IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 07.10.2016

\+ **O.M.P.(I) (COMM.) 23/2015 & CCP(O) 59/2016, IA Nos.25949/2015 & 2179/2016**

RAFFLES DESIGN INTERNATIONAL INDIA PRIVATE LIMITED & ANR. ..... Petitioners

Versus

EDUCOMP PROFESSIONAL EDUCATION LIMITED &ORS. ..... Respondents

Advocates who appeared in this case:

For the Petitioners : Mr Abhinav Vashist and Mr Arun Kathpalia, Senior Advocates with Mr Prashant Mishra, Mr Piyush Prasad, Mr Shalin Arthwan and Ms Jamal Joy and Mr Samaksh Goyal.

For the Respondents : Mr Suhail Dutt, Senior Advocate with Mr M.A. Niyazi, Mr Achint Singh Gyani and Ms Prabjot Kaur Chhabra.
Mr Sunil Mund, Mr Sanjiv Joshi and Ms Badeshree for R-3.

CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioners have filed the present petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter the 'Act'), *inter alia*, praying as under:

"(a) Direct that the Respondents through their directors (including but not limited to Mr Shantanu Prakash), officers, agents, representatives and employees (including but not limited to the Respondent No.3) to cease and desist forthwith from taking any actions that have the effect of depriving the Petitioners and their representatives of the exercise of their rights pursuant to clause 3.1.2 of the Share Purchase Agreement dated 12 March 2015 viz. to have an absolute say on the hiring and dismissal of employees of the Society;

(b) Direct that the Respondents through their directors (including but not limited to Mr Shantanu Prakash), officers, agents, representatives and employees (including but not limited to the Respondent No.3) cease and desist from interfering with any aspect of the hiring and dismissal rights of the Petitioners pursuant to clause 3.1.2 of the Share Purchase Agreement dated 12 March 2015, including interfering in any manner whatsoever with prompt payments to employees hired and/or dismissed by the Society.

(c) Direct the Respondent No. 3 (or any other person appointed in his capacity) to forthwith take steps to effect the payment of salaries to Dr. C.S. Sharma and/or take necessary steps to effect prompt payments of salaries to any other employees hired by the Society.

(d) Restrain the Respondents No. 1 and 2 including through their affiliates, related parties, directors, officers, agents, representatives and employees (including but not limited to the Respondent No.3) from taking any steps whatsoever in contravention of clause 3.1.2 of the Share Purchase Agreement dated 12 March 2015;"

2. At the outset, the respondents have taken a preliminary objection as to the maintainability of the present petition. The respondents contend that the present petition under Section 9 of the Act is not maintainable

principally on the ground that Part-I of the Act is inapplicable to arbitral proceedings held outside India - in this case Singapore - and the parties have impliedly agreed to exclude the applicability of Section 9 of the Act. The respondents also contend that the Arbitration and Conciliation (Amendment) Act, 2015 (hereafter 'the Amendment Act') is inapplicable to the present proceedings as the arbitral proceedings had commenced prior to 23.10.2015. The petitioners contend otherwise.

3. At this stage, the limited controversy that arises for consideration is whether the petition filed by the petitioners is maintainable.

4. Briefly stated, the facts necessary to address the aforesaid controversy are as under:-

4.1 Raffles Education Corporation Limited (hereafter 'Raffles'), being parent company of the petitioners' and Educomp Solutions Limited (hereafter 'Educomp'), being parent company of the respondents' entered into a Master Joint Venture Agreement(Master JVA) dated 16.05.2008.

Pursuant to the Master JVA, Educomp Raffles Higher Education Limited(hereafter 'ERHEL') was incorporated as a joint venture company for providing educational courses in management and designing at various

locations in India. Shares of ERHEL were held by Raffles and Educomp in equal proportion.

4.2 ERHEL took control over the management of a Society namely, Jai Radha Raman Education Society (hereafter 'the Society') to establish a college in NOIDA (hereafter the 'Noida College'). Subsequently, Raffles increased its stake in ERHEL to 58.18%.

4.3 On 12.03.2015, the petitioners and the respondents entered into a Share Purchase Agreement (hereafter 'the Agreement') whereby, on fulfilling the conditions set out in the Agreement, shares of respondents in ERHEL were to be acquired by the Petitioners. The relevant clause of the Agreement reads as under:

> "3.1.2. On deposit of the 10% of the Purchase Price by the Purchasers to the Escrow Agent referred to in clause 3.1.1, the Sellers shall allow the Purchasers (i) to take control of the Company and JRRES, limited to the extent that the Purchasers shall have absolute say on the hiring and dismissal of employees (including existing employees); and (ii) to take charge of JRRES' application to the Government of Uttar Pradesh, India for becoming a deemed university. For clarification, upon the Execution Date, funding of the operations of the Company, JRRES, MIDL and MSB shall be the exclusive responsibility of the Purchasers, details of which shall be shared with the Sellers from time to time till closing. In the event the Closing does not take place as envisaged in this Agreement and this Agreement is terminated, the Sellers shall within 30 (Thirty) days,

> introduce an amount equivalent to the total funding contributed by the Purchasers in JRRES for the operations of JRRES in this period as working capital."

4.4 Certain disputes arose between the parties in relation to the Agreement. Clause 15 of the Agreement provides that the Agreement would be governed and construed in accordance with the laws of Singapore. Further the Arbitration would be held in Singapore under the Arbitration Rules of the Singapore International Arbitration Centre (hereafter 'SIAC Rules').

4.5 On 15.09.2015, the petitioners invoked the arbitration clause by filing a Notice of Arbitration with the Singapore International Arbitration Centre (hereafter 'SIAC') with a copy thereof to the respondents. Pursuant to Rule 26.2 of the SIAC Rules, a request for appointment of an Emergency Arbitrator was made by the petitioners to SIAC on 25.09.2015, which was opposed by the respondents. The respondents by a notice dated 25.09.2015, terminated the Agreement alleging that Petitioners were in repudiatory breach of the Agreement. Thereafter, on 28.09.2015, the Vice President of the Court of Arbitration, SIAC appointed Mr Michael Lee as the Emergency Arbitrator to consider the Emergency Application filed by the claimants (petitioners herein).

4.6 The Emergency Arbitrator passed an Interim Emergency Award dated 06.10.2015 (hereafter ' the Emergency Award') wherein the Interim relief sought by the claimants was granted and respondents were restrained from taking any action that deprived the rights of the claimants in the Agreement in respect of (a) hiring and dismissal of employees of the Society; (b) functioning and management of the society. The respondents were also restrained from instigating the terminated employees of the Society, including Professor Mahesh Gandhi, to act contrary to their respective termination letters and/or to indulge in any forcible entry into the premises of the Society or the Noida College.

4.7 Thereafter, the petitioners filed an application being Case No 929/2015 before the High Court of the Republic of Singapore (hereafter 'Singapore High Court') under Section 12 of the International Arbitration Act (hereafter 'IAA') seeking enforcement of the Emergency Award against respondent no 2. It is stated by the respondents that petitioners have secured an enforcement order dated 04.02.2016 against respondent no 2.

4.8 The respondents filed an application under paragraph 7 of schedule 1 of SIAC Rules praying for setting aside of the Emergency Award. However, on 14.01.2016, a consent order was passed by the sole arbitrator, Mr Andrew Jeffries, wherein the operative first two paragraphs of the

Emergency Award were reiterated but the parties also agreed that the said paragraphs of the Emergency award: (1) are negative or prohibitory in nature and not positive or mandatory in nature; and (2) do not require any member of the Society to act in breach of their fiduciary duty to the Society.

