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ARBITRATION LAW

A.K. Ganguli[*]

I INTRODUCTION

THE JURISPRUDENTIAL approach to arbitration has developed in varying degrees and directions across the world. Historically, it has always been a challenge for the international community to achieve the twin objectives of competing interests – *first*, of standardizing enforceability of international arbitral awards, with a view to promote its adoption as a favoured means of resolving commercial disputes, and *secondly*, of harmonising the different municipal approaches to substantive aspects of arbitration, while at the same time affording sufficient elbow room to not interfere with state sovereignty in this regard.

Practically, the former objective was sought to be achieved through the Convention on Recognition and Enforcement of Foreign Arbitral Awards, 1958. Ascending to the Convention entailed voluntary assumption of an obligation under public international law by member states to adhere to its provisions, which as its name reveals, were confined to "recognition and enforcement" of foreign awards. The latter objective was sought to be achieved by an instrument of soft law, being the UNCITRAL Model Law of 1985, which member states were "encouraged" to adopt while enacting their domestic legislation. As a consequence, states with differing cultural approaches to arbitration retained their sovereign right to adopt only that much of the Model Law which was compatible with their public policy.

Notwithstanding ascension to the New York Convention[1] and the Geneva Convention[2] and adoption of its provisions by way of domestic statutes, variance in interpreting its provisions as incorporated into domestic law has resulted in differing approaches to understanding the (1) validity and (2) enforcement of arbitral awards. After all, municipal courts would always have the onus to finally decide whether or not to apply or give effect to arbitral awards, wherever they may be, in terms of their public policy.

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* Senior Advocate, Supreme Court of India. The author acknowledges the assistance of Mr. Arunabha Ganguli, Mrs. Amrita Panda, Mr. Debesh Panda and Mr. George Varghese, Advocates in the preparation of this survey.

1 United Nations Convention on the Recognition and Enforcement of Arbitral Awards, 1958.

2 Convention on the Execution of Foreign Arbitral Awards, 1927.

The sequitur of this international movement for harmonization is that countries have tried to lay down different approaches for domestic and international arbitration. As on date, very few countries have an identical dispensation for both types of arbitration. The public policy exception to enforcement of arbitral awards now involves the application of "domestic public policy" to purely domestic arbitrations and "international public policy" to arbitrations involving some international element. The scope of international public policy is commonly perceived as being narrower than domestic public policy.[3] The UNCITRAL Model Law, which admittedly borrows from the philosophy of the New York Convention, propounds the same exclusive list of grounds for setting aside an award as the seven defences for opposing enforcement under the Convention. A survey of approaches will however show an absence of commonalities in the standards applied to enforcement of arbitral awards.

Prior to the 1990s in India, due to several reasons the development of law and the jurisprudence of international arbitration was slower than what we have witnessed in the past two decades. Lack of empirical data concerning the number of arbitration proceedings, which were mostly ad-hoc, contributed a major limitation in an accurate assessment in this field. Most of the international transactions were in the nature of trade and commerce and only a few fell into the nature of investments into the country. The investors, probably to secure a comfort zone, sought to create the seat of arbitration outside India as perceived by them as 'neutral zones' for dispute resolution.[4] The economic bargaining power of the investors meant that the use of neutral zones extended to arbitration proceedings as well. Therefore, the law applicable in the seat of the arbitration often took precedence, and in such situations the *lex arbitri* and the law of the contract often got blurred. In such situations, the arbitration gets taken over by jurisdictional issues and issues of the local law, with the result being that such arbitral awards are not brought to the host

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3 *Resolution of the ILA on Public Policy as a Bar to Enforcement of International Arbitral Awards*, adopted at the International Law Association's 70th Conference held in New Delhi, India, 2-6 April 2002. The ILA Resolution is the culmination of a six year study of public policy by the International Law Association Committee on International Commercial Arbitration. The two reports on the ILA Resolution are the "ILA Interim Report" Audley Sheppard, "Interim ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards" 19 *Arbitration International*, 217 2003, and "ILA Final Report" Pierre Mayer and Audley Sheppard, "Final ILA Report on Public Policy as a Bar to Enforcement of International ArbitralAwards", 19 *Arbitration International*, 249 2003. While resolutions of the ILA are non-binding legal instruments under international law, however in practice, the ILA's work is 'highly regarded and generally reflects the opinions of leading international arbitration scholars': R Fathallah, "International Law Association Resolution on the Application of Public Policy as a Ground for Challenging Arbitral Awards", 16(2), *White & Case International Dispute Resolution*,

3 (2003). Consequently, resolutions of the ILA are a source of international law pursuant to art 38(1) (d) of the Statute of the International Court of Justice, 1945.

country for enforcement. Instead, the validity of the arbitral award is judged at the seat of the arbitration itself, and enforcement of the award is carried out there itself. The situation was exacerbated by the Arbitration Act, 1940 whose provisions were not in sync with the changed international thinking, although the grounds under the New York Convention had been incorporated into domestic law through the Foreign Awards Recognition and Enforcement Act, 1961. Section 9(b) of the 1961 Act had also been interpreted in a manner that created controversy, which has now been put to rest after the enactment of the Arbitration and Conciliation Act, 1996 that adopts the Model Law, and also irons out the interpretative creases experienced with the 1961 Act and the 1940 Act. Several controversies with regard to the scope of the Arbitration and Conciliation Act, 1996 have now been put to rest after the landmark judgment of the Constitution bench, last year, in *BALCO*,[5] as noticed last year.

Although the year under survey involved a large number of cases pertaining to arbitration law, most of those decisions stand out for the judicial inclination to interpret the law keeping in mind the international trends and for adopting a "pro-arbitration" stance. At the same time, an old controversy that had arisen after the decision in *NTPC* v. *Singer Co.*[6] but was expected to have died down after the enactment of the Arbitration and Conciliation Act, 1996 resurfaced in a different form and context - whether it is possible to entirely bypass the host country and public policy considerations of the host country? Should public policy considerations of the seat country or host country take precedence in such proceedings? Could you have an award in the teeth of the host country which disregards the relevance of the laws of the host country? Internationally, in *Turner* v. *Grovit*,[7] the Court of Justice of the European Communities had precluded the issuance of anti-suit injunctions, even against parties commencing or continuing proceedings in foreign courts, while acting in bad faith with a view to frustrate the existing proceedings. The court opined that such an act would be seen as constituting

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4 There has however been a considerable change in the perspective of the litigants who prefer an ADR mechanism through institutional arbitration. Even some of the high courts have taken a pro-active role in promoting institutional arbitration. The Delhi High Court, being a pioneer in this sphere, set up an arbitration center with state-of-the-art facilities and Rules governing arbitration proceedings, which are as advanced as any other such institution in the world, but at the same time keeps the ethos of domestic requirements. The institution - Delhi International Arbitration Center (DAC) – has just in the past five years made considerable progress, and eventually become a favoured destination for those seeking mediation and arbitration facilities. Since its inception, the DAC has till date dealt with a total of 670 cases, including both mediation and arbitration. Of these, 302 cases have been disposed off, 205 matters are at the hearing stage, and 163 cases are at the pre-hearing stage.

5 *Bharat Aluminium Co.* v. *Kaiser Aluminium Technical Services Inc.* (2012) 9 SCC 552.

6 *National Thermal Power Corporation* v. *Singer Company* (1992) 3 SCC 551.

7 [2005] 1 A.C. 101

interference with the jurisdiction of the foreign court, and as such inconsistent with the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. However, in *Tamil Nadu Electricity Board* v. *ST-CMS Electric Co. Private Ltd.* [8] the parties who held arbitration proceedings in London ended up making the dispute arbitrable under the English law, even though in terms of the decision of the Supreme Court of India in *Gujarat Urja Vikas Nigam Ltd.* v. *Essar Power Ltd.*,[9] the dispute was not arbitrable under the laws of India. Will this development in arbitration cause or create more conflict?

The Supreme Court struck a much needed chord in favour of harmonization through its decision in *Chloro Controls*[10] on the issue of multi-party arbitration and whether in India, arbitration is confined to signatories to an arbitration agreement under section 7 of the Arbitration and Conciliation Act, 1996, or whether it would be possible to rope in non-signatories to the arbitration agreement. This issue, had been much debated during the *Dow Chemical arbitration*[11] in which the arbitral tribunal rendered an award on the basis that a third party non-signatory to the contract containing the arbitration clause can be obliged to submit to arbitration proceedings if the common intention of the signing parties demonstrates such an intention, and if the non-signatory effectively and individually participated in the conclusion, performance and termination of the contract, appeared as the actual party both to the contract and to the arbitration clause and had taken or would probably take advantage of such appearance. The arbitral tribunal rendered its decision on jurisdiction by taking into account "usages conforming to the needs of international commerce, in particular, in the presence of a group of companies". The award relied on the "group of companies" doctrine, which though well established in France, has been highly disputed in other jurisdictions, as well as by international scholars. The award was upheld by the *Cour d' Appel de Paris*.[12]

Recently, in the well-known decision in *Peterson Farms Inc.* v. *C&M Farming Ltd.*,[13] the English High Court partly set aside an ICC award. While carefully analyzing the law applicable in a situation where the arbitral tribunal had accepted jurisdiction over non-signatories to the arbitration clause based on the "group of companies" doctrine, the high court considered "*the issue as one subject to the chosen proper law of the Agreement and that excludes the doctrine which forms no part of English law*". According to the high court, "*the 'law' the tribunal derived from its approach was not the proper law of the Agreement nor even the law of the chosen place of the arbitration but, in effect, the 'group of companies' doctrine itself*", an approach it considered as "*seriously flawed in law*".

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8 (2008) 1 Lloyds Rep 93.

9 (2008) 4 SCC 755.

10 *Infra* note 14.

11 ICC Case No. 4131; Y.C.A. Vol. IX (1984), 131

12 (Rev. Arb. 1984, 98)

13 [2004] EWHC 121 (Comm).

The decision in *Chloro Controls (P) Ltd.* v. *Severn Trent Water Purification Inc.*[14] has now brought Indian law in conformity with the international trend. Though the case is discussed at length in the latter half of this survey, suffice to say that the court held that the expression 'person claiming through or under' in the language of section 45 of the Arbitration and Conciliation Act, 1996 (for short "the Act") would "mean and take within its ambit multiple and multi-party agreements", though only in "exceptional cases".[15] The court held that even non-signatory parties to some of the agreements could pray and be referred to arbitration provided they satisfy the pre-requisites under sections 44 and 45 read with schedule I to the Act, and unequivocally explaining that *"reference of non-signatory parties is neither unknown to arbitration jurisprudence nor is it impermissible"*.

This issue is not entirely one sided and given that the foundation of arbitration is party autonomy, or the will of the parties, one often comes across cases where the non-signatory party wants to be impleaded in a proceeding after *inter alia* showing its connection to the transaction, and the justness of its cause, but gets fettered by the consent of the parties to the arbitration agreement and the fact of it not being an express signatory. Since arbitration is a private dispute resolution mechanism, the consent of the parties for impleading a non-signatory in arbitration proceedings may be a necessary condition. It's a different situation if all the parties, including the non-signatories, intend to be bound by the arbitration agreement, but are impeded by legal difficulties. In such a case, there is no impediment to impleading non-signatory parties with the formal consent of the parties to the arbitration agreement. In India, the Delhi International Arbitration Centre (DAC) makes provision for the joinder of additional parties,[16] to be impleaded in the arbitration proceedings, with the written consent of all the parties to the arbitration agreement and the party to be impleaded.

Section 45 of the Act states that reference to arbitration may be made by "persons claiming through or under" one of the parties to an agreement. Thus, the language of section 45 contemplates disputes involving third party non-signatories in "string contracts" or "back to back" contracts, whereby discharge of obligations by a contracting party secures a discharge of a connected contract or sub-contracts. For example, Party 'A' is the owner of a project, and enters into a contract with Party 'B' for executing a contract involving construction of roads running to a total length of a thousand kilometers, along with all ancillary construction. The terms of the contract allow B to sub-contract the works involved therein, and accordingly, B sub-contracts various work to 'C'. There is an arbitration clause in the contract between parties A and B, but B has no arbitration agreement with the sub-contractor 'C'. There is no doubt that the performance or inaction on the part of C will have an impact on the disputes between A and B, since they are in the nature of back to back contracts. Similarly, if the disputes between A and B are within the area of C's jurisdiction, then it may step into B's shoes and fight A. In

14 (2013) 1 SCC 641.

15 *Id*., para 165.1.

