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ARBITRATION LAW

*A K Ganguli**

I INTRODUCTION

ACCESS TO justice – a reality or a myth? The debate may remain unresolved but it is a reality that owing to the overcrowding of dockets in courts, enormous time and money are required to be spent before litigations in courts reach finality. Does arbitration, though perceived as an Alternative Dispute Resolution (ADR) mechanism, offer any solution?[1] The answer should be in the affirmative if one considers the spurt in both *ad hoc* and institutional arbitrations in the recent years and also the amount of interest shown by a number of International Arbitral Institutions to have their presence in India.

Though arbitration is perceived as an ADR mechanism voluntarily resorted to by the contracting parties to avoid delays in courts and to secure speedy and cost effective resolution of disputes, in the realm of international commercial disputes, realistically this is the only remedy that the parties can effectively seek. In recent times, resolution of disputes through arbitration, though has gained popularity and more and more litigants have resorted to such proceedings, at least in respect of *ad hoc* arbitrations the litigants have to go through several tiers of litigation with arbitration being the first tier, followed by the second tier of post award litigation in the courts, and third tier being the enforcement and execution of the awards if they are entertained by the courts. With the introduction of the process of mediation (whether court assisted or otherwise) and also the processes like med-arb or arb-med, adopted in several institutional arbitrations[2] there is a

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* Senior Advocate, Supreme Court of India. The author acknowledges the assistance of Mr. Vikram Hegde, Mr. Arunabha Ganguli and Ms. Anurag Rana, Advocates in the preparation of this survey.

1 A. K. Ganguli, "Arbitration in India: Is Institutional Arbitration an Answer to the Present Maladies", Bar Info, Newsletter of the Delhi High Court Bar Association, November 2009.

2 The recent statistics of some of the institutional arbitrations conducted by various institutions in India are as under.

The Delhi International Arbitration Center (DAC) is at the forefront in this regard in India with 227 cases having been decided/terminated/settled under its aegis. It has a 237 active ongoing arbitrations with a further 410 arbitrations being at the stage of

perceptible change now amongst the prospective litigants who seek resolution of the disputes outside court proceedings.

Ad hoc arbitrations however could not fulfill the aspirations of those seeking alternative methods of resolution of their disputes outside the courts. The lingering doubts in the minds of judges who are called upon to judicially examine the correctness of the awards rendered by the *ad hoc* tribunals encompass almost every aspect of the arbitral process, including long delays involving enormous expenses, and have contributed to the court donning the role of an appellate authority, negating the very object of arbitration. India has had a long history of certain trade associations promoting institutional arbitration amongst its members. These efforts, though served the need for speedy resolution of disputes among members of such institutions, they were not, in the true sense, "arbitrations". These were more in the nature of agreements between the parties to abide by the expert opinion or the opinion of a referee appointed under the rules of those associations which did not involve adjudication of *lis* by following a quasi judicial procedure. In spite of some of the well known trade associations effectively functioning in the metropolitan cities, they could not however establish credible, efficient and professionally managed arbitral institutions, barring some exceptions. In the absence of credible arbitral institutions, the litigants never had a choice, in the real sense, to seek their remedies through institutional arbitration.[3] Globally, institutional arbitration is preferred over *ad hoc* arbitration for very many reasons even though the parties realize that their autonomy would be curbed to some extent by the rules of the institutions and that they have to pay some administrative fees to such institutions. This is so, because the parties are well aware that the institution chosen by them can intervene and assist them when the arbitral process is threatened by a variety of circumstances. For instance, where a party refuses to name an arbitrator, or where an arbitrator is challenged or where the tribunal is not sufficiently diligent, the institutional intervention does provide an answer to satisfactory completion of the arbitral process culminating in the award. The success of international arbitration as a phenomenon, is primarily due to factors like the institutional power to appoint arbitrators if the parties request it, assistance that the institution renders in prodding reluctant parties to proceed with arbitration, availability of pre-established rules and procedures to guide the arbitral process to its logical end, administrative assistance from Institutions with a secretariat or a court of arbitration, presence of panels comprising of experienced arbitrators often listed in terms of their fields of expertise, and the availability of infrastructural facilities including support services for conducting the proceedings.[4]

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completion of pleadings. The DAC has also secured references in respect of 7 international arbitrations.

The annual report of the Indian Council of Arbitration for the year 2013-14 states that 227 arbitrations were pending in 2014 of which 56 were new references received in the year including 2 international arbitrations. 106 cases were decided/terminated in that year alone.

3 *Supra* note 1.

4 *Ibid.*

Increasing ubiquity of arbitration also means that the world of arbitration is more connected with the affairs of the country. Emergence of a virtual world economy and its impact on the economic fabric of the country have also caused some ripples in the laws relating to arbitration in India. With the advent of the world trade organisation (WTO) and 161 countries becoming parties to several multi- lateral agreements which are given effect to through the aegis of the WTO, the traditional modes of trade and business have undergone a complete transformation. With more and more avenues of investment being opened, there is a change not only among the market players but also in the manner of their doing business. Large participation in capital markets, infrastructure projects, particularly in telecom, information technology and natural resources through joint ventures and collaborations have not only necessitated large scale changes in the laws relating to all such businesses but at the same time have given rise to an increasing number of disputes both in the public law and private law arena. The role of the arbitral process has thus assumed great significance. The process of adjudication of disputes by arbitration is now put to serious test. Whether the process would be able to meet the challenges of the time or not would come to fore only in the coming years. With the growth of economy and business, the ugly face of corruption has also come to the surface in some cases. The law must catch up with those who abuse the process and seek to bring disrepute to the nation. Since arbitration is a private law remedy founded entirely on the volition of the contracting parties, questions have arisen, as to whether the business aspect of the transactions should receive priority and the disputes, if any, be resolved expeditiously by the process of arbitration even in cases where at the instance of the State, criminal proceedings have been initiated involving the same subject matter of contracts that are the subject matter of arbitration.

As far as the legality and propriety of simultaneous prosecution of civil and criminal proceedings regarding same subject matter is concerned, though the question had been considered by the court on many occasions, it has again been the subject matter of two significant decisions in the year under survey.

The earliest authoritative pronouncement of a Constitution Bench of the Supreme Court in *M. S. Sheriff*s[5] case has been referred to in a large number of subsequent cases, which primarily relied upon certain general observations made therein like: [6]

> …[a]s between the civil and the criminal proceedings we are of the opinion that the criminal matters should be given precedence. This however, is not a hard and fast rule. Special circumstances obtaining in any case might make some other course more expedient and just.

One of the examples of such special circumstances obtaining in that case, noted by the constitution bench was that the civil case or other proceedings may

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5 *M.S. Sheriff* v. *State of Madras,*1954 SCR 1144.

6 *Id.* at 1148.

be so near its end as to make it inexpedient to give precedence to prosecution of the criminal proceedings. The constitution bench however had expressly ruled that likelihood of embarrassment to persons facing criminal prosecution is undoubtedly a relevant consideration that should weigh in favor of staying civil proceedings till the criminal proceedings are completed. Of the many significant reasons in support of these propositions, the factors that weighed with the court were that: [7]

> …[a] civil suit often drags on for years and it is undesirable that a criminal prosecution should wait till everybody concerned has forgotten all about the crime. The public interests demand that criminal justice should be swift and sure; that the guilty should be punished while the events are still fresh in the public mind and that the innocent should be absolved as early as is consistent with a fair and impartial trial. Another reason is that it is undesirable to let things slide till memories have grown too dim to trust.

Though several decisions have referred to the observations made by the Constitution Bench in *M.S.Sheriff's* case, the reasons that led the court to decide those cases rested entirely on the facts of the respective cases and the courts' appreciation as to whether the parties are likely to suffer any prejudice by simultaneously continuing both civil and criminal cases.[8]

With the emergence of the global economic scenario and with increasing involvement of the state and its agencies in economic activities, foreign participation in large infrastructure projects in India has increased manifold, giving rise to greater commercial relationship between foreign and Indian parties. Since in many such contracts, the state agencies have a predominant role in awarding such contracts on a global tender basis and also in monitoring their execution, the relationship between contracting parties have transcended from the private law arena based on contracts, to the public law arena with the relationship between parties being governed by the public law considerations and at times by public international

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7 *Ibid.*

8 In *Guru Granth Saheb Sthan Meerghat Vanaras* v. *Ved Prakas* (2013) 7 SCC 622, a two judge bench following the decision of the constitution bench in *M.S. Sheriff* held that "In light of the above legal position, it may be immediately observed that the high court was not at all justified in staying the proceedings in the civil suit till the decision of criminal case. *Firstly,* because even if there is a possibility of conflicting decisions in the civil and criminal courts, such an eventuality cannot be taken as a relevant consideration. *Secondly*, in the facts of the present case there is no likelihood of any embarrassment to the defendants as they had already filed the written statement in the civil suit and based on the pleadings of the parties the issues have been framed. In this view of the matter, the outcome and/or findings that may be arrived at by the civil court will not at all prejudice the defence(s) of respondents 1 to 4 in the criminal proceedings."

law.[9] The choice of according precedence to either of such proceedings may become more and more difficult when criminal proceedings are pending against the contracting parties and particularly their officers who are responsible for entering into such contracts and execution thereof. In cases where the contracts involve larger public interest and would therefore be partly governed by public law criteria, the added question that has arisen for the consideration of court is whether the court should prioritize the private adjudication process like arbitration or should the criminal proceedings involving the same subject matter be also carried out expeditiously and simultaneously.

The further question that has arisen for the consideration of court is, whether the approach of the court to such questions would be different depending upon whether they pertain to domestic arbitrations or international arbitrations.

Apart from the distinction as regards the scope of powers of courts/judicial authorities contained in section 8 in part I of the Act[10] and section 45 in part II of the Act dealing with international commercial arbitration, a significant question as to the scope of enquiry by the judicial authorities/courts while exercising their powers under the said respective provisions has also arisen. While the court has held that in proceedings under section 8 of the Act, the courts/judicial authorities

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9 In *White Industries* v. *Republic of India*, the dispute arose from arbitration between non-state parties, i.e., White Industries and Coal India Limited (CIL). White Industries had entered into a long term contract with CIL for supply of equipment and development of a coal mine. White Industries initiated arbitration under the ICC rules against CIL when a dispute arose between White Industries and CIL. In the said arbitration the ICC tribunal awarded a sum of USD 4.08 million to White Industries. While White Industries sought to enforce the award by way of application before the Delhi High Court, CIL sought to set aside the award by way of application before the Calcutta High Court. The enforcement proceedings before Delhi High Court came to be stayed on application of CIL. An application by White Industries before the Calcutta High Court, to dismiss CIL's petition to set aside the award, was rejected. White Industries appealed the said order before the division bench of the Calcutta High Court and thereafter before the Supreme Court. The matter remained pending before the Supreme Court after being referred to a larger bench. There was a long delay cumulatively amounting to nearly ten years in enforcement of the award. While matters were still pending, White Industries initiated arbitration against the Republic of India under the agreement between the Government of Australia and the Government of the Republic of India on the Promotion and Protection of Investments, made in New Delhi on February 6, 1999 (Bilateral Investment Treaty or BIT). A three member ad hoc arbitral tribunal rendered an award in arbitration between White Industries and India. The tribunal held that there was an inordinate delay in enforcing an arbitral award in India and that the Republic of India has breached its obligation to provide "effective means of asserting claims and enforcing rights" with respect to White Industries' investment pursuant to art 4(2) of the BIT and awarded a sum of USD 4.08 million in favor of White Industries. The award was given effect by the Republic of India without any challenge. This award has had its own ramifications in the construction and interpretation of BITs and has also played an important role in India's decision to revisit its Most Favourable Nation (MFN) policy.

10 The Arbitration and Conciliation Act, 1996.

would have to enquire into the legality of the arbitration agreement before such judicial authority decides to refer the parties to arbitration, section 45 mandates that the court shall refer the parties to arbitration only when it is satisfied that the arbitration agreement is not null and void, inoperative, or incapable of being performed.[11]

It is now well accepted that since arbitration agreement is independent of the underlying agreement between the parties, a decision by the arbitral tribunal that the contract is null and void, shall not *ipso jure* invalidate the arbitration clause. However, when the arbitration agreement appears as one of the terms of the principal contract and when it is evident that both the agreements are the result of the same bargain, what should be the nature of the pleadings that the parties be expected to adopt when they seek to demonstrate that the arbitration agreement is also void, or though voidable at the instance of a party, has become void? Would it be sufficient discharge of burden by the party seeking to challenge the validity of the arbitration agreement to comprehensively plead the circumstances common to both the arbitration agreement and the principal agreement that rendered both of them void? Though the decisions considered in the present survey do reflect on some of these issues, the nature of the pleadings expected from the party seeking to contend that the arbitration agreement is void are not reflected in the decisions leaving scope for future adjudication of such issues.

The phrase "null and void, inoperative, or incapable of being performed" appearing in section 45 of the Act, is a verbatim replication of article II.3 of the New York Convention[12]. The English Arbitration Act, 1996, in section 9, also replicates the same phrase from the same source which applies equally to arbitrations having seat in UK and those not having seat in UK. The English Act treats the arbitration agreement separately from the principal agreement and even if the principal agreement is found to be void, the intention of the parties to settle disputes by arbitration is still upheld.[13] In the United States of America, the New York Convention is given effect to by the insertion, in 1970, of chapter 2 in the Federal Arbitration Act.[14] However, the phrase "null and void" has been construed

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11 S. 45 - Power of judicial authority to refer parties to arbitration. —Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

12 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.

13 *Harbour Assurance Co.* v. *Kansa General Insurance Co. Ltd.* [1993] All.E.R. 897. Even if underlying contract is void, parties are presumed to have wanted their disputes resolved by an arbitral tribunal.

14 9 U.S. (Ss. 201-208).

narrowly by the US courts.[15] In Singapore, section 6(2) of the International Arbitration Act of that country also incorporates the same expression, in keeping with the New York Convention, of "null & void, inoperative, or incapable of being performed".

II ARBITRATION AGREEMENT

In *Karnataka Power Transmission Corporation Ltd.*,[16] the court was called upon to consider whether a particular contract between the parties constituted an arbitration agreement warranting the respondent to move the Chief Justice of the High Court of Karnataka for appointment of arbitrator invoking his power under section 11(5) and section 11(6) of the Act.

The appellant KPTCL had entered into a contract with respondent for setting up of 2 × 8 MVA, 66/11 Sub-stations at Tavarekere in Channagiri Taluk, Davanagere District, which included the supply of materials, erection and civil works on a partial turnkey basis. Clause 48, on which reliance was placed, read as under:[17]

> 48.0 Settlement of disputes:
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> 48.1 Any dispute(s) or difference(s) arising out of or in connection with the contract shall, to the extent possible, be settled amicably between the parties.
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> 48.2 If any dispute or difference of any kind whatsoever shall arise between the owner and the contractor, arising out of the contract for the performance of the works whether during the progress of the works or after its completion or whether before or after the termination, abandonment or breach of the contract, it shall, in the first place, be referred to and settled by the Engineer, who, within a period of thirty (30) days after being requested by either party to do so, shall give written notice of his decision to the owner and the contractor.

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15 In *Control Screening LLC* v. *Technological Application and Production Screening Company* 687 F.3d 163. United States Court of Appeals, Third Circuit, 26 July 2012, the Court held that where the forum selection clause is found to be inoperable as the forum mentioned in the agreement does not exist, the court held that the otherwise valid arbitration agreement would be treated as if it did not select a forum; In *Lindo* v. *NCL (Bahamas), Ltd.*, 652 F.3d 1257, 1276 (11th Cir. 2011), the Court held that an arbitration agreement is "null and void" within the meaning of the Convention "only where it is obtained through those limited situations, such as fraud, mistake, duress, and waiver, constituting standard breach-of-contract defenses that can be applied neutrally on an international scale."

16 *Karnataka Power Transport Corporation Limited* v. *Deepak Cables* (2014) 11 SCC 148.

17 *Id.* at 158.

> 48.3 Save as hereinafter provided, such decision in respect of every matter so referred shall be final and binding upon the parties until the completion of the works and shall forthwith be given effect to by the contractor who shall proceed with the works with all the due diligence.
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> 48.4 During settlement of disputes and court proceedings, both parties shall be obliged to carry out their respective obligations under the contract.

There was another significant provision in the contract, clause 4, which provided that all disputes arising out of the agreement, shall be decided by a competent court at Bangalore.[18]

The application invoking the jurisdiction of the chief justice, was resisted by the appellant, *inter alia* on the ground that clause 48 of the agreement did not constitute an arbitration agreement and hence could not be construed to provide for settlement of dispute by way of arbitration. Relying upon clause 4, it was contended that all disputes arising out of the agreement between parties would have to be decided by competent courts at Bangalore. The court referred to an earlier decision in *Rukmanibai Gupta*[19] in which the following passage from *Russell* on arbitration was quoted with approval:

> If it appears from the terms of the agreement by which a matter is submitted to a person's decision that the intention of the parties was that he should hold an inquiry in the nature of a judicial inquiry and hear the respective cases of the parties and decide upon evidence laid before him, then the case is one of an arbitration.

It was evident that before the court could reach a conclusion as to whether clause 48 constituted an arbitration agreement, the test, as laid down in the passage from Russell on Arbitration, had to be applied. Only in cases where the agreement contemplated that the decisions of the person to whom the dispute was referred is in the nature of a judicial inquiry and entails hearing upon merits of the case after considering the evidence before him, could the agreement be termed to be an arbitration agreement. The court referred to its earlier decisions in *State of Uttar Pradesh* v. *Tipper Chand*[20] and *State of Orissa* v. *Bhagyadar Dash*[21] wherein the court had held that a dispute between parties may be referred to arbitration only if there was an express arbitration agreement. In both cases, the contractual provisions calling for reference of disputes to an executive engineer were held not to constitute an arbitration agreement. In *K.K.Modi* v. *K.N.Modi*[22] a clause providing for

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18 *Id.* at 159.

19 *Rukmanibai Gupta* v. *Collector of Jabalpur* (1980) 4 SCC 556.

20 *State of Uttar Pradesh* v. *Tipper Chand* (1980) 2 SCC 341.

21 *State of Orissa* v. *Bhagyadar Dash* (2011) 7 SCC 406.

22 *K.K. Modi* v. *K.N.Modi* (1998) 3 SCC 573.

Undoubtedly, in the course of correspondence exchanged by various members of

reference of disputes to the chairman of IFCI, a financial institution was held to not be an arbitration agreement as it did not provide for an adjudication of the dispute based on the submissions of the parties but by his own investigation. Similar reasoning was followed in *Bharat Bhushan.*[23]

The court also referred to the following tests laid down in *Bihar State Mineral Development Corporation*:[24]

(i) There must be a present or a future difference in connection with some contemplated affair.

(ii) There must be the intention of the parties to settle such difference by a private tribunal.

(iii) The parties must agree in writing to be bound by the decision of such tribunal.

(iv) The parties must be *ad idem*.

In all these cases the court had held that though the Act did not specify any form of an arbitration agreement, and though the term "arbitration" need not be mentioned in the agreement itself, what was paramount was to gather the intention of the parties from the terms used by the parties as to whether they had agreed for resolution of dispute through arbitration.

After construing clause 48 of the agreement, Dipak Misra J speaking for the court held as under:

> On a studied scrutiny of this postulate, it is graphically clear that it does not provide any procedure which would remotely indicate that the engineer concerned is required to act judicially as an adjudicator by following the principles of natural justice or to consider the submissions of both the parties. That apart, the decision of the

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Groups A and B with the Chairman, IFCI, some of the members have used the words 'arbitration' in connection with Clause 9. That by itself, however, is not conclusive. The intention of the parties was not to have any judicial determination on the basis of evidence led before the Chairman, IFCI. Nor was the Chairman, IFCI required to base his decision only on the material placed before him by the parties and their submissions. He was free to make his own inquiries. He had to apply his own mind and use his own expertise for the purpose. He was free to take the help of other experts. He was required to decide the question of valuation and the division of assets as an expert and not as an arbitrator. He has been authorised to nominate another in his place. But the contract indicates that he has to nominate an expert. The fact that submissions were made before the Chairman, IFCI, would not turn the decision-making process into arbitration.

23 *Bharat Bhushan Bansal* v. *U.P.Small Industries Corpn. Ltd.* (1999) 2 SCC 166. In this case the decisions of the relevant executive engineer or managing director depending upon the type of dispute was made final and binding between the parties. The executive engineer and managing director were expected to determine the claim based on their own investigation and material.

24 *Bihar State Mineral Development Corporation* v. *Encon Builders (I) (P) Ltd.* (2003)7 SCC 418.

> engineer is only binding until the completion of the works. It only casts a burden on the contractor who is required to proceed with the works with due diligence. Besides the aforesaid, during the settlement of disputes and the court proceedings, both the parties are obliged to carry out the necessary obligation under the contract. The said clause, as we understand, has been engrafted to avoid delay and stoppage of work and for the purpose of smooth carrying on of the works. It is interesting to note that the burden is on the contractor to carry out the works with due diligence after getting the decision from the engineer until the completion of the works. Thus, the emphasis is on the performance of the contract. The language employed in the clause does not spell out the intention of the parties to get the disputes adjudicated through arbitration. It does not really provide for resolution of disputes.

Rejecting the contention raised on behalf of respondent that clause 4.1 merely indicates that the courts at Bangalore would have territorial jurisdiction only in case an award was passed by the arbitrator, the court held that,

> "[i]t really means that the disputes and differences are left to be adjudicated by the competent civil court."

The court therefore set aside the order of the designated judge of the Karnataka High Court appointing an arbitrator on behalf of the appellant.

III REFERENCE TO ARBITRATION

Reference to arbitration when procurement of the contract containing the arbitration agreement is allegedly vitiated by fraud.

The decision rendered by S.S. Nijjar, J in *Swiss Timing*[25] is indeed a significant decision that touched upon certain vital issues like, the scope of adjudication of disputes arising in the proceedings under section 11 of the Act; desirability of making a reference to the tribunal when such reference is resisted on the basis of serious allegations of fraud and illegal gratification in procuring the very contract that contained the arbitration agreement when specific terms in the contract postulated that the contract would be void if the assurances and undertakings given by the parties at the time of entering into the contract are breached; and duty of the judicial authority to secure that by referring the parties to arbitration they are not subjected to a grave risk of suffering prejudice and embarrassment if the arbitration is allowed to proceed simultaneously with the criminal proceedings in which representatives of both parties were facing criminal trials in respect of grave charges like fraud, corruption, collusion, resulting in huge losses being suffered by the organizers of the games and also loss to the public exchequer.

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

The decision has given rise to several questions of great importance which the court did not have occasion to consider earlier. The questions that necessarily arise from the said decision have far reaching consequences and remain unanswered even in the decision rendered by the constitution bench of seven judges in the *Patel Engineering*[26] case.

The seven judge bench, while considering the correctness of an earlier constitution bench decision in *Konkan Railways,*[27] had noticed that though the 1996 Act was modeled on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, section 11 made a departure from article 11 of the Model Law and instead of conferring power of appointment of arbitrator on the court or other authority specified in article 11 of the model law, conferred power on "Chief Justice or any person or institution designated by him". This departure was considered to be of significance as the same was stated to have been devised with the object of "conferring power on the highest judicial authority in the State or in the country for constituting the arbitral tribunal is to ensure credibility in the entire arbitration process".[28]

It was accepted by the seven judge bench that:[29]

> ….[i]t is true that the power under Section 11(6) of the Act is not conferred on the Supreme Court or on the High Court, but it is conferred on the Chief Justice of India or the Chief Justice of the High Court. One possible reason for specifying the authority as the Chief Justice, could be that if it were merely the conferment of the power on the High Court, or the Supreme Court, the matter would be governed by the normal procedure of that Court, including the right of appeal and Parliament obviously wanted to avoid that situation, since one of the objects was to restrict the interference by courts in the arbitral process. Therefore, the power was conferred on the highest judicial authority in the country and in the State in their capacities as Chief Justices.

It is now settled that the designated judge though exercises judicial power under section 11 of the Act, he does not exercise the powers of the court.[30] The

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26 *N. Radhakrishnan* v. *Maestro Engineers* (2005) 8 SCC 618.

27 *Konkan Railway* v. *Rani Constructions* (2002) 2 SCC 388.

28 *Supra* note 26 at 648.

