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ARBITRATION LAW

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I INTRODUCTION

LIKE THE silences of the Constitution,[1] it is now well accepted that even in the realm of Arbitration law, there are silences, which are well perceived, recognized and enforced. In recognition of their impact on matters of public policies, the law of arbitration, though premised on the fundamental principle of party autonomy, admits of several exceptions like mandatory legislative provisions from which the parties cannot derogate. The law not only recognizes that arbitration is a consensual mode of adjudication of disputes between the contracting parties through a private forum of their choice but also encourages the contracting parties to resort to such alternative mode of resolution of their disputes, which is cost effective, less time consuming and also avoids overcrowding of dockets in the court of law. The contracting parties are therefore free to enter into agreements to arbitrate disputes that may arise from the contracts.

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1 Silence of the Constitutions: Gaps, 'abeyances' and political temperament in the maintenance of government, Michael Foley (Routledge, 1989, New York)

The author Michael Foley has chosen to describe the understanding of silences as "constitutional abeyances". The preface to the book describes the reason for the choice of the expression "constitutional abeyance" and it asserts, "This name was chosen because it accurately reflects the element of dormant suspension implicit in what appears to be quite explicit constitutional arrangements. In portraying constitutions, there is normally a pronounced emphasis upon declaratory acts of creation, upon stipulated frameworks of institutional organization, and upon enumerated allotments of power – all centering on an underlying premise of a constitutional settlement in which major sources of conflict over the nature of political authority and obligation have been decisively resolved and which the constitution embodies as a lasting monument…

Constitutional abeyances, by contrast, provide a much more equivocal view of constitutionalism. They do this by drawing attention to the continuing flaws, half answers and partial truths that are endemic in the sub structure of constitutional forms. Abeyances refer to those parts of a constitution that remain unwritten and even unspoken not only by convention, but also of necessity."

The Arbitration and Conciliation Act, 1996 (the Act) not only expressly recognizes but also provides for enforcement of the arbitration agreement.[2] Though the Act does not expressly provide for the exclusion of any disputes from the arbitral process, yet it recognizes that there are certain disputes which the law recognizes as not arbitrable. In terms of section 34(2) (b)[3] one of the grounds on which the court could set aside an award is, if the court finds that the "subject matter of the dispute is not capable of settlement by arbitration under the law for the time being in force". The law of arbitration thus recognizes that certain subject matters are incapable of settlement by arbitration. However, since the law does not expressly prescribe those subject matters, the courts by judicial interpretation have evolved the law on that subject. It is now well settled that the categories of disputes which are generally treated as non-arbitrable are: (i) disputes relating to rights and liabilities which give rise to criminal liability; (ii) matrimonial disputes; (iii) matters relating to guardianship and custody; (iv) insolvency and winding up; (v) testamentary matters; (vi) eviction or tenancy matters governed by special statutes; (vii) disputes relating to trust, trustees and beneficiaries arising out of trust deed and the Trust Act, 1882.

The present survey considers a significant question that fell for consideration by the highest court of the land as to whether an allegation of fraud, which has an element of culpability, would fall within such categories as spelt out by the decisions of the court as non-arbitrable. The question considered by the court is of great significance. The decision rendered is undoubtedly a pro-arbitration stance of the national judiciary, consistent with the contemporary thinking and the reforms introduced by the Parliament by large scale amendments introduced in the Act.

II ARBITRABILITY

Whether upon an application under section 8 of the Act, it was mandatory for the court to refer the parties to arbitration, by reason of the parties having stipulated in the partnership deed that disputes arising between partners shall be resolved by arbitration, even though the subject matter of the suit involved adjudication of allegations of fraud committed by the managing partner, was the question that came up for consideration before a two judge bench in *A. Ayyasamy*[4] case. The parties to the *lis* were five brothers who had entered into a partnership deed on April 1, 1994 for

2 Arbitration and Conciliation Act, 1996, see s.7 and 8.

3 S. 34: An arbitral award may be set aside by the Court only if:
…(b) the Court finds that— (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or…
See also, s. 48 also has a similar provision in respect of foreign awards reads: Conditions for enforcement of foreign awards… …(2) Enforcement of an arbitral award may also be refused if the Court finds that— (a) the subject-matter of the difference is not capable of settlement by arbitration under the law of India.

4 *A. Ayyasamy* v. *A Paramasivam* (2016) 10 SCC 386.

carrying on a hotel business which was started by their father. Disputes arose between them after the demise of their father. Four of the brothers filed a suit for a declaration that they were entitled to participate in the administration of the hotel business. They sought for a permanent injunction restraining the appellant from interfering with their right to participate in the administration of the business.

After receiving the summons in the suit, the appellant moved an application under section 8 of the Act objecting to the maintainability of the suit in view of the arbitration agreement contained in the partnership deed and sought for reference of the disputes to the arbitrator. The application was resisted by the respondents who were plaintiffs in the suit *inter alia* on the ground that the suit was founded upon allegations of fraud attributed to the appellant which could not be adjudicated upon in arbitration proceedings and that it was the civil court which ought to adjudicate upon such disputes. Relying upon an earlier decision of the court in *Radhakrishnan*'s[5] case, the trial court dismissed that application which order was affirmed by the high court by dismissing the revision petition preferred against it.

The question before the Supreme Court was whether in view of the nature of the plea of fraud taken in the suit, the courts below were justified in applying the law laid down in *Radhakrishnan*'s[6] case and declining to refer the disputes for adjudication by arbitration. Two significant pleas raised in the plaint in this regard were, that the appellant fraudulently signed a cheque for Rs.10,00,050 from the bank account of the partnership business in favour of his son without the knowledge and consent of other partners and thus siphoned off and misappropriated the amounts of common fund. It was further alleged that the day to day collections from the business were not deposited in the bank as was required by the appellant. The other allegation was that the house of the brother of the appellant's wife was raided by the Central Bureau of Investigation (CBI) which resulted in seizure of Rs. 45 lakhs in cash which he had alleged as belonging to the partnership business. The said statement was contested by the respondents as false, since the money did not belong to the partnership business.

Analysing sections 5, 8, 16 and 34, of this Act, the court emphasized that the scope of judicial intervention, in the cases where there is an arbitration clause, would be very limited and minimal. It was evident from section 16 that the arbitral tribunal had the power to rule on its own jurisdiction even when the very existence or validity of the arbitration agreement is questioned. The decision of the tribunal upholding its jurisdiction to arbitrate could not be assailed during the arbitration proceedings but only upon its culmination upon the award being delivered by the tribunal. The court however accepted that though there are no express provisions in the Act excluding any category of disputes as being non-arbitrable, sections 34(2)(b) and 48(2) of the Act did recognize that the subject matters of certain disputes are not capable of being

5 *N. Radhakrishnan* v. *Maestro Engineers* (2010) 1 SCC 72.

6 *Ibid.*

settled by arbitration. Referring to the earlier decisions of the court[7] which had detailed the nature of such disputes, the court then adverted to the question as to whether fraud is one such category that should be considered as non-arbitrable.

In *Abdul Kadir*[8] serious allegations of fraud being the subject matter of the suit, it wasconsidered as providing sufficient ground for not making a reference to arbitration. In that case, the court had relied on a decision of the Chancery Division in *Russell* v. *Russell*.[9] In *Russell*, one of the partners gave a notice for dissolution of a partnership. The other partner, (the partners were brothers) brought an action alleging various charges of fraud and claiming that the notice be declared void. The other partner, who was charged with fraud, moved the court for referring the matter to arbitration under the arbitration clause contained in the partnership deed. That application was resisted. The court held that "in a case where fraud is charged, the court will in general refuse to send the dispute to arbitration if the party charged with the fraud desires a public inquiry. But where the objection to arbitration is by the party charging the fraud, the court will not necessarily accede to it, and will never do so unless a prima facie case of fraud is proved."

The court then referred to *Radhakrishnan*[10] wherein a party seeking reference of the dispute therein to arbitration by filing an application under section 8 of the Act had made serious allegations against the respondents of having committed malpractices in the account books and manipulation of the finances of the partnership firm. The court therein had held that such a case cannot be properly dealt with by the arbitrator and ought to be settled by the court, through detailed evidence led by both parties.

The court, observing that "mere allegation of fraud in the pleadings by one party against the other cannot be a ground to hold that the matter is incapable of settlement by arbitration" elaborated upon the nature of the allegations of fraud which would render a dispute non-arbitrable. The court held that "[t]he allegations of fraud should be such that not only these allegations are serious that in the normal course these may even constitute criminal offence, they are so complex in nature and the decision on these issues demands extensive evidence for which the civil court should appear to be more appropriate forum than the Arbitral Tribunal". The court then observed that the judgment in *N. Radhakrishnan*[11] not touch upon this aspect and particularly when the allegations of fraud therein were of a serious nature.

Referring to the oft quoted decision rendered by another division bench in *Booz Allen,*[12] the court, quoted with approval the following passage which provides the rationale for holding certain disputes as non arbitrable, "[e]very civil or commercial

7 *Booz Allen & Hamilton Inc.* v. *SBI Home Finance Ltd.* (2011) 5 SCC 532.

8 *Abdul Kadir Shamsuddin Bubere* v. *Madhav Prabhakar Oak*, AIR 1962 SC 406.

9 (1880) LR 14 Ch D 471.

10 *Supra* note 5.

11 *Ibid*.

12 *Supra* note 7.

dispute, either contractual or non-contractual, which can be decided by a court, is in principle capable of being adjudicated and resolved by arbitration unless the jurisdiction of the Arbitral Tribunals is excluded either expressly or by necessary implication. Adjudication of certain categories of proceedings are reserved by the legislature exclusively for public fora as a matter of public policy. Certain other categories of cases, though not expressly reserved for adjudication by public fora (courts and tribunals), may by necessary implication stand excluded from the purview of private fora. Consequently, where the cause/dispute is in arbitrable, the court where a suit is pending, will refuse to refer the parties to arbitration, under Section 8 of the Act, even if the parties might have agreed upon arbitration as the forum for settlement of such disputes."[13]

Reference was also made to the observation made by the Law Commission of India in its 246th Report,[14] highlighting the divergence of views among the courts on the question of arbitrability of certain disputes. The court noticed that in *Swiss Timing*[15] a designated judge while exercising his jurisdiction under section 11 of the Act had held that the decision of the court in *Radhakrishnan* was *per incuriam*, on the ground that the said decision did not take into consideration the decision in *Anand Gajapati Raju*.[16] Subsequently another bench in *Associated Contractors*[17] had clarified that *Swiss Timing*[18] was a decision rendered by the designated judge while dealing with an application under section 11(6) of the Act and that the decision rendered in exercise of the power of appointment of arbitrator conferred under the said provision could not be deemed to have "precedential value" and as such could not be deemed to have overruled the judgment in *Radhakrishnan*. The court in *Ayyasamy*[19] affirmed the view taken in *Associated Contractors*.[20]

Upon an elaborate consideration of the subject as evolved through judicial precedent, Sikri J. in his opinion held that, "[i]t is only in those cases where the court, while dealing with Section 8 of the Act, finds that there are very serious allegations of fraud which make a virtual case of criminal offence or where allegations of fraud are so complicated that it becomes absolutely essential that such complex issues can be decided only by the civil court on the appreciation of the voluminous evidence that needs to be produced, the court can sidetrack the agreement by dismissing the application under Section 8 and proceed with the suit on merits. It can be so done also

13 *Id*. at 533.

14 *Available at* : http://lawcommissionofindia.nic.in/reports/report246.pdf (last visited on Aug.10, 2017).

15 *Swiss Timing Ltd.* v. *Commonwealth Games 2010 Organizing Committee* (2014) 6 SCC 677.

16 *P. Anand Gajapati Raju* v. *PVG Raju* (2000) 4 SCC 539.

17 *State of West Bengal* v. *Associated Contractors* (2015) 1 SCC 32.

18 *Supra* note 15.

19 *Supra* note 4.

20 *Supra* note 17.

in those cases where there are serious allegations of forgery, fabrication of documents in support of the plea of fraud or where fraud is alleged against the arbitration provision itself or is of such a nature that permeates the entire contract… …the Statutory scheme of the Act… …does not specifically exclude any category of cases as non-arbitrable. Such categories of non-arbitrable subjects are carved out by the courts, keeping in mind the principle of common law that certain disputes which are of public nature, etc. are not capable of adjudication and settlement by arbitration and for resolution of such disputes, courts, *i.e.,* public fora, are better suited than a private forum of arbitration."

