that the arbitral award passed by the sole arbitrator was without jurisdiction on the ground that the dispute raised by the appellant could only be decided by the statutory

38 (2011) 13 SCC 258.

arbitral tribunal constituted under the state law and, therefore, the sole arbitrator appointed by the designate of chief justice under section 11(6) of the Act lacked inherent jurisdiction to decide the disputes. The review petition filed by the appellant was dismissed. The appellant challenged the orders allowing the preliminary objections of the respondent, and the rejection by the high court before the Supreme Court.

The issue before the Supreme Court was whether there was inherent lack of jurisdiction of the arbitrator, thereby nullifying the award. The court relying on its earlier decision in *V.A. Tech Escher Wyass Flovel Ltd.* v. *M.P. S.E. Board*[39] held that the provisions of the Act would apply where there was an arbitration clause and the provisions of the concerned state law would apply where there was no arbitration clause and that in that case it was not in dispute that the contract between the parties contained an arbitration clause (clause 29). The court, therefore, held that the decision of the high court that the provisions of the state law would apply and sole arbitrator appointed by the designate of the chief justice lacked inherent jurisdiction, could not be sustained since though the arbitration clause provided for reference of disputes to a three member arbitration board, the designate chose to appoint a sole arbitrator and that order had attained finality.

The court further rejected the contention of the respondents that the arbitrator ought to have considered the objection relating to jurisdiction and held that he did not have jurisdiction. For this purpose the court relied on the earlier decision of a Constitution bench of the court in *SBP & Co.* v. *Patel Engineering Ltd.*[40] wherein it had been held that once the chief justice or his designate appoints an arbitrator in an application under section 11 of the Act, after satisfying himself that the conditions for exercise of power to appoint an arbitrator are present, the arbitral tribunal could not go behind such decision and rule on its own jurisdiction or on the existence of an arbitration clause. The court, therefore, directed the district judge to go into the merit of the application under section 34 of the Act.

The arbitral tribunal has to decide the dispute on the basis of the facts and the pleadings

The conduct of arbitral proceedings has been made as informal as possible though sections 18 to 27 of the Act provide for some of the basic requirements to ensure that the arbitration proceedings are conducted in fair manner consistent with the principles of natural justice. The parties are given required autonomy in many of these procedural matters dealt with under the above sections. The arbitral tribunal has also been given the freedom to stipulate its own procedure in conducting the arbitration proceedings. One of the major requirements of procedure is to ensure that the tribunal confines to the pleadings and evidence before it.

In *M/s. MSK Projects (I)(Jv) Ltd.* v. *State of Rajasthan*[41] a concession agreement was entered into between the appellant and respondent state under which appellant was to construct a new bye-pass and after construction of the bye-pass could collect toll fee. The agreement had an arbitration clause. There had been some problems in

39 C.A. No.3746/2005 decided on 14.1.2010.
40 *Supra* note 37 at 618.
41 (2011) 10 SCC 573.

collecting the toll fee because of agitation by local people. The respondent state issued a notification under the provisions of the Indian Tolls Act, 1851 and Rajasthan Motor Vehicles Taxation (Amendment) Act, 1994 preventing the entry of vehicles into the city. Since dispute arose between the parties, the appellant invoked the arbitration clause and an arbitration tribunal was constituted which made an award in favour of the appellant and directed the respondent state to pay certain amount to the appellant towards loss with 18% interest. The tribunal further gave various other directions to the respondent state in this regard. The respondent state challenged the award under section 34 of the Act before the district judge who set aside the arbitral award on the ground that there was no clause in the agreement to issue notification barring the entry of vehicles in the city and that tribunal committed an error in calculating the loss suffered by appellant. It held that the appellant was not entitled to any monetary compensation under the concession agreement, but only entitled to extension of concession period, and that the rate of interest was reduced from 18% to 10%. Being aggrieved, the appellant preferred an appeal before the high court wherein the high court held that the contractor could collect the toll fee as per the agreement. The high court also rejected the claim of compensation by the contractor, and upheld the rejection of interest.