16 S. 9A, DAC (Arbitration Proceedings) Rules.

such a scenario, would C be able to initiate arbitration? The developments in the law of arbitration in the year under survey may not answer all these questions and many more that may arise, but there is no doubt that jurisprudentially, this branch of law has marched ahead substantially. To an extent, the decision in *Chatterjee Petrochem*[17] is an important milestone in this regard since Gowda J has applied the *Chloro Controls* doctrine even in the context of a matter relating to an anti-suit injunction involving non-signatory to the principal agreement arguing that it is not bound by the arbitration clause. The court has held that the fact of it being a non-signatory "does not jeopardize the arbitration clause in any manner"[18] and that since it has, "already held that the arbitration clause is valid, suit filed by the respondent no. 1 for declaration and permanent injunction is unsustainable in law and the suit is liable to be dismissed".[19]

During the year under survey, the decision in *Lal Mahal case* also ensured that controversy with respect to interpretation of "public policy" in connection with foreign awards has also been put to rest. The survey elaborates upon each of these decision taking a thematic approach for the convenience of the reader.

II ENFORCEMENT OF FOREIGN AWARDS

Part II of the Arbitration and Conciliation Act, 1996 deals with enforcement of certain foreign awards. While the provisions contained under chapter I of the Act deal with New York Convention awards, those under chapter II of the Act deal with Geneva Convention awards. Section 44 defines a 'foreign award' in terms of the New York Convention. A foreign award is defined to mean an arbitral award on differences between persons arising out of a legal relationship, whether contractual or not, considered as commercial according to the law in force in India, made after the 11th day of October, 1960. Such an award would fall within the definition of foreign award if it satisfies two further conditions; if the award is made: [20]

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17 2013 (4) Arb. LR. 456 (SC).

18 *Id.*, at para 36. In *Chloro Controls* case it was held (at para 107) that, "*it becomes abundantly clear that reference of even non-signatory parties to arbitration agreement can be made. It may be the result of implied or specific consent or judicial determination. Normally, the parties to the arbitration agreement calling for arbitral reference should be the same as those to the action. But this general concept is subject to exceptions which are that when a third party, i.e. non-signatory party, is claiming or is sued as being directly affected through a party to the arbitration agreement and there are principal and subsidiary agreements, and such third party is signatory to a subsidiary agreement and not to the mother or principal agreement which contains the arbitration clause, then depending upon the facts and circumstances of the given case, it may be possible to say that even such third party can be referred to arbitration.*"

19 *Id.*, para 37.

20 In order that Part II applies with regard to the New York Convention, the award must satisfy the twin conditions of the decision of the Supreme Court in *Enercon*

(*a*) in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies, and

(*b*) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which the said Convention applies.

The first schedule to the Act produces verbatim the New York Convention, Article I of which is instructive as the provisions contained therein lay down the conditions subject to which the Convention shall apply to the recognition and enforcement of arbitral awards. It provides that the provisions *"shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal."*[21] There is another condition which appears in the same article and which provides that, "it shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought." Since no other provision in the Convention clarifies whether the twin conditions in article I, for the application of the Convention, would apply cumulatively for recognition and enforcement of an arbitral award. The phraseology in the second sentence of article I, that 'it shall also apply' undoubtedly signifies that an independent condition which would operate on its own force. It would ultimately be for the national courts to construe the provisions of article I to determine whether the provisions of article I would apply to 'differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India', which are bodily incorporated in chapter I of part II of the Act.

Section 46 of the Act provides that a foreign award which would be enforceable under Chapter I shall be treated as binding for all purposes. Section 47 lays down the evidence that has to be produced by a party applying for enforcement of a foreign award, which *inter alia* includes:

(*a*) the original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made;

(*b*) the original agreement for arbitration or a duly certified copy thereof; and

(*c*) such evidence as may be necessary to prove that the award is a foreign award.

India Ltd. v. *Enercon GmbH*, in respect of differences between persons arising out of legal relationships: "Such a relationship may be contractual or not, so long it is considered as commercial under the laws in force in India. Further, that legal relationship must be in pursuance of an agreement, in writing, for arbitration, to which the New York Convention applies. The court can decline to make a reference to arbitration in case it finds that the arbitration agreement is *null* and *void*, *inoperative* or *incapable* of being performed."

21 Art. I (1), New York Convention, 1958.

Section 48 is a crucial provision which lays down the conditions for enforcement of foreign awards. Section 48 is a virtual reproduction of the provisions contained in article V of the New York Convention, which provides *inter alia*, that the enforcement of a foreign award may be refused at the request of the party against whom it is invoked, only if that party furnishes to the court proof, *inter alia*, that "the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made."[22] Sub-section (2) of section 48 provides two other conditions for enforcement of an arbitral award, inasmuch as it entitles a court before which enforcement of a foreign award is sought to refuse such enforcement, if the court finds that: [23]

(*a*) the subject-matter of the difference is not capable of settlement by arbitration under the law of India; or

(*b*) the enforcement of the award would be contrary to the public policy of India.

The scope of the 'public policy of India' has been the subject of great debate and also judicial pronouncements by the superior courts.

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22 See S. 44(1)(e) of the Act; In *Bharat Aluminium Company* v. *Kaiser Aluminium Technical Services Ltd.* reported in (2012) 9 SCC 552, it was contended that, by necessary implication, a foreign award which is sought to be enforced in India, could also be challenged on merits in Indian courts. It was contended that both the courts of the country "in which the award was made" (first alternative) as well as the courts of the country "under the law of which the award was made" (second alternative) would be competent to suspend or annul a foreign award. The court, however, rejected this contention noting that though the provision merely recognized that courts of two nations would be competent to annul or suspend an award, it did not "*ipso facto* confer jurisdiction on such courts for annulment of an award made outside the country. Such jurisdiction has to be specifically provided in the relevant national legislation of the country in which the court concerned is located." To accept the contention, the court held, would entail incorporating the provisions contained in section 34 of the Act, which was placed in part I, in part II of the Act. The court also rejected the submission that the two countries identified as "alternative one" and "alternative two" would have concurrent jurisdiction to annul the award." Having regard to the view expressed by a law professor in an article147 on the issue, the court took the view that "the second alternative is an exception to the general rule. It was only introduced to make it possible for the award to be challenged in the court of the second alternative, if the court of the first alternative had no power to annul the award under its national legislation." For a discussion on the implications of these observations see A.K. Ganguli, "Arbitration Law", XLVIII *ASIL* 27-76 (2012).

23 See *Renusagar Power Co. Ltd.* v. *General Electric Co.* 1994 Supp (1) SCC 644; *ONGC Ltd.* v. *Saw Pipes Ltd.*, (2003) 5 SCC 705; *Phulchand Exports* v. *O.O.O. Patriot* (2011) 10 SCC 300.

In *Sri Lal Mahal Limited v. Progetto Grano spA*,[24] a bench of three judges of the Supreme Court of India had the occasion to reconsider the scope of the mandate of section 48(2), and especially the scope of the expression, 'public policy of India' contained therein. The question that fell for consideration of the court was whether appeal award No. 3782 and appeal award No. 3783 both dated 21.09.1998 passed by the Board of Appeal of the Grain and Feed Trade Association, London in favour of the respondent were enforceable under section 48 of the 1996 Act. The factual matrix in which this question arose for consideration were, that the predecessors of the appellant and respondent companies had entered into a contract on 12.05.1994, by which the Indian company, as seller, agreed to sell 20,000 MT (+/- 5%) of durum wheat, Indian origin, for a price at USD 62 per MT. The contract, *inter alia*, provided that a third party expert, namely SGS India, shall examine the wheat to be loaded on the ship nominated by the buyer, and issue a certificate as regards the quality of the wheat to be exported by the seller. It appears that the contract further provided that the, "certificate and quality shown at the certificate will be the result of average samples taken jointly, at the port of loading by the representatives of the sellers and buyers." SGS India issued the requisite certificate confirming the quality of the wheat being in accord with the contractual specifications. On submission of the said certificate, the buyer had remitted the payments to the seller through a Letter of Credit opened in favour of the sellers. The buyers, on receipt of a faxed copy of SGS India's certificate, forwarded the same to SGS Geneva with a request to them to issue the necessary certificate in terms of another sale contract, which the buyers entered into with *Office Alegerian Interprofessionnel des cereals* (OAIC). After the goods reached the destination, SGS Geneva analysed it and certified that the wheat that reached the destination was soft common wheat and not durum wheat, as required by the contract. The buyers deemed the sellers to be in breach of contract for shipping 'uncontractual' goods. At the instance of the buyers, arbitral proceedings were initiated before an Arbitral Tribunal, GAFTA. The tribunal by its award dated 04.12.1997 accepted the buyers' case "that in appointing SGS Geneva, their aim was to safeguard the performance of both contracts by having one company to co-ordinate all operations regarding inspection, control and the issue of certificate relating to cargo and rejected the sellers' assertion that having loaded the goods, and presented a certificate provided by an international superintendence company, they had fulfilled their contractual obligations".[25] The buyers also initiated another arbitral proceeding before the tribunal claiming costs and damages for sellers' alleged breach of the arbitration agreement in bringing legal proceedings to India, in which a proceeding was initiated before the Delhi High Court challenging the jurisdiction of the tribunal, which proceeding ended in favour of the buyer. The tribunal awarded two awards, both in favour of the buyer.

The Board of Appeal came to the conclusion that the certificate issued by SGS India was 'uncontractual' since SGS India's certificate showed "that an

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24 *Sri Lal Mahal Limited* v. *Progetto Grano spA*, (2014) 2 SCC 433.

25 *Id*., at para 7.

inspection took place at the suppliers' godowns inland and representative samples taken. Sealed samples were inspected lot-wise and the cargo meeting the contractual specifications was allowed to be bagged for dispatch to Kandla. Continuous supervision of loading into the vessel was also carried out at the port. The samples drawn periodically were reduced and composite samples were sealed; one sealed sample of each lot was handed over to the supplier, one sealed sample of each lot was analysed by SGS and the remaining samples were retained by SGS for a period of three months unless and until instructions to the contrary were given."[26] The analysis section of the certificate stated, *inter alia*, that "the above samples have been analysed and the weighted average pre-shipment and shipment results are as under."

The Board of Appeal therefore concluded that the procedure adopted by SGS India, "was not in conformity with the requirements of the contract, which required the result to be of an average sample taken at the port of loading, not the weighted average of pre-shipment and shipment samples. Accordingly, the certificate is uncontractual and its results are not final."[27] The Board of Appeal awarded two appeal awards, both dated 21.09.1998, and both in favour of the buyer. The first appeal award was for the following sums: (i) the difference in value between the goods supplied to the seller and the goods of the contractual description, together with interest, (ii) demurrage incurred at load, together with interest, and (iii) costs of the arbitration. The second appeal award was for damages for expenses incurred in considering and responding to the proceedings initiated by the sellers in India, together with costs of the arbitration proceedings and legal fees.

The first appeal award, being appeal award no. 3782, was challenged before the High Court of Justice at London, but without success. Thereafter, the buyer approached the Delhi High Court for enforcement of both the appeal awards in Delhi. The appellant, as successors-in-interest of the sellers, had contested the enforcement proceedings, contending *inter alia*, that the awards were against the public policy of India, inasmuch as they were against the express provisions of the contract. The appellant contended that SGS India was hired by the buyer as a third party to inspect the quality of the goods, which it did. Since the inspections were confined to the port of loading and not the place of discharge of the consignment, the test reports produced by SGS India were not acceptable as they were not in terms of the contract. Though the Board of Appeal held that SGS India was the contractual agency, the seller failed to establish that the certificate was in the contractual form, and therefore SGS India's certificate was 'uncontractual' as it did not follow the contractual mode of sampling, since the contract required SGS India to take an average sample of the port of loading and not the weighted average of the pre-shipment and shipment. Holding that the analysis of the goods was not in accord with the contractual specification, the tribunal in balance of probabilities held that the wheat was soft wheat and not durum wheat, which was contracted by the parties. The Delhi High Court rejected the objections raised by the appellants,

26 *Id*., para 42.

27 *Ibid.*

inter alia, on the ground that the conclusions reached by the tribunal was based on appreciation of evidence by parties, which was affirmed by the rejection of a challenge by the High Court of Justice at London, and since the grounds enumerated in section 48 of the Act would have to be construed narrowly, and would not permit a review of foreign awards on merits. The awards were held to be enforceable.

On appeal, the Supreme Court of India affirmed the decision of the Delhi High Court. Lodha J held that:[28]

Section 48 of the 1996 Act does not give an opportunity to have a 'second look' at the foreign award in the award enforcement stage. The scope of enquiry under Section 48 does not permit review of the foreign award on merits. Procedural defects (like taking into consideration inadmissible evidence or ignoring/rejecting the evidence which may be of binding nature) in the course of foreign arbitration do not lead necessarily to excuse an award from enforcement on the ground of public policy.

[…] While considering the enforceability of foreign awards, the court does not exercise appellate jurisdiction over the foreign award nor does it enquire as to whether, while rendering the foreign award, some error has been committed. Under Section 48(2)(b) the enforcement of a foreign award can be refused only if such enforcement is found to be contrary to: (1) fundamental policy of Indian law; or (2) the interests of India; or (3) justice or morality. The objections raised by the appellant do not fall in any of these categories and, therefore, the foreign awards cannot be held to be contrary to public policy of India as contemplated under Section 48(2) (b)".[29]

As to what would constitute the 'public policy of India' under section 48(2), extensively referring to the decision of a bench of threemjudges in *Renusagar Power Co. Ltd.* v. *General Electric Co.*,[30] it was held that: [31]

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28 *Supra* note 24 at para 45.