Applying the tests laid down to the facts that obtained in *Ayyasamy,*[21] the court held that, "the allegations of purported fraud were not so serious which cannot be taken care of by the arbitrator" and allowed the application of the defendant under section 8 thereby relegating the parties to arbitration and appointed Prabha Shridevan J., retired judge of the High Court of Madras, as the arbitrator. D. Y. Chandrachud J though delivered a concurring opinion, the reasoning adopted therein however goes a step further and are not mere supplementation of the views expounded by Sikri J.

Referring to the decisions rendered by the courts in England and the US Chandrachud J appears to concur with the philosophy that, when the contracting parties are men of commerce, they invariably intend that all their disputes be resolved by a single forum namely arbitration irrespective of the fact that the process of adjudication may involve determination of claims of fraudulent inducements, bribery, misrepresentations, or non-disclosure etc. This is evident from his assertion that "arbitration must provide a one stop forum for resolution of disputes". Emphasizing the duty of court while performing the duties of judicial decision making, Chandrachud J held that, "[t]he basic principle which must guide judicial decision-making is that arbitration is essentially a voluntary assumption of an obligation by contracting parties to resolve their disputes through a private tribunal. The intent of the parties is expressed in the terms of their agreement. Where commercial entities and persons of business enter into such dealings, they do so with a knowledge of the efficacy of the arbitral process. The commercial understanding is reflected in the terms of the agreement between the parties. The duty of the court is to impart to that commercial understanding a sense of business efficacy."

But the question still remained as to what should be the approach of the court when the subject matter of arbitration involves adjudication of allegations concerning criminal wrongdoing. Emphasizing that the judgment in *Radhakrishnan's* [22] case should not be held to have laid down a broad proposition that a mere allegation of fraud is ground enough not to compel parties to abide by their agreement to refer disputes to arbitration Chandrachud J cautioned that, "[m]ore often than not, a bogey of fraud is

21 *Supra* note 4.

22 *Supra* note 5.

set forth if only to plead that the dispute cannot be arbitrated upon" and hence, "[t]he burden must lie heavily on a party which avoids compliance with the obligation assumed by it to submit disputes to arbitration to establish [that] the dispute is not arbitrable under the law for the time being in force." Even in such cases where an objection on the ground of fraud is raised, Chandrachud J opined that it would be "for the judicial authority to carefully sift through the materials for the purpose of determining whether the defence is merely a pretext to avoid arbitration. It is only where there is a serious issue of fraud involving criminal wrongdoing that the exception to arbitrability carved out in *N. Radhakrishnan* may come into existence." This is indeed a landmark decision that has cleared the clouds of doubts and disputes in the matter of arbitrability of disputes that involve adjudication of allegations of fraud.

Contrasting view: Arbitrator can consider allegation of fraud

Whether in a proceeding under section 11(6) of the Act, was it obligatory for the designated judge to rule on the arbitrability of the disputes in view of the allegation made by the respondent that the contract itself was vitiated by reason of fraud before relegating the parties to arbitration the question that arose in respect of a decision rendered by the designated judge was back in September 2006 in *Meguin GmbH* [23] though the decision came to be reported only in the year under review. The petitioner, was a German company and the respondent was a company having its registered office at Bombay. It was not in dispute that there existed an arbitration clause in the contract entered into by and between the parties therein and that the arbitration proceedings were to be held in Bombay. The respondent had moved the High Court of Bombay for appointment of an arbitrator, but the high court opined that it had no jurisdiction in the matter and the respondent did not challenge that order before the Supreme Court.

Subsequently, the petitioner filed a petition in the Supreme Court under section 11(6) of the Act seeking the appointment of an arbitrator. The petition was resisted by the respondent on the ground that the contract was vitiated by fraud. The designated judge, S. B. Sinha J held that the, "[a]rbitrator can go into the matter whether entire contract is vitiated by alleged commission of any fraud on part of either of the parties to contract. Even jurisdiction of arbitrator can be gone into by arbitral tribunal itself."

The designated judge neither decided the question of arbitrability of the disputes nor did he consider the question as to whether the resistance to reference at the instance of the respondent was sustainable on the principles laid down in *Russell* v. *Russell* [24]and whether the petitioner was entitled to seek reference of the disputes to arbitration. However, since all the questions including the question of jurisdiction of arbitrator to

23 *Meguin GmbH & Co.* v. *Nandan Petrochem Ltd.* (2016) 10 SCC 422, though the judgment in this case was delivered way back on Sep. 5, 2006, it was reported only in 2016.

24 (1880) LR 14 Ch D 471.

adjudicate upon said dispute was also left open for the decision of the tribunal, these issues, have not found any place in the order passed by the Designated Judge.[25]

Whether disputes arising out of trust deed are arbitrable?

It is well settled that a valid arbitration agreement ousts the jurisdiction of civil courts and the parties to such agreement are bound to seek resolution of such disputes arising out of such agreement through arbitration. Section 28 of the Contract Act, 1872 which declares that agreements in restraint of legal proceedings be void, contains an exception – the arbitration agreement.

Thus, a valid arbitration agreement would have the effect of denuding the court of its jurisdiction. Such an agreement would have to be strictly construed and must fall within the four corners of the law which recognizes such agreement. The Supreme Court was called upon to adjudicate upon the question in *Vimal Kishore Shah*[26] as to whether disputes arising out of rights and obligations under a trust-deed would be arbitrable even if the trustees are held to be signatories to the trust deed.

Therein, one Dwarkadas Lakshmidas had executed a family trust deed on April 6, 1983. The trust was for the benefit of six minors when the trust deed was executed. To manage the affairs of the trust and its properties, the settler had also appointed two persons named therein as managing trustees.

Clause 20 of the trust deed which dealt with the resolution of disputes *inter se* trustees and beneficiaries provided *inter alia* that "every dispute or differences regarding the interpretation of any of the clauses or provisions or the contents of the Trust Deed or any dispute inter se trustees or disputes between the trustees and beneficiaries or disputes between beneficiaries *inter se* as and when arise, the same would be resolved in pursuance of the provisions of the Indian Arbitration Act, 1940 and the decision of arbitrator(s) shall be final and binding on the parties to the arbitration."

It appears, that the differences amongst the beneficiaries, led to the resignation of one of the trustees from the trusteeship and eventually, followed by exchange of legal notices, led to the demand of reference of the disputes to arbitration in terms of clause 20 of the trust deed. Since the parties could not settle their disputes amicably, one set of beneficiaries filed an application under section 11 of the Act before the High Court of Bombay seeking reference of the disputes for arbitration in terms of clause 20. This application was resisted by the other set of beneficiaries *inter alia* on the ground that the application was not maintainable since the beneficiaries were not signatories to the trust deed and hence could not be treated as parties to the arbitration agreement.

25 The editors of SCC have noted that the view herein is impliedly overruled by *A. Ayyasamy* to the extent that it does not distinguish between mere allegations of fraud and serious allegations of fraud.

26 *Vimal Kishore Shah* v. *Jayesh Dinesh Shah* (2016) 8 SCC 788.

The designated judge allowed the application holding *inter alia* that though the beneficiaries were not signatories to the trust deed as they were minors when the said deed was executed, they all become major when the application was filed and hence would be deemed to be "party" to the arbitration agreement within the meaning of section 2(1)(h) and appointed a former Mumbai City Civil Judge to act as the sole arbitrator for deciding the disputes. On appeal to the Supreme Court, the basic question raised for consideration was whether clause 20 in the trust deed could be regarded as an arbitration agreement within the meaning of section 2 read with section 7 of the Act.

Relying upon the decision in *Vijaykumar Sharma*[27] in which the question was whether an arbitration clause in a will could be considered as an arbitration agreement and which was answered in the negative,[28] a two judge bench speaking through Sapre J held that, "[w]e are therefore of the view that there is no arbitration agreement between the parties and the learned designate committed a serious error in allowing the application under sections 11 and 15(2) of the Act and holding that there is an arbitration agreement between the parties to the dispute and appointing an arbitrator."

The court considered the issue from another angle, *i.e.,* whether the trust deed could be held to be the result of a bargain between the trustees and the beneficiaries, *i.e.,* a proposal given by one set of parties, and acceptance thereof by the other set of parties and held that, "[i]ndeed, in such case, the trustees or/and beneficiaries are only required to carry out the provisions of the trust deed. There cannot, therefore, be any agreement inter se trustees or beneficiaries to carry out any such activity. If that were to be so then the trustees/beneficiaries would have to give proposal and acceptance in respect of each clause of the trust deed *inter se*. It would be then a sheer absurdity and hence such situation, in our view, cannot be countenanced"

The court also considered the question whether, having regard to the nature of the disputes that arose under a trust deed, relating to management of the trust *etc.,* could be held to be arbitrable. Examining the scheme of the Trust Act,1882 and following the Constitution Bench decision of *Dhulabhai,*[29] Speaking for the court, Sapre J held that, "[w]hen we examine the Scheme of the Trust Act in the light of the principle laid down in condition No. 2, we find no difficulty in concluding that though

27 *Vijaykumar Sharma* v. *Raghunandan Sharma* (2010) 2 SCC 486.

28 The court also considered the judgment of the High Court of Calcutta in *Bijoy Ballav Kundu* v. *Tapeti Ranjan Kundu*, AIR 1965 Cal 628, "we agree that the clause in an agreement, which provides for deciding the disputes arising out of such agreement through private arbitration, affects the jurisdiction of the Civil Court and the ouster of jurisdiction of Courts cannot be inferred readily. The Arbitration Act is one such law, which provides for ouster of jurisdiction of the Civil Courts. The Act, inter alia, provides a forum for deciding the disputes inter se parties to an agreement through arbitration. Such clause, in our opinion, requires strict rule of interpretation to find out whether it provides an ouster of jurisdiction and, if so, to which Court/Tribunal/Authority as the case may be."

29 *Dhulabhai* v. *State of M.P.* (1968) 3 SCR 662.

the Trust Act do not provide any express bar in relation to applicability of other Acts for deciding the disputes arising under the Trust Act yet, in our considered view, there exists an implied bar of exclusion of applicability of the Arbitration Act for deciding the disputes relating to Trust, trustees and beneficiaries through private arbitration."

Finally the court ruled that "the disputes relating to Trust, trustees and beneficiaries arising out of the Trust Deed and the Trust Act are not capable of being decided by the arbitrator despite existence of arbitration agreement to that effect between the parties."

Validity of arbitration agreement to be decided before appointment of arbitrator

Where the arbitration agreement between the parties is denied by the respondent, whether the chief justice or his designate, in exercise of their powers under section 11 of the Act could appoint an arbitrator without first deciding the question of the validity of the agreement leaving it open to the arbitrator to decide was the question that came up for consideration in *Velugubanti Hari Babu*.[30]

Therein the respondent alleged that the appellant who is the owner of a plot of land measuring 15.53 acres, and the respondents entered into a Memorandum of Understanding (MoU) on May 27, 2013. The MoU *inter alia* provided that the respondents shall resolve certain disputes that were pending between the appellant and certain other persons with respect to the land in question. It is alleged that in return the appellant would sell 50% of the land to the respondents at the rate of Rs. 1 crore per acre. According to the respondents, they paid a sum of Rs. 7 crores as token money to the appellant.

It is further asserted that in the MoU, the parties stipulated a term agreeing that if any dispute arises in connection with the enforcement of the terms of the MoU, the same shall be resolved through an arbitrator to be appointed by both the parties with their mutual consent. On December 11, 2013, the respondents sent a letter to the appellant alleging *inter alia* that since disputes have arisen between them in relation to the execution of the MoU, the respondents appointed one Sanyasi Rao retired district judge as an arbitrator to decide the disputes.Having received no response from the appellant, the respondents filed a petition before the High Court of Andhra Pradesh invoking the provisions under section 11(5) and 11(6) of the Act for appointment of an arbitrator.

While the said arbitration application was pending before the high court, the respondents also initiated proceedings under section 9 of the Act before the Principal Sessions Judge, Rajahmundry for grant of an injunction restraining the appellant from alienating the property which was the subject-matter of the MoU. The appellant contested the application and denied the very execution of the MoU by him.

30 *Velugubanti Hari Babu* v. *Parvathini Narsimha Rao* (2016) 14 SCC 126.

The appellant also contested the arbitration petition filed by the respondents before the high court under sections 11(5) and 11(6) of the Act and *inter alia* denied that he had executed the MoU. In fact the appellant took the stand that the MoU in question was a forged and fabricated document and that he never entered into such an agreement.

