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ARBITRATION LAW

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I INTRODUCTION

THOUGH ARBITRATION had been a well-known dispute resolution mechanism in India, and had a long history since its origin in the informal settlements through village elders, and subsequently through legislations that introduced a legal framework for arbitration,[1] the modern law of arbitration faced considerable challenges due to a number of intervening circumstances that caused considerable delays in the proceedings resulting in high costs. The blame may lie at the doors of, the legal fraternity, the judiciary, and the litigants themselves, it is no surprise that the thoughts for corrective measures also came from them.[2]

Acting upon the recommendation of the Law Commission of India;[3] the Parliament introduced several reforms in the law of arbitration by comprehensively amending the Act.[4] These amendments serve to state the law in its proper perspective and also to remove some of the ambiguities and difficulties identified by the courts and resolved by a process of interpretation of the law.

These amendments though introduced in the year under review in the present survey, since these amendments received the assent of the President only on December 31, 2015 and were notified thereafter, the survey does not include any decision/ judgement or opinion of the courts on these amendments. On a perusal of these amendments, it is evident that they have been introduced with a view to make the process of arbitration both cost and time effective. For the first time, a comprehensive schedule of fees, compulsory declaration of independence and impartiality by the

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1 Code of Civil Procedure 1898, 1908, Arbitration Act, 1940.

2 The observations made by the Supreme Court in *Guru Nanak Foundation* v. *Rattan Singh and Sons* (1981) 4 SCC 634, amply demonstrate how arbitrations were viewed by the stake holders.

3 246th Report of the Law Commission of India.

4 Arbitration and Conciliation (Amendment) Act, 2015.

arbitrators, a fixed time frame for the conduct of the arbitration proceedings etc. are all intended to bring about the much desired time and cost effective arbitrations and a high degree of probity in the arbitration proceedings by identifying the possible areas of conflict of interest on the part of the arbitrators and by providing a remedy at the threshold of the proceedings. As a result, there is enhanced certainty for the parties on the outcome and the costs involved in arbitrations seated in India. Recognition of the rights of the non-signatories to participate in an arbitration including adjudication of disputes arising out of string contracts or back to back contracts is a boon to the commercial world particularly those in the business of development of infrastructure like roads, bridges, housing, ports, airports etc. Considering the significance of these reforms in the law of arbitration, a separate chapter has been allocated in this survey to capture the more significant changes introduced in the law.

II APPOINTMENT OF ARBITRATOR

Appointment of arbitrator in the first instance

Section 11 of the Act declares *inter alia* that the parties are free to agree upon a procedure for appointment of arbitrator or arbitrators. Failing any such agreement and on the failure of the parties to act in accordance with the agreed procedure, if any, a party may request the chief justice or any person designated by him for securing the appointment of an arbitrator. The year under survey witnessed considerable developments in the law as declared by the courts and also the changes introduced in section 11 of the Act by reason of parliamentary intervention.[5]

Finality attached to the decision of one of the contracting parties does not prevent adjudication by arbitration

In *KSS KSSIIPL Consortium*,[6] the consortium of two companies – i.e. Kaz Story Service Infrastructure India (P) Ltd. incorporated under the laws of India and M/s JSC OGCC Kaz Story Service incorporated under the laws of Kazakhstan had on 01.07.2010 executed an agreement with GAIL for the purpose of laying a pipeline in respect of the Dabhol-Bangalore Pipeline Project for Spread 'D'& Spread 'J'. The petitioner claimed that by reason of the defaults on the part of the respondent, particularly due to its failure to provide the necessary work fronts and engineering inputs and also due to frequent modification in the drawings, and delays in providing free issue materials, the petitioner became entitled for extended stay compensation in terms of clause 42 of the Special Conditions of Contract (SCC) read with clause 12 of the detailed letter of acceptance. The petitioner also claimed that it was entitled to be paid for the additional works undertaken during the course of execution of the contract.

5 Discussed in detail in the paper presented by author on "International Arbitration in light of Recent amendment of India's Arbitration and Conciliation Act, 1996" at Conference hosted by ASIANSIL, 14-15 June, 2016 at Hanoi.

6 *KSS KSSIPL Consortium* v. *GAIL (India) Ltd.* (2015) 4 SCC 210

The respondent rejected the claims whereupon, clause 40.2 of the General Conditions of Contract (GCC) which provided for conciliation, was invoked. Since the respondent rejected the proposal for conciliation, the petitioner invoked the arbitration clause 15 and sought for appointment of a sole arbitrator. Since the respondent did not accede to the request, the petitioner approached the designated judge of the Supreme Court by filing an application under section 11(6) of the Act. On a consideration of the pleadings of the parties and the affidavits affirmed by them, Ranjan Gogoi, J., the designated judge, held that though Clause 42.0 of the contract provided for compensation for extended stay, in terms of clause 42.1.1, the contractor was required to mention the rate of compensation for the extended stay, in the event the contract was prolonged or extended beyond the contemplated date of completion. Clauses 42.1.2, and 42.1.4 of the SCC further provided that in the event the contractor/ bidder does not indicate the rate of compensation for the extended stay, it would be presumed that no extended stay compensation was required to be paid and since admittedly the petitioner had quoted 'NIL' in the price bid against the compensation for extended stay, compensation for extended stay was excluded. Gogoi, J. noted that the "petitioner had agreed to forego its claim to extended stay compensation in the event the period of performance of the contract is to be extended as had happened in the present case." It was therefore held that since the extended stay compensation did not give rise to an arbitrable dispute, any reference to arbitration was unwarranted.

However, insofar as the second claim for payment against additional works was concerned, clauses 91.3 and 91.2 required that such claims made by the contractor be placed for consideration by the Engineer-in-Chief and his decision shall be "final and binding". It was however held by the Designated Judge that "[t]he finality attached to such a decision cannot be a unilateral act beyond the pale of further scrutiny. Such a view would negate the arbitration clause in the agreement. Justifiability of such a decision though stated to be final, must be subject to a process of enquiry/adjudication which the parties in the present case have agreed would be by way of arbitration."[7]

Accordingly the second set of claims made by the claimant in respect of the additional works were referred to arbitration by M.M.Kumar J (retd.)

The expression "rules" in section 15(2) means the contractual procedure for appointment of substitute arbitrator

In *Huawei Technologies Co.*,[8] the designated judge was called upon to decide whether an application made under section 11(6) of the Act, which essentially seeks appointment of a substitute arbitrator following the termination of the mandate of the sole arbitrator appointed earlier, was premature in the absence of the contracting parties first following the agreed procedure in the appointment of the substitute arbitrator as

7 The same principle was followed in the decision in *NBCC* v. *J.G.Engineering* (2010) 2 SCC 385

8 *Huawei Technologies Co. Ltd.* v. *Sterlite Technologies Ltd*. (2015) 9 SCALE 537: (2016) 1 SCC 721.

mandated by section 15(2) of the Act. Therein, in March 2006, MTNL had issued a tender for supply, installation, testing, commissioning of Broadband Access Network. The petitioner and the respondent jointly submitted their bid against the tender with the respondent acting as the lead bidder. The contract was awarded in favour of the respondent by MTNL which required the petitioner to make certain supplies for the project and for which the respondent undertook to pay the petitioner in US$ for such supplies.

According to the petitioner, it had fulfilled the terms of the contract by effecting supplies of all the equipments on time, but the respondent failed to make the full payment in the sum of US$ 13,390,000. A legal notice was issued at the instance of the petitioner, calling upon the respondent to make the said payment failing which, it was asserted that the petitioner would invoke the arbitration clause i.e. clause 22 of the contract. The petitioner further informed the respondent in the said legal notice that it would appoint S.K.Dubey J, a former judge of the High Court of Madhya Pradesh, as the sole arbitrator. Since the petitioner did not receive any response to its notice from the respondent, *vide* its letter dated 29.12.2014, the petitioner appointed S.K. Dubey J as the sole arbitrator. Dubey J also accepted the appointment and agreed to act as the arbitrator. The respondent thereafter raised several objections and also rejected the appointment of S.K.Dubey J as the sole arbitrator. However, by his order dated 21 January, 2015, S.K. Dubey J recused himself from the proceedings. The petitioner therefore approached the Chief Justice of India by filing an application under section 11(6) of the Act for appointment of the sole arbitrator.

The respondent, opposing the application, took the stand that by reason of the appointment of S.K. Dubey J as the arbitrator, the notice invoking the arbitration clause had spent its force and that since S.K. Dubey J had recused himself, a fresh application could be made only by following the procedure laid down under the Supply Contract. Ranjan Gogoi, J., acting as the designated judge held that since S.K. Dubey J had recused himself in terms of section 15(1) of the Act, the mandate of S.K. Dubey J as the arbitrator stood terminated and hence a substitute arbitrator shall have to be appointed as contemplated under section 15(2) of the Act which provides that "[w]here the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced." The term 'rules' appearing in section 15 had been explained in an earlier decision[9] as referring to the provisions for appointment, contained in an arbitration agreement or any rules of any institution under which any disputes are to be referred to arbitration. Ranjan Gogoi, J., ruled further that since there were no institutional rules, under which the disputes between the parties were to be referred to arbitration, the expression "rules" appearing in section 15(2) of the Act would have to be understood with reference to the provisions for appointment contained in the supply contract.

9 *Yashwith Construction (P) Ltd.* v. *Simplex Concrete Piles India Ltd.* (2006) 6 SCC 204

Since clause 22.3 of the Supply Contract contemplated appointment of a sole arbitrator by the parties by mutual consent, in terms of the mandate of section 15(2) of the Act it was incumbent "on the petitioner to give notice and explore the possibility of naming an arbitrator by mutual consent and only on failure thereof, the present application under section 11(6) of the Act could/should have been filed." Since the petitioner did not follow the agreed procedure for appointment of the substitute arbitrator, it was held that the present application/arbitration petition was premature.

Appointment of a substitute arbitrator contrary to the agreed procedure does not inhibit the jurisdiction of the Chief Justice of India under section 11(6) of the Act

Whether appointment of an arbitrator contrary to the agreed procedure would inhibit the exercise of jurisdiction by the court under section 11(6) of the Act, although such appointment is made well before invoking the jurisdiction of the court under section 11(6) was the question involved in *Walter Bau* case[10]. Therein the parties had entered into a works contract for execution of city tunnel rehabilitation works for sewage disposal. The contract included an arbitration clause, providing for the appointment of an arbitrator by mutual consent, failing which the arbitrator was to be appointed by ICADR.

The rules of arbitration of ICADR laid down the procedure for appointment of arbitrator on behalf of the party that failed to act in accordance with the arbitration clause as aforesaid or for the appointment of the third arbitrator when two arbitrators appointed by the parties failed to appoint the third arbitrator

After the disputes had arisen between the parties, the petitioner invoked the arbitration clause and appointed one R.G. Kulkarni as the arbitrator and called upon the respondent to appoint an arbitrator within 30 days, since he respondent failed to appoint an arbitrator within 30 days, the petitioner approached the ICADR.

ICADR by its letter dated June 3, 2014 called upon the respondent to appoint an arbitrator from out of a panel of three names furnished to it or to independently appoint an arbitrator. The respondent corporation appointed retired A.D.Mane J as its arbitrator. The petitioner however approached the Chief Justice of India by filing a petition under section 11(6) of the Act contending *inter alia* that the appointment of A.D. Mane J by the respondent corporation was contrary to the procedure agreed upon for such appointment. In fact, upon the failure of the respondent to appoint an arbitrator within 30 days in response to the notice dated 24.02.2014, ICADR was required to forward to the respondent a list of three names from out of its panel of arbitrators. ICADR however, in addition to the panel of three names furnished to the respondent corporation, gave a further option to the respondent to independently appoint an arbitrator. It was pursuant to this option granted to it by ICADR that the respondent appointed A.D. Mane J as its arbitrator contrary to rule 35 of the ICADR rules. Hence, the appointment was *non est*. The petitioner therefore invoked the jurisdiction of the Chief Justice of India under section 11(6) of the Act for appointment of an arbitrator.

10 *Walter Bau AG* v. *Municipal Corpn. of Greater Mumbai* (2015) 3 SCC 800

The learned Attorney General, appearing for the respondent corporation, contended that since the arbitrator had already been appointed, the petition under section 11(6) of the Act was no longer maintainable. It was further contended on behalf of the Respondent that the remedy of the petitioner lay elsewhere in the Act and not under section 11(6). Reliance was placed on the judgments in *Antrix Corpn.* v. *Devas Multimedia*[11] and *Pricol Ltd.* v. *Johnson Controls Enterprise Ltd.*[12] It was also argued on behalf of the respondent, relying upon the judgments of the court in *Datar Switchgears* v. *Tata Finance*[13] and *Deep Trading Co.* v. *Indian Oil Corpn.*,[14] that the requirement of appointment within 30 days of receipt of a notice was only in cases covered under sections 11(4) and 11(5) of Act, whereas in cases falling under section 11(2) read with section 11(6) of the Act, so long the appointment is made before the aggrieved party concerned moves the court under section 11(6), such appointment could not be invalidated.

Observing that the judgments relied upon by the respondents were not applicable to the case, Ranjan Gogoi, J., as the Designated Judge, held that in the present case, the appointment of the arbitrator was clearly contrary to the procedure agreed upon by the parties. Ranjan Gogoi, J., further held that "[t]he option given to the respondent Corporation to go beyond the panel submitted by ICADR and to appoint any person of its choice was clearly not in the contemplation of the parties. If that be so, obviously, the appointment of A.D. Mane J is *non est* in law. Such an appointment, therefore, will not inhibit the exercise of jurisdiction by this Court under Section 11(6) of the Arbitration Act… … The said appointment, therefore, is clearly invalid in law."

Consequently the court allowed the petition and appointed S.R. Sathe J, retired judge of the High Court of Bombay as the arbitrator on behalf of the respondent corporation.

Could a party invoke jurisdiction of the Chief Justice of India to replace the arbitrator appointed by the institution

Is it open to a party to invoke the jurisdiction of the Chief Justice of India or the designated judge under section 11(6) of the Act to replace an arbitrator appointed by an institution in terms of an arbitration agreement, though the applicant was entitled to question such appointment in some other proceedings, like a proceeding under section 13 of the Act, was the question that the designated judge was called upon to rule on in *Pricol Ltd.*[15]

The parties herein had entered into a Joint Venture Agreement (JVA) dated December 26, 2011. The arbitration clause, article 30, contained in the said JVA

11 *Antrix Corpn.* v. *Devas Multimedia* (2014) 11 SCC 560, see observations, A.K.Ganguli, "Arbitration Law", L *ASIL* 2014.

12 *Pricol Ltd.* v. *Johnson Controls Enterprise Ltd.* (2015) 4 SCC 177.

13 *Datar Switchgears* v. *Tata Finance* (2000) 8 SCC 151.

14 *Trading Co.* v. *Indian Oil* (2013) 4 SCC 35.

15 *Pricol Ltd.* v. *Johnson Controls Enterprise Ltd.* (2015) 4 SCC 177

provided that in case of any dispute between the parties in connection with the JVA, the parties shall endeavor to resolve the same amicably. In case of failure to resolve the dispute amicably, the dispute was to be referred to a sole arbitrator to be mutually agreed upon by the parties. In case the parties were not able to arrive at such an agreement, the arbitrator was to be appointed in accordance with the rules of arbitration of the Singapore Chambers of Commerce. The arbitration proceedings were to be held in Singapore. Article 31 of the JVA provided that the JVA shall be governed and construed in accordance with the laws of India.

The "Singapore Chambers of Commerce" referred to in article 30.2 of the JVA is not an arbitral institution. Construing the reference to "Singapore Chambers of Commerce" in article 30.2 of the JVA to be a reference to "Singapore International Arbitration Centre" (SIAC), the Respondent on 05.09.2014 moved the SIAC for appointment of an arbitrator. A notice in respect of the said request was served upon the petitioner on 11.09.2014. Thereafter, exercising its powers under section 8(2) read with section 8(3) of the Singapore International Arbitration Act, on September 29, 2014 SIAC appointed one Steven Y.H. Lim as the sole arbitrator.

In a preliminary hearing before the arbitrator, the petitioner indicated that it would be challenging the jurisdiction of the sole arbitrator appointed by SIAC. On the directions of the sole arbitrator, written submissions on the issue of jurisdiction were exchanged and a hearing on the question of jurisdiction was held in Singapore on November18, 2014. By a partial award dated November 27, 2014, the sole arbitrator ruled that the appointment by SIAC was valid as the parties have expressly agreed that Singapore would be the seat of arbitration.

On September15, 2014, the petitioner approached the Chief Justice of India invoking his jurisdiction under section 11(6) of the Act for appointment of an arbitrator contending *inter alia* that since the rights of the parties under the JVA were governed by the laws of India, even the arbitration agreement in Article 30 of would also be governed by the Indian law, i.e., the Arbitration and Conciliation Act, 1996. Consequently, the petitioner urged that the words "arbitration shall be held in Singapore" has to be construed as meaning the "venue" of arbitration shall be Singapore and that the "seat" of arbitration shall continue to be India and hence the application under section 11(6) of the Act was maintainable. Further, the JVA had not specifically excluded the application of Part I of the Act. The JVA having been entered into before the judgment of the Court in *BALCO*,[16] it was urged that the law governing the conduct of arbitration would also be the laws of India.