The contractor approached the Supreme Court. The court had to deal with two issues; namely, whether it was mandatory/necessary in view of the agreement/ contract or on the basis of pre-bid understanding that the state had to issue a notification barring the vehicles through the markets of the city; and secondly whether the rate of interest could be reduced from 18% to 10% by the courts below. In the appeal, the Supreme Court took the view that the only issue required to be considered by the arbitral tribunal was whether the private appellant had a right to collect the toll fee. The court relying on earlier decisions observed that the settled legal proposition was to the effect that the arbitral tribunal could not travel beyond terms of reference; however, in exceptional circumstances where a party had pleaded that the demand of another party was beyond the terms of contract and statutory provisions, the tribunal could examine the terms of contract as well as the statutory provisions and that in the absence of proper pleadings and objections, such a course would not be permissible. Then the court found that in the instant case, a reference to the tribunal had been made on the basis of statement of facts, claims by the private appellant, defense taken by the respondent-state and re- joinder by the claimant and on the basis of the pleading and contentions of the parties held that in the fact-situation that the district judge as well as the high court fell in error considering the issue which was not taken by the state before the tribunal during the arbitration proceedings.

The court on the basis of certain observation held that in order to do complete justice between the parties and protect the public exchequer, the matter required adjudication and reconsideration by the arbitration tribunal on the points framed by it.

No *pendent lite* interest contrary to the agreement

There had been considerable case law under the 1940 Act on the power of the arbitrators to award interest on the amount awarded in terms of jurisdiction, rate,

and period. The issue came to be settled eventually by the Supreme Court by holding that unless prohibited by agreement, the arbitrators have power to award interest during all the periods involved in an arbitral process namely pre-reference, *pendent lite* and post award. But in spite of this clarification several cases have been coming up before the Supreme Court under the 1940 Act. To settle the uncertainty the 1996 Act under section 31 (7) (b) specifically provides that, unless otherwise agreed by the parties, the arbitral tribunal can award interest at a reasonable rate on the whole or any part of the money and on the whole or any part of the period between the date of cause of action and the date of the award. In spite of this provision, disputes on interest claim continue to come up before the courts, especially in the context of clauses in the contract which prohibits payment of any interest on the amount payable by the parties. In *Union of India* v. *M/s. Krafters Engineering & Leasing P. Ltd.*[42] the issue of the arbitrators power to award interest during *pendent lite* period when the contract specifically prohibited came up for consideration.

In this case, the respondent was awarded with a contract for the work of provision of signaling arrangements, on payment of interest and the contract stated as follows:

> 1.15 Interest on Amounts - 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 deposited in terms of clause 1.14.4 will be repayable with interest accrued thereon.

On completion of the contract the respondent raised certain disputes/claims which were referred for arbitration which resulted in an award. In the award the arbitrator also granted interest. The award was challenged before a single judge of the high court which was dismissed and the appellant filed appeal before the division bench of the high court. The division bench also dismissed the appeal. Challenging the said order, the Union of India preferred an appeal before the Supreme Court of India. The issue before the Supreme Court was whether an arbitrator had jurisdiction to grant interest despite the agreement prohibiting the same.

The Supreme Court relied on the words unless otherwise agreed by the parties in section 31 (7) of the Act and held that the said words categorically clarified that the arbitrator was bound by the terms of the contract insofar as the award of interest from the date of cause of action to the date of award. Therefore, where the parties had agreed that no interest should be payable, the arbitral tribunal cannot award interest between the date when the cause of action arose to the date of award. The court also rejected the contention of the respondent who relied on the decisions in *Engineers-De- Space-Age*[43] and *Madnani*[44] to support their claim for interest during *pendente lite* period. The court held that the ratio in those decisions were inapplicable since in those cases the court upheld the award of interest under the old Act on the ground that the arbitrator had the discretion to decide whether interest should be awarded or not during the *pendente lite* period and he was not bound by the

42 (2011) 7 SCC 279.
43 (1996) 1 SCC 516.
44 (2010) 1 SCC 549.

contractual terms insofar as the interest for the *pendente lite* period.

