REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.7019 OF 2005

Bharat Aluminium Co. ...Appellant

VERSUS

Kaiser Aluminium Technical Service, Inc. ...Respondent

WITH

CIVIL APPEAL NO.6284 OF 2004

M/s. White Industries Australia Ltd. ...Appellant

VERSUS

Coal India Ltd. ...Respondent

WITH

CIVIL APPEAL NO.3678 OF 2007

Bharat Aluminium Co. Ltd. ...Appellant

VERSUS

Kaiser Aluminium Technical Service, Inc. ...Respondent

WITH

TRANSFERRED CASE (C) NO.35 OF 2007

Harkirat Singh ...Petitioner

VERSUS

Rabobank International Holding B.V. ...Respondent

WITH

SPECIAL LEAVE PETITION (C) NOS. 3589-3590 of 2009

Tamil Nadu Electricity Board ...Petitioner

VERSUS

M/s. Videocon Power Limited & Anr. ...Respondents

WITH

SPECIAL LEAVE PETITON (C) NOS. 31526-31528 of 2009

Tamil Nadu Electricity Board ...Petitioner

VERSUS

M/s. Videocon Power Ltd. & Anr. ...Respondents

WITH

SPECIAL LEAVE PETITON (C) NO. 27824 of 2011

Bharati Shipyard Ltd. ...Petitioner

VERSUS

Ferrostaal AG & Anr. ...Respondents

WITH

SPECIAL LEAVE PETITION (C) NO. 27841 of 2011

Bharati Shipyard Ltd. ...Petitioner

VERSUS

Ferrostaal AG & Anr. ...Respondents

J U D G M E N T

SURINDER SINGH NIJJAR, J.

1. Whilst hearing C.A. No. 7019 of 2005, a two Judge Bench of this Court, on 16th January, 2008, passed the following order:-

> "In the midst of hearing of these appeals, learned counsel for the appellant has referred to the three-Judges Bench decision of this Court in Bhatia International Vs. Bulk Trading S.A. & Anr., (2002) 4 SCC 105. The said decision was followed in a recent decision of two Judges Bench in Venture Global Engineering Vs. Satyam Computer Services Ltd. & Anr. 2008 (1) Scale 214. My learned brother Hon'ble Mr. Justice Markandey Katju has reservation on the correctness of the said decisions in view of the

interpretation of Clause (2) of Section 2 of the Arbitration and Conciliation Act, 1996. My view is otherwise.

Place these appeals before Hon'ble CJI for listing them before any other Bench."

2. Pursuant to the aforesaid order, the appeal was placed for hearing before a three Judge Bench, which by its order dated 1st November, 2011 directed the matters to be placed before the Constitution Bench on 10th January, 2012.

3. Since the issue raised in the reference is pristinely legal, it is not necessary to make any detailed reference to the facts of the appeal. We may, however, notice the very essential facts leading to the filing of the appeal. An agreement dated 22nd April, 1993 was executed between the appellant and the respondent, under which the respondent was to supply and install a computer based system for Shelter Modernization at Balco's Korba Shelter. The agreement contained an arbitration clause for resolution of disputes arising out of the contract. The arbitration clause contained in Articles 17 and 22 was as under :

"Article 17.1 – Any dispute or claim arising out of or relating to this Agreement shall be in the first instance, endeavour to be settled amicably by negotiation between the parties hereto and failing

which the same will be settled by arbitration pursuant to the English Arbitration Law and subsequent amendments thereto.
Article 17.2 – The arbitration proceedings shall be carried out by two Arbitrators one appointed by BALCO and one by KATSI chosen freely and without any bias. The court of Arbitration shall be held wholly in London, England and shall use English language in the proceeding. The findings and award of the Court of Arbitration shall be final and binding upon the parties.
Article 22 – Governing Law – This agreement will be governed by the prevailing law of India and in case of Arbitration, the English law shall apply."

4. The aforesaid clause itself indicates that by reason of the agreement between the parties, the governing law of the agreement was the prevailing law of India. However, the settlement procedure for adjudication of rights or obligations under the agreement was by way of arbitration in London and the English Arbitration Law was made applicable to such proceedings. Therefore, the *lex fori* for the arbitration is English Law but the substantive law will be Indian Law.

5. Disputes arose between the parties with regard to the performance of the agreement. Claim was made by the appellant for return of its investment in the modernization programme, loss, profits and other sums. The respondent made a claim for unclaimed instalments plus interest and

damages for breach of intellectual property rights. Negotiations to reach a settlement of the disputes between the parties were unsuccessful and a written notice of request for arbitration was issued by the respondent to the appellant by a notice dated 13th November, 1997. The disputes were duly referred to arbitration which was held in England. The arbitral tribunal made two awards dated 10th November, 2002 and 12th November, 2002 in England. The appellant thereafter filed applications under Section 34 of the Arbitration Act, 1996 for setting aside the aforesaid two awards in the Court of the learned District Judge, Bilaspur which were numbered as MJC Nos. 92 of 2003 and 14 of 2003, respectively. By an order dated 20th July, 2004, the learned District Judge, Bilaspur held that the applications filed by the appellant under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Arbitration Act, 1996') for setting aside the foreign awards are not tenable and accordingly dismissed the same.

6. Aggrieved by the aforesaid judgment, the appellant filed two miscellaneous appeals being Misc. Appeal Nos. 889 of 2004 and Misc. Appeal No.890 of 2004 in the High Court of

Judicature at Chattisgarh, Bilaspur. By an order dated 10th August, 2005, a Division Bench of the High Court dismissed the appeal. It was held as follows:

> "For the aforesaid reasons, we hold that the applications filed by the appellant under Section 34 of the Indian Act are not maintainable against the two foreign awards dated 10.11.2002 and 12.11.2002 and accordingly dismiss Misc. Appeal No.889 of 2004 and Misc. Appeal No.890 of 2004, but order that the parties shall bear their own costs."

The aforesaid decision has been challenged in this appeal.

7. We may also notice that number of other appeals and special leave petitions as well as transferred case were listed alongwith this appeal. It is not necessary to take note of the facts in all matters.

8. We may, however, briefly notice the facts in **Bharati Shipyard Ltd. Vs. Ferrostaal AG & Anr.** in SLP (C) No.27824 of 2011 as it pertains to the applicability of Section 9 of the Arbitration Act, 1996. In this case, the appellant, an Indian Company, entered into two Shipbuilding Contracts with respondent No.1 on 16th February, 2007. The appellant was to construct vessels having Builders Hull No.379 which was to be

completed and delivered by the appellant to the respondent No.1 within the time prescribed under the two Shipbuilding Contracts. The agreement contained an arbitration clause. The parties initially agreed to get their disputes settled through arbitral process under the Rules of Arbitration of the International Chamber of Commerce (ICC) at Paris, subsequently, mutually agreed on 29th November, 2010 to arbitration under the Rules of London Maritime Arbitrators Association (LMAA) in London. This agreement is said to have been reached between the parties in the interest of saving costs and time. Prior to agreement dated 29th November, 2010 relating to arbitration under LMAA Rules, respondent No.1 had filed two requests for arbitration in relation to both the contracts under Article 4 of ICC Rules on 12th November, 2010 recognizing that the seat of arbitration is in Paris and the substantive law applicable is English Law. In its requests for arbitration, respondent No.1 had pleaded in paragraphs 25 and 26 as under:

> "Applicable Law:
> 25. The Contract Clause "Governing Law, Dispute and Arbitration Miscellaneous" provides that the Contract shall be governed by the Laws of England." The rights and obligations of the parties are

therefore to be interpreted in light of English Law (the applicable law).
26. In summary:
a) disputes arising out of the Contract between the parties are to be resolved by arbitration under the ICC Rules;
b) the seat of arbitration is Paris; and
c) the substantive law to be applied in the arbitration shall be English Law."

9. Subsequently, in view of the agreement dated 29th November, 2010, the first respondent submitted two requests for arbitration under LMAA Rules in London on 4th February, 2011. During the pendency of the aforesaid two requests, on 10th November, 2010, the first respondent filed two applications under Section 9 of the Arbitration Act, 1996 which are numbered as AA.No.6/2010 and AA.No.7/2010 seeking orders of injunction against the encashment of refund bank guarantees issued under the contracts.

10. Learned District Judge, Dakshina Kannada, Mangalore granted an ex parte ad interim injunction in both the applications restraining the appellant from encashing the bank guarantee on 16th November, 2010. The appellant appeared and filed its statement of objections. After hearing, the learned District Judge passed the judgments and orders

on 14th January, 2011 allowing the applications filed by respondent No.1 under Section 9 of the Arbitration Act, 1996.

11. Both the orders were challenged in the appeals by the appellant before the High Court of Karnataka at Bangalore. By judgment and order dated 9th September, 2011, the High Court allowed the appeal and set aside the orders passed by the District Judge dated 14th January, 2011. In allowing the appeal, the High Court held as follows:

> "From the above, it is clear that respondent No.1 is not remedyless (sic). It is already before the Arbitral Tribunal at London. Thus, it is open for it to seek interim order of injunction for the purpose of preserving the assets as per Section 44 of the Arbitration Act, 1996 in Courts at London.
> Since the parties have agreed that substantive law governing the contract is English Law and as the law governing arbitration agreement is English Law, it is open for respondent No.1 to approach the Courts at England to seek the interim relief."

12. This special leave petition was filed against the aforesaid judgment of the High Court.

13. We have heard very lengthy submissions on all aspects of the matter. All the learned counsel on both sides have made elaborate references to the commentaries of various experts in the field of International Commercial Arbitration.

Reference has also been made to numerous decisions of this Court as well as the Courts in other jurisdictions.

14. Mr. C.A. Sundaram, appearing for the appellants in C.A. No. 7019 of 2005 submits that primarily the following five questions would arise in these cases:- (a) What is meant by the place of arbitration as found in Sections 2(2) and 20 of the Arbitration Act, 1996?; (b) What is the meaning of the words "under the law of which the award is passed" under Section 48 of the Arbitration Act, 1996 and Article V(1)(e) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter referred to as "the New York Convention")?; (c) Does Section 2(2) bar the application of Part I of the Arbitration Act, 1996 (Part I for brevity) to arbitrations where the place is outside India?; (d) Does Part I apply at all stages of an arbitration, i.e., pre, during and post stages of the arbitral proceedings, in respect of all arbitrations, except for the areas specifically falling under Parts II and III of the Arbitration Act, 1996 (Part II and Part III hereinafter)?; and (e) Whether a suit for preservation of assets pending an arbitration proceeding is maintainable?

15. Mr. Soli Sorabjee, Mr. Sundaram, Mr. Gopal Subramanium and Dr. A.M. Singhvi, learned Senior Advocates for the appellants have in unison emphasised that Part I and Part II are not mutually exclusive. They have submitted that the Arbitration Act, 1996 has not "adopted or incorporated the provisions of Model Law". It has merely "taken into account" the Model Law. They have made a reference to the judgments of this Court in the case of **Konkan Railway Corporation Ltd. & Anr.** Vs. **Rani Construction Pvt. Ltd.**[1] and **SBP & Co.** Vs. **Patel Engineering Ltd. & Anr.**[2] It is emphasised that in fact the Arbitration Act, 1996 differs from the UNCITRAL Model Law on certain vital aspects. It is pointed out that one of the strongest examples is the omission of the word "only" in Section 2(2), which occurs in corresponding Article 1(2) of the Model Law. The absence of the word "only" in Section 2(2) clearly signifies that Part I shall compulsorily apply if the place of arbitration is in India. It does not mean that Part I will not apply if place of arbitration is not in India.

16. Mr. Sorabjee has emphasised that the omission of

1 (2002) 2 SCC 388

2 (2005) 8 SCC 618

word "only" in Section 2(2) is not an instance of "CASUS OMISSUS". The omission of the word clearly indicates that Model Law has not been bodily adopted by the Arbitration Act, 1996. All the learned senior counsel seem to be agreed that the Arbitration Act, 1996 has to be construed by discerning the intention of the Parliament from the words and language used, i.e., the provisions of the said Act have to be construed literally without the addition of any word to any provision. Therefore, the missing word "only" can not be supplied by judicial interpretation. In support of the submission, reliance is placed on **Nalinakhya Bysack** Vs. **Shyam Sunder Haldar & Ors.**[3], **Magor & St. Mellons RDC** Vs. **Newport Corporation**[4], **Punjab Land Devl. & Reclamation Corporation Ltd.** Vs. **Presiding Officer, Labour Court**[5] and **Duport Steels Ltd.** Vs. **Sirs**[6]**.** It is pointed out by Mr. Sorabjee that the doctrine of ironing out the creases does not justify the substitution of a new jacket in place of the old, whose creases were to be ironed out.

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3 1953 SCR 533

4 1951 (2) All ER 839

5 (1990) 3 SCC 682

6 (1980) 1 All ER 529

17. All the learned counsel for the appellants have emphasised that the Arbitration Act, 1996 has not adopted the territorial criterion/principle completely, party autonomy has been duly recognized. This, according to the learned counsel, is evident from the provisions in Sections 2(1)(e), 2(5), 2(7), 20 and 28. It is submitted that restricting the operation of Part I only to arbitration which takes place in India would lead to reading words into or adding words to various provisions contained in the Arbitration Act, 1996. It is emphasised that restricting the applicability of Part I to arbitrations which take place only in India would render the provisions in Sections 2(5), 2(7) and 20 redundant. Mr. Sundaram has reiterated that expression "place" in Sections 2(2) and Section 20 has to be given the same meaning. Section 20 of the Arbitration Act, 1996 stipulates that parties are free to agree on the place of arbitration outside India. Therefore, arbitrations conducted under Part I, may have geographical location outside India. Similarly, if Part I was to apply only where the place of arbitration is in India then the words "Where the place of arbitration is situated in India" in Section 28(1) were wholly unnecessary. Further, the above words

qualify only Sub-section (1) of Section 28 and do not qualify Sub-section (3). The necessary implication is that Sub-section (3) was intended to apply even to foreign-seated arbitration so long as parties have chosen Arbitration Act, 1996 as law of the arbitration, which could only be if Part I is to apply to such arbitration. Therefore, it is submitted by the learned counsel that the 'seat' is not the "*centre of gravity*" as far as the Arbitration Act, 1996 is concerned. The Arbitration Act, 1996 is "*subject matter centric"* and not "*seat-centric*". In support of this, the learned counsel placed strong reliance on the provision contained in Section 2(1) (e), which provides that *"jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject matter of a suit"*. This, according to the learned counsel, is an essential precondition for a Court to assume jurisdiction under Part I. The definition of Court in Section 2(1)(e) would necessarily mean that two foreign parties, in order to resolve a dispute arising outside India and governed by foreign law cannot invoke jurisdiction of an Indian Court by simply choosing India as the seat of arbitration. It is further submitted that in the absence of Section 9 of the Arbitration Act, 1996, no

interim relief can be granted unless it is in aid of final/ substantive relief that must be claimed in the suit. On the other hand, a suit claiming any permanent relief on the substance of the dispute would tantamount to a waiver of the arbitration clause by the plaintiff. It is, therefore, submitted by the learned counsel that supplying word "only" in Section 2(2) will in many cases leave a party remediless. It is further submitted that Section 2(7) clearly shows that part I would apply even to arbitrations which take place outside India. If Section 2(7) was to be restricted only to arbitrations which take place in India, there would be no need for such a provision. It is emphasised that the provision clearly states that it applies to an award made *"under this part"*. The aforesaid term is a clear indication to an arbitration which takes place outside India, where the parties have chosen the Arbitration Act, 1996 as the governing law of the arbitration. Mr. Sorabjee relied on **National Thermal Power Corporation** Vs. **Singer Company & Ors.[7],** and submitted that Section 2(7) is a positive re-enactment of Section 9(b) of the Foreign Awards (Recognition and Enforcement) Act, 1961 (hereinafter referred to as the '1961 Act'). It is emphasised that Section 2(7)

7 (1992) 3 SCC 551

has been placed in Part I only to bring it in conformity with Article V(1)(e) of the New York Convention, which has been incorporated and enacted as Section 48(1)(e). The aforesaid section even though it is dealing with enforcement of awards, necessarily recognizes the jurisdiction of courts in two countries to set aside the award, namely, the courts of the country in which arbitration takes place and the country under the law of which the award was made. It is submitted that both the expressions must necessarily be given effect to and no part of the act or the section can be disregarded by describing them as fossil.

18. Mr. Sorabjee has emphasised that not giving effect to the words "under the law of which the award was made", will allow many awards to go untested in Court. He has relied upon certain observations made by the U.K. Court in the case of **Reliance Industries Ltd.** Vs. **Enron Oil & Gas India Ltd.**[8]

19. Mr. Sundaram points out that the Arbitration Act, 1996 departs from the strict territorial criterion/principle as not only it retains the features of New York Convention but significantly departs from Model Law. The Model Law has

8 2002 (1) Lloyd Law Reports 645

sought to bring in an era of localized/territorial arbitration (Article 1(2)). On the other hand, the Arbitration Act, 1996 recognizes and provides for de-localized arbitration. He emphasised that under Model Law, all provisions referred to localized arbitration except the exceptions in Article 1(2). Under the Arbitration Act, 1996, all provisions are de-localized, except where "place" qualification has been provided for.

20. He further submitted that in all commentaries of International Commercial Arbitration, the expression "*place*" is used interchangeably with "*seat*". In many cases, the terms used are "*place of arbitration*"; "the *arbitral situs*"; the "*locus arbitri*" or "*the arbitral forum*". Relying on the judgment in **Braes of Doune Wind Farm (Scotland) Limited** Vs. **Alfred McAlpine Business Services Limited**[9] which has been affirmed in **Shashoua & Ors**. Vs. **Sharma**[10]**,** he submitted that internationally "*seat*" is interpreted as being the "*juridical seat*". Therefore, when the parties opt for a given law to govern the arbitration, it is considered to supplant the law of the geographical location of the arbitration. Therefore, the mere

9 [2008]EWHC 426 (TCC)

10 [2009] EWHC 957 (Comm.).

geographical location is not the deciding factor of the seat. He relies on the observations made by Gary B. Born in his book 'International Commercial Arbitration', which are as follows :

> "A concept of central importance to the international arbitral process is that of the arbitral seat (alternatively referred to as the "place of arbitration", the "siege" "ort", the arbitral "situs" the "locus arbitri" or the arbitral "forum"). The arbitral seat is the nation where an international arbitration has its legal domicile, the laws of which generally govern the arbitration proceedings in significant respects, with regard to both "internal" and "external" procedural matters."
>
> As discussed elsewhere, the arbitral seat is the location selected by the parties (or, sometimes, by the arbitrators, an arbitral institution, or a court) as the legal or juridical home or place of the arbitration. In one commentator's words, the "seat" is in the vast majority of cases the country chosen as the place of the arbitration. The choice of the arbitral seat can be (and usually is) made by the parties in their arbitration agreement or selected on the parties' behalf by either the arbitral tribunal or an arbitral institution."

21. He submits that whist interpreting the word "*place"* in Section 2(2), the provisions contained in Section 20 would have relevance as Section 20 stipulates that the parties are free to agree on the place of arbitration. The interpretation on the word "*place*" in Section 2(2) would also have to be in conformity with the provisions contained in Section 2(1) (e).

Further more, Section 2(2) has to be construed by keeping in view the provisions contained in Section 2(7) which would clearly indicate that the provisions of Part I of the Arbitration Act, 1996 are not confined to arbitrations which take place within India. Whilst arbitration which takes place in India by virtue of Section 2(2) would give rise to a "*domestic award";* the arbitration which is held abroad by virtue of Section 2(7) would give rise to a "*deemed domestic award*"; provided the parties to arbitration have chosen the Arbitration Act, 1996 as the governing law of arbitration.

22. Mr. Sundaram emphasised that if Section 2(2) had not been on the Statute book there would be no doubt that if an arbitration was governed by the Arbitration Act, 1996, Part I would *ipso facto* become applicable to such arbitration, and under Section 2(7), irrespective of where the arbitral proceedings took place, it would become a *deemed domestic award*, giving rise to the incidence arising therefrom. By the inclusion of Section 2(2), the legislature has also made the Arbitration Act, 1996 and Part I applicable when the seat or place of arbitration is in India even if not conducted in accordance with Indian Arbitral laws thereby domestic what

would otherwise have been a non-domestic award having been conducted in accordance with a Foreign Arbitration Act. By making such provisions, the Indian Parliament has honoured the commitment under the New York Convention. He submits that New York Convention in Articles V(1)(a) and V(1)(e) has recognized that the courts in both the countries i.e. country in which the arbitration is held and the country "*under the law of which the award is made*" as a court of competent jurisdiction to question the validity of the arbitral proceedings/award. He, however, points out that the jurisdiction of the domestic court is neither conferred by the New York Convention nor under Part II of the Arbitration Act, 1996, since Part II merely deals with circumstances under which an award may be enforced/may be refused to be enforced. These circumstances include annulment proceedings in one of the two competent courts, whether or not any of the two courts have jurisdiction to annul the proceedings/award, would depend on the domestic law of the country concerned. The Geneva Convention had brought with it the predominance of the seat, particularly with reference to the setting aside of the award. The two jurisdictions were inserted in the New York

Convention to dilute the predominance of the "seat" over the party autonomy. He further submitted that the apprehension that the two courts of competent jurisdiction could give conflicting verdicts on the same award is unfounded. Even if there were parallel proceedings, it would merely be a question of case management by the relevant courts in deciding which proceedings should be continued and which stayed.

23. Learned counsel have submitted that the findings in the case of **Bhatia International** Vs. **Bulk Trading S.A. & Anr.**[11] (hereinafter referred to as "Bhatia International") that if Part I was not made applicable to arbitrations conducted outside India would render "party remediless" is wholly correct. It is not open to a party to file a suit touching on the merits of the arbitration, since such suit would necessarily have to be stayed in view of Section 8 or Section 45 of the Arbitration Act, 1996. He submits that the only way a suit can be framed is a suit "to inter alia restrict the defendant from parting with properties". He submits that if the right to such property itself is subject matter of an arbitration agreement, a suit for the declaration of such right can not be filed. All that could then be filed, therefore, would be a bare

11 (2004) 2 SCC 105

suit for injunction restraining another party from parting with property. The interlocutory relief would also be identical till such time as the injunction is made permanent. Such a suit would not be maintainable because :- (a) an interlocutory injunction can only be granted depending on the institutional progress of some proceeding for substantial relief, the injunction itself must be part of the substantive relief to which the plaintiff's cause of action entitles him. In support of this proposition, he relies on **Siskina (Cargo Owners)** Vs. **Distos Compania Navieria SA**[12], **Fourie** Vs. **Le Roux**[13] and **Adhunik Steels Ltd.** Vs. **Orissa Manganese and Minerals Pvt. Ltd.**[14]; (b) the cause of action for any suit must entitle a party for a substantive relief. Since the substantive relief can not be asked for as the dispute is to be decided by the arbitrator, the only relief that could be asked for would be to safeguard a property which the plaintiff may or may not be entitled to proceed against, depending entirely on the outcome of another proceeding, in another jurisdiction, or which the country has no seisin; (c) in such a suit, there would be no pre-existing

12 1979 AC 210

13 2007 (1) WLR 320; 2007 (1) All ER 1087

14 2007 (7) SCC 125 at 136

right to give rise to a cause of action but the right is only contingent / speculative and in the absence of an existing / subsisting cause of action, a suit can not be filed; (d) the absence of an existing / subsisting cause of action would entail the plaint in such a suit to be rejected under Order VII Rule 11a. Further, no interlocutory injunction can be granted unless it is in aid of a substantive relief and therefore a suit simply praying for an injunction would also be liable to be rejected under Order VII Rule 11; (e) no interim relief can be granted unless it is in aid of and ancillary to the main relief that may be available to the party on final determination of rights in a suit. Learned counsel refers to **State of Orissa** Vs. **Madan Gopal Rungta**[15] in support of the submission; (f) such a suit would be really in the nature of a suit for interim relief pending an entirely different proceeding. It is settled law that by an interim order, the Court would not grant final relief. The nature of such a suit would be to grant a final order that would in fact be in the nature of an interim order. Here the learned counsel refers to **U.P. Junior Doctors' Action Committee** Vs. **Dr. B. Sheetal Nandwani**[16], **State of Uttar**

15 1952(1) SCR 28

16 1997 Suppl (1) SCC 680

Pradesh Vs. **Ram Sukhi Devi**[17], **Deoraj** Vs. **State of Maharashtra & Ors.**[18] and **Raja Khan** Vs. **Uttar Pradesh Sunni Central Wakf Board & Ors.**[19] He submits that the intention of the Indian Parliament in enacting the Arbitration Act, 1996 was not to leave a party remediless.