Alternatively, relying upon *Sumitomo Heavy Industries Ltd.* v. *ONGC Ltd.*,[17] it was argued that, even assuming that the seat of arbitration was Singapore since the rights of the parties under the JVA were governed by Indian law, the curial Law of

16 *Bharat Aluminium Company* v. *Kaiser Aluminium Technical Services* (2012) 9 SCC 552.

17 *Sumitomo Heavy Industries Ltd.* v. *ONGC Ltd.* (1998) 1 SCC 305.

Singapore would regulate the proceedings only after the appointment of the arbitrator is made and till the passing of the award.

The respondent however, contended that article 30.3 made it clear that the "seat" of arbitration was Singapore and that though the substantive law that would govern the rights of the parties under the JVA would be the laws of India, the terms of article 30.2 of the JVA would prevail as regards the appointment of arbitrator.

It was further contended by the respondent that Singapore Chambers of Commerce not being an arbitration institution, the real intention of the parties was to provide for the appointment of an arbitrator by SIAC in case of failure to mutually agree upon an arbitrator. It was also submitted that the arbitrator having been appointed by SIAC, in accordance with the arbitration clause in the JVA, and a partial award having been passed by the sole arbitrator on the question of jurisdiction, it was not a fit case for exercise of power under section 11(6) of the Act.

Ranjan Gogoi J., as the designated judge, held that Singapore Chambers of Commerce admittedly not being an arbitration institution, the most reasonable construction of the arbitration clause was to understand the reference to "Singapore Chambers of Commerce" as a reference to "SIAC".

The learned judge took note of the fact that though SIAC was approached by the respondent on 05.09.2014, i.e., before the petitioner filed the petition under section 11(6) on September 11,2014, no steps were taken by the petitioner to pre-empt the appointment of the arbitrator by SIAC.

Further, the petitioner had submitted to the jurisdiction of Lin, though under protest, hence even if it is held that such participation would not operate as an estoppel, the court must acknowledge that "the appointment of the sole arbitrator made by SIAC and the partial award on the issue of jurisdiction cannot be questioned and examined in a proceeding under section 11(6) of the Act which empowers the Chief Justice or his nominee only to appoint an arbitrator in case the parties fail to do so"

Following the law laid down by the court in *AntrixCorpn* v. *Devas Multimedia*,[18] wherein a bench of two learned judges, held *inter alia* that "while the petitioner was certainly entitled to challenge the appointment of the arbitrator at the instance of Devas, it could not do so by way of an independent proceeding under section 11(6) of the 1996 Act. While power has been vested in the chief justice to appoint an arbitrator under section 11(6) of the 1996 Act, such appointment can be questioned under section 13 thereof. In a proceeding under section 11 of the 1996 Act, the chief justice cannot replace one arbitrator already appointed in exercise of the arbitration agreement." Gogoi J., held further "[t]o exercise the said power, in the facts and events that has taken place, would really amount to sitting in appeal over the decision of SIAC in appointing Lim as well as the partial award dated November 27,014 passed by him acting as the sole arbitrator. Such an exercise would be wholly inappropriate in the

18 *Supra* note 11.

context of the jurisdiction under Section 11(6) of the Act". This decision clearly demonstrates the approach of the judiciary and its efforts to support the process of arbitration – a vital ADR mechanism to which India has legislatively committed itself to render full support.

Does an arbitration clause in the Memorandum of Understanding survive when it did not fructify into an agreement

Does an arbitration clause contained in a Memorandum of Understanding (MoU) survive as a standalone agreement even though the MoU did not eventually fructify into an agreement between the parties was the question for consideration in *Ashapura*.[19]

On August 17,2007 the appellant and the respondent had entered into an MoU for constituting a joint venture amongst themselves, along with M/s Qing TongXia Aluminium Group Co. Ltd. Ningxia of China for setting up an alumina plant with approximately 1.00 million tons per annum capacity in the Kutch district of Gujarat. The MoU also stipulated for equity participation by the parties in the said joint venture. The MoU *inter alia* provided that the appellant would reimburse the respondent an amount of rupees 3.94 crores, being the direct expenses incurred by the respondent on its Alumina Project and other related matters. Clauses19 and 26 of the MoU dealt with resolution of disputes arising out of the MoU and provided that, in the first instance, the parties shall settle such disputes amicably by mutual consultations and if such settlement is not reached, then by arbitration. Though, as provided in the MoU, the parties did take steps to give effect to them, eventually, the respondent by its letter dated April 25, 2011 terminated the MoU in view of alleged failure on the part of the appellant to comply with the terms of the MoU. Subsequently, the appellant issued a legal notice dated December 07,2012 to the respondent, claiming that the attempt to amicably resolve the dispute had failed. Invoking the arbitration clause 27 of the MoU, the appellant also suggested the name of a retired high court judge for being appointed as a sole arbitrator. The respondent took the stance that since there was no fault on its part, there was no occasion for the appellant to invoke the arbitration clause. The respondent also did not agree to the appointment of the person named in the legal notice as the arbitrator. The appellant then filed an application before the High Court of Gujarat under section 11 of the Act, which was rejected. Thereafter, the appellant preferred an appeal by Special Leave to the Supreme Court.

On the question as to whether the arbitration clause contained in the MoU was a standalone agreement, the Court, following its judgements in *Today Homes*[20] (quoted at para 21) and *Enercon*[21], speaking through Ibrahim Kalifulla, J. held that "irrespective of the question or as to the fact whether the MoU fructified into a full-fledged agreement, having regard to the non-fulfilment of any of the conditions or failure of compliance

19 *Ashapura Mine-Chem Ltd.* v. *Gujarat Mineral Development Corpn*. (2015) 8 SCC 193.

20 *Today Homes & Infrastructure (P) Ltd.* v. *Ludhiana Improvement Trust* (2014) 5 SCC 68

21 *Enercon (India) Ltd*. v. *Enercon Gmbh* (2014) 5 SCC 1.

with any requirement by either of the parties stipulated in the other clauses of MoU, specific agreement has been entered into by the appellant and the respondent under Clause 27 to refer such controversies as between the parties to the sole arbitrator by consensus. Therefore, when consensus was not reached at between the parties for making the reference, eventually it will be open for either of the parties to invoke Section 11 of the Act and seek for reference of the dispute for arbitration."

Finally, the court held that "the learned Judge having failed to appreciate the legal position as regards the existence of an arbitration agreement in the MoU irrespective of the failure of the parties to reach a full-fledged agreement with respect to the various terms and conditions contained in the MoU for a joint venture, the said conclusion and judgment of the learned Judge is liable to be set aside and is accordingly set aside."

Although the question posed in the decision has not been discussed or considered in detail, it is evident from the conclusion reached by the court that the court did consider the question and answered the same in the affirmative holding that though the MoU did not fructify as a binding agreement between the parties due to non-fulfillment of the conditions contained therein,. In this ruling, the Court reconfirmed its approach to the process of arbitration as an effective mode of ADR mechanism particularly when it was apparent that the parties did agree to abide by the resolution of the disputes, if any, by arbitration.

Appointment of substitute arbitrator

The scope and meaning of the expression "substitute arbitrator shall be appointed according to *the rules* that were applicable to the appointment of the arbitrator being replaced" appearing in section 15(2) of the Act, came up for consideration of the court in *Shailesh Dhairyawan.*[22]

The respondent had filed a suit in the High Court of Bombay against the appellant and some others seeking *inter alia* a declaration that the development agreement executed on 27.12.2004 together with a Power of Attorney of even date, stood terminated. The parties to the suit settled their disputes and on October 03, 2008, the consent terms were reduced into writing largely settling all the disputes except with respect to two specific differences which the parties agreed to refer to arbitration by a retired judge of Supreme Court. The consent terms were taken on record and the suit was disposed of in those terms including reference of the two specific disputes for arbitration by Sujata Manohar J(retd.). Though the arbitration proceedings continued for some time, there was no material progress and on January 22, 2011 the arbitrator resigned. Thereafter, the plaintiff took out a notice of motion in the disposed of suit for appointment of a substitute arbitrator. The notice of motion was dismissed on the ground that an appointment of a substitute arbitrator could only be made under section

22 *Shailesh Dhairyawan* v. *Mohan Balkrishna Lulla*, 2015 (11) SCALE 684; (2016) 3 SCC 619

11(5) of the Act and not by a notice of motion in a disposed of suit. The plaintiff thereafter moved an application under section 11 before the Chief Justice of the High Court for appointment of a substitute arbitrator. The said application was allowed and a retired judge of the high court, A.S. Radhakrishnan J was appointed as the substitute arbitrator. The defendant in the suit thereafter filed an appeal by special leave before the Supreme Court. Though, the challenge to the order appointing the substitute arbitrator was made in terms of section 11(5) of the 1996 Act, the court referred to the provisions contained in section 8(1)(b) and Section 20 of the 1940 Act for ascertaining the position regarding supply of vacancies created by arbitrators by neglecting, refusing, or becoming incapable of acting as arbitrator.[23] The court also took note of the decisions rendered under the 1996 Act construing the provisions of section 15(2) thereof.[24]

Rohinton F. Nariman, J., analyzing the provisions of the 1940 Act and the scheme of the provisions of the 1996 Act, observed that:

> "[u]nder Section 8(1)(*b*) read with Section 8(2) of the 1940 Act if a situation arises in which an arbitrator refuses to act, any party may serve the other parties or the arbitrators, as the case may be, with a written notice to concur in a fresh appointment, and if such appointment is not made within 15 clear days after service of notice, the Court steps in to appoint such fresh arbitrator who, by a deeming fiction, is to act as if he has been appointed by the consent of all parties. This can only be done where the arbitration agreement does not show that it was intended that the vacancy caused be not supplied. However, under Section 15(2), where the mandate of an arbitrator terminates, a substitute arbitrator "shall" be appointed. Had Section 15(2) ended there, it would be clear that in accordance with the object sought to be achieved by the Arbitration and Conciliation Act, 1996 in all cases and for whatever reason the mandate of an arbitrator terminates, a substitute arbitrator is mandatorily to be appointed. This Court, however, in the judgments noticed above, has interpreted the latter part of the section as including a reference to the arbitration agreement or arbitration clause which would then be "the rules" applicable to the appointment of the arbitrator being replaced. It is in this manner that the scheme of the repealed Section 8 of the 1940 Act is resurrected while construing Section 15(2) of the 1996 Act."

23 if any appointed arbitrator or umpire neglects or refuses to act, or is incapable of acting, or dies, and the arbitration agreement does not show that it was intended that the vacancy should not be supplied, and the parties or the arbitrators, as the case may be, do not supply the vacancy.

24 *Supra* note 9. Also see,*SBP and Co.* v. *Patel Engineering Ltd.* (2009) 10 SCC 293; *ACC Ltd.* v. *Global Cements Ltd.* (2012) 7 SCC 71.

Applying the principles enunciated in the earlier decision to the facts of the case, Nariman, J., held that "it is clear that there is nothing in Clause 8 of the consent terms extracted above to show that the resignation of Justice Sujata Manohar would lead to her vacancy not being supplied. All that the parties have done by the said clause is to agree to refer their disputes to the arbitration of an independent retired Judge belonging to the higher judiciary. There is no personal qualification of Mrs. Justice Sujata Manohar that is required to decide the dispute between the parties. In fact, she belongs to a pool of independent retired High Court and Supreme Court Judges, from which it is always open to the appointing authority to choose a substitute arbitrator. One example will suffice to show that Clause 8 in the present case cannot be construed to either expressly or by necessary implication exclude the appointment of a substitute arbitrator."

Accepting the contention advanced on behalf of the respondent to the effect that the Section 89 of the CPC mandates that a court hearing a dispute may settle the suit or send the same for settlement by conciliation, judicial settlement, mediation or arbitration, it was held that "[t]he Bombay High disposed of the suit between the parties by recording the settlement between the parties in Clauses 1 to 7 of the consent terms and by referring the remaining disputes to arbitration following the mandate of Section 89 of the CPC."

Dr. A.K. Sikri, J., while concurring with R.F. Nariman, J., delivered a supplementary opinion observing that "the parties choose arbitration as a dispute resolution mechanism keeping in view that it offers a timely, private, less formal and cost-effective approach for the binding determination of disputes. It provides the parties with greater control of the process than a court hearing. The non-judicial nature of arbitration makes it both attractive and effective for several reasons. Apart from it being cost-effective and speedier method of settling the disputes when compared with court adjudicatory method, the confidentiality of the arbitration process may appeal to those who do not wish the terms of settlement to be known. Therefore, first thing that has to be kept in mind, when in a pending suit the parties agree for reference to arbitration, though there was no arbitration agreement when the suit was filed, is that they have consciously preferred arbitration rather than the court process. It, thus, follows that the intention is to settle the disputes through arbitration and not the court."

The order of the high court appointing the substitute arbitrator was thus upheld.

Could section 14 of the Limitation Act, be invoked for the period the parties remained engaged in Section 11 process

Whether provisions of Limitation Act 1963 particularly section 14 thereof are applicable to the arbitration proceedings conducted by the State Commission in respect of disputes between the licensees and the generating companies in terms of section 86(1)(f) of Electricity Act 2003 was the question that came up for consideration in *A.P.Power Coordination Committee*'s case.[25] The respondent M/s Lanco Kondapalli

25 *A.P.Power Coordination Committee* v. *Lanco Kondapalli Power Ltd*., 2015 (11) SCALE 714; (2016) 3 SCC 468.

Power Ltd., was engaged in generation and sale of electricity in accordance with the power purchase agreement(PPA) executed with the Andhra Pradesh State Electricity Board in terms of which Lanco Kondapalli Power Ltd. continued to supply power to the appellant M/s Transmission Corporation of Andhra Pradesh (APTRANSCO).While the energy charges were paid by appellant, the bills raised for capacity charges were disallowed on the ground that the same not in accordance with the PPA. On March 26, 2004 M/s Lanco Kondapalli Power Ltd. issued notice of arbitration in terms of the PPA, and after a preliminary meeting for reconciliation, intimated the appellant that it had nominated B.P. Jeevan Reddy J, a former judge of the Supreme Court, to act as an arbitrator.

The APTRANSCO took the stand that the arbitration clause was not enforceable in view of section 86(1)(f) of the Electricity Act, 2003. However, Lanco approached the Chief Justice of India and the high court seeking to appoint an arbitrator on behalf of APTRANSCO. This application was resisted by APTRANSCO on various grounds. While the application was pending before the high court, the Supreme Court in its judgment pronounced on March 13, 2008 in *Gujarat Urja*[26] case held *inter alia* that "whenever there is a dispute between a licensee and the generating companies only the State Commission or the Central Commission (as the case may be) or arbitrator (or arbitrators) nominated by it can resolve such a dispute,"[27] In terms of the law laid down in *Gujarat Urja* case, the application was no longer maintainable as only a State Commission could adjudicate upon such disputes. The High Court on March18, 2009 closed the case and granted liberty to M/s Lanco to approach the Commission. On 5th June 2009, Lanco filed its claim being O.P 33 of 2009 for electricity charges on the basis of the bills raised by it from time to time. APTRANSCO resisted the claim and filed an application for rejection thereof on the ground of limitation. M/s Lanco relied upon section 14 of the Limitation Act contending that the entire time spent in the proceedings under section 11 of the Act before the high court would have to be excluded and in that event its claims would be well within time, if the provisions of the Limitation Act are held to be applicable to such proceedings.

By order dated June13, 2011 the State Commission rejected the claim holding that the time spent in the proceedings relating to arbitration could not be excluded since it had not been pursued in good faith. M/s Lanco preferred an appeal before the Appellate Tribunal for Electricity(APTEL). The APTEL by its decision dated July 02, 2012 remanded the matter back to the Commission for appropriate follow up orders on the actual claims and interest. This order came to be challenged by APTRANSCO before the Supreme Court.

It was contended on behalf of the appellant that since the State Commission performed quasi-judicial functions as mandated by section 86(1)(f) of the Electricity Act, the commission had the essential trappings of Civil Courts. Referring to section

26 *Gujarat UrjaVikas Nigam Ltd*. v. *Essar Power Ltd*. (2008) 4 SCC 755.

27 *Ibid*.

2(4) read with section 43 of the Act, the court rejected the contention that the Limitation Act would as such be applicable to arbitration proceedings under section 86(1)(f) of the Electricity Act. In support of its conclusion, the Court reiterated its earlier decision in *PPN Power Generating Co. (P) Ltd.*[28] wherein it was held that "the Limitation Act would not be applicable in such matters for various reasons including Section 2(4) of the Arbitration Act which was extracted to highlight that sub-section (1) of Section 40, Sections 41 and 43 all in Part I of the Arbitration Act, would not apply to arbitration under any other enactment."