29 *Ibid.*

30 The powers of the Supreme Court are conferred under art. 32, 136 and 141 of the Constitution of India and the powers of the High Courts are conferred *inter alia* under article 226 of the Constitution of India. This was reiterated in *State of West Bengal* v. *Associated Contractors* (2015) 5 SCC 32 wherein the court, speaking through Rohinton F. Nariman designated judge of the chief justice of a high court or in the case of the International Commercial Arbitration, the designated judge of the Chief Justice of India, exercising power under s. 11 of the Act, does not discharge the powers of a "Court".

designated judge in the case under review *inter alia* held that an earlier decision rendered by two judges in *N. Radhakrishnan*,[31] was *per incuriam*. The designated judge after noticing that in *N. Radhakrishnan*'s case the court had "approved the finding of the high court since the case relates to allegations of fraud and serious malpractices on the part of the respondents, such a situation can only be settled in court through furtherance of detailed evidence by either parties and such a situation cannot be properly gone into by the arbitrator", declared that "the aforesaid observations run counter to the ratio of the law laid down by this court in *Hindustan Petroleum Corpn. Ltd.* v. *Pinkcity Midway Petroleums.*" [32]

The question is, whether it would be within the jurisdiction of the designated judge to pronounce upon the correctness of the decisions of the court rendered in exercise of the judicial powers of the state vested in the court by virtue of the Constitution. This necessarily gives rise to the question of great significance as to whether the designated judge exercising statutory power, though in the nature of judicial power, could pronounce upon the correctness of decisions rendered by the court in exercise of the judicial powers of State vested in it and which decisions are binding upon him being a creature of a statute, though exercising judicial power conferred upon him by such statute.

The question is rather complex and is not capable of an easy solution since, the Act does not provide for a mechanism for a designated judge to make a reference to the court to resolve any conflict in its earlier decisions or to cure the defects in such earlier decisions. Had the designated judge been conferred with the judicial powers of the court, the conundrum could have been resolved by making a reference to a larger bench for reconciling the conflicts, if any, in the decisions of the court.[33]

The factual background that led to the passing of the order by the designated judge revealed that the respondent, Commonwealth Games 2010 Organizing Committee, is a society registered under the Societies Registration Act, 1960 established for the purpose of planning, organizing and delivering the Commonwealth Games, 2010, Delhi. The petitioner, Swiss Timings Ltd. entered into an agreement with respondent for providing timing, score and result systems (TSR systems/ services). Clause 11.1 of the agreement provided that the fees set out in schedule 3 shall be paid to the petitioner for performance of its obligations. The petitioner was to submit monthly tax invoices detailing payments to be made by the respondent Committee within 30 days from the end of the month in which the invoices were received by the respondent. All payments were to be made in

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31 (2010)1 SCC 72.

32 (2003) 6 SCC 503.

33 Even in respect of cases where a bench finds conflict in the earlier decisions of the court, judicial discipline requires the bench to follow the norms laid down by the court. This principle has been reiterated in a number of cases such as *Union of India* v. *Raghubir Singh* (1989) 2 SCC 754 and *Central Board of Dawoodi Bohra Community* v. *State of Maharashtra* (2005) 2 SCC 673. It is only under certain special circumstances that a two judge bench of the court could make a reference to a Constitution Bench such as *Union of India* v. *Hansoli Devi* (2002) 7 SCC 273.

Swiss Francs. The agreement also required the petitioner to furnish a bank guarantee in favor of the respondents.

Clause 38 of the agreement provided for a mechanism for resolution of disputes arising between the parties. The petitioner had sent an invoice to the respondent on October 27, 2010 for payment of CHF 1,249,500 being 5% of the amount which was to be paid upon the completion of the games. The petitioner was also to be paid Rs. 15,00,000 deposited by it as earnest money. It was alleged by the petitioner that the respondent delayed payment without any justification and on the contrary the respondent issued a press communiqué stating that the payments to nine foreign vendors including the petitioner were withheld for non-performance of the contracts. Since the respondent disputed its liability, the petitioner issued the requisite notice invoking the arbitration clause 38.6 of the agreement and nominated S.N.Variava, J. a former judge of the Supreme Court as their arbitrator. However, despite a reminder, no reply was issued by the respondents whereupon the petitioner approached the Chief Justice of India seeking appointment of the arbitrators under section 11 of the Act.

The respondent contested the same by filing a counter affidavit raising the following two preliminary objections:

(i) The petitioner has not followed the dispute resolution mechanism as expressly provided in the agreement dated 11-3-2010. No efforts have been made by the petitioner to seek resolution of the dispute as provided under Clause 38. On the other hand, the respondent through numerous communications invited the petitioner for amicable resolution of the dispute.

(ii) The contract stands vitiated and is *void ab initio* in view of Clauses 29, 30 and 34 of the agreement dated 11-3-2010. Hence, the petitioner is not entitled to any payment whatsoever in respect of the contract and is liable to reimburse the payments already made. Therefore, there is no basis to invoke the arbitration clause.

Relying upon clauses 29 and 34, the respondent contended that there cannot be any liability upon the respondent since the petitioner had engaged itself in corrupt, fraudulent, collusive, or coercive practices which was evidenced by the registration of a criminal case being CC No. 22 of 2011 under sections 420, 427, 488, and 477 of the IPC and section 13(2) read with section 13(1)(d) of the Prevention of Corruption Act, 1988 against the chairman of the organising committee and against officials of the petitioner namely S. Chianese, Christophe Bertaud, Spiri J *etc*. The respondents also contended that the petition under section 11(6) should not be entertained in view of the pendency of the criminal trial, relying upon the judgment in *Radhakrishnan*.[34]

In *Radhakrishnan*, a two judge bench of the Supreme Court had held that the disputes between the parties therein fell within the ambit of the arbitration

34 *Supra* note 25.

clause contained in the earlier partnership agreement between the parties, following the decision, in *Haryana Telecom*[35] and *Abdul Kadir*[36] wherein it was held *inter alia* that:

> There is no doubt that where serious allegations of fraud are made against a party and the party who is charged with fraud desires that the matter should be tried in open court that would be a sufficient cause for the court not to order an arbitration agreement to be filed and not to make the reference.

In *Radhakrishnan*, the court had also approved the decision of the Madras High Court in *Oomer Sait*[37] wherein it was held:

> Power of civil court to refuse to stay of suit in view of arbitration clause on existence of certain grounds available under the 1940 Act continues to be available under the 1996 Act as well and the civil court is not prevented from proceeding with the suit despite an arbitration clause if dispute involves serious questions of law or complicated questions of fact adjudication of which would depend upon detailed oral and documentary evidence.
>
> The civil court can refuse to refer matter to arbitration if complicated question of fact or law is involved or where allegation of fraud is made.
>
> Allegations regarding clandestine operation of business under some other name, issue of bogus bills, manipulation of accounts, carrying on similar business without consent of other partner are serious allegations of fraud, misrepresentations, etc., and therefore application for reference to arbitrator is liable to be rejected.

The appellant in *Radhakrishnan* had also relied upon another decision of the Supreme Court in *Hindustan Petroleum Corporation Ltd. (HPCL)*[38] wherein it was held that in view of the mandatory language of section 8 of the Act, the civil court, having found the existence of an arbitration agreement between the parties therein, ought to have referred the dispute to arbitration. It appears that the decision was relied upon for the limited purpose of emphasizing the mandatory language of section 8 of the Act. The decision in *HPCL* was also rendered by a bench of two judges. The court concluded that the disputes raised by parties therein squarely fell within the arbitration clause (clause 14) in the dealership agreement, hence it was sufficient to refer the parties to arbitration. The court considered the contention of the respondent dealer therein, that the appellant *HPCL* by its acts, including

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35 *Haryana Telecom Ltd.* v. *Sterlite Industries (India) Ltd.* (1999) 5 SCC 688.

36 *Abdul Kadir Shamsuddin Bubere* v. *Madhav Prabhakar Oak,* AIR 1962 SC 406 at para. 17

37 *H.G. Oomor Sait* v. *O Aslam Sait* (2001) 3 CTC 269 (Mad.)

38 (2003) 6 SCC 503.

suspending the dealership agreement under clause 30 thereof, had sought to usurp the power of search and seizure conferred upon competent authorities under the Standard Weights and Measures (Enforcement) Act, 1985. It was contended on behalf of the appellant that "the misconduct, if any, pertaining to short supply of petroleum products or tampering with the seals would be a criminal offence under the 1985 Act. Therefore, the investigation into such conduct of the dealer can only be conducted by such officers and in a manner so specified in the said Act, and it is not open to the appellant to arrogate to itself such statutory power of search and seizure by relying on some contractual terms in the dealership agreement. It is further argued that such disputes involving penal consequences can only be tried by a court of competent jurisdiction and cannot be decided by an arbitrator."[39] The appellant had contended that the exercise of such power could not be the subject matter of arbitration and it would not be appropriate for the court to refer the dispute to arbitration.

Rejecting these arguments, the two judge bench in *HPCL* held *inter alia* that

> "[t]his right of the appellant to take action against an erring dealer under the terms of the Agreement is *de hors* the proceedings that may be available to be initiated against an erring dealer under the provisions of various other enactments referred to in clause 20 of the said Agreement including under the provisions of the 1985 Act. This right of the Corporation to suspend the supply of petroleum products to an erring dealer is a right exercised under the terms of the contract and is independent of the statutory provisions of the various Acts enumerated in clause 20 of the Agreement."… The power conferred under the Agreement does not in any manner conflict with the statutory power under the 1985 Act nor does the prescribed procedure under the 1985 Act in regard to search and seizure, and prosecution applies to the power of the appellant to suspend the supply of its petroleum products to an erring dealer. The power exercised by the appellant in such a situation is a contractual power under the Agreement and not a statutory one under the 1985 Act.[40]

The designated judge in *Swiss Timing*, disagreeing with the preliminary objections raised by the respondents, held that "[a]s a pure question of law, I am unable to accept the very broad proposition that whenever a contract is said to be *void ab initio*, the courts exercising jurisdiction under section 8 and section 11 of the Arbitration Act, 1996 are rendered powerless to refer the disputes to arbitration." Referring to the decision in *Radhakrishnan*, it was held that: [41]

> In my opinion, the judgment in *N. Radhakrishnan* is per incuriam on two grounds: firstly, the judgment in *Hindustan Petroleum Corpn.*

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39 *Supra* note 25 at 18.

40 *Supra* note 25 at 22.

41 *Supra* note 33 at 514.

> *Ltd*. though referred to has not been distinguished but at the same time is not followed also. The judgment in *P. Anand Gajapathi Raju* was not even brought to the notice of this Court. Therefore, the same has neither been followed nor considered. Secondly, the provisions contained in Section 16 of the Arbitration Act, 1996 were also not brought to the notice by this Court. Therefore, in my opinion, the judgment in *N. Radhakrishnan* does not lay down the correct law and cannot be relied upon.

Though reference was made to the decision of the constitution bench in *M.S.Sheriff,* [42] the designated judge relied upon the general observations therein to hold that this was a fit case to decline to keep in abeyance the civil proceedings in light of the pending criminal proceedings.

The designated judge therefore finally referred the parties to arbitration and nominated Justice B.P Singh, a former judge of the Supreme Court as the arbitrator nominated for and on behalf of the respondent Committee and appointed Kuldip Singh J, also a former judge of the Supreme Court, as the presiding arbitrator.[43]

Can the court deviate from the contract in appointing arbitrator under Section 11(6)

The court was seized of the above question in *North Eastern Railway* v. *Tipple Engineering Works*.[44] The facts in the *North Eastern Railway* case were as under. The respondent was a contractor who entered into two contracts dated 1.11.1993 and 28.04.1994. Both contracts came to be terminated on 07.11.1994. After futilely trying to avail a writ remedy, the respondent herein sought to resolve the dispute by way of arbitration.

It is expedient at this juncture to refer to the clauses in the general conditions of contract which constituted the arbitration agreement in both contracts. In cases not covered by Clause 64(3) (a)(i), the Arbitral Tribunal shall consist of a panel of three Gazetted Railway Officers not below JA grade, as the arbitrators. For this purpose, the Railways will send a panel of more than 3 names of gazetted Railway Officers of one or more departments of the Railways to the contractor who will be asked to suggest to the General Manager up to 2 names out of the panel for appointment as contractor's nominee. The General Manager shall appoint at least one out of them as the contractor's nominee and will also simultaneously appoint the balance number of arbitrators either from the panel or from outside the panel, duly indicating the 'presiding arbitrator' from amongst the 3 arbitrators so appointed. While nominating the arbitrators it will be necessary to ensure that one of them is from the accounts department. An officer of Selection Grade of the accounts department shall be considered of equal status to the officers in SA grade of other departments of the railways for the purpose of appointment of arbitrators.

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42 1954 SCR 1144.

43 The power under section 11(6) of the Act, as is generally understood, is only to nominate an arbitrator on behalf of the respondent. The designated judge in this case has also appointed the presiding arbitrator who could have been appointed by the two arbitrators.

44 (2014) 9 SCC 288.

If one or more of the arbitrators appointed as above refuses to act as arbitrator, withdraws from his office as arbitrator, or vacates his/their office/offices or is/are unable or unwilling to perform his functions as arbitrator for any reason whatsoever or dies or in the opinion of the General Manager fails to act without undue delay, the General Manager shall appoint new arbitrator/arbitrators to act in his/their place in the same manner in which the earlier arbitrator/arbitrators had been appointed. Such re-constituted Tribunal may, at its discretion, proceed with the reference from the stage at which it was left by the previous arbitrator(s)."

From the provisions of the general conditions of contract it is clear that the panel of arbitrators as per the agreement between the parties necessarily has to be gazetted Railway Officers; any vacancy in the panel of arbitrators has to be filled up in the same manner in which the initial panel is required to be constituted."

Arbitration in respect of one of the contracts, namely contract dated 01.11.1993 having commenced in 1994, was still pending. Arbitration in respect of the other contract, *i.e.*, arising out of contract dated 28.04.1994 had not commenced as a result of division of zone etc. Therefore the respondent filed an application under section 11(6) of the Act before the Chief Justice of the Patna High Court. In the proceedings for appointment of arbitrator under section 11(6) of the Act, a former Chief Justice of the Sikkim High Court was appointed as the arbitrator. The order of the high court came to be challenged by the appellant by way of special leave petition.

The court referred to the decisions in the following cases: *ACE Pipeline Contracts (P) Ltd.*,[45]*Bharat Battery,*[46] *Punj Lloyd*,[47] *Deep Trading Co*.[48]

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45 *ACE Pipeline Contracts (P) Ltd.* v. *Bharat Petroleum Corpn. Ltd.* (2007) 5 SCC 304 where the court had stated that the High Court can deviate from the requirements of the contract in exceptional circumstances observing that "[c]ourts are not powerless to issue mandamus to the authorities to appoint arbitrators as far as possible as per the arbitration clause. But in large number of cases if it is found that it would not be conducive in the interest of parties or for any other reasons to be recorded in writing, choice can go beyond the designated persons or institutions in appropriate cases. But it should normally be adhered to the terms of arbitration clause and appoint the arbitrator/arbitrators named therein except in exceptional cases for reasons to be recorded or where both parties agree for common name. In the present case, in fact the appellant's demand was to get some retired Judge of the Supreme Court to be appointed as arbitrator on the ground that if any person nominated in the arbitration clause is appointed, then it may suffer from bias or the arbitrator may not be impartial or independent in taking decision. Once a party has entered into an agreement with eyes wide open it cannot wriggle out of the situation that if any person of the respondent BPCL is appointed as arbitrator he will not be impartial or objective. However, if the appellant feels that the arbitrator has not acted independently or impartially, or he has suffered from any bias, it will always be open to the party to make an application under Section 34 of the Act to set aside the award on the ground that arbitrator acted with bias or malice in law or fact."

46 *Union of India* v. *Bharat Battery* (2007) 7 SCC 684 where the court relying upon the decision of the three judge bench in *Punj Lloyd Ltd.*v. *Petronet MHB Ltd.* held that opposite party would lose its right of appointment of arbitrator as per terms of the contract once a party files an application under S. 11(6) of the Act. The Supreme Court in *Bharat Battery* unequivocally held "[o]nce Section 11(6) petition is filed

The court also relied upon *Union of India* v. *Singh Builders Syndicate*[49] to hold that the pendency of the arbitration for more than a decade amounted to a mockery of the process. It is pertinent to note that in case of *Singh Builders*, the arbitrators, also being railway officers as in the present case, had tendered their resignation from the arbitration on account of their transfer and as such the position was vacant. It is submitted that the court did not adequately examine the impact of the decision in terms of replacing an existing arbitral tribunal.

The court having examined the case law mentioned above, found that the "forfeiture rule" has been consistently applied.[50] The court also took note of the inordinate delay of 20 years despite which arbitration had not even commenced and upheld the decision of the Patna High Court. The court also noted that section 11(8) of the Act is not mandatory as held in *Northern Railway Admin* v. *Patel Engg. Co. Ltd.*[51]and in light of there being no special technical requirement for the arbitrators other than being senior railway officers, upheld the decision of the high court.

Whether a fresh reference under section 11 is maintainable where arbitration proceedings are terminated.

In *Lalit Kumar Sanghvi* [52] case the court was called upon to decide an interesting question as to whether by reason of an order passed by an arbitral tribunal terminating arbitration proceedings *inter alia* on the ground that the proceedings remain pending since long (about four years) and that the claimant took no interest in the matter nor even paid the fees to the arbitrator despite being directed to do so, an application under section 11 of the Act for fresh appointment of arbitrator would be maintainable. Answering the question in the negative, the designated judge of the High Court of Bombay dismissed the application under section 11 of the Act holding the same as not maintainable and further observed that "the remedy of the applicant is by filing a writ petition and not an application under Section 11 of the Act". This order came to be challenged before the Supreme Court in proceedings under article 136 of the Constitution of India.

The first question that arose for consideration was whether observation made by the high court that the remedy of the applicant lay in challenging the order passed by the arbitral tribunal terminating the proceedings, by way of writ proceedings and not by way of an application under section 11 of the Act, was correct. Relying upon the decision of the seven judge bench in *Patel Engineering*[53]

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by one party seeking appointment of an arbitrator, the other party cannot resurrect the clause of the agreement dealing with the appointment of the arbitrator, in this case Clause 24 of the agreement."

47 *Punj Lloyd Ltd.*v. *Petronet MHB Ltd.* (2006) 2 SCC 638

48 *Deep Trading Co.* v. *Indian Oil Corpn* (2013) 4 SCC 35.

49 (2009) 4 SCC 523.

50 *Indian Oil Corpn. Ltd.* v. *Raja Transport (P) Ltd.* (2009) 8 SCC 520.

51 (2008) 10 SCC 240.

52 *Lalit Kumar Sanghvi* v. *Dharamdas Sanghvi* (2014) 7 SCC 255.

53 (2005) 8 SCC 618.

it was reiterated that the scheme of the Act was that a party aggrieved by any order of the arbitral tribunal, unless it has a right of appeal under section 37 of the Act, has to wait until the award is passed by the tribunal. The court also expressed its disapproval of the stand adopted by some of the high courts that any order passed by the arbitral tribunal is capable of being corrected by the high court under article 226 or 227 of the Constitution and held that such an intervention by the high court is not permissible.

Speaking for the court, Chelameshwar J hastened to clarify "That need not, however, necessarily mean that the application such as the one on hand is maintainable under Section 11 of the Act."

Holding that the apprehension of the applicant, that they would be left without any remedy if the application under section 11 was held to be not maintainable, was unfounded, the court, referring to sections 14 and 32 of the Act held that the legality and validity of the order dated 29.10.2007 passed by the arbitral tribunal terminating the arbitration proceedings could well be the subject matter of proceedings under section 14(2) before a court as defined under section 2(e) of the Act. The court observed that the appellants are at liberty to approach the appropriate court for the determination of the legality of the termination of the mandate of the arbitral tribunal which in turn is based upon an order on October 10, 2007 by which the arbitral proceedings were terminated.

Section 11 only confers power upon the designated judge to appoint, consequent upon a failure of the parties to appoint an arbitrator in terms of the arbitration agreement or in the absence of an agreed procedure being provided in the contract. However, in this case, there was no allegation in the Section 11 Petition that there had been any failure to appoint an arbitrator in terms of the agreement as necessitated.

The question as to whether a duly constituted arbitral tribunal in accordance with an arbitration agreement is justified in terminating arbitration proceedings could not appropriately come within the scope of section 11 of the Act.

Challenge to the order of arbitral tribunal would include a judicial review in a court of law in accordance with the Act. The scope of Section 11 does not contemplate such a judicial review and therefore the Supreme Court has rightly held that such a question could not be adjudicated in a petition under section 11 of the Arbitration Act.

Pre conditions for initiation of arbitration

The decision of the court in *Larsen & Toubro*[54] is unique. The court blended law with equity to resolve to protect the rights and obligations of the parties arising out of an arbitration agreement that underwent subsequent transformations by three supplemental agreements by and between the parties.

This case is also an example of how *ad hoc* arbitrations fail to provide a true solution for resolution of disputes arising out of contracts that are known by various

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54 Civil Appeal No. 7586 of 2009 decided on February 25, 2014 reported in 2014 (1) Arb. L R 556 ; and subsequently reported in (2015) 2 SCC 461.

expressions including "string contracts" or "Pass through contracts" or "Contracts executed on back to back basis". Had the parties been made aware of arbitral institutions which make provisions for multi-party arbitrations, which is convenient in case of disputes arising out of string contracts, they could have incorporated rules of such institutions that provide for series of back to back contracts between multiple parties, though the subject matter of each of the contracts is one and the same project. Such an arrangement would have placed the parties in a simpler and more convenient legal footing than what they found themselves in, in the present case.[55]

In the case under review, Larsen and Toubro preferred appeal by special leave before the Supreme Court from an order dated April 27, 2007 passed by the designated judge of the Delhi High Court allowing an application filed by the respondent under section 11(6) of the Act, nominating an arbitrator on behalf of Larsen and Toubro on the ground that in spite of notice by respondent, the appellant had failed to nominate arbitrator in terms of clause 25 of the agreement dated 03.03.1988 entered into between the appellant and respondent. This was a pass through contract on a back to back basis following an agreement dated 29.02.1988 between Larsen and Toubro and Standing Conference of Public Enterprises (SCOPE).

SCOPE had awarded the contract in favour of Larsen and Toubro for construction of twin tower office complex at Laxmi Nagar District Center, Delhi comprising of civil works and subsidiary works for a sum of Rs.27.48 crores. This agreement permitted Larsen and Toubro to subcontract. Accordingly a sub contract was entered into between Larsen and Toubro and the respondent.

While retaining the civil works component under the agreement on February 29,1988, Larsen and Toubro awarded finishing work including brickworks, woodworks, flooring, furnishing, aluminum works, and other miscellaneous works including waterproofing, *etc*. to the respondent for a contract value of Rs. 12.08 crores. It was a pass through contract on a back to back basis.

Clause 2 of the contract dated 03.03.1988 *inter alia* provided that "L&T shall pay MHB the said contract amount or such other sum as shall become payable only as and when the said payments are received by L&T from SCOPE at the time and in the manner hereinafter specified in the terms and conditions of this contract". Clause 6 of the said contract provided that "[a]ll obligations in respect of ancillary works undertaken by MHB shall be performed by MHB itself and will not jeopardise the interest and contract of L&T with SCOPE. Satisfaction of SCOPE, their representatives and architects shall form the basis of this agreement."

The relevant part of clause 25, which provided for settlement of disputes by arbitration read as under:

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55 For example, R. 16 of the Delhi International Arbitration Center Rules contemplates multiparty arbitrations in the case of "string" or "chain" contracts. Similarly Rule 16 of the Arbitration Centre-Karnataka (Domestic and International) Rules, 2012 provides for multi party arbitration in the case of disputes arising from inter-connected contracts.

Except where otherwise provided in the contract, all questions, disputes, certificates excluding 'excepted matters' relating to this contract shall be referred to a sole arbitrator in case claims are up to and including Rs 10 lakhs to be appointed by the General Manager (Civil), L&T and for claiming over Rs 10 lakhs by a panel of 3 arbitrators of whom one will be appointed by the General Manager (Civil), L&T, the other by BHR and an umpire appointed in advance jointly by the two arbitrators….