24. Mr. Gopal Subramanium submits that the issue in the present case is that in addition to the challenge to the validity of an award being made in courts where the seat is located, are domestic courts excluded from exercising supervisory control by way of entertaining a challenge to an award? He submits that the issue arises when it is not possible, in a given case, to draw an assumption that the validity of the award is to be judged according to the law of the "place" of arbitration. The Arbitration Act, 1996 has removed such vagueness. The Arbitration Act, 1996 clearly states that in respect of all subject matters over which Courts of Judicature have jurisdiction, the National Courts will have residual jurisdiction in matters of challenge to the validity of an award or enforcement of an award. He reiterates the submissions

17 (2005) (9) SCC 733

18 (2004) 4 SCC 697

19 (2011) 2 SCC 741

made by other learned senior counsel and points out that the Arbitration Act, 1996 is not *seat centric*. This, according to learned senior counsel, is evident from numerous provisions contained in Part I and Part II. He points out all the sections which have been noticed earlier. According to learned senior counsel, the definition of International Commercial Arbitration in Section 2(1)(f) is *party centric.* This definition is not indexed to the seat of arbitration. Similarly, the definition in Section 2(1)(e) is *subject matter centric*. According to him, there is a crucial distinction between the definition of *international arbitration* in the Model Law and the definition of *international commercial arbitration* under the 1961 Act. From the above, he draws an inference that seat of arbitration being in India *is not a pre-requisite* to confer jurisdiction on the Indian Courts under the Arbitration Act, 1996. He points out that Section 2(1)(e) contemplates nexus with "*the subject matter of the arbitration*". The use of this expression in the definition gives a clear indication of the manner in which jurisdiction is conferred. If an international arbitration takes place, irrespective of the seat, and the subject matter of that arbitration would otherwise be within the jurisdiction of an

Indian Court, such Indian Court would have supervisory jurisdiction. Therefore, if "the closest connection" of the arbitration is with India, and if the Indian Courts would normally have jurisdiction over the dispute, the Indian Courts will play a supervisory role in the arbitration. Restricting the applicability of Part I of the Arbitration Act, 1996 to the arbitration where the seat is in India cannot, according to Mr. Subramanium, provide a coherent explanation of sub-section 2(1)(e) without doing violence to its language. He also makes a reference to the opening words of Section 28 "where the place of arbitration is situate in India". He then submits that if the legislature had already made it abundantly clear that Section 2(2) of the Arbitration Act, 1996 operated as a complete exclusion of Part I of the aforesaid Act to arbitrations outside India, the same proposition need not subsequently be stated as a qualifier in Section 28.

25. Mr. Gopal Subramanium emphasised that Part II cannot be a complete code as it necessarily makes use of provisions in Part I. He points out that Part I and Part II of the Arbitration Act, 1996 would have been distinct codes in themselves if they had provisions of conducting arbitration in

each part. However, Part I of the Arbitration Act, 1996 prescribed the entire procedure for the conduct of an arbitration, whereas Part II is only for recognition and enforcement of certain foreign awards. Therefore, he submits that Part I and Part II cannot be read separately but have to be read harmoniously in order to make Arbitration Act, 1996 a complete code. He points out that even though certain provisions of Part I are mirrored in Part II, at the same time, certain provisions of Part I which are necessary for arbitration are not covered by Part II. He points out that although Section 45, which is in part II, enables a court to make a reference to arbitration; there is no other provision like Section 11 to resolve a situation when an arbitrator is not being appointed as per the agreed arbitral procedure. Therefore, Section 11(9) specially provides for reference in an *international commercial arbitration*. He further points out that the use of phrase "notwithstanding anything contained in Part I" clearly indicates that Section 45 is to apply, irrespective of any simultaneous application of similar provision in Part I. This section clearly contemplates that provisions of Part I would apply to matters covered by Part II. Mr. Subramanium then

points out that there is no provision in Part II for taking the assistance of the court for interim relief pending arbitration, like Section 9 in Part I. Section 27, according to Mr. Subramanium, is another indication where the assistance of the Indian Court would be taken in aid of arbitration both within and outside India. He reiterates that Sections 34 and 48 of the Arbitration Act, 1996 are to be read harmoniously. He submits various provisions of Part I are facilitative in character, excepting Section 34 which involves a challenge to an award. He points out that Section 2(4) and Section 2(5) also indicate that the Arbitration Act, 1996 applies to all arbitration agreements irrespective of the seat of arbitration. He submits that the harmonious way to read Section 34 as well as Section 48 of the Arbitration Act, 1996 is that where a challenge lies to an award, the legislature must have intended only one challenge. Thus, if an attempt is made to execute an award as a decree of the court under Section 36 of Part I, there can be no doubt that if there is no adjudication under Section 34, there can still be a resistance which can be offered under Section 48. Similarly, by virtue of Section 48(3) if an award is challenged under Section 34 before a competent court, the

enforcement proceeding would be adjourned and the court may order suitable security. There will be only one challenge to an award, either under Section 34 or Section 48. Referring to Section 51, Mr. Gopal Subramanium submits that the rights available under Part II are in addition to rights under Part I. This section firstly postulates a hypothesis that the Chapter on New York Convention awards had not been enacted. It further makes mention, in such a scenario, of certain rights already occupying the field that is intended to be covered by the chapter on New York conventions. It also mentions that such rights are coextensive with the rights under the chapter on the New York Convention. Therefore, the fact that certain provisions in Part II of the Arbitration Act, 1996 appear to function in the same field as provisions in Part I, does not mean that the provisions of Part I cease to have effect, or that the provisions of Part I are no longer available to a party. This, according to Mr. Subramanium, is in consonance with the history of New York Convention and the Model Law, which shows that the Model Law was intended to fill the gaps left by the New York Convention as well as function as a complete code. He, therefore, urges that the

sections which have come to be considered essential for the success of arbitration, such as Sections 9, 11 and 34, must be considered also available to the parties seeking recognition and enforcement of foreign awards

26. Finally, he submits that the decision in **Bhatia International (supra)** is a harmonious construction of Part I and Part II of the Arbitration Act, 1996. He further submits that the case of **Venture Global Engineering** Vs. **Satyam Computer Services Ltd. & Anr.**[20] (hereinafter referred to as "Venture Global Engineering") has been correctly decided by this Court. Mr. Subramanium further pointed out that the judgments of this Court in the case of **ONGC** Vs. **Western Company of North America**[21] and **National Thermal Power Corporation** Vs. **Singer Company & Ors. (supra)** have appropriately set aside the awards challenged therein even though the same were not made in India.

27. Mr. E.R. Kumar appearing in SLP (C) No. 31526-31528 of 2009 has adopted the submissions made by Mr. Subramanium. In addition, he submits that the National Arbitral Law, i.e., Part I of the Arbitration Act, 1996

20 [2008 (4) SCC 190]

21 1987 (1) SCC 496

necessarily applies to all arbitrations arising between domestic parties and pertaining to a domestic dispute. Thus, even if the parties in such a case agree with the situs to be abroad, the same will not *ipso facto* take such arbitrations outside the applicability of Part I and operate to exclude the jurisdiction of Indian Courts therein. In other words, two Indian parties involved in a purely domestic dispute can not contractually agree to denude the Courts of this country of their jurisdictions with respect to a legal dispute arising between them in India. He submits that such a contract would be void under Section 23 and Section 28 of the Indian Contract Act.

28. He placed reliance on a judgment of this Court in the case of **ABC Laminart Pvt. Ltd.** Vs. **A.P. Agencies, Salem**[22]. He relies on Para 10 and 16 of the above judgment. He also relied on the case of **Interglobe Aviation Ltd.** Vs. **N. Satchidanand**[23], wherein this Court has followed the decision in **ABC Laminart Pvt. Ltd. (supra)**.

29. He submits that the UNCITRAL Model Law has defined the term "*international*" in a broad and expansive manner

22 1989 (2) SCC 163

23 2011 (7) SCC 463

allowing full sway to "*party autonomy*". Under the Model Law, it is open to the parties to give international flavour to an otherwise purely domestic relationship, merely by choosing a *situs* of arbitration abroad [Article 1(3)(b)(i)] or even merely by labelling the arbitration an international one. [Article 1(3)(c)].

30. The Indian law has consciously and correctly departed from the same and chosen only the nationality test for defining an arbitration as "*international*" as is apparent from Section 2(1)(f) of the Arbitration Act, 1996. Relying on the provision of Sections 2(2), 20 and 28, he further submits that Arbitration Act, 1996 precludes Indian parties to a purely domestic dispute from choosing a place of arbitration outside India. Mr. Kumar goes even further to submit that when both the parties are Indian, the substantive law governing the dispute must necessarily be Indian irrespective of the situs of the arbitration and irrespective of any provision in the contract between the parties to the contrary. He submits that the same principle applies with equal force to the arbitration law too, that is to say, that if it is not open to two Indian parties with regard to an entirely domestic dispute to derogate from the Indian laws of contract, evidence etc., it is equally not open to

them derogate from the Indian arbitrational law either. He relies on judgment of this Court in the case of **TDM Infrastructure Pvt. Ltd.** Vs. **U.E. Development India Pvt. Ltd.,**[24] Paragraphs 19, 20 and 23. He, however, very fairly points out that this was a case under Section 11 and the point in issue here did not specifically arise for consideration in the said case.

History of Arbitration in India -

31. Before we embark upon the task of interpreting the provisions of the Arbitration Act, 1996, it would be apposite to narrate briefly the history of Arbitration Law in India upto the passing of Arbitration Act, 1996. This exercise is undertaken purely to consider: (i) what was the law before the Arbitration Act, 1996 was passed; (ii) what was the mischief or defect for which the law had not provided; (iii) what remedy Parliament has appointed; (iv) the reasons of the remedy.

32. Resolution of disputes through arbitration was not unknown in India even in ancient times. Simply stated, settlement of disputes through arbitration is the alternate system of resolution of disputes whereby the parties to a

24 2008 (14) SCC 271

dispute get the same settled through the intervention of a third party. The role of the court is limited to the extent of regulating the process. During the ancient era of Hindu Law in India, there were several machineries for settlement of disputes between the parties. These were known as *Kulani* (village council), *Sreni* (corporation) and *Puga* (assembly).[25] Likewise, commercial matters were decided by Mahajans and Chambers. The resolution of disputes through the panchayat was a different system of arbitration subordinate to the courts of law. The arbitration tribunal in ancient period would have the status of panchayat in modern India.[26] The ancient system of panchayat has been given due statutory recognition through the various Panchayat Acts subsequently followed by Panchayati Raj Act, 1994. It has now been constitutionally recognized in Article 243 of the Constitution of India.

33. However, we are concerned here with modern arbitration law, therefore, let us proceed to see the legislative history leading to the enactment of Arbitration Act, 1996.

The Indian Scenario -

25 See P.V Kane History of Dharmasastra, Vol.III P.242

26 See Justice S.Varadachariar Hindu Judicial System P.98

34. The first Indian Act on Arbitration law came to be passed in 1899 known as Arbitration Act, 1899. It was based on the English Arbitration Act, 1899. Then came the Code of Civil Procedure, 1908. Schedule II of the Code contained the provisions relating to the law of Arbitration which were extended to the other parts of British India. Thereafter the Arbitration Act, 1940 (Act No.10 of 1940) (hereinafter referred to as the "1940 Act") was enacted to consolidate and amend the law relating to arbitration. This Act came into force on 1st July, 1940. It is an exhaustive Code in so far as law relating to the domestic arbitration is concerned. Under this Act, Arbitration may be without the intervention of a Court or with the intervention of a Court where there is no suit pending or in a pending suit. This Act empowered the Courts to modify the Award (Section 15), remit the Award to the Arbitrators for reconsideration (Section 16) and to set aside the Award on specific grounds (Section 30). The 1940 Act was based on the English Arbitration Act, 1934. The 1934 Act was replaced by the English Arbitration Act, 1950 which was subsequently replaced by the Arbitration Act, 1975. Thereafter the 1975 Act was also replaced by the Arbitration Act, 1979. There were,

however, no corresponding changes in the 1940 Act. The law of arbitration in India remained static.

35. The disastrous results which ensued from the abuse of the 1940 Act are noticed by this Court in the case of **Guru Nanak Foundation** Vs. **M/s. Rattan Singh & Sons.**[27] Justice D.A. Desai speaking for the court expressed the concern and anguish of the court about the way in which the proceedings under the 1940 Act, are conducted and without an exception challenged in courts. His Lordship observed :

> "Interminable, time consuming, complex and expensive court procedures impelled jurists to search for an alternative forum, less formal, more effective and speedy for resolution of disputes avoiding procedural claptrap and this led them to Arbitration Act, 1940 ("Act" for short). However, the way in which the proceedings under the Act are conducted and without an exception challenged in Courts, *has made lawyers laugh and legal philosophers weep*. (Emphasis supplied). Experience shows and law reports bear ample testimony that the proceedings under the Act have become highly technical accompanied by unending prolixity, at every stage providing a legal trap to the unwary. Informal forum chosen by the parties for expeditious disposal of their disputes has by the decisions of the Courts been clothed with 'legalese' of unforeseeable complexity. This case amply demonstrates the same."

36. This was the arena of domestic arbitration and

27 1981 (4) SCC 634

domestic award.

International Scenario -

37. Difficulties were also being faced in the International sphere of Trade and Commerce. With the growth of International Trade and Commerce, there was an increase in disputes arising out of such transactions being adjudicated through Arbitration. One of the problems faced in such Arbitration, related to recognition and enforcement of an Arbitral Award made in one country by the Courts of other countries. This difficulty was sought to be removed through various International Conventions. The first such International Convention was the Geneva Protocol on Arbitration Clauses, 1923, popularly referred to as "the 1923 Protocol". It was implemented w.e.f. 28th July, 1924. This Protocol was the product of the initiative taken by the International Chamber of Commerce (ICC) under the auspices of the League of Nations. The 1923 Protocol sought to make arbitration agreements and arbitration clauses in particular enforceable internationally. It was also sought to ensure that Awards made pursuant to such arbitration agreements would be enforced in the territory other than the state in which they were made. The 1923 Protocol

proved to be inadequate. It was followed by the Geneva Convention on the execution of Foreign Arbitrated Awards, 1927 and is popularly known as the "Geneva Convention of 1927". This convention was made effective on 25th July, 1929. India became a signatory to both the 1923 Protocol and the 1927 Convention on 23rd October, 1937. It was to give effect to both the 1923 Protocol and 1927 Convention that the Arbitration (Protocol and Convention) Act, 1937 was enacted in India. Again a number of problems were encountered in the operation of the 1923 Protocol and the 1927 Geneva Convention. It was felt that there were limitations in relation to their fields of application. Under the 1927 Geneva Convention a party in order to enforce the Award in the Country of an origin was obliged to seek a declaration in the country where the arbitration took place to the effect that the Award was enforceable. Only then could the successful party go ahead and enforce the Award in the country of origin. This led to the problem of "*double exequatur*", making the enforcement of arbitral awards much more complicated. In 1953 the International Chamber of Commerce promoted a new treaty to govern International Commercial Arbitration. The proposals of

ICC were taken up by the United Nations Economic Social Council. This in turn led to the adoption of the convention on the Recognition and Enforcement of Foreign Arbitral Awards at New York in 1958 (popularly known as "the New York Convention"). The New York Convention is an improvement on the Geneva Convention of 1927. It provides for a much more simple and effective method of *recognition and enforcement* of foreign arbitral awards. It gives much wider effect to the validity of arbitration agreement. This convention came into force on 7th June, 1959. India became a State Signatory to this convention on 13th July, 1960. The Foreign Awards (Recognition and Enforcement) Act, 1961 was enacted to give effect to the New York Convention. Thus prior to the enactment of the Arbitration Act, 1996, the law of Arbitration in India was contained in the Protocol and Convention Act, 1937, the Arbitration Act, 1940 and the Foreign Awards (Recognition and Enforcement) Act, 1961. There were no further amendments in the aforesaid three acts. Therefore, it was generally felt that the arbitration laws in India had failed to keep pace with the developments at the international level.

The Arbitration Act, 1996

The Objects and Reasons of the Act

38. The Statement of Objects and Reasons referred to the fact that the existing legal framework was outdated and that the economic reforms in India would not be fully effective as "the law dealing with settlement of both domestic and international commercial disputes remained out of tune with such reforms". It then refers to the Model Law and the recognition of the general assembly of the United Nations that all countries give due consideration to the Model Laws in view of the *"desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice"*. Finally, the Statement of Objects and Reasons states as follows:-

> "3. Though the said UNCITRAL Model Law and Rules are intended to deal with international commercial arbitration and conciliation, they could, with appropriate modifications, serve as a model for legislation on domestic arbitration and conciliation. The present bill seeks to consolidate and amend the law relating to domestic arbitration, international commercial arbitration, enforcement of foreign arbitral awards and to define the law relating to conciliation, *taking into account the said UNCITRAL Model Law and Rules."*
>
> The main objectives of the bill are as under:-

"(i) to comprehensively cover international and commercial arbitration and conciliation as also domestic arbitration and conciliation;

(ii) to make provision for an arbitral procedure which is fair, efficient and capable of meeting the needs of the specific arbitration;

(iii) to provide that the arbitral tribunal gives reasons for its arbitral award;

(iv) to ensure that the arbitral tribunal remains within the limits of its jurisdiction:

(v) to minimise the supervisory role of Courts in the arbitral process;

(vi) to permit an arbitral tribunal to use mediation, conciliation, or other procedures during the arbitral proceedings to encourage settlement of disputes;

(vii) to provide that every final arbitral award is enforced in the same manner as if it were a decree of the Court;

(viii) to provide that a settlement agreement reached by the parties as a result of conciliation proceedings will have the same status and effect as an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal; and

(ix) to provide that, for purposes of enforcement of foreign awards, every arbitral award made in a country to which one of the two International Conventions relating to foreign arbitral awards to which India is a party applies, will be treated as a foreign award."

The Act is one *"to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards as also to define the law relating to conciliation and for matters connected therewith or incidental thereto."*

39. The Preamble to the Arbitration Act, 1996 repeats to some extent what the Statement of Objects provide, materially:-

> "AND WHEREAS the said Model Law and Rules make significant contribution to the establishment of a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations;
>
> AND WHEREAS it is expedient to make law respecting arbitration and conciliation, taking into account the aforesaid Model Law and Rules;"

Scheme of the Arbitration Act, 1996 -

40. The Arbitration Act, 1996 is divided into four parts.

Part I which is headed “Arbitration”; Part II which is headed “Enforcement of Certain Foreign Awards”; Part III which is headed “Conciliation” and Part IV being “Supplementary Provisions”. We may notice here that it is only Parts I and II which have relevance in the present proceedings.

41. We may further notice here that the 1961 Foreign Awards Act was enacted specifically to give effect to the New York Convention. The preamble of the 1961 Act is as follows :

> "An Act to enable effect to be given to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on the 10th day of June, 1958, to which India is a party and for purposes connected therewith."

42. In the 1961 Act, there is no provision for challenging the Foreign Award on merits similar or identical to the provisions contained in Sections 16 and 30 of the 1940 Act, which gave power to remit the award to the arbitrators or umpire for reconsideration under Section 30 which provided the grounds for setting aside an award. In other words, the 1961 Act dealt only with the enforcement of foreign awards. The Indian Law has remained as such from 1961 onwards. There was no intermingling of matters covered under the 1940

Act, with the matters covered by the 1961 Act.

43. Internationally, the Arbitration Law developed in different countries to cater for the felt needs of a particular country. This necessarily led to considerable disparity in the National Laws on arbitration. Therefore, a need was felt for improvement and harmonization as National Laws which were, often, particularly inappropriate for resolving international commercial arbitration disputes. The explanatory note by the UNCITRAL Secretariat refers to the recurring inadequacies to be found in outdated National Laws, which included provisions that equate the arbitral process with Court litigation and fragmentary provisions that failed to address all relevant substantive law issues. It was also noticed that "even most of those laws that appear to be up-to-date and comprehensive were drafted with domestic arbitration primarily, if not exclusively, in mind". It further mentions that "while this approach is understandable in view of the fact that even today the bulk of cases governed by arbitration law would be of purely domestic nature, the unfortunate consequence is that traditional local concepts are imposed on international cases and the needs of modern practice are often not met."

There was also unexpected and undesired restrictions found in National Laws, which would prevent the parties, for example, from submitting future disputes to arbitration. The Model Law was intended to reduce the risk of such possible frustration, difficulties or surprise. Problems also stemmed from inadequate arbitration laws or from the absence of specific legislation governing arbitration which were aggravated by the fact that National Laws differ widely. These differences were frequent source of concern in international arbitration, where at-least one of the parties is, and often both parties are, confronted with foreign and unfamiliar provisions and procedures. It was found that obtaining a full and precise account of the law applicable to the arbitration is, in such circumstances, often expensive, impractical or impossible.

44. With these objects in view, the UNCITRAL Model Law on International Arbitration ("the Model Law") was adopted by the United Nations Commission on International Trade Law (UNCITRAL) on 21st June, 1985 at the end of the 18th Session of the Commission. The General Assembly in its Resolution 40 of 1972 on 11th December, 1985 recommended that "all States give due consideration to the Model Law on

international commercial arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice".

45. The aim and the objective of the Arbitration Act, 1996 is to give effect to the UNCITRAL Model Laws.

46. Keeping in view the aforesaid historical background; the objects and reasons of the Act and the elaborate submissions made by the learned counsel for the parties, it would now be necessary to consider the true scope of the provisions of Part I and Part II of the Arbitration Act, 1996.

47. Since the reference relates to the ratio in **Bhatia International (supra)** and **Venture Global Engineering (supra)**, it would be appropriate to make a brief note about the reasons given by this Court in support of the conclusions reached therein.