Speaking through Shiv Kirti Singh, J., the court, however, took the view that "a statutory authority like the Commission is also required to determine or decide a claim or dispute either by itself or by referring it to arbitration only in accordance with law and thus Sections 174 and 175 of the Electricity Act assume relevance." The court finally concluded that "a claim coming before the Commission cannot be entertained or allowed if it is barred by limitation prescribed for an ordinary suit before the civil court."Upholding the order of APTEL, the court held "APTEL could grant exclusion of certain period on the basis of the principles under section 14 in view of the law laid down or clarified in *M.P. Steel Corpn.*"[29]

Does the principal of res judicata apply to a procedure under section 11(6) of the Act

Once a judicial authority takes a decision under section 8(1) of the Act declining to refer the dispute involved in the suit to arbitration and such decision is allowed to become final, whether either party to the proceedings could thereafter invoke the jurisdiction of the chief justice under section 11(6) of the Act and in that context, what is the scope of section 8(3) of the Act was the question that came up for consideration of the Court in *Anil* v. *Rajendra.*[30] In that case, a partnership firm-M/s Rana Sahebram Mannulal and three others who were respondents before the court, filed a civil suit in the trial court, district Aurangabad for a declaration that the plaintiffs were partners of said firm and were owners and possessors of the firm. In the plaint, it was pleaded *inter alia* that the agreements were null and void *ab initio* and not binding upon the plaintiffs. The appellant filed application under section 9(A) of CPC as applicable in the State of Maharashtra for dismissal of the suit for want of jurisdiction.Since the partnership deed contained a provision for arbitration, the disputes were liable to the resolved by a process of arbitration as contemplated under the Act. Thus the application filed by the appellants, in substance, was in the nature of an application under Section 8(1) of the Act. The application was opposed on behalf of plaintiffs which plea was accepted by the trial Court holding that it was within jurisdiction of Court to try the dispute which was subject matter of the suit and that the court was not required, under law, to refer the parties to arbitration.

28 *T.N. Generation & Distribution Corpn. Ltd*. v. *PPN Power Generating Co. (P) Ltd.* (2014) 11 SCC 53.

29 *M.P. Steel Corpn.* v. *CCE* (2015) 7 SCC 58 : (2015) 3 SCC (Civ) 510.

30 *Anil* v. *Rajendra* (2015) 2 SCC 583.

Thereafter, the parties proceeded with trial of the suit and when the suit was at the final stage, the respondents/plaintiffs approached the Chief Justice of High Court of Bombay with an application under section 11(6) of the Act seeking appointment of an arbitrator in terms of the arbitration agreement contained in clause 6 of the deed of partnership. This application was opposed by the respondents, who were defendants in the suit contending *inter alia* that the applicants have already waived their right by opposing the application for reference of the dispute to arbitration earlier made by the respondent at the initial stage and that the present attempt was only to delay the suit proceedings. The designated judge however ignored the said objection and held that "taking into account sub-section (3) of Section 8 and Section 11 of the Arbitration and Conciliation Act, 1996, it would be expedient that pursuant to Clause 6 of the partnership deed, a proper person be appointed as arbitrator to entertain dispute between the parties."

In an appeal preferred by the defendant, the Supreme Court held that the application filed by the respondents/plaintiffs under section 11 of the Act was nothing but an abuse of the process of court. Speaking through Kurian Joseph, J., the court held that "[t]he partnership firm itself is the first plaintiff in the suit. The dispute between the parties is the subject of the suit. Precisely for that reason, the appellants sought the matter to be referred to the arbitrator. That was opposed by the respondents. When the suit is at the final stage, the respondents have sought appointment of an arbitrator under Section 11(6) of the Act. Having approached the civil court and having opposed the reference to arbitration under Section 8(1) of the Act and the decision of the court in that regard having become final, the respondents cannot invoke jurisdiction under Section 11(6) of the Act; it is hit by the principle of issue estoppel."

Adverting to the scope of section 8(3), contained in section 8(1) of the Act, it was held that "Section 8(3) of the Act, however, makes it clear that notwithstanding the application under Section 8(1) of the Act and the issue pending before the judicial authority, arbitration may be commenced or continued and an arbitral award can also be made. In other words, despite the pendency of an application under Section 8(1) of the Act before the judicial authority, Section 8(3) of the Act permits the parties to commence and continue the arbitration and the Arbitral Tribunal is free to pass an award. That alone is what is contemplated under Section 8(3) of the Act." Following earlier decisions, it was further held that the principles of *res judicata* would squarely apply to the case and that "once the judicial authority takes a decision not to refer the parties to arbitration, and the said decision having become final, thereafter Section 11(6) route before the Chief Justice is not available to either party."[31]

31 Another principle, though not argued, which would debar the plaintiff is the principle of approbating and reprobating. On the basis of the said principle also the plaintiffs could be debarred from seeking appointment of arbitrator by way of application under s.11(6) of the Act filed at such belated stage after having opposed the request for a reference made by the respondent at the threshold of the proceedings in the suit i.e. when an application was filed under s.8 of the Act.

Could an award be challenged that an arbitrator was not appointed in terms of the contract

Could a challenge to the validity of an award be maintained on the ground that the arbitration clause provided that no person, other than a gazetted railway officer, should be appointed as an arbitrator/umpire and if for any reason it is not possible to appoint such a person as an arbitrator, the matter was not to be referred to arbitration at all, although, admittedly, at the hearing of the application under section 11(6) of the Act before the Chief Justice of the High Court, both parties had consented to the appointment of a former judge to act as an arbitrator, was the question before the court in *Ashoka Tubewell.*[32]

The appellant therein was a contractor, who had entered into a contract with the Indian Railways for certain construction works. Certain disputes arose which, as per the contract between the parties, had to be resolved by an arbitrator. The arbitration clause contained in the contract included a provision that "[i]t is a term of this contract that no person other than a gazetted railway officer should act as an arbitrator/umpire and if for any reason, that is not possible, the matter is not to be referred to the arbitration at all."

As the respondent did not appoint an arbitrator, an application under section 11 of the Act was filed before the Chief Justice of the High Court. In that proceedings Kalyanmoy Ganguly J, a former judge of the high court, came to be appointed as the arbitrator *vide* order dated 27.03.1998 and the said order also recorded that both parties agreed that "Justice Kalyanmoy Ganguly be appointed as the sole arbitrator to decide all claims, counterclaims…" In the arbitration proceedings, an objection was raised by the respondent with regard to the validity of the appointment of the arbitrator but the arbitrator, after hearing the parties concerned, held that his appointment was valid and thereafter made an award on July16, 2007. The said award was challenged under Section 34 of the Act. However, the award was upheld by the learned single judge of the high court. In an appeal from the said order, the division bench of the High Court of Calcutta was pleased to set aside the award on the ground that the arbitrator had not been validly appointed.

The appeal preferred by M/s Ashoka Tubewell, before the Supreme Court was resisted by the respondent on the ground that the aforementioned clause in the contract between the parties, clearly barred appointment of any person other than a gazette officer of the railways as an arbitrator.

Rejecting the contention of respondent, the court speaking through Anil R. Dave, J. held that,

> "It is pertinent to note in the instant case that when the Chief Justice of the High Court had appointed an arbitrator under the provision of Section 11(6) of the Act on 27-3-1998, both the parties i.e. the appellant contractor as well as the respondent had agreed to appointment of Justice

32 *Ashoka Tubewell & Engg. Corpn.* v. *Union of India* (2015) 5 SCC 702:

> Kalyanmoy Ganguly, a former Judge of the Calcutta High Court, as an arbitrator. Once the respondent had given consent for appointment of a former Judge of the Calcutta High Court as an arbitrator, one can presume that there was a new contract by way of novation, whereby the parties had agreed to appointment of someone else—other than a gazetted railway officer as an arbitrator.
>
> It is not in dispute at all that the respondent had given consent for appointment of a former High Court Judge as an arbitrator. The said order dated 27-3-1998 appointing a former High Court Judge as an arbitrator had not been challenged by the respondent and therefore, the respondent could not have challenged the validity of the award on the ground that the arbitrator was not validly appointed."

This decision is founded on the principle that it is open to the parties to an agreement to enter into a fresh agreement at any time which may substitute the terms of the earlier agreement. Section 7(3) of the Act requires an arbitration agreement to be in writing. Sub-section (4) of section 7 clarifies that "an agreement is in writing if it is contained in" a document "which provides a record of the agreement". These documents have been identified as "an exchange of letters, telex, telegrams or other means of telecommunication"[33]

Can an independent arbitrator be appointed under section 11(6) in view of the repeated failure of the tribunal constituted in terms of the contract

When there is a failure on the part of the arbitral tribunal to act and/or it is unable to perform its function either *de jure* or *de facto*, is it open to a party to the arbitral proceedings to approach the high court under section 11(6) read with sections 14 and 15 of the Act, seeking termination of its mandate and for appointment of a substitute arbitrator, and is it competent for the court to appoint such substitute arbitrator in derogation of the rule of "party autonomy" and the rules that were made applicable to the appointment of the arbitrator, were the questions before the court in *U. P. State Bridge Corpn. Ltd.*[34]case. The appellant Union of India had entered into an agreement for construction of guide bunds, foundation and substructure of Rail Bridge across the river Ganges near Digha Ghat, Patna. The General Conditions of Contract, ("GCC"), contained an arbitration clause which empowered constitution of the tribunal from amongst the members of a panel of officers who were part of the Railways. At the request of respondent, such a tribunal was constituted by the Railway Authority. The tribunal however did not complete the arbitral proceedings for period of 4 years and the proceedings were kept pending due to transfers, retirements, adjournments etc. of the arbitrators.

33 The decision however, does not refer to any such document which provided the record of the novated agreement.

34 *Union of India* v. *U.P. State Bridge Corpn. Ltd*. (2015) 2 SCC 52.

Feeling exasperated, the respondent approached the high court seeking termination of authority of the tribunal. However, the railway authority filled up the vacancy in the tribunal before the matter was taken up for hearing before the high court. The high court by its order dated March 09, 2011, disposed of the petition giving a last chance to the arbitral tribunal to complete the proceedings within three months holding regular sittings in Patna from the date of receipt of copy of the order. The high court further directed that if the arbitration proceedings are not completed within the period fixed by the Court, the respondent would be at liberty to approach the court again seeking appropriate orders.

The tribunal was made aware of the said order passed by the court. Though the proceedings were to be concluded by June 25,2011, the tribunal failed to conclude proceedings by the said date and hence the respondent approached the court again. The high court accepted the petition and terminated the mandate of the tribunal and also appointed a substitute sole arbitrator in derogation to the procedure for appointment of arbitrator in contract.

The appellant Union of India challenged this order before the Supreme Court questioning only that part of order by which the High Court appointed a sole arbitrator in substitution of the arbitral tribunal without following the procedure laid down in the arbitration agreement as mandated by section 15 of the Act.

The moot question before court was whether the course of action suggested by the Union of India had to be necessarily adopted by the high court in all cases "while dealing with an application under Section 11 of the Act read with Section 15" or "is there room for play in the joints and the High Court is not divested of exercising discretion under some circumstances? If yes, what are those circumstances?"

Referring to its earlier decisions in *Tripple Engg.*,[35] it was observed by the court that the concept that the high court was bound to appoint the arbitrator as per the contract between the parties had seen a significant erosion in recent past. Emphasizing that first and paramount principle of arbitration is "fair, speedy and inexpensive trial by an impartial tribunal" though the second principle of party autonomy in choice of procedure is also recognized by the Act, it was observed that this principle of party autonomy in choice of procedure have been deviated from where one of the parties have committed default. Many such decisions were taken note of by the Court.[36]

It was observed that in the case of government corporations and State-owned companies, the terms of agreement are usually drawn up by the government companies and the public sector undertaking and that such contracts generally provide for a named officer to act as the sole arbitrator or a senior office like a Managing Director is authorized to nominate an officer to act as the sole arbitrator.

It was held that "[i]f the Government has nominated those officers as arbitrators who are not able to devote time to the arbitration proceedings or become incapable of

35 *Tripple Engg. Works* and *Singh Builders Syndicate* (2014) 9 SCC 488.

36 *Supra* note 9. Also see, *Union of India* v. *Singh Builders Syndicate* (2009) 4 SCC 523.

acting as arbitrators because of frequent transfers, etc., then the principle of "default procedure" at least in the cases where Government has assumed the role of appointment of arbitrators to itself, has to be applied in the case of substitute arbitrators as well and the Court will step in to appoint the arbitrator by keeping aside the procedure which is agreed to between the parties. However, it will depend upon the facts of a particular case as to whether such a course of action should be taken or not. What we emphasise is that Court is not powerless in this regard."

In the factual background of the case, Sikri, J. speaking for the Court held that "[i]n the present case, we find the fact situation almost same as in *Tripple Engg. Works* and *Singh Builders Syndicate*. If the contention of the appellant is allowed, it would amount to giving premium to the appellant for the fault of the Arbitral Tribunal's members who were appointed by none else but by the appellant itself. As pointed above, the appellant has not questioned the order of the high court insofar as it has terminated the mandate of the earlier Arbitral Tribunal because of their inability to perform the task assigned to them. In such a situation, leaving the respondent at the mercy of the appellant thereby giving the power to the appellant to constitute another Arbitral Tribunal would amount to adding insult to the serious injury already suffered by the respondent because of non-conclusion of the arbitral proceedings even when the dispute was raised in the year 2007."

This decision is the result of the current thinking of the courts in the matter of appointment of arbitrators who could hardly qualify to be 'independent' due to their obvious bias being part of the government or the government institution or its undertakings. The only way to balance the interests of an independent tribunal on the one hand and adherence to the rule of party autonomy was to secure appointment of an independent tribunal when the earlier tribunal constituted in accordance with the procedure laid down in the contract failed to yield results by its failure to act with expedition which is the most fundamental principle of ADR and arbitration in particular.

Non-signatories to the arbitration agreement

Could a non-signatory invoke the arbitration agreement

Whether the jurisdiction of the Chief Justice of India under section 11(6) of the Act could be invoked by an applicant who is not a party to the arbitration agreement incorporated in three sub-contracts, but in whose favour letters of intent with regard to the works allotted under the said three sub-agreements had been executed by the respondent, was the question that came up for consideration by the designated judge in *Taiyo Membrane.*[37] Therein the respondent was awarded a contract in respect of works relating to the renovation of Jawahar Lal Nehru Stadium in New Delhi. The respondent in turn entered into three sub-contracts pursuant to letters of intent issued

37 *Taiyo Membrane Corpn. Pty. Ltd.* v. *Shapoorji Pallonji& Co. Ltd.*, 2015 (9) SCALE 636 : (2016) 1 SCC 736.

in favour of the applicant Taiyo Membrane Pty. Ltd. However, two of the sub-contracts were executed between the respondent and Taiyo Membrane Corporation and the third sub-contract was executed between Taiyo Membrane Corporation (India) and the respondent. The application was resisted by the respondent, contending *inter alia* that the applicant was not a party to any of the sub-contracts and therefore was not a party to the arbitration agreements therein and hence the application under section 11(6) was not maintainable. The respondent also raised a further objection to the effect that since one of the three sub-agreements was between two Indian entities i.e. Taiyo Membrane Corporation (India) and the respondent, the applicant could not have invoked the jurisdiction of the Chief Justice of India under section 11(6) of the Act since the proposed arbitration would not fall within the definition of International Commercial Arbitration as defined under section 2(f) read with section 11(9) of the Act.

Ranjan Gogoi, J., as the designated judge, rejecting the contentions raised by the respondent, held that though there was some confusion with respect to the description of the parties in the sub-agreements and the letters of intent issued in respect of works under the three sub-agreements, the correspondence "by and between the parties make it clear that the applicant Taiyo Membrane Corporation Pty. Ltd. and Taiyo Membrane Corporation are one and the same entity and the works under the sub-agreements had been allotted by the respondent to the said entity. In this regard it may also be relevant to note that under the Australian Corporations Act, 2001 (section 57-A) a corporation includes a company and a proprietary company limited by shares is incorporated as Pty. Ltd." It was further held that "[t]he ambiguity, if any, in the description of the parties having been explained and the respondent Company itself having issued LOIs and having exchanged subsequent correspondences with the applicant with regard to the works under the sub-contracts, though executed in the name of Taiyo Membrane Corporation and Taiyo Membrane Corporation (India), the applicant's petition cannot be held to be not maintainable as urged on behalf of the respondent."

On these reasonings, the application under Section 11(6) of the Act was held to be maintainable and M.K. Sharma J., former judge of the Supreme Court, was appointed as the sole arbitrator.

It appears that the second objection raised by the respondent to the effect that the jurisdiction of the Chief Justice of India could not be invoked under section 11(6) of the Act since the arbitration would not fall within the definition of International Commercial Arbitration as defined under section 2(f) read with section 11(9) of the Act, has not been dealt with.

Whether a non-party to an arbitration agreement could invoke the arbitration clause contained in a Joint Venture Agreement (JVA) executed between an association of persons known as Kanda and Associates and a company incorporated in Guyana for reference of disputes arising out of the said JVA to arbitration was the question before the court in *Demerara Distilleries (P) Ltd.*[38] case. Impledment of a non-

38 *Demerara Distilleries (P) Ltd.* v. *Demerara Distillers Ltd.* (2015) 13 SCC 610

contracting party to arbitration proceedings had earlier been considered by the Court on two previous occasions.[39]

The petitioner no. 1 company was incorporated in India under a joint venture agreement dated October17, 2002 executed between the respondent, a foreign company incorporated in Guyana, on the one hand and petitioners no. 2-4 claiming to represent M/s Kanda Associates, on the other. Though, the petitioners no. 2-4 were not signatories to the said agreement, one B.S.Kanda had signed the agreement on their behalf.