> … No award of the arbitration/umpire shall be binding on L&T unless MHB had furnished complete opportunity to L&T to file a similar claim on SCOPE and only upon L&T receiving any payment from SCOPE under the award which L&T may get in its favour on the subject-matter of work."

The respondent made certain claims upon the appellant; the appellant raised these claims with SCOPE. After a settlement was reached between appellant and SCOPE, SCOPE had paid the appellant a sum of Rs. 2.15 crores in respect of those claims, out of which it apportioned a sum of Rs.77.40 lakhs to the sub-contractor. The amount so apportioned was paid to the respondent to compensate for the price escalation on works due to hindrance caused in execution of works in terms of the agreement dated 03.03.1990 entered into between the appellant and the respondent. This was the first supplementary agreement between the parties. Clause (viii) whereof reads as under:

> The agreement provides that all disputes between the parties shall be settled through arbitration. It is now expressly agreed that any dispute or difference which MHB might have with L&T under the agreement or SCOPE might have with L&T under the main contract between them relating to the part of work that is to be executed by MHB, shall be deemed disputes jointly between MHB and L&T and SCOPE under the main contract and L&T will refer all such disputes to SCOPE for settlement by negotiation. If SCOPE does not settle the same by negotiation, then L&T will refer the said disputes for arbitration with SCOPE along with any other disputes which L&T might have with SCOPE in terms of the arbitration clause provided in the main contract. MHB shall in such an event, help prepare claims and statement of case relating to their scope of work and render all assistance and cooperation as may be required in successfully pursuing arbitration. MHB shall bear proportionately, the cost of arbitration relating to their scope of work. The award of the arbitration on all such matters in dispute, claims and counterclaims relating to MHB's scope of works shall be binding on both MHB and L&T and all such disputes between MHB and L&T shall be deemed to have been settled accordingly and shall not be referable to arbitration again between MHB and L&T under the agreement.

It appears that there were further claims made by the respondent which were raised by the appellant with SCOPE. SCOPE agreed to make payments in respect

of such claims. To apportion those payments between the appellant and respondent, another supplementary agreement dated 08.12.1993 was entered into between the parties with a recital to the effect that "L&T has, therefore, invoked the arbitration clause under L&T's contract with SCOPE and referred all the claims including those relating to MHB on 29-5-1992 to arbitration, which is now pending."

In clause 6 of the said supplementary agreement, the parties recorded their understanding as under:

> "That L&T and MHB shall not undertake any other arbitration as between them in respect of the claims referred to pending arbitration, except to share the proceeds or liabilities as stated above by way of accord and satisfaction."

The claims raised by the appellant upon SCOPE were the subject matter of arbitration between L&T and SCOPE before a tribunal of two members which awarded a sum of Rs. 15.02 crores which amount was subsequently reduced to Rs. 13.23 crores by mutual negotiation and endorsed by the respondent. Out of the said amount, a sum of Rs. 4.58 crores was paid by the appellant to the respondent. At that stage appellant and respondent entered into a third supplementary agreement dated 06.02.1995 providing inter alia that "[a]ny claim arising after the date covered by the said award, shall as far as possible be settled mutually by negotiation. It is mutually agreed by the parties that any such disputes shall be identified but shall not be referred to arbitration on the owner (SCOPE herein) until the completion of the project. This would facilitate concentration of the concerted efforts of the parties for timely completion of the project. The reference of disputes, if any, to arbitration after completion of the project shall be in accordance with the terms of the first supplementary agreement dated 31-1-1990. Any further arbitration if referred to the owner after completion of the work, the award arising out of this arbitration shall be a share in promotion of the claims referred to the works of each of the parties herein.

It appears that the respondent made some further claims upon the appellant in October 2000, which were in turn referred to SCOPE. The claims were updated in December 2002 and January 2003.Since the respondent didn't receive any amount towards the claims made by it and it chose to close the contract and serve legal notice upon the appellant seeking resolution of its claims, the respondent nominated its arbitrator and also called upon appellant to nominate its arbitrator. Since the appellant denied the contents of the legal notice, the respondent filed an application under section 11 of the Act, praying *inter alia*:

> "(a) Appoint an arbitrator on behalf of the respondent in terms of Clause 25 of the contract agreement dated 3-3-1988 between the parties as modified by supplementary agreement dated 31-1-1990 and 6-2-1995.
>
> (b) Direct the arbitrators appointed by the applicant and that appoint on behalf of the respondent to appoint an umpire in terms of Clause 25 of the contract agreement dated 3-3-1988."

The designated judge, holding that the appellant had lost its right to nominate its own arbitrator, nominated an arbitrator for the appellant with the direction that the two arbitrators may appoint the presiding arbitrator.

The appellant preferred an appeal from the said order before the Supreme Court. A bench of two judges, taking note of the contents of clause 25 of the agreement on March 03, 1988 and the contents of the supplementary agreements between parties, held that clause 25 had undergone change and stood completely novated. The novated agreement clearly provided that in the first instance, the claims are to be taken up with SCOPE. The respondent is supposed to assist and cooperate with the appellant in pursuing the arbitration. It is only after an award is rendered in the arbitration between the appellant and SCOPE, and if disputes still remain between the appellant and the respondent, that there can be an arbitration in respect of those disputes between the parties.

Sikri, J. speaking for the court held:

> …[E]ven the respondent knew fully well that the said clause had been drastically altered by supplementary agreements. It is for this reason that in Prayer (a) of the application under Section 11 of the Act filed by the respondent, it has itself acknowledged this change by mentioning that the arbitrator be appointed in terms of Clause 25 of the contract agreement dated 3-3-1988 "as modified by supplementary agreements dated 31-1-1990 and 6-2-1995". What, however, is lost sight of by the respondent in the process, is that the modification in Clause 25 did not permit the respondent to move this kind of application for appointment of arbitrator between the parties, at that stage.[56]

After having held that respondent could not have invoked clause 25 for reference of disputes between parties in view of subsequent novation of provisions, the court balanced the equities between the parties by giving the following directions:

> It shall be ensured by the appellant that final bill is settled by SCOPE within two months from the date of receiving the copy of this order. For this purpose, this order shall be brought to the notice of SCOPE as well so that SCOPE acts swiftly for settling the bill.
>
> In case there are certain claims of the respondent which are not agreed to while passing the final bill and disputes remain, those will be taken up by the appellant with SCOPE immediately thereafter by invoking arbitration between the appellant and SCOPE as per the arbitration agreement between the appellant and SCOPE. In raising such disputes the appellant and the respondent shall act in unison as

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56 *Supra* note 54 at 469.

per the understanding arrived at between them vide supplementary agreements. In that event, the Arbitral Tribunal shall be constituted within 2 months thereof.

In case the appellant is satisfied with the final bill and chooses not to raise the claims with SCOPE but the respondent feels that their claims are legitimate then it would be treated as dispute between the appellant and the respondent. In that event, the Arbitral Tribunal shall be constituted as per Clause 25 of the agreement dated 3-3-1998 between the parties within a period of two months of that event.

In either of the aforesaid arbitrations, the Arbitral Tribunal shall endeavour to render its award within six months from the date of the constitution of the Arbitral Tribunal.

Appointment of third/presiding arbitrator

The decision of the Judge designated by the Chief Justice of India, in *Reliance Industries Ltd.* v. *Union of India*,[57] is noteworthy. The petitioner no.1, Reliance Industries Limited, a company registered under the Companies Act, 1956; petitioner no. 2 a company registered in Cayman Islands, British Virgin Islands, and petitioner no. 3 a company registered under the laws of England and Wales. Petitioners no. 1 and 2 made a joint bid for the New Exploration and Licensing Policy of the Union of India, for the KG-D6 block, which came to be accepted. In furtherance of the same, on 12.04.2000 a Production Sharing Contract ("PSC") came to be entered into between the petitioners' no. 1 and 2 on one hand, as the contractors and the Republic of India on the other.

Article 33 of the PSC provided the arbitration clause to the following effect:

"Article 33

Sole	expert,	conciliation	and arbitration
33.1.	*	*	*
33.2.	*	*	*

33.3. Subject to the provisions of this contract, the parties hereby agree that any controversy, difference, disagreement or claim for damages, compensation or otherwise (hereinafter in this clause referred to as a "dispute") arising between the parties, which cannot be settled amicably within ninety (90) days after the dispute arises, may (except for those referred to in Article 33.2, which may be referred to a sole expert) be submitted to an Arbitral Tribunal for final decision as hereinafter provided.

57 *Reliance Industries Ltd.* v. *Union of India* (2014) 11 SCC 576.

> 33.4. The Arbitral Tribunal shall consist of three arbitrators. Each party to the dispute shall appoint one arbitrator and the party or parties shall so advise the other parties. The two arbitrators appointed by the parties shall appoint the third arbitrator.
>
> 33.5. Any party may, after appointing an arbitrator, request the other party(ies) in writing to appoint the second arbitrator. If such other party fails to appoint an arbitrator within thirty (30) days of receipt of the written request to do so, such arbitrator may, at the request of the first party, be appointed by the Chief Justice of India or by a person authorised by him within thirty (30) days of the date of receipt of such request, from amongst persons who are not nationals of the country of any of the parties to the arbitration proceedings.
>
> 33.6. If the two arbitrators appointed by or on behalf of the parties fail to agree on the appointment of the third arbitrator within thirty (30) days of the appointment of the second arbitrator and if the parties do not otherwise agree, at the request of either party, the third arbitrator shall be appointed in accordance with the Arbitration and Conciliation Act, 1996.
>
> 33.12. The venue of the sole expert, conciliation or arbitration proceedings pursuant to this article, unless the parties agree otherwise, shall be New Delhi, India and shall be conducted in the English language. Insofar as practicable, the parties shall continue to implement the terms of this contract notwithstanding the initiation of arbitral proceedings before a sole expert, conciliator or Arbitral Tribunal and any pending claim or dispute.
>
> 33.13. x x x

On 08.08.2011, petitioner no. 3 was also made party to the PSC with the approval of the Union of India which permitted petitioner no. 1 to assign 30% of its participating interest in Block KG-D6. In the financial year 2010-2011 some disputes arose between the petitioners and the respondent. After some preliminary correspondence, the petitioner no. 1 invoked the arbitration clause, *i.e.*, article 33 of the PSC, by notice dated 23.11.2011. By the said letter, the petitioner no. 1 nominated Bharucha J, former Chief Justice of India as its arbitrator and called upon the respondent to nominate its arbitrator within 30 days of receipt of its letter. The respondent through a series of correspondence denied the existence of any dispute between the parties. On 16.04.2012, the petitioners filed an application under article 11(6) of the Act, before the Chief Justice of India seeking constitution of an arbitral tribunal in terms of article 33.5 of the PSC. In the correspondence ensuing between the parties after the filing of the said petition, the respondent vide letter dated 05.07.2012 nominated V.N.Khare J, former Chief Justice of India as the arbitrator on behalf of Union of India. Accordingly the petition filed under Section 11(6) was disposed of by the designated judge on July16, 2012, as both parties had no objection to the arbitrators being nominated by each other, observing

that the two nominated arbitrators are to nominate the third arbitrator. However, as communicated *vide* letter on August 01, 2013 by one of the arbitrators, *viz.* Bharucha J, to the petitioner no.1, the arbitrators were not able to come to a conclusion as to the third arbitrator.

One of the issues between the petitioners and the respondent was whether the arbitration can be considered as an International Commercial Arbitration. The petitioners contended that while petitioners no.2 and 3 were foreign parties, petitioner no. 3 had been inducted in the PSC with the permission of the respondent. Though the disputes were raised by petitioner no.1, they were raised in its capacity as the operator and therefore the disputes must be considered to have been raised on behalf of the other petitioners also. Further, one set of accounts were maintained for all petitioners together. Moreover, since the disputes arose out of the execution of the PSC, any award made in the arbitration between the petitioners and the respondent would affect the interests of the other petitioners as well and hence, it must be considered as an international arbitration. The petitioner contended further that the respondent had not raised any objection regarding maintainability of the petition before the Chief Justice of India, and therefore could not be heard to contend that the arbitration was not an International Commercial Arbitration.

The petitioners claimed that in light of article 33.5 of the PSC, the third arbitrator was required to be of a nationality other than those of the parties and also that this was in keeping with the international practice. The petitioners also contended that by virtue of article 33.5[58] of the PSC, UNCITRAL Rules were adopted for the arbitration agreement and reference to such rules covered the constitution of the tribunal also.[59]

The respondent contended that article 33.6 of the PSC did not mention about the nationality of arbitrators and that the omission of such a requirement, in contrast to article 33.5, was deliberate. It was also contended that the petitioners had accepted the appointment of V.N.Khare J without any reservation and hence were estopped from insisting upon appointment of a foreign arbitrator of a nationality other than the nationalities of the parties. The respondents also contended that the dispute was only between the petitioner no. 1 and the respondent and therefore adjudication of such dispute would not constitute an International Commercial Arbitration. The respondent also relied upon the decisions of the court in *Malaysian Airlines*[60] and *M.S.A.Nederland*[61] to contend that UNCITRAL Rules cannot override section 11(1) and 11(2) of the Act and they were of no help in interpreting section 11(9) of the Act as well. It was also contended on behalf of the respondent that the UNCITRAL Rules would not be applicable for the following reasons:

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58 Not extracted in the judgment(emphasis added).

59 The decision of the Supreme Court in *Antrix Corporation Ltd.* v. *Devas Multimedia*, (2014) 11 SCC 560 was relied upon to contend that reference to such rules covered constitution of tribunal also.

60 *Malaysian Airlines Systems BHD* v. *Stic Travels (P) Ltd.* (2001) 1 SCC 509.

61 *M.S.A. Nederland B.V.* v. *Larsen and Toubro Ltd.* (2005) 13 SCC 719.

(1) The law governing the arbitration agreement is Indian law;

(2) The seat of the arbitration is in India which makes the curial law of the arbitration as Indian law.

(3) The governing law of the contract is the Indian law.

(4) All these factors would show that UNCITRAL Rules would become relevant only after the Arbitral Tribunal has been constituted.

The designated judge, having considered the submissions on behalf of both parties, held that in view of the fact that the Union of India had granted its approval to the petitioner no. 3 being a participant in the KG-D6 block, they could not now contend that petitioners no.2 and 3 were not connected with the PSC. The designated judge further held that while the appointment of an Indian national would not be contrary to article 33.6 of the PSC, there was no requirement that only an Indian national should be appointed as the third arbitrator. The Designated Judge also referred to the following passage from Redfern and Hunter on International Arbitration, 5th edition:

> In an ideal world, the country in which the arbitrator was born, or the passport carried, should be irrelevant. The qualifications, experience, and integrity of the arbitrator should be the essential criteria. It ought to be possible to proceed in the spirit of the Model Law which, addressing this question, provides simply: 'No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.' Nevertheless, as stated above, the usual practice in international commercial arbitration is to appoint a sole arbitrator (or a presiding arbitrator) of a different nationality from that of the parties to the dispute.

The designated judge also quoted with approval from Gary B. Born on International Commercial Arbitration who opined:

Article 11(5) does not restrict the parties' autonomy to select arbitrators of whatever nationality they wish. It merely affects the actions of national courts, when acting in their default roles of appointing arbitrators after the parties' efforts to do so have failed. Article 11(5) does not forbid the appointment of foreign nationals as arbitrators, but on the contrary encourages the selection of an internationally neutral tribunal.

Far from resembling national law prohibitions against foreign arbitrators, Article 11(5) aims at exactly the opposite result. Indeed, Article 11(1) of the UNCITRAL Model Law also provides, like the European and Inter-American Conventions, that "no person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties. That properly reflects the international consensus, embraced by the European, Inter-American and New York Conventions, that mandatory nationality prohibitions are incompatible with the basic premises of international arbitration.

Dispelling all the apprehensions of bias and difficulty in applying Indian law, the designated judge appointed a person of nationality other than that of the parties, i.e., Hon'ble James Spigelman AC QC as the third arbitrator. This order was modified by order dated 2.04.2014, withdrawing the name of Mr. James Spigelman since in spite of the Designated Judge observing in his order dated 31.03.2014, that he shall not appoint an arbitrator from either of the lists submitted by the parties, and since the arbitrator actually happens to be on the list of the petitioners. Thereafter on 29.04.2014 the Designated Judge appointed Michael Hudson McHugh, AC QC, former Judge of the High Court of Australia and former Non-Permanent Justice of the Court of Final Appeal in Hong Kong as the third arbitrator, to act as the Chairman of the arbitral tribunal.

Reference to a "larger bench" by a designated judge in a proceeding under section 11

The decision by a two judge bench in *Antrix Corporation Ltd.*[62] case is of considerable significance as it reflects both innovation of new principles in the realm of law of arbitration and also constitutes a departure from well settled principles of law, hitherto therefore consistently followed by the court in its earlier decisions, without however noticing them.

The applicant Antrix Corporation had invoked the jurisdiction of the Chief Justice of India by filing an application under section 11(4) read with section 11(10) of the Act.[63] The designated judge referred the matter to a "larger bench" of the court. The bench however observed that the said application "has given rise to an important question of law relating to the scope and ambit of powers of Chief Justice of India under section 11(6) of the said Act."[64]

The facts as noticed in the decision are: Antrix Corporation Ltd. a Government of India Company, had on January 28, 2005 entered into an agreement with respondent Devas Multimedia Pvt. Ltd. for the lease of space segment capacity on ISRO/Antrix s-Band spacecraft. Article 19 of the said agreement provided that the rights and responsibilities of parties thereunder would be subject to and construed in accordance with the laws of India. Article 20 of the agreement provided

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62 *Antris Corporation Ltd.* v. *Devas Multimedia Pvt. Ltd.* (2014) 11 SCC 560.

63 The very first paragraph of the judgment describes that the application was filed by the applicant under section 11(4) read with section 11(10) of the Act although sub s. 4 of s. 11 could be invoked by a party to an arbitration agreement only if "the appointment procedure in sub section (3) applies". Sub s. (3) of s.11 in terms provides that failing any agreement referred to in sub s. (2) which provides that parties are free to agree on procedure to be followed in arbitration with 3 arbitrators, each party shall appoint 1 arbitrator and the two appointed arbitrators shall appoint the third arbitrator and who shall act as the presiding arbitrator.

64 Sub-s. (6) of section11 applies only to such cases where an appointment procedure is agreed upon by the parties. In contrast sub-s. (4) of section 11 only if parties fail to agree on procedure for appointing the arbitrator/arbitrators and would be governed by the procedure laid down in sub s. (3) of s. 11. There appears to be some confusion as regards the nature of the application filed by the applicant invoking the jurisdiction of the Chief Justice of India.

for settlement of disputes between the parties arising out of the agreement. Though article 20 of the agreement has not been extracted in the decision, it has been paraphrased as under:

> Article 20 of the agreement deals specially with arbitration and provides that in the event any dispute or difference arises between the parties as to any clause or provision of the agreement, or as to the interpretation thereof, or as to any account or valuation, or as to rights and liabilities, acts, omissions of any party, such disputes would be referred to the senior management of both the parties to resolve the same within 3 weeks, failing which the matter would be referred to an Arbitral Tribunal comprising of three arbitrators. It was provided that the seat of arbitration would be New Delhi in India. It was also provided that the arbitration proceedings would be held in accordance with the rules and procedures of the International Chamber of Commerce (ICC) or UNCITRAL.[65]

On 25.02.2011 Antrix terminated the agreement with immediate effect, stating it to be in keeping with directives of the Government, which it was bound to follow, under article 103 of its Articles of Association.

The respondent objected to the said termination. On 15.04.2011 Antrix refunded a sum of Rs. 58.37 crores by cheque to the respondent being the upfront capacity reservation fee it had received from respondent. The respondent however returned the cheque insisting that the agreement was still subsisting in keeping with the provisions of Article 20 of the agreement. On 15.06.2011, Antrix wrote to respondent inviting its senior management to discuss the matter and try and resolve the dispute between the parties. However, the respondent, without going through the process of mediation as contemplated under Article 20(a), unilaterally and without prior notice to Antrix, on June 29.06.2011 addressed a letter requesting the ICC to constitute an arbitral tribunal in accordance with ICC rules of arbitration and also nominated one Mr. Veedor, QC as its nominee arbitrator. Antrix learnt about these developments only on July 05, 2011 after receiving a request from ICC to nominate its arbitrator. However by its letter dated 11.07.2011, instead of nominating its arbitrator as requested, Antrix once again on July 27,2011 sought a meeting with the senior management team. Though a meeting with the senior management team was held, the respondent insisted on arbitration and declined to discuss the issues for settlement in accordance with article 20 of the agreement.

Thereafter, Antrix, invoking the appointment procedure of UNCITRAL Rules, appointed Ms. Sujata Manohar J, retired judge of the Supreme Court of India and called upon the respondent to appoint its arbitrator within 30 days of receipt of notice. On 05.08.2011, Antrix wrote to the secretary to the ICC Court of Arbitration inviting attention to article 20 of the agreement which provided that the arbitral proceedings would be governed by Indian Law i.e., Arbitration and Conciliation Act, 1996. Though the respondent did not respond to the said letter, the ICC took the following stand:

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65 *Supra* note 62.

> We refer to our letter dated 18-7-2011, and remind the parties that the issues raised regarding the arbitration clause would shortly be submitted to the Court for consideration. All comments submitted by the parties will be brought to the Court's attention. In this regard, any final comments from the parties may be submitted to us by 5-8-2011.
>
> Should the court decide that this arbitration shall proceed pursuant to Article 6(2) of the Rules, any decision as to the jurisdiction of the Arbitral Tribunal shall be taken by the Arbitral Tribunal itself. [66]

Thereafter Antrix approached the Chief Justice of India with an application filed under section 11(4) read with section 11(10) of the Act, *inter alia* for a direction upon the respondent "to nominate its arbitrator in accordance with the agreement on August 28, 2005, and the UNCITRAL Rules, to adjudicate upon the disputes, which had arisen between the parties and to constitute the Arbitral Tribunal and to proceed with the arbitration." The application came to be listed before S.S.Nijjar J the designate of the Chief Justice of India, who by order dated November 16, 2011 observed that in the said petition "certain questions have arisen which would have far reaching consequences with regard to the scope and ambit of the powers of this Court under Section 11(6) of the Arbitration and Conciliation Act, 1996 and the powers of ICC to constitute the Arbitral Tribunal, especially after the powers of the Chief Justice of India under Section 11 of the Act have been invoked." The designated judge identified as many as seven questions with the assistance of the counsel appearing for the parties.

The following two questions were formulated by counsel appearing for Antrix:

> (1) Where the arbitration clause contemplates the application of either the ICC Rules or the UNCITRAL Rules after the constitution of the Tribunal, could a party unilaterally proceed to invoke ICC to constitute the Tribunal and proceed thereafter?
>
> (2) Whether the judgment of this Hon'ble Court in TDM Infrastructure (P) Ltd. v. UE Development India (P) Ltd. lays down the correct law with reference to the definition of International Commercial Arbitration? [67]

Thereafter, at the instance of the respondents, the following additional five questions were formulated:

> (1) Whether the jurisdiction of the Court under Section 11 extends to declaring as invalid the constitution of an Arbitral Tribunal

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66 *Id.*at para 3.

67 *Supra* note 66. Id. at para 9.

purportedly under an arbitration agreement, especially, where the Tribunal has been constituted by an institution purportedly acting under the arbitration agreement?

(2) Whether the jurisdiction of an Arbitral Tribunal constituted by an institution purportedly acting under an arbitration agreement can be assailed only before the Tribunal and in proceedings arising from the decision or award of such Tribunal and not before the Court under Section 11 of the Act?

(3) Whether, once an Arbitral Tribunal has been constituted, the Court has jurisdiction under Section 11 of the Act to interfere and constitute another Tribunal?

(4) Whether an arbitration between two Indian companies could be an 'international commercial arbitration' within the meaning of Section 2(1)(f) of the Act if the management and control of one of the said companies is exercised in any country other than India?

(5) Whether the petition is maintainable in the light of the reliefs claimed and whether the conditions precedent for the exercise of jurisdiction under Section 11 of the Act are satisfied or not?