5. It is stated by the petitioners that despite passing of the Emergency Award, the respondents are acting in contravention of the rights of the petitioners under the Agreement inasmuch as respondents have refused to accept the appointment of Dr C.S Sharma, who was appointed by the petitioners to replace Professor Gandhi and further, respondent no 3 has also refused to sign the cheques for payment of salary to Dr Sharma. It is further stated the respondents are illegally and *malafidely* disrupting the functioning of the Society and the Noida College. It is under these circumstances, the petitioners have filed the present petition under Section 9 of the Act.

Submissions

6. At the outset, Mr Suhail Dutt, learned Senior Advocate appearing for the respondents submitted that present petition is not maintainable and is liable to be dismissed. He contended that since the seat of arbitration was

Singapore and the Agreement was entered into after the Supreme Court had delivered the judgement in ***Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc.*: (2012) 9 SCC 552**, Part I of the Act would not apply and therefore, the present petition is not maintainable. Mr Dutt drew the attention of this Court to Section 26 of the Amendment Act and contented that by virtue of Section 26 of the Amendment Act, it was not applicable in respect of arbitral proceedings that had commenced before the Amendment Act came into force, that is, 23.10.2015.

7. Next, he referred to Clause 15 of the Agreement and without prejudice to the contention that the Amendment Act did not apply, contended that since it was expressly agreed between the parties that the arbitration would be governed by the laws of Singapore and the arbitral proceedings would be conducted in accordance with the Rules of SIAC, the parties had impliedly excluded the applicability of Part I of the Act to the arbitral proceedings. He further submitted that proviso to Section 2(2) as amended by the Amendment Act provided that sections 9, 27, 37(1)(a) and 37(3) were applicable "*subject to an agreement to the contrary*". Mr Dutt earnestly contended that the seat of the arbitration was Singapore and the arbitration agreement was governed by the laws of Singapore and therefore, applicability of Part-I was excluded by the parties by

implication. He submitted that in ***Bhatia International v. Bulk Trading S.A and Anr*****: (2002) 4 SCC 105**, the Supreme Court held that Part I of the Act shall apply to the international commercial arbitrations which take place outside India, unless parties had expressly or impliedly excluded the applicability of the Act. He submitted that even if it is accepted that the Amendment Act applies, the position of law would revert to what had been held in ***Bhatia International*** (*supra*).

8. He further referred to the decisions of the Supreme Court in ***Videocon Industries Ltd. v. Union of India and Anr***: **(2011) 6 SCC 161; *Reliance Industries Limited and Anr. v. Union of India*: (2014) 7 SCC 603;** and ***Harmony Innovation Shipping Ltd. v. Gupta Coal India Ltd. and Anr.***: **(2015) 9 SCC 172** and contended that once the parties had consciously agreed that the seat of arbitration would be outside India and the arbitration agreement would be governed by a foreign law, it would not be open for the parties to contend that Part I would also be applicable to the arbitration agreement.

9. Next, Mr Dutt submitted that the reliefs as prayed for in the present petition have already been granted by virtue of the Emergency Award and recourse to Section 9 for enforcement of Emergency Award (which is an interim order) was not available.

10. Mr Vashist, Senior counsel appearing for the petitioners countered the contentions advanced by Mr Dutt. He submitted that reading the proviso to Section 2(2) of the Amendment Act in the manner as suggested by Mr Dutt would render the said proviso absolutely redundant. He contended that the very purpose for which Section 2(2) was amended was to confer the jurisdiction on Indian courts in respect of Sections 9 and 27 of the Act, even if the seat of arbitration is outside India. He earnestly contended that in the expression "*subject to an agreement to the contrary*", the word "agreement" would mean something more than the choice of law and seat of arbitration. He further submitted that the decision in ***Bhatia International*** (*supra*) was no longer good law for agreements entered into after 06.09.2012 as it was over-ruled prospectively by the constitution bench of the Supreme Court in ***Bharat Aluminium*** (*supra*). He also submitted that mere choosing SIAC Rules for arbitration does not in any way indicate that Part I has been impliedly excluded by the parties.

11. Mr Vashist stated that the present petition is not an enforcement proceeding *per se* and has been filed to prevent the respondents from frustrating the rights of the petitioners.

12. Mr Vashist also countered the submission on behalf of the respondents that the Amendment Act would not be applicable to arbitral

proceedings commenced before commencement of the Amendment Act on the following grounds : (i) the expression " *to arbitral proceedings* " as used in Section 26 of the Amendment Act would not apply to proceedings before a court; and (ii) Petition was filed under the Ordinance and on the day it was filed, there was no provision in the ordinance excluding the applicability of the amendments to arbitral proceedings commenced prior to 23.10.2015 and by virtue of Section 27(2) of the Act, all acts done under the Ordinance were saved.

Reasoning and Conclusion

13. In the aforesaid context as to the maintainability of the present petition, the following questions arise for consideration:-

> (i)Whether the provisions of the Amendment Act are applicable to the present proceedings? and
>
> (ii) If the answer to the aforesaid question is in the affirmative whether Section 9 of the Act is applicable by virtue of the proviso introduced in Section 2(2) of the Act by Section 2 (II) of the Amendment Act?

14. The controversy involved in the first question centres around the interpretation of Section 26 of the Amendment Act, which is set out below:-

> "**26. Act not to apply to pending arbitral proceedings.** – Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act."

15. As is plainly evident from the language of the aforesaid section, it is in two parts. The first is couched in negative form; the opening words expressly provide that the Amendment Act shall not apply to arbitral proceedings commenced in accordance with section 21 of the Act, before the commencement of the Act unless the parties agree otherwise. The second limb is in the affirmative; that is, the Act would apply in relation to arbitral proceedings commenced on or after the date of commencement of the Amendment Act.

16. In my view the aforesaid two limbs are not exhaustive. This is so because the first limb - which is in the negative form - only refers to proceedings commenced in accordance with Section 21 of the Act prior to the commencement of the Amendment Act (23.10.2015). Section 21 is in Part I of the Act and, indisputably, applies only to arbitral proceedings in India. There is no reference to arbitral proceedings that have commenced other than under Part-I of the Act. Thus, clearly, the first limb of Section 26 of the Amendment Act would not cover arbitral proceedings

commenced outside India - arbitral proceedings to which Part I of the Act does not apply. In the context of those arbitral proceedings clearly the provisions of Part II of the Act as amended by the Amendment Act would be applicable and nothing in Section 26 of the Amendment Act bars the applicability of the Amendment Act to those proceedings.

17. If the arbitral proceedings that have commenced under Section 21 of the Act prior to 23.10.2015 and those that are commenced after 23.10.2015 do not exhaust the entire statutory space to which the Amendment Act is applicable, then plainly the provisions of Section 26 as to the applicability of the Act are not exhaustive. In other words, Section 26 is silent as to the applicability of the Amendment Act to proceedings which are not expressly indicated under Section 26 of the Act.

18. The second aspect to be kept in mind is the meaning of the expression "arbitral proceedings". Section 21 of the Act provides for commencement of arbitral proceedings and reads as under:

> "21.**Commencement of arbitral proceedings.**—Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent."

19. Section 32 of the Act contains provisions regarding termination of proceedings. The said section is set out below:-

> "**32. Termination of proceedings.—**
>
> (1) The arbitral proceedings shall be terminated by the final arbitral award or by an order of the arbitral tribunal under sub-section (2).
>
> (2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings where—
>
> (a) the claimant withdraws his claim, unless the respondent objects to the order and the arbitral tribunal recognises a legitimate interest on his part in obtaining a final settlement of the dispute,
>
> (b) the parties agree on the termination of the proceedings, or
>
> (c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.
>
> (3) Subject to section 33 and sub-section (4) of section 34, the mandate of the arbitral tribunal shall terminate with the termination of the arbitral proceedings."