The JVA contemplated equal participation by both the parties in the equity of the company to be set up, as well as in the transfer of technology, process know-how, etc. However, the petitioners claimed that the respondent company failed to fulfill its contractual obligations for equity participation and also for transfer of technology. It was claimed by the petitioners that due to inadequate transfer of know-how and assistance from the respondent, the business of the petitioner no. 1 company was being hampered. The petitioners approached the International Centre for ADR (ICADR), Hyderabad, to nominate T.N.C. Rangarajan J., as the Arbitrator.[40] However, since the respondent company did not respond to the notice issued by the petitioner and did not nominate its arbitrator, the petitioner had no alternative but to approach the Chief Justice of India/the designated judge under section 11(6) of the Act seeking appointment of an arbitrator on behalf of the respondent.

The application was resisted by the respondent contending *inter alia* that since the petitioners were not signatories to the agreement containing the arbitration clause, they could not initiate the arbitration proceedings nor could they seek appointment of an arbitrator for the alleged failure of the respondent to nominate its own arbitrator. The respondent contended that it was only M/s. Kanda & Associates who were parties and signatories to the agreement which contained the arbitration clause whereas the petition under section 11(6) of the Act was filed on behalf of the Joint Venture Company and three other individuals who, though claimed to be a part of M/s Kanda & Associates, were not signatories to the agreement. In support of their contention, the respondent sought to rely on the decision of the Court in *Deutsche Post Bank Home Finance Ltd.* v. *Taduri Sridhar* and *Indowind Energy Ltd.* v. *Wescare (India) Ltd*.[41]

39 Whether an arbitration clause contained in an agreement could be invoked against a non-party to such agreement even though the agreement was for the benefit of such non-party was considered in *Indowind Energy Ltd.* v. *Wescare (I) Ltd.* (2010) 5 SCC 306; *Deutsche Post Bank Home Finance Ltd*. v. *Taduri Sridhar* (2011) 11 SCC 375; *Chloro Controls India (P) Ltd.* v. *Severn Trent Water Purification Inc.*(2013) 1 SCC 641, See observations, A.K.Ganguli, "Arbitration Law", XLIX *ASIL* 2013.

40 It is somewhat unclear as to why the petitioner approached in the first instance the ICADR for nomination of an arbitrator though in terms of the arbitration clause, the parties had the right to nominate their respective arbitrators.

41 *Deutsche Post Bank Home* v. *Taduri Sridhar* (2011) 11 SCC 375; *Indowind Energy Ltd.* v. *Wescare (I) Ltd.* (2010) 5 SCC 306. There is, however, no discussion as regards the applicability of the said decisions to the facts of the present case. However, since the parties have approached the Chief Justice of India for appointment of an arbitrator due to failure on the part of the respondent to nominate its arbitrator, it is obvious that the nature of the dispute fell within the International

The respondent resisted the application on the further ground that it was premature in as much as in terms of clause 3 of the agreement, the differences amongst the parties were required to be resolved first by mutual discussions followed by mediation and only upon failure of the mediation process that recourse to arbitration could be had. The respondents also contended that the disputes were not arbitrable in as much as the petitioners were in reality seeking winding up of the company on the ground that the respondent company has indulged in oppression and mismanagement in the administration of the company and that the said proceedings were still pending before the Company Law Board. It was further disclosed that in the said proceedings before the Company Law Board, the petitioners have appeared and sought a reference to the arbitration by filing an application under section 8 of Act.

Rejecting the contentions of the respondents as regards the maintainability of the application on the grounds that it was premature and that the proceedings before the Company Law Board created a bar to the entertainment of the application under section 11(6) of the Act, it was observed that the said contentions did not merit any serious consideration in as much as the parties had entered into elaborate correspondence in their attempt to resolve the disputes by mutual discussions and hence mediation at this stage would only be an empty formality.

The proceedings before the Company Law Board at the instance of the present respondent and the prayer of the petitioners therein for reference to arbitration cannot logically and reasonably be construed to be a bar to the entertainment of the present application. Admittedly, a dispute had arisen with regard to the commitments of the respondent Company as regards equity participation and dissemination of technology as visualised under the agreement. It would, therefore, be difficult to hold that the same would not be arbitrable, if otherwise, the arbitration clause can be legitimately invoked.

On the question as to whether the petitioners being non-signatories to the arbitration agreement could still invoke the arbitration clause for resolution of the disputes, the Court considered the fact that petitioner nos. 3 and 4 were the wife and the son respectively of petitioner no. 2 and that in response to a query by the respondent company regarding the legal status of Kanda and Associates, petitioner no. 2 had stated in writing that "Kanda & Associates is only a group of people formed for giving birth to the joint venture company" and that "Kanda is an individual and his associates are myself and family". In the backdrop of those facts, the court held that though one

Commercial Arbitration as defined in Section 2(f) of the Act. It is also evident that though the Court did not specifically refer to any of the provisions contained in part 2 of the Act, it has implicitly relied upon Section 45 thereof which contemplates "Power of judicial authority to refer parties to arbitration.—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."

B.S. Kanda had signed the Agreement on behalf of M/s Kanda and Associates, the said entity also consisted of petitioners no. 2, 3 and 4. On those reasonings the Court held that the petition under section 11(6) was maintainable and hence appointed B. Sudershan Reddy J, former judge of the Supreme Court as the sole arbitrator. This decision is yet another example of active support by the Court to the arbitral process of adjudication.

III STAY OF SUIT

In conformity with the object of the Act, section 8 empowers the court in which a suit proceedings is initiated by a party to an arbitration agreement, to refer the parties to arbitration "if a party so applies not later than when submitting his first statement on the substance of the dispute." The object of section 8 of the Act is not to deny the court, which may otherwise have jurisdiction under section 9 of CPC but the principle underlying the provision is to ensure that the contracting parties to the arbitration agreement do not frustrate such agreement by resorting to civil proceedings and in derogation of the remedy contracted for by way of arbitration agreement. Though, in the matter of jurisdiction, it is well settled that the provisions excluding the jurisdiction of the court have to be strictly construed, the said principle has no application to the proceedings initiated in terms of section 8 of the Act. Section 8 mandates that in the event the court finds that there is a valid arbitration agreement between the parties, the court has no choice but to refer the dispute for arbitration.[42]

Once an application is duly filed in terms of section 8[43] of the Act, before the Civil Court, what should be the approach of the court was the question that came up for consideration in *Sundaram Finance.*[44] Therein, the respondent had filed a suit for injunction against the financier seeking an injunction restraining the financier and their men from illegally taking away from the possession of the plaintiff or her employee a car which was in the ownership and possession of the plaintiff. The financier filed an application for stay of suit after duly complying with the procedure under section 8 of the Act, pleading *inter alia* that clause 22 of the agreement executed by the parties provided for reference of the disputes to arbitration. The trial court declined to entertain

42 In contrast with s.34 of 1940 Act, which was construed to confer a discretion on court, s. 8 of the 1996 Act does not confer such discretion.

(1) 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 not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.

(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.

43 S.8; Power to refer parties to arbitration where there is an arbitration agreement.

44 *Sundaram Finance* v. *Thankam* (2015) 14 SCC 444

the application, holding *inter alia* that the arbitration clause would not prevent the plaintiff from approaching a civil court especially when one of the parties to the agreement was trying to commit an act opposed to public policy and *per se* illegal. The financier approached the high court challenging the order of the civil court however, without any success. The high court held that going by section 8 of the Act, "mere inclusion of an arbitration clause in the agreement does not bar or cause to oust the jurisdiction of the Civil Court provided under Section 9 of the Code of Civil Procedure…" Referring to section 5 of the Act which provides that "in the matters governed by the first part of the Arbitration and Conciliation Act, no judicial authority shall intervene except where so provided in the first part" the high court held that "[i]t means that jurisdiction of the civil court is not completely ousted by Section 8 of the Arbitration and Conciliation Act". The matter was heard *ex parte* as the borrower was not represented before the court. In an appeal to the Supreme Court allowing the appeal, the court speaking through Kurien Joseph J held "[o]nce an application in due compliance with Section 8 of the Arbitration Act is filed, the approach of the civil court should be not to see whether the court has jurisdiction. It should be to see whether its jurisdiction has been ousted. There is a lot of difference between the two approaches. Once it is brought to the notice of the court that its jurisdiction has been taken away in terms of the procedure prescribed under a special statute, the civil court should first see whether there is ouster of jurisdiction in terms or compliance with the procedure under the special statute. The general law should yield to the special law—*generalia specialibus non derogant*. In such a situation, the approach shall not be to see whether there is still jurisdiction in the civil court under the general law. Such approaches would only delay the resolution of disputes and complicate the redressal of grievance and of course unnecessarily increase the pendency in the court."

Although, the court went into the larger question of ouster of jurisdiction of civil court, in conformity with the object of the Act in the facts of the present case, the court rightly held that the jurisdiction of the court was excluded only to the extent the subject matter was covered by the arbitration agreement.

IV APPLICABLITY OF PART-I OF THE ACT TO FOREIGN SEATED ARBITRATIONS

Applicability of the provisions of part I of the 1996 Act in respect of Foreign Seated Arbitration continued to occupy considerable judicial time ever since the Supreme Court rendered its decision in *Bhatia International.*[45]

In *Harmony,*[46]a two-Judge bench revisited the question regarding application of part I of the Act in respect of foreign seated international commercial arbitration and the award pronounced by such tribunal which had been the subject matter of the decision

45 *Bhatia International* v. *Bulk Trading S. A.* (2002) 4 SCC 105

46 *Harmony Innovation Shipping Ltd.* v. *Gupta Coal India Ltd.* (2015) 9 SCC 172

rendered by a Constitution Bench of the Supreme Court in *BALCO*.[47] The constitution bench, overruling the earlier three Judge bench decisions in *Bhatia International* and a two-Judge bench decision in *Venture Global*[48] held that "[i]n a foreign-seated international commercial arbitration, no application for interim relief would be maintainable under section 9 or any other provision, as applicability of part I of the Arbitration Act, 1996 is limited to all arbitrations which take place in India. Similarly, no suit for interim injunction simpliciter would be maintainable in India, on the basis of an international commercial arbitration with a seat outside India and that Part I of the Arbitration Act, 1996 is applicable only to all the arbitrations which take place within the territory of India."

Having so declared the law on September 06, 2012, in the penultimate paragraph of the judgement, the court had observed that "[t]he judgment in *Bhatia International* was rendered by this court on March 13,2002. Since then, the aforesaid judgment has been followed by all the high courts as well as by this court on numerous occasions. In fact, the judgment in *Venture Global Engg.* has been rendered on January10, 2008 in terms of the ratio of the decision in *Bhatia International*. And finally directed that "in order to do complete justice, we hereby order, that the law now declared by this Court shall apply prospectively, to all the arbitration agreements executed hereafter."[49]

The question of applicability of part I of the Act arose in *Harmony* under the following factual background. The parties therein had on October 20,2010 entered into an agreement in respect of 24 voyages of coal shipment belonging to the appellant from Indonesia to India for being supplied to the respondent. The respondent undertook only 15 voyages which resulted in disputes between the parties and stood referred to arbitration in accordance with clause 5 thereof.

The award pronounced by the arbitral tribunal was sought to the enforced by the appellant by filing an application under section 47 read with Section 48 of the Act before the District Court, Ernakulam. In the meanwhile, further disputes had arisen between parties in respect of an addendum to the contract subsequently executed between the parties.The appellant moved another application under section 9 of the Act before the Second Additional District Court at Ernakulam seeking attachment of the cargos that had arrived in Kerala as an interim measure. The learned additional district judge passed an additional order for attachment of those cargos. The said order was assailed before the high court in a writ petition filed by the respondent *inter alia* on the ground that the courts in India had no jurisdiction to entertain such application in respect of a foreign seated arbitration. The High Court rejecting the contention of the appellant which was the writ petitioner before it, held that since the agreement in question was entered into between the parties on October 20, 2010 i.e. well before the pronouncement of the judgement in *BALCO* by the Constitution Bench

47 *Supra* note 16.

48 *Venture Global* v. *Satyam Computers* (2008) 4 SCC 190

49 *Supra* note 16.

on September 06, 2012, the law laid down therein was not applicable to the facts of the case. The high court held further that "[t]he law laid down by the Supreme Court in *BALCO case* is declaratory in nature and, therefore, the first respondent cannot be heard to say that he is not bound by the same and that the said principle cannot be applied to the case on hand. In the case of a declaration, it is supposed to have been the law always and one cannot be heard to say that it has only prospective effect. It is deemed to have been the law at all times. If that be so, the petition before the court below is not maintainable and is only to be dismissed."

The appellant preferred an appeal before the Supreme Court reiterating its contention that the decision in *BALCO* could not be made applicable to the disputes that had arisen out of the contract dated October 20, 2010 executed between the parties and hence the petitions were maintainable. The Court accepted the said contention of the appellant holding that "there can be no scintilla of doubt that the authority in *BALCO case* would not be applicable for determination of the controversy in hand. In fact, the pronouncement in *Bhatia International* would be applicable to the facts of the present case inasmuch as there is nothing in the addendum to suggest any arbitration and, in fact, it is controlled and governed by the conditions postulated in the principal contract."

However, the court finally upheld the decision of the high court and dismissed the appeal but for different reasons observing that "even applying the principles laid down in *Bhatia International* and scanning the anatomy of the arbitration clause, we have arrived at the conclusion that the courts in India will not have jurisdiction as there is implied exclusion."

In support of its conclusion, the court heavily relied upon an earlier decision of a two-judge bench in *Reliance Industries* case. Therein, article 33.12 of the Production Sharing Contracts (PSCs) entered into by and between the parties *inter alia* provided for the arbitration proceedings being held in London. That provision however underwent a change in 2005 consequent upon substitution of one of the existing contracting parties i.e. Enron by a new party - BG. As a result of that amendment, the "venue/ seat" of arbitration was changed from London to Paris. Though pursuant to a notice dated December16,2010 invoking the arbitration clause issued by M/s Reliance, one of the contractors, the tribunal was constituted wherein only three (out of four) of the contracting parties participated in such proceedings. The 4th contracting party, ONGC, which had 40% share in the PSC did not join the arbitration proceedings. After the tribunal was constituted, the said three parties to the arbitration proceedings, by consent, agreed that "the juridical seat (or legal place) of arbitration for the purposes of the arbitration initiated under the claimants' notice of arbitration dated 16.12.2010 shall be London, England."

After the tribunal pronounced a final partial award on certain issues of arbitrability, the jurisdiction of the High Court of Delhi was invoked by the Union of India by filing a petition under section 34 of the Act relying upon a provision contained in PSC, which provided *inter alia* that "[n]othing in this contract shall entitle the Government or the contractor to exercise the rights, privileges and powers conferred upon it by this contract in a manner which will contravene the laws of India." Those proceedings

were contested by the other two parties i.e. Reliance and BG on the ground that courts in India did not have jurisdiction to entertain such petition.

It was contended on behalf of the Union of India that the decision in *Venture Global* [50] squarely applied to the case in as much as it was held that though the agreement therein provided that the terms thereof shall be construed in accordance with and be governed by the law of State of Michigan, US and that the arbitration proceedings shall be conducted in accordance with the rules of the London Court of Arbitration, yet in view of the declaration contained in the said agreement to the effect that "notwithstanding anything to the contrary in this agreement, the shareholders shall at all times act in accordance with the Companies Act and other applicable Acts/rules being in force, in India at any time," it was held following the decision in *Bhatia International* that the provisions contained in part I of the Act neither expressly nor impliedly excluded by the parties to the said contract. This contention was however negatived therein observing that "the expression 'laws of India' as used in Articles 32.1 and 32.2 has a reference only to the contractual obligations to be performed by the parties under the substantive contract i.e. PSC. In other words, the provisions contained in Article 33.12 are not governed by the provisions contained in Article 32.1."[51] "….in our opinion, the conclusion is inescapable that applicability of the Arbitration Act, 1996 has been ruled out by a conscious decision and agreement of the parties. Applying the ratio of law as laid down in *Bhatia International* it would lead to the conclusion that the Delhi High Court had no jurisdiction to entertain the petition under Section 34 of the Arbitration Act, 1996."

After extensively referring to several passages from the decision in *Reliance Industries*[52] case, the court summed up its view observing "that it is too late in the day to contend that the seat of arbitration is not analogous to an exclusive jurisdiction clause. Once the parties had consciously agreed that the juridical seat of the arbitration would be London and that the agreement would be governed by the laws of London, it was no longer open to contend that the provisions of Part 1 of the Act would also be applicable to the arbitration agreement."

Referring to the earlier decisions in *Videocon Industries*[53] case, *DOZCO,*[54] *Yograj Infrastructure*[55], Dipak Misra J. speaking for the court concluded that "Coming to the stipulations in the present arbitration clause, it is clear as day that if any dispute or difference would arise under the charter, arbitration in London to apply; that the

50 *Supra* note 48.

51 There was however no express finding as regards the scope of Article 32.2 that contained a overhead provision similar to the non-substantive clause in the contract involved in Venture Global case.

52 *Reliance Industries Ltd.* v. *Union of India* (2014) 7 SCC 603, see observations, "Arbitration Law", L *ASIL* 2014.