Having noted the said questions of law, the designated judge held, that "[i]n my opinion given the magnitude of the controversy involved, all the seven questions need to be placed before the larger bench to elucidate/clarify the jurisdictional content of this Court under Section 11 of the Act."[68]

Thereafter, the matter was placed before a 2 judge bench consisting of the then Chief Justice of India and S.S.Nijjar, J. In the decision under review, the bench did not advert to the question whether a designated judge exercising power under Section 11 of the Act could make a reference to a larger bench of the court, and if so, under which provision of law in the Arbitration Act such reference could be made. No provision of any statute, much less the Arbitration and Conciliation Act, 1996 were adverted to in this aspect. The Designated Judge also does not consider as to how the important question of law arose under Section 11(6) in that case when admittedly Antrix had invoked the jurisdiction under Section 11(4) read with Section 11(10) of the Act and not under Section 11(6).

The court then went on to consider the following questions of law:

(i) whether the arbitration agreement contemplates the application of Section 11 of the 1996 Act after the ICC Rules had been invoked by one of the parties which also appointed its nominee arbitrator

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68 No reference to any provisions of the Act were made which authorize such a reference to "a larger bench". In fact as is evident from s. 11 of the Act and as has been reiterated by the seven judge bench in *Patel Engineering* case s. 11 confers powers only on the chief justice and not to the court.

> (ii)whether Section 11 of the 1996 Act empowers the Chief Justice to constitute a Tribunal in supersession of the Tribunal already in the stage of constitution under the ICC Rules, notwithstanding the fact that one of the parties had proceeded unilaterally in the matter

Considering the rival contentions of the parties, the bench had observed that once the arbitration agreement had been invoked by the respondent and nominee arbitrator appointed by it, the arbitration clause could not have been invoked for the second time by Antrix which was fully aware of the appointment made by the respondent.

Analyzing provisions of section 11(6) of the Act, the court held:

> Sub-section (6) of Section 11 of the 1996 Act, quite categorically provides that where the parties fail to act in terms of a procedure agreed upon by them, the provisions of sub-section (6) may be invoked by any of the parties. Where in terms of the agreement, the arbitration clause has already been invoked by one of the parties thereto under the ICC Rules, the provisions of sub-section (6) cannot be invoked again, and, in case the other party is dissatisfied or aggrieved by the appointment of an arbitrator in terms of the agreement, his/its remedy would be by way of a petition under Section 13, and, thereafter, under Section 34 of the 1996 Act.

According to the bench, "[i]t would lead to an anomalous state of affairs if the appointment of an arbitrator once made, could be questioned in a subsequent proceeding initiated by the other party also for the appointment of an arbitrator."[69]

It was further observed by the bench that "[i]n view of the language of Article 20 of the arbitration agreement which provided that the arbitration proceedings would be held in accordance with the rules and procedures of the International Chamber of Commerce or UNCITRAL, Devas was entitled to invoke the Rules of Arbitration of ICC for the conduct of the arbitration proceedings." Having noticed that Article 19 of the agreement provided that the rights and responsibilities of the parties there under would be subject to and construed under laws of India, the bench observed that there is a law which was to operate as governing law and law which was to operate in respect of arbitration proceedings. "[t]here is, therefore, a clear distinction between the law which was to operate as the governing law of the agreement and the law which was to govern the arbitration proceedings"[70] After noticing the distinction between the law applicable to the arbitration agreement,

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69 *Supra* note 62 at 572.

70 Though the bench rightly took note of distinction between the *Lex Arbitri* and *Lex Fori* yet the inevitable conclusions emerging there from were not taken to their logical conclusion, since in terms of art. 19, the arbitration agreement was to be governed by the laws of India since seat of arbitration is in Delhi, provisions of Part 1 of the act, clearly governed the arbitration agreement, which include appointment procedure laid down under S. 11 of the Act.

i.e., proper law of arbitration (*Lex arbitri*) and the procedure that the tribunal is required to follow while conducting arbitration proceedings, *i.e*., *lex fori*, the bench went on to observe that "[o]nce the provisions of the ICC Rules of Arbitration had been invoked by Devas, the proceedings initiated there under could not be interfered with in a proceeding under Section 11 of the 1996 Act," and held further that "[w]here the parties had agree that the procedure for the arbitration would be governed by the ICC Rules, the same would necessarily include the appointment of an Arbitral Tribunal in terms of the arbitration agreement and the said Rules." The bench therefore declared that the arbitration petition under section 11(6) of the Act must fail and rejected the same. The bench however hastened to add that "this will not prevent the petitioner from taking recourse to other provisions of the aforesaid Act for appropriate relief."

In article 20, the parties had laid down a pre-condition to invoke the arbitration clause *i.e.,* a mediation process by the senior management of both the parties. When both the parties were before the designated judge and also before the two judge bench, an appropriate decision ought to have been a direction to the parties to fulfill the pre-condition of mediation before invoking the arbitration clause.

Secondly, as noticed in the decision, article 20 of the agreement merely provided that the arbitration would be conducted in accordance with the rules of ICC/UNCITRAL. It is evident that the parties had not even made a clear choice with respect to the rules of procedure which the tribunal would have to adopt for the arbitration proceedings. The parties had not reached a firm agreement but had left it to themselves to choose between two sets of rules of which one would be eventually adopted by the tribunal. At any rate, none of those rules were intended to apply to the constitution of the tribunal which is governed by the laws of India, *i.e.,* section 11 of the Act. Unfortunately the same was not taken into account by the court.

Maintainability of a second petition under section 11 when earlier petition is dismissed for want of jurisdiction

In *Walchandnagar Industries Ltd.*[71] the Chief Justice of the Meghalaya High Court summarily disposed of an unusual argument. The applicant entered into an agreement with the respondent on August 09, 2007, at Guahati whereby the applicant was required to supply the respondent a clinkerisation plant for a contract price of Rs. 95 crores. The clinkerisation plant was to be set up in Meghalaya and the respondent had its registered office in Shillong in Meghalaya. Certain disputes with respect to payment of advance amount arose between the parties. The applicant invoked arbitration agreement on 23.01.2012 by appointing a former judge of the Bombay High Court as its arbitrator and called upon the respondent to appoint the second arbitrator. In the absence of any response from the respondent to the said notice, the applicant filed an application under section 11(6) of the Act. The respondent resisted the said application *inter alia* on the ground that Bombay High Court does not have territorial jurisdiction. In the statement of objection

71 *M/s Walchandnagar Industries Ltd.* v. *M/s JUD Cements Ltd.,* AIR 2014 MEG 32.

filed by the respondent before the Bombay High Court, the respondent categorically stated that it is either the courts at Guwahati or Meghalaya that have jurisdiction over the application under section 11(6) therein. The Application filed by the applicant before the Bombay High Court came to be dismissed on 15.03.2013 on the ground of lack of territorial jurisdiction. Thereafter, the applicant filed another application under Section 11(6) of the Act before the Meghalaya High Court. The application filed by the applicant before the Meghalaya High Court under section 11(6) of the Act was resisted by the respondent on the ground that after dismissal of the application by the Bombay High Court, the appellant could not be permitted to maintain another application under section 11(6) before the Meghalaya High Court as it would amount to forum shopping. The respondent sought to rely upon the decision of the Constitution Bench in *Patel Engineering*[72] to contend that the only remedy available to the applicant from an order under section 11(6) of the Act was by way of special leave petition before the Supreme Court under article 136 of the Constitution and not by way of a fresh application before the Meghalaya High Court. The Chief Justice of the Meghalaya High Court rejected all the said objections for the reason that the Bombay High Court had dismissed the application under section 11(6) filed before it merely on grounds of lack of territorial jurisdiction and not on merits. Allowing the petition under section 11(6) for the said reasons, after giving the parties an opportunity to suggest names of the arbitrator, the chief justice exercising his power under section 11 of the Act, appointed a retired judge of the Guahati High Court as the second arbitrator.

Whether a matter covered under rent control legislation is arbitrable

In *Ranjit Kumar Bose*[73] the court had the opportunity to revisit the question as to whether the dispute between parties in a suit for eviction under a special tenancy legislation could be referred to arbitration. The appellant, by way of unregistered tenancy agreement notarized on November 10.11.2003, leased a shop room to the respondents. After a few years, the appellants served a notice of termination of tenancy upon the respondents and asked them to vacate the shop premises. However, the respondents did not vacate the shop and the appellants were constrained to file a suit against the respondents for eviction, arrears of rent, *etc.*, in the court of the jurisdictional civil judge (senior division). In the suit, the respondents filed an application under Section 8 of the Act, seeking reference of all the disputes therein to arbitration in terms of clause 15 of the agreement, which was claimed to be an arbitration agreement. The said application under section 8 came to be dismissed *vide* order dated June 10, 2009 by the trial court. Aggrieved by the said order, the respondents filed an application under article 227 of the Constitution of India before the Calcutta High Court challenging the order of the civil judge (senior division). By the impugned order, the high court, relying upon the decision in *Hindustan Petroleum Corpn. Ltd.*[74] and other decisions referred

72 (2005) 8 SCC 618.

73 *Ranjit Kumar Bose* v. *Anannya Chowdhury* (2014) 11 SCC 446.

74 *Hindustan Petroleum Corpn. Ltd.* v. *Pinkcity Midway Petroleums* (2003) 6 SCC 503.

the disputes to arbitrators to be appointed by the parties and directed further that any dispute regarding the arbitrability may be decided by the arbitral tribunal.

It was contended on behalf of the appellants, that in light of the judgments of the supreme court in *Natraj Studios*[75] and *Booz Allen*,[76]eviction or tenancy matters governed by a special statute where the tenant enjoys statutory protection against eviction, can be decided only by specified courts conferred with the jurisdiction to grant eviction and such disputes are non-arbitrable.

On behalf of the respondents, it was argued that in the light of the decision of *Hindustan Petroleum* case it was mandatory for the court to refer the matter to arbitration.

The court distinguished the decisions relied upon by the respondent by pointing out that in these cases, the agreements were not hit by a statutory bar on arbitration by a special legislation such as in the immediate case. The court, relying upon the judgment in *Natraj Studios,* allowed the appeal with the observation:

> The High Court, therefore, was not correct in coming to the conclusion that as per the decisions of this Court in the aforesaid three cases, the Court has no alternative but to refer the parties to arbitration in view of the clear mandate in Section 8 of the 1996 Act. On the contrary, the relief claimed by the appellants being mainly for eviction, it could only be granted by the "Civil Judge having jurisdiction" in a suit filed by the landlord as provided in Section 6 of the Tenancy Act.

Can a party seek reference to arbitration after resisting a petition under section 11?

In *AGS Retail Private Ltd.*[77] the Punjab & Haryana High Court considered the question whether a party having resisted a reference to arbitration on the ground that the arbitration agreement was not enforceable, could later seek reference of dispute to arbitration relying upon the very same arbitration agreement. The revision petitioner before the high court came to be the lessee of the respondent when the respondent purchased the leased property from the previous lessor of the petitioner. A written lease agreement was executed between the parties for a monthly lease rental of Rs. 2,35,500, which was executed on a stamp paper of Rs. 50. The petitioner stopped paying rent to the landlord-respondent with effect from January, 2011 onwards. The respondent issued a notice terminating the tenancy and called upon the petitioner to hand over vacant possession of the property. The respondent also issued a notice dated January 17,2012 to the petitioner invoking the arbitration clause contained in the lease agreement and suggested a panel of names of three former judges of the Delhi High Court and requested the petitioner to give consent to any of the three names to act as the sole arbitrator. Upon failure of the petitioner to agree to the appointment of a sole arbitrator in terms of the notice, the respondent

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75 *Natraj Studios (P) Ltd.* v. *Navrang Studios* (1981) 1 SCC 523.

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

77 AGS Retail Private Ltd. v. Usha Gupta (2014) 2 Arb.L.R. 325.

filed an application under section 11 before the Chief Justice of the High Court of Punjab and Haryana for appointment of the sole arbitrator. The petitioner vehemently resisted the said application on the ground that the arbitration agreement was under-stamped and therefore unenforceable. Faced with such objections, the respondent withdrew the said application and instituted a civil suit against the petitioner for recovery of possession, arrears of rent, *mesne profit* and interest in the civil court along with an application for *ad interim* injunction under Order XXXIX Rule 1 and 2 of the CPC. In the said suit, the petitioner filed applications under sections 5, 7, and 8 of the Act, read with Order VII Rule 11 of the CPC for rejection of the plaint on the ground that the lease agreement contained an arbitration clause and hence the suit filed by the plaintiffs in the civil court was not maintainable. The said interlocutory application came to be dismissed by the trial court *vide* order dated December 4, 2013 which was challenged in the decision under review.

Though acknowledging the settled law regarding the mandatory nature of section 8 of the Act, the high court, having regard to the conduct of the revision petitioner, held:

> Thus, the lessee is guilty of misconduct and is not entitled for any discretionary relief in the instant revision petitions. Since the lessee failed to do so, so, no option was left with the landlord to file the present suit for recovery of possession and arrears of rent against the lessee. Therefore, the suit was very much maintainable and the contrary arguments of learned senior counsel for the petitioners "strict sensu" deserve to be and are hereby repelled under the present set of circumstances.

With regard to the circumstances under which the suit came to be filed,it was held that "[t]hereafter, under these compelling circumstances, the plaintiffs filed the present suit for the pointed reliefs. That means, once the defendants have repeatedly and stoutly resisted the prayer of plaintiff No.1 for the appointment of arbitrator in the indicated proceedings, then, to my mind, the defendants are estopped from now claiming that the matter be referred to the arbitrator and plaint of plaintiffs be returned/rejected in this relevant connection. They cannot possibly be permitted to blow hot and cold in the same breath. In case, the contentions of learned Senior Counsel for petitioners are accepted, then, the plaintiffs would be rendered remediless to prosecute their legitimate claim, which is not legally permissible."

IV APPLICABILITY OF PART I OF THE ACT WHEN VENUE/SEAT OF THE ARBITRATION IS LONDON/PARIS

The decision of the court in *Reliance Industries Ltd.* v. *Union of India* [78] is a significant decision having serious impact on long term contracts entered into

78 (2014) 7 SCC 603.

between Government of India, as custodian of natural resources which belong to the people of India, and a consortium of contractors whose primary objective is undoubtedly to earn a large profit out of their investments. These contracts require contractors to make large investments and to operate within the territory of India for a fairly long duration. The case under review involved the execution of two PSCs both dated December 22, 1994 for exploration and production of petroleum and gas in respect of distinct oil and gas fields in the Mid and South Tapti fields and two others in Panna and Mukta fields. The contracts were to be performed wholly within India. The contracting parties to the PSCs were Government of India on the one hand and Reliance Industries Ltd. (An Indian Company having a 30% share in the PSC); Enron Oil and Gas India Ltd. (A company incorporated in India, belonging to the Enron Group, based in USA, having 30% shares in the PSC) and ONGC (A government of India Company having 40% share in the PSC).

In 2002, British Gas group incorporated a company - British Gas Exploration and Production India Limited (BG) under the laws of Cayman Islands, but having an office in India. BG Group is an international energy group headquartered in the UK. BG group acquired the shares of Enron and thus, the share of Enron in the PSC came to vest in BG.

The contracts were awarded for a period of 25 years; *i.e.* they were to expire in 2019, for purposes of exploration and production of petroleum and gas from the said fields jointly by the three contractors Reliance, BG, and ONGC. Both PSCs contained almost identical terms. [79] Articles 32 and 33 of the PSC provided as under:

> 32. Applicable law and language of the contract:
>
> 32.1. Subject to the provisions of Article 33.12, this contract shall be governed and interpreted in accordance with the laws of India.
>
> 32.2. Nothing in this contract shall entitle the Government or the contractor to exercise the rights, privileges and powers conferred upon it by this contract in a manner which will contravene the laws of India.
>
> 32.3. The English language shall be the language of this contract and shall be used in arbitral proceedings. All communication, hearings or visual materials or documents relating to this contract shall be in English.
>
> 33. Sole expert, conciliation and arbitration:
>
> 33.1. The parties shall use their best efforts to settle amicably all disputes, differences or claims arising out of or in connection with any of the terms and conditions of this contract or concerning the interpretation or performance thereof.

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79 The high court in its judgment dated Mar. 22, 2013 which was under appeal hereunder has correctly recorded the facts as summarized above.

33.2. Except for matters which, by the terms of this contract, the parties have agreed to refer to a sole expert and any other matters which the parties may agree to so refer, any dispute, difference or claim arising between the parties hereunder which cannot be settled amicably may be submitted by any party to arbitration pursuant to Article 33.3. Such sole expert shall be an independent and impartial person of international standing with relevant qualifications and experience appointed by agreement between the parties. Any sole expert appointed shall be acting as an expert and not as an arbitrator and the decision of the sole expert on matters referred to him shall be final and binding on the parties and not subject to arbitration. If the parties are unable to agree on a sole expert, the disputed subject-matter may be referred to arbitration.

33.3. Subject to the provisions herein, any unresolved dispute, difference or claim which cannot be settled amicably within a reasonable time may, except for those referred to in Article 33.2, be submitted to an Arbitral Tribunal for final decision as hereinafter provided.

33.4. The Arbitral Tribunal shall consist of three arbitrators. The party or parties instituting the arbitration shall appoint one arbitrator and the party or parties responding shall appoint another arbitrator and both parties shall so advise the other parties. The two arbitrators appointed by the parties shall appoint the third arbitrator.

33.9. Arbitration proceedings shall be conducted in accordance with the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) of 1985 except that in the event of any conflict between these rules and the provisions of this Article 33, the provisions of this Article 33 shall govern.

33.10. The right to arbitrate disputes and claims under this contract shall survive the termination of this contract.

33.11. Prior to submitting a dispute to arbitration, a party may submit the matter for conciliation under the UNCITRAL conciliation rules by mutual agreement of the parties. If the parties fail to agree on a conciliator (or conciliators) in accordance with the rules, the matter may be submitted for arbitration. No arbitration proceedings shall be instituted while conciliation proceedings are pending and such proceedings shall be concluded within sixty (60) days.

33.12. The venue of conciliation or arbitration proceedings pursuant to this article, unless the parties otherwise agree, shall be London, England and shall be conducted in the English language. The arbitration agreement contained in this Article 33 shall be governed by the laws of England. Insofar as practicable, the parties shall

> continue to implement the terms of this contract notwithstanding the initiation of arbitral proceedings and any pending claim or dispute.
>
> 33.13. The fees and expenses of a sole expert or conciliator appointed by the parties shall be borne equally by the parties. Assessment of the costs of arbitration including incidental expenses and liability for the payment thereof shall be at the discretion of the arbitrators.

After BG purchased the shares of Enron, the terms of the PSC were amended on 24.02.2004 with effective participation of all four parties, *i.e.*, Government of India on the one hand and Reliance, BG, and ONGC on the other.

While the contracts were still under execution, the appellant, Reliance and British Gas, issued a notice of arbitration dated 16.12.2010 raising certain disputes arising out of both PSCs. No such notice was issued on behalf of ONGC. Pursuant to the said notice, on 29.07.2011, an arbitral tribunal of three members consisting of Christopher Lau SC (Chairman), Mr. Peter Leaver QC (co-arbitrator) and B.P. Jeevan Reddy J (co-arbitrator) was constituted and on 14.09.2011, by agreement amongst the three parties appearing before the arbitral tribunal, (the fourth party, ONGC, did not participate in the arbitration) a final partial consent award was rendered which read as under:[80]

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

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80 It is of significance that ONGC, not being a party to the arbitration proceedings, was also not party to the partial consent award and hence as provided in cl. C of the said consent award, the terms and conditions of the arbitration agreements in the PSCs remained unmodified and that the agreement with regard to the juridical seat of the arbitration was only for the purposes of arbitration initiated under Claimants notice of arbitration dated Dec. 16, 2010, was London, as mentioned in para 3.1 of the consent award.

Thus while in the two PSCs executed on 22.12.1994, article 33.12. provided that the venue of the arbitration be London, by reason of amendment dated 24.02.2004 the venue/seat "was changed" from London to "Paris". While these terms of the PSCs, as modified on 24.02.2004 by amendment of the PSCs, remain unchanged, only as regards the parties appearing before the arbitral tribunal, *i.e.*, Reliance, BG, Government of India, for the limited purpose of arbitration initiated under claimants' notice on December16, 2010, the seat of arbitration was agreed to be at "London" instead of "Paris".

The appellants initially filed their statement of claim on August 05, 2011 *i.e.*, much after the initial round of hearing,[81] and a revised amendment to the statement of claim on January 19, 2012. Some of the reliefs claimed related to Cess and Royalties read as under:

> (2) A declaration that, with effect from the date of any partial or final award to the termination of the PSCs, and pursuant to Article 15.6.1 of the PSCs, the Government is required to reimburse any excess royalties paid as a result of the exclusion of post well-head capital expenditure from well-head value calculations made pursuant to gazette notification or pay damages in the same amount for failure to procure an exemption in respect of such excess royalties.
>
> (3) A declaration that the Government is liable to reimburse the claimants pursuant to Article 15.6.1 of the PSCs in respect of any additional royalties imposed and paid by the claimants since August 2007 as a result of the exclusion of post well-head capital expenditure from well-head value calculations made pursuant to the gazette notification."[82]
>
> "(2) A declaration that, provided royalties are paid within time frames specified in (1) no interest is payable under the terms of the PSCs and any interest otherwise imposed is to be reimbursed by the Government.
>
> (3) A declaration that, in the event royalties are paid after the time-frame specified in (1), any interest in excess of LIBOR plus one percentage point is to be reimbursed by the Government.
>
> (4) A declaration that the Government is liable to reimburse the claimants pursuant to Article 15.6.1 of the PSCs in respect of any additional royalties or interest imposed which does not accord with the principles outlined at (1) to (3) above.[83]

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81 As noted in the para 9 &10.

82 *Ibid* at para 11.

83 *Id.*, at para 13.

The court noticed that some of the reliefs claimed by the claimant were in terms of article 15.6.1 of the PSC which read as under:

> The constituents of the (claimants) shall be liable to pay royalties and cess on their participating interest share of crude oil and natural gas saved and sold in accordance with the provisions of this agreement. The royalty on oil saved and sold will be paid at Rs 481 per metric tonne and cessan oil saved and the said will be paid at Rs 900 per metric tonne. Royalty on gas saved and the said will be paid at ten per cent (10%) of the value at well-head. No cess shall be payable in response of gas. Royalty and cess shall not exceed the hereinabove amounts throughout the term of the contract. Royalty and cess shall be payable in Indian rupees. Any such additional payment shall be made by the (respondent).

The respondent, Government of India filed its statement of defence on 31.01.2012 and an additional statement of defence on 10.04.2012. The respondent raised four preliminary objections in regard to royalties, cess, service tax, and the power of the Comptroller Auditor General to carry out performance audit claiming that the same were not arbitrable for the following reasons:

> (a) the claimants' claim entails a challenge to the validity of the Oilfields (Regulation and Development) Act, 1948 (the ORD Act) and to the powers exercised under it;
>
> (b) the claimants cannot contract out of such legislation and any agreement to that effect would be void and unenforceable by virtue of Section 23 of the Indian Contract Act, 1872;
>
> (c) the claimants cannot avoid the effect of the legislation by relying on the doctrine of estoppel;
>
> (d) any dispute in respect of royalties should be referred to arbitration under Rule 33 of the Petroleum and Natural Gas Rules, 1959 (the PNG Rules);
>
> (e) there will likely be a defence to enforcement of any award in India under Article V(2)(b) of the New York Convention as a matter of the public policy of India;
>
> (f) since any award has to be enforced in India, this Tribunal ought not to enter into or adjudicate questions/issues relating to royalties in view of Rule 33 of the PNG Rules and the decisions of the Indian Supreme Court in *Natraj Studios (P) Ltd*. v. *Navrang Studios, AmritBanaspati Co. Ltd.* v. *State of Punjab* and *Mafatlal Industries Ltd.* v. *Union of India*; but would rather lie before specific fora constituted under Oilfields (Regulation and Development) Act, 1948 and the Petroleum and Natural Gas Rules, 1956 and;

> (g) were the Tribunal to do so in reliance on *T.N. Electricity Board* v. *ST-CMS Electric Co. (P) Ltd.*, it would be contrary to the law as laid down by the English Court of Appeal in *Ralli Bros*. v. *CompaniaNavieraSotay An Aznar.*

The appellants opposed the preliminary objections contending that the issue of arbitration was governed by the law of the seat. Since the seat of the arbitration, with regard to the arbitration initiated under the notice on December 16, 2010 was in England, the issue of reference to arbitration is governed by English Law as held in *T.N. Electricity Board* v. *ST-CMS Electric Co. (P) Ltd.*[84] by formal final partial award the arbitral tribunal held:

The tribunal, having carefully considered the documentary evidence, the oral evidence and the submissions of the claimants and the respondent, and rejecting all submissions to the contrary, hereby makes, issues and publishes this formal final partial award and for the reasons set out above FINDS, AWARDS, ORDERS AND DECLARES that the claimants' claims in respect of royalties, cess, service tax and CAG audit are arbitrable.