The chief justice exercising powers under sections 11(5) and 11(6) of the Act allowed the application and appointed a former judge of the high court to act as the sole arbitrator to adjudicate all the disputes raised by the parties. Without deciding the question of validity of the arbitration agreement and the MoU, the chief justice recorded the following reasons:[31]

> I am of the view that the legality and validity of the memorandum of understanding and also the arbitration agreement can also be examined by the learned arbitrator on taking evidence in this matter, particularly, under Section 16 of the said Act. As I notice and taking prima facie material, such question cannot be adjudicated conclusively by me effectively and it would be proper for the learned arbitrator to do so. I, therefore, appoint Mr. Justice B. Prakash Rao, a retired Judge of this Court as sole arbitrator to adjudicate all the disputes raised by the parties. If the plea of existence and validity of the aforesaid memorandum of understanding is taken on any ground and so also the arbitration agreement, such pleas have to be adjudicated together with other pleas.

On appeal to the Supreme Court, the court observed that the question involved in the case was no more *res integra* and has already been answered by the Constitution Bench in *SBP and Co.*[32] and subsequently reiterated in *National Insurance Co. Ltd.*[33] and in *Bharat RasiklalAshra.*[34] While setting aside the order passed by the Chief Justice of the High Court of Andhra Pradesh, the court observed that, "[i]t is really unfortunate that the learned Chief Justice while deciding the application did not take note of any of these decisions and passed the impugned order which is apparently against the law laid down in these decisions."

Following the earlier decisions in *SBP and Co.* and *Bharat Rasiklal Ashra* cases, it was held that there were three categories of preliminary issues that may arise for consideration in an application under section 11 of the Act and they are (*i*) issues which the chief justice or his designate is bound to decide (*ii*) issues which he can also decide, that is, issues which he may choose to decide; and (*iii*) issues which should be left to the arbitral tribunal to decide.

31 *Id*. at 129.

32 *SBP* v. *Patel Engineering* (2005) 8 SCC 618.

33 *National Insurance Co.* v. *Boghara Polyfab* (2009) 1 SCC 267.

34 *Bharat Rasiklal Ashra* v. *Gautam Rasiklal Ashra* (2012) 2 SCC 144.

The first category of issues, which the chief justice/his designate will have to decide are:

(a) Whether the party making the application has approached the appropriate high court?
(b) Whether there is an arbitration agreement and whether the party who has applied under Section 11 of the Act, is a party to such an agreement?

The court therefore set aside the direction given in the order passed by the chief justice that the arbitrator shall decide the legality and validity of the agreement/MoU.

Sapre J speaking for the court held that, "such directions issued by the high court are plainly against the law laid down by this Court in three decisions quoted above. Indeed, the High Court ought to have decided the questions itself and recoded a finding as to whether the MoU dated 27-5-2013 is a valid and genuine document or it is a forged and fabricated document and then depending upon the findings, appropriate directions, if necessary, should have been passed for disposal of the application finally. Unfortunately, it was not done."

The court ultimately remanded the case back to the designated judge to decide the question of legality, validity and genuineness of the agreement/(MoU) in question on its merits on the basis of pleadings and evidence of the parties keeping in view the law laid down by the court in the three decisions.

III REFERENCE TO ARBITRATION

Application seeking extension of time to file written statement does not exclude a subsequent application under section 8

An application under section 8 of the Act, for reference of the disputes pending before the court to arbitration is required to be made "not later than when submitting his first statement on the substance of the dispute." In *Greaves Cotton*[35] the respondent had filed a civil suit seeking a decree for certain amount towards loss and damages allegedly suffered by it on account of breach of contract on the part of the respondent. In the meantime the respondent claimed from the appellant payment of the outstanding dues of more than Rs. 1 crore. After receiving the summons in the suit, the appellant filed an application seeking extension of time for eight weeks to file the written statement. The appellant also invoked the arbitration clause contained in the agreement between the parties by issuing a separate communication to the respondent. The respondent denied the claims made by the appellant and also objected to the invocation of the arbitration clause on the ground of pendency of the civil suit. Thereafter, the

35 *Greaves Cotton Ltd.* v. *United Machinery & Appliances* (2017) 2 SCC 268.

appellant filed an application under section 5 read with section 8[36] of the Act seeking reference of the disputes forming the subject matter of the suit for arbitration. The high court, which had issued summons in the suit in its original side, rejected that application on the ground that the appellant, by moving the earlier application for extension of time to file the written statement, waived its right to seek arbitration. On appeal, the Supreme Court set aside the order holding *inter alia* that by mere filing of an application seeking further time of eight weeks to file the written statement did not amount to the applicant "submitting his first statement on the substance of the dispute". The court referred to its decision in *Rashtriya Ispat Nigam*[37]wherein the expression "first statement" appearing in section 8 was construed thus, "[t]he expression "first statement on the substance of the dispute" contained in section 8(1) of the 1996 Act must be contradistinguished with the expression "written statement". It employs submission of the party to the jurisdiction of the judicial authority. What is, therefore, needed is a finding on the part of the judicial authority that the party has waived its right to invoke the arbitration clause. If an application is filed before actually filing the first statement on the substance of the dispute, in our opinion, the party cannot be said to have waived its right or acquiesced itself to the jurisdiction of the court. What is, therefore, material is as to whether the petitioner has filed his first statement on the substance of the dispute or not, if not, his application under Section 8 of the 1996 Act, may not be held wholly unmaintainable….."

Though reference was also made to the earlier decision in *Booz Allen and Hamilton Inc.,*[38] however the interpretation of the said provision was somewhat different. Therein, the court interpreting the expression "first statement" held as under:[39]

> not only filing of the written statement in a suit, but filing of any statement, application, affidavit by a defendant prior to the filing of the written statement will be construed as "submission of a statement on the substance of the dispute", if by filing such statement/application/ affidavit, the defendant shows his intention to submit himself to the jurisdiction of the court and waives his right to seek reference to arbitration. But filing of a reply by a defendant, to an application for temporary injunction/attachment before judgment/ appointment of Receiver, cannot be considered as submission of a statement on the substance of the dispute, as that is done to avoid an interim order being made against him

36 *Supra* note 2, see sub-s (1) of s. 8 as it stood prior to Oct. 23, 2015 provided that, "(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."

37 *Rashtriya Ispat Nigam* v. *Verma Transport* (2006) 7 SCC 275.

38 *Supra* note 7.

39 *Id*. at 543.

The court however felt that merely moving an application seeking time of eight weeks to file written statement would not amount to making a first statement on the substance of the dispute. P.C. Pant J speaking for the court held: "filing of an application without reply to the allegations of the plaint does not constitute first statement on the substance of the dispute. It does not appear from the language of sub- section (1) of section 8 of the 1996 Act that the Legislature intended to include such a step like moving simple application of seeking extension of time to file written statement as first statement on the substance of the dispute."

While remanding the matter back to the high court for a fresh decision, the court observed that since the high court did not decide whether there was an arbitration agreement between the parties, whether the disputes which were the subject matter of the suit, fell within the scope of arbitration and whether the relief sought in the suit could be adjudicated upon and granted in arbitration proceedings, the high court should decide these questions as well.

Court is obliged to refer the parties to arbitration under the mandate of section 45 in respect of an arbitration agreement governed by the New York Convention

Whether two Indian companies could, by agreement, exclude the operation of the Indian Law of arbitration and refer their dispute to be adjudicated upon under the English law by designating the place of arbitration in London, was the question that was canvassed before the Supreme Court in *Sasan Power Ltd.*[40] However, on an analysis of the facts, the court came to the conclusion that the arbitration agreement was not strictly between two Indian companies and that the agreement also involved an American Company and hence the question sought to be canvassed did not arise for its consideration. Therein, Sasan Power, a company registered under the laws of India, entered into a contract with North American Coal Corporation, an American company, for mining and development operations in India. Under Agreement I, the American company agreed to provide certain consultancy and other services in respect of a mine to be operated by the appellant Sasan Power. This agreement stipulated *inter alia* that the governing law of the agreement shall be the laws of the United Kingdom and that the disputes arising out of the agreement between the parties shall be resolved by arbitration to be administered by International Chambers of Commerce (ICC) and that the place of arbitration shall be London.

Subsequently, the appellant, Sasan Power, the American company and the respondent, North American Coal Corpn. (India) Ltd. a wholly owned subsidiary of the American company, entered into Agreement II. By that agreement, the American company purported to assign all its rights and obligations under Agreement I to the subsidiary Indian company with the consent of Sasan. By reason of the said assignment of rights and obligations of the American company in favor of the Indian subsidiary it

40 *Sasan Power Ltd.* v. *North American Coal Corporation* (2016) 10 SCC 813.

was contended that the resultant Agreement II became an agreement between the two Indian companies and therefore in terms of the arbitration agreement contained in Agreement I, the two Indian companies could not bypass their rights and obligations under the laws of India and refer their disputes to be adjudicated upon in London with the governing law being English law.

This contention was rejected on two counts. First, that no such contention was raised at the oral hearing of the case and was introduced only subsequently in the written submissions filed later. Second that the so called assignment of the rights and liabilities of the American company under Agreement I did not result in assignment of "burden of the contract" to the Indian company and that the rights and obligations flowing out of Agreement II between the three parties were interdependent. The court however did not analyse the precise nature of the rights and obligations as it was not called upon to decide these question.

The matter reached the Supreme Court by reason of the fact that subsequent to the execution of Agreement II, disputes arose between Sasan Power and the Indian subsidiary of the American company. Sasan filed a suit in the court of the District Judge, Singrauli claiming various reliefs including a declaration that clause 10.2 of Agreement I was null, void, inoperative and unenforceable.

The American company was not impleaded as a party to the suit though the declaration of illegality sought was in respect of clause 10.2 which was part of Agreement I and to which only Sasan Power and the American company were parties. In the said suit, the Indian subsidiary filed two applications. One, under Order VII Rule 11(d) CPC read with section 45 of the Act for referring the disputes to arbitration and an application for vacating the order of injunction passed by the court earlier.

Upon contest, the applications were allowed and the suit was dismissed against which, Sasan carried an appeal before the high hourt which also did not succeed. Hence Sasan approached the Supreme Court. In that background on the question whether the suit was maintainable or barred by section 48 of the Act, Chelameshwar J held that the, "scope of enquiry (even) under the section 45 is confined only to the question whether the arbitration agreement is "null and void, inoperative or incapable of being performed" but not the legality and validity of the substantive contract… …The case of the appellant as disclosed from the plaint is that Article X, Section 10.2 is inconsistent with some provisions of the Indian Contract Act, 1872, and hit by section 23 of the Indian Contract Act, 1872 (as being contrary to public policy). It is a submission regarding the legality of the substantive contract. Even if the said submission is to be accepted, it does not invalidate the arbitration agreement because the arbitration agreement is independent and apart from the substantive contract. All that we hold is that the scope of enquiry under the Section 45 does not extend to the examination of the legality of the substantive contract." Finally Chelameswar J held that the judicial authorities were bound to "refer the dispute between the parties to arbitration and are precluded under Sections 8 and 45 from adjudicating the dispute".

Sapre J rendered a concurring opinion holding that the "execution of Agreement-II has not resulted in substituting or rescinding or extinguishing Agreement-I. On the other hand, it recognized the existence of Agreement-I and resulted in its amendment

by adding some new clauses and one party." Sapre J also held that section 45 is in the nature of a mandatory provision and Court was bound to give full effect to the same. In his opinion "[m]ere reading of Section 45 would go to show that the use of the words "shall" and "refer the parties to arbitration" in the section makes it legally obligatory on the court to refer the parties to the arbitration once it finds that the agreement in question is neither null and void nor inoperative and nor incapable of being performed. In other words, once it is found that the agreement in question is a legal and valid agreement, which is capable of being performed by the parties to the suit, the Court has no discretion but to pass an order by referring the parties to the arbitration in terms of the agreement."

IV APPOINTMENT OF ARBITRATORS

In *TBEA Shenyang Transformers*[41] the question was whether supply of allegedly defective transformer pursuant to a contract between the parties and encashment of a bank guarantee by reason of such defective supply gave rise to a live dispute which warranted adjudication thereof by arbitration. Therein the parties had entered into contract December 24, 2007 for supply of transformers and certain other electrical equipment which were necessary for the purpose of settling up the transformer. According to the respondent, the transformer supplied by the petitioner were found to be defective and the defects were brought to the notice of the petitioner. Though the petitioner agreed to replace the defective parts, the respondent encashed the bank guarantee given by the petitioner. The petitioner approached the district court by filing an application under section 9 of the Act which was rejected by the court. An appeal from the said order preferred by the petitioner before the high court also stood dismissed. Being aggrieved by the order passed by the high court dismissing the appeal, the petitioner filed special leave petition (SLP) before the Supreme Court which also came to be dismissed on October 7, 2013 as the Supreme Court did not find any infirmity in the order of the high court. Thereafter, the petitioner filed a petition under section 11(6) of the Act for appointment of an arbitrator to adjudicate upon the disputes on merits. The respondent resisted the application contending that there was no dispute which would require adjudication by an arbitrator since the bank guarantee was invoked by reason of the defects in the material supplied by the petitioner and said action was upheld by all courts. The designated judge did not accept the said contention as, in his opinion, there was a dispute between the parties with regard to the quality of the materials supplied by the petitioner. The learned Judge also noted that through the representatives of both the parties attempted to resolve their disputes ultimately they did not succeed as the respondent has invoked the bank guarantee. The judge therefore

41 *TBEA Shenyang Transformers Group Company Limited* v. *AWTOM Projects India Limited* (2016) 15 SCC 722.

allowed the application under section 11(6) of the Act, and appointed a former chief justice of High Court of Delhi as the sole arbitrator and to complete the arbitration proceedings preferably within six months.