It was held by the court that:[45]

> [W]here the parties had agreed that no interest shall be payable, the arbitrator cannot award interest for the amounts payable to the contractor under the contract. Where the agreement between the parties does not prohibit grant of interest and where a party claims interest and the said dispute is referred to the arbitrator, he shall have the power to award interest pendent elite. As observed by the Constitution Bench in *G.C. Roy's* case[46] (*supra*), in such a case, it must be presumed that interest was an implied term of the agreement between the parties. However, this does not mean that in every case, the arbitrator should necessarily award interest *pendente lite*. In the subsequent decision of the Constitution Bench, i.e., *N.C. Budharaj's* case[47] (*supra*), it has been reiterated that in the absence of any specific stipulation or prohibition in the contract to claim or grant any such interest, the arbitrator is free to award interest.

In the light of the above observations the Supreme Court set aside the award of the arbitrator granting interest in respect of the amount payable to the contractor under the contract as well as the order of single and the division bench of the high court confirming the same.

Challenge to an award

Section 34 of the Act enables a party who wants to challenge an award passed by an arbitral tribunal or arbitrator and provides for specific grounds on which such challenge can be made. This section is a very significant provision under the Act because the award is a decree and unless an award is challenged within the time period prescribed under section 34 the party who wants to challenge will loose his right to challenge, and the award would attain finality. The courts in this regard while deciding cases involving challenges of awards have evolved certain principles applicable on the basis of the interpretation of various grounds mentioned under section 34 of the Act.

(a) Starting point of limitation for challenging an award

Sub-section (3) of section 34 of the Act provides that an application for setting aside of an award may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award. Thus, the section provides a time limit of three months from the date of receipt of the award by the applicant. The starting point of calculating the three months has been the main issue before the Supreme Court in the *State of Maharashtra.*v. *Ark Builders Pvt. Ltd.*[48] The question before the Supreme Court was whether the three months period was to be reckoned from the date a copy of the award was received by the

45 *Supra* note 42 at 288.
46 (1992) 1 SCC 508.
47 2001 (1) SCALE 109.
48 (2011) 4 SCC 616.

applicant by any means and from any source, or it would start running from the date a signed copy of the award is delivered to him by the arbitrator.

In this case the respondent received the award as soon as it was made and served a copy on the appellant demanding payment. The appellant, however, obtained a signed copy of the award directly from the arbitrator more than three months after the receipt of the copy from the respondent. Thereafter, the appellant filed an application for setting aside the award within a period of three months from the receipt of the award from the arbitrator. The respondent raised an objection regarding the maintainability of the petition contending that it was hopelessly barred by limitation.

The principal district court dismissed the appellants' application as barred by limitation. Against the said order, the appellants preferred an appeal before the high court. The high court upheld the view taken by the principal district judge and dismissed the appeal filed by the appellants. It took note of section 31(5) and section 34(3) of the Act and the decision of Supreme Court in *Union of India* v. *Tecco Trichy Engineers & Contractors*[49] but rejected the appellant's contention on the ground that the word used in section 31(5) is 'delivered' and not 'dispatched' and, therefore, the limitation period started when the appellant received a copy from the respondent. The appellant approached the Supreme Court questioning the decision of the high court.

The Supreme Court considered the wording of sections 31[50] and 34[51] of the Act 1996, and observed that the expression "party making that application had received the arbitral award" under section 34 (3) cannot be read in isolation and it must be understood in the light of what has been said in Section 31(5) that requires a signed copy of the award to be delivered to each party and that reading the two provisions together it was quite clear that the limitation prescribed under section 34 (3) would

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49 (2005) 4 SCC 239.

50 S.31 of the Act is as follows: Form and contents of arbitral award. - (1) An arbitral award shall be made in writing and shall be signed by the members of the arbitral tribunal.
(2) xxxxxxxxxxx
(3) xxxxxxxxxxx
(4) xxxxxxxxxxx
(5). After the arbitral award is made, a signed copy shall be delivered to each party (6) (7), (8) xxxxxxxxxxx (emphasis added)

51 S. 34 of the Act states as follows: Application for setting aside arbitral award.-(1) Recourse to a court against an arbitral award may be made only by an application for setting aside such award in accordance with sub- section (2) and sub-section (3).
(2) xxxxxxx
(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:
Provided that if the court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

commence only from the date a signed copy of the award was delivered to the party making the application for setting it aside.