53 *Videocon Industries Ltd.* v. *Union of India* (2011) 6 SCC 161

54 *Dozco India (P) Ltd.* v. *Doosan Infracore Co. Ltd* (2011) 6 SCC 179

55 *Yograj Infrastructure Ltd.* v. *Ssang Yong Engg. and Construction Co. Ltd.* (2011) 9 SCC 735

arbitrators are to be commercial men who are members of the London Arbitration Association; the contract is to be construed and governed by the English law; and that the arbitration should be conducted, if the claim is for a lesser sum, in accordance with small claims procedure of the London Maritime Arbitration Association. There is no other provision in the agreement that any other law would govern the arbitration clause." "… when the aforesaid stipulations are read and appreciated in the contextual perspective, "the presumed intention" of the parties is clear as crystal that the juridical seat of arbitration would be London." "….interpreting the clause in question on the bedrock of the aforesaid principles it is vivid that the intended effect is to have the seat of arbitration at London. The commercial background, the context of the contract and the circumstances of the parties and in the background in which the contract was entered into, irresistibly lead in that direction."

The court therefore concurred with the conclusion arrived at by the high court but for different reasons.

The very same question had come up for consideration again before the Court in a somewhat different context in the *Reliance Industries (II)*[56] case. In an earlier decision[57] between the same parties, the court had noticed the factual matrix that led to M/s Reliance Industries approaching the court with a petition under Article 136 of the Constitution challenging the decision of the High Court of Delhi which had overruled its preliminary objection regarding maintainability of the petition under section 34 of the Act filed by Union of India challenging the final partial award dated December13, 2012. The present proceedings at the instance of Union of India arose out of a petition filed by the Union Government under section 14 of Act seeking a declaration that the mandate of one of the arbitrators constituting the arbitration tribunal stood terminated as he had become *de jure* or *de facto* unable to perform his functions as the Arbitrator and that despite the said disqualification of the arbitrator having been brought to the notice of the Permanent Court of Arbitration in accordance with the UNCITRAL rules, and though the Secretary-General who took upon himself the task to decide the question (as to whether the arbitrator failed to discharge his duties and responsibilities in accordance with the said rules) but since the controversy continued even thereafter, the Union of India had no alternative but to approach the High Court of Delhi under section 14 of the Act when the earlier proceedings under section 34 of Act challenging the final partial award dated July 03,2014 was still pending before the high court. By the time the High Court took up the application under section 14 for hearing, the petition filed under section 34 was held to be maintainable by the high court. A challenge to the said decision was made by and on behalf of M/s Reliance Industries before the Supreme Court and the challenge was accepted by the Court *vide* its judgement dated May28, 2014.[58]

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57 *Union of India* v. *Reliance Industries Ltd.* (2015) 10 SCC 213

58 *Supra* note 52, see observations A.K.Ganguli, "Arbitration Law", L *ASIL* 2014.

On July 03, 2014, a learned single Judge of the high court dismissed the said application under section 14 on the ground that the Supreme Court, in its judgement dated May 28, 2014, had already held that part I of the Act was not applicable and hence section 14 petition was also not maintainable. In the appeal preferred by the Union Government, the Court noticed some of the provisions of the Production Sharing Contracts (PSCs) which were executed by and between four parties *i.e.* Enron Oil and Gas India Ltd. [later substituted by British Gas Exploration and Production India Limited (BG)], Reliance Industries Limited, Oil and Natural Gas Corporation Limited, and the Union of India.

On Jaunuary10,2005, the terms of the PSC were amended substituting Enron Oil and Gas India Ltd. with British Gas Exploration and Production India Limited (BG). In 2010, Reliance issued a notice of arbitration raising a few disputes that had arisen between the parties out of the said PSCs and it also appointed Peter Leaver QC as its Arbitrator. The Union Government appointed B.P. Jeevan Reddy J, a former Judge of the Supreme Court as its nominee arbitrator and the two arbitrators appointed Christopher Lau, QC as the Chairman of Tribunal.[59]

After the initiation of arbitration proceedings, only three of the four contracting parties participated, namely Reliance Industries, British Gas Exploration and Production India Limited (BG) and the Union of India. ONGC neither invoked the arbitration clause nor did it participate in the arbitration proceeding.

On September12, 2012, these three parties agreed to alter the venue/seat of the arbitration based on which the Tribunal passed a final partial consent award to the following effect:

> "3. Final partial award as to seat
> 3.1. Upon the agreement of the parties, each represented by duly authorised representatives and through counsel, the Tribunal hereby finds, orders and awards:
> (*a*) That without prejudice to the right of the parties to subsequently agree otherwise in writing, the juridical seat (or legal place) of arbitration *for the purposes of the arbitration initiated under the claimants' notice of arbitration dated 16-12-2010* shall be London, England.
> (*b*) That any hearings in this arbitration may take place in Paris, France, Singapore or any other location the Tribunal considers may be convenient.
> (*c*) That, save as set out above, the terms and conditions of the arbitration agreements in Article 33 of the PSCs shall remain in full force and effect and be applicable in this arbitration." (emphasis supplied)

59 Unfortunately the narration of facts in para 3 of the judgement do not reflect these facts.

In the earlier round of litigation, challenging the judgement dated March 22, 2013 of the High Court of Delhi, M/s Reliance had laid a limited challenge to the jurisdiction of the court to entertain the petition under section 34 on the ground that it was a foreign seated arbitration which was governed by the laws of England and hence the provisions contained in part I of the Act did not apply. The Union Government on the other hand had strongly relied upon the decision in *Bhatia International*,[60] which also involved a foreign seated arbitration being governed by the laws of France. The court in that case held that the provisions Part I were attracted and that a petition under section 9 of Act was maintainable in the courts in India. The Union also relied upon a subsequent judgement of the court in *Venture Global*,[61] wherein the arbitration was not only a foreign seated arbitration but was governed by the laws of USA, yet the Court had held that the Indian courts will have jurisdiction to entertain a challenge to the validity of the award which was in reality a foreign award primarily because the contract between the parties contained a provision to the effect that "[n]otwithstanding anything to the contrary in this agreement, the shareholders *shall at all times* act in accordance with the Companies Act and other applicable Acts/rules being in force, in India at any time." The union also relied upon article 32.2 of the PSC, which expressly provided that "[n]othing in this contract shall entitle the Government or the contractor to exercise the rights, privileges and powers conferred upon it by this contract in a manner which will contravene the laws of India." The union sought to support the petition under section 34 of the Act *inter alia* on the ground that issues covered by the said partial award dated December 13, 2012 were not arbitrable under the Indian law and that the award on the question of arbitrability held in favour of the contractors was in direct contravention of the laws of India.

Reliance was also placed on the decision in *Videocon*[62] wherein the court had ruled that an agreement between the participants in arbitration proceedings, purporting to amend the terms of their contract (PSCs) which also provided for the seat of arbitration, does not result in any change in the contractual provision until the terms of the PSCs are amended by all the contractual parties. It was contended on behalf of the Union that admittedly, ONGC, which was a party to the PSCs, did not participate in the arbitration proceedings and did not consent to the passing of the said final partial award regarding the change in the venue/seat of arbitration. Therein the court, however, declined to follow the doctrine of concurrent jurisdiction laid down in *Bhatia International* and *Venture Global* and on the analogy of the principles laid down in the subsequent decision in *BALCO* held that the provisions of part I were inapplicable to all the foreign seated arbitrations, more so, if the arbitration agreement is agreed to be governed by a foreign law.

Though, the law declared in *BALCO* was held to be prospective in operation, the Court reached the conclusion that even in terms of the decision in *Bhatia*, the provisions

60 *Supra* note 45.

61 *Supra* note 48.

62 *Videocon Industries Ltd*. v. *Union of India* (2011) 6 SCC 161

of Part I of the Act were impliedly excluded as in terms of the consent award, the seat/ venue of the arbitration proceedings was shifted from Paris to London and that the said proceedings were governed by the laws of England.

The Union of India challenged the decision of the high court that simply ruled that in terms of the earlier decision between the parties, Part I of the Act could not be invoked and hence the petition under section 14 of the Act was not maintainable. In appeal before the Supreme Court, after referring to the decision in *Bhatia*, *Venture Global* and *BALCO*, though the Court held that "It will thus be seen that facts like the present case attract the *Bhatia International* principle of concurrent jurisdiction inasmuch as all arbitration agreements entered into before September12, 2012, that is, the date of pronouncement of *BALCO* judgment, will be governed by *Bhatia International*" yet, Rohinton F. Nariman J. speaking for the court ruled that

> "[t]he last paragraph of *BALCO* judgment has now to be read with two caveats, both emanating from para 32 of *Bhatia International* itself — that where the Court comes to a determination that the juridical seat is outside India or where law other than Indian law governs the arbitration agreement, Part I of the Arbitration Act, 1996 would be excluded by necessary implication. Therefore, even in the cases governed by the *Bhatia* principle, it is only those cases in which agreements stipulate that the seat of the arbitration is in India or on whose facts a judgment cannot be reached on the seat of the arbitration as being outside India that would continue to be governed by the *Bhatia* principle. Also, it is only those agreements which stipulate or can be read to stipulate that the law governing the arbitration agreement is Indian law which would continue to be governed by the *Bhatia*."

Referring to its decision in the *Harmony*[63] case, the court emphasized that even though the law governing the arbitration agreement was not specified in that case, yet the court had held that "having regard to the various circumstances, the seat of arbitration would be London and therefore, by necessary implication, the ratio of Bhatia would not apply" [64]

However, clause 5 of the contract, which was the subject matter of the decision in *Harmony case*, provided *inter alia* that "[i]f any dispute or difference should arise under this charter, general average/arbitration in London to apply, one to be appointed by each of the parties hereto, the third by the two so chosen, and their decision or that of any two of them, shall be final and binding, and this agreement may, for enforcing the same, be made a rule of court. Said three parties to be commercial men who are the members of the London Arbitrators Association. This contract is to be governed and construed according to English law. For disputes where total amount claimed by

63 *Supra* note 46.

64 *Ibid.*

either party does not exceed US $50,000 the arbitration should be conducted in accordance with small claims procedure of the London Maritime Arbitration Association."

The stipulation that the contract should be governed by the English law surely implied, in the absence of any provision to the contrary, that the arbitration agreement contained in the contract shall also be governed and construed according to the English law. The fact that the seat of arbitration was agreed to be London merely provided an added reason in support of the decision that it was a foreign-seated arbitration the proceeding of which were to be conducted in accordance with the procedure of the London Maritime Arbitration Association.

V JURISDICTION OF COURTS

When more than one court had territorial jurisdiction to entertain a suit in terms of section 20 of the Code of Civil Procedure (CPC), it is well settled law that the parties to a contract by their agreement can exclude the jurisdiction of one of the courts and opt for the jurisdiction of another.[65] Section 42 of Act however, provides "[n]otwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to an arbitration agreement any application under this Part has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court." Would it still be open to the parties to an arbitration agreement to restrict the jurisdiction of one of the two courts within whose limits parts of the cause of action arose concerning the subject matter of arbitration?

In *B.E. Simoese Von Staraburg Niedenthal*,[66] the parties had entered into a contract for raising of mineral with regard to the mines located in Goa. The said agreement was entered into on April 09, 2007 at Raipur. The appellant operated the mines in Goa and in terms of the raising agreement, the respondent was the exclusive purchaser of the ore from the said mines. Disputes having arisen between the parties, the respondent made an application before the District Judge, Raipur under section 9 of the Act for grant of interim protection. The appellant, who were respondents before the trial court, objected to the jurisdiction of the court to entertain the petition *inter alia* for the reason that: (*i*) the subject mines were located in Goa, (*ii*) the agreement was also made in Goa, and (*iii*) the place of residence of respondent 2 was Goa.

65 *Globe Transport Corpn*. v. *Triveni Engg. Works* (1983) 4 SCC 707; *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 Corpn. 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. *MaaBhagwati Coke Gujarat (P) Ltd*. (2009) 9 SCC 403.

66 *B.E. Simoese Von Staraburg Niedenthal* v. *Chhattisgarh Investment Ltd*.(2015) 12 SCC 225.

The application was supported by the respondents *inter alia* on the grounds that since the cause of action arose in Raipur, the application was maintainable. The district judge having noted the arguments of the parties observed that "it would be possible to decide the issue of jurisdiction only when SIMOESE filed a reply to the petition under Section 9 of the 1996 Act and later dismissed the application when SIMOESE raised the objection of lack of jurisdiction."

The order passed by the district judge was challenged before the high court but the High Court declined to interfere with the same observing that "the question of jurisdiction could be decided by the District Judge only after replies are filed to the application under Section 9 of the Act." The matter was carried to the Supreme Court when the parties relied upon clause 13 of the agreement which provided that "[t]he courts at Goa shall have exclusive jurisdiction."

Interpreting the said provision in the light of several earlier pronouncements by the court and particularly the decision in *Swastik Gases*,[67] the court held that "having regard to Clause 13 of the agreement, as noted above, the jurisdiction of the District Judge, Raipur is ousted and, therefore, he cannot be said to have any jurisdiction in dealing with the matter. The only competent court of jurisdiction is the court at Goa."[68]

VI AWARD OF INTEREST

Prior to the enactment of the 1996 Act, divergent views expressed in judicial pronouncements on the jurisdiction of the arbitral tribunal to award interest, particularly *pendente lite* was finally settled by the pronouncement of the constitution bench in

67 *Swastic Gases (P) Ltd.* v. *Indian Oil Corpn. Ltd.* (2013) 9 SCC 32. R.M. Lodha, J. (as his Lordship then was) held "[i]t is so because for construction of jurisdiction clause, like clause 18 in the agreement, the maxim *expressio unius est exclusion alterius* comes into play as there is nothing to indicate to the contrary. This legal maxim means that expression of one is the exclusion of another. By making a provision that the agreement is subject to the jurisdiction of the courts at Kolkata, the parties have impliedly excluded the jurisdiction of other courts. Where the contract specifies the jurisdiction of the courts at a particular place and such courts have jurisdiction to deal with the matter, we think that an inference may be drawn that parties intended to exclude all other courts".. Madan Lokur, J., though authored a separate judgement concurred with Lodha, J. observing "in the jurisdiction clause of an agreement, the absence of words like "alone", "only", "exclusive" or "exclusive jurisdiction" is neither decisive nor does it make any material difference in deciding the jurisdiction of a court. The very existence of a jurisdiction clause in an agreement makes the intention of the parties to an agreement quite clear and it is not advisable to read such a clause in the agreement like a statute."

68 In the case of *Bharat Aluminium Co.* v. *Kaiser Aluminium Technical Services* at para 96 the Supreme Court had observed, by way of illustration, that the place of arbitration would confer jurisdiction upon courts where such arbitration takes place. The observations of the Supreme Court in para 96 of the judgment has created an anomalous situation as it has been observed that the place of arbitration would confer jurisdiction upon the courts there even though the subject matter of the arbitration may not fall within its jurisdiction. Though the central issue therein concerned International Arbitration where the seat of arbitration plays a crucial role on the question of applicability of Part I of the Act, the illustration given in the judgment runs contrary to law laid down by the Supreme Court in several decisions.

Irrigation Department, Government of Orissa v. *G.C.Roy.*[69] The power of the arbitral tribunal to award interest was upheld by the court "where the agreement between the parties does not prohibit grant of interest".[70]

The 1996 Act expressly recognises the power of the arbitral tribunal to award interest at "such rates as it deems reasonable, on the whole or any part of the money". In other words, the award of interest is upon the money awarded in favour of a party and thus, would be treated as incidental or collateral to the sum awarded. As to the period for which the arbitral tribunal is empowered to award interest, clause (a) of section 31(7) provides that such a period could be "the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made". For award of interest in the post-award period, clause (b) of section 31(7) provides that "a sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of eighteen per cent per annum from the date of the award to the date of payment."[71]

In *Bright Power Projects,*[72] the question was whether a stipulation in the contract providing that "no interest shall be paid upon the earnest money and the security deposit or amounts payable to the contractor under the contract" barred the arbitrator from awarding interest on the amount awarded in favour of the respondent from the date of the reference till the date of the award.

The parties to this case had entered into a contract on January 20, 1997 in terms of which the respondent agreed to construct certain structures described therein. Clause 13(3) of the contract provided *inter alia* that no interest shall be paid to the contractor on the amounts payable to the contractor under the contract.

Some disputes arose between the parties during the course of execution of the contract which were referred to arbitration by a tribunal. The arbitral tribunal by its award dated May17,2005 awarded a certain amount in favour of the respondent along with interest from the date of reference, till the date of the award.

The appellant challenged the award, especially with regard to interest awarded by the arbitral tribunal, before the High Court of Bombay, which was however dismissed on December13, 2005. An appeal from the said order, also came to be dismissed on August 07, 2006 by a division bench of the high court placing reliance upon an earlier

69 *Irrigation Department, Government of Orissa* v. *G.C.Roy* (1992) 1 SCC 508

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

71 See for details, A.K.Ganguli, "Arbitration", XLVI *ASIL* 2010.

72 *Union of India* v. *Bright Power Projects (India) (P) Ltd.* (2015) 9 SCC 695.

judgment of another division bench of the same high court in *Union of India* v. *Anand Builders*.