In stating its conclusion on the four arbitrable issues identified in Section A of the list of issues for the May 2012 hearing, the Tribunal wishes to make it clear that it is expressing no opinion on the merits of the parties' respective submissions which were made during the May 2012 hearing. Subject to further order in the meantime, the merits of those issues will be decided in the March 2013 hearing.

The respondents herein challenged the said award before the High Court of Delhi, under section 34 of the Act. The appellants raised preliminary objections to the maintainability on the ground that the arbitration being a London seated arbitration, the Delhi High Court had no jurisdiction. It was claimed that the courts in England have exclusive jurisdiction. The high court, upon consideration of the entire matter, held "[r]esultantly, the objection raised by the respondents relating to lack of jurisdiction of Indian court on the count of express choice of laws provisions cannot be sustained as Indian laws including provisions of Part I of the Act are not expressly nor impliedly excluded. The said objection is therefore rejected."[85]

The high court, relying upon the decisions in *Bhatia International* [86] and *Venture Global*,[87] *inter alia* held:[88]

> a) Firstly, the reading of article 32.1itself makes it apparent that subject to article 33.12, the contract shall be governed and interpreted in accordance with the laws of India. Thus, the intention of the parties

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84 (2007) 2 AII ER (Comm) 701.

85 Para at 59 of *Union of India* v. *Reliance and another* OMP no. 46/2013, order of Delhi High Court dated 22.3.2013.

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

87 *Venture Global Engg.* v. *Satyam Computer Services Ltd.* (2008)4 SCC 190.

88 *Supra* note 92.

primarily is to govern themselves with the laws of India under the contract subject to what has been contained in clause 32.1. Hence, the governing law of the contract or what is known as proper law of the contract is the laws of India. This clause also indicates that the parties never intended to altogether exclude the laws of India so far as contractual rights are concerned.

b) Article 33.12 makes it clear that the venue of the arbitration unless the parties otherwise agree shall be in London. The arbitration agreement contained in this article 33 shall be governed by the laws of England. This means that the arbitration agreement as contained in article 33 would be governed by the laws of England.

c) There is another clause which is clause 32.2 which provides for that nothing in this contract shall entitle the government or the contractor to exercise the rights, privileges and powers in a manner which will contravene laws of India. This is another indicator of the intention of the parties towards remaining adhered to Indian law and not to exercise any rights or privilege which would contravene laws of India. The existence of the said clause in a way also enables this court to infer as to whether the parties intended to exclude the Indian laws altogether or not.

d) Now, the question comes what is the effect on the intention of the parties by the interplay of clause 32.1, clause 32.2 and clause 33.12. if one reads clause 33.12 carefully, it is true that the parties had intended that the arbitration agreement as contained in clause 33 shall be governed by the laws of the England. But the effect upon intention of the parties under clause 33.12 should be given to the extent the parties had intended to be governed by the said laws of England and not beyond the same. The unnecessary extension of the scope of operation of article 33.12 would mean that the said article 33.12 would militate against clause 32.1 and clause 32.2 which was never the intention of the parties. … The wording of clause 33.12 itself limits its applicability of law of England relating to the arbitration agreement as contained in article 33 and not beyond the same. … For all other matters, one has to revert back to clause 32.1, which is the proper law of contract which is laws of India… Further, if the article 15.1 is read along side with the other article 32 and 33, it is also seen that intention of the parties was that the operations under the agreement shall be subject to fiscal laws of India. Therefore, the exclusion of Indian public policy was not passing through the parties mind at the time of entering the contract.

The appellants Reliance and BG preferred special leave petition (SLP) from the said order of the Delhi High Court under Article 136 of the Constitution of India. It appears that the appellants sought to bring on record new documents and

to urge new points before the Supreme Court which were not raised before the high court. The appellants filed an application seeking permission of the court to bring on record new documents and also filed another application to urge contentions not urged before the high court. The respondent objected to the production of new documents as also the new contentions sought to be raised. These contentions are summarized by the court at paragraph 32 of the judgment under review. However, from the decision of the court, it does not appear that the court considered and recorded any decision on the said applications. The judgment also doesn't indicate whether the court allowed the said applications filed on behalf of the applicants.

Although appellants sought to rely upon a subsequent decision of the Constitution Bench in *BALCO*,[89] the court relying upon the earlier judgment of the court in *Bhatia International*, held "[w]e are also of the opinion that since the ratio of law laid down in Balco has been made prospective in operation by the Constitution Bench itself, we are bound by the decision rendered in *Bhatia International*. Therefore, at the outset, it would be appropriate to reproduce the relevant ratio of *Bhatia International*:

> To conclude, we hold that the provisions of Part I would apply to all arbitrations and to all proceedings relating thereto. Where such arbitration is held in India the provisions of Part I would compulsorily apply and parties are free to deviate only to the extent permitted by the derogable provisions of Part I. In cases of international commercial arbitrations held out of India provisions of Part I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions. In that case the laws or rules chosen by the parties would prevail. Any provision, in Part I, which is contrary to or excluded by that law or rules will not apply.

Referring to article 32.2, the court observed that"[i]n view of the aforesaid, it would be necessary to analyse the relevant articles of the PSC, to discover the real intention of the parties as to whether the provisions of the Act have been excluded. It must, immediately, be noticed that articles 32.1 and 32.2 deal with applicable law and language of the contract as is evident from the heading of the article which is "Applicable law and language of the contract". Article 32.1 provides for the proper law of the contract *i.e.*, laws of India. Article 32.2 makes a declaration that none of the provisions contained in the contract would entitle either the government or the contractor to exercise the rights, privileges and powers conferred upon it by the contract in a manner which would contravene the laws of India.

According to the court "[t]he article which provides the basis of the controversy herein is Article 33.12 which provides that venue of the arbitration shall be London and that the arbitration agreement shall be governed by the laws of England. It appears, as observed earlier, that by a final partial consent award,

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89 *Bharat Aluminium Co.* v. *Kumar Technical Services* (2012) 9 SCC 552.

the parties have agreed that the juridical seat (or legal place of arbitration) for the purposes of arbitration initiated under the claimants' notice of arbitration dated 16-12-2010 shall be London, England." Though the agreement December 22, 1994 (PSC), as amended by agreement on February 24, 2004 provided Paris as the venue/seat of arbitration.

Rejecting the contention that "the expression "laws of India" under article 32.2 would also include the Act, the court held "[i]n our opinion, the expression "laws of India" as used in articles 32.1 and 32.2 has a reference only to the contractual obligations to be performed by the parties under the substantive contract i.e. PSC."[90]

Referring to the decision of the court in *Videocon Industries Ltd*.[91] the court held "We are of the opinion that in the impugned judgment the High Court has erred in not applying the ratio of law laid down in *Videocon Industries Ltd*. in the present case." The court proceeded on the assumption that "[t]he parties have made the necessary amendment in the PSCs to provide that the juridical seat of arbitration shall be London. It is also provided that the arbitration agreement will be governed by the laws of England." The court held that "[t]herefore, the ratio in *Videocon* Industries Ltd. would be relevant and binding in the present appeal." Reiterating what the court had held in *Videocon,* that the parties could not have changed the seat of arbitration without an amendment in the PSC, the court observed that the parties to the arbitration agreement in the present case had changed the seat of arbitration from Paris to London and that those terms of the PSCs were amended subsequently. As per the consent award of the tribunal, though the seat of the tribunal was London, as noticed by the court, the subject matter thereof, was limited only to "arbitration initiated under claimants' notice dated 16.12.2010". It is respectfully submitted that the decision in *Videocon* squarely applied to the present case and if the said decision is held binding, it is evident that since only three parties to arbitration agreement (PSCs) were parties to consent award, resulting in the shifting of the arbitration proceedings from Paris to London, did not result in the PSC being amended for all parties. Therefore, as held in *Videocon*, seat/venue of arbitration remained unchanged. In spite of the parties agreeing that terms of agreement shall be governed by laws of England, this was of no consequence, since in terms of the English Arbitration Act, 1996 the said Act would be applicable only by virtue of the seat of arbitration being in England.[92]

Another particularly crucial aspect of the case dealt with by the High Court was the nature and effect of article 32.2 in view of the opening words of that

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90 The court, however did not expressly overrule the finding of the high court. *supra* note 88.

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

92 Another aspect of the decision in *Videocon* was that the Supreme Court in upholding the decision of the Gujarat High Court, did not consider cl. 33.2 of the agreement therein which provided that nothing in the contract shall entitle the contractor to exercise its rights in a manner which will contravene the laws of India. However, such a clause had been relied upon by the court in *Venture Global Engg.*

article that "Nothing in this contract". The high court referred to the decision in *Venture Global*, wherein a similar overriding clause was dealt with, and construing the said agreement, it was held that "[t]he non-obstante clause would override the entirety of the agreement including sub-section (b) which deals with settlement of the dispute by arbitration."

It is submitted that the judgment under review not only did not consider the crucial findings of the high court, even the decision in *Venture Global*, which unequivocally ruled that clause 75(c) in the contract therein, which was similar to article 32.2. in the PSCs could not be construed to mean Indian Law being only substantive law of contract and that the said overriding provision also governed the dispute resolution clause in article 11(5)(b) of the Contract. The decision under review, to the extent it takes a different view from *Venture Global* and decisions rendered by benches of co-equal strength, it is submitted that the question be resolved by reference to a larger bench.

It appears that it was seriously contended on behalf of the respondents that all four preliminary issues concerned violation of public policy of India and in view of the overriding provisions contained in article 32.2 read with article 15.1 of the PSC, the issues could not *ex-facie* be held to be arbitrable, as was held in *Venture Global*. The said argument was repelled with the observation that "[i]n this case, the parties have by agreement provided that the juridical seat of arbitration will be in London. On the basis of the aforesaid agreement, necessary amendment has been made in the PSCs." It appears that the parties did not plead such a case before the court that the terms of the PSCs were amended in terms of the consent award.

The court however proceeded on the premise, that the juridical seat being London, necessary amendment has been made to PSCs which was not supported by the records which merely depicted that the PSCs were amended only up to 24.2.2004. It is not recorded in the judgment that after the aforementioned Consent Award was passed, all four parties to the PSC had amended the agreements. It is a moot question as to what would have been the decision of the court had the court considered that the terms of the PSCs were never amended after 24.02.2004, and not proceeded on the premise that the PSCs were amended pursuant to the consent award. In fact in the judgment under review the court has held that the decision in *Videocon* was binding upon the parties and hence it was its bounden duty to enquire from parties as to whether the parties did in fact carry out any amendment to the terms of the PSCs, for had the court been made aware that no such amendment had been carried out in the PSCs following the binding decision in *Videocon*, the consent award being restricted only to the three parties to the arbitration, the seat remained Paris and not shifted to London.

It also appears that while considering the contention on behalf of the respondent that Part I of the Act was applicable to the arbitration in view of the decision in *Venture Global*, the court declined to accept the same by making a formal observation which would tantamount to the court giving its own findings on the application under section 34 of the Act which was yet to be heard on its merits by the high court. The high court judgment was restricted only to the question

of maintainability of the application under section 34 of the Act and was not on merits. The court however observed that:

> In our opinion, even the second part of the ratio in *Venture Global Engg*. from para 32 of the judgment onwards would not be applicable to the facts and circumstances of this case. Firstly, in our opinion, all the disputes raised by the petitioners herein are contractual in nature. Secondly, the performance of any of these obligations would not lead to any infringement of any of the laws of India per se. Thirdly, the non obstante clause which was under consideration in Venture Global is non-existent in the present case. In Venture Global, the Court was concerned with direct violation of the Foreign Exchange Management Act. The actions of the respondents therein would also have been contrary to various provisions of the Companies Act in the event the shares were to be transferred in accordance with the award. Therefore, this Court was persuaded to take the view that in spite of the applicability of Part I having been excluded as the seat of arbitration was outside nonetheless Part I would apply as the transfer of the shares would be against the laws of India and, therefore, violate public policy. In our opinion, such circumstances do not exist in the present case as there is no danger of violation of any statutory provisions."

It is on this premise that the court held that the application under section 34 of the Act was not sustainable but with the following observation on the "merits" of the matter"*[p]rima facie*, it appears that there is no challenge to the gazette notification. In fact, the claim statement shows that the amounts of royalties/cess levied have been paid. Prayer is for reimbursement of the amounts paid, based on articles 15.6 and 15.7 of the PSC. There also seems to be a claim for making necessary revisions and adjustment to the contract to offset the effect of any changes in the law. We fail to see any apparent or so patently obvious violation of Indian laws in any of these claims. The basis for filing the petition under Section 34 of the Arbitration and Conciliation Act, 1996 is that the appellants are bound to obey the laws of the country. The appellants have nowhere claimed to be exempted from the laws of India. They claim that the Government of India, party to the contract *i.e*. PSC has failed to seek and obtain exemption as stipulated in the contract. Whether or not the claim has substance is surely an arbitral matter. It is not the case of the appellants that they are not bound by the laws of India, relating to the performance of the contractual obligations under the PSCs."

Relying upon a model PSC said to have been prepared in 1982,[93] which provided *inter alia* that "[t]his contract shall be governed and interpreted in accordance with the laws of India." the court held that "[t]his was specifically amended and incorporated in the present PSCs signed on 22-12-1994 and provided

93 A new document, placed for the first time before the Supreme Court through IA No.2/2014 and 7/2014

that the governing law clause (32.1) would be "subject to the provision of Article 33.12", the court held"[c]onsidering the aforesaid two provisions, it leaves no manner of doubt that Article 32.2 would have no impact on the designated juridical seat as well as governing law of the arbitration agreement."

Finally the court concluded that:

> We are also unable to agree with the submission of Mr. Ganguli that since the issues involved herein relate to the public policy of India, Part I of the Arbitration Act, 1996 would be applicable. Applicability of Part I of the Arbitration Act, 1996 is not dependent on the nature of challenge to the award. Whether or not the award is challenged on the ground of public policy, it would have to satisfy the precondition that the Arbitration Act, 1996 is applicable to the arbitration agreement. In our opinion, the High Court has committed a jurisdictional error in holding that the provisions contained in Article 33.12 are relevant only for the determination of the curial law applicable to the proceedings. We have already noticed earlier that the parties by agreement have provided that the juridical seat of the arbitration shall be in London. Necessary amendment has also been made in the PSCs, as recorded by the final partial consent award dated 14-9-2011. It is noteworthy that the Arbitration Act, 1996 does not define or mention juridical seat. The term "juridical seat" on the other hand is specifically defined in Section 3 of the English Arbitration Act. Therefore, this would clearly indicate that the parties understood that the arbitration law of England would be applicable to the arbitration agreement.

V SETTING ASIDE OF ARBITRAL AWARD

Whether duty to record "findings" implies a duty to record reasons

In *Anand Brothers* [94] a three judge bench of the supreme court considered the question as to whether the requirement of the arbitrator to indicate his "findings" as provided in the general conditions of contract ("GCC") implied more than mere recording of the conclusion by the arbitrator and whether the absence of such reasons rendered the award liable to be set aside. A non-speaking arbitral award in favor of the appellant was set aside by a single judge of the High Court of Delhi on the ground that the arbitrator had not recorded "findings" as required by clause 70 of the general conditions of the contract between the parties. Upon appeal to a division bench of the high court, the order of the single judge was affirmed. The appellant challenged the order of the division bench by way of appeal before the Supreme Court. The matter was referred by a two judge bench to a larger bench by order on January 05, 2009 owing to an apparent conflict in the earlier decisions of the court[95].

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94 *Anand Brothers Pvt. Ltd.* v. *Union of India* (2014) 9 SCC 212.

95 The order referring the matter to a larger bench reads as follows "Delay condoned. Leave granted. We find that there is a divergence in opinion between two the decisions

The relevant portion of clause 70 provided that "[t]he arbitrator shall give his award within a period of six months from the date of his entering on his reference or within the extended time as the case may be on all matters referred to him and shall indicate his findings, along with sums awarded, separately on each individual item of dispute."Clause 70 of the GCC thus required the arbitrator to:

(*i*) Give his award within the stipulated period as extended from time to time;

(*ii*) The award must be on "all matters referred to him";

(*iii*) The award must indicate the findings of the arbitrator along with sums, if any, awarded;

(*iv*) The findings and award of sums if any must be separate on each item of dispute.

The appellant contended that a "finding" would not include the process of reasoning involved in arriving at such finding. The respondent however urged that "finding on each individual item of dispute" meant that reason in support of the findings must also be recorded by the arbitrator and that finding unsupported by reason is no finding in law.

Considering the state of law as it was under the Arbitration Act, 1940, the court referred to the following passage from its judgment in *Raipur Development Authority*:[96]

> There is, however, one aspect of non-speaking awards in non-statutory arbitrations to which Government and governmental authorities are parties that compel attention. The trappings of a body which discharges judicial functions and is required to act in accordance with law with their concomitant obligations for reasoned decisions, are not attracted to a private adjudication of the nature of arbitration as the latter, as we have noticed earlier, is not supposed to exert the State's sovereign judicial power. But arbitral awards in disputes to which the State and its instrumentalities are parties affect public interest and the matter of the manner in which Government and its instrumentalities allow their interest to be affected by such arbitral adjudications involve larger questions of policy and public

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by two-Judge Benches of this Court in *Build India Construction System* v. *Union of India* (2002) 5 SCC 433 and *Gora Lal* v. *Union of India* (2003) 12 SCC 459. In both these decisions the word "finding" in Clause 70 of the general conditions fell for consideration. In *Build India Construction* this Court held that the "findings" does not mean reasons for the findings. In *Gora Lal case* this Court held that the word "findings" includes reasons for the "findings". The matter therefore requires resolution by a larger Bench. Place the matter before the Chief Justice of India for appropriate orders."

96 *Raipur Development Authority* v. *Chokhamal Contractors* (1989) 2 SCC 721.

> interest. Government and its instrumentalities cannot simply allow large financial interests of the State to be prejudicially affected by non-reviewable—except in the limited way allowed by the statute—non-speaking arbitral awards. Indeed, this branch of the system of dispute resolution has, of late, acquired a certain degree of notoriety by the manner in which in many cases the financial interests of Government have come to suffer by awards which have raised eyebrows by doubts as to their rectitude and propriety. It will not be justifiable for Governments or their instrumentalities to enter into arbitration agreements which do not expressly stipulate the rendering of reasoned and speaking awards. Governments and their instrumentalities should, as a matter of policy and public interest—if not as a compulsion of law—ensure that wherever they enter into agreements for resolution of disputes by resort to private arbitrations, the requirement of speaking awards is expressly stipulated and ensured. It is for Governments and their instrumentalities to ensure in future this requirement as a matter of policy in the larger public interest. Any lapse in that behalf might lend itself to and perhaps justify, the legitimate criticism that Government failed to provide against possible prejudice to public interest.

The court also referred to the Act, which repealed the Arbitration Act, 1940.The twin objectives of the Act were to oblige the arbitral tribunal to give reasons for its judgments and to reduce the supervisory role of courts in arbitration proceedings. Under the new Act, reasons are to be stated unless the parties agree that no reasons need be given or the award is made upon the consent of the parties.

Though the matter had been referred to a three judge bench on the basis of a perceived conflict between the decisions of the court in *Gora Lal*[97] case and in *Build India Construction System*,[98] the court agreed with the view taken in *Gora*

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97 *Gora Lal* v. *Union of India* (2003) 12 SCC 459. Referring to this decision, the court quoted the following paragraph with approval "The point for determination in this case is: whether the arbitrator ought to have given reasons in support of his findings, along with the sums awarded, on each item of dispute. To decide this point, we have to go by the text and the context of Clause 70 of the arbitration agreement quoted above. Under the said clause, the arbitrator was required to identify each individual item of dispute and give his findings thereon along with the sum awarded. In this context, one has to read the word 'findings' with the expression 'on each item of dispute' and if so read it is clear that the word 'finding' denotes 'reasons' in support of the said conclusion on each item of dispute. The word 'finding' has been defined in *Words and Phrases*, Permanent Edn., 17, West Publishing Co. to mean 'an ascertainment of facts and the result of investigations'. Applying the above test to Clause 70, we are of the view that the arbitrator was required to give reasons in support of his findings on the items of dispute along with the sums awarded. We make it clear that this order is confined to the facts of this case and our interpretation is confined to Clause 70 of the arbitration agreement in this case."

98 *Build India Construction System* v. *Union of India* (2002) 5 SCC 433.

Lal case that "finding" denotes "reasons" in support of the conclusion. Referring to the *Build India* case, the court held that "[i]n *Build India Construction System* this Court noted in no uncertain terms that the validity of the award had not been specifically questioned on the ground of its having been given in breach of any obligation of the arbitrator to give reasons as spelled out by the arbitration clause. The judgment of the learned single judge did not show, observed this Court, that such a plea was urged before him. The objection petition filed to challenge the award was also found by this Court to be vague and general hence insufficient to give rise to an effective challenge to the award on the ground of it being non-speaking. The plea regarding the award being non-speaking was raised for the first time before the Division Bench in appeal."…"It is, in the light of the above observations, difficult to read *Build India Construction System* as an authority for the proposition that Clause 70 of the general conditions of the contract did not oblige the arbitrator to record reasons. The decision must, therefore, remain confined to the facts of that case only."

Upholding the decision of the high court, the court held that "[i]n the case at hand the arbitrator's award was admittedly unsupported by any reason,"… "The High Court was, therefore, justified in setting aside the award made by the arbitrator and remitting the matter to him for making of a fresh award."

Whether award could not be set aside on belated plea of lack of jurisdiction

In *Pam Development Pvt. Ltd*.[99] the Union of India preferred an appeal from an order dated 15.06.2005 rendered by the Calcutta High Court dismissing an application under section 34 of the Act challenging an award dated January 25, 2002 in an arbitration between the parties therein. The award came to be passed under the following circumstances. The parties entered into an agreement on October 19, 1992 for the construction of an industrial covered electrical loco shed. The agreement came to be terminated in terms of clause 64 of the general terms of the said contract for the reason that the respondent delayed the commencement of work and subsequently executed work which was of inferior quality. As a result, the appellant had to get the balance work completed by another contractor.

On July 24,1996 the respondent raised certain claims against the appellant and the latter demanded that the disputes be referred to arbitration. Since the disputes were not referred to arbitration, the respondent filed an application under section 11(6) of the Act before the High Court of Calcutta for appointment of a sole arbitrator. The high court, *vide* order dated July 10, 1998 appointed Satybrat Mitra J as the sole arbitrator. In the arbitration proceedings before the said sole arbitrator, the appellant participated fully without any demur, filed its statement of defence, and led evidence. The arbitrator, after hearing both the parties, accepted the claims of the respondent and made an award in favour of the respondent-contractor in the sum of Rs. 1,29,89,768. The Union of India filed an application under section 34 of the Act, before the high court seeking that the award be set

99 *Union of India* v. *Pam Development Pvt. Ltd.* (2014) 11 SCC 366.

aside. The said application under section 34 was dismissed on October 28, 2003 and an intra court appeal from the said order also came to be dismissed on June 15, 2005.

The Union of India relied upon clause 64 of the General Terms of Contract[100] and contended that the appointment of the arbitrator was contrary to the conditions of the contract between the parties and hence the arbitral tribunal was not properly constituted. It was also contended that the arbitrator had no jurisdiction to entertain the claims with regard to certain excepted matters.

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100 The relevant portion of cl. 64 of the General terms of contract provided that "*Arbitration*.—Matters in question, dispute or difference to be arbitrated upon shall be referred for decision to:

(*i*) A sole arbitrator who shall be the General Manager or a gazetted railway officer nominated by him in that behalf in cases where the claim in question is below Rs 5,00,000 (Rupees five lakhs) and in cases where the issues involved are not of complicated nature. The General Manager shall be the sole Judge to decide whether or not the issues involved are of a complicated nature.