29 *Id.*, para 47.

30 1994 Supp (1) SCC 644; Therein the court was concerned with the interpretation of the expression 'public policy' appearing in s. 7(1)(b)(ii) of the Foreign Awards (Recognition and Enforcement) Act, 1961. While holding that the expression 'public policy of India' in s. 7(1) (b)(ii) should be construed narrowly, the court referred to art. I (2) (e) of the Geneva Convention, which provided, inter alia, that to obtain recognition and enforcement of foreign awards to which the Convention applied, it shall further be necessary, "that the recognition or enforcement of the award is not contrary to the public policy *or to the principles of the law of the country in which it is sought to be relied upon*." Since the said provisions in the Geneva Convention provided for two alternative conditions for recognition and enforcement of a foreign award covered by the said Convention, Venkatachaliah J speaking for the court, observed that, "since the expression 'public policy' covers the field not covered by the words 'and the law of India' which follow the said expression, contravention of law alone will not attract the bar of public policy and something more than contravention of law is required", and then followed with the further observation,

> What has been stated by this court in Renusagar with reference to Section 7(1)(b)(ii) of the Foreign Awards Act must apply equally to the ambit and scope of Section 48(2)(b) of the 1996 Act. […] Following Renusagar, we think that for the purposes of Section 48(2)(b), the expression 'public policy of India' must be given a narrow meaning and the enforcement of foreign award would be refused on the ground that it is contrary to the public policy of India if it is covered by one of the three categories enumerated in Renusagar. Although the same expression 'public policy of India' is used both in Section 34(2)(b)(ii) and Section 48(2)(b) and the concept of 'public policy in India' is same in nature in both the sections but, in our view, its application differs in degree insofar as these two sections are concerned. The application of 'public policy of India' doctrine for the purposes of Section 48(2)(b) is more limited than the application of the same expression in respect of the domestic arbitral award.

The court distinguished the decision in *ONGC v. Saw Pipes Ltd.*[32] on the ground that the court in that case was concerned with the construction of the phrase, "public policy of India" occurring in section 34(2)(b)(ii) and was alive to the subtle distinction in the concept of "enforcement of the award" and "jurisdiction of the court in setting aside the award". It is for that reason that in *Saw Pipes* it was held that the term "public policy of India" in section 34 was to be interpreted in the context of the jurisdiction of the court where the validity of the award is challenged before it becomes final and executable, in contradiction to the enforcement of an award after it becomes final. Analyzing the decision in *Saw Pipes*, Lodha J held that, "having that distinction in view, with regard to Section 34 this court said that the expression 'public policy of India' was required to be

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> "this would mean that 'public policy in s. 7(1)(b)(ii) has been used in a narrower sense and in order to attract the bar of public policy the enforcement of the award must invoke something more than the violation of the law in India." It is of significance that the provisions contained in art. V (2) (b) of the New York Convention is materially different from those contained in art. I (2) (e) of the Geneva Convention, inasmuch as, the expression 'principles of the law of the country in which it is sought to be relied upon' does not appear in art.V (2)(b) of the New York Convention. This distinction has not been noticed in *Renusagar*, which contained a materially different provision from art. I (2)(e) of the Geneva Convention, inasmuch as the second limb of the provision was absent in s. 7(1)(b)(ii). In the absence of that dichotomy between 'public policy of India' and the principles of law of the country in which the award is sought to be relied upon, whether the expression 'public policy of India' would not comprehend violation of a law relating to arbitration is a moot question, and if it does, then the question as to whether an award delivered contrary to the mandate of Section 28(3) of the 1996 Act, which incorporates a fundamental principle of arbitration, namely, that the arbitral tribunal shall decide 'in accordance with the terms of the contract' should be construed as a fundamental policy of Indian law.

31 *Supra* note 24 at para 27.

32 (2003) 5 SCC 705.

given a wider meaning. Accordingly, for the purposes of Section 34, this court added a new category – patent illegality – for setting aside the award."[33]

Having reiterated that the principles in *Renusagar* would apply in section 48(2) of the Act, the court overruled its decision in *Phulchand Exports Ltd. v. O.O.O. Patriot*,[34] where a two judge bench, speaking through Lodha J., held that the meaning given to the expression 'public policy of India' in section 34 in *Saw Pipes*, must be applied to the same expression occurring in section 48(2)(b) of the 1996 Act. The court expressly held "that the statement in para 16 of the Report that the expression 'public policy of India used in Section 48(2)(b) has to be given a wider meaning and the award could be set aside, if it is patently illegal' does not lay down correct law and is overruled."[35]

It was seriously contended on behalf of the appellant that since the parties had contractually agreed that the certification by an inspection agency would be final, it was not open to the tribunal as well as the Board of Appeal to go behind the certificate and disregard it even if the certificate was not in accord with the contractual specification. Reliance was placed on two decisions of the English courts, namely *Agroexport Enterprise d'Etat pour le Commerce Exterieut* v. *Goorden Import Cy SA NV*[36] and *Alfred C. Toepfer* v. *Continental Grain Co.*[37] The decision in *Toepfer* was affirmed by the House of Lords in *Gill and Dufus S.A.* v. *Berger & Co. Inc.*[38] Relying upon the said decision, it was contended that the tribunal was acting contrary to the law, disregarding the finality of the certificate issued by SGS India. The awards are patently contrary to the contract and hence not enforceable in India. In *Agroexport* it was held that an award founded on evidence of analysis made other than in accordance with the terms of the contract cannot stand and deserves to be set aside, as evidence relied upon was inadmissible. In *Toepfer*, the Court of Appeal had ruled that where the seller and the buyer have agreed that a certificate issued by an agreed agency at the load port as to the quality of goods shall be final and binding on them, the buyer would be precluded from recovering damages from the seller, even if the person giving the certificate has been negligent in making it. The decision in *Toepfer* was affirmed by the House of Lords in *Gill & Dufus* v. *Berger*.

This contention was rejected by the court with the observation that, "The High Court of Justice can be assumed to have full knowledge of the legal position exposited in *Agroexport*, *Toepfer* and *Gill & Dufus* yet it found no ground or justification for setting aside the award passed by the Board of Appeal. If a ground

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33 *Supra* note 24 at para 25.

34 (2011) 10 SCC 300.

35 *Supra* note 24 at para 30.

36 (1956) 1 Lloyd's Rep 319 (QBD).

37 (1974) 1 Lloyd's Rep 11 (CA).

38 1984 AC 382: (1984) 2 WLR 95: (1984) 1 All ER 438: (1984) 1 Lloyd's Rep 227 (HL)

supported by the decisions of that country was not good enough for setting aside the award by the court competent to do so, *a fortiorari*, such ground can hardly be a good ground for refusing enforcement of the award."[39]

III DOES AN 'AWARD' IN SECTION 7 OF THE INTEREST ON DELAYED PAYMENTS TO SMALL SCALE AND ANCILLARY INDUSTRIAL UNDERTAKINGS ACT, 1993 INCLUDE A PROCEEDING UNDER SECTION 34 OF THE ARBITRATION AND CONCILIATION ACT, 1996?

Section 7 of the Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 provided for appeals from any decree or award or other orders made under that Act, and provided as a condition for entertaining such appeal, a pre-deposit of 75% of such award amount. The question was answered by the Supreme Court in an earlier proceeding in *Snehadeep Structures (P) Ltd.* v. *Maharashtra Small-Scale Industries Development Corporation Ltd.*[40]

The decision was followed by a three judge bench in *Sri Paravathi Parameshwar Cables* v. *Andhra Pradesh Transmission Corporation Limited*,[41] which arose out of a judgment of the High Court of Andhra Pradesh, dismissing the review petitions filed against the order of the trial court against the directions of the respondents' applications against section 34, to deposit 75% of the amount awarded, failing which the original application would stand dismissed for non-compliance with section 37 of the Act. A new contention was sought to be raised to the effect that the earlier decision did not consider the impact of section 36, and in any event, when the award was made, the provisions of the 1996 Act not

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39 *Supra* note 24 at para 44; The sweeping observations of the court appears to be at variance with the well-settled principle that if a subsequent judgment, even by a co-equal bench of the same court does not notice the previous binding precedent, subsequent decision would not be held to be valid, in view of the well-known principle of *per incuriam*, applied to such situations. In *Express Newspapers* v. *Union of India*, (1986) 1 SCC 133 at para 83, a subsequent Constitution bench decision rendered in *State of Orissa* v. *R.C. Dey*, AIR 1964 SC 685, which did not refer to an earlier Constitution bench decision in *Bishan Das* v. *State of Punjab*, (1962) 2 SCR 69, was held to be '*per incuriam*'. In fact, the aforesaid observations of the court, if applied as an invariable presumption to be invoked in every case where a subsequent decision disregards an earlier judgment, the principle of *per incuriam* would then never have any application; *Per Incuriam* – 'In *ignorantium* of a state, or other binding authority'.'The expression *per incuriam* means decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority finding on the court concerned, so that in such cases some part of the decision or some step in the reasoning on which it is based, is found, on that account to be demonstrably wrong'.

40 (2010) 3 SCC 34; For a critical analysis of the decision in *Snehadeep Structures* case, see A.K. Ganguli, 'Arbitration Law', XLVI *ASIL* 31(2010).

41 (2013) 10 SCC 693.

being in force, one would have to go back to the 1940 Arbitration Act. The argument was countered by citing section 4 of the 1996 Act which provided that:

> Waiver of right to object - A party who knows that –
>
> (*a*) any provision of this Part from which the parties may derogate, or
>
> (*b*) any requirement under the arbitration agreement,
>
> has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object."

The court therefore ruled that the question involved were already answered in the *Snehadeep Structures* case[42] and was not inclined to take a different view from that decision.

IV RULE OF *DOUBLE EXEQUATUR*

In *Escorts Limited* v. *Universal Tractor Holding LLC*,[43] an interesting question came up for consideration, in the context of execution of a foreign award. The Respondent in that case and one Escorts Agri Machinery Inc., a subsidiary of the Petitioner, held 49 % and 51% of the shares in another company, Beever Creek Holdings (BCH) respectively, and the respondent sold its said 49% of shares in BCH in favour of the subsidiary of the Petitioner for 1.2 million dollars, which was to be paid in four installments. Escorts AMI paid the first two installments but defaulted in payment of the other two. Respondent initiated proceedings in Wake Country Superior Court, North Carolina, USA. A consent order was passed on 19.06.2009, wherein the parties agreed to refer the matter for arbitration. The arbitration proceedings ended in an award in favour of the respondent. Escorts EMI subsequently got merged with the petitioner. Respondent sought to enforce the award by initiating proceedings before the Delhi High Court. The petitioner objected to the enforceability of the award, *inter alia*, on the ground that, in terms of the agreement, it was necessary for the respondent to obtain confirmation of the award in the court in the USA and relied upon the following portions of the consent award, which read thus:

> The case will be stayed from the date and time of entry of this order until completion of arbitration between the plaintiff and EAMI. Upon the issuance of a decision by the arbitrators, this Court may confirm and enter judgment upon such decision in accordance with the Federal Arbitration Act and may conduct such further proceedings as are necessary to resolve the plaintiff's claims against Escorts Ltd.

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42 *Supra* note 40.

43 (2013) 10 SCC 717.

> The plaintiff agrees that entry of this order resolves the defendant's motion to dismiss. The court shall retain jurisdiction for the purposes of entering an order confirming the arbitration decision pursuant to the Federal Arbitration Act.

In support of its contentions, the petitioner also relied on section 9 of the Federal Arbitration Act, which *inter alia*, provided that:

> Award of arbitrators; confirmation; jurisdiction; procedure.—If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in Sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made.

In the background of the objections raised, the question for consideration of the Supreme Court of India was whether the consent award was a binding one, as required under section 48(1)(e) of the Act and whether, in the absence of any confirmation of the award, it could be held to be executable in India. It was contended on behalf of the petitioner, relying on the earlier decision in *ONGC* v. *Western Co. of North America*,[44] that recognition of the award would have to be refused if the award has not become binding between the parties. The respondent contended that the provision only applied to domestic awards, in terms of Section 202 of the Federal Act, which adapted the New York Convention, and hence the rule of *double exequatur* was not required to be complied with. Decisions of the courts of England were cited to show that even in England, the rule of *double exequatur* has been done away with, after the English Act was adopted.

In a short summarized paragraph, the court, overruling the objections, held: [45]

> It is also material to note that even as per the requirement of the US law, a notice of three months is required to be given in case a party does not want the award to be enforced. In the instant case, Para 7 of the consent order clearly recorded that the award given by the arbitrator shall be final and binding on the parties. If the petitioner wanted to dispute it, it was required of them to have issued necessary notice which they had not done.