Ex-Parte appointment of arbitrator

Under the Arbitration and Conciliation (Amendment) Act, 2015 enacted by the Parliament, significant reforms were introduced in the law of arbitration. Several anomalies that had crept into the Act by reason of departure from the UNCITRAL Model Law have also been rectified by the amending Act.[42] One of the significant changes that were introduced in the law of arbitration with effect from October 23, 2015 was substitution of the expression "The Chief Justice or any person or institution designated by him" by "Supreme Court or, as the case may be, the High Court". The confusion with regard to the nature of the power that the chief justice was expected an exercise while appointing an arbitrator has also been clarified and also that the appointment of a particular institution to appoint arbitrators would not be considered delegation of judicial power.[43] It has also introduced a new provision that mandates the Supreme Court or the case may be, the high court or the person or institution designated by such court to seek disclosure in writing from the prospective arbitrator in terms of sub section (1) of section 12 of the Act before appointing an arbitrator.

In *Purple India Holdings,*[44] a petition under section 11(6) of the Act was filed before the Supreme Court for appointment of an arbitrator by reason of failure on the part of the respondent to nominate an arbitrator in terms of the arbitration agreement between the parties.

The arbitration agreement *inter alia* provided that "[a]ny and all disputes, controversies or claims (the "Dispute") arising out of or in connection with this Engagement Letter, … …shall be settled amicably by mutual consensus, failing which by arbitration to be conducted in accordance with the provision of the Indian Arbitration and Conciliation Act, 1996, as amended (the "Arbitration Act")." After the disputes have arisen between the contracting parties, the petitioner had called upon the respondent by its letter dated January 28, 2015 to name an arbitrator. However, the respondent failed to do the needful. The petitioner thereupon filed an application under section 11(6) of the Act. The respondent did not appear before the court to contest the prayer made in that application. The court, therefore, treated the averments made in the petition as correct and then proceeded to appoint a former judge of the Supreme Court to act as the sole arbitrator to adjudicate upon the disputes between the parties.

What is significant is though the arbitration agreement contemplated that the arbitral tribunal shall consist of three members – two of the parties were to appoint

42 For example amendment of ss. 2 and 9.

43 *Supra* note 2, s. 11(6B).

44 *Purple India Holding Ltd.* v. *Drilling & Offshore* (2016) 7 SCC 583.

one arbitrator each and thereafter the two arbitrators were to appoint the third, yet the court appointed a sole arbitrator in place of a three member tribunal and that too in the absence of the respondent's consent for the same. Sub-ection 6 of section 11 also requires a court to appoint an arbitrator where under an appointment procedure agreed upon by the parties, if a party fails to act as required under the procedure. The decision does not disclose if the parties, after execution of the engagement letter on October 24, 2013 which contained the arbitration agreement between the parties laying down the appointment procedure as stated above, had modified that agreement subsequently by substituting appointment of a sole arbitrator in place of a tribunal consisting of three members.

India being the venue for arbitration chosen by foreign entities confers jurisdiction in Supreme Court to appoint arbitrator

The decision of the Supreme Court in *Mears Group Inc.*[45] demonstrates that though the contracting parties were foreign entities, yet they chose India as the venue for their arbitration and their disputes being adjudicated upon in accordance with the Indian law - Arbitration and Conciliation Act, 1996.[46] Therein the respondent, a company incorporated in Turkey was awarded a contract for construction of a pipeline by the Gas Transmission Company Limited, Bangladesh. The petitioner was a company incorporated in the United States. The respondent had on April 16, 2012 issued a letter of intent in favour of the petitioner for performing horizontal directional drilling works for six river crossings under the said project in Bangladesh. Clause 24 of the work order contained an arbitration agreement between parties which contemplated adjudication of the disputes and differences between them by a sole arbitrator in accordance with the provisions of the (Indian) Arbitration and Conciliation Act, 1996 and that the "venue" of arbitration shall be New Delhi, India. Disputes having arisen between the parties, which could not be settled, the petitioner invoked the arbitration clause and suggested the names of two former judges of High Court of Delhi for appointment of the sole arbitrator. Since the respondent did not respond to the request, the petitioner approached the Supreme Court by filing an application under section 11(5) of the Act. On being satisfied that the disputes that have arisen between the parties which could not be settled by mutual negotiation, the court appointed a former judge of the Supreme Court to act as the sole arbitrator in terms of the arbitration agreement.

45 *Mears Group Inc.* v. *Femas Insaat A.S* (2017) 2 SCC 429

46 Over the years, arbitration law has significantly changed in India. The Government of India has taken several measures to develop and promote India as an arbitration hub. The availability of trained arbitrators and competent counsel and the change in the attitude of the Judiciary towards arbitration have led to foreign entities choosing India as a seat of arbitration. The instant case is a step forward for India eventually becoming a hub for arbitration in South Asia.

Whether while referring the parties to arbitration no findings on the merits is warranted

Two interesting question came up for consideration by the court in *Rajesh Verma*[47] in an appeal by special leave from the orders passed by the designated judge of the high court, exercising powers under section 11 of the Act. The first question was, whether while, referring the existing disputes being resolved by arbitration, was the court justified in recording its findings on the merits of the disputes and thus limiting the powers of the arbitral tribunal to be bound by those findings? The court rightly answered the question in the negative and held that such findings recorded by the designated judge were beyond the scope of his powers under section 11 of the Act.

A.M. Sapre J speaking for the court stated the law in these terms, "[i]t is a settled principle of law that jurisdiction of court under section 11 of the Act is limited and confined to examine as to whether there is an arbitration agreement between the contracting parties and, if so, whether any dispute has arisen between them out of such agreement which may call for appointment of arbitrator to decide such disputes. Once it is held that disputes had arisen between the parties in relation to agreement which contained an arbitration clause for resolving such disputes, the court should have made reference to the arbitrator leaving the parties to approach the arbitrator with their claim and counterclaim to enable the arbitrator to decide all such disputes on the basis of case set up by the parties before him. In this case, we find that the learned Single Judge did exceed his jurisdiction on this issue and hence interference to this extent is called for."

The other question related to the choice of the arbitrator made by the designated judge while referring the disputes for adjudication by the arbitral tribunal. The designated judge had referred the dispute for adjudication by an advocate acting as the sole arbitrator. The counsel for the appellant felt aggrieved by the choice of the arbitrator made by the designated judge though no reasons were assigned for raising such objection. All that was suggested by the counsel was that "any retired Judge would have been more preferable for appointment to act as an arbitrator in place of any lawyer."

The bench speaking through Sapre J acceded to the request made by the counsel for the appellant observing that "in view of the reservation expressed by the appellant regarding the choice of an advocate arbitrator by the High Court, we feel that it is just and proper that a retired Judge should be appointed in his place as an arbitrator to resolve the disputes" and accordingly appointed a retired judge of the high court to act as the sole arbitrator.

This is an important arena which clearly comes in conflict with the international practice in the realm of arbitration. The views expressed by several experts[48] clearly

47 *Rajesh Verma* v. *Ashwani Kumar Khanna* (2016) 12 SCC 678.

48 *Available at*: http://www.financialexpress.com/archive/column-professionalise-indian-arbitration/1286068/ last visited on Nov.11, 2017.

demonstrate that international arbitral tribunals predominantly consist of lawyers are the inevitable choice made by the parties for constitution of the arbitral tribunal while seeking adjudication of their disputes, primarily by reason of their ability to effectively conclude and complete the proceedings in a time bound manner and also in rendering their awards soon thereafter. Now that India aspires to challenge the Asian competitors who have pioneered quick and successful resolution of arbitral disputes and to create an arbitration hub in this country, this is one arena that would require a serious rethinking by all stakeholders.

V OTHER LEGISLATIONS AND MECHANISMS

Bar under section 69 of Partnership Act does not apply to arbitration

The object of section 69 of the Partnership Act, 1932 is to confer a legal status upon a Partnership business or partnership firm and to afford protection to strangers dealing with the firm. All the relevant information of a firm registered under the Act, including the names of the partners, their shares *etc*. is placed in the public domain. It also confers protection to partners who may be sued by third parties for unlimited liability.

Whether the expression "other proceedings" appearing in section 69(3) of the Partnership Act, 1932 includes arbitral proceedings and if so whether the bar imposed against enforcement of contractual rights by or against an unregistered firm and its partners would also apply to such proceedings, was the question in *Umesh Goel*'s[49] case.

The question arose under the following factual background of the case: A housing cooperative society invited tenders for construction of residential units and awarded the contract in favor of the appellant. A dispute arose between the parties which were referred to arbitration by a sole arbitrator at the instance of the contractor appellant. Claims and counterclaims were raised by the parties before the sole arbitrator. The respondent, though resisted the claim of the claimant/appellant, did not specifically raise any plea of the bar under section 69 of the Partnership Act, 1932 or that the appellant was an unregistered firm.

The sole arbitrator considered the respective claims and counterclaims and passed an award allowing the claim of the appellant to the extent of Rs. 1,36,24,886.08 along with interest at 12% from June 1, 2002 till the date of the award and further interest at 18% per annum from the date of the award till its payment. The arbitrator rejected the contention that the bar under section 69 of the Partnership Act, 1932 operated insofar as counterclaim preferred by the appellants were concerned.

The award was challenged by the respondent by an application under section 34 of the Act filed before the High Court of Delhi. The application of the respondent

49 *M/s Umesh Goel* v. *Himachal Pradesh Cooperative Group Housing Society Ltd.* (2016) 11 SCC 313

came to be dismissed, and a review petition filed against the said order was also dismissed. The single judge also rejected the plea of the bar of section 69 of the Partnership Act, 1932.

The respondent challenged the orders by way of appeal under section 37 of the Act, which was allowed by a division bench of the high court. The division bench took the view that the counterclaims made by the appellant in the arbitration proceedings were covered by the expression "other proceedings" appearing in section 69(3) of the Partnership Act, 1932 and hence the bar contained therein operated against such proceedings.

The appellant approached the Supreme Court by filing a SLP. Strong reliance was placed by the parties on the earlier decision rendered by a bench of four judges in *Jagdish Chander.*[50] In that case arising out of the Arbitration Act, 1940 considering the scope of section 69(3) of the Partnership Act, 1932, Hidayatullah J speaking for the court held that, "[t]he proceeding under the eighth section of the Arbitration Act has its genesis in the arbitration clause, because without an agreement to refer the matter to arbitration that section cannot possibly be invoked. Since the arbitration clause is a part of the agreement constituting the partnership it is obvious that the proceeding which is before the court is to enforce a right which arises from a contract. Whether we view the contract between the parties as a whole or view only the clause about arbitration, it is impossible to think that the right to proceed to arbitration is not one of the rights which are founded on the agreement of the parties." And finally construing the expression "other proceedings" appearing in section 69(3) concluded that " the words 'other proceeding' in sub- section (3) must receive their full meaning untramelled by the words 'a claim of set-off'. The latter words neither intend nor can be construed to cut down the generality of the words 'other proceeding'. The sub-section provides for the application of the provisions of sub-ss. (1) and (2) to claims of set-off and also to other proceedings of any kind which can properly be said to be for enforcement of any right arising from contract except those expressly mentioned as exceptions in sub-s. (3) and sub-s. (4)." The two judge bench in *Umesh Goel*'s case distinguished the larger bench decision in *Jagdish Chander* case following another decision rendered by a division bench of two judges in *Kamal Pushp.*[51]

In *Kamal Pushp*[52] the two-judge bench, speaking through Doraiswamy Raju J referring to the larger bench decision in *Jagdish Chander* observed that, "[t]his Court ultimately construed the words 'other proceedings' in sub-section (3) of Section 69 giving them their full meaning untrammelled by the words 'a claim of set off', and held that the generality of the words 'other proceedings' are not to be cut down by the

50 *Jagdish Chander Gupta* v. *Kajaria Traders (India) Ltd.*, AIR 1964 SC 1882: (1964) 8 SCR 50.