20. A conjoint reading of Section 21 and 32 of the Act also indicates the scope of the expression "arbitral proceedings". Any proceedings initiated in the Court outside the course of the arbitral proceedings can by no stretch be considered to fall within the scope of arbitral proceedings. Thus, a petition to set aside the arbitral award under Section 34 or for that matter a petition under Section 9 to seek interim measures of protection after the

arbitral award has been passed would clearly be proceedings, which by no stretch can be considered as arbitral proceedings.

21. Bearing the aforesaid in mind, it would be noticed that the first limb of Section 26 of the Act only bars its applicability to arbitral proceedings. The use of the word 'to' instead 'in relation to', as is used for the second limb of Section 26, is material. The use of the word 'to' clearly restricts the import of the first limb of Section 26.

22. The distinction between the expression 'to' and 'in relation to' was highlighted by the Supreme Court in ***Thyssen Stahlunion Gmbh v. Steel Authority of India Ltd*: (1999) 9 SCC 334** in the context of Section 85(2) of the Act. Section 85 of the Act is the repeal and savings clause. By virtue of Section 85 (1) of the Act, the Arbitration (Protocol and Convention) Act, 1937, the Arbitration Act, 1940 and the Foreign Awards (Recognition and Enforcement) Act, 1961 were repealed. However, by virtue of Section 85 (2)(a) of the Act, the provisions of the aforesaid enactments were expressly made applicable *"in relation to"* arbitral proceedings, which had commenced before the Act coming into force. In that context the Supreme Court, *inter alia*, held as under:-

> "The provisions of the old Act (Arbitration Act, 1940) shall apply in relation to arbitral proceedings which have

commenced before the coming into force of the new Act (the Arbitration and Conciliation Act, 1996).

The phrase "in relation to arbitral proceedings" cannot be given a narrow meaning to mean only pendency of the arbitration proceedings before the arbitrator. It would cover not only proceedings pending before the arbitrator but would also cover the proceedings before the court and any proceedings which are required to be taken under the old Act for the award becoming a decree under Section 17 thereof and also appeal arising thereunder."

* * *

The expression "in relation to" is of the widest import as held by various decisions of this Court in Doypack Systems (P) Ltd., Mansukhlal Dhanraj Jain, Dhanrajamal Gobindram and Navin Chemicals Mfg. This expression "in relation to" has to be given full effect to, particularly when read in conjunction with the words "the provisions" of the old Act. That would mean that the old Act will apply to the whole gambit of arbitration culminating in the enforcement of the award. *If it was not so, only the word "to" could have sufficed and when the legislature has used the expression "in relation to", a proper meaning has to be given.* This expression does not admit of restrictive meaning. The first limb of Section 85 (2)(a) is not a limited saving clause. It saves not only the proceedings pending at the time of commencement of the new Act but also the provisions of the old Act for enforcement of the award under that Act."

[emphasis supplied]

23. As noticed above, while in the first limb, the word used is "to" arbitral proceedings and in the second limb, the expression used is "in relation to" arbitral proceedings. Thus, if the aforesaid expressions are interpreted in the manner as indicated by the Supreme Court in ***Thyssen Stahlunion Gmbh*** (*supra*), the first limb of Section 26 of the Amendment

Act would have to be read in a restrictive manner. In other words, the Amendment Act would not apply to arbitral proceedings commenced under Part-I of the Act before 23.10.2015. There is no controversy regarding the second limb of Section 26; undisputedly, it has a much wider sweep and covers all proceedings, which are connected with the arbitral proceedings - whether commenced under Part-I or otherwise - including proceedings under Sections 8, 9, 14, 34 and 37 of the Act.

24. Mr Dutt's contention that the use of the word "to" and the expression "in relation to" is not of much significance and the intention of the legislature was clear that the provisions of the Amendment Act should not be applied to any proceedings in relation to arbitral proceedings commenced before 23.10.2015, is unpersuasive. It is well settled that if the legislature uses different words in respect of the same subject matter, it must be understood that they were not used to convey the same meaning. In ***The Member, Board of Revenue v. Arthur Paul Benthall***: **AIR 1956 SC 35** a Constitution Bench of the Supreme Court observed that *"When two words of different import are used in a statute in two consecutive provisions, it would be difficult to maintain that they are used in the same sense"*. In ***D.L.F. Qutab Enclave Complex Educational Charitable Trust v. State of Haryana and Ors.***: **(2003) 5 SCC 622**, the Supreme Court held

that *"When different terminologies are used by the legislature it must be presumed that the same had been done consciously with a view to convey different meanings."*

25. To summarise, Section 26 of the Amendment Act is silent as to, (i) arbitral proceedings commenced before 23.10.2015 to which Part-I of the Act does not apply; (ii) proceedings in courts in relation to arbitral proceedings commenced before 23.10.2015 to which part-I of the Act applies; and (iii) proceedings in courts in relation to arbitral proceedings commenced before 23.10.2015 to which Part-I does not apply.

26. The next aspect to be examined is whether the Amendment Act would apply to proceedings before the court. As discussed earlier, Section 26 of the Amendment Act is silent as to the applicability of the Amendment Act to proceedings (other than arbitral proceedings commenced before 23.10.2015) which are commenced before or after 23.10.2015 but are in relation to or connected with arbitral proceedings commenced before 23.10.2015.

27. The Amendment Act must be held applicable from the date it came into force. The Act as it stands in the statute book stands amended with effect from 23.10.2015. The applicability of the Amendment Act to arbitral

proceedings that have commenced prior to that date has expressly been excluded and, therefore, to that extent the Amendment Act would not be applicable. However for proceedings other than those expressly excluded, the Amendment Act would be applicable from the date it came into force.

28. Mr Dutt had, during the course of his arguments, also mentioned that applying the amended provisions of the Amendment Act in relation to pending proceedings would imply that the provisions were being applied retrospectively. He did not pursue this line of argument, but in my view, it must be addressed for the sake of completeness.

29. It is important to clarify that applying the Amendment Act from 23.10.2015 does not indicate that the Amendment Act is being applied retrospectively in the true sense because the Amendment Act replaced the Arbitration and Conciliation (Amendment) Ordinance, 2015; by virtue of Section 27(1) of the Amendment Act, the said ordinance was repealed and by virtue of Section 27(2), all acts done under the Act as amended by the Ordinance were deemed to be done under the Act as amended by the Amendment Act.

30. The issue to be considered is whether the Amendment Act should be interpreted as not applicable to court proceedings for the reason that the

same would make the Amendment Act a retrospective legislation? The well accepted principle of interpretation is that all statutes affecting substantive rights should be interpreted as being applicably prospectively unless indicated otherwise either expressly or by necessary implication. There is a general presumption that unless the statute expressly indicates, it would not be applied retrospectively to impair a vested right or impose a fresh burden based on past transaction/events. However, procedural laws are presumed to apply retrospectively; this is so because as explained by the Supreme Court in ***Anant Gopal Sheorey v. State of Bombay***: **AIR 1958 SC 915**, *"no person has any right in any course of procedure"*. In ***Amireddi Raja Gopala Rao v. Amireddi Sitharamamma and Ors***: (**1965) 3 SCR 122,** the Supreme Court had observed that *"It is a well-recognised rule that a statute should be interpreted, if possible, so as to respect vested rights."* These principles have to be kept in mind while addressing the above issue.