48. In **Bhatia International**, the appellant entered into a contract with the 1st respondent on 9th May, 1997. This contract contained an arbitration clause, which provided that arbitration was to be as per the rules of the International

Chamber of Commerce (for short "ICC"). On 23rd October, 1997, the 1st respondent filed a request for arbitration with ICC. Parties agreed that the arbitration be held in Paris, France. ICC appointed a sole arbitrator. The 1st respondent filed an application under Section 9 of the Arbitration Act, 1996 before the IIIrd Additional District Judge, Indore, M.P. against the appellant and the 2nd respondent. One of the interim reliefs sought was an order of injunction restraining these parties from alienating, transferring and/or creating third-party rights, disposing of, dealing with and/or selling their business assets and properties. The appellant raised the plea of maintainability of such an application. The appellant contended that Part I of the Arbitration Act, 1996 would not apply to arbitrations where the place of arbitration is not in India. This application was dismissed by the IIIrd Additional District Judge on 1st February, 2000. It was held that the Court at Indore had jurisdiction and the application was maintainable. The appellant filed a writ petition before the High Court of Madhya Pradesh, Indore Bench. The said writ petition was dismissed by the judgment dated 10th October, 2000, which was impugned in the appeal before this Court.

On behalf of the appellants, it was submitted that Part I of the Arbitration Act, 1996 only applies to arbitrations where the place of arbitration is in India. It was also submitted that if the place of arbitration is not in India then Part II of the Arbitration Act, 1996 would apply. Reliance was also placed on Section 2(1)(f). With regard to Section 2(4) and (5), it was submitted that the aforesaid provisions would only apply to arbitrations which take place in India. It was submitted that if it is held that Part I applies to all arbitrations, i.e., even to arbitrations whose place of arbitration is not in India, then sub-section (2) of Section 2 would become redundant and/or otiose. It was also pointed out that since Section 9 and Section 17 fall in Part I, the same would not have any application in cases where the place of arbitration is not in India. It was emphasised that the legislature had deliberately not provided any provision similar to Section 9 and Section 17 in Part II. It was also submitted that a plain reading of Section 9 makes it clear that it would not apply to arbitrations which take place outside India. It was further submitted that Section 9 provides that an application for interim measures must be made before the award is enforced in accordance with Section

36, which deals with enforcement of domestic awards only. On the other hand, provisions for enforcement of foreign awards are contained in Part II. It was submitted that Section 9 does not talk of enforcement of the award in accordance with Part II. It was further submitted that there should be minimum intervention by the Courts in view of the underlying principle in Section 5 of the Arbitration Act, 1996. On the other hand, the respondents therein had made the submissions, which are reiterated before us. In Paragraph 14 of the Judgment, it is held as follows:-

> "**14.** At first blush the arguments of Mr Sen appear very attractive. Undoubtedly sub-section (2) of Section 2 states that Part I is to apply where the place of arbitration is in India. Undoubtedly, Part II applies to foreign awards. Whilst the submissions of Mr Sen are attractive, one has to keep in mind the consequence which would follow if they are accepted. The result would:
>
> (a) Amount to holding that the legislature has left a lacuna in the said Act. There would be a lacuna as neither Part I or II would apply to arbitrations held in a country which is not a signatory to the New York Convention or the Geneva Convention (hereinafter called "a non-convention country"). It would mean that there is no law, in India, governing such arbitrations.
>
> (b) Lead to an anomalous situation, inasmuch as Part I would apply to Jammu and

Kashmir in all international commercial arbitrations but Part I would not apply to the rest of India if the arbitration takes place out of India.

(c) Lead to a conflict between sub-section (2) of Section 2 on one hand and sub-sections (4) and (5) of Section 2 on the other. Further, sub-section (2) of Section 2 would also be in conflict with Section 1 which provides that the Act extends to the whole of India.

(d) Leave a party remediless inasmuch as in international commercial arbitrations which take place out of India the party would not be able to apply for interim relief in India even though the properties and assets are in India. Thus a party may not be able to get any interim relief at all."

49. It is held that the definition of international commercial arbitration under Section 2(1)(f) makes no distinction between international commercial arbitrations held in India or outside India. Further it is also held that the Arbitration Act, 1996 no where provides that its provisions are not to apply to *international commercial arbitrations* which take place in a non-convention country. Hence, the conclusion at Paragraph 14(a). On the basis of the discussion in Paragraph 17, this Court reached the conclusion recorded at Paragraph 14(b). The conclusions at Paragraph 14(c) is recorded on the

basis of the reasons stated in Paragraphs 19, 20, 21, 22 and 23. Upon consideration of the provision contained in Sections 2(7), 28, 45 and 54, it is held that Section 2(2) is only an inclusive and clarificatory provision. The provision contained in Section 9 is considered in Paragraphs 28, 29, 30 and 31. It is concluded in Paragraph 32 as follows:-

> "**32.** To conclude, I 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."

50. In **Venture Global Engineering (supra)**, this Court relied on Paragraphs 14, 17, 21, 26, 32 and 35. It is concluded in Paragraph 37 as follows:-

> "**37.** In view of the legal position derived from Bhatia International we are unable to accept Mr. Nariman's argument. It is relevant to point out that in this proceeding we are not deciding the merits of the claim of both parties, particularly, the stand taken in the suit filed by the appellant herein for setting aside the award. It is for the court concerned to

> decide the issue on merits and we are not expressing anything on the same. The present conclusion is only with regard to the main issue whether the aggrieved party is entitled to challenge the foreign award which was passed outside India in terms of Sections 9/34 of the Act. Inasmuch as the three-Judge Bench decision is an answer to the main issue raised, we are unable to accept the contra view taken in various decisions relied on by Mr. Nariman. Though in Bhatia International the issue relates to filing a petition under Section 9 of the Act for interim orders the ultimate conclusion that Part I would apply even for foreign awards is an answer to the main issue raised in this case."

51. As noticed above, the learned senior counsel for the appellants have supported the ratio of law laid down in **Bhatia International (supra)** and **Venture Global Engineering (supra)**. They have also supported the decisions in **ONGC** Vs. **Western Company of North America (supra)** and **National Thermal Power Corporation** Vs. **Singer Company & Ors. (supra).**

52. In order to consider the issues raised and to construe the provisions of the Arbitration Act, 1996 in its proper perspective, it would be necessary to analyse the text of the Arbitration Act, 1996 with reference to its legislative history and international conventions. We shall take due notice of the stated objects and reasons for the enactment of the Arbitration

Act, 1996.

53. Further, for a comprehensive and clear understanding of the connotations of the terms used in the Arbitration Act, 1996, a brief background of various laws applicable to an International Commercial Arbitration and distinct approaches followed by countries across the world will also be useful.

54. With utmost respect, upon consideration of the entire matter, we are unable to support the conclusions recorded by this Court in both the judgments i.e. **Bhatia International (supra)** and **Venture Global Engineering (Supra).**

55. In our opinion, the conclusion recorded at Paragraph 14B can not be supported by either the text or context of the provisions in Section 1(2) and proviso thereto. Let us consider the provision step-by–step, to avoid any confusion. A plain reading of Section 1 shows that the Arbitration Act, 1996 extends to whole of India, but the provisions relating to domestic arbitrations, contained in Part I, are not extended to the State of Jammu and Kashmir. This is not a new addition. Even the 1940 Act states:

"Section 1 - Short title, extend and commencement –

(1) ……,
(2) It extends to the whole of India (except the State of Jammu and Kashmir)."

56. Thus, the Arbitration Act, 1996 maintains the earlier position so far as the domestic arbitrations are concerned. Thereafter, comes the new addition in the proviso to Section 1(2), which reads as under:

"Provided that Parts I, III and IV shall extend to the State of Jammu and Kashmir only in so far as they relate to international commercial arbitration or, as the case may be, international commercial conciliation."

57. The proviso is necessary firstly due to the special status of the State of Jammu & Kashmir, secondly to update the Jammu and Kashmir Act, 1945. In our opinion, the proviso does not create an anomaly. The aforesaid Act is almost a carbon copy of the 1940 Act. Both the Acts do not make any provision relating to International Commercial Arbitration. Such a provision was made under the Arbitration Act, 1996 by repealing the existing three Acts, i.e., 1937 Protocol Act, 1940 Act and the Foreign Awards Act, 1961. Therefore, the proviso has been added to incorporate the provisions relating to International Commercial Arbitration.

The Arbitration Act, 1996 would not apply to purely domestic arbitrations which were earlier covered by the Jammu and Kashmir Act, 1945 and now by the Jammu & Kashmir Arbitration and Conciliation Act, 1997. We are also unable to agree with the conclusion that in Jammu & Kashmir, Part I would apply even to arbitration which are held outside India as the proviso does not state that Part I would apply to Jammu & Kashmir *only if the place of Arbitration is in Jammu & Kashmir.* Since Section 2(2) of Part I applies to all arbitrations, the declaration of territoriality contained therein would be equally applicable in Jammu & Kashmir. The provision contained in Section 2(2) is not affected by the proviso which is restricted to Section 1(2). By the process of interpretation, it can not be read as a proviso to Section 2(2) also. It can further be seen that the provisions relating to "Enforcement of Certain Foreign Awards" in Part II would apply without any restriction, as Part II has no relation to the enforcement of any purely domestic awards or domestically rendered international commercial awards. These would be covered by the Jammu & Kashmir Act, 1997.

58. In view of the above, we are unable to discern any

anomaly as held in **Bhatia International (supra**). We also do not discern any inconsistency between Section 1 and Section 2(2) of the Arbitration Act, 1996.

Does Section 2(2) bar the Application of Part I to Arbitrations which take place outside India?

59. The crucial difference between the views expressed by the appellants on the one hand and the respondents on the other hand is as to whether the absence of the word "only" in Section 2(2) clearly signifies that Part I of the Arbitration Act, 1996 would compulsorily apply in the case of arbitrations held in India, or would it signify that the Arbitration Act, 1996 would be applicable only in cases where the arbitration takes place in India. In **Bhatia International** and **Venture Global Engineering (supra)**, this Court has concluded that Part I would also apply to all arbitrations held out of India, unless the parties by agreement, express or implied, exclude all or any of its provisions. Here again, with utmost respect and humility, we are unable to agree with the aforesaid conclusions for the reasons stated hereafter.

60. It is evident from the observation made by this Court

in **Konkan Railway Corporation Ltd. & Anr. (supra)** that the Model Law was taken into account in drafting of the Arbitration Act, 1996. In Paragraph 9, this Court observed "that the Model Law was only taken into account in the drafting of the said Act is, therefore, patent. The Arbitration Act, 1996 and the Model Law are not identically drafted". Thereafter, this Court has given further instances of provisions of the Arbitration Act, 1996, not being in conformity with the Model Law and concluded that "The Model Law and judgments and literature thereon are, therefore, not a guide to the interpretation of the Act and, especially of Section 12 thereof". The aforesaid position, according to Mr. Sorabjee has not been disagreed with by this Court in **SBP & Co. (supra)**. We agree with the submission of Mr. Sorabjee that the omission of the word "only" in Section 2(2) is not an instance of "CASUS OMISSUS". It clearly indicates that the Model Law has not been bodily adopted by the Arbitration Act, 1996. But that can not mean that the territorial principle has not been accepted. We would also agree with Mr. Sorabjee that it is not the function of the Court to supply the supposed omission, which can only be done by Parliament. In our opinion,

legislative surgery is not a judicial option, nor a compulsion, whilst interpreting an Act or a provision in the Act. The observations made by this Court in the case of **Nalinakhya Bysack (supra)** would tend to support the aforesaid views, wherein it has been observed as follows:-

> "It must always be borne in mind, as said by Lord Halsbury in **Commissioner for Special Purpose of Income Tax** Vs. **Premsel**[28], that it is not competent to any Court to proceed upon the assumption that the legislature has made a mistake. The Court must proceed on the footing that the legislature intended what it has said. Even if there is some defect in the phraseology used by the legislature the Court cannot, as pointed out in **Crawford** Vs. **Spooner**[29], aid the legislature's defective phrasing of an Act or add and amend or, by construction, make up deficiencies which are left in the Act. Even where there is a casus omissus, it is, as said by Lord Russell of Killowen in **Hansraj Gupta** Vs. **Official Liquidator of Dehra Dun-Mussoorie Electric Tramway Co., Ltd.**[30], for others than the Courts to remedy the defect."

61. Mr. Sorabjee has also rightly pointed out the observations made by Lord Diplock in the case of **Duport Steels Ltd. (supra)**. In the aforesaid judgment, the House of Lords disapproved the approach adopted by the Court of

28 LR (1891) AC 531 at Page 549

29 6 Moo PC 1 : 4 MIA 179

30 (1933) LR 60 IA 13; AIR (1933) PC 63

Appeal in discerning the intention of the legislature, it is observed that:-

> "...the role of the judiciary is confined to ascertaining from the words that Parliament has approved as expressing its intention what that intention was, and to giving effect to it. Where the meaning of the statutory words is plain and unambiguous *it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral.* In controversial matters such as are involved in industrial relations there is room for differences of opinion as to what is expedient, what is just and what is morally justifiable. Under our Constitution it is Parliament's opinion on these matters that is paramount." (emphasis supplied)

In the same judgment, it is further observed:-

> "But if this be the case it is for Parliament, not for the judiciary, to decide whether any changes should be made to the law as stated in the Act."

62. The above are well accepted principles for discerning the intention of the legislature. In view of the aforesaid, we shall construe the provision contained in Section 2(2) without adding the word "only" to the provision.

63. We are unable to accept the submission of the learned counsel for the appellants that the omission of the word "only"

from Section 2(2) indicates that applicability of Part I of the Arbitration Act, 1996 is not limited to the arbitrations that take place in India. We are also unable to accept that Section 2(2) would make Part I applicable even to arbitrations which take place outside India. In our opinion, a plain reading of Section 2(2) makes it clear that Part I is limited in its application to arbitrations which take place in India. We are in agreement with the submissions made by the learned counsel for the respondents, and the interveners in support of the respondents, that Parliament by limiting the applicability of Part I to arbitrations which take place in India has expressed a legislative declaration. It has clearly given recognition to the territorial principle. Necessarily therefore, it has enacted that Part I of the Arbitration Act, 1996 applies to arbitrations having their place/seat in India.

Does the missing 'only' indicate a deviation from Article 1(2) of the Model Law?

64. As noticed earlier the objects and reasons for the enactment of the Arbitration Act, 1996 clearly indicate that the Parliament had taken into account the UNCITRAL Model Laws.

The statement of the objects and reasons of the Arbitration Act, 1996 clearly indicates that law of arbitration in India at the time of enactment of the Arbitration Act, 1996, was substantially contained in three enactments, namely, The Arbitration Act, 1940; The Arbitration (Protocol and Convention) Act, 1937 and The Foreign Awards (Recognition and Enforcement) Act, 1961. It is specifically observed that it is widely felt that the Arbitration Act, 1940, which contains the general law of arbitration, has become outdated. It also mentions that the Law Commission of India, several representative bodies of trade and industry and experts in the fields of arbitration have proposed amendments to the Arbitration Act, 1940, *to make it more responsive to contemporary requirements.* It was also recognized that the economic reforms initiated by India at that time may not become fully effective, if the law dealing with settlement of both domestic and international commercial dispute remained out of tune with such reforms. The objects and reasons further make it clear that the general assembly has recommended that all countries give due consideration to the Model Law adopted in 1985, by the UNCITRAL*, in view of the*

desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice. Paragraph 3 of the statement of objects and reasons makes it clear that although the UNCITRAL Model Laws are intended to deal with international commercial arbitration and conciliation, they could, with appropriate modifications, serve as a Model Law for legislation of domestic arbitration and conciliation. Therefore, the bill was introduced seeking to consolidate and amend the law relating to domestic arbitration, international commercial arbitration, enforcement of foreign arbitral award and to define the law relating to conciliation, *taking into account the UNCITRAL Model Law and Rules.* We have set out the main objects of the bill a little earlier, Paragraph 3(5) of which clearly states that one of the objects is "to minimize the supervisory role of Courts in arbitral process".

65. Much of the debate before us was concentrated on the comparison between Article 1(2) of UNCITRAL and Section 2(2). Learned counsel for the appellants had canvassed that the Parliament had deliberately deviated from Article 1(2) of UNCITRAL to express its intention that Part I shall apply to all

arbitrations whether they take place in India or in a foreign country. The word "only" is conspicuously missing from Section 2(2) which is included in Article 1(2) of UNCITRAL. This indicates that applicability of Part I would not be limited to Arbitrations which take place within India. Learned counsel for the appellants submitted that in case the applicability of Section 2(2) is limited to arbitrations which take place within India, it would give rise to conflict between Sections 2(2), 2(4), 2(5), 2(7), 20 and 28. With equal persistence, the learned counsel for the respondents have submitted that Part I has accepted the territorial principle adopted by UNCITRAL in letter and spirit.

66. Whilst interpreting the provisions of the Arbitration Act, 1996, it is necessary to remember that we are dealing with the Act which seeks to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards. The aforesaid Act also seeks to define the law relating to conciliation and for matters connected therewith or incidental thereto. It is thus obvious that the Arbitration Act, 1996 seeks

to repeal and replace the three pre-existing Acts, i.e., The Arbitration Act, 1940; The Arbitration (Protocol and Convention) Act, 1937 and the Foreign Awards (Recognition and Enforcement) Act, 1961. Section 85 repeals all the three Acts. Earlier the 1937 Act catered to the arbitrations under the Geneva Convention. After the 1958 New York Convention was ratified by India, the 1961 Act was passed. The domestic law of arbitration had remained static since 1940. Therefore, the Arbitration Act, 1996 consolidates the law on domestic arbitrations by incorporating the provisions to expressly deal with the domestic as well as international commercial arbitration; by taking into account the 1985 UNCITRAL Model Laws. It is not confined to the New York Convention, which is concerned only with enforcement of certain foreign awards. It is also necessary to appreciate that the Arbitration Act, 1996 seeks to remove the anomalies that existed in the Arbitration Act, 1940 by introducing provisions based on the UNCITRAL Model Laws, which deals with international commercial arbitrations and also extends it to commercial domestic arbitrations. UNCITRAL Model Law has unequivocally accepted the territorial principle. Similarly, the Arbitration Act,

1996 has also adopted the territorial principle, thereby limiting the applicability of Part I to arbitrations, which take place in India.

67. In our opinion, the interpretation placed on Article 1(2) by the learned counsel for the appellants, though attractive, would not be borne out by a close scrutiny of the Article. Article 1(2) reads as under:-

> "Article 1(2): The provisions of this law, except Articles 8, 9, 17(H), 17(I), 17(J), 35 and 36 apply "*only*" if the place of arbitration is in the territories of this State".

68. The aforesaid article is a model and a guide to all the States, which have accepted the UNCITRAL Model Laws. The genesis of the word "only" in Article 1(2) of the Model Law can be seen from the discussions held on the scope of application of Article 1 in the 330th meeting, Wednesday, 19 June, 1985 of UNCITRAL. This would in fact demonstrate that the word "only" was introduced in view of the exceptions referred to in Article 1(2) i.e. exceptions relating to Articles 8, 9, 35 & 36 (Article 8 being for stay of judicial proceedings covered by an arbitration agreement; Article 9 being for interim reliefs; and Articles 35 & 36 being for enforcement of

Foreign Awards). It was felt necessary to include the word "only" in order to clarify that except for Articles 8, 9, 35 & 36 which could have extra territorial effect if so legislated by the State, the other provisions would be applicable on a strict territorial basis. Therefore, the word "only" would have been necessary in case the provisions with regard to interim relief etc. were to be retained in Section 2(2) which could have extra-territorial application. The Indian legislature, while adopting the Model Law, with some variations, did not include the exceptions mentioned in Article 1(2) in the corresponding provision Section 2(2). Therefore, the word "only" would have been superfluous as none of the exceptions were included in Section 2(2).

69. We are unable to accept the submission of the learned counsel for the appellants that the omission of the word "only", would show that the Arbitration Act, 1996 has not accepted the territorial principle. The Scheme of the Act makes it abundantly clear that the territorial principle, accepted in the UNCITRAL Model Law, has been adopted by the Arbitration Act, 1996.

70. That the UNCITRAL Rules adopted strict territorial principle is evident from the Report of the UNCITRAL in paragraphs 72 to 80 on the work of its 18th Session in Vienna between 3rd to 21st June, 1985. The relevant extracts of these paragraphs are as under:

> *"72. Divergent views were expressed as to whether the Model Law should expressly state its territorial scope of application and, if so, which connecting factor should be the determining criterion……"*

> *"73, As regards the connecting factor which should determine the applicability of the (Model) Law in a given State, there was wide support for the so-called strict territorial criterion, according to which the Law would apply where the place of arbitration was in that State……"*

> *"74. Another view was that the place of arbitration should not be exclusive in the sense that parties would be precluded from choosing the law of another State as the law applicable to the arbitration procedure……"*

> *"78. The Commission requested the secretariat to prepare, on the basis of the above discussion, draft provisions on the territorial scope of application of the Model Law in general, including suggestions as to possible exceptions of the general scope……"*

> *"80. In discussing the above proposal, the Commission decided that, for reasons stated in support of the strict territorial criterion (see above, para 73), the applicability of the Model Law should depend exclusively on the place of arbitration as defined in the Model Law.....*
> *....."*
>
> *"81. The Commission agreed that a provision implementing that decision, which had to be included in article 1, should be formulated along the following lines: "The provisions of this Law, except articles 8, 9, 35 and 36 apply only if the place of arbitration is in the territory of this State.....*
> *....."*

71. Similarly, the acceptance of the territorial principle in UNCITRAL has been duly recognized by most of the experts and commentators on International Commercial Arbitration. The aforesaid position has been duly noticed by Howard M. Holtzmann and Joseph E. Beuhaus in "A guide to the UNCITRAL Model Law on International Commercial Arbitration, Legislative History and Commentary". Dealing with the territorial scope of application of Article 1(2) at Pages 35 to 38, it is stated:-

> "...in early discussions of this issue, Article 27, dealing with court assistance in taking evidence was included in the list of exceptions. At that time, the draft of that Article provided for such assistance to

foreign arbitrations. The provision was subsequently changed to its present format, and, by virtue of Article 1(2), it applies only to arbitrations in the enacting State. Assistance in taking evidence for use in foreign arbitrations can be provided only under any rules on the question in other laws of the State.

"The Commission adopted the principle that the Model Law would only apply if the place of arbitration was in the enacting State – known as the "territorial criterion" for applicability – only after extensive debate. The primary alternative position was to add a principle called the "autonomy criterion" which would have applied the Law also to arbitrations taking place in another country if the parties had chosen to be governed by the procedural law of the Model Law State. Thus, if the autonomy criterion had been adopted, the parties would have been free, subject to restrictions such as fundamental justice, public policy and rules of court competence, to choose the arbitration law of a State other than that of the place of arbitration. The courts of the Model Law State would then presumably have provided any court assistance needed by this arbitration, including setting aside, even though the place of arbitration was elsewhere. Such a system of party autonomy is envisioned by the New York Convention, which recognizes that a State may consider as domestic an award made outside the State, and vice versa."

"The Commission decided not to adopt the autonomy criterion. It was noted that the territorial criterion was widely accepted by existing national laws, and that where the autonomy criterion was available it was rarely used."