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44 (1987) 1 SCC 496.

45 *Supra* note 43 at para 9.

Rejecting the contention that confirmation of the award by a US Court is a pre-condition for enforcement in India, the Court held that: [46]

> […] the said submission is not tenable in view of the changed law and doing away of the rule of double exequatur.

V VALIDITY OF ARBITRATION AGREEMENT IN A DOCUMENT REQUIRED TO BE COMPLUSORILY REGISTERED AND STAMPED

Whether an arbitration agreement contained in a document which is compulsorily registrable, but which has not been registered, would be valid and enforceable, and whether an arbitration agreement in a document required to be stamped, but not duly stamped, are valid and enforceable, are the two questions that came up for consideration of the Supreme Court of India in *Naina Thakker* v. *Annapurna Builders*.[47]

Reiterating the law laid down in *SMS Tea Estates (P) Ltd*. v. *Chandmari Tea Co. (P) Ltd*.,[48] the court held that the lease deed dated 19.12.2003 entered into between the Petitioner and the respondent purporting to grant lease in respect of an immoveable property for a period of five years, which was prepared on a non-judicial stamp paper of Rs. 100 only, and which was unregistered, could not be acted upon by the court before whom the Petitioner made an application under section 8 of the Act for relegating the parties to the process of adjudication by arbitration.

In *SMS Tea Estates* case, two tea estates were the subject matter of grant of a long term lease for 30 years by an instrument dated 07.20.2006 which was neither

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46 *Ibid*. While it is true that the New York Convention no longer adopts the rule of *double exequatur*, the question as to whether the award has become binding between the parties will depend on the law according to which the award has been rendered, and whether such law makes the award binding. Though the judgment is silent as to the law applicable, the US Court appears to have retained its jurisdiction for the purposes of 'entering an order confirming the arbitration decision pursuant to the Federal Arbitration Act.' It appears that the parties in the court clearly understood that the award in question would require an order of confirmation by the court in terms of the Federal Arbitration Act. This order was not varied and therefore continued to bind the parties. Though it is stated that paragraph 7 of the consent order provided that the award of the arbitrator shall be final and binding between the parties, obviously the finality was subject to the court confirming it as required under the Federal Arbitration Act. Art. V (1) (e) of the New York Convention, corresponding to s. 48 (1) (e) of the 1996 Act, requires the award to become binding on the parties, under the law of which that award is made, before that award could be made enforceable as a foreign award. The judgment does not discuss this aspect, namely, under the law of which that award was made.

47 (2013) 14 SCC 354.

48 (2011) 14 SCC 66.

registered nor properly stamped, as required under the Indian Stamp Act, 1899. The lease deed however, contained an arbitration clause, for adjudication of disputes between the parties therein. The parties failed to appoint an arbitrator in terms of clause 35 of the lease deed. The appellant approached the Chief Justice of the Guwahati High Court with an application under section 11(6) of the Act for appointment of an arbitrator. The respondent had opposed it on the ground that since the lease deed was an unregistered document, and also insufficiently stamped, the arbitration clause is also invalid and unenforceable. On the question of the effect of non-registration of the document which was required to be compulsorily registered, relying on the proviso to section 49 of the Registration Act, the court had concluded that since an arbitration clause in an unregistered instrument is an agreement independent of the other terms in the contract or instrument, the arbitration agreement would survive for the purpose of resolution of disputes arising under or in connection with the contract. Referring to section 16 of the 1996 Act, the court held that even if a deed of transfer of immoveable property is challenged as not valid and enforceable, the arbitration agreement would remain unaffected for the purpose of resolution of disputes arising with reference to the deed of transfer. It was however, clarified by the court that if the contract or instrument was voidable at the option of the parties, the invalidity that attaches itself to the principal agreement may also affect the validity of the arbitration agreement.

On the second question, with regard to the validity of an arbitration agreement contained in an unregistered (but compulsorily registrable) instrument which is not duly stamped, the court held that sections 35 and 36 of the Indian Stamp Act, 1899, unlike the proviso to section 49 of the Registration Act, does not provide for any exception to treat the instrument insufficiently stamped for any purpose whatsoever. On the contrary, it is the duty of the court before which it is produced to impound the same. The arbitration clause in this instrument would therefore not be acted upon.

However, in the context of the provisions of the Indian Stamp Act, 1899, the court did not examine whether section 16 of the Act would save the arbitration clause, since there is no provision in the Stamp Act which requires an arbitration agreement to be compulsorily stamped. Referring to the decision in *SMS Tea Estates* case Lodha J held that:

> It is true that the consequences provided in the Stamp Act, 1899 must follow where sufficient stamp duty has not been paid on an instrument irrespective of the willingness of a party to the instrument to pay deficit stamp duty but the procedure where the arbitration clause is contained in a document which is not registered although compulsorily registrable and which is not duly stamped as summed up by this Court in *SMS Tea Estates (P) Ltd. case* shall not be applicable to the proceedings under Section 8 of the Act where the party making such application does not express his/her readiness and willingness to pay the deficit stamp duty and the penalty. It is not the duty of the Court to adjourn the suit indefinitely until the defect with reference to deficit stamp duty concerning the arbitration agreement is cured."

VI PAYMENT OF INTEREST UPON INTEREST

The issue of whether interest awarded on the principal amount up to the date of the award becomes part of the principal amount, or rather, whether an arbitral tribunal could award interest upon interest from the date of the award was considered by the Supreme Court in *Hyder Consulting (UK) Limited* v. *Governor, State of Orissa*.[49]

It was contended on behalf of the Petitioner that the observation in *State of Haryana v. S.L. Arora & Co,*[50] to the effect that the decisions in *McDermott International Inc.* v. *Burn Standard Co. Ltd.*,[51] and *U.P. Coop. Federation Ltd.* v. *Three Circles*[52] were passed on an inadvertent erroneous assumption, is not justified, and that the view taken in the *State of Haryana* v. *S.L. Arora & Co.* that award of future interest on the principal amount up to the date of the award, does not amount to an award of 'interest upon interest', is not the correct position.

The issue of payment of 'interest upon interest' was dealt with by the Supreme Court in the *Three Circles* case in the following terms: [53]

> Now the question comes which is related to awarding of "interest on interest". According to the appellant, they have to pay interest on an amount which was inclusive of interest and the principal amount and therefore, this amounts to a liability to pay "interest on interest". This question is no longer res integra at the present point of time. This Court in *McDermott International* v. *Burn Standard Co. Ltd*. (2006) 11 SCC 181 has settled this question in which it had observed as follows: (SCC p. 207, para 44)
>
> … The arbitrator has awarded the principal amount and interest thereon up to the date of award and future interest thereupon which do not amount to award of interest on interest as interest awarded on the principal amount up to the date of award became the principal amount which is permissible in law.
>
> The High Court on this question has also rightly relied on a decision of this Court in *ONGC* v. *M.C. Clelland Engineers* S.A. (1999) 4 SCC 327. That being the position, we are unable to find any ground to set aside the judgment of the Division Bench of the High Court while considering the ground of "interest on interest.

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49 (2013) 2 SCC 719.

50 (2010) 3 SCC 690.

51 (2006) 11 SCC 181.

52 (2009) 10 SCC 374.

53 *Id*., para 31

Subsequently, a co-equal bench of the Supreme Court in *S.L. Arora*'s case held that interest on interest is not payable. The court held as follows: [54]

> In the absence of any provision for interest upon interest in the contract, the Arbitral Tribunals do not have the power to award interest upon interest, or compound interest, either for the pre-award period or for the post-award period.

In view of conflicting judgments of co-equal benches of the Supreme Court in *U.P. Coop. Federation Ltd.* v. *Three Circles* and in *State of Haryana v. S.L. Arora & Co.*, the matter has been referred to be heard by a bench of three judges of the Court by an order dated March 13, 2012.[55]

VII APPOINTMENT OF ARBITRATOR

Where the arbitration agreement has worked its course

In *Newton Engineering & Chemicals Ltd.* v. *Indian Oil Corporation Ltd.*,[56] the arbitration clause in the agreement between the parties provided that all disputes and differences between them would be referred to the sole arbitration of the ED(NR), an officer of the respondent corporation. The arbitration clause further provided that if such ED(NR) is unable or unwilling to act as the sole arbitrator, the matter would be referred to the sole arbitration of some other person designated by the ED(NR) in his place. The arbitration clause also provided that no person other than the ED(NR) or the person designated by the ED(NR) should act as arbitrator.

When disputes arose between the appellant and the respondent corporation, the appellant wrote to the respondent for appointment of the ED(NR) as the sole arbitrator as per the arbitration clause. The respondent corporation informed the Appellant that due to internal reorganization in the corporation, the office of ED(NR) had ceased to exist, and since the intention of the parties was to get their disputes settled through arbitration, ultimately appointed the director (marketing) as the sole arbitrator.

The appellant, being aggrieved by the appointment of the director (marketing) as sole arbitrator, preferred an application in the Delhi High Court under section 11(6) read with sections 13 and 15 of the Act for appointment of a retired judge as sole arbitrator. The petition was dismissed by the single judge, observing that the challenge to the appointment of the arbitrator could be raised before the arbitral tribunal itself.

The Supreme Court, having regard to the express, clear and unequivocal arbitration clause between the parties, held that the appointment of the director (marketing) as sole arbitrator could not be sustained. The court held that: [57]

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54 *Supra* note 50 para 18

55 *Supra* note 48.

56 (2013) 4 SCC 44.

57 *Id*.at para 7.

> If the office of ED(NR) ceased to exist in the Corporation and the parties were unable to reach to any agreed solution, the arbitration clause did not survive and has to be treated as having worked its course. According to the arbitration clause, sole arbitrator would be ED(NR) or his nominee and no one else. In the circumstances, it was not open to either of the parties to unilaterally appoint any arbitrator for resolution of the disputes. Sections 11(6) (c), 13 and 15 of the 1996 Act have no application in the light of the reasons indicated above.

In view of this reasoning the court was pleased to set aside the appointment of the director (marketing) as sole arbitrator, and allowed the appellant to pursue appropriate ordinary civil proceedings in respect of the disputes between the parties.

Failure to appoint an arbitrator within time

In *Deep Trading Company v. Indian Oil Corporation*,[58] the respondent corporation failed to appoint an arbitrator despite a written notice dated 09.08.2004 by the appellant calling upon it to do so in terms of the arbitration clause in the agreement. The appellant preferred an application to the Allahabad High Court under section 11(6) of the Act on 06.12.2004, after nearly four months, and the respondent corporation appointed the sole arbitrator on 28.12.2004 after the application under section 11(6) had already been made by the appellant. The Allahabad High Court found no reason to appoint an arbitrator, as by the time the application came up for consideration the arbitrator had already been appointed by the corporation.

On appeal, the Supreme Court relied on an earlier decision in *Datar Switchgears Ltd. v. Tata Finance Ltd*.,[59] which was followed in *Punj Lloyd Ltd. v. Petronet MHB Ltd.*,[60] in which the court noticed the distinction between sections 11(5) and 11(6) of the Act, and considered the question of whether in a case falling under the purview of section 11(6), the opposite party could appoint an arbitrator after the expiry of thirty days from the date of demand. The court held therein, that in such a case the right to make an appointment is not forfeited but continues, but such an appointment has to be made before the first party makes an application under section 11 seeking the appointment of an arbitrator. If the application is made first, the right of the opposite party to make such an appointment ceases and is forfeited.

Applying the legal position as exposited in *Datar Switchgears Ltd.* to the judgment under review, the court held that the corporation had forfeited its right to appoint the arbitrator, since it had made an appointment only during the pendency of proceedings under section 11(6). The court held such an appointment to be of

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58 (2013) 4 SCC 35; For a discussion on the time period for appointment of an arbitrator, see A.K. Ganguli, "Arbitration Law", XLVI *ASIL* 31(2010).

59 (2000) 8 SCC 151.

60 (2006) 2 SCC 638.

no consequence and restored the appeal to the Allahabad High Court, for appointment of an arbitrator.

Does Limitation strictly apply in a case of disputed facts?

In *Schlumberger Asia Services Ltd.* v. *ONGC Ltd.*,[61] the parties entered into a contract for the lease of certain heavy equipment, along with allied services for a period of two years, which was extended twice thereafter in two installments of six months each, till 15.10.2007. The petitioner demanded certain sums which were unpaid as outstanding, in terms of a letter dated 11.07.2008, and when it got no reply issued a legal notice dated 14.11.2008, invoking arbitration in terms of the arbitration clause in the contract, stating that it had appointed its nominee arbitrator, and calling on the respondent to nominate its arbitrator. According to the petitioner, the notice dated 14.11.2008 was duly served, but no steps were taken by the respondent. Thereafter, the petitioner issued reminders dated 21.05.2009, 11.08.2010, and 09.01.2012. The respondent sent a reply on 29.02.2012, denying that any amount as claimed by the petitioner was due. The petitioner therefore, preferred a petition under section 11(6) seeking appointment of the nominee arbitrator of the Respondent, as well as the Presiding Arbitrator.