31. The Act embodies the Indian Law as applicable to arbitrations. The nature of arbitration law is essentially procedural but it also includes provisions with regard to matters that cannot be classified as mere procedural matters. This would include the question as to whether the disputes are arbitrable; the question as to jurisdiction; the scope of

challenge to the awards; and, to some extent even the supportive and supervisory roles of Courts in relation to arbitrations. Thus, the Amending Act does to certain extent affect the substantive rights of parties. The question thus arises is: whether in view of the such effect, the applicability of the Amendment Act to proceedings instituted in courts in relation to arbitral proceedings instituted prior to 23.10.2015, should be interpreted to be excluded?

32. It is also well settled that an amending enactment is not retrospective merely because it also applies to persons to whom the pre-amended Act applies. In ***Punjab University v. Subhash Chander and Anr.*: 1984 (3) SCC 603**, the Supreme Court set aside the decision of the Full Bench of the Punjab and Haryana High Court, whereby it was held that the amendment to the rules to award lower grace marks would not be applicable to students who had been admitted to the course prior to the amendment. In ***Bishan Naraian Mishra vs State of U.P*: 1965 (1) SCR** the Supreme Court held that the amendment in the rules reducing the age of superannuation from 58 years to 55 years could not be considered as retrospective and would apply to all employees altering the age of superannuation after the amendment notwithstanding that the age of superannuation was higher when they had joined the employment. The

Court held that merely because a legislation applies to past acts does not make the law retrospective. In ***The Queen v. The Inhabitants of St. Mary, Whitechapel*****: (1848) 12 QBD 120** the court observed that a statute *"is not properly called a retrospective statute because a part of the requisites for its action is drawn from a time antecedent to its passing"*. This principle was cited with approval by the Supreme Court in ***Rao Shiv Bahadur Singh and Anr. v. State of Vindhya Pradesh*****: AIR 1953 SC 394.**

33. Most enactments would invariably affect some existing rights however they cannot be considered as a retrospective legislation only for that reason.

34. It is also necessary to bear in mind that the rights of the parties for resolution of disputes were crystallised when they agreed for resolution of the disputes by arbitration and not when the arbitration agreement was invoked. Thus, in any view, even if it is assumed that the Amendment Act has a retroactive effect, simply interpreting Section 26 of the Amendment Act to exclude its applicability to proceedings in relation to arbitral proceedings would not address the issue of interpreting the enactment in a manner so as to avoid its retroactive effect, if any.

35. Thus, in my view, a more appropriate approach would be to consider the nature of arbitration law and effect of the Amendment Act as a whole. Essentially, the provisions of an arbitration law can be classified into four broad categories. The first being the provisions which relate to matters which define the scope of arbitrations; this includes provisions defining the matters that are arbitrable; the scope of arbitration agreements, etc. Such provisions define the entire scope of arbitration and the legal policy of the Alternate Dispute Resolution Mechanism. The second category of provisions relate to the conduct of arbitrations. These provisions essentially provide for the manner in which arbitration shall be conducted. The provisions under chapter V of the Act clearly fall within this category. The parties are free to derogate from most of such provisions and agree to a separate set of rules for conduct of arbitrations. The parties are also free to adopt the rules of any institutional arbitration such as International Chambers of Commerce (ICC), London Court of International Arbitration (LCIA), Delhi International Arbitration Centre (DIAC) etc. The third category of provisions relate to the interface between the courts and the arbitration process. The Act contains provisions in aid of arbitral proceedings such as role of courts in appointment of arbitrators, assistance in taking evidence, etc. This category would also include provisions relating to exercise of supervisory role by courts including setting aside of

awards. One facet of this category would also be enforcement of awards by courts.

36. As discussed earlier, insofar as the rules pertaining to conduct of arbitral proceedings are concerned, the legislature in its wisdom has specifically provided that the Amendment Act would not apply to arbitral proceedings that were commenced prior to 23.10.2015. The applicability of the provisions of the Amendment Act that relate to the supportive and supervisory role of courts, may be considered in the context of the reasons that led to enactment of such provisions.

37. The Consultation Paper (hereafter 'the consultation paper') on the proposed amendments to the Act placed in public domain in April, 2010 by the Government of India, indicated the reasons for amending the Act as under:

> "As we know that main purpose of the 1996 Act is to encourage an ADR method for resolving disputes speedy and without much interference of the Courts. In fact Section 5 of the Act provides, "Notwithstanding anything contained in any other law for the time being in force, in matters covered by this Part (i.e. Part I), no judicial authority shall intervene except where so provided in this Part." However, with the passage of time, some difficulties in its applicability of the Act have been noticed. The Supreme Court and High Courts have interpreted many provisions of the Act and while doing so they have also realized some lacunas in the Act which leads to conflicting views. Further,

> in some cases, courts have interpreted the provisions of the Act in such a way which defeats the main object of such a legislation. Therefore, it becomes necessary to remove the difficulties and lacunas in the Act so that ADR method may become more popular and object of enacting Arbitration law may be achieved."

38. The amendments introduced by the Amendment Act are based on 246th Report of the Law Commission of India. A plain reading of the said report clearly indicates that most of the amendments are occasioned by the decisions rendered by the courts (mainly the Supreme Court of India). In some cases, the courts had pointed out certain anomalies while in the other cases, the courts had interpreted the law, which the Government felt was different from India's legal policy relating to arbitration. Thus, several amendments have also been introduced to overcome the decisions rendered by the courts.

39. The amendment to Section 2(2) of the Act has been introduced principally to strengthen the view of the Supreme Court in ***Bharat Aluminium*** (*supra*) in respect of *lex arbitri* being the law that is applicable at the seat of arbitration; at the same time also enable courts to pass interim orders. The amendment is also to overcome the view in ***Bhatia International*** (*supra*). The object of the said amendment is clearly to

enable a party to take recourse to the courts to assist the arbitral process being conducted overseas.

40. Significant amendments have been introduced to Section 11 of the Act principally to restrict the judicial intervention at pre-arbitral stage in conformity with Section 8 and 45 of the Act and further to promote institutional arbitrations. Section 11A and IVth Schedule to the Act have been introduced in respect of the arbitral fees. The issue as to excessive arbitral fees had been flagged by the Supreme Court in ***Union of India v Singh Builders Syndicate***: (**2009) 4 SCC 523**; and notice of this was taken by the Law Commission. The amendments to Section 12 have been made and Vth Schedule has been introduced to ensure the neutrality of the arbitrators as this issue had been highlighted in several decisions rendered by the Supreme Court. Substantial amendments have been brought in Section 17 of the Act to enable arbitral tribunals to pass orders which can be effectively enforced. The Supreme Court in ***Sundaram Finance Ltd v. NEPC India Ltd*****: (1999) 2 SCC 479** had pointed out that the orders passed by the arbitral tribunal cannot be enforced as orders of the Court and, therefore, the parties have to resort to Section 9 of the Act. The Commission also noted that in ***Sri Krishan v. Anand*****: 2009 3 Arb LR 447 (Del)** this Court had attempted to find suitable legislative basis for

enforcing the orders by reading Section 27(5) of the Act in a manner so as to hold a person violating interim orders, guilty of contempt. The Commission felt that the solution provided in ***Sri Krishan*** (*supra*) was not a complete solution and, therefore, amendments were required to give teeth to the orders of the arbitral tribunal.