72. We are also unable to accept the submission of the learned counsel for the appellants that the Arbitration Act,

1996 does not make seat of the arbitration as the *centre of gravity* of the arbitration. On the contrary, it is accepted by most of the experts that in most of the National Laws, arbitrations are anchored to the seat/place/situs of arbitration. Redfern in Paragraph 3.54 concludes states that *"the seat of the arbitration is thus intended to be its centre of gravity."* This, however, does not mean that all the proceedings of the arbitration have to take place at the seat of the arbitration. The arbitrators at times hold meetings at more convenient locations. This is necessary as arbitrators often come from different countries. It may, therefore, on occasions be convenient to hold some of the meetings in a location which may be convenient to all. Such a situation was examined by the court of appeal in England in **Naviera Amazonica Peruana S.A.** Vs. **Compania Internacionale De Seguros Del Peru**[31] therein at p.121 it is observed as follows :

> "The preceding discussion has been on the basis that there is only one "place" of arbitration. This will be the place chosen by or on behalf of the parties; and it will be designated in the arbitration agreement or the terms of reference or the minutes of proceedings or in some other way as the place or "seat" of the arbitration. This does not mean, however, that the arbitral tribunal *must* hold all its meetings or hearings at the place of arbitration.

31 1988 (1) Lloyd's Law Reports 116

> International commercial arbitration often involves people of many different nationalities, from many different countries. In these circumstances, it is by no means unusual for an arbitral tribunal to hold meetings or even hearings in a place other than the designated place of arbitration, either for its own convenience or for the convenience of the parties or their witnesses..... It may be more convenient for an arbitral tribunal sitting in one country to conduct a hearing in another country, for instance, for the purpose of taking evidence..... In fact circumstances each move of the arbitral tribunal does not of itself mean that the seat of arbitration changes. The seat of arbitration remains the place initially agreed by or on behalf of the parties."

73. These observations were subsequently followed in **Union of India** Vs. **McDonnell Douglas Corp.**[32]

74. It must be pointed out that the law of the seat or place where the arbitration is held, is normally the law to govern that arbitration. The territorial link between the place of arbitration and the law governing that arbitration is well established in the international instruments, namely, the New York Convention of 1958 and the UNCITRAL Model Law of 1985. It is true that the terms "seat" and "place" are often used interchangeably. In Redfern and Hunter on International Arbitration, 5th Edn. (para 3.51), the seat theory is defined thus: "The concept that an arbitration is governed by the law

32 1993 (3) Lloyd's Law Reports 48

of the place in which it is held, which is the 'seat' (or 'forum' or *locus arbitri)* of the arbitration, is well established in both the theory and practice of international arbitration. In fact, the 1923 Geneva Protocol states: 'The arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place.' The New York Convention maintains the reference to 'the law of the country where the arbitration took place "(Article V(1)(d))" and, synonymously to 'the law of the country where the award is made' [Article V(1)(a) and (e)]. The aforesaid observations clearly show that New York Convention continues the clear territorial link between the place of arbitration and the law governing that arbitration. The author further points out that this territorial link is again maintained in the Model Law which provides in Article 1(2) that "the provision of this law, except Articles 8, 9, 35 and 36 apply only if the place of arbitration is in the territory of the State". Just as the Arbitration Act, 1996 maintains the territorial link between the place of arbitration and its law of arbitration, the law in Switzerland and England also maintain a clear link between

the seat of arbitration and the *lex arbitri*. Swiss Law states: "the provision of this chapter shall apply to any arbitration *if the seat of the arbitral tribunal is in Switzerland* and if, at the time when the arbitration agreement was concluded, at least one of the parties had neither its domicile nor its habitual residence in Switzerland.[33]

75. We are of the opinion that the omission of the word "only" in Section 2(2) of the Arbitration Act, 1996 does not detract from the territorial scope of its application as embodied in Article 1(2) of the Model Law. The article merely states that the Arbitration Law as enacted in a given state shall apply if the arbitration is in the territory of that State. The absence of the word "only" which is found in Article 1(2) of the Model Law, from Section 2(2) of the Arbitration Act, 1996 does not change the content/import of Section 2(2) as limiting the application of Part I of the Arbitration Act, 1996 to arbitrations where the place/seat is in India.

76. For the reasons stated above, we are unable to support the conclusion reached in **Bhatia International** and **Venture Global Engineering (supra)**, that Part I would also

33 See Swiss Private International Law Act, 1987, Chapter 12 Article 176 (1)

apply to arbitrations that do not take place in India.

77. India is not the only country which has dropped the word *"only"* from its National Arbitration Law. The word *"only"* is missing from the Swiss Private International Law Act, 1987 Chapter 12, Article 176 (1)(I). It is also missing in Section 2(1) of the 1996 Act (U.K.). The provision in Section 2(1) of the U.K. Act reads as follows :- "2(1) - The provisions of this Part apply where the seat of the arbitration is in England, Wales, or Northern Ireland." The aforesaid sections clearly do not provide for any exception which, in fact, are separately provided for in Section 2(2) and 2(3) of the Arbitration Act, 1996. Therefore, we are in agreement with the submission made by Mr.Aspi Chenoy that Section 2(2) is an express parliamentary declaration/ recognition that Part I of the Arbitration Act, 1996 applies to arbitration having their place/seat in India and does not apply to arbitrations seated in foreign territories.

78. We do not agree with the learned counsel for the appellants that there would be no need for the provision contained in Section 2(2) as it would merely be stating the

obvious, i.e., the Arbitration Act, 1996 applies to arbitrations having their place/seat in India. In our opinion, the provisions have to be read as limiting the applicability of Part I to arbitrations which take place in India. If Section 2(2) is construed as merely providing that Part I of the Arbitration Act, 1996 applies to India, it would be ex facie superfluous/redundant. No statutory provision is necessary to state/clarify that a law made by Parliament shall apply in India/to arbitrations in India. As submitted by Mr. Sorabjee, another fundamental principle of statutory construction is that courts will never impute redundancy or tautology to Parliament. See observations of Bhagwati, J. in **Umed** Vs. **Raj Singh**,[34] wherein it is observed as follows: "It is well settled rule of interpretation that the courts should, as far as possible, construe a statute so as to avoid tautology or superfluity." The same principle was expressed by Viscount Simon in **Hill** Vs. **William Hill (Park Lane) Ltd.**[35] in the following words:-

> "It is to be observed that though a Parliamentary enactment (like Parliamentary eloquence) is capable of saying the same thing twice over without adding

34 1975 (1) SCC 76 Para 37 at P.103

35 1949 AC 530 at P 546

> anything to what has already been said once, this repetition in an Act of Parliament is not to be assumed. When the legislature enacts a particular phrase in a statute the presumption is that it is saying something which has not been said immediately before. The Rule that a meaning should, if possible, be given to every word in the statute implies that, unless there is good reason to the contrary, the words add something which has not been said immediately before."

79. We quote the above in extenso only to demonstrate that Section 2(2) is not merely stating the obvious. It would not be a repetition of what is already stated in Section 1(2) of the Arbitration Act, 1996 which provides that "it extends to the whole of India". Since the consolidated Arbitration Act, 1996 deals with domestic, commercial and international commercial arbitrators, it was necessary to remove the uncertainty that the Arbitration Act, 1996 could also apply to arbitrations which do not take place in India. Therefore, Section 2(2) merely reinforces the limits of operation of the Arbitration Act, 1996 to India.

80. Another strong reason for rejecting the submission made by the learned counsel for the appellants is that if Part I were to be applicable to arbitrations seated in foreign countries, certain words would have to be added to Section

2(2). The section would have to provide that "this part shall apply where the place of arbitration is in India and to arbitrations having its place out of India." Apart from being contrary to the contextual intent and object of Section 2(2), such an interpretation would amount to a drastic and unwarranted rewriting/alteration of the language of Section 2(2). As very strongly advocated by Mr. Sorabjee, the provisions in the Arbitration Act, 1996 must be construed by their plain language/terms. It is not permissible for the court while construing a provision to reconstruct the provision. In other words, the Court cannot produce a new jacket, whilst ironing out the creases of the old one. In view of the aforesaid, we are unable to support the conclusions recorded by this Court as noticed earlier.

Is Section 2(2) in conflict with Sections 2(4) and 2(5) -

81. We may now take up the submission of the learned counsel that Sections 2(4) and 2(5) specifically make Part I applicable *to all arbitrations* irrespective of where they are held. This submission is again a reiteration of the conclusions recorded in **Bhatia International** at Paragraph 14C and

reiterated in Paragraphs 21 and 22. We have earlier held that Section 2(2) would not be applicable to arbitrations held outside India. We are unable to accept that there is any conflict at all between Section 2(2) on the one hand and Sections 2(4) and 2(5) on the other hand. Section 2(4) provides as under :

> "This Part except sub-section (1) of Section 40, Sections 41 and 43 shall apply to every arbitration under any other enactment for the time being in force, as if the arbitration were pursuant to an arbitration agreement and as if that other enactment were an arbitration agreement except in so far as the provisions of this Part are inconsistent with that other enactment or with any rules made thereunder."

82. It is urged by the appellants that Section 2(4) makes Part I applicable to "every arbitration" under any other enactment, thereby makes it applicable to arbitrations wherever held, whether in India or outside India. In our opinion, the submission is devoid of merit. Section 2(4) makes Part I applicable to *"every arbitration under any other enactment for the time being in force"*. Hence, there must be an enactment "for the time being in force" under which arbitration takes place. In our opinion, "any other enactment"

would in its ordinary meaning contemplate only an Act made by the Indian Parliament. By virtue of Article 245, "Parliament may make laws for the whole or any part of India". Thus it is not possible to accept that "every arbitration" would include arbitrations which take place outside India. The phrase "all arbitrations" has to be read as limited to all arbitrations that take place in India. The two sub-sections merely recognize that apart from the arbitrations which are consensual between the parties, there may be other types of arbitrations, namely, arbitrations under certain statutes like Section 7 of the Indian Telegraph Act, 1886; or bye-laws of certain Associations such as Association of Merchants, Stock Exchanges and different Chamber of Commerce. Such arbitrations would have to be regarded as covered by Part I of the Arbitration Act, 1996, except in so far as the provisions of Part I are inconsistent with the other enactment or any rules made thereunder. There seems to be no indication at all in Section 2(4) that can make Part I applicable to statutory or compulsory arbitrations, which take place outside India.

83. Similarly, the position under Section 2(5) would

remain the same. In our opinion, the provision does not admit of an interpretation that any of the provisions of Part I would have any application to arbitration which takes place outside India. Section 2(5) reads as under:-

> "Subject to the provisions of sub-section (4), and save insofar as is otherwise provided by any law for the time being in force or in any agreement in force between India and any other country or countries, this Part shall apply to all arbitrations and to all proceedings relating thereto."

84. This sub-clause has been made subject to sub-clause (4) and must be read in the backdrop of Section 2(2) of the Arbitration Act, 1996. Section 2(2) of the aforesaid Act provides that this part shall apply where the place of arbitration is in India. Section 2(5) takes this a step further and holds that this Part shall apply to all arbitrations and proceedings relating thereto, where the seat is in India [a corollary of Section 2(2)] and if it is not a statutory arbitration or subject of an agreement between India and any other country. The exception of statutory enactments was necessary in terms of the last part of sub-clause (4), which provides for non application of this Part to statutory arbitrations in case of inconsistency. Thus, barring the statutory enactments as

provided for under Section 2(4) of the Arbitration Act, 1996 and arbitrations pursuant to international agreement, all other arbitration proceedings held in India shall be subject to Part I of the said Act. Accordingly, the phrase '*all arbitrations*' in Section 2(5) means that Part I applies to all where Part I is otherwise applicable. Thus, the provision has to be read as a part of the whole chapter for its correct interpretation and not as a stand alone provision. There is no indication in Section 2(5) that it would apply to arbitrations which are not held in India.

85. In view of the aforesaid observations, we have no doubt that the provisions of Section 2(4) and Section 2(5) would not be applicable to arbitrations which are covered by Part II of the Arbitration Act, 1996, i.e. the arbitrations which take place outside India. We, therefore, see no inconsistency between Sections 2(2), 2(4) and 2(5). For the aforesaid reasons, we are unable to agree with the conclusion in **Bhatia International** that limiting the applicability of part I to arbitrations that take place in India, would make Section 2(2) in conflict with Sections 2(4) and 2(5).

Does Section 2(7) indicate that Part I applies to arbitrations held outside India?

86. We have earlier noticed the very elaborate submissions made by the learned senior counsel on the rationale, scope, and application of Section 2(7), to arbitrations having a seat outside India.

87. Having considered the aforesaid submissions, we are of the opinion that the views expressed by the learned counsel for the appellants are not supported by the provisions of the Arbitration Act, 1996. Section 2(7) of the Arbitration Act, 1996 reads thus:

> "An arbitral award made under this Part shall be considered as a domestic award."

88. In our opinion, the aforesaid provision does not, in any manner, relax the territorial principal adopted by Arbitration Act, 1996. It certainly does not introduce the concept of a delocalized arbitration into the Arbitration Act, 1996. It must be remembered that Part I of the Arbitration Act, 1996 applies not only to purely domestic arbitrations, i.e., where none of the parties are in any way "foreign" but also to "international commercial arbitrations" covered within Section

2(1)(f) held in India. The term "domestic award" can be used in two senses: one to distinguish it from "international award", and the other to distinguish it from a "foreign award". It must also be remembered that "foreign award" may well be a domestic award in the country in which it is rendered. As the whole of the Arbitration Act, 1996 is designed to give different treatments to the awards made in India and those made outside India, the distinction is necessarily to be made between the terms "domestic awards" and "foreign awards". The Scheme of the Arbitration Act, 1996 provides that Part I shall apply to both "international arbitrations" which take place in India as well as "domestic arbitrations" which would normally take place in India. This is clear from a number of provisions contained in the Arbitration Act, 1996 viz. the Preamble of the said Act; proviso and the explanation to Section 1(2); Sections 2(1)(f); 11(9), 11(12); 28(1)(a) and 28(1)(b). All the aforesaid provisions, which incorporate the term "international", deal with pre-award situation. The term "international award" does not occur in Part I at all. Therefore, it would appear that the term "domestic award" means an award made in India whether in a purely domestic

context, i.e., domestically rendered award in a domestic arbitration or in the international context, i.e., domestically rendered award in an international arbitration. Both the types of awards are liable to be challenged under Section 34 and are enforceable under Section 36 of the Arbitration Act, 1996. Therefore, it seems clear that the object of Section 2(7) is to distinguish the domestic award covered under Part I of the Arbitration Act, 1996 from the "*foreign award"* covered under Part II of the aforesaid Act; and not to distinguish the "*domestic award"* from an *"international award"* rendered in India. In other words, the provision highlights, if any thing, a clear distinction between Part I and Part II as being applicable in completely different fields and with no overlapping provisions.

89. That Part I and Part II are exclusive of each other is evident also from the definitions section in Part I and Part II. Definitions contained in Section 2(i)(a) to (h) are limited to Part I. The opening line which provides "In this part, unless the context otherwise requires……", makes this perfectly clear. Similarly, Section 44 gives the definition of a foreign award for the purposes of Part II (Enforcement of Certain Foreign

Awards); Chapter I (New York Convention Awards). Further, Section 53 gives the interpretation of a foreign award for the purposes of Part II (Enforcement of Certain Foreign Awards); Chapter II (Geneva Convention Awards). From the aforesaid, the intention of the Parliament is clear that there shall be no overlapping between Part I and Part II of the Arbitration Act, 1996. The two parts are mutually exclusive of each other. To accept the submissions made by the learned counsel for the appellants would be to convert the "foreign award" which falls within Section 44, into a domestic award by virtue of the provisions contained under Section 2(7) even if the arbitration takes place outside India or is a foreign seated arbitration, if the law governing the arbitration agreement is by choice of the parties stated to be the Arbitration Act, 1996. This, in our opinion, was not the intention of the Parliament. The territoriality principle of the Arbitration Act, 1996, precludes Part I from being applicable to a foreign seated arbitration, even if the agreement purports to provide that the Arbitration proceedings will be governed by the Arbitration Act, 1996.

90. The additional submission of Mr. Sorabjee is that Section 9-B of the 1961 Act, which was in negative terms, has

been re-enacted as Section 2(7) of the Arbitration Act, 1996 in positive terms. Section 9-B of the 1961 Act, was as under:

> "9. Saving – Nothing in this Act shall –
> .....
> (b) apply to any award made on an arbitration agreement governed by the law of India."

91. We are of the opinion that the Section has been intentionally deleted, whereas many other provisions of the 1961 Act have been retained in the Arbitration Act, 1996. If the provision were to be retained, it would have been placed in Part II of the Arbitration Act, 1996. In our opinion, there is no link between Section 2(7) of the Arbitration Act, 1996, with the deleted Section 9-B of the 1961 Act. It was by virtue of the aforesaid provision that the judgments in **Singer Company & Ors. (supra)** and **ONGC v. Western Company of North America (supra)** were rendered. In both the cases the foreign awards made outside India were set aside, under the 1940 Act. By deletion of Section 9-B of the 1961 Act, the judgments have been rendered irrelevant under the Arbitration Act, 1996. Having removed the mischief created by the aforesaid provision, it cannot be the intention of the Parliament to reintroduce it, in a positive form as Section 2(7) of the Arbitration Act, 1996. We, therefore, see no substance in the

additional submission of Mr. Sorabjee.

92. We agree with Mr. Salve that Part I *only* applies when the seat of arbitration is in India, irrespective of the kind of arbitration. Section 2(7) does not indicate that Part I is applicable to arbitrations held outside India.

93. We are, therefore, of the opinion that Section 2(7) does not alter the proposition that Part I applies only where the "seat" or "place" of the arbitration is in India.

94. It appears to us that provision in Section 2(7) was also necessary to foreclose a rare but possible scenario (as canvassed by Mr. Gopal Subramanium) where two foreigners who arbitrate in India, but under a Foreign Arbitration Act, could claim that the resulting award would be a "non-domestic" award. In such a case, a claim could be made to enforce the award in India, even though the seat of arbitration is also in India. This curious result has occurred in some cases in other jurisdictions, e.g., U.S.A. In the case of **Bergesen** Vs. **Joseph Muller Corporation**[36], the Court held an award made in the State of New York between two foreign parties is to be considered as a non-domestic award within the meaning of the New York Convention and its implementing

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legislation. Section 2(7), in our opinion, is enacted to reinforce the territorial criterion by providing that, when two foreigners arbitrate in India, under a Foreign Arbitration Act, the provisions of Part I *will* apply. Indian Courts being the supervisory Courts, will exercise control and regulate the arbitration proceedings, which will produce a "*domestically rendered international commercial award".* It would be a "foreign award" for the purposes of enforcement in a country other than India. We, therefore, have no hesitation in rejecting the submissions made by the learned senior counsel for the appellants, being devoid of merit.

Party Autonomy

95. Learned counsel for the appellants have submitted that Section 2(1)(e), Section 20 and Section 28 read with Section 45 and Section 48(1)(e) make it clear that Part I is not limited only to arbitrations which take place in India. These provisions indicate that Arbitration Act, 1996 is *subject matter centric* and not exclusively *seat centric*. Therefore, "*seat*" is not the "*centre of gravity"* so far as the Arbitration Act, 1996 is concerned. We are of the considered opinion that the aforesaid

provisions have to be interpreted by keeping the principle of territoriality at the forefront. We have earlier observed that Section 2(2) does not make Part I applicable to arbitrations seated or held outside India. In view of the expression used in Section 2(2), the maxim *expressum facit cessare tacitum*, would not permit by interpretation to hold that Part I would also apply to arbitrations held outside the territory of India. The expression *"this Part shall apply where the place of arbitration is in India"* necessarily excludes application of Part I to arbitration seated or held outside India. It appears to us that neither of the provisions relied upon by the learned counsel for the appellants would make any section of Part I applicable to arbitration seated outside India. It will be apposite now to consider each of the aforesaid provisions in turn. Section 2(1)(e) of the Arbitration Act, 1996 reads as under:

> "2. Definitions
>
> (1) In this Part, unless the context otherwise requires –
> .....
>
> (e) "Court" means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil

> jurisdiction, having jurisdiction to decide the questions forming the subject matter of the arbitration if the same had been the subject matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes."

96. We 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 nugatory. In our view, the legislature has intentionally given jurisdiction to two courts i.e. the court which would have jurisdiction where the 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 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 17 of the Arbitration Act, 1996, the appeal against such 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.

97. The definition of Section 2(1)(e) includes *"subject matter of the arbitration"* to give jurisdiction to the courts

where the arbitration takes place, which otherwise would not exist. On the other hand, Section 47 which is in Part II of the Arbitration Act, 1996 dealing with enforcement of certain foreign awards has defined the term "*court*" as a court having jurisdiction *over the subject-matter of the award.* This has a clear reference to a court within whose jurisdiction the asset/person is located, against which/whom the enforcement of the international arbitral award is sought. The provisions contained in Section 2(1)(e) being purely jurisdictional in nature can have no relevance to the question whether Part I applies to arbitrations which take place outside India.

98. We now come to Section 20, which is as under:-

> "20. Place of arbitration –
>
> (1) The parties are free to agree on the place of arbitration.
>
> (2) Failing any agreement referred to in sub-section (1), the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.
>
> (3) Notwithstanding sub-section (1) or sub-section (2), the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, good or other property."

A plain reading of Section 20 leaves no room for doubt that where the place of arbitration is in India, the parties are free to agree to any "place" or "seat" within India, be it Delhi, Mumbai etc. In the absence of the parties' agreement thereto, Section 20(2) authorizes the tribunal to determine the place/seat of such arbitration. Section 20(3) enables the tribunal to meet at any place for conducting hearings at a place of convenience in matters such as consultations among its members for hearing witnesses, experts or the parties.

99. The fixation of the most convenient "venue" is taken care of by Section 20(3). Section 20, has to be read in the context of Section 2(2), which places a threshold limitation on the applicability of Part I, where the place of arbitration is in India. Therefore, Section 20 would also not support the submission of the extra-territorial applicability of Part I, as canvassed by the learned counsel for the appellants, so far as purely domestic arbitration is concerned.

100. True, that in an international commercial arbitration, having a seat in India, hearings may be necessitated outside

India. In such circumstances, the hearing of the arbitration will be conducted at the venue fixed by the parties, but it would not have the effect of changing the seat of arbitration which would remain in India. The legal position in this regard is summed up by Redfern and Hunter, The Law and Practice of International Commercial Arbitration (1986) at Page 69 in the following passage under the heading "The Place of Arbitration":-

> "The preceding discussion has been on the basis that there is only one "place" of arbitration. This will be the place chosen by or on behalf of the parties; and it will be designated in the arbitration agreement or the terms of the reference or the minutes of proceedings or in some other way as the place or "seat" of the arbitration. This does not mean, however, that the arbitral tribunal must hold all its meetings or hearings at the place of arbitration. International commercial arbitration often involves people of many different nationalities, from many different countries. In these circumstances, it is by no means unusual for an arbitral tribunal to hold meetings – or even hearings – in a place other than the designated place of arbitration, either for its own convenience or for the convenience of the parties or their witnesses... It may be more convenient for an arbitral tribunal sitting in one country to conduct a hearing in another country - for instance, for the purpose of taking evidence..... In such circumstances, each move of the arbitral tribunal does not of itself mean that the seat of arbitration changes. The seat of the arbitration remains the place initially agreed by or on behalf of the parties."