On further appeal to the Supreme Court, it was urged on behalf of the appellant that, in view of a specific condition incorporated in the contract entered into between the parties, that no interest was to be paid to the contractor, it was not open to the arbitral tribunal to award any interest to the contractor.

Adverting to clause 13(3) of the contract, which provided *inter alia* that no interest was to be paid on the earnest money, security deposit, and the amounts payable under the contract and that it was only in respect of government securities deposited by the respondent with the appellant that interest was payable, the court held that "[h]aving once agreed that the contractor would not claim any interest on the amount to be paid under the contract, he could not have claimed interest either before a civil court or before an arbitral tribunal".[73]

Construing the words "unless otherwise agreed upon by the parties" contained in to section 31(7) of the Act, the court held that the arbitral tribunal is bound by the terms of the contract in relation to award of interest and since the parties had agreed that no interest shall be payable in respect of any amount payable to the contractor, the arbitral tribunal could have not awarded interest on the amounts held to be payable to the contractor.

In support of its conclusion the court also referred to its earlier decision in *Union of India* v. *Saraswat Trading Agency*[74] wherein it was held that if there was a bar on payment of interest in the contract, the arbitrator cannot award any interest for such period.

Since the arbitral tribunal had relied upon the decision in *G.C.Roy*'s[75] case for awarding interest in favour of the respondent, the court clarified that reliance upon the said decision by the tribunal was wholly unjustified since the factual situation in that case were different from the present case. It was pointed out that the contract between the parties in *G.C.Roy's* case did not contain any condition that interest would not be paid. In the view of the Court, the tribunal failed to consider the provisions of section 31 (1)(7) of the Act, & clause 13(3) of the contract before awarding interest.

The court finally ruled that "[s]ection 31(7)(*a*) of the Act ought to have been read and interpreted by the Arbitral Tribunal before taking any decision with regard to awarding interest. The said section, which has been reproduced hereinabove, gives more respect to the agreement entered into between the parties. If the parties to the agreement agree not to pay interest to each other, the Arbitral Tribunal has no right to award interest pendente lite."[76]

73 *Id.* at para 11

74 *Union of India* v. *Saraswat Trading Agency* (2009) 16 SCC 504. *Union of India* v. *Concrete Products and Construction Co*(2014) 4 SCC 416, explained in ASIL 2014, dealt with the same issue.

75 *Supra* note 69.

76 *Supra* note 72, *id*., para18.

When an arbitral award is for payment of money and the sum directed to be paid by the award includes interest payable at such rate and for such period between the date on which cause of action arose and the date of the award, whether the interest that would become payable in terms of clause (b) of section 31(7) of the Act for the post-award period till the date of payment would be on the aggregate amount of the principal and the interest for the pre-award period as determined in terms of section 31(7)(a) of the Act or whether the interest component for the post-award period would be limited to the principal amount only was the question that came up for consideration before a three judge bench in *Hyder Consulting.*[77]

Initially the appeal preferred by *Hyder Consulting* from the judgment of the High Court of Orissa, came up for hearing before a bench of two judges when it was contended on behalf of the appellant that the view taken in *S.L.Arora*'s[78] case to the effect that award of interest upon interest for the post award period was not permissible under section 31(7) of the Act was inconsistent with the decision of a co-equal bench in *U.P. Coop. Federation Ltd.* v. *Three Circles*.[79] Having regard to the said submission, the bench referred the appeal for being heard by a bench of three judges.[80]

The appeal to the Supreme Court arose from a claim for execution of an arbitral award in favour of the appellant for a principal sum of Rs. 2,30,59,802 which taken together with post-award interest on the aggregate of the principal amount awarded by the arbitral award and interest *pendente lite* thereon aggregated to a sum of Rs. 8,92,15,993. The appellant filed a petition for execution of the award and payment of the said amount before the district judge, Khurda, Orissa. In the said execution petition, the district court *vide* orders dated February19, 2009 and February 26, 2009, issued orders of attachment in favour of the appellant. The said orders were challenged by the respondent by way of writ petition before the high court. A division bench of the high court, directed the executing court to recalculate the amount keeping in view the principles laid down in the *S.L.Arora* case.[81] The said order of the high court came to be challenged by the appellant by way of a Special Leave Petition before in the Supreme Court.

In view of the said order of reference, the three judge bench of the court framed the following questions for consideration:[82]

> a) Whether in the light of *Three Circles case* and *McDermott case* there exists any infirmity in the decision rendered by this Court in *S.L. Arora case.*
>
> b) Whether sub-section (7) of Section 31 of the 1996 Act could be interpreted to include interest *pendente lite* within the sum payable as per the arbitral award for the purposes of awarding post-award interest.

77 *Hyder Consulting (UK) Ltd.* v. *State of Orissa* (2015) 2 SCC 189

78 *State of Haryana* v. *S.L. Arora and Co*. (2010) 3 SCC 690

79 (2009) 10 SCC 374

80 *Hyder Consulting (UK) Ltd* v. *State of Orissa* (2013) 2 SCC 719.

81 *Supra* note 78.

82 *Supra* note 80, *id*. at 208.

Though all three learned judges delivered three separate opinions, the decision rendered by S.A.Bobde J., constitutes the majority view as Abhay Manohar Sapre J., concurred with him . According to Bobde J., the words used in section 31(7) of the Act, were "so plain and unambiguous"[83] that the court was bound to give effect to them as no serious "question of construction of a statutory provision arose".

Bobde J. however agreed with the finding in *S.L.Arora*'s case that the *Three Circles* case was "incorrectly founded upon the decision in *McDermott International Inc.* v. *Burn Standard Co. Ltd.*[84] and such reliance was not in consonance with the doctrine of precedent. *McDermott* case is not an authority on the question whether the arbitrator may award compound interest, nor does that decision sanction post-award interest be imposed on the aggregate sum and interest pendente lite. The arbitral tribunal's authority to award "interest on interest" was not discussed therein." [85]

Bobde J., also held that *S.L.Arora*'s case rightly refused to treat *McDermott*s case and *Three Circles* as authorities for awarding interest on interest and held that further both were wrongly decided. Moreover, the decisions in *M.C.Clelland Engineers*[86]and *Three Circles* pertained to awards under the Arbitration Act, 1940 which did not contain a specific provision dealing with arbitrators power to grant interest.[87]

Analysing the provisions of section 31(7) of the Act, Bobde J., held that "sub-section (7)(*a*) contemplates that an award, inclusive of interest for the pre-award period on the entire amount directed to be paid or part thereof, may be passed. The "*sum*" awarded may be the principal amount and such interest as the Arbitral Tribunal deems fit. If no interest is awarded, the "*sum*" comprises only the principal. The significant words occurring in clause (*a*) of sub-section (7) of Section 31 of the Act are "*the sum for which the award is made*". On a plain reading, this expression refers to the *total amount* or *sum* for the payment for which the award is made. Parliament has not added a qualification like "principal" to the word "sum", and therefore, the word "sum" here simply means "a particular amount of money". In section 31(7), this particular amount of money may include interest from the date of cause of action to the date of the award." Since the language employed in section 31(7) was clear and unambiguous, it was held that the court was bound to give effect to it whatever be the consequences even if the result of such construction be strange, surprising, unreasoned, unjust, or oppressive.[88]

83 *Id*., para 14.

84 (2006) 11 SCC 181

85 *Id.* at 199.

86 *ONGC* v. *M.C.Clelland Engineers S.A.* (1999) 4 SCC 327

87 *Supra* note 80, at 199.

88 Bobde J., referred to several judgments in support of this proposition including *Ganga Prasad Verma* v. *State of Bihar* 1995 Supp (1) SCC 192; *Keshav Ravji& Co.* v. *CIT* (1990) 2 SCC 231; *Pakala Narayana Swami* v. *King Emperor,* AIR 1939 PC 47; *TNSEB* v. *Central Electricity Regulatory Commission* (2007) 7 SCC 636; *King Emperor* v. *Benoari Lal Sarma,* AIR 1945 PC 48; *London Brick Co. Ltd.* v. *Robinson* 1943 AC 341; *Nasiruddin* v. *Sita Ram Agarwal* (2003) 2 SCC 577; *Sussex Peerage Case* (1843-60) All ER 55 – *Ibid* at 202.

Sapre J., while concurring with the opinion of Bobde J., held that "[s]ection 31(7)(*a*) employs the words "… *the Arbitral Tribunal may include in the sum for which the award is made interest*…". The words "*include* in the *sum*" are of utmost importance. This would mean that pre-award interest is not independent of the "*sum*" awarded. If in case, the arbitral tribunal decides to award interest at the time of making the award, the interest component will not be awarded separately but it shall become part and parcel of the award. An award is thus made in respect of a "*sum*" which includes within the "*sum*" component of interest, if awarded.

Therefore, for the purposes of an award, there is no distinction between a "*sum*" with interest, and a "*sum*" without interest. Once the interest is "*included in the sum*" for which the award is made, the original sum and the interest component cannot be segregated and be seen independent of each other. The interest component then loses its character of an "*interest*" and takes the colour of "*sum*" for which the award is made."[89]

In his dissenting opinion, Dattu C.J., analyzing the decisions in *McDermott* and *S.L.Arora's* case expressed his agreement with the view in *S.L.Arora's* case that "the decision in *McDermott*'s case would not be applicable, since it does not pertain to the issue of granting compound interest on the post-award claim. This court, in *McDermott case*, did not consider the issue pertaining to award of "interest upon interest" or compound interest. It merely held that the interest must be awarded on the principal amount up to the date of award."[90]

Analyzing the provisions of section 31(7) of the Act, Dattu CJ., held that "the word "sum", in its natural meaning and as per its most common usage, would mean money. The term "money" has also been used in sub-section (7) of section 31 of the 1996 Act. Therefore, I would not hesitate in finding that the terms "sum" and "money" have been used by the legislature, in the given provision, interchangeably. In this light, it would be pertinent to take note of the given clause once again. The said clause states that interest may be awarded on the "sum" for which the arbitral award is made, or the same could be read as—interest may be awarded on the "money" for which the arbitral award is made. This "money" for which the award is made, necessarily would refer to the money as adjudicated by the Arbitral Tribunal, based on the claims of the parties, to be paid under the award. In other words, it would simply refer to the principal amount so awarded."[91]

Referring to the meaning of the expression "interest" appearing in section 31(7) and particularly in the absence of any definition of the said expression in the Act, it was held that "interest" would be the return or compensation for the use or retention by one person of a sum of money belonging to or owed to another. It may be understood to mean the amount which one has contracted to pay for the use of borrowed money. It is a consideration paid either for the use of money or for forbearance in demanding it,

89 *Id.*, para 27-28.

90 *Id.*, para 53.

91 *Id.*, para 73.

after it has fallen due, and thus, it could be said to be a charge for the use or forbearance of a particular amount of money. In this sense, it is a compensation allowed in law for use of money belonging to another or for the delay in paying the said money after it has become payable."[92]

Dattu C.J., finally concluded the term "sum" as used in clause (*b*) of sub-section (7) of Section 31 of the 1996 Act would have the same meaning as assigned to the word under clause (*a*) of the same provision. It would refer to the money as adjudicated by the Arbitral Tribunal based on the claim of the parties to the arbitral proceedings. It has already been noticed that this money would be distinct from the interest as may have been awarded by the Arbitral Tribunal under clause (*a*) of sub-section (7) of Section 31 of the 1996 Act. Therefore, the interest under clause (*b*) would be imposed on money awarded by the Arbitral Tribunal on the basis of the claims of the parties, and the said money cannot merge within it any interest as imposed in the period from the date of cause of action to the date of the award."[93]

Reliance was placed by the appellants upon the 246th report of the Law Commission of India, in support of its contention that Section 31(7) did contemplate interest upon interest, i.e., compound interest., Dattu C.J., disagreed with the view expressed by the commission observing that "the decision in *S.L. Arora case* is sound and wholly conclusive on the interpretation of sub-section (7) of Section 31 of the 1996 Act on the issue of awarding "interest on interest". The Law Commission had erred in relying upon *Oil and Natural Gas Commission case* as well as *Three Circles case*, since these decisions are not applicable to the present arbitration held under the 1996 Act."

Incidentally, the Law Commission also suggested an amendment to section 31(7) to the following effect.

"(iii) In sub-section (7), after sub-clause (b), add the words "*Explanation 1*: The expression "current rate of interest" shall have the same meaning as assigned to it under Clause (b) section 2 of the Interest Act, 1978.

(iv) *Explanation 2*: The expression "sum directed to be paid by an arbitral award" includes the interest awarded in accordance with section 31(7)(a)."[94]

It is rather intriguing that the Parliament did not give effect to the said recommendation made by the Law Commission insofar as addition of Explanation 2 was concerned. Does that imply that the Parliament did not agree with the Commission's view that *S.L.Arora's* case was wrongly decided and that in order to make the position clear, Explanation 2 should be inserted? The note below the two recommended explanations expressly states that Explanation 2 intends to legislatively overrule the decision in *S.L.Arora*.[95] Yet the Parliament did not consider it appropriate to incorporate the said Explanation 2 in section 31(7) of the Act.

92 *Id.*, para 75.

93 *Id.*, para 92.

94 246th Report of the Law Commission of India.

95 *Ibid*.

Eventually the appeal preferred by *Hyder Consulting* came up for hearing before a two judge bench for disposal on merits in light of the law laid down by the larger bench. Dipak Misra J., after considering the decision rendered by the majority in *Hyder Consulting*[96] held that since the decision in *S.L.Arora* stood overruled, in *Hyder Consulting*,[97] "interest component payable to the appellant shall be computed in accordance with law laid down in *Hyder Consulting (UK) Ltd.* and not in accordance with *S.L. Arora* as that has been declared not good law."

VII SETTING ASIDE OF ARBITRAL AWARD

What constitutes "public policy of India" restated

In a landmark decision[98] rendered by a bench of two learned Judges, the Supreme Court enunciated the law with clarity while answering the vexed question as to what constitutes the "Public Policy of India" within the meaning of section 34(2)(b)(ii) of the Act. By a letter of award dated May14,1992, the appellant had awarded a Construction Work Contract in favour of the respondent for building a colony consisting of 7000 houses in Trilok Puri in the trans-Yamuna area. Though the work was to be completed within nine months, ultimately the work could be completed only in 34 months. The apellant made 15 claims before the learned Arbitrator appointed by the high court. By his award, the learned Arbitrator allowed the claims made by the appellant. The award was challenged by the respondent by filing an application under section 34 of the Act. By his judgement dated April 03, 2006 the learned single judge dismissed the objection petition and upheld the award. In an appeal preferred by the respondent under section 37 of the Act, a division bench of the high court by its judgement dated February 08, 2012 set aside the decision of the learned Single Judge on claims 9, 10, 11 and 15 negativing the claims in toto and scaled down the amounts claimed under claims 12 and 13 rendering "rough and ready justice". Before the division bench, the respondent therein however gave up its challenge to the award in respect of claims 2, 3 and 4.

Since the award in question was governed by Part-I of the Act, the court analyzing the scope of section 34 ruled that "none of the grounds contained in sub-section (2)(a) of Section 34 deal with the merits of the decision rendered by an arbitral award. It is only when we come to the award being in conflict with the public policy of India that the merits of an arbitral award are to be looked into under certain specified circumstances."

Referring to the earlier decisions in *Renusagar*[99] wherein the expression "public policy" appearing in section 7(1)(b)(ii) of the Foreign Awards (Recognition and Enforcement) Act, 1961 in the context of enforcement of a foreign award and in *ONGC*

96 *Supra* note 77.

97 *Ibid.*

98 *Associate Builders* v. *DDA* (2015) 3 SCC 49.

99 *Renusagar Power Co. Ltd.* v. *General Electric Co.* (1987) 4 SCC 137

v. *Saw Pipes*,[100] wherein the expression "public policy of India" as contained in section 34(b)(ii) of the Act was construed, the Court speaking through Rohinton Nariman, J. ruled that "it must clearly be understood that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or no evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts."[101]

In *Saw Pipes* case, construing the expression "public policy of India" in section 34, it was held that an award could be set aside if it is contrary to:

(a) fundamental policy of Indian law; or
(b) the interest of India; or
(c) justice or morality; or
(d) if it is patently illegal (illegality must go to the root of the matter).

Explaining the scope of each of the components that constitute the "public policy of India", the court held as under:

Re – Fundamental policy of Indian law

Reiterating that violation of the Foreign Exchange Regulation Act, 1973 and disregarding orders of superior courts in India would be regarded as being contrary to the fundamental policy of Indian law, it was held that three other distinct and fundamental juristic principles must also be understood as part and parcel of the fundamental policy of Indian law. These three principles were enunciated in earlier decision in *Saw Pipes*.[102] The first and foremost principle was that in every determination whether by court or other authority that affects the right of a citizen or leads to any civil consequences, the court or authority concerned is bound to adopt what is in legal parlance called a *'judicial approach'*. The second principle was that "a Court and so also a quasi-judicial authority must, while determining the rights and obligations of the parties before it, do so in accordance with the principles of natural justice" which would not only require compliance with the *audi alteram partem* rule but the court or the authority must also apply its mind to the attendant facts and circumstances while taking one view or the other as non-application of mind is a defect that is fatal to any adjudication and thirdly, "a decision which is perverse or so irrational that no reasonable person would have arrived at the same." Perversity or irrationality of decisions is tested on the touchstone of Wednesbury principle of reasonableness.