51 *Kamal Pushp* v. *D.R. Construction Co.* (2000) 6 SCC 659.

52 *Ibid.*

latter words. The said case, being one concerning an application before court under section 8(2) of the Arbitration Act, 1940 in the light of the arbitration agreement, this court finally held that since the arbitration clause formed part of the agreement constituting the partnership the proceeding under Section 8(2) was in fact to enforce a right which arose from a contract/agreement of parties… …The prohibition contained in Section 69 is in respect of instituting a proceeding to enforce a right arising from a contract in any court by an unregistered firm, and it had no application to the proceedings before an Arbitrator and that too when the reference to the Arbitrator was at the instance of the appellant itself. If the said bar engrafted in Section 69 is absolute in its terms and is destructive of any and every right arising under the contract itself and not confined merely to enforcement of a right arising from a contract by an unregistered firm by instituting a suit or other proceedings in Court only, it would become a jurisdictional issue in respect of the Arbitrators power, authority and competency itself, undermining thereby the legal efficacy of the very award, and consequently furnish a ground by itself to challenge the award when it is sought to be made a rule of Court……Consequently, the post award proceedings cannot be considered by any means, to be a suit or other proceedings to enforce any rights arising under a contract. All the more so when, as in this case, at all stages the respondent was only on the defence and has not itself instituted any proceedings to enforce any rights of the nature prohibited under Section 69 of the Partnership Act, before any Court as such."

Finally the two judge bench in *Umesh Goel* also distinguished the decision in *Jagdish Chander* on the ground that the scheme of the 1996 Act was completely different from the scheme under the Arbitration Act, 1940 and also the nature of the arbitration proceedings contemplated under that Act. Ibrahim Kalifulla J speaking for the court observed that "[t]he definition of 'Court' under section 2(c) read along with sections 8 and 21 of the 1940 Act, therefore, indicates that the proceedings initiated under the said Sections are virtually in the nature of a suit in a civil court having jurisdiction, though such proceedings are relating to initiation as well as superintendence of arbitration proceedings such as appointment of an arbitrator or umpire or inaction or neglect on the part of arbitrator or umpire or the incapacity of the arbitrator or umpire, death of an arbitrator or umpire or even in situations where the agreement has not provided for or not intended to supply the vacancy or the parties or the Arbitrator fail to supply the vacancy or the parties or the Arbitrator who are required to appoint an umpire and they fail to carry out their obligation" Kalifulla J finally assigned the following reasons for distinguishing the larger bench decision in *Jagdish Chandra:*[53]

> We have therefore no hesitation to hold that the ratio laid down in Jagdish Chander case (supra) does not in anyway conflict with the view which we have taken herein, having regard to the advent of the

53 *Supra* note 49 at 329.

> 1996 Act, under which the nature of Arbitration Proceedings underwent a sea change as compared to the 1940 Act, what isstated in Jagdish Chander case (supra) can have application in the special facts of that case and that it can have no application to a proceedings which emanated under the 1996 Act, for which the interpretation to be placed on Section 69(3) will have to be made independently with specific reference to the provisions of the 1996 Act, where the role of the Court is limited as noted earlier to the extent as specified in Sections 8, 9 etc.

On those reasonings the appeal challenging the judgment of the division bench was allowed and the decision rendered by the single judge was restored. It is seen that the purpose and the objective of section 69 of the Partnership Act as already noticed remains unchanged despite the changes in the law of Arbitration. Although the court in *Jagdish Chander*[54] did not rest its conclusion on the fundamental objective of section 69, but on the construction of section 69, the decision therein fulfilled the objective. That purpose has not been considered either in *Kamal Pushp*[55] or in the present case under review. There is however a significant point of distinction in the 1996 Act when contrasted with the legal position that obtained in 1964 when *Jagdish Chander*[56] was decided and that is the express statutory mandate contained in Section 16(1) which provides that "an arbitration clause which forms part shall be treated as an agreement independent of the other terms of the contract"

In contrast, Hidayatullah J views in *Jagdish Chander*[57] rested primarily on the reasoning that the arbitration clause is only a part of the principal contract and that, "It is impossible to think that the right to proceed to arbitration is not one of the rights which are founded on the agreement of the parties". It does not appear that this point of view was canvassed before the court and hence has not been examined by the court.

Award rendered by permanent in house administrative machinery set up by government falls outside the Arbitration Act

To subserve the larger public interest, on the suggestion of the Department of legal affairs, Government of India, the committee of secretaries suggested that a permanent machinery for arbitration be set up in the Department of Public Enterprises to settle all commercial disputes between Public Sector Enterprises/Public Sector Undertakings *inter se* and between PSE and government departments excluding disputes concerning Income Tax, Customs and Excise. Eventually permanent

54 *Supra* note 50.
55 *Supra* note 51.
56 *Supra* note 50.
57 *Ibid*.

machinery for arbitration was put in position outside the framework of the Arbitration Act which *inter alia* laid down the following procedure, "The Arbitration Act, 1940 shall not applicable to the arbitration under this clause. The award of the sole arbitrator shall be binding upon the parties to the dispute. Provided, however, any party aggrieved by such award may make a further reference for setting aside or revision of the award to the Law Secretary, Department of Legal Affairs, Ministry of Law and Justice, Government of India. Upon such further reference, the dispute shall be decided by the Law Secretary, whose decision shall bind the parties finally and conclusively"

Since the public sector undertakings chose to sidestep the procedure and continued to take recourse to legal proceedings, in 1995 the Supreme Court in *ONGC*[58] case taking note of the fact that such legal proceedings initiated by the PSUs involve considerable public expenses, resulting in the waste of valuable time of court directed the government to "set up a committee consisting of representatives from committee consisting of representatives from the Ministry of Industry and Commerce, Bureau of Public Enterprises and the Ministry of Law to monitor disputes inter se Public Sector Undertakings and with the Government to ensure that no litigation came to the Courts and Tribunals without the matter having being first examined by the Committee for grant or refusal of clearance for litigation." Pursuant to the said directions, a Committee on Disputes headed by the Cabinet Secretary was constituted by the government. Subsequently, in another case concerning ONGC,[59] the court clarified its previous order to the effect that in the absence of a clearance from the committee, the courts would not proceed with the case but a suit could be instituted by a public sector undertaking to save limitation. In yet another case of ONGC,[60] the court directed for constitution of another committee to look into the disputes between Central Government and state government entities. Subsequently, the order came to be further clarified in *Oriental Insurance.*[61] In *Bharat Petroleum*[62] the court noticed that the working of the committee of disputes had failed and consequently reference was made to a larger bench. A five judge bench in *Electronics Corporation,*[63] referring to all its previous orders, eventually recalled all its previous orders having noticed that despite best efforts of the committee of disputes, the mechanism did not achieve the results for which it had been constituted and had instead lead to delays in litigation and loss of revenue. The Government of India in the meantime had issued a consolidated guidelines for setting up the permanent machinery of arbitration for settlement for commercial disputes and specifically instructed PSEs, CPSEs, banks

58 *Oil and Natural Gas Commission* v. *Collector of Central Excise* (1995) Supp 4 SCC 541.

59 *ONGC* v. *Collector of Central Excise* (2004) 6 SCC 437.

60 *ONGC* v. *Collector of Central Excise* (2007) 7 SCC 39.

61 *Commissioner of Income Tax* v. *Oriental Insurance* (2008) 9 SCC 349.

62 *Commissioner of Central Excise* v. *Bharat Petroleum* (2010) 13 SCC 42.

63 *Electronics Corporation of India* v. *Union of India* (2011) 3 SCC 404.

etc. to incorporate a clause for arbitrations to be conducted under the permanent machinery of arbitration in all current and future contracts/ agreements specifically excluding the Act, 1996.[64]

In *Northern Coalfields Ltd.*[65] the court was called upon to consider *inter alia* the following questions: Whether a suit filed by a PSE challenging an arbitral award rendered in pursuance of the proceedings conducted in accordance with the guidelines laid down for the Permanent Machinery of Arbitration for Settlement was maintainable and, if so, whether the proceedings in the civil suit could be continued in the absence of clearance by the committee on disputes? A two-judge bench presided over by T.S. Thakur CJI after a detailed analysis of the developments that led to the setting up of the said permanent machinery of arbitration ruled that:[66]

> The Permanent Machinery of Arbitration was outside the statutory provision then regulating arbitrations in this country namely Arbitration Act, 1940 (10 of 1940).
>
> The award made in terms of the Permanent Machinery of Arbitration being outside the provisions of the Arbitration Act, 1940 would not constitute an award under the said legislation and would therefore neither be amenable to be set aside under the said statute nor be made a rule of the court to be enforceable as a decree lawfully passed against the judgment debtor.
>
> The Committee on disputes set up under the orders of this Court in the series of orders passed in ONGC cases did not prevent filing of a suit or proceedings by one PSE/PSU against another or by one Government department against another. The only restriction was that even when such suit or proceedings was instituted the same shall not be proceeded with till such time the Committee on Disputes granted permission to the party approaching the Court.
>
> The time limit fixed for obtaining such permission was also only directory and did not render the suit and/ or proceedings illegal if permission was not produced within the stipulated period.

On the agreement of the counsel for the parties, the court referred the matter for resolution by arbitration by a sole arbitrator and appointed K.G. Balakrishnan J former Chief Justice of India as the arbitrator. While making a fresh reference to arbitration,

64 On distinction between an expert determination and arbitration see *Russell on Arbitration*, 21st Edn., at 37, para 2-014 quoted with approval in *K.K.Modi* v. *K.N.Modi* (1998) 3 SCC 573 at 584.

65 *Northern Coalfields Ltd.* v. *Heavy Engg. Corpn. Ltd.* (2016) 8 SCC 685.

66 *Id.* at 701.

the court acknowledged that "the alternative to such arbitration is a long drawn expensive and cumbersome trial of the suit filed by the appellant before a civil court and the difficulties that beset the execution of an award made under a non-statutory administrative mechanism." Thus, eventually, arbitration is considered by the court to be more effective and efficacious remedy and hence should be resorted to by the litigants in preference to resolution of disputes by initiation of proceedings in courts.

VI TIME LIMIT ON PROCEEDINGS

Strict adherence to time limit under the 1940 Act

The very object of resolution of disputes by arbitration is to render such proceedings both time and cost effective. In fact, success of the arbitral process depends entirely on its expeditious and satisfactory disposal – the reason why the contracting parties should prefer to arbitrate and not litigate.

Though the Arbitration Act, 1940 had been the subject matter of great criticism for its inability to secure acceptability and finality to the arbitral process by permitting court intervention at several stages of such proceedings including after pronouncement of the award, it had one salutory principle which deserved to be appreciated *i.e.,* its mandate to the arbitral tribunal to render their award within 4 months after entering on the reference or after have been called upon to act by notice in writing by any party to the arbitration agreement or within such extended time as the court may allow.

The 1996 Act did not however prescribe any such time limit primarily due to the fact that the UNCITRAL model law of arbitration based on which the law eventually came to be enacted[67] did not contain any such mandate to the arbitral tribunal. However, working of the Act in the last two decades prompted the Parliament to amend the law by introducing a new provision in the Act[68] mandating the tribunal to conclude the arbitration proceedings within a time frame. The change was obviously based on the experience gained in the working of the statute in the past two decades.

The *Electrical Manufacturing Company's,*[69] case which arose under the 1940 Act, demonstrates the approach of the court towards arbitration generally and its lack of tolerance towards attempts to unduly delay the arbitral proceedings. Therein NTPC

67 A.K.Ganguli, "Arbitration Law", XLVIII *ASIL* 28 (2012); A.K.Ganguli, "Arbitration Law", XLVI *ASIL* 31 (2010); A.K. Ganguli, "International Commercial Arbitration and Enforcement of Foreign Awards in India" in Bimal N. Patel (ed.), *India and International Law* 319 (Martinus Nijhoff Publishers, 2005).

68 S. 29A, introduced by the Arbitration and Conciliation (Amendment) Act, 2015 mandates that the arbitration shall be concluded within a period of 12 months from the date of entering reference.

69 *Electrical Manufacturing Company Ltd.* v. *Power Grid Corporation of India Ltd.* (2016) 8 SCC 667.

Limited (NTPC – the predecessor of the respondent Power Grid Corporation of India Limited), a Government of India company had awarded a contract to the appellant for setting up a 400 KVA transmission lines power package for Rihand-Kanpur-Eta-Kanpur line. Clause 26 of the contract provided for resolution of disputes between the parties through arbitration. However, before the arbitral process could be commenced, the dispute or difference between the owner and the contractor was required to be first referred for settlement by the engineer who, within a period of 30 days after being requested by either party to do so, was required to give written notice of his decision to the parties. The arbitration clause also provided that after the engineer had given a written notice of his decision to the parties and no claim to arbitration is communicated to him by either party within 30 days from the receipt of such notice, the said decision shall become final and binding.