(*ii*) Two arbitrators who shall be gazetted railway officers of equal status to be appointed in the manner laid in Clause 64(3)(*b*) for all claims of Rs 5,00,000 (Rupees five lakhs) and above, and for all claims irrespective of the amount of value of such claims if the issues involved are of a complicated nature, the General Manager shall be the sole Judge to decide whether the issues involved are of a complicated nature or not. In the event of the two arbitrators being divided in their opinions the matter under dispute will be referred to an umpire to be appointed in the manner laid down in Clause 3(*b*) for his decision.

(*iii*) It is a term of this contract that no person other than a gazetted railway officer, should act as an arbitrator/umpire and if for any reason, that is not possible, the matter is not to be referred to arbitration at all.

(*iv*) In cases where the claim is up to Rs 5,00,000 (Rupees five lakhs), the arbitrator(s)/ umpire so appointed, as the case may be, shall give the award on all matters referred to arbitration indicating therein break-up of the sums awarded separately on each individual item of disputes. In cases where the claim is more than Rs 5,00,000 (Rupees five lakhs), the arbitrator(s)/umpire so appointed, as the case may be, shall give intelligible award (i.e. the reasoning leading to the award should be stated) with the sums awarded separately on each individual item of dispute referred to arbitration.

3 (*b*) For the purpose of appointing two arbitrators as referred to in sub-clause (*a*) (*ii*) above, the Railway will send a panel of more than three names of gazetted railway officers of one or more departments of the Railway to the contractor who will be asked to suggest to the General Manager one name out of the list for appointment as the contractor's nominee. The General Manager, while so appointing the contractor's nominee, will also appoint a second arbitrator as the Railway's nominee either from the panel or from outside the panel, ensuring that one of the two arbitrators so nominated is invariably from the Accounts Department. Before entering upon the reference the two arbitrators shall nominate an umpire who shall be a gazetted railway officer to whom the case will be referred to and in the event of any difference between the two arbitrators officers of the Junior Administrative grade of the Accounts Department of the Railways shall be considered as of equal status to the officers in the intermediate administrative grade of other departments of the Railway for the purpose of appointment as arbitrators."

On behalf of the respondent, it was pointed out that the appellant had participated in all prior proceedings without any demur or objections. No plea of lack of jurisdiction of the learned arbitrator was taken by the appellant in its statement of defence. The appellant had not only led evidence in defence, but had also accepted the jurisdiction of the arbitrator by filing a counterclaim in the proceedings.

Referring to clause 64 of the contract, the court noted the scheme of arbitration under the said clause, which provided for two arbitrators who shall be gazetted railway officers and who together shall appoint a third gazetted officer as an umpire. The court held that after coming into force of the Act, which repealed the Arbitration Act, 1940, the provision regarding appointment of two arbitrators and an umpire had become redundant. Accordingly, the respondent had requested the railways to appoint a sole arbitrator.

The high court had appointed a sole arbitrator in the proceedings under section 11(6) of the Act. The said order had not been challenged by the appellant and had become final and binding. Moreover, the appellant failed to raise any objection as to the lack of jurisdiction of the arbitral tribunal before the learned arbitrator. The appellant was thus deemed to have waived its right, in terms of section 4 of the Act, to question the jurisdiction of the arbitral tribunal under section 16(2) of the Act.

Following its earlier decision in *BSNL*[101] *etc.*, the court held that the obligation cast upon the appellants by section 4 of the Act squarely applied to the case and since the appellant failed to raise the plea of jurisdiction before the arbitral tribunal as mandated by section 16(2), the appellant would be deemed to have waived its right to object to the jurisdiction of the Tribunal for the first time in court.

Scope of interference by courts under section 34 of the Act

In a series of cases, various high courts had the occasion to further define the limits of interference with the arbitral awards by courts under Section 34 of the Act.

In *Balasore Alloys Ltd.*[102] the respondent held 10 duty free advance licenses for import of furnace oil which were freely transferable under Export Import Policy 1992-1997. The petitioner and the respondent entered into a contract, where under the respondent was to arrange for advance release orders of furnace oil to the petitioner in respect of the licenses held by it. The petitioner was to pay a premium of Rs. 330/kilo liter to the respondent. The furnace oil was to be supplied by three state owned oil companies. The said agreement also provided for an arbitration clause.

As disputes arose between the parties, with regard to the amounts payable to the petitioner for furnace oil, the petitioner initiated arbitration proceedings in terms of the arbitration agreement. After completion of pleadings and due examination of witnesses, the arbitral tribunal, by an award by a majority dated

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101 *BSNL* v. *Motorola India (P) Ltd.* (2009) 2 SCC 337.

102 *Reliance Alloys Ltd v. Balasore Alloys Ltd.* (2014) 1A+BLR.

20.06.2008, held that the claim of the petitioner was premature and that the respondent was not liable to pay the amount claimed by the petitioner. The petitioner challenged the award by way of an application under Section 34 of the Act, before the Bombay High Court *inter alia* on the ground that the arbitral tribunal had wrongly interpreted the indemnity clause in the said contract. The High Court of Bombay, relying upon the decision in *RashtriyaIspat Nigam Ltd.*,[103] held that where the interpretation of the clause by the arbitral tribunal is one of two possible interpretations, the court shall not interfere with such award.

VI MEANING OF "COURT" UNDER SECTION 2(1) (e)

For application of section 34

In *Atlanta Ltd.*,[104] appellant engaged the respondent contractors for construction of a bypass road in Thane. A dispute that arose between the parties was referred to arbitration and an award dated 12.05.2012 was made granting almost all claims made by the respondent. However, both the parties challenged the award on the same day, *i.e.*, 07.08.2012, with the appellant filing an application under section 34 of the Act, before the district judge, Thane while the respondent filed an application under section 34 before the High Court of Bombay. Since award dated 12.05.2012 was the subject matter of challenge by different parties before two different courts, the respondent filed an application before the high court seeking transfer of the applications under section 34 of the Act filed by the appellant before the district judge, Thane to the original side of the high court to be heard along with the application filed by the respondent under section 34 of the Act. The Bombay High Court of Bombay allowed the application of the petitioner. This order was challenged by the appellants before the Supreme Court by way of SLP. On behalf of the appellant, relying upon sections 15, 16, and 20 of the CPC it was contended that the subject matter of arbitral award being the construction of the Mumbai bypass, from kilometer 133/800 to 138/200 admittedly fell within Thane district, which fell within the jurisdiction of the District Judge, Thane. On behalf of the respondent, relying upon *BALCO*[105] it was contended that the seat of

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103 *Rashtriya Ispat Nigam Ltd.* v. *Dewan Chand Ram Saran* (2012) 5 SCC 306. See in A.K.Ganguli, "Arbitration Law" XLVIII *ASIL* 56-60 (2012).

104 *State of Maharashtra* v. *Atlanta Ltd.* (2014) 11 SCC 619.

105 Bharat Aluminium Co. v. Kaiser Technical Services (2012) 9 SCC 552 at paragraph 96 where in it was held that "[2]e are of the opinion, the term 'subject-matter of the arbitration' cannot be confused with 'subject matter of the suit'. The term 'subject-matter' in Section 2(1) (e) is confined to Part I. It has a reference and connection with the process of dispute resolution. Its purpose is to identify the courts having supervisory control over the arbitration proceedings. Hence, it refers to a court which would essentially be a court of the seat of the arbitration process. In our opinion, the provision in Section 2(1) (e) has to be construed keeping in view the provisions in Section 20 which give recognition to party autonomy. Accepting the narrow construction as projected by the learned counsel for the appellants would, in fact, render Section 20 migatory. In our view, the legislature has intentionally given jurisdiction to two courts i.e. the court which would have jurisdiction where the

arbitration being Mumbai, the high court along has jurisdiction to entertain a challenge to the arbitral award.

The court held that in view of the special definition of the term "court" in section 2(1)(e) of the Act, the provisions contained in sections 15, 16, and 20 of the CPC, would not be applied for determining the court of competent jurisdiction to entertain application under section 34 of the arbitration act, particularly in view of the use of the expression, "the High Court in exercise of its ordinary original civil jurisdiction" in section 2(1)(e) of the Act. The court speaking through Kehar J. held:

> In view of the inferences drawn by us, based on the legislative intent emerging out of Section 2(1)(*e*) of the Arbitration Act, we are of the considered view, that legislative choice is clearly in favour of the High Court. We are, therefore of the view, that the matters in hand would have to be adjudicated upon by the High Court of Bombay alone.

For application of section 42

In *Associated Contractors* case, a two judge bench of the court made a reference[106] to a bench of three judges for an authoritative pronouncement on the question as to which court would have jurisdiction over an application under section 34 read with section 2(1)(e) and other provisions including section 42 of the Act, for setting aside an award.

The question arose under the following circumstances. An item rate tender was signed and executed in 1995-1996 between the respondents and the appellant state for the execution of work of lining of excavation and lining of Teesta-Jaldhaka Main Canal from Chainage 3 km to 3.625 km in Police Station Mal, District Jalpaiguri, West Bengal. Para 25 of the said item rate tender and contract contained

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cause of action is located and the courts where the arbitration takes place. This was necessary as on many occasions the agreement may provide for a seat of arbitration at a place which would be neutral to both the parties. Therefore, the courts where the arbitration takes place would be required to exercise supervisory control over the arbitral process. For example, if the arbitration at a place which would be neutral to both the parties. Therefore, the courts where the arbitration takes place would be required to exercise supervisory control over the arbitral process. For example, if the arbitration is held in Delhi, where neither of the parties are from Delhi, (Delhi having been chosen as a neutral place as between a party from Mumbai and the other from Kolkata) and the tribunal sitting in Delhi passes an interim order under Section 37 must lie to the courts of Delhi being the courts having supervisory jurisdiction over the arbitration proceedings and the tribunal. This would be irrespective of the fact that the obligations to be performed under the contract were to be performed either at Mumbai or at Kolkata, and only arbitration is to take place in Delhi. In such circumstances, both the courts would have jurisdiction i.e. the court within whose jurisdiction the subject-matter of the suit is situated and the courts within the jurisdiction of which the dispute resolution i.e. arbitration is located."

106 Order dated 07.04.2010 in Civil appeal No. 6691, *State of West Bengal* v. *Associated Contractors* reproduced in (2015) 1 SCC 32 at 37.

an arbitration clause. Disputes had arisen between the parties.Though an arbitration had not yet been initiated by either of the parties, the respondent filed an application under section 9 of the Act, before the High Court of Calcutta seeking certain interim reliefs. A single judge of the high court, after granting leave under Clause 12 of the letters patent, passed an order of *ad interim ex parte* injunction. That order was continued from time to time and came to be confirmed on 10.12.1998. Meanwhile, in an application filed under section 11 of the Act, B.P. Banerjee J (retd) was appointed as the sole arbitrator to adjudicate upon the disputes between the parties.

The arbitration proceedings culminated in an award on June 30, 2004 in which the claimant was awarded a sum of Rs 2,76,97,205.00 with 10% interest from July1,1998 till the date of the award and also awarded costs. The counterclaim of the appellant was rejected.

On 21.09.2004, the appellant filed an application under section 34 of the Act before the principal civil court, *i.e.*, the court of the District Judge, Jalpaiguri. The district judge issued notice directing the respondent to file written objections before November 04, 2004. The respondent filed a petition under article 227 of the constitution challenging the jurisdiction of the district judge, to entertain an application under section 34 of the Act, in view of the bar under section 42 of the Act. The single judge of the high court allowed the said petition, and quashed the impugned notice issued by the district judge holding that the jurisdiction of the District Judge at Jalpaiguri to entertain the said application for setting aside of the award, was excluded under section 42 of the said Act and that the high court in exercise of its original jurisdiction was the only court which could entertain such an application.

The appellant state preferred as special leave petition from the said order which was referred by a two judge bench of the Supreme Court to a three judge bench. The larger bench considered the schemes of the Arbitration Act, 1940, the 1996 Act, and held that the definition of the expression "Court" under section 2(1) (e) of the 1996 Act was exhaustive by reason of the use of the expression "means" and "includes" unlike the "court" as defined under section 2(c) of the 1940 Act, which meant, a civil court having jurisdiction over the subject matter of reference.[107]

The court noted another striking feature. While section 42 of the 1996 Act dealt "with respect to arbitration agreement", section 4 of the 1940 Act, was concerned with only "any reference".

It was held that the expression "with respect to an arbitration agreement" widened the scope of section 42 to include all matters which, directly or indirectly, pertain to an arbitration agreement. Applications made to courts which are before, during or after arbitral proceedings made under Part I of the Act are all covered by section 42. But an essential ingredient of the section was that an application under Part I must be made to a "court".

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107 Under Section 2(1) (e) of the 1996 Act, "Court" means and includes the High Court in exercise of its original civil jurisdiction.

On an analysis of other provisions of the Act, particularly with regard to sections 8 and 11 of the act, it was held that section 8 contemplated a proceeding before a judicial authority and not a court and that "for that reason alone, such applications would be outside the scope of section 42. It was held in *P. Anand Gajapathi Raju v. P.V.G. Raju*, that applications under Section 8 would be outside the ken of Section 42. We respectfully agree, but for the reason that such applications are made before "judicial authorities" and not "courts" as defined. Also, a party who applies under Section 8 does not apply as *dominus litus*, but has to go wherever the 'action' may have been filed. Thus, an application under section 8 is parasitical in nature—it has to be filed only before the judicial authority before whom a proceeding is filed by someone else. Further, the "judicial authority" may or may not be a court. And a court before which an action may be brought may not be a Principal Civil Court of Original Jurisdiction or a high court exercising original jurisdiction."

Referring to the nature of proceedings under section 11, following the judgment of the Constitution Bench in *Patel Engineering*[108] it was held that "[i]t is obvious that section 11 applications are not to be moved before the "court" as defined but before the Chief Justice either of the High Court or of the Supreme Court, as the case may be, or their delegates. This is despite the fact that the Chief Justice or his delegate has now to decide judicially and not administratively. Again, Section 42 would not apply to applications made before the Chief Justice or his delegate for the simple reason that the Chief Justice or his delegate is not "court" as defined by Section 2(1)(e)."

Referring to section 11(12)(b) it was observed that this provision also "does not in any manner make the Chief Justice or his designate "court" for the purpose of Section 42."

On the question, whether Section 42 applied after arbitration proceedings had come to an end, the court answered in the affirmative. The expression "with respect to an arbitration agreement" in section 42 would include all the applications during or after the arbitration proceedings are over. On question as to whether section 42 would apply in cases where an application made in a court is found to be without jurisdiction, analyzing several earlier decisions rendered under both the 1940 and 1996 Acts, the court held that if an application under Section 34 is preferred before a court which is not the Principal Civil Court of jurisdiction, or the High court on its original side, then obviously such an application would be outside the four corners of section 42.

> Explaining the proposition, it was observed that "If an application were to be preferred to a court which is not a Principal Civil Court of original jurisdiction in a district or a High Court exercising original jurisdiction to decide questions forming the subject matter of an arbitration if the same had been the subject matter of a suit, then obviously such application would be outside the four corners of

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

> Section 42. If, for example, an application were to be filed in a court inferior to a Principal Civil Court, or to a High Court which has no original jurisdiction, or if an application were to be made to a court which has no subject-matter jurisdiction, such application would be outside Section 42 and would not debar subsequent applications from being filed in a court other than such court."

Finally, Nariman J speaking for the court answered the reference in the following terms:

> Our conclusions therefore on Section 2(1) (e) and Section 42 of the Arbitration Act, 1996 are as under:
>
> (a) Section 2(1)(e) contains an exhaustive definition marking out only the Principal Civil Court of Original Jurisdiction in a district or a High Court having original civil jurisdiction in the State, and no other court as "court" for the purpose of Part I of the Arbitration Act, 1996.
>
> (b) The expression "with respect to an arbitration agreement" makes it clear that Section 42 will apply to all applications made whether before or during arbitral proceedings or after an award is pronounced under Part I of the 1996 Act.
>
> (c) However, Section 42 only applies to applications made under Part I if they are made to a court as defined. Since applications made under Section 8 are made to judicial authorities and since applications under Section 11 are made to the Chief Justice or his designate, the judicial authority and the Chief Justice or his designate not being court as defined, such applications would be outside Section 42.
>
> (d) Section 9 applications being applications made to a court and Section 34 applications to set aside arbitral awards are applications which are within Section 42.
>
> (e) In no circumstances can the Supreme Court be "court" for the purposes of Section 2(1)(e), and whether the Supreme Court does or does not retain seisin after appointing an arbitrator, applications will follow the first application made before either a High Court having original jurisdiction in the State or a Principal Civil Court having original jurisdiction in the district, as the case may be.
>
> (f) Section 42 will apply to applications made after the arbitral proceedings have come to an end provided they are made under Part I.
>
> (g) If a first application is made to a court which is neither a Principal Court of Original Jurisdiction in a district or a High Court exercising original jurisdiction in a State, such application not being to a court as defined would be outside Section 42. Also, an application made

to a court without subject-matter jurisdiction would be outside Section 42.

VII WHETHER APPELLATE COURT CAN PASS CONDITIONAL ORDER OF STAY IN PROCEEDINGS UNDER SECTION 37

In *Kanpur Jal Sansthan*[109] the appellant challenged the order March 17, 2013 passed by a division bench of the High Court of Allahabad, wherein, after admitting the appeal while considering an application for stay, the appellant was directed to deposit the entire amount awarded by the arbitrator, permitting the respondent-claimant to withdraw half of the said sum without furnishing any security and the remaining half after furnishing security. In the event of default in making the deposit, it was directed that the order of stay would automatically stand vacated. The appellant questioned the power of the division bench of the high court to pass such a conditional order in the absence of any specific power to do so.

The question arose under the following circumstances. An agreement was entered into between the appellant and the respondent on June 10, 1987 for the supply of slow sand filter. As per the agreement the work was to be completed within a year from the commencement thereof. However, during the subsistence of the contract a dispute arose between the parties and upon application made by the respondent, an arbitrator was appointed. The arbitration proceedings culminated in an award on January 20, 2009 allowing the claim of the respondent and with a direction upon the appellant to pay a sum of about rupees 32 lakhs with an interest of 18% from 1988. The appellant filed an application under section 34 for setting aside the said award. However, *vide* order dated March 30, 2013 the District Judge, Kanpur rejected the said application.

The appellant filed an appeal before the high court, along with an application for stay of the said award. The division bench of the Allahabad High Court passed the interim order as noted hereinabove, which came to be challenged before the Supreme Court by way of SLP. It was contended on behalf of the appellant that section 37 of the Act did not clothe the appellate court with the power to grant such conditional order of stay inasmuch as Order XLI Rule 5 of the CPC had no application to the said proceedings. It was contended that, in any event, the principle underlying Order XLI Rule 5, CPC was to be read in harmony with Order XXVII Rule 8A of the CPC. It was clear that such a condition could not be imposed on a government organization.

On behalf of the respondent it was contended that since the application filed by the appellant under section 34 of the Act had been rejected by the court, the award passed by the arbitrator had become executable by itself having the status of a money decree and hence the division bench of the high court had rightly passed the said conditional interim order.

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109 *Kanpur Jal Board* v. *Bapu Construction* (2015) 5 SCC 267.

The court noticed that section 35 of the Act declared that: "[s]ubject to this part an arbitral award shall be final and binding on the parties and persons claiming under them respectively". Section 36 declared that "[w]here the time for making an application to set aside the arbitral award under Section 34 has expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 in the same manner as if it were a decree of the court". Reading the provisions together the court held that the award had the potentiality of enforcement. If an application is filed seeking stay of the said award, the court could undoubtedly have power to consider if conditional stay should be granted. The court referred to section 19 of the Act which provides for the determination of rules of procedure for the arbitral tribunal, and section 37 which provides for appealable orders, with sub section (1)(b) thereof providing for appeals from order setting aside or refusing to set aside arbitral award under section 34 of the Act. The court then placed reliance upon its earlier decision in *Paramjeet Singh Patheja*[110] to hold that "whatever may be the status of the award under the Act in respect of any other Statute, but when it is challenged in an appeal under Section 37 of the Act the underlying principle of the Code of Civil Procedure is applicable." Referring to another decision of the court in *Pandey & Co*.[111] the court held that "Order XLI Rule 5 in principle is applicable to an appeal preferred before the High Court, for there is no provision in the Act prohibiting the appellate court not to take recourse to the underlying principles of the Code of Civil Procedure as long as they are in consonance with the spirit and principles engrafted under the Act"

Rejecting the contention of the appellant that it should be given the benefit of Order XXVII Rule 8A, the court ruled that the appellant "being a Jal Sansthan it would come within the extended wing of the government does not commend acceptation."[112] The court speaking through Dipak Misra J held:

> It is the "Jal Sansthan" which claims to be an extended wing or agency of the State which has preferred the appeal. We have clearly ruled that Order XXVII Rules 8A and 8B are applicable only to the government and not to instrumentality or agency of the state.

On the merits of the order passed by the high court, the court held that the high court had not given any justifiable reason for withdrawal of 50% of the amount without furnishing security. The court accordingly modified the order of the division bench, observing that "…we only modify the order that the respondent shall furnish the security for the entire amount to the satisfaction of the concerned District Judge..."

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110 *Paramjeet Singh Patheja* v. *ICDS Ltd.* (2006) 13 SCC 322.

111 *Pandey and Co. Builders Pvt. Ltd.* v. *State of Bihar and another* (2007) 1 SCC 467.

112 Justifying the said conclusion, the court referred to a large number of cases which had considered the definition of "Government".

VIII ANTI-SUIT INJUNCTION AND ANTI ARBITRATION INJUNCTION

Anti suit injunction

In *Enercon (India)*[113] though the agreement between the parties expressly provided that "[t]his agreement and any dispute of claims arising out of or in connection with its subject-matter are governed by and construed in accordance with the law of India." and that the provisions of the Act shall apply to the arbitration proceedings, the court was called upon to consider multiple issues firstly by reason of the language employed in the agreement providing that "[t]he proceedings in such arbitration shall be conducted in English. The venue of the arbitration proceedings shall be in London";and secondly, by reason of multiple court proceedings resorted to by the parties in India and in England.

On 12.01.1994, appellants no. 2 and 3 (Members of the Mehra family), entered into a Share Holding Agreement (SHA) with respondent no. 1 (Enercon GmBH, a company incorporated under the laws of Germany). In terms of the SHA, respondent no. 1 was to hold 51% shares of appellant no. 1, Enercon (India) Pvt. Ltd. appellant 2 and 3 collectively were to hold 49% shares. Enercon India was the joint venture business set up by the appellant and respondent together, having its registered office in Daman, for the purpose of manufacture and sale of Wind Turbine Generators (WTGs) in India. On the same day, the parties entered into another agreement, namely the Technical Know How Agreement by which, respondent no.1 agreed to transfer to Enercon (India) the right and technological knowhow for manufacture of WTGs. Respondent no.1 also agreed to supply special components to appellant as the licensor. Subsequently, by executing a supplementary shareholding agreement the shareholding of respondent no. 1 in appellant no. 1 company was increased to 56% while the shareholding of appellant no.2 and 3 was reduced to 44%. A Supplementary Technical Know How Agreement was also executed amending the earlier technical know-how agreement.

Though the period under the technical knowhow agreement expired, the respondent continued to supply WTGs to Enercon (India). On May 23, 2006, negotiations were recorded in a document titled heads of agreement. Subsequently on September 29, 2006 what is known as "agreed principles" were entered into, which were finally to be incorporated into:

A. IPLA 'draft enclosed'

B. Successive technology transfer agreement

C. Name use licence agreement

D. Amendment to existing shareholding agreement.

On the same day, *i.e.*, on 29.06.2006, the parties also executed an intellectual property license agreement, (IPLA). Though appellant no. 2 had signed the contract on behalf of appellants no. 2 and 3, it was contended that IPLA was not a concluded

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113 *Enercon (India) Pvt. Ltd.* v. *Enercon GmBH* (2014) 5 SCC 1.

contract. Emails were exchanged between the parties between September 30, 2006 and January 31, 2007 in this regard. On September 11, 2007 appellant no. 2 and 3 filed a derivative suit before the Bombay High Court seeking resumption of supplies and parts for components, as the respondent stopped all supplies from July 2007. In the suit, respondent No. 1 filed an application under section 45 of the Act. On January 31, 2007, the Bombay High Court, by an interim order, directed the respondent no. 1 to resume supplies until further orders.