The court in support of the above view relied on its earlier decision in *Tecco Trichy Engineers & Contractors*[52] wherein the court had held that the delivery of an arbitral award under sub-section (5) of section 31 was not a matter of mere formality, but of substance and that it was only after the stage under section 31 has passed that the stage of termination of arbitral proceedings within the meaning of section 32 of the Act arose and that the delivery of arbitral award to the party, to be effective, has to be "received" by the party.

The Supreme Court reiterated the legal position in the following words:[53]

> The legal position on the issue may be stated thus. If the law prescribes that a copy of the order/award is to be communicated, delivered, dispatched, forwarded, rendered or sent to the parties concerned in a particular way and in case the law also sets a period of limitation for challenging the order/award in question by the aggrieved party, then the period of limitation can only commence from the date on which the order/award was received by the party concerned in the manner prescribed by the law.

(b) Scope of challenge

An arbitral award when challenged before the court on any of the grounds mentioned under section 34 of the Act, the scope of the court's power to interfere on the factual and legal aspect of the award is a contentious issue. Even though the precise grounds on which such challenges could be made are prescribed under section 34, often the courts would find that there were errors apparent on the face of the award both on facts and law. The scope of interference in such cases has been a subject matter of decision in *M/S. J.G. Engineers Pvt. Ltd* v. *Union of India*[54] wherein the Supreme Court has held that the jurisdiction of the court under section 34 of the Act to interfere in an award is only supervisory and not appellate. In this case the respondents awarded a work contract to the appellant. As the appellant did not complete the first phase of the work within the stipulated time, the respondents terminated the contract. Disputes arose between the parties under the contract and based on the arbitration agreement in the contract the dispute was referred to arbitration. The arbitrator awarded certain sum with interest and costs in favour of the appellant and rejected the counter claims of the respondents.

The respondents challenged the award under section 34 of the Act in the district court. The respondents also filed a petition in the said proceedings, raising additional claims based on its counter claims. The learned district judge dismissed the petitions, holding that none of the grounds under section 34 (2) were made out. This order was reversed by the high court and remitted the dispute back to the arbitrator by directing the arbitrator to reconsider the counter claims. The appellant therefore

52 (2005) 4 SCC 239.
53 *Supra* note 48 at 621.
54 (2011) SCC 758.

approached the Supreme Court.

The appellant contended before the Supreme Court that the award did not violate any clauses of the agreement. The Supreme Court held that a civil court examining the validity of an arbitral award under section 34 of the Act exercises supervisory and not appellate jurisdiction over the award of an arbitral tribunal and that a court can set aside an arbitral award, only if any of the grounds mentioned in sections 34(2)(a) (i) to (v) or section 34(2)(b)(i) and (ii), or section 28(1)(a) or 28(3) read with section 34(2)(b)(ii) of the Act, are made out. The court further held that an award adjudicating claims which are 'excepted matters' excluded from the scope of arbitration, would violate section 34(2)(a)(iv) and 34(2)(b) of the Act and that making an award allowing or granting a claim, contrary to any provision of the contract, would violate section 34 (2) (b) (ii) read with section 28(3) of the Act. The Supreme Court in the light of the above principles held that the high court order was not maintainable and therefore allowed the appeal and restored the order of the district court.

VII APPELLATE JURISDICTION: MAINTAINABILITY OF LETTERS PATENT APPEAL IN ARBITRATION MATTERS

Sections 37 and 50 of the Act provide for appeals and specifically mention the orders which are appealable. Appeals under these sections would lie before the court where appeals against original decrees would normally lie. In high courts having letters patent jurisdiction an appeal lies against the order of a single judge of the high court before a letters patent bench. Since the Act does not provide for any appeal against the order of a single judge under the Act, the question had arisen whether a letters patent appeal would lie against an order of a single judge under the Act. The Supreme Court in *Fuerst Day Lawson Ltd.* v. *Jindal Exports Ltd*.[55] held that letters patent appeal is not maintainable against the order passed by a single judge of the high court in an arbitration matter. The question before the Supreme Court was whether an order, though not appealable under section 50 of the Act would nevertheless be subject to appeal under the relevant provision of the letters patent of the high court. In other words even though the Act does not envisage or permit an appeal from the order, the party aggrieved by it can still have his way, by-passing the Act and taking recourse to another jurisdiction. In this case the appellants contented that the jurisdiction of the high court under the letters patent was an independent jurisdiction and as long as the order qualifies for an appeal under the letters patent an appeal from that order would be, undoubtedly, maintainable before the high court.