Clause 26(4), which provided for reference of such disputes to arbitration provided as under:

> 26.4. In the event of the Engineer failing to notify his decision as aforesaid within thirty (30) days after being requested as aforesaid, or in the event of either the Owner or the Contractor being dissatisfied with any such decision, or within thirty (30) days after the expiry of the first mentioned period of thirty (30) days, as the case may be, either party may required that the matters in dispute be referred to arbitration as hereinafter provided.

The contract was completed and the aforesaid transmission line was taken over by NTPC. However, there was some dispute between the parties. The appellant had addressed a letter to the executive director of NTPC seeking its decision in respect of pending disputes between the parties. On the failure of the engineer to notify his decision within the stipulated period, the appellant invoked clause 26(4) of the contract and nominated one Shri JC Jain as his arbitrator. The appellant requested NTPC to appoint its arbitrator and to intimate the President of the Engineers Institute of India for appointment of the third arbitrator. Eventually the Engineers Institute of India appointed one P.P. Aggarwal, Chief Consulting Engineer, Water and Power Consultancy Engineers (India) as the second arbitrator and on the same day one Som Gupta was appointed as third arbitrator by the President, Institution of Engineers (India). On January 13, 1993, the tribunal held its first sitting. Thereafter the appellant filed its statement of claims. In the third meeting of the tribunal, though the appellant was present, respondent was absent. Though some counsel appeared on behalf of the respondent, he apparently did not have the authority to proceed with the case and hence attempts were made to seek adjournment of the hearing. However, the tribunal continued the arbitral proceedings and held three more sittings and eventually rendered its award on May 5, 1993. Awarding a sum of Rs. Rs. 72,69,096/- in favour of the appellant and forwarded the award to the court for being made rule of the court in terms of the provisions contained in the Arbitration Act 1940. The respondent filed his objections under section 30 and 33 of the Act. A single judge dismissed the

objections and made the award a rule of the court. The respondent carried an appeal before the division bench of the high court. The division bench set aside the award with the following observation:[70]

> We are of the view that the Arbitrators have unnecessarily acted in haste in concluding the arbitral proceedings. Once the appellant had appeared before them, the least they should have done was to afford some reasonable time to the appellant to file its objections to the statement of claim filed by the respondent EMC. The Arbitrators also could have given a pre-emptory notice to the appellant before proceeding ex parte against them. Even after proceeding ex-parte against the appellant the Arbitrators still could have called upon them to cause appearance in the matter

On further appeal in the Supreme Court by the appellant, the court set aside the decision of the division bench and restored the decision of the single judge making an award the rule of the court.

Referring to the scheme of the 1940 Act, U.U. Lalit, Justice, speaking for the court held:[71]

> "In the circumstances, if the Arbitral Tribunal insisted upon appropriate consent to extend the time, no fault could be found with. At the same time, if respondent No.1 was not willing to give such consent, the Arbitral Tribunal had to go on with the matter and make the award within the statutory period"

VII APPLICABILITY OF PART I TO FOREIGN SEATED ARBITRATIONS

The question as to the applicability of the provisions of part I of the 1996 Act in respect of foreign seated arbitrations had continued to occupy valuable time of the Indian judiciary for considerable time ever since the court rendered its decision in *Bhatia International.*[72] Though the law has since been settled by a Constitution Bench of the Supreme Court in *BALCO,*[73] yet the question continued to dominate the legal scenario primarily since the decision in *BALCO* itself excluded application of the law declared therein in respect of arbitration agreements entered into between the contracting parties before September 6, 2012 – the cutoff date when the court

70 *Id*. at 680.

71 *Id*. at 684.

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

73 *Bharat Aluminium co.* v. *Kaiser Aluminium Technical Services Inc.* (2012) 9 SCC 552.

pronounced its judgment in *BALCO*. The development of the entire law on the subject has been discussed in detail in the previous Annual Surveys by the author.[74]

Implied Exclusion of Part I of the Act

Eitzen[75] is yet another instance on the same issue that came up again before the Supreme Court in the year under survey. Therein Eitzen Bulk A/S of Denmark had entered into a contract of afreightment dated Jan 18, 2008 with Ashapura Minechem Ltd. registered in Mumbai, India for shipment of bauxite from India to China. The charter party contained an arbitration clause to the following effect

"Any dispute arising under this COA is to be settled and referred to arbitration in London. One arbitrator to be employed by the charterers and one by the owners and in case they shall not agree then shall appoint an umpire whose decision shall be final and binding, the arbitrators and umpire to be commercial shipping men. English law to apply."

Though the arbitration clause contemplated appointment of two arbitrators by the respective parties to the contract yet, it appears, that the parties had in fact agreed to appoint a sole arbitrator and referred the disputes for adjudication by him. The arbitration proceedings were held in London following the English law as stipulated in the arbitration clause. The tribunal passed an award on May 26, 2009 holding Ashapura guilty of a repudiatory breach of the charter party and awarded a sum of USD 36,306,104.00 along with interest.

Ashapura challenged the award by filing an application under section 34 of the Act before the District Judge, Jamnagar, and Gujarat. Ashapura also sought an injunction restraining Eitzen from enforcing the award in foreign jurisdictions outside India. However that application for injunction was dismissed on August 24, 2009.

In the meantime, between July 4, 2009 and August 3, 2009, Eitzen sought enforcement of the award in several countries like Netherlands, USA, Belgium and UK. The respective courts in Netherlands, US District for the State of New York, and the court in England, all declared that the ward was enforceable in their respective jurisdictions.

In the meantime, against the rejection of the application for injunction, Ashapura invoked the jurisdiction of High Court of Gujarat by filing a writ petition under articles 226 and 227 of the Constitution. It was contended by Ashapura that the ward could not be enforced and executed in any *fora* since their objections to the validity of the award was pending in the proceedings initiated under section 34 of the Act. A single judge, holding that the issues were inextricably connected with the issues of jurisdiction in the pending application under section 34 of the Act, set aside the order of August 24, 2009 and remanded the matter back for fresh decision in accordance with law.

74 See A.K Ganguly, "Arbitration Law", XLIX *ASIL* (2014); Amal K Ganguly, "Arbitration Law", L *ASIL* (2015).

75 *Eitzen Bulk A/S* v. *Ashapura Minechem* (2016) 11 SCC 508.

Eitzen preferred a Letters Patent Appeal before the division bench but without success as the Division Bench as well directed the district court to consider all the contentions of the parties afresh and render their decision theron. Eitzen also filed another writ petition before the high court questioning the maintainability of the application under section 34 of the Act preferred by Ashapura on the ground of lack of jurisdiction. Eitzen prayed for issuance of a writ of prohibition restraining the district judge from adjudicating Ashapura's application under section 34 of the Act. A single judge stayed the further proceedings before the Jamnagar Court where Ashapura preferred a Letters Patent Appeal. A division bench of the high court held that Ashapura was entitled to challenge the award though rendered in London, under section 34 of the Act and that since the question of territorial jurisdiction a mixed question of fact and law, the district judge was competent to decide the issue on its merits.

In the meantime, Eitzen preferred an arbitration petition under section 47, 48 and 49 of the Act for enforcement of the foreign award before High Court of Bombay within whose jurisdiction Ashapura carried on business and had a registered office. Eitzen also filed a Notice of Motion under section 49(3) of the Act for securing the amount awarded in its favour under the Award. Ashapura also filed a notice of motion claiming that since the proceedings were already pending before the High Court of Gujarat, by virtue of section 42 of the Act, the High Court of Bombay had no jurisdiction to entertain the application filed by Eitzen. A single judge of the High Court of Bombay dismissed the Ashpura application holding that part (i) of the Act was clearly excluded by the parties and therefore section 42 which occurs in part (i) of the Act had no application to the present case. The High Court of Bombay also directed that since proceedings under the Sick Industrial Company (special provisions) Act 1995 were pending before the BIFR, the Eitzen could not be entitled to take steps for execution of the award without obtaining permission from the BIFR in terms of section 22.

This decision was challenged by Ashapura before the Supreme Court. Also challenged the decision of the High Court of Gujarat before the Supreme Court by filing a special leave petition. The principal question that came up for consideration of the court was whether the provisions of part I of the Act were excluded by reason of the provisions contained in the arbitration clause of the charter party and if so, whether the award rendered in London being a foreign award was enforceable in India and whether the award could also be challenged in India in a proceeding under section 34 of the Act.

Reiterating the law laid down in *Reliance Industries*[76] case, the court held that the arbitration clause in the charter party made it evident that the juridical seat of arbitration was London and that English law was to apply to the arbitration proceedings. These two factors themselves were sufficient indicators that the parties excluded the

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

application of the provisions of part I of the Act and hence the courts in India would have no jurisdiction to entertain a challenge to the award, being a foreign award. The award could however be enforceable in India following the provisions contained in sections 47 to 49, contained in Part II of the Act. Bobde, J speaking for the court held as under:[77]

> We think that the clause evinces such an intention by providing that the English Law will apply to the Arbitration. The clause expressly provides that Indian Law or any other law will not apply by positing that English Law will apply. The intention is that English Law will apply to the resolution of any dispute arising under the law. This means that English Law will apply to the conduct of the Arbitration. It must also follow that any objection to the conduct of the Arbitration or the Award will also be governed by English Law. Clearly, this implies that the challenge to the Award must be in accordance with English Law. There is thus an express exclusion of the applicability of Part I to the instant Arbitration by Clause 28. In fact, Clause 28 deals with not only the seat of Arbitration but also provides that there shall be two Arbitrators, one appointed by the charterers and one by the owners and they shall appoint an Umpire, in case there is no agreement. In this context, it may be noted that the Indian Arbitration and Conciliation Act, 1996 makes no provision for Umpires and the intention is clearly to refer to an Umpire contemplated by Section 21 of the English Arbitration Act, 1996.

The court expressed its strong disapproval of the conduct of Ashapura observing that "[i]n this case the losing side has relentlessly resorted to apparent remedies for stalling the execution of the Award and in fact even attempted to prevent Arbitration. This case has become typical of cases where even the fruits of Arbitration are interminably delayed. Even though it has been settled law for quite some time that Part I is excluded where parties choose that the seat of Arbitration is outside India and the Arbitration should be governed by the law of a foreign country."

VIII LIMITATION

Does allowing a time-barred claim vitiate the award

In *RashtriyaIspat Nigam Ltd*,[78] the contracting parties had entered into an agreement for transportation of pig iron, *etc*. from the appellant's plant to the Vishakhapatnam Port area. The work under the contract was to be completed on March 31, 1993. But owing to several extensions of time the contract was finally completed

77 *Supra* note 75 at 517.

78 *Rashtriya Ispat Nigam Ltd* v. *Prathyusha Resources* (2016) 12 SCC 405.

on October 23, 1997. Dispute arose between the parties as to the base year being taken as 1992 or 1994 for calculating the rate of escalation. The respondent submitted its final bill which was partly admitted by the appellant but it rejected the claim for escalation. The dispute was referred to an arbitral tribunal which rendered an award in favour of the respondent treating the base year as 1992. The appellant had contended that the claims made by the respondent were time barred as, in terms of article 18 of the Limitation Act, 1963, the right to sue accrued when the contract was completed on October 23, 1997 and hence the notice for arbitration was beyond the period of limitation. The challenge succeeded before the district judge who set aside the award on the ground that the claims made before the tribunal was time barred. On an appeal preferred by the respondent, the high court set aside the order of the district judge and upheld the award. On a further appeal the Supreme Court held, that the cause of action to sue would arise only when the real dispute arises between the parties. That is to say, when one party asserts and the other party denies any right. Upholding the judgment of the high court and the award, the court held "[t]he difference on determination of base year first arose in the letter dated July15.7.1996. The said letter is already controverted as the service of the same was seriously contested before in Arbitration. However, the said letter was there even before completion of the work and prior to that the respondent/claimant had reserved his right to claim money later since the contract was still subsisting then.…. Therefore, we find that the findings of the learned Arbitrator and concurrently affirmed by the High Court are correction the point that the cause of action arose on or after 4.9.1998. Hence, the said letter by the respondent/claimant to the appellant to initiate arbitration was not barred by the law of limitation."