On March 13, 2008 respondent no. 1 sent a letter to the appellant nos. 2 and 3, invoking the arbitration agreement contained in clause 18.1 of the IPLA and nominated Mr. V.V.Veedor, Q.C. as licensor's arbitrator stating therein that "Enercon and WPG are happy to allow EIL to nominate its arbitrator and for the two party (sic) nominated arbitrators to select the third arbitrator, subject to consultation with the parties. The third arbitrator will act as the Chairman of the Tribunal".

On 27.03.2008, the "arbitration claim form" was issued by the respondents seeking several declaratory reliefs in relation to the IPLA from the High Court of Justice, Queens Bench Division, Commercial Court, United Kingdom. One of the reliefs claimed therein related to the constitution of the arbitral tribunal in accordance with the IPLA. In the meantime, in response to the said letter, the appellant no. 2 on behalf of himself and appellant no. 3, stated that since IPLA was only in the form of a draft and not in the form of a concluded agreement there did not exist any arbitration agreement, and as such the question of nominating an arbitrator did not arise.

In response to the said letter of the appellants, the solicitors based in UK, acting on behalf of the respondent addressed a letter to the appellants on 02.04.2008 stating that should the appellants fail to nominate their arbitrator within 7 days of receipt of the said letter, the respondents shall proceed under section 17(2) of the English Arbitration Act, 1996 to appoint their nominee arbitrator Mr.V.V.Veedor, QC as the sole arbitrator.

On 08.04.2008, the appellants filed Regular Suit No. 9 of 2008 before the Court of Civil Judge, Senior Division, Daman, seeking *inter alia* a declaration to the effect that the IPLA was not a concluded contract and hence there was no contract between the parties. On the same day, the Daman trial court passed an order in favour of the appellants, wherein the respondents were directed to maintain *status quo* with regard to the proceedings initiated by them before the English High Court.

Thereafter, on April 11, 2008 the appellants without prejudice, nominated B.P. Jeevan Reddy J, a former judge of the Supreme Court, as the arbitrator. On May 24, 2008 Reddy J informed the solicitors that there were inherent defects in the arbitration clause in the IPLA and expressed the inability of the arbitrators to appoint the third arbitrator. This was reiterated in a letter jointly addressed by both arbitrators.

The respondent filed an application under section 45 of the Act, 1996 in the Daman Suit. The appellant also moved an application for interim injunction in the same suit seeking a relief in the nature of an anti arbitration injunction seeking to restrain the respondents from proceeding before the English Court. The Daman

court dismissed the application filed by the respondent under section 45 of the Indian Arbitration Act and allowed the application filed by the appellant, granting a relief in the nature of an anti arbitration injunction.

The respondent filed appeals before the Daman District Court challenging the said orders of the Civil Judge, Senior Division. The Daman District Court set aside the orders passed by the Civil Judge, thereby vacated the anti arbitration injunction and allowed the application of the respondent filed under section 45 of the Act.

A bench of two judges of the Supreme Court, after a detailed examination of materials on record and contentions of the parties, held on the various issues as follows:

Re: Concluded Contract and Existence of arbitration agreement.

Though the Daman trial court came to the conclusion that IPLA was not a concluded contract for it was devoid of free consent and the execution was vitiated by undue influence, fraud, misrepresentation and mistake, the appellate court upon consideration of the pleadings, found that there was no plea to the effect that the agreement was null and void, incapable of being performed. The high court did not examine the pleadings as questions regarding the validity of the arbitration agreement were left to be decided by the arbitral tribunal. The court also noted that the appellant did not raise any plea to the effect that the arbitration agreement was without free consent; had been procured by coercion, fraud, misrepresentation, or was signed under a mistake and hence the provisions contained in sections 14, 15, 16, 17, 18, 19, and 19(A) of the Contract Act, 1872, were not attracted. The court agreed with the course of action suggested by the high court, *i.e.,* the question as to whether the contract was validly concluded could be left to the arbitral tribunal though the court reached the same conclusion for different reasons. Referring to clause 3 of the heads of agreement of the proposed IPLA dated 23.05.2006, the court held:

> A bare perusal of this clause makes it abundantly clear that the parties have irrevocably agreed that Clause 18 of the proposed IPLA shall apply to settle any dispute or claim that arises out of or in connection with this memorandum of understanding and negotiations relating to IPLA."… "In the facts of this case, we have no hesitation in concluding that the parties must proceed with the arbitration

Reiterating the known rules of interpretation the court further observed that "whilst interpreting the arbitration agreement and/or the arbitration clause, the court must be conscious of the overarching policy of *least intervention by courts or judicial authorities* in matters covered by the Act. In view of the aforesaid, it is not possible for us to accept the submission of Mr. Nariman that the arbitration agreement will perish as the IPLA has not been *finalised*. This is also because the arbitration clause (agreement) is independent of the underlying contract *i.e.,* the IPLA containing the arbitration clause. Section 16 provides that the arbitration clause forming part of a contract shall be treated as an agreement independent of such a contract."

Re: Unworkability of arbitration agreement

Though both the arbitrators were of the opinion that parties cannot proceed to arbitration as the agreement was unworkable, the high court had taken a contrary view on the ground that two arbitrators were to be appointed: *viz.*, one by the licensors and the other by the licensee. Reiterating the well known principles that "the courts play a supportive role in encouraging the arbitration to proceed rather than letting it come to a *grinding halt*." And another equally important principle recognised in almost all jurisdictions "is the *least intervention* by the courts". The court observed that "[k]eeping in view the aforesaid, we find force in the submission of Dr. Singhvi that the arbitration clause as it stands cannot be frustrated on the ground that it is unworkable."

Accepting the argument on behalf of the respondent that to the extent the arbitration contained a machinery provision, it was open to the court to adopt a commonsense or pragmatic approach and not a pedantic or a technical approach, it was possible for the court to supply the obvious omission in the machinery provision of the arbitration clause and that since the two arbitrators have already been appointed by the parties, the court held that "the two arbitrators appointed by the parties shall appoint the third arbitrator" can be read into the arbitration clause since the omission is obvious and hence could be legitimately read into the arbitration clause by the court.

Re: Seat of arbitration:

The question before the court was whether the provision contained in clause 18.3 to the effect that "The venue of the arbitration proceedings shall be in London." should be read as providing the "venue" of arbitration or be construed as the "seat" of arbitration being in London. In other words, whether the expression "venue" in clause 18.3 can be read as "seat".

The court accepted the appellant's contention that the law laid down in "*Naviera Amazonica*"[114] would squarely apply to the present case. In applying the test of "closest and intimate connection to the arbitration", it was held that since parties had agreed that the Arbitration and Conciliation Act, 1996 would apply to the arbitration proceedings. *i.e.*, the curial law contained in chapters III, IV, and V, of the Act would apply to the arbitration proceedings as *lexfori*. The parties have deliberately mentioned London as the "venue" of arbitration and hence venue cannot be considered as "seat". Reiterating the principles laid down in *Naviera* that "[a]ll contracts which provide for arbitration and contain a foreign element may involve three potentially relevant systems of law: (*1*) the law governing the substantive contract; (*2*) the law governing the agreement to arbitrate and the performance of that agreement; (*3*) the law governing the conduct of the arbitration. In the majority of cases all three will be the same. But (*1*) will often be different from (*2*) and (*3*). And occasionally, but rarely, (*2*) may also differ from (*3*)."It was observed that the law governing the arbitration proceedings, being the Arbitration

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114 N*aviera Amazonica Peruana S.A.* v. *Compania Internacional De Seguros Del Peru* (1988) 1 Lloyd's Rep 116 (CA).

and Conciliation Act, 1996, that became the curial law or *lex fori* and hence, London remained only a "venue" and not the 'legal seat' of arbitration.

Speaking for the court, S.S.Nijjar, J. observed that:

> Surely, jurisdiction of the courts cannot be rested upon unsure or insecure foundations. If so, it will flounder with every gust of wind from different directions. Given the connection to India of the entire dispute between the parties, it is difficult to accept that parties have agreed that the *seat* would be London and that *venue* is only a misnomer. The parties having chosen the Indian Arbitration Act, 1996 as the law governing the substantive contract, the agreement to arbitrate and the performance of the agreement and the law governing the conduct of the *arbitration*; it would, therefore, in our opinion, be vexatious and oppressive if Enercon GmbH is permitted to compel EIL to litigate in England. This would unnecessarily give rise to the undesirable consequences so pithily pointed by Lord Brandon and Lord Diplock in *Abidin v. Daver*. It was to avoid such a situation that the High Court of England and Wales, in *Braes of Doune*, construed a provision designating Glasgow in Scotland as the *seat* of the arbitration as providing only for the *venue* of the arbitration.

Finally the court concluded on the issue as under:

> This apart, we have earlier noticed that the main contract, the IPLA is to be performed in India. The governing law of the contract is the law of India. Neither party is English. One party is Indian, the other is German. The enforcement of the award will be in India. Any interim measures which are to be sought against the assets of appellant 1 ought to be in India as the assets are situated in India. We have also earlier noticed that respondent 1 has not only participated in the proceedings in the Daman courts and the Bombay High Court, but also filed independent proceedings under the Companies Act at Madras and Delhi. All these factors would indicate that respondent 1 does not even consider the Indian courts as *forum non conveniens*. In view of the above, we are of the considered opinion that the objection raised by the appellants to the continuance of the parallel proceedings in England is not wholly without justification. The only single factor which prompted respondent 1 to pursue the action in England was that the *venue* of the arbitration has been fixed in London. The considerations for designating a convenient *venue* for arbitration cannot be understood as conferring *concurrent jurisdiction* on the English courts over the arbitration proceedings or disputes in general. Keeping in view the aforesaid, we are inclined to restore the anti-suit injunction granted by the Daman Trial Court.

Re: anti-suit injunction

The high court having held that the courts in England would have concurrent jurisdiction, it went on to further hold that there existed no reason to hold Indian courts as *Forum Non Conveniens*. Disagreeing with the aforesaid conclusion reached by the High Court which was characterized as "ignoring" the conclusion in "*ONGC.* v *Western*" & "*Modi Entertainment Network*" and noticing the fact that respondent no. 1 had 51% shareholding in Enercon (India), which subsequently increased to 56%, the court held that it was clear that respondent was actively carrying on business in Daman within the meaning of section 20, of the CPC the IPLA was performed in India, law of the contract was India, neither party was English, enforcement was to be in India as the assets are situated in India, it could not be contended by the respondent that the law of England was the natural law of the contract. It was clear that the respondents did not consider Indian courts as *Forum Non Conveniens* and hence, the anti-suit injunction granted by the Daman Trial Court was restored.

Anti arbitration injunction

In *World Sport Group (Mauritius) Ltd.* v. *MSM Satellite (Singapore) Pte. Ltd.*,[115] the question that arose for consideration by the court was whether the Division Bench of the Bombay High Court could pass an order of injunction restraining arbitration proceedings at Singapore between the parties.

The question arose under the following factual circumstances. On November 30, 2007 the Board for Control of Cricket in India (BCCI) invited tenders on a worldwide basis for Indian Premier League (IPL) media rights for a period of ten years for the period from 2008 to 2017. The bid offered by the appellant World Sport Group (India) (WSG) was accepted by the BCCI. By a pre bid arrangement, however, respondent MSM was to get media rights to IPL in respect of the Indian Subcontinent for the period between 2008 and 2010. Accordingly on January 21, 2008 BCCI and MSM entered into a media rights license agreement for the period between 2008 and 2012 for a sum of $ 274.50 Million.

After the first season of the IPL, the BCCI terminated the agreement dated January 21, 2008 in respect of Indian subcontinent and commenced negotiations with WSG India. On March 14, 2009, the respondent filed a petition under section 9 of the Act, against BCCI before the Bombay High Court seeking grant of an injunction against BCCI from acting on the termination letter dated March 14, 2009 and for preventing BCCI from granting the rights under the agreement dated August 21, 2008 to any third party.

After negotiations between BCCI and WSG India, an agreement was entered into between them awarding the media rights of IPL for the period 2009 to 2017 for a sum of Rs. 4791 Crores. To operate the media rights in India, the appellant WSG was required to seek sub licensee within a period of 72 hours. WSG was however unable to get a sub-licensee even though the period was extended twice. It was suggested that WSG India allowed media rights in India to lapse. On 25.03.2009 a new Media Rights License agreement between the BCCI and the

115 (2014) 11 SCC 639.

respondent was entered into for the Indian Subcontinent for the same contract value of Rs. 4791 Crores. WSG however continued to enjoy rights in respect of rest of the world media rights. On 25.03.2009 the appellant WSG and respondent MSM executed a deed for provision of facilitation services (Facilitation Deed) where the respondent agreed to pay a sum of Rs. 425 Crores as facilitation fees. Clause 9 of the Facilitation Deed dealt with Governing Law of contract provided as under:

> This Deed shall be governed by and construed in accordance with the laws of England and Wales, without regard to choice of law principles. All actions or proceedings arising in connection with, touching upon or relating to this Deed, the breach thereof and/or the scope of the provisions of this section shall be submitted to the International Chamber of Commerce ('the Chamber') for final and binding arbitration under its Rules of Arbitration, to be held in Singapore, in the English language before a single arbitrator who shall be a retired Judge with at least ten years of commercial experience. The arbitrator shall be selected by mutual agreement of the parties, or, if the parties cannot agree, then by striking from a list of arbitrators supplied by the Chamber. If the parties are unable to agree on the arbitrator, the Chamber shall choose one for them. The arbitration shall be a confidential proceeding, closed to the general public."…"Notwithstanding the foregoing, the arbitrator may require that such fees be borne in such other manner as the arbitrator determines is required in order for this arbitration provision to be enforceable under applicable law. The arbitrator shall issue a written opinion stating the essential findings and conclusions upon which the arbitrator's award is based. The arbitrator shall have the power to enter temporary restraining orders and preliminary and permanent injunctions. No party shall be entitled or permitted to commence or maintain any action in a court of law with respect to any matter in dispute until such matter shall have been submitted to arbitration as herein provided and then only for the enforcement of the arbitrator's award, provided, however, that prior to the appointment of the arbitrator or for remedies beyond the jurisdiction of an arbitrator, at any time, any party may seek equitable relief in a court of competent jurisdiction in Singapore, or such other court that may have jurisdiction over the parties, without thereby waiving its right to arbitration of the dispute or controversy under this section. The parties hereby waive their right to jury trial with respect to all claims and issues arising under, in connection with, touching upon or relating to this deed, the breach thereof and/or the scope of the provisions of this section, whether sounding in contract or tort, and including any claim for fraudulent inducement thereof."

The respondent MSM after paying three installments of Rs.125 crores stopped making any further payments and on June 25, 2010 wrote to the appellant WSG

rescinding the facilitation deed on the ground that it was voidable on account of misrepresentation and fraud. On the same day, the respondent filed a suit seeking declaration that the facilitation deed was void and sought recovery of Rs. 125 crores. On 28.06.2010 the appellant, acting under clause 9 of the Facilitation Deed, sent a request for arbitration to ICC Singapore and the ICC issued a notice to the respondent calling upon it to file its reply to the request for arbitration.

On 30.06.2010, the respondent filed a second suit before the High Court of Bombay against the appellant seeking *inter alia* a declaration that as the facilitation deed stood rescinded, the appellant was not entitled to invoke the arbitration clause under the said facilitation deed and also filed an application for grant of a temporary injunction against the appellant from continuing with the arbitration proceedings commenced by the appellant under the aegis of the ICC. A single judge of the high court dismissed the application *inter alia* on the ground that it would be for the arbitrator to consider whether the facilitation deed was void for misrepresentation and fraud and hence the arbitration must proceed without interference by the court.

Upon challenge before the division bench of the high court, the appeal was allowed, setting aside the order of the single judge, injuncting the appellant from continuing with the arbitration proceedings. The appellant challenged the said order of the Division Bench of the High Court of Bombay by way of SLP before the Supreme Court.

On behalf of the appellant it was contended *inter alia* that:

a. Bombay High Court had no jurisdiction to pass an order of injunction restraining a foreign seated arbitration at Singapore between parties who were not residents of India.

b. In terms of Clause 4 of the Facilitation Deed only a court in Singapore would be competent to consider disputes in respect of the arbitration.

c. Respecting the principle of comity of courts, the Bombay High Court should have refused to entertain the application for injunction and ought to have allowed parties to resolve disputes through arbitration before the ICC Arbitration Center.

d. The agreement between the parties fell within the parameter of Section 44 of the Act and hence the court was duty bound to refer the parties to arbitration in deference to the mandate of Section 45 of the Act.

e. The High Court has erroneously held that the entire Facilitation Deed was vitiated by fraud and misrepresentation instead of examining whether the arbitration agreement contained in the Facilitation deed was null and void, inoperative or incapable of being performed.

f. Article (6) of the ICC rules of arbitration permits the arbitral tribunal to consider and to adjudicate claims even if the main

contract is null and void or non-existent since the arbitration clause is an independent and distinct agreement. Section 16 of the Act also confers an identical power on the arbitral tribunal.

g. The arbitration clause itself having not been assailed as being vitiated by fraud and misrepresentation, the court had no option but to refer parties for arbitration in accordance with Section 45 of the Act.

Though the High Court of Bombay has held that clause 9 of the facilitation deed was opposed to public policy and in particular section 23 and 28 of the Indian Contract Act, 1872, it was clear that the arbitration agreement squarely fell within the exception 1 to section 28 of the Indian Contract Act, 1872. In its letter of repudiation dated June 25, 2010 addressed to the appellant, the respondent had contended that the facilitation deed had become voidable at their option alleging that "in view of the false misrepresentations and fraud played by WSGM the deed is voidable at the option of our client and thus our client rescinds the deed with immediate effect".

Thus on the respondent's own showing, the arbitration agreement was not null and void, but only voidable. The respondent, refuting the aforesaid arguments urged as under:

a. In terms of Section 45 of the Act, it was the duty of the court to decide whether the Facilitation Deed including the arbitration agreement in Clause 9 thereof was void on account of Fraud and Misrepresentation by the appellant.

b. Section 9 of Code of Civil Procedure, 1908 confers upon the court the power to try all civil suits unless impliedly or expressly barred. Since Section 45 does not contemplate a bar either express or implied, the High Court did have the jurisdiction to consider the suit and also to issue the injunction restraining the appellant from continuing with the arbitration.

c. Section 45 of the Act, casts an obligation upon the courts to determine the validity of the agreement at the threshold.

d. Under Section 45 of the Act, the court is required not only to consider a challenge to the arbitration agreement but also a serious challenge to the contract containing the arbitration agreement. This respondent contended that it was established that great fraud was played by the appellant not only on the respondent but also on the BCCI. The arbitration proceedings, to which BCCI was not a party and could not be a party, would affect the interests of BCCI. [116]

116 *Supra* note 10, s.44 defined foreign award as meaning arbitration award on difference between persons arising out of legal relations whether contractual or otherwise. It is

Territorial jurisdiction of the High Court of Bombay was upheld in terms of section 9 of the CPC to entertain the civil suit, since the cause of action arose within the jurisdiction of the high court and the high court had territorial jurisdiction under section 20, CPC. In view of the legislative mandate of section 45 of the Act, once a request was made by one of the parties to refer the dispute to arbitration, the high court was required to refer the parties to arbitration unless it found that the agreement was null and void, inoperative or incapable of being performed.

Referring to the earlier decision of the court in *SMS Tea Estates*[117] it was held that "the court will have to see in each case whether the arbitration agreement is also void, unenforceable or inoperative along with the main agreement or whether the arbitration agreement stands apart from the main agreement and is not null and void."

Analysing the notice dated June 25, 2010 rescinding the facilitation deed, the court speaking through Patnaik J held as that:

> The ground taken by the respondent to rescind the Facilitation Deed thus is that the appellant did not have any right to relinquish and/or to facilitate the procurement of the Indian subcontinent media rights for the IPL from BCCI and no facilitation services could have been provided by the appellant and therefore the representation by the appellant that the appellant relinquished its Indian subcontinent media rights for the IPL in favour of the respondent for which the appellant had to be paid the facilitation fee under the Deed was false and accordingly the Facilitation Deed was voidable at the option of the respondent on account of false representation and fraud. This ground of challenge to the Facilitation Deed does not in any manner affect the arbitration agreement contained in Clause 9 of the Facilitation Deed, which is independent of and separate from the main Facilitation Deed and does not get rescinded as void by the letter dated 25-6-2010 of the respondent. The Division Bench of the Bombay High Court, therefore, could not have refused to refer the parties to arbitration on the ground that the arbitration agreement was also void along with the main agreement.

The court also referred to several texts authored by well known authors to discern the meaning of the expression "inoperative or incapable of being performed" used in section 45 of the Act and held:

> the arbitration agreement does not become "inoperative or incapable of being performed" where allegations of fraud have to be inquired

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made in pursuance of an agreement made in writing, to which the convention in the 1st schedule applies. The 1st Schedule to the Act, contains the New York Convention. The facilitation deed in this case fulfilled the requirement of Article 2 of the said convention.

117 *SMS Tea Estates (P) Ltd.* v. *Chandmari Tea Co. Pvt. Ltd.* (2011) 14 SCC 66.

> into and the court cannot refuse to refer the parties to arbitration as provided in Section 45 of the Act on the ground that allegations of fraud have been made by the party which can only be inquired into by the court and not by the arbitrator. *N. Radhakrishnan* v. *Maestro Engineers* and *Abdul Kadir Shamsuddin Bubere* v. *Madhav Prabhakar Oak* were decisions rendered in the context of domestic arbitration and not in the context of arbitrations under the New York Convention to which Section 45 of the Act applies. In the case of such arbitrations covered by the New York Convention, the court can decline to make a reference of a dispute covered by the arbitration agreement only if it comes to the conclusion that the arbitration agreement is null and void, inoperative or incapable of being performed, and not on the ground that allegations of fraud or misrepresentation have to be inquired into while deciding the disputes between the parties.

Overruling the decision of the high court that the facilitation deed was opposed to the public policy of India, the court held that"[c]lause 9 of the Facilitation Deed is consistent with this policy of the legislature as reflected in the Arbitration and Conciliation Act, 1996 and is saved by Exception 1 to Section 28 of the Indian Contract Act, 1872. The right to jury trial is not available under Indian laws. The finding of the Division Bench of the High Court, therefore, that Clause 9 of the Facilitation Deed is opposed to public policy and is void under Sections 23 and 28 of the Indian Contract Act, 1872 is clearly erroneous."

The court therefore allowed the appeal and relegated the parties to arbitration.[118]

IX MISCELLANEOUS

Award of interest

In *Concrete Products and Construction Co.*[119] the respondent had entered into two agreements with the appellant on January 30, 1983 and March 30, 1984 for supply of mono block concrete sleepers. The agreements were renewed from time to time which provided that the rates payable shall be based on certain standard rates of principal raw materials and that the contract prices for sleepers shall be increased or decreased as and when the price of the principal raw materials increased or decreased. The agreements also provided for escalation, subject to certain

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118 Though it appears that BCCI was not party to the facilitation deed, it is clear that both parties claim to have derived their rights from BCCI and hence BCCI could have been added as party in view of the provisions contained in Section 45 of the Act which provides that the court shall refer the parties to arbitration "at the request of one of the parties or any person claiming under them". This expression has been construed in *Chloro Controls India (Pvt.) Ltd.* v. *Severn Trent Water Purification Inc.* (2013) 1 SCC 641. See,"Arbitration Law" XLIX ASIL 63 (2013).

119 *Union of India* v. *Concrete Products and Construction Co* (2014) 4 SCC 416.

conditions prescribed under clause 11 of the contract. In May 1997, a new contract was entered into between the parties, under a new policy by which the railway administration permitted the respondents to purchase HTS wires from established sources subject to escalation as noticed above. By letter dated 12.07.1997, the railway administration informed the respondents that the railway board had found that excess payments had been made between 1989 and November 1994 under the escalation clause for HTS wires and hence a sum of Rs. 1,80,92,462 was recoverable from the respondent. This decision of the railway administration was challenged by the respondent by way of a writ petition in the High Court of Madras which came to be allowed directing the railway authorities to refund the said sum of money. The said order was challenged by the railway authorities in writ appeal which also came to be dismissed. The railway administration though challenged the order of the Division Bench of the High Court of Madras before the Supreme Court, the court by its order dated May 2,2005[120] appointed a former judge of the Supreme Court, K. Venkataswami J as the sole arbitrator and referred the dispute for adjudication by the arbitrator.