41. The Act has also brought about significant changes in Section 34 of the Act. The amendments made to Section 34 of the Act are intended to bring the aforesaid Section in line with the decision regarding the scope of the 'public policy' as explained by the Supreme Court in ***Renu Sagar Power Company Ltd v. General Electric Company*****: AIR 1994 SC 860.** Explanation 2 to Section 34(2)(b) (ii) was suggested by the Law Commission after the 246th Report had been submitted. This was to overcome the decision of the Supreme Court in ***Oil and Natural Gas Corporation Ltd v. Western Geco International Ltd***.: **(2014) 9 SCC 263** and to curtail the interference of courts on the *Wednesbury* principle. In that case the Supreme Court had *inter alia* held that an award which was unreasonable on the anvil of *Wednesbury* principle could be set aside as being contrary to public policy of India.

42. Section 36 of the Act has been amended in view of the observations made by the Supreme Court in ***National Aluminium Co Limited v. M/s***

***Press Steel & Fabrications Pvt Ltd and Anr*: 2004 (1) SCC 540** wherein the Supreme Court had criticized the provision of automatic suspension of execution of the award on filing of a petition under Section 34 of the Act.

43. It is thus, seen that most of the amendments introduced in the Act were either clarificatory or to address certain anomalies in the Act or to remove difficulties.

44. The essential purpose of the Act is to provide the legal framework for an Alternate Dispute Resolution (ADR) mechanism. And, as stated above, the Amendment Act has been enacted for removing the difficulties and the lacunae in the Act. The entire purpose of the Amendment Act is to improve the efficacy of the ADR. Whilst it is understandable that the arbitral proceedings that have already commenced, should be continued in accordance with the procedure as adopted; it is difficult to understand the rationale as to why the supportive and supervisory role of Courts in regard to those proceedings be not provided as per the Amendment Act. If the contention as advanced by the respondents is accepted, it would mean that the courts would adopt different approach in lending their aid to proceedings and enforcement of awards depending upon when the arbitral proceedings commenced.

45. As an illustration, let us consider a case where two sets of parties enter into similar contracts prior to 23.10.2015. Disputes relating to one agreement arises before 23.10.2015 and one of the parties invokes the arbitration clause. In the other case, disputes arise after 23.10.2015 and the arbitral proceedings commence thereafter. Arbitral awards in respect of disputes between both the sets of parties are made on the same date - after 23.10.2015. By virtue of the amendment to Section 36 of the Act, the stay of an arbitral award is no longer automatic after the period for setting aside the award under Section 34 of the Act has expired and unless the Court hearing an application under Section 34 of the Act grants a stay, the arbitral award is liable to be enforced. If the contention of the respondent is accepted then the Court would have to view the awards rendered in the light of when the arbitral proceedings were commenced. While in the case of former, the arbitral award would be automatically stayed on any party filing an application under Section 34 of the Act but that would not be the case in respect of the latter notwithstanding that the arbitral awards were rendered on the same date. This, in my view, can clearly not be the intention of the legislature.

46. The amendment for effective enforcement of the award would also principally be a procedural matter. The Supreme Court in ***Narhari***

***Shivram Shet Narvekar v. Pannalal Umediram*: (1976) 3 SCC 203,** held that a decree passed by an Indian Court against a foreigner which was non-executable in Goa (which was not a part of India) at the time when it was passed, became executable once Goa became a part of India and the Code of Civil Procedure was extended to Goa. The Supreme Court further observed:-

> "It seems to us that the right of the judgment- debtor to pay up the decree passed against him cannot be said to be a vested right, nor can be question of executability of the decree be regarded as a substantive vested right of the judgment-debtor. A fortiorari the execution proceedings being purely a matter of procedure it is well settled that any change in law which is made during the pendency of the cause would be deemed to be retro-active in operation and the Appellate Court is bound to take notice of the change in law"

47. In ***Kuwait Minister of Public v. Sir Frederick Snow & Partners*: (1984) 1 All ER 733 (HL)**, the Court held that an arbitral award would be executable in United Kingdom if the foreign State was a party to the New York Convention, notwithstanding that such State was not a party to the convention when the award was made. Therefore, lifting the stay of enforcement on an award would essentially be an alteration in the procedure.

48. The amendments to Section 36 of the Act, although affects the rights of parties, cannot be read as being retrospective law and, therefore, interpreted as inapplicable for enforcement of awards rendered in relation to the arbitral proceedings commenced before 23.10.2015. The amendments introduced to Section 34 of the Act are also substantive, however, it is seen that the same have been introduced to bring the defence of "public policy" within the scope of that defence, as explained by the Supreme Court in ***Renu Sagar*** (*supra*). The suggestion that changes introduced in Section 34 of the Act are substantial therefore affect the vested rights of the parties, is also inconsiderable. The extent of impairment to extant rights is an essential measure to evaluate whether the law should be interpreted in a manner so as to exclude from its scope the extant rights.

49. The fundamental premise of arbitration is that the parties have agreed to accept the decision of an arbitral tribunal as final and binding. Any amendment to restrict judicial intervention essentially enforces the aforesaid ethos; thus, it cannot be considered to be divesting any part of its vested right to any significant extent so as to read Section 34 of the Act to be inapplicable in respect of the awards rendered pursuant to arbitral proceedings initiated prior to 23.10.2015.

50. In ***Secretary of State for Social Security and Another v. Tunnicliffe*: (1991) 2 All ER 712,** the Court of Appeal observed as under:

> "In my judgment the true principle is that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree— the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended."

51. The aforesaid view was approved by the House of Lords in ***L'Office Cherifien des Phosphates and another v. Yamashita-Shinnihon Steamship Co Ltd*: (1994) 1 All ER 20.** In that case, the Court was concerned with the applicability of Section 13A of the Arbitration Act of 1950. The said provision came into force on 01.01.1992 and enabled the arbitrators to dismiss the claim if any of the following conditions were satisfied: *"(a) that there has been inordinate and inexcusable delay on the part of the claimant in pursuing the claim; and (b) that the delay – (i) will give rise to a substantial risk that it is not possible to have a fair resolution of the issues in that claim; or (ii) has caused, or is likely to cause or to have caused, serious prejudice to the respondent."* In that case, the disputes between the parties were referred to arbitration in 1985 and after filing of the claims and statement of defence, the arbitration had not

proceeded further. After the introduction of Section 13A in the Arbitration Act 1950, the respondents filed for dismissal of the case and the arbitrators accepted the application and dismissed the case. In the aforesaid context, the claimants argued that the arbitrator could not take into account the delay that had occurred prior to insertion of Section 13A as the said provision could not have any retrospective operation. The Court rejected the aforesaid contention. The following passage from the concurring opinion of Lord Mustill is instructive:-

> "If there were any doubt about this the loud and prolonged chorus of complaints about the disconformity between practices in arbitration and in the High Court, and the increasing impatience for something to be done about it, show quite clearly that s 13A was intended to bite in full from the outset. If the position were otherwise it would follow that, although Parliament has accepted the advice of all those who had urged that this objectionable system should be brought to an end, and has grasped the nettle and provided a remedy, it has reconciled itself to the continuation of arbitral proceedings already irrevocably stamped with a risk of injustice. I find it impossible to accept that Parliament can have intended any such thing, and with due respect to those who have suggested otherwise I find the meaning of s 13A sufficiently clear to persuade me that in the interests of reform Parliament was willing to tolerate the very qualified kind of hardship implied in giving the legislation a partially retrospective effect."