100 *ONGC* v. *Saw Pipes Ltd.* (2003) 5 SCC 705
101 *Id.*,para 33.
102 *ONGC Ltd.* v. *Saw Pipes Ltd.* (2014) 9 SCC 263

Re - Interest of India

It was in the context of a challenge to the validity of an award, the interest of Indian should concern itself with India as a member of the world community in its relations with foreign powers. It was however felt that this ground "may need to evolve on a case-by-case basis"

Re – Justice

An award can be said to be against justice only when it shocks the conscience of the court. What would shock conscience of the court would however depend upon the facts of the case. As an illustration, it was observed that "[a] claimant is content with restricting his claim, let us say to Rs. 30 lakhs in a statement of claim before the arbitrator and at no point does he seek to claim anything more. The arbitral award ultimately awards him Rs. 45 lakhs without any acceptable reason or justification. Obviously, this would shock the conscience of the court and the arbitral award would be liable to be set aside on the ground that it is contrary to "justice"[103]

Re – Morality

Referring to section 23 of the Contract Act and several authoritative judgments that have attempted to define the expression 'morality', the court ruled that "this court has confined morality to sexual morality so far as Section 23 of the Contract Act, 1872 is concerned, which in the context of an arbitral award would mean the enforcement of an award say for specific performance of a contract involving prostitution. "Morality" would, if it is to go beyond sexual morality necessarily cover such agreements as are not illegal but would not be enforced given the prevailing mores of the day. However, interference on this ground would also be only if something shocks the court's conscience."[104]

Re – Patent Illegality

The concept of patent illegality in an arbitral award would have to be understood under the following sub-heads: [105]

> (a) Contravention of the substantive law of India – "This must be understood in the sense that such illegality must go to the root of the matter and cannot be of a trivial nature."
> (b) Contravention of the Arbitration Act itself which would be regarded as patent illegality – "for example if an arbitrator gives no reasons for an award in contravention of Section 31(3) of the Act, such award will be liable to be set aside."
> (c) Contravention of Section 28(3) of the Act which mandates the tribunal to decide in accordance with the terms of the contract and taking into account the usages of the trade applicable to the transaction.
> It was however held that this concept would have to be understood

103 *Id.*,para 36.
104 *Id.*,para 39.
105 *Id.*, at 81.

> with a caveat that "[a]n Arbitral Tribunal must decide in accordance with the terms of the contract but if the arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no-fair-minded or reasonable person could do."

Applying the aforesaid principles, the court held that the division bench was not justified in interfering with the award that was upheld by the learned single judge as according to the court, the whole approach to set aside the arbitral award was incorrect and that the division bench had lost sight of the fact that it was not the first appellate court and hence could not interfere with the errors of facts. There was nothing in the award that shocked the conscience of the court even if the court felt that on certain aspects the award was unjust.

On the approach of the division bench that it had rendered "rough and ready justice" Nariman, J. observed "[w]e are at a complete loss to understand how this can be done by any court under the jurisdiction exercised under Section 34 of the Arbitration Act. As has been held above, the expression "justice" when it comes to setting aside an award under the public policy ground can only mean that an award shocks the conscience of the court." It cannot possible include what the court thinks is unjust on the facts of a case for which it then seeks to substitute its view for the arbitrator's view and does what it considers to be "justice". The whole approach to setting aside arbitral awards is incorrect. The division bench has lost sight of the fact that it is not a first appellate court and cannot interfere with the errors of fact.[106]

Can the tribunal determine the "reasonable price" ignoring the price agreed to by the parties

Whether it is competent for an arbitral tribunal to determine what it considered to be "reasonable price" for the tools that the parties had contracted for to be supplied by the appellants having already agreed to a price for such goods in the contract, was the question before the court in *Chebrolu*[107] case. Therein in pursuance of a scheme-"Adarna" launched by the Government of Andhra Pradesh under which certain tools for the trade necessary for Blacksmiths, Carpenters, Dhobis etc. were to be supplied to the rural artisans. The government decided to purchase the tools through A.P. Backward Classes Cooperative Financial Corporation Limited, a corporation set up by the government. The respondent-Corporation had invited quotations for supplying iron boxes, iron rings, boxes, buckets and bannas required in the process of washing clothes etc. The appellants had, in response to the said tenders, agreed to supply the said tools at certain rates which, according to appellant, were the lowest rate at which they were selling the tools of the same specification in the state of Andhra Pradesh.

106 *Id.*, para 56.

107 *Chebrolu Enterprises* v. *Andhra Pradesh Backward Class Cooperative Finance Corporation* (2015) 12 SCALE 207

Each of the appellants had given an undertaking to the corporation stating that the prices quoted for supply of the tools were the lowest possible prices and that nowhere in Andhra Pradesh the suppliers were selling those products at prices lower than the price quoted. They had also undertaken to refund the differential amount in the event it is found that the price quoted by them was higher than the price offered by them in the open market. After negotiations between the parties, the appellant had agreed to supply the tools @ Rs. 165/kg. in 6 coastal districts of Andhra Pradesh and @ Rs. 189.75/kg. for the remaining districts. These rates were exclusive of sales tax. After the tools were supplied by appellants, the Respondent-Corporation found that the appellants had breached their undertaking as they were selling the same tools at lower prices in Lal Market. Since the dispute arose between the parties, they were referred to the Arbitral Tribunal. The tribunal by its award dated March11, 2002 held that the suppliers were entitled to the price of the tools at Rs. 115/kg., held that the appellants were not entitled to recover the differential amount and were liable to pay the differential amount to the corporation with interest @ 6% p.a. w.e.f. 26.04.2001 when claims were filed till date of payment. A challenge to the award failed both before the trial court and the high court whereupon, the appellants approached the Supreme Court in a proceedings under article 136 of the Constitution of India.

Dismissing the appeal, the court, speaking through A.R.Dave J. held that "[t]he effect of the undertaking was that if the rate which had been quoted by the suppliers in their agreement was more than the rate at which the said tools were sold by them in the State of Andhra Pradesh, the suppliers would refund the excess of price charged by them to the respondent-corporation. The contract entered into by the suppliers on one hand and the respondent-corporation on the other was subject to the aforestated undertaking given by the suppliers. So, if the price quoted in the agreement is 'X' per kg. for the tools supplied by the suppliers but if the tools of the same specifications were being sold by the suppliers in the State of Andhra Pradesh for a price lower than 'X', say at price 'Y', the respondent-Corporation was supposed to pay rate 'Y' and not 'X', which had been agreed upon in the contract." The court further ruled that determination of price by the arbitral tribunal was a question of fact and that in the proceedings under section 34 of the Act and in appeal under section 37 of the Act, the court would not relook into findings of fact. The court "under Article 136 of the Constitution of India would not like to interfere with the concurrent finding of facts, save in exceptional circumstances or unless the finding is perverse."

Whether the interpretation of the contract by the tribunal would be a ground for challenge

Though an Arbitral Tribunal is mandated by section 28(3) of the Act to adjudicate upon the disputes referred to it in accordance with "terms of the contract", whether the award rendered by it could be challenged on the ground of misinterpretation of the terms of contract was the question involved in *NHAI*.[108] Appellant NHAI had awarded a contract in favour of the respondent for execution of work of widening of lanes and

108 *National Highway Authority of India* v. *ITD Cementation India Ltd.* (2015) 14 SCC 21

rehabilitation of the existing two lane carriage way in Vaniyambadi-Pallikonda section of NH-6 (from km 49.00 to km 100.00). The total value of the contract was appropriately Rs. 183.71 crores.

The FIDIC form of the terms and conditions were adopted by the parties in respect of the contract with certain changes which were termed as "Conditions of Particular Application (COPA).

Subsequent variation in prices on account of various factors including changes due to subsequent legislation after the said deadlines were provided for in clause 70 to 70.8 of COPA which *inter alia* dealt with price adjustment in accordance with the formula prescribed therein.

The Government of Tamil Nadu, in exercise of its powers under section 15 of MMDR Act, increased the seigniorage fee (synonymous to royalty) on stone, sand and earth by 30% with effect from November 01, 2002 i.e. after about one year of commencement of the work.

The respondent requested for price adjustment consequent upon increase in royalty in terms of clause 70.8 of COPA. The request was rejected by NHAI on the ground that the increase in royalty charges could not be paid separately as the same was already considered under the price adjustment formula being paid for general materials under clause 70.3 of COPA. The disputes were referred to arbitration. The arbitral tribunal comprising of the experienced engineers, in its award, unanimously found that the respondent had incurred additional cost due to change in rate of seigniorage fee pursuant to change in legislation and since the said increase in the rates had not been taken into account in the indexing of the inputs to the price adjust formula on general materials, the respondent was entitled to be paid the additional cost incurred by it.

The tribunal however held that since the material placed on record by the respondent lacked in particulars as to the precise additional cost it had incurred, the claim of the appellant, requiring NHAI to pay the difference in the rates of change of royalty for use of minerals by the respondent must be rejected. The quantification of the impact of the change in the rates of royalty was however left to be determined by the appellant NHAI. The award was challenged by NHAI before high court which rejected the challenge to the award observing *inter alia* that "[o]n the question of interpretation, the arbitrators noticed the relevant provisions and came to the conclusion that since the basket of materials whose cost variation is an input for filing WPI did not include minor minerals like earth, sand and aggregate used in heavy construction works, the additional cost of those specific materials did not include the full impact of the subsequent change in legislation. The arbitrators noted that WPI was a single index applicable uniformly in all the States while the increase in seigniorage fee varied from State to State depending upon the policies of the respective State Governments. The arbitrators also held that while the contractual provisions related to price adjustment as per clauses 70.1 to 70.7, the additional cost on account of a subsequent legislation had to be paid in full. Suffice it to say that the arbitrators not only looked into the provisions of the contract but also examined the issue like whether minor minerals used for construction of highways were or were not included in the basket of materials

whose cost variation is taken into consideration as an input in the assumption of the wholesale price index (WPI). Such being the position, simply because the interpretation placed by the arbitrators has not favoured one or the other party can be no reason for the court to interfere under section 34 of the Act with the award made on any such interpretation. It is fairly well settled by a long line of decisions rendered by the Supreme Court that a court dealing with a petition under Section 34 of the Arbitration and Conciliation Act, 1996 does not sit in an appeal over the arbitral award."[109]

The high court however agreed with the appellant NHAI on the second submission and remitted the matter to the Arbitral Tribunal on the limited issue of quantification of the amount.

The appellant NHAI thereafter challenged the said order of the high court before the Supreme Court. The court speaking though Uday U. Lalit, J., dismissed the appeal holding that "It is thus well settled that construction of the terms of a contract is primarily for an arbitrator to decide. He is entitled to take the view which he holds to be the correct one after considering the material before him and after ,interpreting the provisions of the contract. The court while considering challenge to an arbitral award does not sit in appeal over the findings and decisions unless the arbitrator construes the contract in such a way that no fair-minded or reasonable person could do." U.U Lalit J., finally held that "[i]n the backdrop of the law laid down by this Court, the construction of the terms of the contract by the Arbitral Tribunal is completely consistent with the principles laid down by this court. Upon construing the terms and the material on record it concluded that the instant matter would be covered by substantive part of clause 70.8 of COPA. It also noted that NHAI itself was of such opinion. The view so taken by the Arbitral Tribunal after considering the material on record and the terms of the contract is certainly a possible view, to say the least. We do not see any reason to interfere. The Division Bench in our considered view, was completely right and justified in dismissing the challenge."[110]

Jurisdiction of Courts in India in respect of Foreign Seated arbitral tribunals

Jurisdiction of the Courts in India to entertain a challenge to the validity of an award rendered by a foreign seated tribunal has engaged the attention of the Court on several occasions ever since pronouncement of the decision in *Bhatia International.*[111]

Although in a subsequent decision in *BALCO,*[112] a Constitution Bench of Supreme Court expressly overruled the decision in *Bhatia,* however since the decision was to apply prospectively i.e. in respect of any such contracts which were executed subsequent to pronouncement in *BALCO,* in respect of a series of cases involving arbitration agreements executed prior to decision in *BALCO,* the parties continued to invoke the jurisdiction of Indian Courts applying the principles in *Bhatia. Sakuma Exports,*[113]is

109 *Id.* at 35.

110 *Id.,* para 25,27.

111 *Supra* note 45.

112 *Supra* note 16.

113 *Sakuma Exports Ltd.* v. *Louis Dreyfus Commodities Suisse Sa* (2015) 5 SCC 656

one such case where the parties had executed the underlying contract as well as the arbitration agreement on Jaunary12, 2010, providing *inter alia* that all disputes arising out of the contract shall be referred to the Refined Sugar Association, London for settlement in accordance with their rules of arbitration and that the contract shall be governed by English Law. Yet, the final award rendered by the arbitral tribunal in London was challenged by *Sakuma Exports* in a petition under section 34 of the Act, in the High Court of Bombay. The challenge was repelled on the ground of lack of jurisdiction of Indian Court to entertain a challenge to a foreign award. The objection was accepted by the single judge of the high court and on appeal was upheld by a division bench. The appellant appealed to Supreme Court contending *inter alia* that their contract was based on the law laid down in *Bhatia International*,[114] to the effect that Part 1 of the Act would apply to international commercial arbitration held out of India unless the parties by agreement, expressly or impliedly, excluded all or any of its provisions.

The court approved the decision of the high court which ruled that "[i]t is clear from the terms and conditions which have been accepted by the parties in the purchase contract, read with Rule 8 that parties have accepted English law as the governing law of the contract; that the seat of the arbitration would be London; that disputes shall be settled according to the law of England which would include the resolution of disputes and that all proceedings shall take place in England. Alternatively, even if it were to be held that parties have not provided for the curial law governing the arbitration, the decision in *Bhatia International* does not prohibit the exclusion of the application of Part I on account of the proper law of the contract being a foreign law. Where the proper law governing the contract is expressly chosen by the parties, which they have done in the present case by selecting English law as the proper law of the contract, that law must, in the absence of an unmistakable intention to the contrary, govern the arbitration agreement. The arbitration agreement, though it is collateral or ancillary to the main contract is nevertheless a part of the contract. In an application for challenging the validity of an arbitral award under section 34, the court would necessarily have to revert to the law governing the arbitration agreement which, in our considered view, would be the law of England."

Shiva Kirti Singh, J., speaking for the court further opined that " The condition that the contract is subject to the Rules of the Refined Sugar Association, London which stand inserted in the contract and wordings of Rule 8 clinch the relevant issue in favour of the respondent and that we find no merit in the petition and the same is dismissed as such. No costs."

Whether a non-signatory to an arbitration agreement could be made amenable to jurisdiction of arbitral tribunal

Whether a person not being a party to the arbitration agreement and also not being a party to the arbitration proceedings could be called upon to make payment to

114 *Supra* note 45.

the sub-contractor on account of the failure on the part of the contractor appointed by the principal was the question in *Essar Oil*'s.[115] Therein, ONGC had awarded a contract in favour of Hindustan Shipyard Ltd. to carry out works of fabrication, skidding, sea fastening, transportation etc. at various stations located in the coastal areas of India. The contractor Hindustan Shipyard Ltd. was permitted to avail the services of other agencies for carrying out the works entrusted to it under the contract. The respondent-Hindustan Shipyard Ltd. had entered into a sub-contract with appellant Essar Oil Ltd.

In the process of carrying out the contract, a dispute arose between the appellant and the respondent as it was alleged that the appellant was not paid for the work executed by the respondent. The dispute was referred to an arbitral tribunal for adjudication. The tribunal by its award, by majority, held that there was no privity of contract between the appellant and ONGC and that ONGC was neither a party to the contract between the appellant and the respondent nor was it a party to the arbitration agreement or the arbitration proceedings and hence no direction could be given to ONGC to make payment to the appellant directly in respect of its entitlement if any from the respondent and hence the liability was on the respondent. The respondent challenged the validity of the award before the Principle District Judge, Vishakhapatnam under a petition filed under section 34 of the Act. The principal district judge confirmed the award and held against the appellant and remanded the matter to the tribunal with regard to the counter claims. This order was challenged by the respondent by way of an appeal before the high court. The high court allowed the appeal and set aside the award as well as the order passed by the principal district judge *inter-alia* on the ground that ONGC was a party to the contract and it ought to have been made a party before the Arbitral Tribunal. In appeal to the Supreme Court, analyzing the records including the correspondence between parties, partly between ONGC and the respondent, Dave, J. speaking for the court held

"It is true that ONGC had made payment to the appellant directly on several occasions. Upon perusal of the correspondence, we find that some understanding, but not amounting to any agreement or contract, was arrived at between ONGC and the respondent for making direct payment to the appellant, possibly because the respondent was not in a position to make prompt payments to the appellant. It also appears that on account of the delay in making payment to the appellant, the work of ONGC was likely to be adversely affected. ONGC was interested in getting its work done promptly and without any hassles. In the circumstances, upon perusal of the correspondence, which had taken place between ONGC and the respondent, it is clear that so as to facilitate the respondent, ONGC had made payments on behalf of the respondent to the appellant directly.Simply because some payments had been made by ONGC to the appellant, it would not be established that there was a privity of contract between ONGC and the appellant and only for that reason ONGC cannot be saddled with a liability to pay the amount payable to the appellant by the respondent."