It was contended on behalf of the respondent that the claims had been settled, as the Petitioner had accepted payments without demur in 2007, and that the cause of action had arisen on 14.12.2008, i.e. on expiry of thirty days from the first notice dated 14.11.2008. The petition was time barred, as it ought to have been presented within three years from the date of the cause of action, which arose on 14.12.2011, while the petition had been filed only on 11.01.2013. It was also pointed out that the notices dated 14.11.2008, 21.05.2009 and 11.08.2010 issued by the petitioner were not received in the concerned section of ONGC, but were sent to an old address, despite the petitioner's knowledge that such a change of address had occurred back in 2005 and it had since then submitted invoices to the Respondent, which were sent to its new address. It was argued that merely sending subsequent notices/letters would not extend the limitation. The respondent relied on paragraph 39 of the judgment in *SBP Co.* v. *Patel Engineering Ltd.*,[62] to submit that the chief justice, in an application under section 11, "can also decide the question whether the claim was a dead one; or a long-barred claim that was sought to be resurrected", and that the court would have to decide whether the petition was liable to be dismissed on the ground of limitation as it raised dead claims, and it would not be necessary to leave the matter to be decided by the arbitral tribunal.

It was sought to be contended on behalf of the petitioner that the limitation stopped running from the date of the issuance of the notice of arbitration on 14.11.2008. The petitioner relied on section 3 of the Act in support of the submission that the notice is deemed to have been delivered to the addresses mentioned in the contract, and that since the Respondent had denied the claim through a letter dated

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61 (2013) 7 SCC 562.

62 (2005) 8 SCC 618.

29.02.2012, the cause of action arose on that date. In any event, the Petitioner contended that in *Indian Oil Corporation Ltd.* v. *SPS Engineering Ltd*.,[63] the Supreme Court had considered and explained *SBP & Co.*'s case, to the effect that on the question of limitation, the matter would be left to the decision of the tribunal, to decide whether the claim was barred by limitation or not.

The Supreme Court, speaking through S.S. Nijjar J before whom this petition was preferred, adverted to *Indian Oil Corporation Ltd.*, to hold that paragraph 39 of *SBP & Co.* made it clear that "the Chief Justice or the designated Judge can *also* decide whether the claim was dead one or a long-barred claim. But it is not imperative for the Chief Justice or his designate to decide the questions at the threshold. It can be left to be decided by the Arbitral Tribunal."[64] The court highlighted the following observations in *Indian Oil Corporation Ltd.*, which are as follows:[65]

> […] The Chief Justice or his designate may however choose to decide whether the claim is a dead (long-barred) claim or whether the parties have, by recording satisfaction, exhausted all rights, obligations and remedies under the contract, so that neither the contract nor the arbitration agreement survived. When it is said that the Chief Justice or his designate may choose to decide whether the claim is a dead claim, it is implied that he will do so only when the claim is evidently and patently a long time-barred claim and there is no need for any detailed consideration of evidence.

The single judge held that the observations make it clear that such power of the chief justice or his designate is "optional", and would be exercised "only when the claim is evidently and patently a long time-barred claim." He went on to hold the following:[66]

> […] The claim could be said to be patently long time-barred, if the contractor makes it a decade or so after completion of the work without referring to any acknowledgment of a liability or other factors that kept the claim alive in law. On the other hand, if the contractor makes a claim, which is slightly beyond the period of three years of completing the work say within five years of completion, the Court will not enter into the disputed questions of fact as to whether the claim was barred by limitation or not. The judgment further makes it clear that there is no need for any detailed consideration of evidence.

And, to further conclude in the following manner:[67]

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63 (2011) 3 SCC 507.

64 *Supra* note 61para 25.

65 *Id*., para 14.

66 *Id*., para 25.

67 *Id*; para 26.

> In the present case, there is a dispute as to whether the repeated notices sent by the petitioner to the respondents were ever received. There are further disputes (even if the notices were received by ONGC) as to whether they were actually received in the correct section of ONGC. These are matters of evidence which are normally best left to be decided by the Arbitral Tribunal.

In these terms, the learned Single Judge was pleased to appoint an arbitral tribunal in exercise of powers under section 11(6) of the Act.

Jurisdiction of the courts

In *Swastik Gases (P) Ltd.* v. *Indian Oil Corporation Ltd*.,[68] the court interpreted a jurisdiction clause contained in an arbitration agreement, in order to decide the territorial jurisdiction of the courts in relation to the contract. The court came to the conclusion that the absence of such words as, 'alone', 'only', 'exclusive', and 'exclusive jurisdiction' in the jurisdiction clause in themselves are not decisive, and does not make any material difference to determining the intention of the parties.

The court relied on the principle of *expressio unius est exclusio alterius* (which means that "the expression of one is the exclusion of another") to ascertain the intention of the parties that the courts in Kolkata would have territorial jurisdiction, because in the reading of the jurisdiction clause, there was nothing to indicate the contrary. The court went on to hold that where the contract specifies the jurisdiction of the courts at a particular place and such courts have jurisdiction to deal with the matter, an inference may be drawn that parties intended to exclude all other courts. The Court held that such a clause was not hit by Section 23 or 28 of the Contract Act, 1872 at all, and is neither forbidden by law nor against public policy.[69]

Designated judge does not have to go into a detailed examination

In *Today Homes and Infrastructure (P) Ltd.* v. *Ludhiana Improvement Trust*,[70] the court reiterated the observations made by the seven judge bench in the *SBP & Co.'s* case[71] regarding what is really required to be decided by the designated judge on an application preferred under section 11(6) of the 1996 Act.

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68 (2013) 9 SCC 32.

69 The court relied on the following cases to support its view: *Hakam Singh* v. *Gammon India Ltd*., (1971) 1 SCC 286; *A.B.C. Laminart (P) Ltd.* v. *A.P. Agencies*, (1989) 2 SCC 163; *R.S.D.V. Finance Co. (P) Ltd.* v. *Shree Vallabh Glass Works Ltd*., (1993) 2 SCC 130; *Angile Insulations v. Davy Ashmore India Ltd*., (1995) 4 SCC 153; *Shriram City Union Finance Corporation Ltd.* v. *Rama Mishra*, (2002) 9 SCC 613; *Hanil Era Textiles Ltd.* v. *Puromatic Filters (P) Ltd.*, (2004) 4 SCC 671; *Balaji Coke Industry (P) Ltd.* v. *Maa Bhagwati Coke Gujarat (P) Ltd*., (2009) 9 SCC 403.

70 (2014) 5 SCC 68.

71 (2005) 8 SCC 618.

In light of the settled law, the court held that the action of the designated judge was not warranted, inasmuch as the designated judge went into a detailed examination of the merits of the case and the existence of an arbitration agreement and held that once the main agreement between the parties was declared void, the entire contents thereof, including any arbitration clause that may have been incorporated in the main agreement, were rendered invalid.

The chief justice cannot replace an arbitrator already appointed in exercise of the arbitration agreement

The facts of *Antrix Corporation Ltd.* v. *Devas Multimedia (P) Ltd*.[72] involved an agreement for the lease of space (segment capacity) on the ISRO/Antrix S-Band Spacecraft. Article 20 of the agreement, which dealt specially with arbitration, provided that such disputes would be referred to senior management of both the parties to resolve the same within 3 weeks, failing which the matter would be referred to an arbitral tribunal comprising of three arbitrators. It was also provided that the arbitration proceedings would be held in accordance with the rules and procedures of the International Chamber of Commerce (ICC) or UNCITRAL. Article 19 of the agreement provided that the agreement would be construed in accordance with the laws of India.

On February 25, 2011 the petitioner company terminated the agreement with immediate effect. The respondent company objected to the termination by letter dated February 28, 2011. In keeping with article 20 of the agreement, the petitioner wrote to the respondent on June 15, 2011, nominating its senior management to discuss the matter and try to resolve the dispute between the parties. However, without exhausting the mediation process contemplated in article 20(a) of the agreement, the respondent unilaterally and without prior notice to the Petitioner, addressed a request to for arbitration to the ICC International Court of Arbitration on June 29, 2011, seeking resolution of disputes under the agreement, and also nominated its arbitrator in accordance with the ICC Rules. The petitioner came to know about the request for arbitration, upon receipt on July 5, 2011 of a copy of the request forwarded by the ICC, and which also contained an invitation to nominate its own arbitrator.

Instead of nominating its arbitrator, the petitioner once again requested the respondent to convene its senior management. Pursuant to this request, a meeting of the senior management team was held, but in the meeting, the representatives of the respondent insisted that the matter proceed to arbitration and refused to discuss the issues between the parties.

Subsequently, the petitioner invoked the arbitration agreement in accordance with the UNCITRAL Rules and appointed its arbitrator under the said rules, and called upon the respondent to appoint its arbitrator within 30 days of receipt of its notice. The petitioner contended that the respondent had invoked the ICC Rules unilaterally, without allowing the petitioner to exercise its choice. The petitioner

72 2013 (2) Arb.LR 226 (SC).

also wrote to the Secretariat of the ICC Court stating it had appointed its arbitrator in accordance with the agreement, and asserted that the arbitral proceedings would be governed by the Indian law *i.e.*, the Arbitration and Conciliation Act, 1996. The ICC responded to the letter indicating that the issues raised would be submitted before the ICC Court shortly, and should the court decide that the arbitration may proceed, any decision as to the jurisdiction of the tribunal shall be taken by the arbitral tribunal itself.

It is in these circumstances that the petitioner applied to the Supreme Court under section 11(4) read with section 11(10) of the Act, asking that the respondent be directed to nominate its arbitrator in accordance with the UNCITRAL Rules. In the opinion of the court, the most important issues were (1) whether section 11 of the 1996 Act could be invoked when the ICC Rules had already been invoked by one of the parties, and (2) whether section 11 empowered the chief justice to constitute a tribunal in supersession of the tribunal already in the stage of constitution under the ICC Rules, notwithstanding that one of the parties had proceeded unilaterally in the matter.

The Supreme Court, after hearing the parties, observed that "the matter was not as complex as it seemed" and held that once the arbitration agreement had been invoked by the respondent, it could not have been invoked for a second time by the petitioner, who was aware of the action of the respondent. The court held that it would lead to an anomalous situation where an appointment of an arbitrator could be questioned in a subsequent proceeding initiated by the other party also for appointment of an arbitrator. In the court's view, while the petitioner was certainly entitled to challenge the appointment by the respondent, it could not do so by way of an independent proceeding under section 11(6). In a proceeding under section 11, cannot replace an arbitrator already appointed in exercise of the arbitration agreement. The court was fortified in its opinion by the case of *Gesellschaft fur Biotechnologische Forschun GmbH* v. *Kopran Laboratories*,[73] wherein a single judge had referred to sole arbitration with the venue in Bombay, despite the fact that the arbitration agreement called for arbitration in accordance with ICC Rules, Paris at the venue of Bombay. The Supreme Court held that "when there was a deviation from the methodology for appointment of an arbitrator, it was incumbent on the part of the Chief Justice to assign reasons for such departure".[74]

The court held that section 11(6) was quite categorical that it could be invoked where the parties fail to act in terms of an agreed procedure. Where in terms of the agreement, the arbitration clause has already been invoked by one of the parties in terms of the ICC Rules, the provisions of section 11(6) cannot be invoked again, and in case the other party is dissatisfied or aggrieved, its remedy would be by way of a petition under section 13 and, thereafter, under section 34 of the 1996

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73 (2004) 13 SCC 630.

74 *Supra* note 71at para 31.

Act. Observing that the law is well settled that where an arbitrator had already been appointed and intimation thereof had been conveyed to the other party, a separate application for appointment is not maintainable, the court went on to hold that, "once the power has been exercised under the arbitration agreement, there is no power left to, once again, refer the same disputes to arbitration under Section 11 of the 1996 Act, unless the order closing the proceedings is subsequently set aside".[75] The court referred to and agreed with the finding of the Punjab & Haryana High Court in *Som Datt Builders Pvt. Ltd.* v. *State of Punjab*,[76] that when the tribunal is seized of the disputes between two parties, constitution of another arbitral tribunal in respect of those same issues which are already pending before the arbitral tribunal for adjudication, would be without jurisdiction.

Lastly, the court held that in view of the language of article 20, which provided for arbitration proceedings in accordance with the ICC or UNCITRAL, the Respondent was entitled to invoke the ICC for conduct of the proceedings. Since Article 19 laid down that the law governing the agreement would be Indian law, there was a clear distinction between the law which was to operate as the law governing the agreement and the law which was to govern the arbitration proceedings. Once the provisions of the ICC Rules of Arbitration had been invoked by the respondent, the proceedings initiated thereunder could not be interfered with under section 11 of the 1996 Act, but only under appropriate proceedings. The court disposed of the petition in these terms.