What circumstances would warrant the application of section 14 of the Limitation Act

In *Commissioner M.P. Housing Board,*[79] the housing board had awarded a contract on June 26, 2009 in favor of the respondent of a commercial complex at Bittan Market area. During subsistence of the contract, certain disputes arose between the parties which were referred to the additional housing commissioner for arbitration, invoking clause 29 of the contract. The respondent appeared before the additional housing commissioner, who passed an award on October 11, 2010 rejecting the claims of the respondent. The respondent thereafter filed an application under section 11 of the Act before the High Court of Madhya Pradesh for appointment of an arbitrator to adjudicate upon the dispute.[80] The designated judge of the high court however rejected the application.

79 *Commissioner, Madhya Pradesh Housing Board* v. *Mohan Lal and Company* (2016) 14 SCC 199.

80 Relying upon an earlier decision of the High Court *M.P. housing* v. *Sohanlal Courasia,* 2007 SCC OnLine MP 431 it was contended that Cl. 29 of the contract could not be treated as an arbitration clause and the decision of the Additional Housing Commissioner could not be treated as an award and hence an arbitrator could be appointed in terms of s. 11 of the Act.

Thereafter, on September 26, 2011 the respondent filed an application under section 34(2) of the Act before the district judge for setting aside the award. Since that application was apparently barred by time, the respondent moved another application under section 14 of the Limitation Act,1963 seeking exclusion of the time taken under the earlier proceedings under section 11 of the Act which it had pursued *bona fide*. The additional district judge allowed the application under section 14 holding that the respondent was entitled to the exclusion of the time taken while pursuing the earlier proceedings under section 11 of the Act. The appellant challenged the said order by filing a revision petition before the high court which was however dismissed. On appeal by special leave, the Supreme Court, while allowing the appeal set aside the order passed by the courts below. Explaining the scope of section 14 of the Limitation Act, Dipak Misra J. (as his Lordship then was) held that the said provision "lays down that the proceedings must relate to the same matter in issue. It emphasises on due diligence and good faith. Filing of an application under section 11 of the 1996 Act for an appointment of arbitrator is totally different than an objection to award filed under section 34 of the 1996 Act. To put it differently, one is at the stage of initiation, and the other at the stage of culmination. By no stretch of imagination, it can be said that the proceedings relate to "same matter in issue". Additionally, the respondent had participated in the arbitral proceeding and was aware of passing of the award. He, may be, by design, invoked the jurisdiction of the High Court for appointment of an arbitrator. We are absolutely conscious that liberal interpretation should be placed on Section 14 of the Act, but if the fact situation exposits absence of good faith of great magnitude, law should not come to the rescue of such a litigant. because the respondent instead of participating in the arbitration proceedings, could have immediately taken steps for appointment of arbitrator as he thought appropriate or he could have filed his objections under Section 34(2) of the Act within permissible parameters but he chose a way, which we are disposed to think, an innovative path, possibly harbouring the thought that he could contrive the way where he could alone rule. Frankly speaking, this is neither diligence nor good faith. On the contrary, it is absence of both."

IX INTEREST

Award of *pendente lite* interest under the Arbitration Act, 1940

Due to the apparent conflict between the two decisions regarding award of *pendente lite* interest under the 1940 Act, even if there was an express bar under the contract, the matter was referred to a larger bench in *Ambika Construction*.[81] The larger bench held that where the contract expressly barred *pendent lite* interest, the Arbitrator cold not award such interest. However a bar on interest on late payment could not be construed as a bar on *pendente lite* interest. In an award covered by

81 *Union of India* v. *Ambica Construction* (2016) 6 SCC 60. (decided on Sep. 22, 2010).

Arbitration Act 1940, the question as to whether the arbitrator had the power to award interest *pendente lite* in the event the contract barred the grant of interest, came to be construed again by three judge bench in judge *Ambica Construction*[82] case. In fact the bench also had considered the correctness of its two earlier decisions in *Engineer-De-Space-Age*[83] *and Madnani Construction Corpn.(P) Ltd* [84] in view of the order of reference on September 22, 2010, and decision in *Sayeed Ahmed* [85]which doubted the correctness of the said two decisions.

The bench noted the scheme of the 1940 Act, which enumerated in the First Schedule thereto, the powers of the arbitrator. In view of Section 3 thereof an arbitration agreement would include all the said provisions contained in first schedule, unless a different intention is expressed in the arbitration agreement.

The bench also noted that section 29of the Act conferred power upon the court to award interest from the date of the decree. While section 34 of the Code of Civil Procedure, 1908, which is made applicable to all proceedings before Court under the 1940 Act, empowered the court to order interest at such rate as the court deems reasonable, to be paid on the principle sum adjudged, from the date of the suit to the date of the decree, for a period prior to the institution of the suit, and also from the date of the decree to the date of payment.

Section 41 of the 1940 Act made the provisions of the Code of Civil Procedure, 1908 applicable to all proceedings before the court under the Act. In addition, Section 29 of the 1940 Act, expressly authorized the court to order interest from the date of the decree at such rate as the court deems reasonable. The bench also noted the fact that those provisions of the 1940 Act, however did not apply to arbitration proceedings as such, as arbitration proceedings are not proceedings before the court.

The question as to whether the arbitrator had the power to award *pendente lite* interest was concluded by the decisions of the Constitution Bench in *G.C. Roy*[86] wherein the court held that, "[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."[87]

82 *Union of India* v. *Ambica Construction* (2016) 6 SCC 36. (decided on Mar. 22, 2016).

83 *Engineers De Space Age* v. *Port of Calcutta* (1996) 1 SCC 516.

84 *Madnani Construction Corporation* v. *Union of India* (2010) 1 SCC 549.

85 *Sayeed Ahmed & Co.* v. *State of U.P.* (2009) 12 SCC 26.

86 *G.C.Roy* v. *State of Orissa* (1992) 1 SCC 508.

87 *Id.,* para 44.

As regards the power of the arbitrator to award interest for the pre-reference period was also concluded by the decision of another Constitution Bench in *N.C. Budharaj*[88] holding that the "arbitrator appointed with or without the intervention of the court, has jurisdiction to award interest, on the sums found due and payable, for the pre-reference period, in the absence of any specific stipulation or prohibition in the contract to claim or grant any such interest. The decision in *Jena*[89] case taking a contra view does not lay down the correct position and stands overruled, prospectively, which means that this decision shall not entitle any party nor shall it empower any court to reopen proceedings which have already become final, and apply only to any pending proceedings."

However, despite the said pronouncement by the Constitution Bench, a two judge bench in *Engineers-De-Space-Age*[90] case construing clause 13(g) of the contract therein ruled that "the term in sub-clause (*g*) merely prohibits the Commissioner from entertaining any claim for interest and does not prohibit the arbitrator from awarding interest. The opening words "no claim for interest will be entertained by the Commissioner" clearly establishes that the intention was to prohibit the Commissioner from granting interest on account of delayed payment to the contractor. Clause has to be strictly construed for the simple reason that as pointed out by the Constitution Bench, ordinarily, a person who has a legitimate claim is entitled to payment within a reasonable time and if the payment has been delayed beyond reasonable time he can legitimately claim to be compensated for that delay whatever nomenclature one may give to his claim in that behalf. If that be so, we would be justified in placing a strict construction on the term of the contract on which reliance has been placed. Strictly construed the term of the contract merely prohibits the commissioner from paying interest to the contractor for delayed payment but once the matter goes to arbitration the discretion of the arbitrator is not, in any manner, stifled by this term of the contract and the arbitrator would be entitled to consider the question of grant of interest *pendente lite* and award interest if he finds the claim to be justified. We are, therefore, of the opinion that under the clause of the contract the arbitrator was in no manner prohibited from awarding interest pendente lite."[91]

This decision was followed subsequently in *Madnani Construction Corporation*[92] wherein, despite clause 16.2 of the GCC providing that no interest would be payable, upon the earnest money and Clause 30 of the SCC providing that "the contractor will have no claim for interest" *etc*. It was held that "the relevant clauses, which have been quoted above, namely, Clause 16(2) of GCC and clause 30

88 *Executive Engineer Dhenkanal* v. *N.C.Budharaj* (2001) 2 SCC 721.

89 *Department of Irrigation* v. *Abhaduta Jena* (1988) 1 SCC 418.

90 *Supra* note 83.

91 *Id*., para 4.

92 *Madnani Construction Corporation* v. *Union of India* (2010) 1 SCC 549.

of SCC do not contain any prohibition on the arbitrator to grant interest. Therefore, the high court was not right in interfering with the arbitrator's award on the matter of interest on the basis of the aforesaid clauses. We therefore, on a strict construction of those clauses and relying on the ratio in *Engineers*[93] find that the said clauses do not impose any bar on the arbitrator in granting interest."[94]

The court in *Sayeed Ahmed,*[95] which was under the 1996 Act, considered the decision in *Engineers-De-Space-Age*[96] and observed that the bar on Government or Department from paying interest does not constitute a bar on the arbitrator awarding interest.

It is evident that the decision in *Engineers-De-Space-Age*[97] and the subsequent decision in *Madnani*[98] were right in view of the provisions concerned in the respective contracts considered in these cases.

Arun Mishra J. speaking for the court therefore answered the reference holding that "our answer to the reference is that if the contract expressly bars the award of interest pendente lite, the same cannot be awarded by the arbitrator. We also make it clear that the bar to award interest on delayed payment by itself will not be readily inferred as express bar to award interest pendente lite by the Arbitral Tribunal, as ouster of power of the arbitrator has to be considered on various relevant aspects referred to in the decisions of this Court".[99]

It is of significance that the court did not expressly overrule the decisions in *Engineers-De-Space-Age*[100] and *Madnani*[101] cases but held that the said decisions were required to be "diluted to the extent that express stipulation under contract may debar the arbitrator from awarding interest pendente lite"[102]

X CHALLENGE TO AWARD

Challenge to award under 1940 Act

In *Harish Chandra and Co.*[103] an arbitral award rendered under Arbitration Act, 1940 was challenged in a proceedings under section 30 of that Act which permitted only limited grounds of challenge specified in clauses (a) (b) and (c) thereof. Though

93 *Supra* note 83.

94 *Id.,* para 39.

95 *Sayeed Ahmed & Co.* v. *State of U.P.* (2009) 12 SCC 26.

96 *Engineers De Space Age* v. *Port of Calcutta* (1996) 1 SCC 516.

97 *Supra* note 83.

98 *Supra* note 72.

99 *Supra* note 73 at para 34.

100 *Supra* note 83.

101 *Ibid.*

102 *Supra* note 73 at para 33.

103 *Harish Chandra and Company* v. *State of Uttar Pradesh (through Superintending Engineer)* (2016) 9 SCC 478.

the 1940 Act stood repealed by section 85 of the Act 1996, the court was called upon to consider afresh the scope of the remedy available under sections 30 and 33 of the Arbitration Act of 1940 since the award was challenged invoking the said provisions. The appellant therein, a civil contractor, entered into a contract with the State of Uttar Pradesh for doing, "earthwork power channels on different routes of various distances and also construction of drainage crossing in Chhoti Lui falling in six stretches and divided in two sections called "Serial no 4 and Serial no 6 in a scheme called – KHARA HYDELSCHEME". The appellant had submitted its tender for Serial no. 6 stretch. The respondent accepted the appellant's tender. Accordingly, two agreements bearing Nos. 5/SE/79-80 and 6/SE /79-80 were executed between the appellant and the respondent for execution of the work in question on 30.10.1979. The work under the contracts was to start from December 1, 1979 and to be completed on or before 31.5.1982.Since disputes arose between the parties which could not be settled amicably, they were referred to arbitration by a retired chief engineer. Before the arbitrator, the appellant made six claims. By award on November 27, 1995, the arbitrator allowed three claims and rejected the other three claims. The respondent challenged the award before the civil judge by filing its objections under section 30 of the Act. By order on June 30, 1996 the Civil Judge rejected the objections and made the award a rule of the court and also awarded simple interest at the rate of 18% on the awarded sum to be paid to the appellant from the date of decree till realization. The respondent challenged this decision of the civil court by filing an appeal before the high court. The high court, allowing the objections filed by the state set aside the award. On appeal, the Supreme Court upon the law laid down in the earlier decision in *Allied Constructions,*[104] and held that the arbitrator had assigned sufficient and cogent reasons in support thereof and that, "[i]nterpretation of a contract, it is trite, is a matter for the arbitrator to determine (see *Sudarsan Trading Co.* v. *State of Kerala)*.[105] Section 30 of the Arbitration Act, 1940 providing for setting aside an award is restrictive in its operation. Unless one or the other condition contained in Section 30 is satisfied, an award cannot be set aside. The arbitrator is a Judge chosen by the parties and his decision is final. The court is precluded from reappraising the evidence. Even in a case where the award contains reasons, the interference herewith would still be not available within the jurisdiction of the court unless, of course, the reasons are totally perverse or the judgment is based on a wrong proposition of law. An error apparent on the face of the records would not imply closer scrutiny of the merits of documents and materials on record. Once it is found that the view of the arbitrator is a plausible one, the court will refrain itself from interfering…."