This, in our view, is the correct depiction of the practical considerations and the distinction between "seat" (Section 20(1) and 20(2)) and "venue" (Section 20(3)). We may point out here that the distinction between "seat" and "venue" would be quite crucial in the event, the arbitration agreement designates a foreign country as the "seat"/"place" of the arbitration and also select the Arbitration Act, 1996 as the curial law/law governing the arbitration proceedings. It would be a matter of construction of the individual agreement to decide whether:

(i) The designated foreign "seat" would be read as in fact only providing for a "venue" / "place" where the hearings would be held, in view of the choice of Arbitration Act, 1996 as being the *curial law* – OR

(ii) Whether the specific designation of a foreign seat, necessarily carrying with it the choice of that country's Arbitration / *curial law*, would prevail over and subsume the conflicting selection choice by the parties of the Arbitration Act, 1996.

ONLY if the agreement of the parties is construed to provide for the "seat" / "place" of Arbitration being in India – would Part I of the Arbitration Act, 1996 be applicable. If the agreement is held to provide for a "seat" / "place" outside India, Part I would be inapplicable to the extent inconsistent with the arbitration law of the seat, even if the agreement purports to provide that the Arbitration Act, 1996 shall govern the arbitration proceedings.

101. How complex the situation can become can be best demonstrated by looking at some of the prominent decisions on the factors to be taken into consideration in construing the relevant provisions of the contract/arbitration clause**.**

102. In **Naviera Amazonica Peruana S.A. (supra),** the Court of Appeal, in England considered the agreement which contained a clause providing for the jurisdiction of Courts in Lima Peru in the event of judicial dispute and at the same time contained a clause providing that the arbitration would be governed by English Law and the procedural law of Arbitration

shall be English Law.

103. The Court of Appeal summarized the State of the jurisprudence on this topic. Thereafter, the conclusions which arose from the material were summarized as follows:-

> "All 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)."

104. It is observed that the problem about all these formulations, including the third, is that they elide the distinction between the legal localization of an arbitration on the one hand and the appropriate or convenient geographical locality for hearings of the arbitration on the other hand.

105. On the facts of the case, it was observed that since there was no contest on Law 1 and Law 2, the entire issue turned on Law 3, "The law governing the conduct of the arbitration. This is usually referred to as the *curial or procedural law, or the lex fori."* Thereafter, the Court

approvingly quoted the following observation from Dicey & Morris on the Conflict of Laws (11th Edition): "English Law does not recognize the concept of a de-localised" arbitration or of "arbitral procedures floating in the transnational firmament, unconnected with any municipal system of law". It is further held that "accordingly every arbitration must have a "seat" or "locus arbitri" or "forum" which subjects its procedural rules to the municipal law which is there in force". The Court thereafter culls out the following principle "Where the parties have failed to choose the law governing the arbitration proceedings, those proceedings must be considered, at any rate prima facie, as being governed by the law of the country in which the arbitration is held, on the ground that it is the country most closely connected with the proceedings". The aforesaid classic statement of the Conflict of Law Rules as quoted in Dicey & Morris on the Conflict of Laws (11th Edition) Volume 1, was approved by the House of Lords in **James Miller & Partners** Vs. **Whitworth Street Estates (Manchester) Ltd.**[37]. Mr. Justice Mustill in the case of **Black Clawson International Ltd.** Vs. **PapierIrke Waldhof-Aschaf-**

37 [1970] 1 Lloyd's Rep. 269; [1970] A.C.583

fenburg A.G.[38], a little later characterized the same proposition as "the law of the place where the reference is conducted, the lex fori". The Court also recognized the proposition that "there is equally no reason in theory which precludes parties to agree that an arbitration shall be held at a place or in country X but subject to the procedural laws of Y". But it points out that in reality parties would hardly make such a decision as it would create enormous unnecessary complexities. Finally it is pointed out that it is necessary *not to confuse* the legal "seat" of an arbitration with the geographically convenient place or places for holding hearings.

106. On examination of the facts in that case, the Court of Appeal observed that there is nothing surprising in concluding that these parties intended that any dispute under this policy, should be arbitrated in London. But it would always be open to the Arbitral Tribunal to hold hearings in Lima if this were thought to be convenient, even though the seat or forum of the arbitration would remain in London.

107. A similar situation was considered by the High Court

38 [1981] 2 Lloyd's Rep. 446 at P. 453

of Justice Queen's Bench Division Technology and Construction Court in **Braes of Doune Wind Farm (Scotland) Limited v Alfred McAlpine Business Services Limited** (supra). In this case the Court considered two applications relating to the First Award of an arbitrator. The award related to an EPC (Engineering, Procurement and Construction) Contract dated 4th November, 2005 ("the EPC Contract") between the Claimant ("the Employer") and the Defendant ("the Contractor") whereby the Contractor undertook to carry out works in connection with the provision of 36 wind turbine generators (the "WTGs") at a site some 18 kilometres from Stirling in Scotland. This award dealt with enforceability of the clauses of the EPC Contract which provided for liquidated damages for delay. The claimant applied for leave to appeal against this award upon a question of law whilst the Defendant sought, in effect, a declaration that the Court had no jurisdiction to entertain such an application and for leave to enforce the award. The Court considered the issue of jurisdiction which arose out of application of Section 2 of the (English) Arbitration Act, 1996 which provides that - "(1) The provisions of this Part apply where the seat of the arbitration

is in England and Wales or Northern Ireland." The Court notices the singular importance of determining the location of "juridical seat" in terms of Section 3, for the purposes of Section 2, in the following words:-

> "I must determine what the parties agreed was the "seat" of the arbitration for the purposes of Section 2 of the Arbitration Act 1996. This means by Section 3 what the parties agreed was the "juridical" seat. The word "juridical" is not an irrelevant word or a word to be ignored in ascertaining what the "seat" is. It means and connotes the administration of justice so far as the arbitration is concerned. It implies that there must be a country whose job it is to administer, control or decide what control there is to be over an arbitration."

108. Thus, it would be evident that if the "juridical seat" of the arbitration was in Scotland, the English Courts would have no jurisdiction to entertain an application for leave to appeal. The Contractor argued that the seat of the arbitration was Scotland whilst the Employer argued that it was England. There were to be two contractors involved with the project.

109. The material Clauses of the EPC Contract were:

1.4.1. The Contract shall be governed by and construed in accordance with the laws of England and Wales and, subject to Clause 20.2 (Dispute Resolution), the Parties agree that the courts of England and Wales have exclusive

jurisdiction to settle any dispute arising out of or in connection with the contract.

(a) … any dispute or difference between the Parties to this Agreement arising out of or in connection with this Agreement shall be referred to arbitration.

(b) Any reference to arbitration shall be to a single arbitrator… and conducted in accordance with the Construction Industry Model Arbitration Rules February 1998 Edition, subject to this Clause (Arbitration Procedure)…

(c) This arbitration agreement is subject to English Law and the *seat* of the arbitration shall be Glasgow, Scotland. Any such reference to arbitration shall be deemed to be a reference to arbitration within the meaning of the Arbitration Act, 1996 or any statutory re-enactment."

110. The Arbitration was to be conducted under the Arbitration Rules known colloquially as the "CIMAR Rules". Rule 1.1 of the Rules provided that:

> "These Rules are to be read consistently with the Arbitration Act 1996 (the Act), with common expressions having the same meaning."

Rule 1.6 applied:

(a) a single arbitrator is to be appointed, and

(b) the seat of the arbitration is in England and Wales or Northern Ireland.

111. The court was informed by the parties in arguments that Scottish Court's powers of control or intervention would be, at the very least, seriously circumscribed by the parties' agreement in terms as set out in paragraph 6 of the judgment. It was further indicated by the counsel that the Scottish Court's powers of intervention might well be limited to cases involving such extreme circumstances as the dishonest procurement of an award.

112. In construing the EPC, the court relied upon the principles stated by the Court of Appeal in **Naviera Amazonica Peruana SA (supra)**.

113. Upon consideration of the entire material, the Court formed the view that it does have jurisdiction to entertain an application by either party to the contract in question under Section 69 of the (English) Arbitration Act, 1996. The court gave the following reasons for the decision:–

(a) One needs to consider what, in substance, the parties agreed was the law of the country which would

juridically control the arbitration.

(b) I attach particular importance to Clause 1.4.1. The parties agreed that essentially the English (and Welsh) Courts have "exclusive jurisdiction" to settle disputes. Although this is "subject to" arbitration, it must and does mean something other than being mere verbiage. It is a jurisdiction over disputes and not simply a court in which a foreign award may be enforced. If it is in arbitration alone that disputes are to be settled and the English Courts have no residual involvement in that process, this part of Clause 1.4.1 is meaningless in practice. The use of the word "jurisdiction" suggests some form of control.

(c) The second part of Clause 1.4.1 has some real meaning if the parties were agreeing by it that, although the agreed disputes resolution process is arbitration, the parties agree that the English Court retains such jurisdiction to address those disputes as the law of England and Wales permits. The Arbitration Act, 1996 permits and requires the Court to entertain applications under Section 69 for leave to appeal against awards

which address disputes which have been referred to arbitration. By allowing such applications and then addressing the relevant questions of law, the Court will settle such disputes; even if the application is refused, the court will be applying its jurisdiction under the Arbitration Act, 1996 and providing resolution in relation to such disputes.

(d) This reading of Clause 1.4.1 is consistent with Clause 20.2.2 (c) which confirms that the arbitration agreement is subject to English Law and that the "reference" is "deemed to be a reference to arbitration within the meaning of the Arbitration Act, 1996." This latter expression is extremely odd unless the parties were agreeing that any reference to arbitration was to be treated as a reference to which the Arbitration Act, 1996 was to apply. There is no definition in the Arbitration Act, 1996 of a "reference to arbitration", which is not a statutory term of art. The parties presumably meant something in using the expression and the most obvious meaning is that the parties were agreeing that the Arbitration Act, 1996 should apply to the reference

without qualification.

(e) Looked at in this light, the parties' express agreement that the "seat" of arbitration was to be Glasgow, Scotland must relate to the place in which the parties agreed that the hearings should take place. However, by all the other references the parties were agreeing that the curial law or law which governed the arbitral proceedings establish that, prima facie and in the absence of agreement otherwise, the selection of a place or seat for an arbitration will determine what the curial law or "lex fori" or "lex arbitri" will be, we consider that, where in substance the parties agree that the laws of one country will govern and control a given arbitration, the place where the arbitration is to be heard will not dictate what the governing or controlling law will be.

(f) In the context of this particular case, the fact that, as both parties seemed to accept in front of me, the Scottish Courts would have no real control or interest in the arbitral proceedings other than in a criminal context, suggests that they can not have intended that

the arbitral proceedings were to be conducted as an effectively "delocalized" arbitration or in a "transnational firmament", to borrow Lord Justice Kerr's words in the **Naviera Amazonica** case.

(g) The CIMAR Rules are not inconsistent with my view. Their constant references to the Arbitration Act, 1996 suggest that the parties at least envisaged the possibility that the Courts of England and Wales might play some part in policing any arbitration. For instance, Rule 11.5 envisages something called "the Court" becoming involved in securing compliance with a peremptory order of the arbitrator. That would have to be the English Court, in practice."

114. These observations clearly demonstrate the detailed examination which is required to be undertaken by the court to discern from the agreement and the surrounding circumstances the *intention* of the parties as to whether a particular place mentioned refers to the "*venue*" or "*seat*" of the arbitration. In that case, the Court, upon consideration of the entire material, concluded that Glasgow was a reference to the "*venue"* and the "*seat*" of the arbitration was held to be in

England. Therefore, there was no supplanting of the Scottish Law by the English Law, as both the seat under Section 2 and the "juridical seat" under Section 3, were held to be in England. Glasgow being only the venue for holding the hearings of the arbitration proceedings. The Court rather reiterated the principle that the selection of a place or seat for an arbitration will determine what the "*curial law*" or "*lex fori*" or "*lex arbitri*" will be. It was further concluded that where in substance the parties agreed that the laws of one country will govern and control a given arbitration, the place where the arbitration is to be *heard* will not dictate what the governing law or controlling law will be. In view of the above, we are of the opinion that the reliance placed upon this judgment by Mr.Sundaram is wholly misplaced.

115. The aforesaid ratio has been followed in **Shashoua & Ors. (supra)**. In this case, the Court was concerned with the construction of the shareholders' agreement between the parties, which provided that "the venue of the arbitration shall be London, United Kingdom". Whilst providing that the arbitration proceedings should be conducted in English in accordance with ICC Rules and that the governing law of the

shareholders' agreement itself would be the law of India. The claimants made an application to the High Court in New Delhi seeking interim measures of protection under Section 9 of the Arbitration Act, 1996, prior to the institution of arbitration proceedings. Following the commencement of the arbitration, the defendant and the joint venture company raised a challenge to the jurisdiction of the arbitral tribunal, which the panel heard as a preliminary issue. The tribunal rejected the jurisdictional objection. The tribunal then made a cost award ordering the defendant to pay $140,000 and £172,373.47. The English Court gave leave to the claimant to enforce the costs award as a judgment. The defendant applied to the High Court of Delhi under Section 34(2)(iv) of the Arbitration Act, 1996 to set aside the costs award. The claimant had obtained a charging order, which had been made final, over the defendant's property in the UK. The defendant applied to the Delhi High Court for an order directing the claimants not to take any action to execute the charging order, pending the final disposal of the Section 34 petition in Delhi seeking to set aside the costs award. The defendant had sought unsuccessfully to challenge the costs award in the Commercial

Court under Section 68 and Section 69 of the 1996 Act (U.K.) and to set aside the order giving leave to enforce the award. Examining the fact situation in the case, the Court observed as follows:-

> "The basis for the court's grant of an anti-suit injunction of the kind sought depended upon the seat of the arbitration. *An agreement as to the seat of an arbitration brought in the law of that country as the curial law and was analogous to an exclusive jurisdiction clause.* Not only was there agreement to the curial law of the seat, but also to the Courts of the seat having supervisory jurisdiction over the arbitration, so that, by agreeing to the seat, *the parties agreed that any challenge to an interim or final award was to be made only in the courts of the place designated as the seat of the arbitration.*
>
> Although, 'venue' was not synonymous with 'seat', in an arbitration clause which provided for arbitration to be conducted in accordance with the Rules of the ICC in Paris (a supranational body of rules), a provision that 'the venue of arbitration shall be London, United Kingdom' did amount to the designation of a juridical seat……."

In Paragraph 54, it is further observed as follows:-

> "There was a little debate about the possibility of the issues relating to the alleged submission by the claimants to the jurisdiction of the High Court of Delhi being heard by that court, because it was best fitted to determine such issues under Indian Law. Whilst I found this idea attractive initially, we are persuaded that it would be wrong in principle to allow this and that *it would create undue practical problems in any event. On the basis of what I have already decided, England is the seat of the arbitration and since this carries with it something*

akin to an exclusive jurisdiction clause, as a matter of principle the foreign court should not decide matters which are for this court to decide in the context of an anti-suit injunction."[emphasis supplied]

116. In making the aforesaid observations, the Court relied on judgments of the Court of Appeal in **C** Vs. **D**[39]**.** Here the Court of Appeal in England was examining an appeal by the defendant insurer from the judgment of Cooke, J. granting an anti-suit injunction preventing it from challenging an arbitration award in the U.S. Courts. The insurance policy provided "any dispute arising under this policy shall be finally and fully determined in London, England under the provisions of the English Arbitration Act, 1950 as amended". However, it was further provided that "this policy shall be governed by and construed in accordance with the internal laws of the State of New York....". A partial award was made in favour of the claimants. It was agreed that this partial award is, in English Law terms, final as to what it decides. The defendant sought the tribunal's withdrawal of its findings. The defendant also intimated its intention to apply to a Federal Court applying US Federal Arbitration Law governing the enforcement of arbitral

39 [2007] EWCA Civ 1282 (CA)

award, which was said to permit "vacatur" of an award where arbitrators have manifestly disregarded the law. It was in consequence of such intimation that the claimant sought and obtained an interim anti-suit injunction. The Judge held that parties had agreed that any proceedings seeking to attack or set aside the partial award would only be those permitted by English Law. It was not, therefore, permissible for the defendant to bring any proceedings in New York or elsewhere to attack the partial award. The Judge rejected the arguments to the effect that the choice of the law of New York as the proper law of the contract amounted to an agreement that the law of England should not apply to proceedings post award. The Judge also rejected a further argument that the separate agreement to arbitrate contained in the Condition V(o) of the policy was itself governed by New York Law so that proceedings could be instituted in New York. The Judge granted the claimant a final injunction. The Court of Appeal noticed the submission on behalf of the defendant as follows:-

> "**14.** The main submission of Mr Hirst QC for the defendant insurer was that the judge had been wrong to hold that the arbitration agreement itself was governed by English law merely because the seat of the arbitration was London. He argued that

the arbitration agreement itself was silent as to its proper law but that its proper law should follow the proper law of the contract as a whole, namely New York law, rather than follow from the law of the seat of the arbitration namely England. The fact that the arbitration itself was governed by English procedural law did not mean that it followed that the arbitration agreement itself had to be governed by English law. The proper law of the arbitration agreement was that law with which the agreement had the most close and real connection; if the insurance policy was governed by New York law, the law with which the arbitration agreement had its closest and most real connection was the law of New York. It would then follow that, if New York law permitted a challenge for manifest disregard of the law, the court in England should not enjoin such a challenge."

The Court of Appeal held:-

"***16.*** *I shall deal with Mr Hirst's arguments in due course but, in my judgment, they fail to grapple with the central point at issue which is whether or not, by choosing London as the seat of the arbitration, the parties must be taken to have agreed that proceedings on the award should be only those permitted by English law.* In my view they must be taken to have so agreed for the reasons given by the judge. The whole purpose of the balance achieved by the Bermuda Form (English arbitration but applying New York law to issues arising under the policy) is that judicial remedies in respect of the award should be those permitted by English law and only those so permitted. Mr Hirst could not say (and did not say) that English judicial remedies for lack of jurisdiction on procedural irregularities under sections 67 and 68 of the Arbitration Act, 1996 Were not permitted; he was reduced to saying that New York judicial remedies were also permitted. That, however, would be a recipe for

> litigation and (what is worse) confusion which cannot have been intended by the parties. No doubt New York law has its own judicial remedies for want of jurisdiction and serious irregularity but it could scarcely be supposed that a party aggrieved by one part of an award could proceed in one jurisdiction and a party aggrieved by another part of an award could proceed in another jurisdiction. Similarly, in the case of a single complaint about an award, it could not be supposed that the aggrieved party could complain in one jurisdiction and the satisfied party be entitled to ask the other jurisdiction to declare its satisfaction with the award. There would be a serious risk of parties rushing to get the first judgment or of conflicting decisions which the parties cannot have contemplated.
>
> ***17.*** *It follows from this that a choice of seat for the arbitration must be a choice of forum for remedies seeking to attack the award".....*

117. On the facts of the case, the Court held that the seat of the arbitration was in England and accordingly entertained the challenge to the award. Again in **Union of India** Vs. **McDonnell Douglas Corp. (supra)**, the proposition laid down in **Naviera Amazonica Peruana S.A. (supra)** was reiterated. In this case, the agreement provided that:-

> "The arbitration shall be conducted in accordance with the procedure provided in the Indian Arbitration Act of 1940 or any reenactment or modification thereof. The arbitration shall be conducted in the English language. The award of the Arbitrators shall be made by majority decision and shall be final and binding on the Parties hereto.

> The seat of the arbitration proceedings shall be London, United Kingdom."

118. Construing the aforesaid clause, the Court held as follows:-

> "On the contrary, for the reasons given, it seems to me that by their agreement the parties have chosen English law as the law to govern their arbitration proceedings, while contractually importing from the Indian Act those provisions of that Act which are concerned with the internal conduct of their arbitration and which are not inconsistent with the choice of English arbitral procedural law."

119. The same question was again considered by the High Court of Justice, Queen's Bench Division, Commercial Court (England) in **Sulamerica CIA Nacional de Seguros SA v. Enesa Engenharia SA – Enesa.**[40] The Court noticed that the issue in this case depends upon the weight to be given to the provision in Condition 12 of the Insurance policy that "the seat of the arbitration shall be London, England." It was observed that this necessarily carried with it the English Court's supervisory jurisdiction over the arbitration process. It was observed that "this follows from the express terms of the Arbitration Act, 1996 and, in particular, the provisions of Section 2 which provide that Part I of the Arbitration Act, 1996

40 [2012 WL 14764].

applies where the seat of the arbitration is in England and Wales or Northern Ireland. This immediately establishes a strong connection between the arbitration agreement itself and the law of England. It is for this reason that recent authorities have laid stress upon the locations of the seat of the arbitration as an important factor in determining the proper law of the arbitration agreement." The court thereafter makes a reference to the observations made in the case of **C. vs. D** by the High Court as well as the Court of Appeal. In Paragraph 12, the observations made have particular relevance which are as under:

> "In the Court of Appeal, Longmore LJ, with whom the other two Lord Justices agreed, decided (again obiter) that, where there was no express choice of law for the arbitration agreement, the law with which that agreement had its closest and most real connection was more likely to be the law of the seat of arbitration than the law of the underlying contract. He referred to Mustill J. (as he then was) in Black Clawsen International Limited v Papierwerke Waldhof-Aschaffenburg AG [1981] 2 LLR 446 as saying that it would be a rare case in which the law of the arbitration agreement was not the same as the law of the place or seat of the arbitration. Longmore LJ also referred to the speech of Lord Mustill (as he had then become) in Chanel Tunnel Group Limited vs. Balfour Beatty Construction Limited [1993] 1 LLR 291 and concluded that the Law Lord was saying that, although it was exceptional for the proper law of the underlying contract to be different from the proper

> law of the arbitration agreement, it was less exceptional (or more common) for the proper law of that underlying contract to be different from the curial law, the law of the seat of the arbitration. He was not expressing any view on the frequency or otherwise of the law of the arbitration agreement differing from the law of the seat of the arbitration. Longmore LJ agreed with Mustill J's earlier dictum that it would be rare for the law of the separable arbitration agreement to be different from the law of the seat of the arbitration. The reason was "that an agreement to arbitrate will normally have a closer and more real connection with the place where the parties have chose to arbitrate, than with the place of the law of the underlying contract, in cases where the parties have deliberately chosen to arbitrate, in one place, disputes which have arisen under a contract governed by the law of another place".

120. Upon consideration of the entire matter, it was observed that - "In these circumstances it is clear to me that the law with which the agreement to arbitrate has its closest and most real connection is the law of the seat of arbitration, namely, the law of England". (Para 14). It was thereafter concluded by the High Court that English Law is the proper law of the agreement to arbitrate. (Para 15)

121. The legal position that emerges from a conspectus of all the decisions, seems to be, that the choice of another country as the seat of arbitration inevitably imports an acceptance that the law of that country relating to the conduct and supervision of arbitrations will apply to the proceedings.

122. It would, therefore, follow that if the arbitration agreement is found or held to provide for a seat / place of arbitration outside India, then the provision that the Arbitration Act, 1996 would govern the arbitration proceedings, would not make Part I of the Arbitration Act, 1996 applicable or enable Indian Courts to exercise supervisory jurisdiction over the arbitration or the award. It would only mean that the parties have contractually imported from the Arbitration Act, 1996, those provisions which are concerned with the internal conduct of their arbitration and which are not inconsistent with the mandatory provisions of the *English Procedural Law/Curial Law*. This necessarily follows from the fact that Part I applies only to arbitrations having their seat / place in India.