52. The view that a statutory provision can be applied retrospectively on the doctrine of fairness was accepted by the Supreme Court in ***Vijay v.***

***State of Maharashtra*: 2006 (6) SCC 289.** In that case, the Court was concerned with the applicability of provisions of Bombay Village Panchayats Act, 1958 which enacted that no person, who has been elected as Councillor of Zila Parishad or as member of the Panchayat Samiti shall be a member of Panchyat or continue as such. The Supreme Court rejected the contention that the said provision would not be applicable to the existing members. The relevant observations of the court are quoted below:-

> "It is now well-settled that when a literal reading of the provision giving retrospective effect does not produce absurdity or anomaly, the same would not be construed to be only prospective. The negation is not a rigid rule and varies with the intention and purport of the legislature, but to apply it in such a case is a doctrine of fairness. When a law is enacted for the benefit of the community as a whole, even in the absence of a provision, the statute may be held to be retrospective in nature. The appellant does not and cannot question the competence of the legislature in this behalf."

53. Thus, even in cases where there is no provision that the new law is to be applied retrospectively, the Courts would nonetheless apply the same if it is fair to do so and if it furthers the intention of the legislature.

54. The question whether Section 26 of the Amendment Act should be interpreted in a manner so as to exclude its applicability to Court proceedings in relation to the arbitral proceedings that have commenced

before 23.10.2015 would also have to be viewed on the basis whether it could be fair to do so and whether it would further the object of the legislation.

55. The stated object of Arbitration Act has always been to provide for a speedy resolution of disputes and provide an efficacious ADR mechanism. The Act was enacted in 1996 to consolidate laws relating to Domestic Arbitrations, International Commercial Arbitrations and enforcement of Foreign Awards. After its enactment, it was felt that the Act had certain lacunae which needed to be addressed. In the year 2001, the Law Commission of India undertook a comprehensive review and recommended several Amendments in its 176th Report to the Government of India. The Government of India decided to accept most of the recommendations and accordingly, the Arbitration and Conciliation (Amendment) Bill, 2003 was introduced in the Rajya Sabha on 22.12.2003. Thereafter, in July, 2004, the Government constituted a Committee under the Chairmanship of Justice Dr B.P. Saraf to undertake the study of implications of the recommendations of the Law Commission relating to Arbitration and Conciliation (Amendment) Bill, 2003. The Bill was thereafter referred to the Departmental Standing Committee on Personnel, Public Grievances, Law and Justice. The said Committee after taking

evidence of eminent advocates, representatives of Trade and Industry and other stake holders submitted a report on 04.08.2005. The Committee also recommended that the Bill of 2003 may be withdrawn to bring a fresh legislation. The said Bill of 2003 was thereafter withdrawn for further examination. In 2010, the Government of India issued the Consultation Paper inviting suggestions from public and other stakeholders.

56. Thereafter, the Ministry of Law and Justice asked the Law Commission of India to undertake a study of the proposed amendments. The Law Commission of India submitted its report on 05.08.2014 and proposed several amendments to the Act. The Amended Act is essentially based on the said proposals. Most of the amendments also address the issues that were sought to be addressed by the 2003 Bill. Thus, it is clear that there has been a long standing demand for amending the Act to make it more effective. The amendments for restricting Judicial Review and for removing the provision for an automatic stay of execution of the awards have been on the anvil since several years. The Government of India caused the President to promulgate the Arbitration and Conciliation (Amendment) Ordinance, 2015 [No.9 of 2015], which was published in the Gazette of India on 23.10.2015 and it came into effect immediately. The fact that Government caused the Ordinance to be issued under Article 123

(1) of the Constitution of India - which is issued where the President *is satisfied that circumstances exist which make it necessary for him to take immediate action* - without waiting for the Parliament Session to commence clearly indicates that the Government was of the view that it was necessary to immediately implement the proposed amendments. In the circumstances, it is difficult to accept that the intention of the Legislature was not to apply the said provisions in respect of proceedings instituted before the courts after 23.10.2015 either under Section 34 or under Section 36 of the Act.

57. It is also relevant to note that it is not the respondents' contention that the applicability of the Amendment Act depends on the date when the parties entered into the Arbitration Agreement; thus, no vested right can be claimed by the parties in respect to the pre-amended Act.

58. It is also relevant to mention that as far as enforceability of foreign awards is concerned, any proceedings for enforcement of a foreign award after 23.10.2015 would, undisputedly, be in terms of the Act as amended. It is not disputed that in the facts of the present case, any award that is passed by the Arbitral Tribunal in Singapore would be enforceable as a foreign award in accordance with the provisions of Part-II of the Act as amended by virtue of the Amendment Act. In this view, it is also difficult to

reconcile the position that for the purposes of section 9 of the Act, the provisions of the Amendment Act be ignored but the arbitral award that may follow would be enforced according to the Amended Act.

59. As mentioned hereinbefore, there is no indication in Section 26 of the Amendment Act that it would not be applicable to the proceedings instituted in courts after the Amendment Act came into force. As stated earlier, the Amendment Act is based on the amendments as provided by the Law Commission in its 246th Report. In the said report, the Law Commission had proposed that a new section-Section 85A-be inserted in the Act, which reads as under:-

> "Transitory provisions .—(1) Unless otherwise provided in the Arbitration and Conciliation (Amending) Act, 2014, the provisions of the instant Act (as amended) shall be prospective in operation and shall apply only to fresh arbitrations and fresh applications, except in the following situations -
>
> (a) the provisions of section 6-A shall apply to all pending proceedings and Arbitrations.
>
> Explanation: It is clarified that where the issue of costs has already been decided by the court/tribunal, the same shall not be opened to that extent.
>
> (b) the provisions of section 16 sub-section (7) shall apply to all pending proceedings and arbitrations, except where the issue has been decided by the court/tribunal.

(c) the provisions of second proviso to section 24 shall apply to all pending arbitrations.

(2) For the purposes of the instant section,—

(a) "fresh arbitrations" mean arbitrations where there has been no request for appointment of arbitral tribunal; or application for appointment of arbitral tribunal; or appointment of the arbitral tribunal, prior to the date of enforcement of the Arbitration and Conciliation (Amending) Act, 2014.

(b) "fresh applications" mean applications to a court or arbitral tribunal made subsequent to the date of enforcement of the Arbitration and Conciliation (Amending) Act, 2014.

[NOTE: This amendment is to clarify the scope of operation of each of the proposed amendments with respect to pending arbitrations/proceedings.]"

It is clear from the above that the proposal was to apply the Amendment Act, not only to all applications filed before a court/ arbitral tribunal after the Amendment Act came into force, but it was also proposed that certain provisions be applied retrospectively to proceedings before the arbitral tribunal. The proposal with regard to retrospective application to pending proceedings was not accepted, therefore, Section 26 expressly provides that nothing in the Amendment Act would apply to pending arbitral proceedings. The proposal that the Amendment Act shall apply only to fresh arbitrations was accepted as is plainly evident from the language of the latter part of Section 26 of the Amendment Act. No specific provision

was enacted with regard to the applicability of the amendment to "fresh applications". However, it was enacted that the Amendment Act would come into force from 23.10.2015 and therefore would be plainly applicable to the proceedings instituted after the said date. The Parliament had specified the date on which the Amendment Act came into force and unless enacted otherwise, it would be applicable to all proceedings instituted after the specified date. There is no reason to hold that the Amendment Act would not apply to the applications filed in Courts. For the reasons stated herein before the Amendment Act would also apply to pending proceedings before courts.