By his award dated June 24, 2006 the arbitrator, rejected the counter claim of the appellants and while allowing the claim of the respondent, directed "the railway administrator to refund a sum of Rs.1,78,09,789/- recovered from the claimants and interest of Rs.2,38,28,960/- and subsequent interest at 18% P.A from 1.9.2005 on Rs. 1,78,09,789/- till date of payment in Kottukulam Engineers Pvt. Ltd. matter. And a sum of Rs.1,69,78,883/- and interest of Rs.2,25,25,513/- and subsequent interest at 18% P.A from 1.09.2005 till date of payment in m/s Concrete Product & Construction Company Trivalam."

The appellants' challenge to the common award by way of an application under Section 34 came to be dismissed on November 30, 2010 and an intra court appeal was also dismissed by the High Court of Madras. The appellant thereafter filed appeals for special leave before the Supreme Court. It appears that in its appeal before the Supreme Court, the appellant restricted the challenge to the award of interest by the arbitrator. The question for consideration of the court was whether the contractors were entitled to interest and whether the arbitrator was justified in awarding interest at the rate of 18% per annum from the date of recovery till the date of payment, when the contract did not provide for the payment of any interest. A collateral question that arose for consideration of the court was whether the appellant had the authority to exercise lien over the amount withheld. The appellant, in support of its claim of having lien over the amounts, relied upon clauses 2401 and 2403 of the agreement which was paraphrased by the court as under:

> Clause 2401 provides that the Railways shall be entitled to withhold and also have a lien to retain any amount deposited as security by the contractor to satisfy any claims arising out of or in the contract.

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120 *Union of India* v. *Concrete Products and Construction Co.* (2014) 4 SCC 426.

> In such circumstances, the Railways can withhold the amount deposited by the contractors as security and also have lien over the same pending finalisation or adjudication of the claim. In case, the security deposit is insufficient to cover the claim of the Railways, it is entitled to withhold and have lien to the extent of the amount claimed from any sum payable for any works done by the contractor thereafter under the same contract or any other contract. This withholding of the money and the exercise of the lien is pending finalisation or adjudication of any claim. This clause further provided that the amount withheld by the Railways over which it is exercising lien will not entitle the contractor to claim any interest or damages for such withholding or retention under lien by the Railways.
>
> Clause 2403 again provides that any sum of money due and payable to the contractor under the contract may be withheld or retained by way of lien by the Railway Authorities or the Government in respect of payment of a sum of money arising out of or under any other contract made by the contractor with the Railway Authority or the Government. Clause 2403(*b*) further provides that it is an agreed term of the contract that against the sum of money withheld or retained under lien, the contractor shall have no claim for interest or damages whatsoever provided the claim has been duly notified to the contractor.

Accepting the contention raised by the appellant that the sole arbitrator had failed to take into account clause 2403 of the contract, it was held that "award of interest from the date of deposit" was unwarranted and hence in awarding such interest, the tribunal committed a jurisdictional error. The court speaking through Nijjar J held that "[f]rom the aforesaid it becomes apparent that the arbitrator could not have awarded any interest from the date when the recovery was made till the award was made. However, interest would have been payable from the date when the award was made till the money was deposited in the high court and thereafter converted to fixed deposit receipts. Upon the amount being deposited in the high court, no further interest could be paid to the respondents. In view of the aforesaid, the appeals are allowed and it is directed that the respondents shall not be entitled to any interest on the amount which was recovered by the appellant, till the date of award and thereafter till the date when the amount awarded was deposited in the High Court i.e. from 12-7-1997."

Arbitrator's fee

The decision of the High Court of Delhi in *Registrar, Indian Council of Arbitration* v. *K.S.Sidhu*[121] depicts an interesting scenario of how a presiding arbitrator is deprived of his fees for having conducted the arbitral proceedings as

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121 2014 (1) Arb L R 148

presiding arbitrator in a three member tribunal for nearly 30 months during which the presiding arbitrator conducted proceedings in about 30 hearings until his appointment was terminated declaring the same to be *void ab initio* by the Registrar of the arbitral institution *i.e.*, Indian Council of Arbitration.

It appears that the presiding arbitrator, upon being informed that his appointment was terminated by the registrar, subsequent to the order, did not take recourse to the provisions contained in section 31(8) read with section 38 and 39 of the Act for enforcement of his rights. Rather he chose to file a writ petition under article 226 of the constitution of India seeking a declaration to the effect that his mandate as the presiding arbitrator continued. That Writ Petition was dismissed by the high court and the Supreme Court also dismissed a SLP filed by him against the said order of the high court.

The presiding arbitrator, who was the respondent in the decision under survey, thereafter filed a suit against the Registrar of Indian Council of Arbitration claiming certain amounts as fee payable to him together with interests and costs both *pendente lite* and for future.

The trial court, after a remand by the high court, decreed the suit in favor of the respondent for an amount ofRs.5,60,000/- as fee recoverable by the respondent in respect of two arbitrations as the presiding arbitrator of the tribunal.

The arbitration institution appealed against the decree on various grounds including the ground of limitation. Rajiv Sahai Endlaw J, after detailed analysis of the facts of the case and considering contentions urged by the parties, ruled that once the appointment of respondent as presiding arbitrator had been held *void ab initio*, he could not have sustained any claim for contractual arbitration fee but could only seek compensation within the meaning of section 65 and section 70 of the Contract Act, 1872.

On the question as to whether the suit was barred by limitation, Endlaw J held that in the absence of any specific provision in the Limitation Act relating to claims under section 65 and 70 of the Contract Act, the residuary provision in article 113 of the schedule to the Limitation Act would apply, which provides for a period of 3 years from the date when the right to sue accrues. It was held that since the cause of action under section 65 or Section 70 of Contract Act, undoubtedly accrued when the contract of appointment of respondent as Presiding Arbtirator was discovered to be void, "[t]he mere fact that the respondent / plaintiff unsuccessfully challenged such termination would not extend the period of limitation which has begun to run on the date of termination." The suit was therefore held to be barred by limitation.

After considering the rules of arbitration of the Indian Council of Arbitration, Endlaw J, held that the fee claimed by respondent in the suit did not match with the schedule of the fee indicated in the said rules and hence the respondent had failed to prove the basis of his claim. It was further ruled that the Rules of Indian Council of Arbitration provide for the fee of arbitration being borne by the parties to the arbitration and not by the Indian Council of Arbitration. The respondent had also conceded in his plaint that appellant was merely a "facilitator and agent of the parties". On that premise, it was held that the appellant could not be made

liable unless the fee was paid by parties but the respondent did not plead such a case.

It was further observed that the respondent did not choose to implead the parties to the arbitration as defendants in the suit. Moreover, Rule 87 of the Rules of Indian Council of Arbitration provided that neither ICA nor its officers shall be liable in whatsoever capacity they have acted, hence although the claims made by the respondent were thus held to be misconceived. Having dismissed the suit however, the Judge felt concerned as to the manner in which an arbitration institution of great repute had shabbily dealt with a senior member of the legal fraternity for which the institution was blameworthy.

After noting the fact that the appellant having appointed the respondent as the presiding arbitrator and made him conduct the arbitration proceedings, did not make any payment whatsoever although the respondent did not conduct the proceedings gratuitously. The appellant therefore had a responsibility to compensate the respondent. Such a conduct was held to be "not expected from a body such as appellant associated with the chamber of Industry". Finally the learned judge made the following observations imploring the arbitration institution to compensate him for the services which were admittedly rendered by him:

> Having held so, I must observe that though the claim of the respondent / plaintiff has been dismissed for reasons aforesaid, there can be no denying the fact that the respondent / plaintiff has been wronged and despite being a senior respectable member of the legal fraternity, has indeed been treated shabbily. The blame therefore squarely rests on the appellant / defendant. The appellant / defendant, by appointing the respondent / plaintiff as the Presiding Arbitrator, made him conduct the arbitration proceedings. The respondent / plaintiff was not conducting the said proceedings gratuitously. The appellant / defendant, even if an agent of the parties to arbitration, was responsible for collecting the arbitration fee from parties to arbitration and to pay the same to the respondent / plaintiff. It appears that the respondent / plaintiff has not been paid anything for his services. Such conduct is not expected from a body as the appellant / defendant, which is itself closely linked to the legal fraternity and associated with the Chamber of Industry. I therefore implore upon the appellant / defendant to, notwithstanding the verdict aforesaid, compensate the respondent / plaintiff for his services, admittedly rendered. For this purpose, a copy of this judgment be sent to the Governing Body of the appellant / defendant who are requested to within one month, taking note of the fact that their own goodwill and reputation and fairness is at stake, take a decision to suitably compensate the respondent / plaintiff. A copy of this judgment be also sent to the President of Federation of Indian Chamber of Commerce & Industry (FICCI) for appropriate action.

Applicability of Limitation Act, 1963 to filing of Counterclaims under the Arbitration Act, 1996

In *Voltas Ltd.* v.*Rolta India Ltd.*[122] the Supreme Court considered the applicability of the Limitation Act, 1963 to counterclaims filed in the course of arbitration proceedings. The facts of the case are as follows. The appellant and the respondent had entered into a contract *inter se* for the construction of two buildings and modification of a previously constructed building. Due to certain disputes, the respondent terminated the contract on December 03, 2004. The arbitration clause was invoked by the appellant by letter dated March 29, 2006 in respect of its claims against the respondent. Though it appears that the respondent issued a reply wherein it raised a claim of approximately Rs. 68 crores against the appellant, it failed to appoint an arbitrator. As the respondent failed to appoint an arbitrator, the appellant filed an application under section 11 of the Act, before the High Court of Bombay and the designated judge appointed a sole arbitrator *vide* order dated November 19, 2010. In the proceedings before the arbitrator, the appellant filed its claim on April 13, 2011 approximately for a sum of Rs 23 crores. The respondent filed its defence on August 24, 2011. Subsequently, referring to a notice dated April 17, 2006 issued by the respondent to the appellant wherein, it was alleged, that the respondent's counter claim was detailed, the respondent filed a counterclaim on September 26, 2011 for approximately Rs. 333 Crores. The learned arbitrator on November 07, 2012 framed two issues regarding the tenability and limitation of the counter claim as under:

(*i*) Whether the counterclaim, or a substantial part thereof, is barred by the law of limitation?

(*ii*) Whether the counterclaim is not maintainable and beyond the scope of reference?

Though the learned arbitrator overruled the objection that the counterclaim is not maintainable as being beyond the scope of the arbitration, on the former question, the learned arbitrator held "[t]he respondent has been vigilant and assertive of its legal rights right from 3-12-2004 on which date the contract was terminated. The assertions in the letters dated 27-4-2005 and 29-3-2006 show unmistakable consciousness of its rights on the part of the respondent. The last Letter dated 29-3-2006 is the notice of the advocates of the respondent asserting its right to invoke arbitration. The tribunal is of the view that cause of action for the counterclaim which must be treated as an independent action to be instituted, really arose latest by 29-3-2006 if not earlier, it is clear that the counterclaim is filed only on 26-9-2011 and as such it is beyond the period of limitation of three years."

The respondent filed an application under section 34 of the Act, challenging the said order of the learned sole arbitrator. A single judge of the Bombay high court passed the following order:

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122 (2014) 5 SCC 516.

> When the notice was given by the respondent on 29-3-2006, the said notice was only in respect of the disputes having arisen between the parties due to refusal of claims made by the petitioner. On the date of issuance of such notice, the petitioner had not even asserted its claim. After issuance of such notice on 29-3-2006 the petitioner by its letter dated 17-4-2006 had asserted its claim for the first time. The dispute in respect of the counterclaim was raised when the petitioner did not pay the said amount as demanded. Such disputes thus did not exist when the notice invoking arbitration agreement was given by the respondent on 29-3-2006. In my view, the arbitral proceedings therefore, cannot be said to have commenced in respect of the counterclaim when the notice was given by the respondent on 29-3-2006. The counterclaim was admittedly filed on 26-9-2011 which was made beyond the period of limitation. The arbitral proceedings commenced in respect of the counterclaim only when the said counterclaim was lodged by the petitioner on 26-9-2011. Even if the date of refusal on the part of the respondent, to pay the amount as demanded by the petitioner by its notice dated 17-4-2006 is considered as commencement of dispute, even in such case on the date of filing the counterclaim i.e. 26-9-2011 the counterclaim was barred by law of limitation. In my view, thus the Tribunal was justified in rejecting the counterclaim filed by the petitioner as time-barred.

The respondent then preferred an appeal before a division bench of the High Court of Bombay. The division bench, having regard to the principle laid down in the case of *ONGC* v. *Saw Pipes*,[123] the demand made by the respondent and the exclusion of the period between 03.05.2006 and 19.11.2010 during which period the application under section 11 remained pending before the high court, held that the counterclaim filed by the respondent on 26.09.2011 was within limitation. Accordingly the division bench overturned the order of the learned single judge as well as the award of the sole arbitrator rejecting the counterclaim of the respondent without disturbing the other parts of the award.

The order of the division bench came to be challenged by the appellant before the Supreme Court before the sole arbitrator, *inter alia* on the following grounds:

> a) the limitation in respect of counterclaim ought to be construed strictly in accordance with Section 43(1) of the Act, read with Section 3(2)(b) of the Limitation Act, 1963. The only permissible deviation in terms of Section 21 of the Act meant that where the respondent also makes a claim and invokes arbitration in respect of particular dispute, the relevant date for calculation of limitation in respect of the counterclaim would not be the date of making the counterclaim

123 (2003) 5 SCC 705.

> but rather, would be the date on which such request for arbitration was made.
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> b) the decision in *Praveen Enterprises*[124] relied upon by the Single Judge was not applicable to the facts of the instant case, there had been no enumeration of claims made by the respondent in its letter dated 17.04.2006 but merely a computation of claims, whereas for the application of the exception carved out in *Praveen Enterprises*, both making out of a specific claim and invocation of arbitration were to be satisfied.
>
> c) assuming the principle laid down in *Praveen Enterprises* was applicable, the claims of the respondent were crystallized at the sum mentioned in its letter dated 17.04.2006 and the respondent could be heard to make an exaggerated claim as seen in the counterclaim.

The respondent contended that in terms of the decision in *Praveen Enterprises* the statement of claim need not be restricted to the claim in the notice and that the same proposition holds good for counterclaims as well.

The court, held that [i]t saves the limitation for filing a counterclaim if a respondent against whom a claim has been made satisfies the twin test, namely, he had made a claim against the claimant and sought arbitration by serving a notice to the claimant. In our considered opinion the said exception squarely applies to the case at hand inasmuch as the appellant had raised the counterclaim and sought arbitration by expressing its intention on number of occasions. That apart, it is also perceptible that the appellant had assured for appointment of an arbitrator. Thus, the counterclaim was instituted on 17-4-2006 and hence, the irresistible conclusion is that it is within limitation.

On the question of the amount that could be claimed by way of a counterclaim by the respondent, having crystallized by the letter of the respondent dated April 17, .2006, the court held that the decision in *Praveen Enterprises* was not applicable to the said question as the court in *Praveen Enterprises*, "has carved out an exception and, while carving out an exception, has clearly stated that the limitation for "such counterclaim" should be computed as on the "date of service of notice" of "such claim on the claimant" and not on the date of final counterclaim" and also reasoned that "if the counterclaim filed after the prescribed period of limitation before the arbitrator is saved in entirety solely on the ground that a party had vaguely stated that it would be claiming liquidated damages, it would not attract the conceptual exception carved out in *Praveen Enterprises*". Rather, the court relied upon its decision in *K.Raheja Constructions Ltd.*,[125] where the court held that a period of seven years having elapsed from the filing of the suit, with the

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124 *State of Goa* v. *Praveen Enterprises* (2012) 12 SCC 581.

125 *K.Raheja Constructions Ltd.* v. *Alliance Ministries* (1995) Supp 3 SCC 17.

period of limitation in respect of the subject matter of the said suit being three years, permitting any amendment would defeat the right accruing to the respondent.

The court partly allowed appeals by both parties, restricting the claims of both parties to the sums of money claimed in the letters issued by the appellant and respondent to each other on March 21, 2006 and April 17, 2006 respectively.

X CONCLUSION

In the year under survey, the decision in *State of West Bengal* v. *Associated Contractors*[126] is significant since it is only in this case that for the first time, the court speaking through Rohinton F. Nariman J reiterated that the designated judge of the chief justice of a high court or in the case of the International Commercial Arbitration, the designated judge of the Chief Justice of India, exercising power under section 11 of the Act, does not discharge the powers of a "Court". The finding is in keeping with the decision of the Constitution Bench in the *Patel Engineering*[127]case. However, in *Swiss Timing*[128] and in the earlier case of *Antrix*[129]it appears that this principle was not canvassed before the court as it is seen that in the former case, the Designated Judge held an earlier judgment of a two judge bench of the Supreme Court[130] to be *per incuriam*, whereas in the latter case, a petition under section 11 was referred to by the Designated Judge to a "larger bench" and the said "larger bench" eventually decided the matter obviously exercising the statutory powers of the Chief Justice of India, vested in him under section 11 of the Act, and not in exercise of the powers of the "court" vested in it by the Constitution.

As seen in *Reliance Industries Ltd.* v. *Union of India*[131] the question as to the seat and venue of arbitration continues to be a serious debate, particularly since the court in *Videocon*,[132] categorically ruled that a seat of arbitration agreed to in a contract between three contracting parties could not be altered except with the consent of all contracting parties and that too only after amending the terms of the PSCs. Also in terms of the said judgment in *Videocon*, where, out of the three contracting parties, two parties appearing before the tribunal by mutual consent agreed to a seat of arbitration different from the one stipulated in the arbitration agreement in the PSC, such consent award was held not to have the effect of altering the seat as stipulated in the arbitration agreement. On that principle, in the *Reliance* case, the court was bound to hold that the consent award of the nature

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126 (2015) 1 SCC 32.

127 (2015) 8 SCC 618.

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

129 *Antrx Corporation Ltd.* v. *Devas Multimedia Pvt. Ltd.* (2014) 11 SCC 560.

130 *Rashakrishnan* v. *Maestro Engineers* (2010) 1 SCC 72.

131 (2014) 7 SCC 603.

132 *Videocum Industries Ltd. v. Union of India* (2011) 6 SCC 161.

considered therein did not have the effect of altering/shifting the seat as stipulated in the contract, i.e., the consent award did not have the effect of altering the seat of arbitration from Paris to London as per the terms settled in the PSC by all the contracting parties. Thus if Paris remained the seat of arbitration, following the principle laid down in *Videocon*, the further stipulation that the arbitration agreement was to be governed by English Law was of no consequence since the English Arbitration Act does not apply to such arbitration agreement and the arbitration proceedings where the seat is outside England, in this case, Paris. Since this case relates to a long term investment contract having currency for a period of twenty five years, it will be open for the court to revisit these questions and reconsider them in the light of the law laid down in *Videocon* and *Venture Global.*[133]

Though the two cases *i.e. Swiss Timing* and *Enercon*[134] related to the same issue as to the desirability of continuing both the civil and the criminal proceedings simultaneously with common subject matter of disputes arising out of the same contract, there is a striking and vital difference in the circumstances of the two cases. In *Swiss Timing*, the officials of both parties were being prosecuted on grounds of making illegal gains for themselves and causing loss to the public exchequer by entering into the contract, which also contained the arbitration clause, and, under which, the company - Swiss Timing Ltd. made huge financial gains, which also contained an arbitration clause. The legality and validity of the arbitration agreement stood questioned by the same set of factual assertions that provided the foundation for the criminal prosecution of the contracting parties. In this background, applying the test laid down in *M.S.Sheriff*,[135] since both criminal and civil liability arose out of the self same set of factual circumstances, the likelihood of embarrassment being caused to the accused was evident that a different treatment could have been given to the arbitration proceedings namely, that they could be continued further as soon as criminal proceedings stood concluded.

In *Enercon*, there was not even an allegation that the contract was void. Moreover, the allegations made in the criminal complaint did not involve the officials of the contracting parties being made to face trial. The underlying contract was challenged as having become voidable at the option of one of the parties and not *void ab initio.* Hence the allegations made in the criminal complaint did not have any impact on the arbitration agreement, which remained independent to the underlying contract.

In *Swiss Timing*, though the applicant approached the court only for nomination and appointment of an arbitrator on behalf of the respondent, it is not clear why the designated judge not only appointed the arbitrator on behalf of the respondent but also appointed the presiding arbitrator when in terms of mandate of section 11 of the act, and in terms of the arbitration agreement, the two nominated arbitrators were to appoint the presiding arbitrator. The court only was called

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133 *Venture Global Engg. v. Satyam computer Services Ltd.* (2008)4 SCC 190.

134 *Enercon (India) Pvt. Ltd.* v. *Enercon GmBH* (2014) 5 SCC 1.

135 1954 SCR 1144.

upon to appoint the nominee for one of the parties. The presiding arbitrator could later have been appointed by the two arbitrators as stipulated in clause 38.6 of the contract.

In *Reliance Industries Ltd.* v. *Union of India*[136] the court having noticed that the seat of the arbitration was in India, still nominated James Spigelman AC QC as the third presiding arbitrator and by subsequent amendment again appointed Michael Hudson McHugh, AC QC, former Judge of the High Court of Australia and former Non-Permanent Justice of the Court of Final Appeal in Hong Kong, without recording that due consideration to the requirement of expertise in Indian law was bestowed. Article 33 of the PSC clearly provided that the contract would be governed by the laws of India. Nothing was brought on record to suggest either of the appointees by the Designated Judge had expertise in Indian Law.

Though in the year under survey courts have made some striking rulings, none of the issues that arose in the year seem to have been the subject matter of the recommendations in the 246th Law Commission Report on Amendments to the Arbitration and Conciliation Act, 1996. Further, the Commercial Court Bill, 2015 would bring in a significant change to the legal system and would also affect the law of arbitration.

Now that there is a proposal by the law commission suggesting enactment of a law relating to Commercial Courts and a draft bill is presently under consideration by the joint standing committee of the parliament[137] section 2(e) of the Act needs to be suitably amended to clarify the jurisdiction of courts in India in the matter of place of arbitration, The verdict of the court in *BALCO* case by reason of which, jurisdictions are being sought to be conferred upon courts even in respect of domestic arbitrations, within whose jurisdiction the arbitration proceedings take place, have created more problems than solutions. The concept of 'seat' of arbitration which has relevance to international commercial arbitration disputes has no application whatsoever for domestic arbitration disputes since the jurisdiction of the Indian courts to try any subject matter of a proceedings initiated before them is governed by well defined laws like CPC and in the context of arbitration, section 2(e) of the Act. In the background of the observations[138] made by the court in its decision in *BALCO*, with a view to clarify and to remove any possible doubt section 2(e) of the Arbitration and Conciliation Act, 1996 should be amended when parliament enacts the law regarding setting up of commercial courts in India. The amendment should provide that a Commercial Court shall have jurisdiction to entertain applications in respect of an arbitration arising from a commercial dispute only if such commercial court would otherwise have jurisdiction over subject matter of arbitration. It may further be clarified that the place of arbitration would not necessarily be regarded as conferring jurisdiction

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136 (2014) 11 SCC 576.

137 The author was invited to depose before the Joint Standing Committee of Parliament on the subject the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Bill, 2015.

138 *Supra* note 105.

upon the courts over the subject matter of arbitration, if they happen to be related to some other court's jurisdiction. The aforesaid observation of the court has created an anomalous situation wherein the place of arbitration would confer jurisdiction upon the courts there even though the subject matter of the arbitration may not fall within their jurisdiction. Though the central issue considered in *BALCO* was International Arbitration where the seat of arbitration plays a crucial role in the applicability of Part I of the Act, the illustration given in the judgment at paragraph 96[139] runs contrary to law laid down by the Supreme Court in several decisions. In light of the foregoing, should the Commercial Court, Commercial Division and Commercial Appellate Division of High Courts Bill, 2015 be passed, Section 2(e) of the Arbitration and Conciliation Act, 1996 may be simultaneously amended by inserting the following proviso:

Provided that in respect of the Commercial Disputes, as defined under Section 2(c) of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015, "Court" means a Court constituted under Section 3 of the said Act having jurisdiction over subject matter of arbitration.

139 *Ibid.*