Section 28 -

123. It was submitted by the learned counsel for the appellants that Section 28 is another indication of the intention of the Parliament that Part I of the Arbitration Act, 1996 was not confined to arbitrations which take place in

India. We are unable to accept the submissions made by the learned counsel for the parties. As the heading of the Section 28 indicates, its only purpose is to identify the rules that would be applicable to "substance of dispute". In other words, it deals with the applicable conflict of law rules. This section makes a distinction between purely domestic arbitrations and international commercial arbitrations, with a seat in India. Section 28(1)(a) makes it clear that in an arbitration under Part I to which Section 2(1)(f) does not apply, there is no choice but for the Tribunal to decide "the dispute" by applying the Indian "substantive law applicable to the contract". This is clearly to ensure that two or more Indian parties do not circumvent the substantive Indian law, by resorting to arbitrations. The provision would have an overriding effect over any other contrary provision in such contract. On the other hand, where an arbitration under Part I is an international commercial arbitration within Section 2(1)(f), the parties would be free to agree to any other "substantive law" and if not so agreed, the "substantive law" applicable would be as determined by the Tribunal. The section merely shows that the legislature has segregated the domestic and international

arbitration. Therefore, to suit India, conflict of law rules have been suitably modified, where the arbitration is in India. This will not apply where the seat is outside India. In that event, the conflict of laws rules of the country in which the arbitration takes place would have to be applied. Therefore, in our opinion, the emphasis placed on the expression "where the place of arbitration is situated in India", by the learned senior counsel for the appellants, is not indicative of the fact that the intention of Parliament was to give an extra-territorial operation to Part I of the Arbitration Act, 1996.

Part II

124. It was next submitted by the counsel for the appellants that even some of the provisions contained in Part II would indicate that Part I of the Arbitration Act, 1996 would not be limited to the arbitrations which take place in India. It was pointed out that even though Part II deals specifically with recognition and enforcement of certain foreign awards yet provision is made for annulment of the award by

two Courts, i.e., Courts of the country in which the award was made or the Courts of the country under the law of which the award was made. This, according to the learned counsel, recognizes the concurrent jurisdictions of Courts in two countries to set aside the award. They rely on Section 48(1)(e) of the Arbitration Act, 1996, which corresponds to Article V(1)(e) of the New York Convention. Mr. Sorabjee has emphasised that both these expressions must necessarily be given effect to and no part of the Act or section can be disregarded by describing the same as a "fossil". This is in reply to the submission made by Mr. Salve on the basis of the history of the inclusion of the term "under the law of which" in Article V(1)(e). Mr. Sorabjee has emphasised that the word "under the law of which" were specifically inserted in view of the Geneva Convention, which limited the jurisdiction to only one Court to set aside the award namely "the country in which the award was made." He, therefore, submits that this specific intention must be given effect to. Not giving effect to the words "under the law of which the award was made", will allow many awards to go untested. At this stage, Mr. Sorabjee had relied on **Reliance Industries Ltd. (supra)**. We must notice here that

Mr. Sundaram in his submissions has not gone so far as Mr. Sorabjee. According to Mr. Sundaram, the jurisdiction of a domestic Court over an arbitration is neither conferred by the New York Convention, nor under Part II, since Part II merely deals with circumstances under which the enforcing court may or may not refuse to enforce the award. That circumstance includes annulment of proceedings in a competent court, i.e., the Court in the country where the arbitration is held or the Court having jurisdiction in the country under the laws of which the arbitral disputes have been conducted. According to Mr. Sundaram, providing two such situs for the purposes of annulment does not ipso facto amount to conferring of jurisdiction to annul, on any domestic Court. The provision only provides that if the annulment proceedings are before such Courts, the award may not be enforced. Therefore, to see if an arbitral award can be annulled by the Court of the country, one has to look at the jurisdiction of such Courts under the domestic law. The relevance of New York Convention and Article V(1)(e) ends there, with merely recognizing possibility of two Courts having jurisdiction to annul an award. Mr. Subramanium

emphasised that provisions contained in Part II can not be said to be a complete code as it necessarily makes use of the provisions of Part I. Since Part I prescribes the entire procedure for the conduct of an arbitration and Part II is only to give recognition to certain foreign awards, the two parts have to be read harmoniously in order to make the Indian Arbitration Law a complete code. He submits that Part I can not be read separately from Part II as certain provisions of Part I, which are necessary for arbitrations are not covered by Part II. He gives an example of the provision contained in Section 45, which empowers the term "judicial authority" to refer parties to arbitration when seized of an action in a matter, in respect of which parties have made an agreement as referred to in Section 44. The aforesaid provision contains a non-obstante clause. This clearly indicates that it is contemplated by the legislature that provisions of Part I would apply to matters covered by Part II. He, therefore, points out that if Part I were to apply only to arbitrations that take place in India, then Indian Courts would not be able to grant any interim relief under Section 9 to arbitrations which take place outside India. He also points out that there are a number of

other provisions where Indian Courts would render assistance in arbitrations taking place outside India. Learned senior counsel has also pointed out the necessity to read Sections 34 and 48 of the Arbitration Act, 1996 harmoniously. He points out that barring Section 34, which involves the challenge to an award, the other provisions in Part I and Part II are facilitative in character.

125. We are unable to agree with the submission of the learned senior counsel that there is any overlapping of the provisions in Part I and Part II; nor are the provisions in Part II supplementary to Part I. Rather there is complete segregation between the two parts.

126. Generally speaking, regulation of arbitration consists of four steps (a) the *commencement* of arbitration; (b) the *conduct* of arbitration; (c) the *challenge* to the award; and (d) the *recognition or enforcement* of the award. In our opinion, the aforesaid delineation is self evident in Part I and Part II of the Arbitration Act, 1996. Part I of the Arbitration Act, 1996 regulates arbitrations at all the four stages. Part II, however,

regulates arbitration only in respect of commencement and recognition or enforcement of the award.

127. In Part I, Section *8* regulates the *commencement* of arbitration in India, Sections *3, 4, 5, 6, 10 to 26, 28 to 33* regulate the *conduct* of arbitration, Section 34 regulates the *challenge* to the award, Sections 35 and 36 regulate the *recognition* and *enforcement* of the award. Sections 1, 2, 7, 9, 27, 37, 38 to 43 are ancillary provisions that either support the arbitral process or are structurally necessary. Thus, it can be seen that Part I deals with all stages of the arbitrations which take place in India. In Part II, on the other hand, there are *no* provisions regulating the *conduct* of arbitration *nor* the *challenge* to the award. Section 45 only empowers the judicial authority to refer the parties to arbitration outside India in pending civil action. *Sections* 46 to 49 regulate the *recognition* and *enforcement* of the award. Sections 44, 50 to 52 are structurally necessary.

128. Thus, it is clear that the regulation of *conduct* of arbitration and challenge to an award would have to be done

by the courts of the country in which the arbitration is being conducted. Such a court is then the supervisory court possessed of the power to annul the award. This is in keeping with the scheme of the international instruments, such as the Geneva Convention and the New York Convention as well as the UNCITRAL Model Law. It also recognizes the territorial principle which gives effect to the sovereign right of a country to regulate, through its national courts, an adjudicatory duty being performed in its own country. By way of a comparative example, we may reiterate the observations made by the Court of Appeal, England in **C** Vs. **D (supra)** wherein it is observed that "*it follows from this that a choice of seat for the arbitration must be a choice of forum for remedies seeking to attack the award.*" In the aforesaid case, the Court of Appeal had approved the observations made in **A** Vs. **B,**[41] wherein it is observed that:-

> *".....an agreement as to the seat of an arbitration is analogous to an exclusive jurisdiction clause. Any claim for a remedy.....as to the validity of an existing interim or final award is agreed to be made only in the courts of the place designated as the seat of arbitration."*

41 [2007] 1 Lloyds Report 237

129. Having accepted the principle of territoriality, it is evident that the intention of the parliament was to segregate Part I and Part II. Therefore, any of the provisions contained in Part I can not be made applicable to Foreign Awards, as defined under Sections 44 and 53, i.e., the New York Convention and the Geneva Awards. This would be a distortion of the scheme of the Act. It is, therefore, not possible to accept the submission of Mr. Subramanium that provisions contained in Part II are supplementary to the provision contained in Part I. The Parliament has clearly segregated the two parts.

Section 45

130. We are unable to accept the submission that the use of expression "notwithstanding anything contained in Part I, or in the Code of Civil Procedure, 1908", in Section 45 of the Arbitration Act, 1996 necessarily indicates that provisions of

Part I would apply to foreign seated arbitration proceedings. Section 45 falls within Part II which deals with enforcement proceedings in India and does not deal with the challenge to the validity of the arbitral awards rendered outside India. Section 45 empowers a judicial authority to refer the parties to arbitration, on the request made by a party, when seized of an action in a matter in respect of which the parties have made an agreement referred to in Section 44. It appears that inclusion of the term "judicial authority" in Sections 5 and 8 of the Arbitration Act, 1996, has caused much confusion in the minds of the learned counsel for the appellants. In our opinion, there is no justification for such confusion. Such use of the term "judicial authority", in Section 5 and Section 8 of the Arbitration Act, 1996, is not a recognition by the Parliament that Part I will apply to international commercial arbitrations held outside India. The term "judicial authority" is a legacy from the 1940 Act. The corresponding provision of Section 34 of the 1940 Act, which covered purely domestic arbitrations, between two or more Indian parties, within the territory of India, also refers to *"judicial authority"*. It is nobody's contention that by using the term *"judicial authority",*

the Parliament had intended the 1940 Act to apply outside India. In our opinion, the term *"judicial authority"* has been retained especially in view of policy of least intervention, which can not be limited only to the Courts. This is clearly in recognition of the phenomenon that the judicial control of commercial disputes is no longer in the exclusive jurisdiction of Courts. There are many statutory bodies, tribunals which would have adjudicatory jurisdiction in very complex commercial matters. Section 5 would be equally applicable to such bodies. The use of the term "judicial authority" in no manner has any reference to arbitrations not held in India It is in conformity with Clause (V) of the objects and reasons for the Arbitration Act, 1996, which has been given statutory recognition in Section 5.

131. The learned senior counsel had also pointed out that since Section 19 of the Arbitration Act, 1996 clearly provides that the arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908, there was no need for the non-obstante clause. But the reason, in our view, is discernable from Section 3 of the 1961 Act, which also contains a non-obstante

clause with reference to the Arbitration Act, 1940. Section 45 in the Arbitration Act, 1996 is a repetition of the non-obstante clause in Section 3 in the 1961 Act. It is not unusual for a consolidating act to retain the expressions used in the previous Acts, which have been consolidated into a form of Principal Act. A consolidating Act is described in Halsbury's law of England, Fourth Edition Reissue, Para 1225 as under:-

> "A consolidation Act is a form of principal Act which presents the whole body of the statute law on a subject in complete form, repealing the former Acts. *When drafting a consolidation Act the practice is not to change the existing wording, except so far as may be required for purposes of verbal 'carpentry',* and not to incorporate court rulings. This is known as 'straight' consolidation, the product being a form of declaratory enactment. The difference between a consolidating Act and a codifying Act is that the latter, unlike the former, incorporates common law rules not previously codified. It can be determined from the long title whether or not an Act is a consolidation Act." (emphasis supplied)

132. Similarly, a certain amount of 'carpentry' has been done in the Arbitration Act, 1996 whilst consolidating the earlier three Acts. Therefore, in section 45 of the Arbitration Act, 1996, the reference to 1940 Act has been replaced by

reference to Part I, which now covers the purely domestic arbitrations, earlier covered by the 1940 and the new additions, i.e. the international commercial arbitrations, which take place in India. It appears that the Parliament in order to avoid any confusion has used the expression "notwithstanding anything contained in Part I" out of abundant caution, i.e., "*ex abundanti cautela*". A three judge bench of this Court in **R.S. Raghnath** Vs. **State of Karnataka & Anr.**[42], considering the nature of the non-obstante clause observed that:-

> "11. .....
>
> But the non-obstante clause need not necessarily and always be co-extensive with the operative part so as to have the effect of cutting down the clear terms of an enactment and if the words of the enactment are clear and are capable of a clear interpretation on a plain and grammatical construction of the words the non-obstante clause cannot cut down the construction and restrict the scope of its operation. In such cases the non-obstante clause has to be read as clarifying the whole position and must be understood to have been incorporated in the enactment by the legislature by way of abundant caution and not by way of limiting the ambit and scope of the Special Rules."

42 (1992) 1 SCC 335

133. We are, therefore, of the opinion that existence of the non-obstante clause does not alter the scope and ambit of the field of applicability of Part I to include international commercial arbitrations, which take place out of India. We may further point out that a similar provision existed in the English Arbitration Act, 1950 and the English Arbitration Act, 1975. Section 4(1) of the English Arbitration Act, 1950 was similar to Section 34 of the Arbitration Act, 1940 in India. Section 1(2) of the English Arbitration Act, 1975 was similar to Section 3 of the Foreign Awards Act, 1961.

134. In view of the above, it would not be possible to accept the submission of the learned counsel for the appellants that the aforesaid non-obstante clause in Section 45 would indicate that provisions of Part I would also be applicable to arbitrations that take place outside India.

Does Section 48(1)(e) recognize the jurisdiction of Indian Courts to annul a foreign award, falling within Part II?

135. Much emphasis has been laid by the learned counsel for the appellants on the expression that enforcement of a foreign award may be refused when the award "has been set

aside or suspended ....." "under the law of which" that award was made. The aforesaid words and expressions appear in Section 48, which is contained in Part II of the Arbitration Act, 1996 under the title "enforcement of certain foreign awards". The Courts in India under Chapter I of Part II of the aforesaid Act have limited powers to refuse the enforcement of foreign awards given under the New York Convention. It would be apposite to notice the provisions of Section 48 at this stage, which are as under:-

> "48.Conditions for enforcement of foreign awards.-
>
> (1) Enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the court proof that----
>
> > (a) the parties to the agreement referred to in section 44 were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
> >
> > (b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
> >
> > (c) the award deals with a difference not contemplated by or not falling within the terms

of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration.

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be enforced; or

(d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place ; or

(e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

(2) Enforcement of an arbitral award may also be refused if the court finds that-

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

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

Explanation.----Without prejudice to the generality of clause (b), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption.

(3) If an application for the setting aside or suspension of the award has been made to a

competent authority referred to in clause (e) of sub-section (1) the Court may, if it considers it proper, adjourn the decision on the enforcement of the award and may also , on the application of the party claiming enforcement of the award, order the other party to give suitable security."

136. The party which seeks to resist the enforcement of the award has to prove one or more of the grounds set out in Section 48(1) and (2) and/or the explanation of sub-section (2). In these proceedings, we are, however, concerned only with the interpretation of the terms "country where the award was made" and "under the law of which the award was made". The provisions correspond to Article V(1)(e) of the New York Convention, which reads as under:-

"1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

.....

(e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in

the country where recognition and enforcement is sought finds that:

(a) the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
(b) the recognition or enforcement of the award would be contrary to the public policy of that country.

137. The aforesaid Article of the New York Convention has been bodily lifted and incorporated in the Arbitration Act, 1996 as Section 48.

138. Thus, the intention of the legislature is clear that the Court may refuse to enforce the foreign award on satisfactory proof of any of the grounds mentioned in Section 48(1), by the party resisting the enforcement of the award. The provision sets out the defences open to the party to resist enforcement of a foreign award. The words "suspended or set aside", in Clause (e) of Section 48(1) can not be interpreted to mean that, by necessary implication, the foreign award sought to be enforced in India can also be challenged on merits in Indian Courts. The provision merely recognizes that courts of the two nations which are competent to annul or suspend an award.

It does not *ipso facto* confer jurisdiction on such Courts for annulment of an award made outside the country. Such jurisdiction has to be specifically provided, in the relevant national legislation of the country in which the Court concerned is located. So far as India is concerned, the Arbitration Act, 1996 does not confer any such jurisdiction on the Indian Courts to annul an international commercial award made outside India. Such provision exists in Section 34, which is placed in Part I. Therefore, the applicability of that provision is limited to the awards made in India. If the arguments of the learned counsel for the appellants are accepted, it would entail incorporating the provision contained in Section 34 of the Arbitration Act, 1996, which is placed in Part I of the Arbitration Act, 1996 into Part II of the said Act. This is not permissible as the intention of the Parliament was clearly to confine the powers of the Indian Courts to set aside an award relating to international commercial arbitrations, which take place in India.

139. As noticed above, this section corresponds to Article V(1)(e) of the New York Convention. A reading of the Article

V(1)(e) [Section 48(1)(e)] makes it clear that only the courts in the country "in which the award was made" and the courts "under the law of which the award was made" (hereinafter referred to as the "first alternative" and the "second alternative" respectively) would be competent to suspend/annul the New York Convention awards. It is clarified that Section 48(1)(e) is only one of the defences on the basis of which recognition and enforcement of the award may be refused. It has no relevance to the determination of the issue as to whether the national law of a country confers upon its courts, the jurisdiction to annul the awards made outside the country. Therefore, the word "suspended/set aside" in Section 48(1)(e) cannot be interpreted to mean that, by necessary implication, the foreign awards sought to be enforced in India can also be challenged on merits in Indian Courts. The provision only means that Indian Courts would recognize as a valid defence in the enforcement proceedings relating to a foreign award, if the Court is satisfied that the award has been set aside in one of the two countries, i.e., the "first alternative" or the "second alternative".

140. Mr. Sundaram had submitted that the two countries identified in "alternative one" and "alternative two", would have concurrent jurisdiction to annul the award. In our opinion, interpreting the provision in the manner suggested by Mr. Sundaram would lead to very serious practical problems.

141. In this context, it would be relevant to take note of some of the observations made by Hans Smit, Professor of Law, Columbia University in the Article titled "Annulment and Enforcement of International Arbitral Awards". The author points out the reasons for incorporating the second forum for annulment. He states that –

> "While, therefore, there appears to be no justification, based in reason and principle, for providing for an exception to the general rule of recognition and enforcement for the forum at the place of arbitration, the drafters of the Convention compounded their error by providing for two fora for an annulment action. For Article V(1)(e) envisages that an annulment action may be brought "in the country in which….the award was made" or "in the country….under the law of which the award was made." The disjunctive used in the Convention's text naturally raises the question of whether the second forum is available only if the first is not or whether the party seeking annulment has the option of selecting either or even to try its luck in both. The legislative history of the Convention sheds

illuminating light on the issue.

> The text of Article V(1)(e) originally proposed acknowledge only the bringing of an annulment action in the place in which the award was made. One of the delegates at the Conference devoted to the drafting of the Convention raised the question of what would happen if the forum at the place of arbitration would refuse to entertain an annulment action. The obviously correct answer to that question would have been that, in that case, no annulment action could be brought and that the happy consequence would be that only denial of recognition and enforcement on grounds specified in the Convention would be possible. Instead, the drafters of the Convention provided for an alternative forum in the country the arbitration laws of which governed the arbitration. That choice was both most fateful and most regrettable."

142. These observations militate against the concurrent jurisdiction submission of Mr.Sundaram. The observations made by the learned author, as noticed above, make it clear that the "second alternative" is an exception to the general rule. It was only introduced to make it possible for the award to be challenged in the court of the "second alternative", if the court of the "first alternative" had no power to annul the award, under its national legislation. In our opinion, the disjunction would also tend to show that the "second

alternative" would be available only if the first is not. Accepting the submission made by Mr.Sundaram, would lead to unnecessary confusion. There can be only one Court with jurisdiction to set aside the award. There is a public policy consideration apparent, favouring the interpretation that, only one Court would have jurisdiction to set aside the arbitral award. This public policy aspect was considered by the Court of Appeal in England in the case of **C** Vs. **D (supra)**. The observation of the Court of Appeal in Paragraph 16 of the judgment has already been reproduced earlier in this judgment.

143. It was pointed out by the Court of Appeal that accepting more than one jurisdiction for judicial remedies in respect of an award would be a recipe for litigation and confusion. "Similarly, in the case of a single complaint about an award, it could not be supposed that the aggrieved party could complain in one jurisdiction and the satisfied party be entitled to ask the other jurisdiction to declare its satisfaction with the award".

144. The creation of such a situation is apparent from the judgment of this Court in **Venture Global Engineering (supra)**. In the aforesaid judgment, the award was made by the London Court of International Arbitration on 3rd April, 2006. Respondent No.1, on 14th April, 2006, filed a petition to recognize and enforce the award before the United States District Court, Eastern District Court of Michigan, in the United States of America (for short the 'US Court'). The appellant entered appearance to defend this proceeding before the US Court by filing a cross petition. In the said petition, it took objection to the enforcement of the award, which had directed transfer of shares. The objection was that the direction was in violation of Indian laws and regulations, specifically the Foreign Exchange Management Act (in short the 'FEMA') and its notifications. Two weeks later on 28th April, 2006, the appellant filed a suit in the City Civil Court, Secunderabad seeking declaration to set aside the award and permanent injunction on the transfer of shares. On 15th June, 2006, the District Court passed an ad interim ex parte order of injunction, inter alia, restraining respondent No.1 for seeking or effecting the transfer of shares either under

the terms of the award or otherwise. Respondent No.1 filed an appeal challenging the said order before the High Court of Andhra Pradesh. The High Court admitted the appeal and directed interim suspension of the order of the District Judge, but made it clear that "respondent No.1 would not affect the transfer of shares till further orders".

145. On 13th July, 2006, in response to the summons, respondent No.1 appeared in the court and filed a petition under Order VII, Rule 11 for rejection of the plaint. The trial court by its order dated 28th December, 2006, allowed the said application and rejected the plaint of the appellant. On 27th February, 2007, the High Court dismissed the appeal holding that the award cannot be challenged even if it is against public policy and in contravention of statutory provisions. The judgment of the High Court was challenged in appeal before this Court. The appeal was allowed. It was held as follows:

> **"31.** On close scrutiny of the materials and the dictum laid down in the three-Judge Bench decision in *Bhatia International* we agree with the contention of Mr. K.K. Venugopal and hold that paras 32 and 35 of *Bhatia International* make it clear that the

provisions of Part I of the Act would apply to all arbitrations including international commercial arbitrations and to all proceedings relating thereto. We further hold that where such arbitration is held in India, the provisions of Part I would compulsorily apply and parties are free to deviate to the extent permitted by the provisions of Part I. It is also clear that even in the case 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. We are also of the view that such an interpretation does not lead to any conflict between any of the provisions of the Act and there is no lacuna as such. The matter, therefore, is concluded by the three-Judge Bench decision in *Bhatia International*

33. The very fact that the judgment holds that it would be open to the parties to exclude the application of the provisions of Part I by express or implied agreement, would mean that otherwise the whole of Part I would apply. In any event, to apply Section 34 to foreign international awards would not be inconsistent with Section 48 of the Act, or any other provision of Part II as a situation may arise, where, even in respect of properties situate in India and where an award would be invalid if opposed to the public policy of India, merely because the judgment-debtor resides abroad, the award can be enforced against properties in India through personal compliance of the judgment-debtor and by holding out the threat of contempt as is being sought to be done in the present case. In such an event, the judgment-debtor cannot be deprived of his right under Section 34 to invoke the public policy of India, to set aside the award. As observed earlier, the public policy of India includes — (*a*) the fundamental policy of India; or (*b*) the interests of India; or (*c*) justice or morality; or (*d*) in addition, if it is patently illegal. This extended definition of public policy can be bypassed by taking

the award to a foreign country for enforcement.