60. The view that Section 26 of the Amendment Act does not apply to proceedings before courts is also supported by the decision of a Division Bench of the Calcutta High Court in ***Sri. Tufan Chatterjee v. Sri Rangan Dhar***: **2016 SCC online Cal 483**. Although, I have some reservation as to the manner in which the esteemed Court has interpreted Section 9(3) of the Act, I respectfully concur with the following conclusion:-

> "A careful reading of the provisions of the 1996 Act, and in particular Sections 21 and 32 thereof, makes it amply clear that the expression 'arbitral proceedings' in Section 26 of the Amendment Act of 2015 cannot be construed to include proceedings in a Court under the provisions of the 1996 Act, and definitely not any proceedings under Section 9 of the

1996 Act, instituted in a Court before a request for reference of disputes to arbitration is made.

Arbitral proceedings can be said to commence, when a request for reference to arbitration is received by the respondent and/or the authority competent under the arbitration agreement, upon notice to the respondent. The arbitral proceedings, which so commence, terminate with a final award as provided in Section 32(1) of the 1996 Act or with an order under Section 32(2) of the 1996 Act Proceedings in Court under the 1996 Act whether initiated before, during or after the termination of the arbitral proceedings, would not attract Section 26 of the Amendment Act of 2015."

61. In ***New Tirupur Area Development Corporation v. Hindustan Construction Company Limited (A.No. 7674 of 2016 in O.P. No.931 of 2015)***, the Madras High Court has held that the Amendment Act shall apply to petitions pending under Section 34 of the Act. The Bombay High Court in a recent decision in ***M/s Rendezvous Sports World v. The Board of Control for Cricket in India*** **[*Chamber Summons No.1530 of 2015 in Execution Application (L) No.2481 of 2015 decided on 14.06.2016*]** has also accepted the view that Section 36 of the Act as amended shall apply to proceedings pending before Courts.

62. In view of the aforesaid, Section 2(2) of the Act as amended would be clearly applicable in the facts of the present case. The said Sub-section as amended reads as under:-

> "(2) This Part shall apply where the place of arbitration is in India:
>
> Provided that subject to an agreement to the contrary, the provisions of sections 9, 27 and clause (a) of sub-section (1) and sub-section (3) of section 37 shall also apply to international commercial arbitration, even if the place of arbitration is outside India, and an arbitral award made or to be made in such place is enforceable and recognised under the provisions of Part II of this Act."

63. The principal question to be addressed is whether by virtue of the proviso introduced in Section 2(2) of the Act, recourse to Section 9 of the Act is available in relation to the arbitral proceedings in question.

64. At this stage, it is necessary to refer to the Dispute Resolution Clause, which reads as under:-

> **"15 Governing Law and Dispute Resolution**
>
> 15.1 This Agreement shall be governed by and construed in accordance with the laws of Singapore.
>
> 15.2 Any dispute, controversy, claims or disagreement of any kind whatsoever between or among the Parties in connection with or arising out of this Agreement or the breach, termination or invalidity thereof shall be referred to and finally resolved by arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre (SIAC Rules) for the time being in force, which rules are deemed to be incorporated by reference in this clause. This Agreement and the rights and obligations of the Parties shall remain in full force and effect pending the award in such arbitration proceedings which

award, if appropriate, shall determine whether and when any termination shall become effective.

15.3 The Arbitral Tribunal shall consist of one arbitrator to be appointed by the Chairman of SIAC.

15.4 Language of Arbitration. The language of the arbitration shall be in English.

15.5 Survival: The provisions contained in this Clause 15 shall survive the termination of this Agreement."

65. Clause 15.1 of the agreement expressly indicates that the agreement would be governed by and construed in accordance with the law of Singapore. Thus, clearly, the substantive law as applicable to the contract between the parties is the law as applicable in Singapore. The seat of arbitration is also Singapore and therefore the law as applicable to the arbitral proceedings, *lex arbitri*, is also the law as applicable in Singapore. The legal principle that the law as applicable to arbitral proceedings would be the law as applicable where the seat of arbitration is situated has been authoritatively settled by a Constitution Bench of the Supreme Court in ***Bharat Aluminium*** (*supra*).

66. The Supreme Court in ***Bhatia International*** (*supra*) had considered the question whether Part I of the Act would be applicable to International arbitrations and had held as under:-

> "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 parties would prevail. Any provision, in Part I, which is contrary to or excluded by that law or rules will not apply."

67. Thus, prior to decision in ***Bharat Aluminium*** (*supra*) the position of law was that unless the parties had agreed to the contrary, the provisions of Part I of the Act would be applicable. The decision in ***Bhatia International*** (*supra*) was overruled by the Constitution Bench in ***Bharat Aluminium*** (*supra*) and the law declared was that Part I of the Act would have no application in cases where the seat of arbitration is outside India. However, the Constitution Bench of the Supreme Court had expressly held that the said decision would be applied prospectively and only in respect of agreements that were entered into and after the date of that decision. The Supreme Court held as under:-

> "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.
>
> xxxx xxxx xxxx xxxx
>
> The judgment in Bhatia International (supra) was rendered by this Court on 13-3-2002. 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 10-01-2008 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."

68. Plainly, this position stands amended by enactment of Section 2(II) of the Amendment Act by virtue of which Section 2(2) of the Act stands amended by introduction of a proviso that expressly provides that provisions of Section 9, 27 & 37(1)(a) and 37 (3) of the Act would also apply to international commercial arbitrations even if the place of arbitration is outside India and the arbitral award is enforceable under the provisions of Part II of Act.

69. As is apparent from the plain language of the proviso, it is subject to an agreement to the contrary. In other words the proviso is applicable only if there is no agreement to the contrary; that is, there is no agreement, which excludes the applicability of sections 9, 27, 37(1)(a) and 37(3) of the Act.

70. It is relevant to note that the Law Commission in its 246th report had proposed the following amendments to Section 2(2) of the Act:

> "(vi) In sub-section (2), add the word "only" after the words "shall apply" and delete the word "place" and insert the word "seat" in its place.
>
> [NOTE: This amendment ensures that an Indian Court can only exercise jurisdiction under Part I where the seat of the arbitration is in India. To this extent, it over-rules Bhatia International v. Bulk Trading S.A. and Anr (2002) 4 SCC 105 Anr., (2002) 4 SCC 105, and re-enforces the "seat centricity" principle of Bharat Aluminium Company and Ors. etc. v. Kaiser Aluminium Technical Service, Inc and Ors. etc., (2012) 9 SCC 552]
>
> Also insert the following proviso "Provided that, subject to an express agreement to the contrary, the provisions of sections 9, 27, 37 (1)(a) and 37(3) shall also apply to international commercial arbitration even if the seat of arbitration is outside India, if an award made, or that which might be made, in such place would be enforceable and recognized under Part II of this Act.
>
> **[NOTE**: This proviso ensures that an Indian Court can exercise jurisdiction with respect to these provisions even where the seat of the arbitration is outside India.]"

71. The aforesaid proposal was not accepted in toto; the word "only" in the opening sentence of sub section (2) and the word “express" in the first line of the proviso as proposed by the Law commission were omitted. Thus, it is not necessary that the parties exclude the applicability of Section 9 of the Act by an express agreement and so long as an agreement to exclude Section 9 and 27 of the Act can be inferred by implication, the

provisions of Sections 9, 27, 37(1)(a) and 37(3) would stand excluded. This in effect reverts the position of law as it was prior to the decision in case of ***Bharat Aluminium*** (*supra*) in so far as the applicability of sections 9, 27, 37(1)(a) and 37(3) of the Act is concerned. In other words, although provisions of Part -I - except Sections 9, 27, 37(1)(a) and 37(3) of the Act - would not apply to arbitrations held outside India, Sections 9, 27, 37(1)(a) and 37(3) of the Act would apply unless the parties have contracted to the contrary.