Several other decisions were also referred which laid down that the jurisdiction of court in the matter of interference with an award under section 30 of the Act was limited. The court particularly emphasized the following observation made by

104 *State of U.P.* v. *Allied Constructions* (2003) 7 SCC 396.

105 *Sudarsan Trading Co.* v. *State of Kerala* (1989) 2 SCC 38.

Sabyasachi Mukherjee J. (as his Lordship then was)in *Sudarsan Trading Co.,*[106] "However, there is a distinction between the disputes as to the jurisdiction of the arbitrator and the disputes as to in what way that jurisdiction should be exercised. There may be a conflict as to the power of the arbitrator to grant a particular remedy. One has to determine the distinction between an error within the jurisdiction and an error in excess of the jurisdiction. The court cannot substitute its own evaluation of the conclusion of law or fact to come to the conclusion that the arbitrator had acted contrary to the bargain between the parties. Whether a particle amount was liable to be paid or damages liable to be sustained, was a decision within the competency of the arbitrator in this case. By purporting to construe the contract, the court could not take upon itself the burden of saying that this way contrary to the contract and, as such, beyond jurisdiction. If on a view taken of a contract, the decision of the arbitrator on certain amounts awarded, is a possible view though perhaps not only correct view, the award cannot be examined by the court."[107]

Sapre J speaking for the court gave seven reasons why interference with the award by the high court was not at all justified. They were, First, it was held that the high court did not apply the law laid down by several decisions of the Supreme Court. Second, the high court acted like an appellate court by examining all the factual findings. Third, the high court ought to have confined its enquiry to find out whether the arbitrator was guilty of legal misconduct. Fourth, the high court erroneously went into the factual question by referring to clause 26 of the agreement for holding that the award passed by the arbitrator was contrary to clause 26 particularly when no such objection was raised either before the arbitrator or before the trial court. Fifth the high court failed to see that clause 26 merely prohibited the appellant from assigning the agreement to a third party and that admittedly the appellant did not make any such assignment. Sixth the high court failed to see that there was no error apparent on the face of the record in the award passed by the arbitrator. Seventh, the high court also failed to see that the trail court had elaborately gone into all the factual issues and rightly did not find any substance in the objections raised by the respondent. Further, the award being a reasoned one, the reasoning of the arbitrator could not be said to be perverse. Hence the ground for challenge under section 30 of the Act was not available.

Construction of the terms of a contract is primarily for an arbitrator to decide

Section 28(3) of the Act mandates that while deciding and making an award, the arbitral tribunal shall, in all cases, take into account the terms of the contract and trade usages applicable to the transaction.[108] Before the amendment, sub section (3) of section 28 read as under:

106 *Ibid.*

107 This passage, as extracted in *Harish Chandra and Company* v. *State of U.P.,* para 24 is in fact reproduced from the headnote in *Sudarsan Trading Co.* v. *State of Kerala* (1989) 2 SCC 38 which a combined reading of para 31 and 35.

108 This provision was substituted by Act 3 of 2016 with effect from Nov. 23, 2015.

> (3) In all cases, the Arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction

Before October 23, 2015, the expression used in sub section (3) of section 28 was "the Arbitral Tribunal shall decide *in accordance with* the terms of the contract". The amended provision leaves it to the tribunal to *take into account* the terms of the contract while making an award. It is well settled that an arbitrator being a creature of the contract between the parties cannot ignore specific terms of the contract and in fact is duty bound to apply the terms thereof while rendering an award. It is equally well settled that the construction of the terms of a contract is within the jurisdiction of the arbitrator.[109]

Law Commission of India in its 246th Report recommended that the words "in accordance with" as appearing in sub section (3) of section 28 be deleted and the words "having regard to" being substituted. The object of this amendment has been explained in the Note appended to the recommended amendment stating:

> This amendment is intended to overrule the effect of *ONGC Ltd.* v. *Saw Pipes Ltd.,* (2003) 5 SCC 705, where the Hon'ble Supreme Court held that any contravention of the terms of the contract would result in the award falling foul of Section 28 and consequently being against public policy

Despite the law being well settled, the question of interpretation of terms of the contract have engaged the attention of the courts in several cases. In *JSC Centrodorstroy*[110] which involved interpretation of clauses 70.1 to 70.7 (of the contract therein) which *inter alia* provided for price adjustment formula and clause 70.8 that dealt with changes by reason of any subsequent legislation, ordinance, decree etc. of the Conditions of Particular Application (CoPA) which were adopted from the FIDIC form of conditions of contract. The respondent made claims for reimbursement of the service tax which they were called upon to pay by reason of revision of rate in the tax from 5% to 10.30% during the course of the contract. The appellant NHAI declined to accept the claim which led to disputes between the parties being referred to the arbitral tribunal. The arbitral tribunal by its unanimous award dated March 28, 2013 accepted the claims and directed NHAI to pay the sums claimed by the respondent

109 *Sudarshan Trading Co.* v. *Government of Kerala* (1989) 2 SCC 30; *Hindustan Construction Co. Ltd.* v. *State of Jammu & Kashmir* (1992) 4 SCC 217; *Mac Dermott International Incorporated* v. *Burn Standard Co. Ltd.* (2006) 11 SCC 181, *Numaligarh Refinery Ltd.* v. *Daelim Industrial Co. Ltd.* (2007) 8 SCC 466.

110 *National Highways Authority of India* v. *JSC Centrodorstroy* (2016) 12 SCC 592.

together with interest at the rate of 12%. This award was challenged by NHAI in a proceeding under section 34 of the Act. A single judge, however, dismissed the petition which decision was affirmed by the division bench by dismissing the appeal. In an appeal preferred before the Supreme Court, it was contended on behalf of NHAI that the interpretation of the contractual provisions rendered by the tribunal were not correct in as much as service tax on bank guarantees could have been avoided by depositing cash in place of bank guarantee and that even enhanced service tax component would not have an impact.

Having regard to the fact that revision in the rate of service tax had not been disputed by NHAI, the court speaking through UU Lalit J rejecting the contention on behalf of the appellant held that "the assessment made by the arbitral tribunal in the instant case as affirmed by the High Court was definitely within its jurisdiction. It has consistently been laid down by this Court that construction of the terms of a Contract is primarily for an Arbitrator or Arbitral Tribunal to decide and unless the Arbitrator or Arbitral Tribunal construes the contract in such a way that no fair minded or reasonable person could do, no interference by Court is called for. Viewed thus, we do not see any reason or justification to interfere in the matter. The view that the increase in rates of service tax in respect of bank guarantee and insurance premium is directly relatable to terms of the contract and performance under the Contract is certainly a possible view."

XI ENFORCEMENT OF FOREIGN AWARD

Whether a Letters Patent Appeal is maintainable

In *Arun Dev Upadhyaya*[111] the question for consideration of the court was whether a letters patent appeal (LPA) would lie from the judgment of the learned single judge of the high court arising out of an international arbitration. Therein an award passed by a tribunal in respect of an international arbitration between the appellant DMC Management Consultant Ltd. and the respondent an American company was rendered under Delaware Law which was the law applicable to the contract. The respondent filed an application under sections 45 and 49 of the Act for enforcement of the award before the District Judge at Nagpur. Those proceedings continued before the district judge till the Arbitration and Conciliation (Amendment) Act 2015, came into force with effect from October 23, 2015. After the coming into force of the amending Act, the respondent filed an application before the high court for enforcement of the award since the amended law conferred original jurisdiction upon the high court in respect of international commercial arbitrations. The single judge however held that the award was not enforceable in India against the other respondents as the tribunal could not have passed an award against them. The first respondent preferred an appeal under section 50(1)(b) read with clause 15 of the Letters Patent before the

111 *Arun Dev Upadhyaya* v. *Integrated Sales Service Limited* (2016) 9 SCC 524.

division bench of the high court. The appellant had contended before the high court that the appeal was not maintainable in view the abolition of the letters patent appeal (LPA) by section 3(1) of the Maharashtra High Court (Hearing of Writ Petitions by Division Bench and Abolition of Letters Patent Appeals) Act, 1986. The Division Bench repealed the said contention by placing reliance upon the decision in *Padmashri Pursushottan*[112] and held that the appeal was maintainable. Thereafter the appellant filed a review petition relying upon the decision in *Fuerst Day Lawson*[113] and contended that the LPA under clause 10 was not available in arbitration matters and section 13 of the Commercial Courts Act was also not applicable. The division bench however, dismissed the application for review.

On further appeal before the Supreme Court, analyzing section 50 of the Arbitration Act as well as the amendment brought in by the 2015 amendment Act and the provisions of the Commercial Courts Act, Dipak Misra J (as his Lordship then was) held that "[a] conspectus reading of section 5 and 13 of the Act and section 50 of the 1996 Act which has remained unamended leads to the irresistible conclusion that a Letters Patent Appeal is maintainable."

Dismissing the appeal and affirming the judgment of the high court but for different reasons held that "[i]t has to be treated as an appeal under Section 50(1)(b) and has to be adjudicated within the said parameters."

XII CONCLUSION

Now that it is judicially acknowledged that there are silences in the Arbitration Law despite the law being codified by the Parliament by enacting the 1996 Act, based on the UNCITRAL Model Law and despite the comprehensive amendments to the Act made in 2015, the question of arbitrability of certain disputes would always remain a subject matter in the process of evolution. This is despite the fact that judicial pronouncements have attempted to identify and enumerate the subjects which would not be arbitrable. These are basically in the realm of public law and on those issues which operate *in rem*. The question as to whether a mere allegation of fraud renders the dispute non-arbitrable has now been put to rest, after a brief controversy, in *Ayyasamy*. Both Sikri and Chandrachud JJ in their concurrent opinions have rightly clarified that it is only serious allegations of fraud which patently involved criminal liabilities would warrant such disputes being adjudicated upon by through the public fora, *i.e.,* the courts of law exercising the sovereign powers of the state and that in all other cases allegations of fraud could legitimately be the subject matter of arbitration given the parties intention that "[a]rbitration must provide a one-stop forum for resolution of disputes" to borrow the language of Chandrachud J.

112 *Padmashri Purushottaman* v. *TusarDhansukhlal,* 2016 SCC OnLine Bom 255.

113 *Fuerst Day Lawson Ltd.* v. *Jindal* (2011) 8 SCC 333.

The issue of award of interest has occupied considerable judicial time in the past. In view of the roller coaster approach of the court, the issues concerning award of interest in arbitration had remained a serious challenge to the judicial decision making process ever since the decision of the Constitution Bench in *G.C. Roy*[114] which, it was thought to have settled all the related issues. However, that was not to be so. The year under survey however seems to have brought down the curtain on the subject in view of the pronouncement in *Ambica Construction*.

Some of the provisions which stood amended by the amending Act of 2015 also found consideration in *Arun Dev Upadhyaya*[115]and *JSC Centrodorstroy*[116]where the court considered the implication of the amendment to section 28(3). In view of the amendment of section 8(2), the principle, which was earlier confined only to Section 45 as interpreted in *Chloro Controls,* has now been extended to domestic arbitrations as well, as observed in *Ayyasamy*. This clarificatory amendment would go a long way to resolve the issues that invariably arise in back to back or string contracts or multiple contracts particularly in connection with the infrastructure industry where this is a common feature.

It is gratifying to note that Non-Indian commercial entities now consider India to be the destination for resolution of their commercial disputes by arbitration and that too following the laws of India. The spate of institutional arbitrations in recent times appear more encouraging and confirming to the expectation that India is progressing in the right direction towards realization of the country being recognized as an arbitration hub in South Asia.

Way back in November 2009 the author, supporting institutional arbitration in India had stated that 'the reams of paper presently utilized by legal experts to propagate their ingenuity of "how to avoid arbitration in India' would undoubtedly turn out to be a real waste. DAC would provide the incentive to those experts to devise methods on "how to secure arbitrations being held in India".[117] The prediction is coming true today.

114 *Irrigation Deptt., Govt. of Orissa* v. *G.C. Roy* (1992) 1 SCC 508.

115 *Arun Dev Upadhyaya* v. *Integrated Sales Service Limited and another* (2016) 9 SCC 524.

116 *National Highways Authority of India* v. *JSC Centrodorstroy* (2016) 12 SCC 592.

117 A.K.Ganguli; *Arbitration in India: Is institutional arbitration an answer to the present maladies* BarInfo (November 2009), published by the Delhi High Court Bar Association.