37. In view of the legal position derived from *Bhatia International* we are unable to accept Mr. Nariman's argument. It is relevant to point out that in this proceeding, we are not deciding the merits of the claim of both parties, particularly, the stand taken in the suit filed by the appellant herein for setting aside the award. It is for the court concerned to decide the issue on merits and we are not expressing anything on the same. The present conclusion is only with regard to the main issue whether the aggrieved party is entitled to challenge the foreign award which was passed outside India in terms of Sections 9/34 of the Act. Inasmuch as the three-Judge Bench decision is an answer to the main issue raised, we are unable to accept the contra view taken in various decisions relied on by Mr. Nariman. Though in *Bhatia International*[1] the issue relates to filing a petition under Section 9 of the Act for interim orders the ultimate conclusion that Part I would apply even for foreign awards is an answer to the main issue raised in this case.

42. The learned Senior Counsel for the appellant submitted that the first respondent Satyam Computer Services Ltd. could not have pursued the enforcement proceedings in the District Court in Michigan, USA in the teeth of the injunction granted by the courts in India which also, on the basis of the comity of courts, should have been respected by the District Courts in Michigan, USA. Elaborating the same, he further submitted that the injunction of the trial court restraining the respondents from seeking or effecting the transfer of shares either under the terms of the award or otherwise was in force between 15-6-2006 and 27-6-2006. The injunction of the High Court in the following terms - "the appellant (i.e. Respondent 1) shall not effect the transfer of shares of the respondents pending further orders" was in effect from 27-6-2006 till 28-

12-2006. The judgment of the US District Court was on 13-7-2006 and 31-7-2006 when the award was directed to be enforced as sought by Respondent 1, notwithstanding the injunction to the effect that the appellant (Respondent 1 herein) "shall not effect the transfer of shares of the respondents pending further orders". The first respondent pursued his enforcement suit in Michigan District Courts to have a decree passed directing — "... VGE shall deliver to Satyam or its designee, share certificates in a form suitable for immediate transfer to Satyam evidencing all of the appellant's ownership interest in Satyam Venture Engineering Services (SVES), the party's joint venture company". Further, "VGE (the appellant herein) shall do all that may otherwise be necessary to effect the transfer of its ownership interest in SVES to Satyam (or its designee)". It is pointed out that obtaining this order by pursuing the case in the US District Courts, in the teeth of the prohibition contained in the order of the High Court, would not only be a contempt of the High Court but would render all proceedings before the US courts a *brutum fulmen*, and liable to be ignored. Though Mr. R.F. Nariman has pointed out that the High Court only restrained the respondent from effecting transfer of the shares pending further orders by the City Civil Court, Secunderabad, after the orders of the trial court as well as limited order of the High Court, the first respondent ought not to have proceeded with the issue before the District Court, Michigan without getting the interim orders/directions vacated.

47. In terms of the decision in *Bhatia International* we hold that Part I of the Act is applicable to the award in question even though it is a foreign award. We have not expressed anything on the merits of claim of both the parties. It is further made clear that if it is found that the court in which the appellant has filed a petition challenging the award is not competent and having jurisdiction, the same shall be transferred to the appropriate court. Since

> from the inception of ordering notice in the special leave petition both parties were directed to maintain status quo with regard to transfer of shares in issue, the same shall be maintained till the disposal of the suit. Considering the nature of dispute which relates to an arbitration award, we request the court concerned to dispose of the suit on merits one way or the other within a period of six months from the date of receipt of copy of this judgment. Civil appeal is allowed to this extent. No costs."

146. With these observations, the matter was remanded back to the trial court to dispose of the suit on merits. The submissions made by Mr. K.K.Venugopal, as noticed in paragraph 42, epitomize the kind of chaos which would be created by two court systems, in two different countries, exercising concurrent jurisdiction over the same dispute. There would be a clear risk of conflicting decisions. This would add to the problems relating to the enforcement of such decisions. Such a situation would undermine the policy underlying the New York Convention or the UNCITRAL Model Law. Therefore, we are of the opinion that appropriate manner to interpret the aforesaid provision is that "alternative two" will become available only if "alternative one" is not available.

147. The expression "under the law" has also generated a

great deal of controversy as to whether it applies to "the law governing the substantive contract" or "the law governing the arbitration agreement" or limited only to the procedural laws of the country in which the award is made.

148. The consistent view of the international commentators seems to be that the "second alternative" refers to the procedural law of the arbitration rather than "law governing the arbitration agreement" or "underlying contract". This is even otherwise evident from the phrase "under the law, that award was made", which refers to the process of making the award (i.e., the arbitration proceeding), rather than to the formation or validity of the arbitration agreement.

149. Gary B. Born in his treatise titled International Commercial Arbitration takes the view in Chapter 21 that the correct interpretation of Article V(1)(e)'s "second alternative" is that it relates exclusively to procedural law of the arbitration which produced an award and not to other possible laws (such as the substantive law governing the parties underlying dispute or governing the parties' arbitration agreement). He further notices that courts have generally been extremely

reluctant to conclude that the parties have agreed upon a procedural law other than that of the arbitral seat. Consequently, according to Born, although it is theoretically possible for an award to be subject to annulment outside the arbitral seat, by virtue of Article V(1)(e)'s "second alternative", in reality this is a highly unusual "once-in-a-blue-moon" occurrence. He further notices that a number of national courts have considered the meaning of Article V(1)(e)'s "second alternative". Many, but not all, courts have concluded that the alternative refers to "the procedural law of arbitration", rather than the "substantive law applicable to the merits of the parties' dispute or to the parties' arbitration agreement." In our opinion, the views expressed by the learned author are in consonance with the scheme and the spirit in which the New York Convention was formulated. The underlying motivation of the New York Convention was to reduce the hurdles and produce a uniform, simple and speedy system for enforcement of foreign arbitral award. Therefore, it seems to be accepted by the commentators and the courts in different jurisdictions that the language of Article V(1)(e) referring to the "second alternative" is to the country applying the procedural law of

arbitration if different from the arbitral forum and not the substantive law governing the underlying contract between the parties.

Case Law –

150. At this stage, it would be appropriate to consider the manner in which the expression "under the law" has been interpreted judicially in different jurisdictions.

151. The aforesaid expression came up for consideration in the case of **Karaha Bodas Co. LLC** Vs. **Perusahaan Pertambangan Minyak Dan Gas Bumi Negara,**[43] the Federal Court in the U.S. considered the provisions contained in Article V(1)(e) and observed as follows:-

> "Article V(1)(e) of the Convention provides that a court of secondary jurisdiction may refuse to enforce an arbitral award if it "has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made." Courts have held that the language, "the competent authority of the country …… under the law of which, that award was made" refers exclusively to procedural and not substantive law, and more precisely, to the regimen or scheme of arbitral procedural law under which the arbitration

43 335 F.3d 357

was conducted, and not the substantive law..... applied in the case."..............

"Under the New York Convention, an agreement specifying the place of the arbitration creates a presumption that the procedural law of that place applies to the arbitration. Authorities on international arbitration describe an agreement providing that one country will be the site of the arbitration but the proceedings will be held under the arbitration law of another country by terms such as "exceptional"; "almost unknown"; a "purely academic invention"; "almost never use in practice"; a possibility "more theoretical than real"; and a "once–in-a-blue-moon set of circumstances." Commentators note that such an agreement would be complex, inconvenient, and inconsistent with the selection of a neutral forum as the arbitral forum........"

152. Similarly, in the case of **Karaha Bodas Co. LLC (Cayman Islands)** Vs. **Perusahaan Pertambangan Minyak Dan Gas Bumi Negara – Pertamina (Indonesia),**[44] the aforesaid legal proposition is reiterated. In this case, again the Hong Kong Court considered Article V(1)(e) of the Convention at length. This was a case where the substantive law applicable to the contract was Indonesian law and the country of the arbitration i.e. seat of arbitration as per the arbitration agreement was Switzerland. It was contended relying on the second leg of

44 Yearbook Comm. Arb'n Vol. XXVIII)2003) Page 752

Article V(1)(e) that the law under which the award had been made was Indonesian law and therefore Pertamina's challenge in Indonesia was valid. This was rejected. It was held that Article V(1)(e) referred to the *procedural or curial law* and that because the seat of the arbitration was in Switzerland, the *lex arbitri* or the *curial* or *procedural law* applicable to the arbitration was Swiss law. Therefore, only the Swiss Courts had jurisdiction to set aside the award.

153. In **International Electric Corporation** Vs. **Bridas Sociedad Anonima Petroleva, Industrial Y Commercial,**[45] the New York Court held that the italicised words referred to the *procedural law* governing the arbitration, and not to the *substantive law* governing the agreement between the parties, since the situs of arbitration is Mexico, the governing *procedural law* that of Mexico, only Mexico Courts have jurisdiction under the Convention to vacate the award.

154. Redfern and Hunter (supra) at paragraph 11.96 state that the court which is competent to sustain or set aside an award is the court of the country in "alternative one" or "alternative

45 745 F Supp 172, 178 (SDNY 1990)

two". The authors, however, further state that "this Court will almost invariably be the national court at the seat of the arbitration". They point out that the prospect of an award being set aside under the procedural law of a State other than that at the seat of arbitration is unlikely. They point out that an ingenious (but unsuccessful) attempt was made to persuade the US District Court to set aside an award made in Mexico, on the basis that the reference to the law under which that award was made was a reference to the law governing the dispute and not to the procedural law (Paragraph 11.96). The Learned Authors had made a reference to the case **International Standard Electric Corp. (US)** Vs. **Bridas Sociedad Anonima Petrolera (Argentina).**[46] The Court rejected the aforesaid argument with the following observations:-

> "Decisions of foreign courts under the Convention uniformly support the view that the clause in question means procedural and not substantive (that is, in most cases, contract law)....
>
> Accordingly, we hold that the contested language in Article V(1)(e) of the Convention.....refers *exclusively to procedural* and *not substantive law*,

46 (1992) VII Ybk Comm Arb 639

> and more precisely to the regimen or scheme of arbitral procedural law under which the arbitration was conducted."

155. The Court went on to hold that since the quorum of arbitration was Mexico, only the Mexican court had jurisdiction to set aside the award.

156. The correct position under the New York Convention is described very clearly and concisely by Gary B. Born in his book International Commercial Arbitration (Kluwer Law International, Vol. I), Chapter X Page 1260 as follows :

> "This provision is vitally important for the international arbitral process, because it significantly restricts the extent of national court review of international arbitral awards in annulment actions, limiting such review only to the courts of the arbitral seat (that is, the state where the award is made or the state whose procedural law is selected by the parties to govern the arbitration). In so doing, the Convention ensures that courts outside the arbitral seat may not purport to annul an international award, thereby materially limiting the role of such courts in supervising or overseeing the procedures utilized in international arbitrations.
>
> At the same time, the New York Convention also allows the courts of the arbitral seat wide powers with regard to the annulment of arbitral awards made locally. The Convention generally permits the courts of the arbitral seat to annul an arbitral

> award on any grounds available under local law, while limiting the grounds for non-recognition of Convention awards in courts outside the arbitral seat to those specified in Article V of the Convention. This has the effect of permitting the courts of the arbitral seat substantially greater scope than courts of other states to affect the conduct or outcome of an international arbitration through the vehicle of annulment actions. *Together with the other provisions of Articles II and V, this allocation of annulment authority confirms the (continued) special importance of the arbitral seat in the international arbitral process under the New York Convention."*
>
> (emphasis supplied)

157. In our opinion, the aforesaid is the correct way to interpret the expressions "country where the award was made" and the "country under the law of which the award was made". We are unable to accept the submission of Mr. Sundaram that the provision confers concurrent jurisdiction in both the fora. "Second alternative" is available only on the failure of the "first alternative". The expression *under the law* is the reference only to the *procedural law/curial law* of the country in which the award was made and under the law of which the award was made. It has no reference to the substantive law of the contract between the parties. In such view of the matter, we have no hesitation in rejecting the

submission of the learned counsel for the appellants.

158. At this stage, we may notice that in spite of the aforesaid international understanding of the second limb of Article V(1)(e), this Court has proceeded on a number of occasions to annul an award on the basis that parties had chosen Indian Law to govern the substance of their dispute. The aforesaid view has been expressed in **Bhatia International (supra)** and **Venture Global Engineering (supra)**. In our opinion, accepting such an interpretation would be to ignore the spirit underlying the New York Convention which embodies a consensus evolved to encourage consensual resolution of complicated, intricate and in many cases very sensitive International Commercial Disputes. Therefore, the interpretation which hinders such a process ought not to be accepted. This also seems to be the view of the national courts in different jurisdictions across the world. For the reasons stated above, we are also unable to agree with the conclusions recorded by this Court in **Venture Global Engineering** (supra) that the foreign award could be annulled on the exclusive grounds that the Indian law governed the substance of the

dispute. Such an opinion is not borne out by the huge body of judicial precedents in different jurisdictions of the world.

Interim measures etc. by the Indian Courts where the seat of arbitration is outside India.

159. We have earlier noticed the submissions made by the learned counsel for the parties wherein they had emphasised that in case the applicability of Part I is limited to arbitration which take place in India, no application for interim relief would be available under Section 9 of the Arbitration Act, 1996, in an arbitration seated outside India. It was further emphasised that in such circumstances, the parties would be left remediless. Dr. Singhvi, in order to get out of such a situation, had submitted that remedy under Section 9 would still be available. According to Dr. Singhvi, Section 9 is a stand alone provision which cannot be effected by the limit contained in Section 2(2). He submits that the provisions contained in Section 9 do not impede the arbitral process. Its only purpose is to provide an efficacious, preservatory, interim, conservatory, emergent relief necessary for protecting the subject matter of arbitration, pending the conclusions of the proceedings. He also emphasised that interim orders of

foreign courts are not, *ipso facto* or *ipso jure*, enforceable in India and, absent Section 9, a party will be remediless in several real life situations. He, therefore, urged that this Court could give a purposive interpretation of Section 9 to ensure that the Courts in India have the jurisdiction to take necessary measures for preservation of assets and/or to prevent dissipation of assets. Dr. Singhvi submitted that the decision in **Bhatia International (supra)** is correct, in so far as it relates to the grant of interim injunction under Section 9 of the Arbitration Act, 1996. He did not say before us that the courts in India would have any power to annul the award under Section 34 of the Arbitration Act, 1996, in matters where arbitrations have taken place at abroad. But at the same time, he canvassed that the provisions contained in Section 9 cannot be equated with the provisions contained in Section 34. The remedy under Section 9 is interim and subservient to the main arbitration proceedings, whereas remedy under Section 34 would interfere with the final award. Further more, annulment of the award under Section 34 would have extra-territorial operation whereas Section 9 being entirely asset focused, would be intrinsically territory focused

and intra-territorial in its operation. He submitted that the ratio in **Bhatia International** on the core issue, i.e., grant of interim measures under Section 9, is correct. Although, he was not much concerned about the other issues, of annulment or enforcement of the award, he has reiterated the submissions made by the other learned counsel, on Sections 2(2), 2(1)(f) and 2(5).

160. We are unable to accept the submissions made by the learned counsel. It would be wholly undesirable for this Court to declare by process of interpretation that Section 9 is a provision which falls neither in Part I or Part II. We also do not agree that Section 9 is a *sui generis* provision.

161. Schematically, Section 9 is placed in Part I of the Arbitration Act, 1996. Therefore, it can not be granted a special status. We have already held earlier that Part I of the Arbitration Act, 1996 does not apply to arbitrations held outside India. We may also notice that Part II of the Arbitration Act, 1996, on the other hand, does not contain a provision similar to Section 9. Thus, on a logical and schematic construction of the Arbitration Act, 1996, the Indian Courts do

not have the power to grant interim measures when the seat of arbitration is outside India. A bare perusal of Section 9 would clearly show that it relates to interim measures before or during arbitral proceedings or at any time after the making of the arbitral award, but before it is enforced *in accordance with Section 36*. Section 36 necessarily refers to enforcement of domestic awards only. Therefore, the arbitral proceedings prior to the award contemplated under Section 36 can only relate to arbitrations which take place in India. We, therefore, do not agree with the observations made in **Bhatia International** (supra) in paragraph 28 that "The words in accordance with Section 36 can only go with the words after the making of the arbitral award." It is clear that the words "in accordance with Section 36" can have no reference to an application made "before" or "during the arbitral proceedings". The text of Section 9 does not support such an interpretation. The relevant part of the provisions is as under:

> "9. Interim measures, etc. by Court – A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with Section 36, apply to a court....."

162. A bare look at the aforesaid provision would indicate that

there is no break up of the sentence in between the two comas at the beginning and end of the sentence. Therefore, the sentence cannot be broken into three parts as it is done in paragraph 28 of **Bhatia International** (supra). The arbitral proceedings mentioned in the aforesaid provision cannot relate to arbitration which takes place outside India.

163. Therefore, we have no hesitation in declaring that the provision contained in Section 9 is limited in its application to arbitrations which take place in India. Extending the applicability of Section 9 to arbitrations which take place outside India would be to do violence to the policy of the territoriality declared in Section 2(2) of the Arbitration Act, 1996.

164. It was next submitted that if the applicability of Part I is limited to arbitrations which take place in India, it would leave many parties remediless in a number of practical situations.

165. In this connection, Mr. Sorabjee has relied upon the judgment of the English High Court in **Reliance Industries Limited (supra).** In the aforesaid case, the contracts were governed by the Indian law as their proper law. The disputes

were to be determined by the arbitration in London. The procedural law applicable was English Law. The distinction between the proper law of the JOA's and the procedural law was known to the parties. At the arbitration hearing, the parties agreed that the principles of construction of contracts in Indian Law were the same as in English Law. The parties further agreed that the English Law principles on the construction of contracts were those set out by Lord Hoffmann in **Investors Compensation Scheme Ltd. vs. West Bromwich Building Society**,[47] as explained and expanded by Lord Hoffmann in **Bank of Credit & Commerce International SA vs. Ali & Ors.** [48] In their awards, the three arbitrators stated (at paragraph 73) that they would apply those principles to construe the contracts under consideration in making their Partial Arbitral Awards. The question raised at the threshold was whether the applicant-Reliance can apply for permission to appeal to the Commercial Court in England and Wales "on a question of law arising out of an award made in the proceedings" under Section 69 (1) of the Arbitration Act, 1996 (English). So the

47 [1998] WLR 1896 at 913

48 [2001] 2 WLR 735 at 749

"threshold" issue was whether any point of construction of the contracts, assuming that would be a question of law at all, is a "question of law of England and Wales" within Section 82(1) of the Arbitration Act, 1996. It was accepted by the applicant that unless the question of law concerned "the law of England and Wales, then leave to appeal cannot be granted." The issue before the Court was as to whether the questions of construction of JOA's are questions of Indian Law because the contracts are governed by Indian Law. The parties did not, as a matter of fact, vary the proper law of the contracts for the purposes of arbitration hearing in London. As the parties agreed that the Indian Law applied to the contracts, the arbitrators had to apply Indian Law when construing the contracts. Although the parties agreed that Indian Law and English Law principles of construction were the same, ultimately the arbitrators were applying Indian Law rather than English Law to construe the contract. The Court rejected the submission of the applicant that the arbitrators had applied the English Law. The Court observed that:-

> "27. I am unable to accept the submissions of Mr.Akenhead. The parties agreed that the contracts

were to be governed by Indian Law as their proper law. The parties also agreed that disputes should be determined by arbitration in London. The parties were carful to ensure that English Law would be the procedural law applicable to arbitration proceedings that arose as a result of disputes arising out of the JOAs. The distinction between the proper law of the JOAs and the procedural law was also well in the minds of the arbitrators as they drew particular attention to it in paragraph 26 of their Partial Awards. The effect of those contractual provisions is, as the arbitrators also recognized, that all procedural matters were to be governed by English law as laid down in Part 1 of the 1996 Act. The parties must be taken to have appreciated that fact also.

28. The consequence is that if and when disputes under the contracts were referred to arbitration, as a matter of the procedural law of the arbitrations (English Law), the tribunal had to decide those disputes in accordance with the proper law of the contracts as chosen by the parties – unless the parties agreed to vary the contracts' terms, which they did not. Therefore, if as in this case, the arbitrators had to decide issues of construction of the JOAs, then they were bound to do so using principles of construction established under the proper law of the contracts, i.e. Indian law.

29. As it happens the parties agreed that the principles of construction under the proper law of the contract equated with those principles under English law, as declared by the House of Lords in two recent cases. What the arbitrators did was to take those principles of construction and apply them as principles of Indian law in order to construe the contracts according to Indian law. The arbitrators had to do that, as a matter of the procedural law of the arbitration. That is because under the English law of arbitration procedure, the arbitrators were bound to construe the contracts and determine the disputes between the parties according to the proper law of the contracts

concerned.

30. Therefore, I think that it is wrong to say that the arbitrators "applied English Law" when construing the contracts. They applied Indian law, which happened to be the same as English law on this topic."

166. On the basis of that, it was concluded that no question of law of England and Wales arises out of the two partial awards of the arbitrators. It was accordingly held that the English Court does not have any power to grant leave to appeal under Section 69 of the Arbitration Act, 1996.

167. In our opinion, the aforesaid judgment does not lead to the conclusion that the parties were left without any remedy. Rather the remedy was pursued in England to its logical conclusion. Merely, because the remedy in such circumstances may be more onerous from the view point of one party is not the same as a party being left without a remedy. Similar would be the position in cases where parties seek interim relief with regard to the protection of the assets. Once the parties have chosen voluntarily that the seat of the arbitration shall be outside India, they are impliedly also understood to have chosen the necessary incidents and consequences of such choice. We, therefore, do not find any substance in the submissions made by the learned counsel

for the appellants, that if applicability of Part I is limited to arbitrations which take place in India, it would leave many parties remediless.

168. If that be so, it is a matter to be redressed by the legislature. We may also usefully refer here to the observations made in **Nalinakhya Bysack (supra), Duport Steels Ltd. (supra)** and **Magor & St. Mellons, RDC** Vs. **Newport Corporation (supra)**, in which the attempt made by Lord Denning to construe legislation contrary to Parliament's intention just to avoid hardship was disapproved by the House of Lords. It was observed by Lord Simonds as follows:-

> "The second part of the passage that I have cited from the judgment of the learned Lord Justice is no doubt the logical sequel of the first. The court, having discovered the intention of Parliament and of Ministers too, must proceed to fill in the gaps. What the legislature has not written, the court must write. This proposition, which restates in a new form the view expressed by the Lord Justice in the earlier case of Seaford Court Estates Ld. V. Asher (to which the Lord Justice himself refers), cannot be supported. *It appears to me to be a naked usurpation of the legislative function under the thin disguise of interpretation and it is the less justifiable when it is guesswork with what material the legislature would, if it had discovered the gap, have filled it in. If a gap is disclosed, the remedy lies in an amending Act."*
>
> [emphasis supplied]

169. The aforesaid words in italics have been quoted with approval by a Constitution Bench of this Court in **Punjab Land Development and Reclamation Corporation Ltd., Chandigarh** Vs. **Presiding Officer, Labour Court, Chandigarh & Others.**[49]

170. In view of the aforesaid, we are unable to agree with the submission made by Dr. Singhvi that provision contained in Section 9 can be made applicable even to arbitrations which take place outside India by giving the same a purposive interpretation. In our opinion, giving such an interpretation would be destructive of the territorial principles upon which the UNCITRAL Model Laws are premised, which have been adopted by the Arbitration Act, 1996.