115 *Essar Oil Ltd.* v. *Hindustan Shipyard Ltd.* (2015) 10 SCC 642

Noting that ONGC was not a party to the arbitration agreement nor was it a party to the arbitration proceedings, the court held that the majority view of the Arbitral Tribunal was correct and that the high court had committed an error by not considering these facts and by observing that the appellant will have to take legal action against ONGC for recovery of the amount payable to it. If one looks at the relationship between the appellant and the respondent, it is very clear that the respondent had given a sub-contract to the appellant and in the said agreement of sub-contract, ONGC was not a party and there was no liability on the part of ONGC to make any payment to the appellant. Moreover, there was no correspondence between the appellant and ONGC establishing contractual relationship between ONGC and the appellant. In the circumstances, ONGC cannot be made legally liable to make any payment to the appellant. As stated hereinabove, it was only for the sake of convenience and to get the work of ONGC done without any hassle, that ONGC had made payment to the appellant on behalf of the respondent without incurring any liability to make complete payment on behalf of the respondent.

The decision declined to recognize the well known concept of back to back contracts which are executed with full and complete knowledge of the status of the contracting parties and their responsibilities and obligations under the respective contracts. In fact, since the contracts are back to back, execution of the contract by the sub-contractor or the last contractor in terms of the sub contract *ipso facto* determines the responsibility of the contractor *vis a vis* the principal. Moreover, in all such cases the sub contracts are executed in full concurrence and knowledge of the principal. In such cases since the discharge by the performance of the sub contract also leads to discharge of the principal contract between the principal and the contractor, the principal could very well be made jointly liable with the contractor.[116]

Whether a contracting party could fall back on a deleted provision in the contract which stood novated

Whether a party to a contract having agreed to the deletion of a condition relating to payment of taxes in the contract though the initial offer had contained such a stipulation regarding reimbursement of amount of taxes paid by the contractor could an award which declined to grant such reimbursement be challenged under section 34(2)(b)(ii) of Act on the ground that award was opposed to Public Policy was the question in *Swan Gold.*[117]

The appellant Swan Gold, an Australian company, responded to a global notice inviting tender issued by the respondent.Though the global tender floated by the respondent provided that it shall be the responsibility of the successful bidder for

116 The following cases have recognized these principles - *Chloro Controls India (P) Ltd.* v. *Severn Trent Water Purification Inc.* (2013) 1 SCC 641, See observations, A.K.Ganguli, "Arbitration Law", XLIX *ASIL* 2013; *Larsen & Toubro* v. *Mohan Harbanslal Bhayana* (2015) 2 SCC 461,see observations, A.K. Ganguli, "Arbitration Law", L *ASIL* 2014.

117 *Swan Gold Mining Ltd*. v. *Hindustan Copper Ltd*. (2015) 5 SCC 739.

payment of all statutory duties, the appellant in its price bid stipulated that any excise duty/service taxes or any levy presently applicable or any variation or new levy in future was to be reimbursed by the respondent on actual basis. After several negotiation by parties, the respondent issued a work order on April14,2007 in terms of which the appellant remained responsible for payment of all taxes and duties. The clause relating to payment of taxes in the price bid was deleted by the appellant's representative on January19,2007.

The appellant however applied for reimbursement of the taxes paid by it. On the refusal by the respondent to make such payments, the dispute stood referred to the sole arbitrator who, by his award, rejected the claim of the appellant holding that the price bid of the appellant was not exclusive of the applicable taxes since the clause in the price bid relating to payment of taxes was deleted by appellant's representative on January19, 2009 and since the appellant had acknowledged the said work order and executed the same, the terms thereof were binding on the appellant.

A challenge to the validity of the award having failed before high court, the appellant, in its appeal to Supreme Court, relying upon the decision in *Saw Pipes*[118] contended *inter alia* that the parties had expressly agreed that the price bid shall be exclusive of the duties and taxes, deviation from which would not be permissible and the consequent award was liable to be set aside on the ground being unfair and unreasonable and also being opposed to Public Policy. Rejecting the contention, the court held that the work order and the contract were signed by both parties and that these documents clearly demonstrated that the appellant was liable for payment of duty and taxes which were inclusive of the bid price arrived at between the parties.

Rejecting the contention based on Public Policy,[119] the court, speaking through Eqbal J. held that "[t]he words "public policy" or "opposed to public policy", find reference in section 23 of the Contract Act and also section 34(2)(*b*)(*ii*) of the Arbitration and Conciliation Act, 1996. As stated above, the interpretation of the contract is matter of the arbitrator, who is a judge chosen by the parties to determine and decide the dispute. The court is precluded from reappreciating the evidence and to arrive at different conclusion by holding that the arbitral award is against the public policy."

Declining to examine the award on merits and partly interpretation of term of contract, Eqbal J. ruled that "[t]t is a well-settled proposition that the court shall not ordinarily substitute its interpretation for that of the arbitrator. Similarly, when the parties have arrived at a concluded contract and acted on the basis of those terms and conditions of the contract then substituting new terms in the contract by the arbitrator or by the court would be erroneous or illegal… It is equally well settled that the arbitrator appointed by the parties is the final judge of the facts. The finding of facts recorded by him cannot be interfered with on the ground that the terms of the contract were not correctly interpreted by him."[120]

118 *Supra* note 100.

119 *Associate Builders* v. *DDA* (2015) 3 SCC 49

120 *Id.*, para 11 and 12.

VIII AMENDMENTS

Though by the process of judicial interpretation, many of the lacunae in the 1996 Act could be remedied, however, it was perceived by all concerned that an appropriate legislative intervention was necessary not only to remedy the lacunae in the law but to bring about reforms in the law of arbitration following the experiences gained in the last two decades both in the working of the 1996 Act, and also in view of the transformation in international practices including changes brought about in the UNCITRAL Model Law by the United Nations General Assembly in 2006 by its resolution No. 61/33. In 2010 the Ministry of Law and justice issued a consultation paper, calling for suggestions from all the stakeholders and followed it up with conferences and debates held in various parts of the country. After collating the views from various stakeholders, the matter was referred to the Law Commission of India which dealt with the suggested amendments at length in its 246th report.[121]

The suggestion for extensive amendments of the Act, contained in the report of the Law Commission appears to have provided for the Government undertaking a comprehensive amendment of the Act in 2015. Unfortunately the amendment was brought in again by an ordinance bypassing the parliament. Unlike on the previous occasion[122] the Parliament has no opportunity to examine these changes through a select committee as is the practice. The ordinance was ratified by the parliament but without a parliamentary committee examining the pros and cons of these changes. The salient features of the changes brought about by the amending acts are as under.

(i) A significant change that has been introduced by the 2015 amendment is the amendment of Section 2(2) of the Act to bring it in consonance with Article 1(2) of the UNCITRAL Model Law. Though application of Article 8, 35, and 36 in respect of foreign seated arbitration are not expressly included in the amended provision, the law now expressly confers jurisdiction on the courts in India to order interim measures of protection in respect of foreign seated arbitrations during the arbitral proceedings.

Section 2(2) as amended provides that "[t]his Part shall apply where the place of arbitration is in India.

Provided that subject to an agreement to the contrary, the provisions of sections 9, 27 and clause (a) of sub-section (1) and sub-section (3) of section 37 shall also apply to international commercial arbitration, even if the place of arbitration is outside India, and an arbitral award made or to be made in such place is enforceable and recognised under the provisions of Part II of this Act"

While even after the amendment, the text of the provision does not exactly match article 1(2) of the UNCITRAL Model Law,[123] the law now in spirit gives effect to the UNCITRAL Model Law.

121 246th Report of the Law Commission of India.

122 The Arbitration and Conciliation (Amendment) Act, 2003.

123 The UNCITRAL Model Law was amended in 2006. Article 1(2) of the UNCITRAL Model Law now reads "The provisions of this Law, except articles 8, 9, 17 H, 17 I, 17 J, 35 and 36, apply only if the place of arbitration is in the territory of this State"

(ii) Section 17 of the Act which had incorporated *in verbatim* the provisions of Article 17 of the UNCITRAL Model Law has now been amended to widen the powers of the tribunal in line with the amendments to UNCITRAL Model Law which introduced a new chapter "4A" including Articles 17A-17J. The most significant change introduced in amendment to Section 17 is the provision for enforcement of the orders of interim measures issued by the Arbitral Tribunal on the footing that such orders be deemed to be an order of the court for all purposes.

(iii) Limiting the operation of interim measures and protections to ninety days (or such further time as the Court may determine) when a court passes such order before the commencement of arbitral proceedings.

A declaration to the effect that once the arbitral tribunal is constituted, the court shall not entertain an application for interim reliefs, unless the court finds that circumstances exist which may not render the remedy provided under section 17 efficacious. Thus, the power of the court has also been restricted to the extent the importance of the arbitral tribunal is enhanced while at the same time not leaving the parties without any remedy.

(iv) A new provision-Section 29A has been inserted into the Act, by the amendment, which provides that the award should be made within twelve months from the date the arbitral tribunal enters upon the reference failing which, the mandate of the arbitrator would terminate unless the parties by agreement extend the period for making the award for a period not exceeding six months. Thus a total timeline of 18 months has now been provided for concluding the arbitral proceedings and for making the award.

(v) The ground for challenging the appointment of arbitrator for lack of independence or lack of impartiality had been provided for in Section 12 of the Act in consonance with the provisions of Article 12 of the UNCITRAL Model Law. A new provision has now been added as Sub-section 5 to Section 12 which provides that "[n]otwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator". The Seventh Schedule lays down various circumstances which relate to the arbitrators' relationship with the parties or their counsel and the relationship of the arbitrator to the dispute, direct or indirect which would *per se* disqualify an arbitrator and he shall be ineligible to be appointed as an arbitrator. In addition, a further amendment to section 12 provides that the grounds stated in the newly introduced Fifth Schedule shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of the arbitrator. The Fifth Schedule virtually incorporates the circumstances listed in the Orange list of the IBA Guidelines on the Conflicts of Interest in International Arbitration. In addition, Section 12 requires the arbitrator to make a declaration in writing disclosing the circumstances mentioned in the Sixth Schedule as regards the relationship of the arbitrator with the parties or their counsel and also the relationship, if any, of the arbitrator to the subject matter of the dispute.

The advantages of these new provisions introduced into the statutes are manifold since these operate at the threshold of the arbitration proceedings, preventing colossal waste of time and money that would necessarily be involved if the arbitral proceedings were to be continued and concluded and the award is eventually challenged on these grounds.

(vi) Section 11 has been amended by insertion of Sub Section 14 therein which read with the Fourth Schedule to the Act, which provides a model fee structure payable to arbitral tribunal depending upon the "sum in dispute". Though the fee structure mentioned in the Fourth Schedule is intended only to provide guidelines to the parties and the Court, by an explanation, it has been clarified that the said Schedule shall not apply to "international commercial arbitration and in arbitrations (other than international commercial arbitration) in case where parties have agreed for determination of fees as per the rules of an arbitral institution."

(vii) Section 34, which provides for filling of application for setting aside arbitral awards has also been amended restricting the challenge to the award on the ground of conflict with the "public policy of India" only if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or it is in contravention with the fundamental policy of Indian law; or it is in conflict with the most basic notions of morality or justice.

It has further been clarified that the test as to whether there is a contravention with the fundamental policy of Indian law "shall not entail a review on the merits of the dispute". Similar changes have been brought about in Section 48 appearing in Part II of the Act that provides for enforcement of foreign awards.

(viii) Section 8, which dealt with the power of the court to refer the parties to arbitration where there is an arbitration agreement executed between the parties has now been widened to empower the Court to make the reference to arbitration at the instance of parties who may not be signatories to the arbitration agreement but are persons "claiming through or under" such signatories. The courts are further mandated to refer all such parties to arbitration if it is brought to the notice of the court that the action brought before it in a matter is the subject of an arbitration agreement unless "it finds that *prima facie* no valid arbitration agreement exists". This amendment has paved the way for multiparty arbitrations in respect of string contracts and has also restricted the scrutiny of the arbitration agreements by the court to only *prima facie* validity of such agreements. These are positive steps taken to encourage arbitration as a true alternative dispute resolution method.

(ix) By substituting the High Court and the Supreme Court in place of the "Chief Justice of the High Court" and "the Chief Justice of India" in Section 11 when parties fail to act in accordance with the arbitration agreement, and further declaring that "[t]he designation of any person or institution by the Supreme Court or, as the case may be, the High Court, for the purposes of this section shall not be regarded as a delegation of judicial power by the Supreme Court or the High Court" this amendment has set at rest the conundrum as to the true nature of the power of appointment of arbitrators and has also paved the way for institutional arbitrations in India.

(x) Taking note of the observations made by the Supreme Court in *National Aluminum Co. Ltd.*[124] and the unintended consequences arising out of lack of clarity in Section 36 that dealt with enforcement of arbitral award, Parliament has amended Section 36 first by declaring that by mere filing of application under section 34 by itself would not render that award unenforceable and further classifying that Court may grant, subject to such conditions as it may deem fit, stay of the operation of such award for reasons to be recorded in writing. The amendment has further clarified that the court shall, while considering the application for grant of stay of the operation of the arbitral award, be guided by the provisions for grant of stay of a money decree under the provisions of the Code of Civil Procedure, 1908.

IX CONCLUSION

The most significant change in the law relating to arbitration, in the year under review, undoubtedly was the Arbitration and Conciliation (Amendment) Act, 2015 passed by the Parliament. However, since the amendments were notified only at the very end of the year, i.e on December 31,2015, the impact of the amendments would be seen only in the next calendar year.

Though there had been considerable discussions and analysis of the proposed amendments at various levels, including by the Law Commission of India, which in its 246th Report had recommended several amendments, the Government strangely took the route of Ordinance to bring about such large scale changes in the Act by way of amendments, bypassing the Parliament and avoiding a close scrutiny by the Parliamentary Committees, as per the usual practice. This development raises some concern since the 1996 Act itself was introduced as the new law of arbitration repealing the 1940 Act, by an ordinance and was continued by the promulgation of successive ordinances till the parliament eventually adopted the law without any further scrutiny.[125] The clamor to alter the law started pouring in when the then Law Commission of India, in 2003, suggested large scale amendments to the Act.

As has been observed in this survey, some of the crucial amendments recommended by the Law Commission of India have been omitted despite the fact that these recommendations were made after taking note of a lacuna in the law pointed out by the courts. The Law Commission of India in its 246th Report had recommended *inter alia* the following amendments to section 31(7) with a view to legislatively cure the lacunae in the judgment of the Court in *S.L.Arora* the proposed explanation sought to clarify that "[t]he expression "sum directed to be paid by an arbitral award" includes the interest awarded in accordance with section 31(7)(a)." The Law Commission also made it clear that the Parliament had to legislatively overrule the decision in *S.L.Arora*.

However, first the Ordinance and next the Parliament, for reasons not known, excluded the suggested amendment by insertion of explanation 2 to section 31(7).

124 *National Aluminum Co. Ltd.* v. *Press Steel & Fabrications* (2004) 1 SCC 540

125 See AK Ganguli, "Arbitration Law", XLVI *ASIL* 2010.

Though, the judgment in *Hyder Consulting,*[126] discussed herein, delivered prior to the amendments, has brought some amount of clarity on the issue, the legislative arm of the Government missed the opportunity to settle the position of law. The omission may gain importance in light of the dissenting opinion of H.L.Dattu CJ., in *Hyder Consulting*. H.L.Dattu CJ., disagreed with the views expressed by the Law Commission and held that section 31(7) of the Act, as it then stood, did not contemplate the arbitral tribunal awarding compound interest, or interest upon interest and that the word "sum" in section 31(7) of the Act would only mean the "principle amount so awarded". The courts have yet to examine the issue after the amendment and as to whether the deliberate omission of Explanation 2 to ssection 31(7) in the suggested amendment warrants a different interpretation of the said provision.

In *Associate Builders* v. *DDA*, the court once again took upon itself the task of explaining what constitutes "Public Policy of India" and elaborated on each of the components of the "Public Policy of India" as enumerated in *Saw Pipes.*[127] However the amendments to section 34 by Act 3 of 2016 has introduced several new concepts like "fundamental policy of Indian Law", "most basic notions of morality and justice", moreover it is yet to be seen if the very purpose of introduction of explanation 2 to section 34(2)(b) i.e., "for avoidance of doubt" could be achieved by the mere declaration that "the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute" made in the said explanation. In *Saw Pipes* the court read into section 34 of the Act, Patent Illegality in the award as one of the grounds of challenge. Though the Court in *Associate Builders* has clarified the concept of Patent Illegality, by holding that the concept would have to be understood under the three sub-heads explained in the judgment, it would be a moot question as to whether despite section 34 being amended by Act 3 of 2016, which did not include "Patent Illegality" as a ground, the arbitration award would still be amenable to be tested with respect to the concept of patent illegality as explained in *Associate Builders* case.

The developments in the law relating to arbitration in the year under review though had been significant, the real change in the working of the law as reformed by the Amendment, Act 3 of 2016, is yet to be realized in the years to come.

126 *Hyder Consulting (UK) Ltd.* v. *State of Orissa* (2015) 2 SCC 189
127 *Supra* note 100.