Decision under section 11(6) regarding excepted matters

A two judge bench of the Supreme Court in *Arasmeta Captive Power Company* v. *Lafarge India P. Ltd.*,[77] was called upon to rule on the question as to whether there is a conflict between a three judge bench decision in *Chloro Controls India Private Limited* v. *Severn Trent Water Purification Inc.*[78] and a bench of seven judge judges in *SBP & Co.* v. *Patel Engineering Ltd*.[79] in the context of the exercise of power by the chief justice or the designated judge under section 11(6) of the Act regarding excepted matters and their arbitrability.

The appellant, which was engaged in the generation of power, had entered into two power purchase agreements with the respondent, for the supply of power. Disputes arose between the parties as to the amounts due and payable under the respective power purchase agreements. The appellants put the disputes in the category of "billing disputes" and proposed to refer the said disputes to a panel of three experts as contemplated in clause 16.2 of the agreement and requested the Confederation of Indian Industry (CII) to appoint the panel. The respondent did not agree with the appellant that the disputes fell within the category of "billing

75 *Supra* note 71at para 33.

76 2006 (3) RAJ 144 (P&H); 2006 (3) Arb.LR 201 (P&H)(DB).

77 2013 (4) Arb.LR 439 (SC).

78 (2013) 1 SCC 641.

79 (2005) 8 SCC 618.

disputes", but fell outside the ambit of clause 9.3(a) of the agreement, therefore warranting arbitration.

The respondent approached the high court for appointment of arbitrator in terms of clause 16.3 of the agreement. The appellant resisted the said proceedings contending *inter alia* that the disputes fell within the category of "billing disputes". Such disputes were excepted matters and could not be the subject matter of reference for arbitration.

It was further contended that the decision in *National Insurance Co.* v. *Boghara Polyfab (P) Ltd.*[80] which classified disputes into three categories and had concluded that only the first two categories would be adjudicated, was not in consonance with *SBP & Co.* case [81] and since the two judge decision in *National Insurance Co.* had been re-affirmed by a bench of three judges in *Chloro Controls India (P) Ltd.* v. *Severn Trent Water Purification Inc*.,[82] these two decisions are in conflict and would have to be referred to a larger bench to resolve the conflict.

The Supreme Court, speaking through Dipak Misra J held: [83]

> […] it is extremely difficult to state that the principal stated in SBP & Co. requires the Chief Justice or his designate to decide the controversy when raised pertaining to arbitrability of the disputes. Or to express an opinion on excepted matters. Such an inference by syllogistic process is likely to usher in catastrophe in jurisprudence developed in this field. We are disposed to think so as it is not apposite to pick up a line from here and there from the judgment or to choose one observation from here or there for raising it to the status of "the *ratio decidendi*". That is most likely to pave one on the path of danger and it is to be scrupulously avoided. The propositions set out in SBP & Co., in our opinion, have been correctly understood by the two judge bench in Boghara Polyfab Private Limited and the same have been appositely approved by the three judge bench in Chloro Controls India Private Limited and we respectfully concur with the same. We find no substance in the submission that the said decisions require reconsideration, for certain observations made in SBP & Co., were not noticed. We may hasten to add that the three judge bench has been satisfied that the *ratio decidendi* of the judgment in SBP & Co. is really inhered in paragraph 39 of the judgment.

The court reiterated another decision by a bench of two judges in *Booz Allen and Hamilton* v. *SBI Home Finance Ltd.*,[84] wherein the court observed as follows: [85]

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80 (2009) 1 SCC 267.

81 *Supra* note 79.

82 *Supra* note 78.

83 *Supra* note 76 at para 37.

84 (2011) 5 SCC 532

85 2013 (4) Arb.LR 470 (SC); *Id*., para 32.86.

> 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 would leave the issue of arbitrability for the decision of the Arbitral Tribunal. If the arbitrator wrongly holds that the dispute is arbitrable, the aggrieved party will have to challenge the award by filing an application under Section 34 of the Act, relying upon sub-section (2)(*b*)(*i*) of that section.

Reiterating the observations in *Booz Allen*, as to whether the question of arbitrability need be gone into by a chief justice or his designate, it was held that the said ruling was absolutely in accordance with *SBP & Co*. The court explained:

> The meaning given to arbitrability thereafter has been restricted to the adjudication under Section 8 and not under Section 11 of the Act.

"Full and final settlement" if disputed is to be decided by the arbitrator

In *Gayatri Projects Ltd.* v. *Sai Krishna Construction*,[86] the Supreme Court was called upon to determine whether the High Court of Andhra Pradesh was justified in entertaining an application under sub-sections (5) and (6) of section 11 of the Act, and directing that the matter be referred to arbitration by a retired judge of the Andhra Pradesh High Court. The appellant contended before the Supreme Court that the agreement dated 29.01.2001, which contained an arbitration clause, had been superseded by the "full and final settlement" agreement dated 06.06.2003 executed between the parties, and hence, the respondent was not entitled to invoke the arbitration clause as there was no arbitrable dispute between the parties which could be referred to arbitration.

The court viewed the contention of the appellant, as regards the "full and final settlement" of the claims of the respondent, as a matter of defense, but the respondent did not accept that there was any such "full and final settlement". In fact, the respondent pleaded that after it had submitted its demand for payment of the balance amount had made and a further claim on account of the value of HSD oil supply, exemption of excise duties and sales tax, the appellant had denied the said claims. In fact, in response to the legal notice served by the respondent, the appellant had also raised counter-claims.

Relying upon the ratio of its earlier decision in *National Insurance*,[87]which in turn had relied upon previous decisions in *Nav Bharat Builders*[88] and *Nathani*

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86 *Available at* : http//: www.advocatekhoj.com/library/judgements/php. (last visted on Aug 22nd 2014).

87 *National Insurance Company* v. *Boghara Polyfab Private Limited*, (2009) 1 SCC 267.

88 *State of Maharashtra* v. *Nav Bharat Builders*, 1994 Supp (3) SCC 83.

Steels,[89]wherein it was held that "this court on examination of facts, was satisfied that there was a voluntary settlement of all pending disputes, and the contract was discharged by accord and satisfaction",[90] the court held that, "since there is no acceptance of the full and final settlement by the respondent which has been relied upon by the appellant, the issue clearly has to be left to the arbitrator to be adjudicated".[91]

VIII WHETHER THE ARBITRATION AGREEMENT IN A CONTRACT SURVIVES AFTER NOVATION

In *Young Achievers* v. *IMS Learning Resources (P) Ltd*.,[92] the court was called upon to consider, *inter alia*, whether "an arbitration clause is a collateral term in the contract, which relates to resolution of disputes, and not performance and even if the performance of the contract comes to an end on account of repudiation, frustration of breach of contract, would the arbitration agreement survive for the purpose of resolution of disputes arising under or in connection with the contract?" The respondent therein had filed a suit in the Delhi High Court for a permanent injunction restraining infringement of a registered trade mark, infringement of copyright, passing off of damages, rendition of accounts of profit and also for other consequential reliefs. The appellant filed an application under section 8 read with section 5 of the Act before the high court, seeking rejection of the plaint, and for a direction referring the disputes to arbitration. The high court rejected the application filed by the Appellant on the ground that the earlier agreements dated 01.04.2007 and 01.04.2010, which contained an arbitration clause stood superseded by a new contract dated 01.02.2011 executed between the parties by mutual consent. The appellant preferred an appeal before the division bench which was dismissed. Thereafter, the appellant approached the Supreme Court seeking special leave.

It was contended on behalf of the appellant that the arbitration clause contained in two earlier agreements was a collateral term in the contracts, which merely provided for a mechanism for resolution of disputes, but did not relate to performance of the contract as such, and hence, even if the contract containing the arbitration clause comes to an end on account of repudiation, frustration or breach of contract, the arbitration agreement would still survive. It was also contended that there is no assertion by the respondent that the original contracts stood discharged by accord and satisfaction, but the only purpose of the subsequent agreements (*i.e*. exit paper dated 01.02.2011) was to put an end to the contractual relationship of the parties to the earlier contracts. The court ruled that the question of survival of the arbitration clause contained in the earlier agreements dated 01.04.2007 and 01.04. 2010 has to be viewed in the light of the terms and conditions

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89 *Nathani Steels Ltd.* v. *Associated Constructions*, 1995 Supp (5) SCC 324.

90 (2009) 1 SCC 267 at para 34.

91 *Supra* note 86 para 17.

92 (2013) 10 SCC 535.

of the new agreement dated 01.02.2011. It was the admitted case of the parties that the subsequent agreements did not contain any arbitration clause, though it contained comprehensive terms and conditions as were mutually agreed upon by the parties. Relying upon the dicta in *Union of India* v. *Kishorilal Gupta and Bros*.,[93] to the effect that "if the contract is superseded by another, the arbitration clause, being a component part of the earlier contract, falls with it. But where the dispute is whether such contract is *void ab initio*, the arbitration clause cannot operate on those disputes, for its operative force depends upon the existence of the contract and its validity",[94] the court, speaking through K.S.P. Radhakrishnan, J held that, "so far as the present case is concerned, parties have entered into a fresh contract contained in the exit paper which does not even indicate any disputes arising under the original contract or about the settlement thereof, it is nothing but pure and simple novation of the original contract by mutual consent."[95] Hence, the court did not find any error in the decision of the high court.

In *Chatterjee Petrochem (Mauritius) Co.* v. *Haldia Petrochemicals*,[96] the respondent, after a long drawn litigation between the parties before the Company Law Board, the high court at Calcutta and the Supreme Court, filed a suit before the High Court at Calcutta praying that the arbitration clause (clause 15) contained in the agreement of restructuring entered into between Chatterjee Petrochem (Mauritius) Co. (CPMC), the Government of West Bengal, the West Bengal Industrial Development Corporation (WBIDC) and Haldia Petrochemicals on 12.01.2002, be declared as void in respect of the claim of transfer of fifteen million shares in favour of Chatterjee Petrochem (India) Private Limited (CPIL), since the parties had contracted out of the said agreement and their legal liability in respect thereof was redefined by the subsequent agreement dated 08.03.2002, which provided for an "exclusive jurisdiction" to courts in Calcutta to decide on disputes arising out of the said agreement.

The suit was filed after the appellant (CPMC) on 21.03.2012 had requested the ICC, Paris to initiate arbitration proceedings between the parties in relation to the agreement of restructuring executed on 12.01.2002. The respondents also prayed for an injunction against arbitration of disputes between the parties, invoked by the appellant. The high court had passed an order of injunction from which an appeal was preferred by CPCL before the Supreme Court, wherein the following questions came up for consideration; [97]

> Can the arbitration clause under Clause 15 of the letter of agreement dated 12th January, 2002 be invoked by the Appellant and whether Clause 7.5 of the subsequent agreement dated 8th March, 2002

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93 AIR 1959 SC 1362.

94 *Supra* note 92 para 7.

95 *Id*., para 8.

96 2013 (4) Arb.LR 456 (SC).

97 *Id*., para 20.

> invoking the exclusive jurisdiction of the courts of Calcutta nullify the scope of arbitration as mentioned in the previous agreement dated 12th January, 2002?.
>
> Is the suit, filed by the respondents, seeking injunction against arbitration of disputes between the parties sought for by the appellant as per Clause 15 of the principal agreement referred to supra maintainable in law?
>
> What order?"

On the question as to whether the arbitration clause in the agreement dated 12.01.2002 stood novated and substituted by the subsequent agreement dated 08.03.2002, the court, after perusing the terms of the subsequent agreement, disagreed with the decisions of the single judge and the division bench of the high court, and held that the subsequent agreement clearly preserved the rights and obligations of parties arising out of the principal agreement dated 12.01.2002, as it clarified that it "shall not prejudice any of our rights under the said agreement dated January 12, 2002 and all terms and conditions thereof shall continue to remain valid, binding and subsisting between the parties to be acted upon sequentially."[98] The court therefore held that the arbitration agreement in clause 15 remained in force and that there had been no alteration in the nature of the rights and obligations of the parties as there has been no novation.

Relying on its decision in *Venture Global*,[99] the court held that section 5, which mandates that no judicial authority shall intervene except where so provided, would apply to the provisions contained in part II of the Act, and would therefore govern the proceedings under section 45 of the Act as well. The appellant was therefore held to be justified in invoking the arbitration clause seeking arbitration in terms of the Rules of the ICC, Paris, and that such action did not warrant an interference by the court, following the mandate of sections 5 and 6 of the Act.

On the question as to whether CPIL, the Indian counter-part of the Appellant, which was a non-signatory to the principal agreement, could be bound by the arbitration clause, the Court, relying upon the judgment in *Chloro Controls*,[100] held that the said fact "does not jeopardize the arbitration clause in any manner."[101]

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98 *Id*., para 27.