171. We are further of the opinion that the approach adopted by this Court in **Bhatia International** to remove the perceived hardship is not permissible under law. A perusal of paragraph 15 would show that in interpreting the provisions of the Arbitration Act, 1996, the court applied the following tests:

> "Notwithstanding the conventional principle that the duty of Judges is to expound and not to legislate, the courts have taken the view that the

49 (1990) 3 SCC 682

> judicial art interpretation and appraisal is imbued with creativity and realism and since interpretation always implied a degree of discretion and choice, the courts would adopt, particularly in areas such as, constitutional adjudication dealing with social and defuse (*sic*) rights. Courts are therefore, held as "finishers, refiners and polishers of legislation which comes to them in a state requiring varying degrees of further processing" (see *Corocraft Ltd.* v. *Pan American Airways*, All ER at p. 1071 D, WLR at p. 732, *State of Haryana* v. *Sampuran Singh*, AIR at p. 1957). If a language used is capable of bearing more than one construction, in selecting the true meaning, regard must be had to the consequences, resulting from adopting the alternative constructions. A construction that results in hardship, serious inconvenience, injustice, absurdity or anomaly or which leads to inconsistency or uncertainty and friction in the system which the statute purports to regulate has to be rejected and preference should be given to that construction which avoids such results."

172. From the above, it is evident that the provisions of the Arbitration Act, 1996 were interpreted keeping in mind the consequences in limiting the applicability of Part I to arbitrations which take place in India. The Court also acted as "finishers", "refiners" and "polishers" of the Arbitration Act, 1996 assuming that the Arbitration Act, 1996 required varied degrees of further "processing". In our opinion, as demonstrated whilst discussing the various provisions of the Arbitration Act, 1996 in earlier part of judgment, the intention

of the Parliament is available within the text and the context of the provisions. As observed by Lord Simonds in **Magor & St.Mellons** Vs. **Newport Corporation** (supra), if the gap or lacuna is disclosed, it would be for the Parliament to rectify the same. Such a task cannot be undertaken by the Court.

173. It was also submitted that Non-Convention Awards would not be covered either by Part I or Part II. This would amount to holding that the legislature has left a lacuna in the Arbitration Act, 1996. This would mean that there is no law in India governing such arbitrations.

174. We are of the opinion that merely because the Arbitration Act, 1996 does not cover the non convention awards would not create a lacuna in the Arbitration Act, 1996. If there was no lacuna during the period in which the same law was contained in three different instruments, i.e. the Arbitration Act, 1940 read with 1961 Act, and the Arbitration (Protocol and Convention) Act, 1937, it cannot be construed as a *lacuna* when the same law is consolidated into one legislation, i.e. the Arbitration Act, 1996.

175. It must further be emphasised that the definition of "foreign awards" in Sections 44 and 53 of the Arbitration Act, 1996 intentionally limits it to awards made in pursuance of an agreement to which the New York Convention, 1958 or the Geneva Protocol, 1923 applies. It is obvious, therefore, that no remedy was provided for the enforcement of the 'non convention awards' under the 1961 Act. Therefore, the non convention award cannot be incorporated into the Arbitration Act, 1996 by process of interpretation. The task of removing any perceived *lacuna* or curing any defect in the Arbitration Act, 1996 is with the Parliament. The submission of the learned counsel is, therefore, rejected. The intention of the legislature is primarily to be discovered from the language used, which means that the attention should be paid to what has been said and also to what has *not* been said. [See: **Gwalior Rayon Silk Mfg. (Wvg.) Co. Ltd. vs. Custodian of Vested Forests**, [AIR 1990 SCC 1747 at page 1752]. Here the clear intention of the legislature is not to include the Non-convention Awards within the Arbitration Act, 1996.

<u>Is An Inter-Parte Suit For Interim Relief Maintainable</u> –

176. It appears to us that as a matter of law, an inter-parte suit simply for interim relief pending arbitrations, even if it be limited for the purpose of restraining dissipation of assets would not be maintainable. There would be number of hurdles which the plaintiff would have to cross, which may well prove to be insurmountable.

177. Civil Courts in India, by virtue of Section 9 of the Code of Civil Procedure, 1908 (for short the 'CPC'), have the jurisdiction to try all suits of a civil nature, excepting suits which are either expressly or impliedly barred. Fundamental to the maintainability of a civil suit is the existence of a *cause of action* in favour of the plaintiff. This is evident from the various provisions contained in the CPC. However, it would be appropriate to notice that Order VII Rule 1 gives the list of the particulars which have to be mandatorily included in the plaint. Order VII Rule 1(e) mandates the plaintiff to state the facts constituting the cause of action and when it arose. Order VII Rule 11(a) provides the plaint shall be rejected where it does not disclose a cause of action. A cause of action is the bundle of facts which are required to be proved for obtaining relief prayed for in the suit. The suit of the plaintiff has to be

framed in accordance with Order II. Order II Rule 1 provides that every suit shall as far as practicable be framed so as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them. The aforesaid rule is required to be read along with Rule 2 which provides that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the *cause of action;* but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any court. The aforesaid provisions read together would lead to the firm conclusion that the existence of cause of action is a *sine qua non* for the maintainability of a civil suit.

178. The provisions with regard to the temporary injunction and interlocutory orders are contained in Order 39 and Order 40. In order to claim an injunction the existence of a pending suit is a pre requisite. It is in this background that one has to examine as to whether an inter-parte suit for interim relief during the pendency of arbitration proceedings outside India would be maintainable.

179. In our opinion, pendency of the arbitration proceedings

outside India would not provide a *cause of action* for a suit where the main prayer is for injunction. Mr.Sundaram has rightly pointed out that the entire suit would be based on the pendency of arbitration proceedings in a foreign country. Therefore, it would not be open to a party to file a suit touching on the merits of the arbitration. If such a suit was to be filed, it would in all probabilities be stayed in view of Sections 8 and 45 of the Arbitration Act, 1996. It must also be noticed that such a suit, if at all, can only be framed as a suit to "inter alia restrain the defendant from parting with property." Now, if the right to such property could possibly arise, only if the future arbitration award could possibly be in favour of the plaintiff, no suit for a declaration could obviously be filed, based purely only on such a contingency. All that could then be filed would, therefore, be a bare suit for injunction restraining the other party from parting with property. The interlocutory relief would also be identical. In our view, such a suit would not be maintainable, because an interlocutory injunction can only be granted during the pendency of a civil suit claiming a relief which is likely to result in a final decision upon the *subject in dispute*. The suit

would be maintainable only on the existence of a *cause of action,* which would entitle the plaintiff for the substantive relief claimed in the suit. The interim injunction itself must be a part of the substantive relief to which the plaintiff's cause of action entitled him. In our opinion, most of the aforesaid ingredients are missing in a suit claiming injunction restraining a party from dealing with the assets during the pendency of arbitration proceedings outside India. Since the dispute is to be decided by the Arbitrator, no substantive relief concerning the merits of the arbitration could be claimed in the suit. The only relief that could be asked for would be to safeguard the property which the plaintiff may or may not be entitled to proceed against. In fact the plaintiff's only claim would depend on the outcome of the arbitration proceeding in a foreign country over which the courts in India would have no jurisdiction. The cause of action would clearly be contingent/speculative. There would be no existing cause of action. The plaint itself would be liable to be rejected under Order VII Rule 11(a). In any event, as noticed above, no interim relief could be granted unless it is in aid of and ancillary to the main relief that may be available to a party on

final determination of rights in a suit. This view will find support from a number of judgments of this Court.

180. In the **State of Orissa vs. Madan Gopal Rungta,**[50] at page 35 this Court held:

> "....An interim relief can be granted only in aid or, and as ancillary to, the main relief which may be available to the party on final determination of his rights in a suit or proceeding....."

181. Following the above Constitution Bench, this Court in **Cotton Corporation Limited vs. United Industrial Bank**[51] held:

> "10.....But power to grant temporary injunction was conferred in aid or as auxiliary to the final relief that may be granted. If the final relief cannot be granted in terms as prayed for, temporary relief in the same terms can hardly if ever be granted. In *State of Orissa* v. *Madan Gopal Rungta* a Constitution Bench of this Court clearly spelt out the contours within which interim relief can be granted. The Court said that 'an interim relief can be granted only in aid of, and as ancillary to, the main relief which may be available to the party on final determination of his rights in a suit or proceeding'. If this be the purpose to achieve which power to grant temporary relief is conferred, it is inconceivable that where the final relief cannot be granted in the terms sought for because the statute bars granting such a relief ipso facto the temporary relief of the same nature cannot be granted....."

50 AIR 1952 SC 12

51 (1983) 4 SCC 625

182. The legal position is reiterated in **Ashok Kumar Lingala vs. State of Karnataka.**[52]

183. In matters pertaining to arbitration, the suit would also be barred under Section 14(2) of the Specific Relief Act. Although the provision exists in Section 37 of the Specific Relief Act, 1963, for grant of temporary/perpetual injunction, but the existence of cause of action would be essential under this provision also. Similar would be the position under Section 38 of the Specific Relief Act.

184. Claim for a Mareva Injunction in somewhat similar circumstances came up for consideration in England before the House of Lords in **Siskina (Cargo Owners)** Vs. **Distos Compania Navieria SA (supra)**. In this case, cargo owners had a claim against a Panamanian company. The dispute had no connection with England. The defendant's only ship had sunk and there were insurance proceeds in England to which the defendant was entitled. The cargo owners sought leave to serve the writ on the defendant under what was then RSC Order 11, Rule 1(1)(i). Mocatta, J. gave leave and at the same

52 (2012) 1 SCC 321

time granted an injunction in the terms asked for in Paragraph 2 of the writ petition. Subsequently, Kerr, J. set aside the notice of the writ but maintained the injunction pending in appeal. On the cargo-owners appeal, the Court of Appeal by a majority reversed the judgment of Kerr, J. and restored the Mareva injunction as originally granted by Mocatta, J. The matter reached the House of Lords by way of an appeal against the majority judgment of the Court of Appeal. The House of Lords on appeal held that there was no jurisdiction to commence substantive proceedings in England. Therefore, the writ and all subsequent proceedings in the action had to be set aside. Consequently there could be no Mareva injunction. It was held that a Mareva injunction was merely an interlocutory injunction and such an injunction could only be granted as "…. ancillary and incidental to the pre-existing cause of action".

185. Lord Diplock observed that "it is conceded that the cargo owners' claim for damages for breach of contract does not of itself fall within any of the sub-rules of Order 11, Rule 1(1); nor does their claim for damages for tort." It is further observed that "what is contended by the counsel for the cargo-

owners is that if the action is nevertheless allowed to proceed, it will support a claim for Mareva injunction restraining the ship owners from disposing of their assets within the jurisdiction until judgment and payment of the damages awarded thereby; and that this of itself is sufficient to bring the case within sub-rule (i) which empowers the High Court to give leave for service of its process on persons outside the jurisdictions". Interpreting Order 11 Rule 1(i), it was held that the word used in sub-rule (i) are terms of legal art. The sub-rule speaks of "the action" in which a particular kind of relief, "an injunction" is sought. This pre-supposes the existence of a cause of action on which to found "the action". *A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own.* It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the Court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action. It is granted to preserve the status quo pending the ascertainment by the

Court of the rights of the parties and the grant to the plaintiff of the relief to which his cause of action entitles him, which may or may not include a final injunction.

186. As noticed earlier, the position is no different in India. Therefore it appears that under the law, as it stands today, an inter-parte suit simply for interim relief pending arbitration outside India would not be maintainable.

187. It appears after the aforesaid observations were made in **Siskina (Cargo Owners) (supra)**, necessary amendments were made in the English Law viz. Section 37(1) of the Supreme Court Act, 1981. The provision was specifically made for grant of Mareva injunction by Section 25 of the Civil Jurisdiction and Judgments Act, 1982.

189. The after effects of **Siskina (Cargo Owners) (supra)** were duly noticed by Steven Gee QC MA (Oxon) in his book titled Mareva Injunctions and Anton Piller Relief, Fourth Edition, as under:-

(i) The English Court would not assert a substantive jurisdiction over a defendant just because he had assets within the jurisdiction. The contrary proposition would have had the

unsatisfactory consequence as observed by Lord Diplock in Siskina that the Court would find itself asserting jurisdiction over a foreigner to decide the merits of substantive proceedings which had nothing to do with England.

(ii) There was no jurisdiction to grant Mareva relief unless and until the plaintiff had an accrued right of action.

(iii) There was no jurisdiction to preserve assets within the jurisdiction of the Court which would be needed to satisfy a claim against the defendant if it eventually succeeded regardless of where the merits of the substantive claim were to be decided. According to the other, the position in relation to the free-standing interlocutory injunction relief has been eroded by a succession of developments.

190. Thereafter, in a subsequent judgment in **Channel Tunnel Group Ltd. & Anr.** Vs. **Balfour Beatty Construction Ltd. & Ors.,**[53] Lord Mustill summed up the principle for grant of interim relief as follows:-

> "For present purposes it is sufficient to say that the doctrine of Siskina, put at its highest, is that the right to an interlocutory injunction cannot exist in isolation, but is always incidental to and dependent on the enforcement of a substantive right, which usually although not invariably takes the shape of a

53 (1993) AC 334

> cause of action. If the underlying right itself is not subject to the jurisdiction of the English Court, then that Court should never exercise its power under Section 37(1) by way of interim relief."

191. However, on facts in the **Channel Tunnel case (supra)**, it was found that "if this is a correct appreciation of the doctrine, it does not apply to the present case."

192. From the above, it is apparent that the injunctive relief was granted in **Channel Tunnel case** in view of the statutory provisions contained in Section 37(1) of the Supreme Court Act, 1981. This is made further clear by the following observations:-

> "We are concerned here with powers which the Court already possesses under Section 37 of the Act of 1981. The only question is whether the court ought permanently and unconditionally to renounce the possibility of exercising such powers in a case like the present. I am unable to see why the fact that Parliament is contemplating the specific grant of interim powers, not limited to interlocutory injunctions, in support of arbitrations but has not yet chosen to do so should shed any light on the powers of the court under existing law. It may be that if and when section 25 is made applicable to arbitrations, the court will have to be very cautious in the exercise of its general powers under section 37 so as not to conflict with any restraint which the legislature may have imposed on the exercise of the new and specialized powers."

193. The decision in **Channel Tunnel** would not support the proposition that injunctive relief could be granted under Section 9 of the Arbitration Act, 1996, as no corresponding provision to Section 37(1) of the English Supreme Court Act, 1981 exists under the Indian legislation.

194. Mr. Sorabjee has also referred to the principle that no suit allows for grant of interim injunction simplicitor and that an interim injunction had to be granted only in aid of a final injunction/principle relief claimed in the suit. He made a reference to the Constitution Bench decision of this Court in **State of Orissa** Vs. **Madan Gopal Rungta (supra)**. He also referred to the judgment of the House of Lords in **Fourie** Vs. **Le Roux (supra)**. The House of Lords after referring to the decision in **Siskina** and **Channel Tunnel** observed as follows:-

> "On the other hand, if the leave had been upheld, or if the defendant had submitted to the jurisdiction, it would still have been open to the defendant to argue that the grant of a Mareva injunction in aid of the foreign proceedings in Cyprus was impermissible, not on strict jurisdictional grounds *but because such injunctions should not be granted otherwise than as ancillary to substantive proceedings in England."* [emphasis supplied]

195. However, the House of Lords pointed out in Paragraph 31

of the judgment that the relief can now be granted under English Law by virtue of express provision contained in Section 25 of the Civil Jurisdiction and Judgment Act, 1982, as extended to the Civil Jurisdiction and Judgments Act (Interim Relief) Order, 1997. This order enables the High Court "to grant interim relief" in relation to "proceedings that have been or are about to be commenced in a foreign state".

196. So far as the Indian Law is concerned, it is settled that the source "of a Court's power to grant interim relief is traceable to Section 94 and in exceptional cases Section 151 CPC. CPC pre-supposes the existence of a substantive suit for final relief wherein the power to grant an interim relief may be exercised only till disposal thereof.

197. In this view of the matter, it is patent that there is no existing provision under the CPC or under the Arbitration Act, 1996 for a Court to grant interim measures in terms of Section 9, in arbitrations which take place outside India, even though the parties by agreement may have made the Arbitration Act, 1996 as the governing law of arbitration.

CONCLUSION :-

198. In view of the above discussion, we are of the considered

opinion that the Arbitration Act, 1996 has accepted the territoriality principle which has been adopted in the UNCITRAL Model Law. Section 2(2) makes a declaration that Part I of the Arbitration Act, 1996 shall apply to all arbitrations which take place within India. We are of the considered opinion that Part I of the Arbitration Act, 1996 would have no application to International Commercial Arbitration held outside India. Therefore, such awards would only be subject to the jurisdiction of the Indian courts when the same are sought to be enforced in India in accordance with the provisions contained in Part II of the Arbitration Act, 1996. In our opinion, the provisions contained in Arbitration Act, 1996 make it crystal clear that there can be no overlapping or intermingling of the provisions contained in Part I with the provisions contained in Part II of the Arbitration Act, 1996.

199. With utmost respect, we are unable to agree with the conclusions recorded in the judgments of this Court in **Bhatia International (supra) and Venture Global Engineering (supra).** In our opinion, the provision contained in Section 2(2) of the Arbitration Act, 1996 is not in conflict with any of the provisions either in Part I or in Part II of the Arbitration Act,

1996. In a foreign seated international commercial arbitration, no application for interim relief would be maintainable under Section 9 or any other provision, as applicability of Part I of the Arbitration Act, 1996 is limited to all arbitrations which take place in India. Similarly, no suit for interim injunction simplicitor would be maintainable in India, on the basis of an international commercial arbitration with a seat outside India.

200. We conclude that Part I of the Arbitration Act, 1996 is applicable only to *all the arbitrations* which take place within the territory of India.

201. The judgment in **Bhatia International (supra)** was rendered by this Court on 13th March, 2002. Since then, the aforesaid judgment has been followed by all the High Courts as well as by this Court on numerous occasions. In fact, the judgment in **Venture Global Engineering (supra)** has been rendered on 10th January, 2008 in terms of the ratio of the decision in **Bhatia International (supra)**. Thus, in order to do complete justice, we hereby order, that the law now declared by this Court shall apply prospectively, to all the arbitration agreements executed hereafter.

202. The reference is answered accordingly.

.....CJI.

[S.H.KAPADIA]

.....J.
[D.K.JAIN]

.....j
[SURINDER SINGH NIJJAR]

.....J.
[RANJANA PRAKASH DESAI]

.....J.
[JAGDISH SINGH KHEHAR]

NEW DELHI;
SEPTEMBER 06, 2012.

ITEM NO.1A COURT NO.1 SECTION IV/XVI/XVIA/XII/IVA

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

CIVIL APPEAL NO.7019 OF 2005

BHARAT ALUMINIUM CO. Appellant (s)

VERSUS

KAISER ALUMINIUM TECHNICAL SERVICES. INC. Respondent(s)

(With appln(s) for substitution, intervention, stay, permission to file additional documents and office report)

With Civil Appeal No.6284 of 2004
(With appln.(s) for permission to file additional documents and office report)

Civil Appeal No.3678 of 2007

(With appln.(s) for substitution and office report)

Transferred Case (C) No.35 of 2007
(With appln.(s) for directions, c/delay in filing reply affidavit and bringing on record additional documents)

S.L.P. (C) Nos.3589-3590 of 2009
(With appln.(s) for permission to file synopsis and list of dates,
permission to file additional documents, prayer for interim relief and office report)

S.L.P. (C) Nos.31526-31528 of 2009
(With office report)

S.L.P. (C) No.27824 of 2011
(With appln.(s) for directions, permission to file additional documents and office report)

S.L.P. (C) No.27841 of 2011
(With prayer for interim relief and office report)

Date: 06/09/2012 These Matters were called on for judgment today.

...2/-

For Appellant(s) CA 7019/2005 & CA 3678/2007:	Mr. C.A. Sundaram,Sr.Adv. Mr. Ramesh Singh,Adv. Ms. Mehernaz Mehta,Adv. Ms. Binu Tamta,Adv.
In CA 6284/2004:	Mr. Subramonium Prasad,Adv.
In TC 35/2007:	Mr. Parmanand Pandey,Adv.
In SLP 3589-90/2009 & SLP 31526-28/2009:	Mr. E.R. Kumar,Adv. M/s. Parekh & Co.,Advs.
In SLP 27824/2011 & SLP 27841/2011:	Ms. Ruby Singh Ahuja,Adv. M/s. Karanjawala & Co.,Advs.
For Respondent(s) CA 7019/2005 & CA 3678/2007:	M/s. Suresh A. Shroff & Co.,Advs.
In SLP 3589-90/2009	M/s. Suresh A. Shroff & Co.,Advs.
In SLP 27824/2011 & 27841/2011:	M/s. Suresh A. Shroff & Co.,Advs.
In CA 6284/2004: [Coal India Ltd.]	Mr. Anip Sachthey,Adv.
In TC 35/2007:	Ms. Ruby Singh Ahuja,Adv. Ms. Manik Karanjawala,Adv.
In SLP 3589-90/2009: (For Respondent No.2)	Mr. Rameshwar Prasad Goyal,Adv.
In SLP 27824/2011 & 27841/2011: [for Respondent No.2/ S.B.I.]	Mr. A.V. Rangam,Adv.
For Intervenor(s) [I.A. No.7]	Mr. Dharmendra Rautray,Adv.
For Intervenor(s) [I.A. No.8]	Mr. S.K. Dholakia,Sr.Adv. Mr. Pramod Nair,Adv. Mr. Divyam Agarwal,Adv. Mr. Dheeraj Nair,Adv. Ms. Aarthi Rajan,Adv.

...3/-

For Intervenor(s) [I.A. No.9]	**Mr. E.C. Agrawala,Adv.**
For Intervenor(s) [I.A. No.6]	**Mr. Nakul Dewan,Adv. Mr. V.P. Singh,Adv. for M/s. Suresh A. Shroff & Co.,Advs.**
For Intervenor(s) [J.K. Industries]	**Mr. Ramesh Singh,Adv. Mr. A.T. Patra,Adv. for M/s. O.P. Khaitan & Co.,Advs.**
For Intervenor(s) [I.A. Nos.10-13]	**Mr. Ramesh Babu M.R.,Adv.**

Hon'ble Mr. Justice Surinder Singh Nijjar pronounced the judgement of the Bench comprising of Hon'ble the Chief Justice, Hon'ble Mr. Justice D.K. Jain, His Lordship, Hon'ble Mrs. Justice Ranjana Prakash Desai and Hon'ble Mr. Justice Jagdish Singh Khehar, answering the Reference.

[T.I. Rajput]
A.R.-cum-P.S.

[Indu Satija]
Court Master

[Signed Reportable Judgement is placed on the file]