The Supreme Court held that correct answer to both the questions would depend upon how the Act is to be viewed as to whether the provisions of the Act constitute a complete code for matters arising out of an arbitration proceeding, the making of the award and the enforcement of the award and if the answer to the question was in the affirmative then, obviously, all other jurisdictions, including the letters patent jurisdiction of the high court would stand excluded but in case the answer was in

55 (2011) 8 SCC 333.

the negative then, the letters patent appeal would lie.

The court after comparing the provisions of the Arbitration Act, 1940, which in turn was brought in place of the Arbitration Act, 1899, Arbitration (Protocol and Convention) Act, 1937 (for execution of the Geneva Convention Awards), Foreign Awards (Recognition and Enforcement) Act, 1961 (for enforcement of the New York Convention awards) and Arbitration and Conciliation Act, 1996 and the cases decided under these laws on the issues similar to the issue involved herein, held that Arbitration and Conciliation Act, 1996 is a self-contained code and exhaustive, therefore, a letters patent appeal would be excluded in view of the general principles that where the special Act sets out a self-contained code the applicability of the general law procedure would be impliedly excluded. It was further held:[56]

> We, thus, arrive at the conclusion regarding the exclusion of a letters patent appeal in two different ways; one, so to say, on a micro basis by examining the scheme devised by sections 49 and 50 of the 1996 Act and the radical change that it brings about in the earlier provision of appeal under section 6 of the 1961 Act and the other on a macro basis by taking into account the nature and character of the 1996 Act as a self-contained and exhaustive code in itself.

On the basis of the above discussion the Supreme Court held that no letters patent appeal would lie against an order which was not appealable under section 50 of the Act.

VIII 1940 ACT

Cases under the repealed 1940 Act continue to knock at the doors of the apex court seeking interpretation of the provisions of the said Act and the correctness of the awards and judgements under that Act. In *Rameshkumar* v. *Furu Ram*[57] the Supreme Court has held that an award was not genuine, but collusive and sham and the court should not make it a rule of the court and that if the parties had already settled the matter they cannot make the arbitration proceedings a ruse to avoid payment of stamp duty and registration. In *M/s. Milkfood Ltd* v. *M/s. GMC Ice Cream (P) Ltd.*[58] the apex court had held that an application filed under section 33 of the Act before the Delhi High Court seeking clarifications as to whether the 1996 Act or 1940 Act would govern the arbitration proceedings would have to be treated as the first application under section 31 of the Act so that Delhi High Court alone has jurisdiction to entertain subsequent applications. In *State of UP* v. *M/s. Combined Chemicals Company Pvt. Ltd*.[59] the Supreme Court held that the arbitrator was duty bound to examine the tenability of the claim made by the claimant and decide the same by assigning some reasons, howsoever, briefly and that his failure to do so would constitute a valid ground for setting aside the award.

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56 *Id*. at 370.
57 (2011) SCC 613.
58 (2004) 7 SCC 288.
59 (2011) 2 SCC 151.

IX CONCLUSION

The survey of various decisions rendered by the Supreme Court in the year on arbitration would show that these decisions have made significant additions to the existing arbitral jurisprudence. The impact of some of the decisions is that intervention by courts at each stage of arbitral process has increased and areas such as mortgage related disputes have been excepted from arbitrability so that only suits will lie. As in the previous years a considerable number of cases involved appointment of arbitrators, which would show that there are considerable delays in the initiation of the arbitral process itself. The current delays in arbitration process highlights the need for urgent reforms of the existing law.