99 *Venture Global Engineering* v. *Satyam Computer Services Ltd*., (2008) 4 SCC 190.

100 *Supra* note 78.

101 *Supra* note 96 para 36. In *Chloro Controls* case it was held that, "it becomes abundantly clear that reference of even non-signatory parties to arbitration agreement can be made. It may be the result of implied or specific consent or judicial determination. Normally, the parties to the arbitration agreement calling for arbitral reference should be the same as those to the action. But this general concept is subject to exceptions which are that when a third party, i.e. non-signatory party, is claiming or is sued as being directly affected through a party to the arbitration agreement and there are principal and subsidiary agreements, and such third party

The Court finally ruled that since it has, "already held that the arbitration clause is valid, suit filed by the respondent No. 1 for declaration and permanent injunction is unsustainable in law and the suit is liable to be dismissed."[102]

IX EXPERT DETERMINATION CLAUSE NOT AN ARBITRATION CLAUSE

In the case of *P. Dasaratharama Reddy Complex* v. *Govt. of Karnataka*,[103] the court was dealing with expert determination clauses in government works contracts, in terms of which any dispute or difference, irrespective of its nomenclature, in matters relating to specifications, designs, drawings, quality of workmanship or material used or any question relating to claim, right in any way relating to the contract designs, drawings, etc. or failure on the contractor's part to execute the work, whether arising during the progress of the work or after its completion, termination or abandonment has to be first referred to the designated officer of the department.

Affirming the decision of the Karnataka High Court in *Mysore Construction Co.* v. *Karnataka Power Corporation Ltd*.,[104] the court opined that such a clause did not meet the criteria for being construed as an arbitration agreement.[105] The court held that the chief engineer or the designated officer is not an independent authority or person, who has no connection or control over the work. As a matter of fact, he has over all supervision and charge of the execution of the work. He is not required to hear the parties or to take evidence, oral or documentary, nor is he invested with the power to adjudicate upon the rights of the parties to the dispute

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is signatory to a subsidiary agreement and not to the mother or principal agreement which contains the arbitration clause, then depending upon the facts and circumstances of the given case, it may be possible to say that even such third party can be referred to arbitration."

102 *Id*., para 37.

103 (2014) 2 SCC 201.

104 ILR 2000 KAR 4953.

105 In *Mysore Construction Co.* case, the Karnataka High Court after referring to various decisions of the Supreme Court, held that, "the above decisions make it clear that an agreement or a clause in an agreement can be construed as an arbitration agreement, only if: (*i*) it provides for or contemplates reference of disputes or difference by either party to a private forum (other than a court or tribunal) for decision; (*ii*) it provides either expressly or impliedly, for an enquiry by the private forum giving due opportunity to both parties to put forth their cases; and (*iii*) it provides that the decision of the forum is final and binding upon the parties, without recourse to any other remedy and both would abide by such decision. Where there is no provision either for reference of disputes to a private forum, or for a fair and judicious enquiry, or for a decision which is final and binding on parties to the dispute, there is no arbitration agreement."

or difference and his decision is subject to the right of the aggrieved party to seek relief in a court of law. The decision of the chief engineer or the designated officer is treated as binding on the contractor, subject to his right to avail remedy before an appropriate court. Therefore, such expert determination clauses cannot be treated as an arbitration clause.

X AN EFFECTIVE ALTERNATIVE REMEDY IN COMPLEX DISPUTES

In *GAIL India Ltd.* v. *Gujarat State Petroleum Corporation Ltd*.,[106] the court held that in a dispute that involved complex questions of price fixation mechanisms, in which reference to arbitration was available as an alternative effective remedy, the high court should not have entertained the petition filed under article 226 of the Constitution of India.

The court held that contents of the contract, the price side letters and the correspondence exchanged between the parties gave a clue to the complex nature of the dispute. In these circumstances, the parties should have been relegated to arbitration and the arbitral tribunal could have decided the complicated dispute between the parties by availing the services of experts. Unfortunately, the high court presumed that the negotiations held between the appellant and the respondent were not fair and that the respondent was entitled to the benefit of the policy decision taken by the Government of India, despite the fact that it had not only challenged that decision but had also shown disinclination to accept the offer made by the Appellant to supply gas at the pooled price, and had insisted on a mutually agreed price.

XI SEEKING ASSISTANCE FROM COURT WHERE EVIDENCE REQUIRED

In *Delta Distilleries Ltd.* v. *United Spirits Ltd*.,[107] in a dispute pertaining to adjustment/set-off of refund of sales tax before the arbitral tribunal, the appellant refused to produce sales tax assessment orders when called upon to do so by the arbitral tribunal. The tribunal permitted the respondent to move the high court for assistance by a direction for production of the said documents. The appellant contended that the arbitral tribunal could have proceeded to make an award *ex-parte* by drawing an adverse inference if the documents were not produced. The high court held that though the arbitral tribunal could proceed *ex-parte* if a person fails to appear before it, but instead of depending upon hypothetical calculations, it can resort to taking the assistance of the court in obtaining evidence, in this case being the actual sales tax assessment orders, to decide the dispute on merits as to whether the quantum of adjustment/set-off is justified or not.

The Supreme Court, relying on section 27 of the 1996 Act, held that since the provision was an enabling provision, the term 'any person' in section 27(2)(c) is

106 (2014) 1 SCC 329.

107 (2013) 1 SCC 113.

wide enough to cover not only witnesses, but also parties to the proceeding. Therefore, it was possible for the arbitral tribunal to take the assistance of the court in such and similar matters.

XII NON-SIGNATORIES NOW BOUND BY ARBITRATION AGREEMENT

Section 2(b) of the Act defines the expression arbitration agreement as "an agreement referred to in Section 7." The opening words of section 7 limits the concept of an arbitration agreement to Part I by the opening words, "In this Part, 'arbitration agreement' means […]" section 7 then goes on to define further that an arbitration agreement would mean an agreement *by the parties* to submit to arbitration all or certain disputes, which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. Sub-section (2) of section 7 clarifies that an arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. Sub-section (3) of section 7 lays down an important condition that "an arbitration agreement shall be in writing". Sub-section (4) clarifies that an arbitration agreement could be in writing if it is contained in "(a) a document signed by the parties; (b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or (c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other." Sub-section (5) adopts the rule of incorporation by reference as it provides that the reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement, "if the contract is in writing and the reference is such as to make that arbitration clause part of the contract". The expression "party" as defined in section 2(h) means "a party to an arbitration agreement".

These definitions of an arbitration agreement and parties thereto assume great significance, *inter alia* by reason of the mandate of section 8 of the Act which provides that a judicial authority before which an action is brought in a matter "*which is the subject of an arbitration agreement* shall, if a party so applies, refer the disputes to arbitration". This section is based on the principle that the right to seek arbitration is a contractual right and a contract cannot be unilaterally abrogated so as to overthrow the arbitration clause. It is only on the defendant exercising its right to go in for arbitration that the judicial authority refers them to arbitration to abide by their contract. In order to enable the judicial authority to refer the parties to arbitration, the defendant must so apply "not later than when submitting his first statement on the substance of the dispute." The expression "not later than" would imply that the defendant would make an application for referring the parties to arbitration simultaneously "when submitting his first statement on the substance of the dispute.[108] This provision does not empower the judicial authority to restrain the plaintiff from bringing an action in breach of his agreement with the defendant.[109]

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108 *Ramakrishna Theatre Ltd.* v. *General Investments & Commercial Corp. Ltd* AIR 2003 Kant 502; *Ajit Singh* v. *Shri Mata Vaishno Devi Shrine Board* AIR 2002 J&K 108.

109 See A.K. Ganguli, 'Arbitration Law', XLVIII *ASIL*, 42(2012).

In contrast, section 45 of the Act, which appears in part II under the heading "Enforcement of Certain Foreign Awards", which opens with a non-obstante clause provides that "Notwithstanding anything contained in part I or in the Code of Civil Procedure, 1908 (V of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed". The agreement referred to in section 44 contemplates an agreement in writing for arbitration to which "the Convention set forth in the First Schedule applies."

In *Chloro Controls India (P) Ltd.*,[110] a bench of three judges was called upon to construe the provisions of section 45 of the Act, in the context of the disputes that arose between large numbers of parties to as many as seven contracts, some of which contained arbitration clauses, while others did not. Though the facts stated are quite complex, as is the corporate structure of the companies involved in the said proceedings, a brief summary of the facts could be stated thus:

Chloro Controls India (P) Ltd., a company run by the "Kocha Group", was engaged in the business of manufacturing and selling gas and electrical chlorination equipment. Severn Trent Water Purification Inc. agreed to appoint Chloro Controls as its exclusive distributor in India and a joint venture company was incorporated in India for this purpose. As is not uncommon in such transactions, there was a network of several interlinked agreements, each dealing with a different aspect of the commercial relationship between the parties. In all, there were seven agreements, of which the Shareholders Agreement ("SHA") was the principal agreement, to which Mr. Kocha, Severn Trent and Chloro Controls were parties. Clause 4 of the SHA provided that Chloro Controls could not, during the subsistence of the agreement, deal with similar products manufactured by any other entity. Clause 30 thereof provided that disputes would be resolved by English law arbitration in London. The SHA made reference to the other agreements to be executed between these and other parties. The difficulty arose because not all parties had signed all the ancillary agreements, and some of the ancillary agreements did not contain an identical dispute resolution clause.

Of the seven contracts that formed the subject matter of the transaction, the following *contained an arbitration clause* (all the contracts were signed on the same day, *i.e.* November 16, 1995):

> The Shareholders' Agreement, being the principal agreement, to which Capital Controls (Delaware) Co. Inc. (Respondent No. 2)[111], Chloro Controls (India) (P) Ltd. (Appellant) and Mr. M.B. Kocha (Respondent No. 9) were parties;

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110 See *supra* note 78.

111 Capital Controls (Delaware) Co. Inc. is a subsidiary of Severn Trent Services Delaware Inc., the holding company of *inter alia*, Severn Trent Water Purification Inc.

(2) Financial and technical know-how license agreement, and

(3) Export Sales Agreement, (in terms of Clause 14 of the SHA) - to which Severn Trent Water Purification Inc. (Respondent No. 1) and Capital Controls (India) (P) Ltd. (Respondent No. 5) were parties;

The rest of the agreements, which *did not contain arbitration clauses*, were:

(4) The International Distributor Agreement, (in terms of Clause 7 of the SHA)

(5) Trade mark registered user license agreement and

(6) Supplementary collaboration agreement, - to which Severn Trent Water Purification Inc. (Respondent No. 1) and Capital Controls (India) (P) Ltd. (Respondent No. 5) were parties; and

(7) Managing Directors' Agreement, (in terms of Clause 6.8 of the SHA) to which Capital Controls (India) (P) Ltd. (Respondent No. 5) and Mr. M.B. Kocha (Respondent No. 9) were parties.

In this factual background, a dispute arose as to whether the Joint Venture Agreement covered electrical chlorination equipments as well, and Severn purported to terminate it. Chloro Controls instituted a derivative suit in the Bombay High Court impleading *inter alia* Severn, the JVC, the Kocha group and the directors of the Joint Venture Company as parties. It also impleaded two respondents who were not parties to any of the agreements. Severn sought a reference under section 45 of the Arbitration and Conciliation Act, 1996 for submitting the disputes to the International Chamber of Commerce for arbitration,[112] pleading that the dispute was essentially about the scope of the joint venture agreement and the validity of its termination, matters eminently within the scope of the arbitration clause. A division bench of the Bombay High Court agreed.

This was resisted by Chloro Controls, which filed the suit, *inter alia* on the ground that because there were so many contracts, a derivative suit was maintainable in the absence of arbitration agreements contained in all seven agreements, with many of the parties who were signatories to one arbitration agreement not being signatory to arbitration agreements in other contracts, and therefore, as per the law laid down in *Sukanya Holdings (P) Ltd.* v. *Jayesh H. Pandya*,[113] the parties could not be relegated to arbitration, since it would cause bifurcation of subject matter of the suit and segregation of the parties to separate proceedings, since some would continue in the suit and some would not.

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112 In fact, at the time of proceedings before the High Court at Bombay, there was no provision for multi-party arbitration before the ICC. Subsequently, the ICC Arbitration Rules 2012, which came into force with effect from 01.01.12, for the first time inserted provisions for multi-party arbitrations, in terms of art. 7 (Joinder of Additional Parties), Art. 8 (Claims between Multiple Parties), and art. 9 (Multiple Contracts). In contrast, the Delhi International Arbitration Centre has provisions for multi-party arbitration, although this has not been examined by the Supreme Court or the high courts.

113 (2003) 5 SCC 531.

The Supreme Court, speaking through Swatanter Kumar J observed that a challenge was made to the correctness of the decision in *Sukanya Holdings.*[114] The contention for the appellant was recorded by the court as follows: [115]

> Bifurcation of matters/cause of action and parties is not permissible under the provisions of the 1996 Act. Such procedure is unknown to the law of arbitration in India. The judgment of this Court in *Sukanya Holdings (P) Ltd.* is a judgment in support of this contention. This judgment of the court is holding the field even now. In the alternative, it is submitted that bifurcation, if permitted, would lead to conflicting decisions by two different forums and under two different systems of law. In such situations, reference would not be permissible.

On behalf of the Respondents, it was contended that *Sukanya Holdings* does not lay down the correct law. The court recorded the contention as follows: [116]

> The judgment of this Court in *Sukanya* does not enunciate the correct law. Severability of cause of action and parties is permissible in law, particularly, when the legislative intent is that arbitration has to receive primacy over the other remedies. *Sukanya* being a judgment relatable to Part I (Section 8) of the 1996 Act, would not be applicable to the facts of the present case which exclusively is covered under Part II of the 1996 Act.

The court declined to go into the question, since the decision in *Sukanya Holdings* rested on an interpretation of section 8, which appeared in Part I of the Act, whereas this was a case under section 45 of the Act, appearing in part II, and the said two sections were materially different. The court interpreted section 45 of the Act,[117] and drew a distinction between section 8 and section 45, holding as follows:

> Still, the legislature opted to word Section 45 somewhat dissimilarly. Section 8 of the 1996 Act also uses the expression "parties" simpliciter without any extension. In significant contradistinction, Section 45 uses the expression "one of the parties or any person claiming through or under him" and "refer the parties to arbitration", whereas the rest of the language of Section 45 is similar to that of Article II(3) of the New York Contention. The court cannot ignore this aspect and has to give due weightage to the legislative intent. It is a settled rule of interpretation that every word used by the legislature in a provision should be given its due meaning. To us, it appears that the legislature intended to give a liberal meaning to this expression.

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114 *Ibid.*

115 (2013) 1 SCC 641; para 54.5

116 *Supra* note 78 para 55.5

117 *Ibid.*

> The language of Section 45 has wider import. It refers to the request of a party and then refers to an Arbitral Tribunal, while under Section 8(3) it is upon the application of one of the parties that the court may refer the parties to arbitration. There is some element of similarity in the language of Section 8 and Section 45 read with Article II(3). The language and expressions used in Section 45, "any person claiming through or under him" including in legal proceedings may seek reference of all parties to arbitration. Once the words used by the legislature are of wider connotation or the very language of the section is structured with liberal protection then such provision should normally be construed liberally.
>
> Examined from the point of view of the legislative object and the intent of the framers of the statute i.e. the necessity to encourage arbitration, the court is required to exercise its jurisdiction in a pending action, to hold the parties to the arbitration clause and not to permit them to avoid their bargain of arbitration by bringing civil action involving multifarious causes of action, parties and prayers. [Emphasis Supplied]

Concluding that the decision in *Sukanya Holdings* may hold good for disputes under section 8 of the Act, but not for disputes under section 45 in this case, the court held that it had no application to the present case. The court held as follows: [118]

> Firstly, *Sukanya* was a judgment of this Court in a case arising under Section 8, Part I of the 1996 Act while the present case relates to Section 45, Part II of the Act. As such that case may have no application to the present case.
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> Secondly, in that case the Court was concerned with the disputes of a partnership concern. A suit had been filed for dissolution of partnership firm and accounts also challenging the conveyance deed executed by the partnership firm in favour of one of the parties to the suit. The Court noticing the facts of the case emphasised that where the subject-matter of the suit includes the subject-matter for arbitration agreement as well as other disputes, the Court did not refer the matter to arbitration in terms of Section 8 of the Act. In the case in hand, there is a mother agreement and there are other ancillary agreements to the mother agreement. It is a case of composite transaction between the same parties or the parties claiming through or under them falling under Section 45 of the Act. Thus, the dictum stated in para 13 of the judgment of *Sukanya* would not apply to the present case.

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118 *Supra* note 78; para133.1- 133.2.

The court however, held that the decision in *Sumitomo Corporation* v. *CDC Financial Services (Mauritius) Ltd*.[119] was not correct because section 2(h) of the Act does not govern section 45. The court held that: [120]

> However, the observations made by the learned Bench in *Sumitomo Corpn.* do not appear to be correct. Section 2(*h*) only says that "party" means a party to an arbitration agreement. This expression falls in the chapter dealing with definitions and would have to be construed along with the other relevant provisions of the Act. When we read Section 45 in light of Section 2(*h*), the interpretation given by the Court in *Sumitomo Corpn* does not stand the test of reasoning. Section 45 in explicit language permits the parties who are claiming through or under a main party to the arbitration agreement to seek reference to arbitration. This is so, by fiction of law, contemplated in the provision of Section 45 of the 1996 Act.

The Court also laid down the fundamental issues to be decided by the court under Section 45 of the Act.[121] In this regard, the Court upheld the decisions in *National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd*.[122] and *SBP & Co. v. Patel Engineering Ltd*.[123] Eventually, the Court held that, "it would be incumbent upon the court to decide first of all whether there is a binding agreement for arbitration between the parties or not."[124] The court went on to conclude as follows:

> Applying the analogy thereof will fortify the view that determination of fundamental issues as contemplated under Section 45 of the 1996 Act at the very first instance by the judicial forum is not only appropriate but is also the legislative intent. Even the language of Section 45 of the 1996 Act suggests that unless the court finds that an agreement is null and void, inoperative and incapable of being performed, it shall refer the parties to arbitration.

Therefore, in sum, the court held that the dicta in *Sukanya Holdings* would not apply to the facts of the case in hand.[125] Of the different approaches canvassed before the court, none of those principles are applicable to the facts in the present case, which featured persons claiming through other parties, with all the parties signing the seven contracts on the same day, and the performance of the agreements were intertwined.[126] The court therefore saw no reason to interfere with the

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119 (2008) 4 SCC 91.

120 (2013) 1 SCC 641, para 116.

121 *Id*; para 131.

122 (2009) 1 SCC 267.

123 (2005) 8 SCC 618.

124 *Supra* note 78 para 131.4.

125 *Supra* note 78 para 133.4.

126 The judgment however, does not analyze which were the parties directly claiming under the contracts, and which were parties claiming through another party. Secondly,

impugned judgment of the Bombay High Court, and directed all the disputes arising from the agreement between the parties to be referred to arbitration in accordance with the Rules of ICC.[127]

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it may be noted that the fact that all the contracts were executed on the same day does not lead to an intention to arbitrate. In fact, the opposite is true. The fact that the parties chose to insert arbitration clauses in some of the contracts, and chose to leave them out of other contracts indicates that the parties wanted to exclude the subject matter of some contracts from reference to arbitration. There are good reasons for this. For example, the Trade mark registered user license agreement, which deals with intellectual property rights, may be the subject matter for decision by the competent courts in India and not arbitration, since intellectual property rights are not arbitrable in India, though they are arbitrable in certain other jurisdictions. Such questions have not been highlighted or gone into by the Court.

127 It may be noted that the court did not consider its previous decision in *Indowind Energy Ltd.* v. *Wescare (I) Ltd*., reported in (2010) 5 SCC 306, wherein the question involved was whether a person who was a non-signatory to the arbitration agreement could be bound by it, being a beneficiary of the contract, and by reason of its subsequent conduct. The case involved interpretation of Sub-section (4) of Section 7 and Section 8, in Part I of the Act. The court made a distinction between a "party" to an arbitration agreement, and a mere nominee of one of the parties. Raveendran J that, "Wescare puts forth the agreement dated 24-2-2006 as an agreement signed by the parties containing an arbitration agreement but the said agreement is signed by Wescare and Subuthi and not by Indowind. It is not in dispute that there can be appointment of an arbitrator if there was any dispute between Wescare and Subuthi. The question is when Indowind is not a signatory to the agreement dated 24-2-2006, whether it can be considered to be a "party" to the arbitration agreement. In the absence of any document signed by the parties as contemplated under clause (a) of sub-section (4) of Section 7, and in the absence of existence of an arbitration agreement as contemplated in clauses (b) or (c) of sub-section (4) of Section 7 and in the absence of a contract which incorporates the arbitration agreement by reference as contemplated under sub-section (5) of Section 7, the inescapable conclusion is that Indowind is not a party to the arbitration agreement. In the absence of an arbitration agreement between Wescare and Indowind, no claim against Indowind or no dispute with Indowind can be the subject-matter of reference to an arbitrator. This is evident from a plain, simple and normal reading of Section 7 of the Act." With reference to Indowind's position as a nominee of Subuthi under the contract, the court held (at paragraphs 17 and 18) that, "It is not in dispute that Subuthi and Indowind are two independent companies incorporated under the Companies Act, 1956. Each company is a separate and distinct legal entity and the mere fact that the two Companies have common shareholders or common Board of Directors, will not make the two Companies a single entity. Nor will the existence of common shareholders or Directors lead to an inference that one company will be bound by the acts of the other. If the Director who signed on behalf of Subuthi was also a Director of Indowind and if the intention of the parties was that Indowind should be bound by the agreement, nothing prevented Wescare insisting that Indowind should be made a party to the agreement and requesting the Director who signed for Subuthi also to sign on behalf of Indowind. The very fact that the parties carefully avoided making Indowind a party and the fact that the Director of Subuthi though a Director

XIII CONCLUSION

Although the year under survey reflected a large number of decisions whereby Indian law became better aligned with international approaches to arbitration, it will also be remembered as the year when several claims under Bilateral Investment Promotion Agreements signed by the Republic of India were lodged against it. These claims are all in the backdrop of the award rendered in 2011 in *White Industries*, where for the first time the Republic of India had suffered an award on merits in an arbitration conducted under a Bilateral Investment Promotion Agreement and thereafter decided to voluntarily tendered payment to White Industries (Australia) Limited.

It is interesting to note the increase in investment treaty claims in respect of matters like taxation, which may touch upon the sovereign interests of the Republic of India. Constitutionally, it is well-settled that a demand for payment of tax, once raised, cannot be privately "settled". A taxation statute operates *proprio vigore*, and it is only by an exemption notification can a private entity take shelter from taxation, for the issuance of which not even a writ petition would lie before courts of law.

Be that as it may, Indian courts have shown the willingness to foster a 'pro-arbitration' atmosphere by encouraging the enforcement of international awards. The Supreme Court has also limited the application of the phrase 'public policy of India' as it appears in section 48(2)(b), and in this it differs from the scope and application of the same phrase as it appears in section 34(2)(b)(ii) of the Act. As far as international arbitral awards are concerned, the application of the 'public policy of India' is limited to three grounds earlier enumerated in the *Renusagar* case,[128] and enforcement of a foreign award can be refused only if such enforcement is found to be contrary to: (1) fundamental policy of Indian law; or (2) the interests of India; or (3) justice or morality. In doing so, the Court overruled its own earlier decision in *Phulchand Exports* v. *O.O.O. Patriots*[129] where the Court had held that the phrase appearing in both Sections 34 and 48 must be given the same meaning.[130]

Although in *Chloro Controls*, the court held that even non-signatory parties to agreements could pray and be referred to arbitration provided they satisfy the pre-requisites under sections 44 and 45 read with schedule I to the Act, and observing that "reference of non-signatory parties is neither unknown to arbitration

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of Indowind, was careful not to sign the agreement as on behalf of Indowind, shows that the parties did not intend that Indowind should be a party to the agreement. Therefore the mere fact that Subuthi described Indowind as its nominee or as a company promoted by it or that the agreement was purportedly entered by Subuthi on behalf of Indowind, will not make Indowind a party in the absence of a ratification, approval, adoption or confirmation of the agreement dated 24-2-2006 by Indowind."

128 *Renusagar Power Co. Ltd.* v. *General Electric Co*.1994 Supp (1) SCC 644.

129 *Phulchand Exports* v. *O.O.O. Patriot* (2011) 10 SCC 300.

130 *Sri Lal Mahal Limited* v. *Progetto Grano spA*, (2014) 2 SCC 433.

jurisprudence nor is it impermissible", one still wonders what this implies for complex commercial transactions between businesses that prefer arbitration as a mode of dispute resolution. Since major contracts in both the public and private arenas involve multiple parties and multiple contracts and sub-contracts, and involve back-to-back or string transactions, such a development could be an impediment to the concept of party autonomy, which is the foundation of arbitration. There is no uniformity of opinion in what is still a fast growing field. Can you thrust a contract on parties who have not consented to be bound in a private dispute resolution mechanism, where intention is difficult to gather, and is to be discerned by conduct? Did they intend arbitration? These are questions that would require resolution in order to harmonize the approach to multi-party arbitration.

These are interesting times for India as the economy continues to grow by leaps and bounds. With the increase in inflow of foreign investment and growth of the economy, disputes are bound to increase. It is hoped that these would provide fertile occasions for Indian courts to interpret and clarify the legal framework with respect to arbitration and introduce greater certainty and predictability in the law while at the same time also making it better harmonized with international practices.