72. The controversy as to whether parties have contracted out of Part I of the Act has been considered in several decisions. In ***Venture Global Engineering v. Satyam Computer Services Ltd. and Another*****: (2008) 4 SCC 190**, the Supreme Court considered the question whether a petition under Section 34 of the Act was maintainable in respect of a foreign award. Following its earlier decisions in ***Bhatia International*** (*supra*), the Supreme Court had reiterated that provisions of Part I of the Act would be applicable unless the same was expressly or impliedly excluded by the parties. In that case, the Shareholder's Agreement between the parties therein included the following clauses:-

> "11.05 (a) xxxx xxxx xxxx xxxx
>
> (b) This Agreement shall be construed in accordance with and governed by the laws of the State of Michigan, United States,

without regard to the conflicts of law rules of such jurisdiction. Disputes between the parties that cannot be resolved via negotiations shall be submitted for final, binding arbitration to the London Court of Arbitration.

(c) Notwithstanding anything to the contrary in this agreement, the Shareholders shall at all times act in accordance with the Companies Act and other applicable Acts/Rules being in force, in India at any time."

73. In the aforesaid context, the Court, *inter alia*, held that the non obstante clause - clause (c) as quoted above - would override the entirety of the contract including clause (b) which deals with the settlement of disputes by arbitration. The Court rejected the contention that the afore-quoted clause (c) could not be construed to mean that Indian law was the substantive law of contract or the Indian law would not govern the Disputes Resolution clause - clause (b) quoted above. The Court concluded the Part-I of the Act could not be held to be excluded by the parties.

74. In ***M/s. Indtel Technical Services Pvt. Ltd. v. W.S. Atkins Rail Ltd.*: (2008) 10 SCC 308**, the Supreme Court considered the application under Section 11 of the Act and was concerned with an agreement which included the clause that read as under:-

"CLAUSE 13 - SETTLEMENT OF DISPUTES

> 13.1. This Agreement, its construction, validity and performance shall be governed by and constructed in accordance with the laws of England and Wales."

And, in context of the aforesaid clause, the Court held that:

> "it is no doubt true that it is fairly well-settled that when an arbitration agreement is silent as to the law and procedure to be followed in implementing the arbitration agreement, the law governing the said agreement would ordinarily be the same as the law governing the contract itself. The decisions cited by Mr. Tripathi and the views of the jurists referred to in the NTPC case support such a proposition. What, however, distinguishes the various decisions and views of the authorities in this case is the fact that in the Bhatia International case this Court laid down the proposition that notwithstanding the provisions of Section 2(2) of the Arbitration and Conciliation Act, 1996, indicating that Part-I of the said Act would apply where the place of arbitration is in India, even in respect of International Commercial agreements, which are to be governed by laws of another country, the parties would be entitled to invoke the provisions of Part-I of the aforesaid Act and consequently the application made under Section 11 thereof would be maintainable."

75. The decisions in ***Bhatia International*** (*supra*) and ***M/S. Indtel Technical Services Pvt. Ltd.*** (*supra*) were followed by the Supreme Court in a later decision in ***Citation Infowares Limited v. Equinox Corporation*****: (2009) 7 SCC 220**.

76. In ***Dozco India (P) Ltd. v. Doosan Infracore Co. Ltd.***: **(2011) 6 SCC 179**, the Supreme Court rejected a petition under Section 11(6) of the Act as the Court interpreted the agreement between the parties to exclude

Part-I of the Act. In that case, the relevant clauses of the agreement between the parties read as under:-

> "Article 22. Governing Laws - 22.1 : This agreement shall be governed by and construed in accordance with the laws of The Republic of Korea.
>
> Article 23. Arbitration - 23.1 : All disputes arising in connection with this Agreement shall be finally settled by arbitration in Seoul, Korea (or such other place as the parties may agree in writing), pursuant to the rules of agreement then in force of the International Chamber of Commerce."

In the aforesaid context, the Supreme Court held as under:-

> "In the backdrop of these conflicting claims, the question boils down to as to what is the true interpretation of Article 23. This Article 23 will have to be read in the backdrop of Article 22 and more particularly, Article 22.1. It is clear from the language of Article 22.1 that the whole Agreement would be governed by and construed in accordance with the laws of The Republic of Korea.
>
> xxxx xxxx xxxx xxxx
>
> If we see the language of Article 23.1 in the light of the Article 22.1, it is clear that the parties had agreed that the disputes arising out of the Agreement between them would be finally settled by the arbitration in Seoul, Korea. Not only that, but the rules of arbitration to be made applicable were the Rules of International Chamber of Commerce. This gives the prima facie impression that the seat of arbitration was only in Seoul, South Korea."

77. In ***Videocon Industries*** (*supra*), the Supreme Court considered the controversy as to the applicability of the Part-I of the Act in the context of the following clauses of the agreement:-

> "33.1 Indian Law to Govern Subject to the provisions of Article 34.12, this Contract shall be governed and interpreted in accordance with the laws of India.
>
> 33.2 Laws of India Not to be Contravened - Subject to Article 17.1 nothing in this Contract shall entitle the Contractor to exercise the rights, privileges and powers conferred upon it by this Contract in a manner which will contravene the laws of India.
>
> xxxx xxxx xxxx xxxx
>
> 34.12. Venue and Law of Arbitration Agreement The venue of sole expert, conciliation or arbitration proceedings pursuant to this Article, unless the Parties otherwise agree, shall be Kuala Lumpur, Malaysia, and shall be conducted in the English language. Insofar as practicable, the Parties shall continue to implement the terms of this Contract notwithstanding the initiation of arbitral proceedings and any pending claim or dispute. Notwithstanding the provisions of Article 33.1, the arbitration agreement contained in this Article 34 shall be governed by the laws of England."

And, the Supreme Court held as under:-

> "In the present case also, the parties had agreed that notwithstanding Article 33.1, the arbitration agreement contained in Article 34 shall be governed by laws of England. This necessarily implies that the parties had agreed to exclude the provisions of Part I of the Act. As a corollary to the above conclusion, we hold that the Delhi High Court did not have the jurisdiction to entertain the petition filed by the respondents under Section 9 of the Act and the mere fact that the appellant had earlier filed similar petitions was not

sufficient to clothe that High Court with the jurisdiction to entertain the petition filed by the respondents."

78. A similar view was also expressed by the Supreme Court in ***Reliance Industries Limited and Anr v. Union of India*: (2014) 7 SCC 603** and ***Union of India v. Reliance Industries Limited and Others*: (2015) 10 SCC 213**. In those cases the parties had, *inter alia,* agreed as under:-

> "33.12 The venue of conciliation or arbitration proceedings pursuant to this Article, unless the Parties otherwise agree, shall be London, England and shall be conducted in the English Language. The arbitration agreement contained in this Article 33 shall be governed by the laws of England. Insofar as practicable, the Parties shall continue to implement the terms of this Contract notwithstanding the initiation of arbitral proceedings and any pending claim or dispute."

79. In ***Harmony Innovation Shipping Ltd.*** (*supra*), the Supreme Court was concerned with interpretation of a clause that read as under:

> "5. If any dispute or difference should arise under this charter, general average/arbitration in London to apply, one to be appointed by each of the parties hereto, the third by the two so chosen, and their decision or that of any two of them, shall be final and binding, and this agreement may, for enforcing the same, be made a rule of Court. Said three parties to be commercial men who are the members of the London Arbitrators Association. This contract is to be governed and construed according to English Law. For disputes where total amount claim by either party does not exceed USD $ 50,000 the arbitration should be conducted in accordance with small claims procedure of the London Maritime Arbitration Association."

80. The Supreme Court after noticing various earlier decisions held as under:

> "50. Thus, interpreting the clause in question on the bedrock of the aforesaid principles it is vivid that the intended effect is to have the seat of arbitration at London. The commercial background, the context of the contract and the circumstances of the parties and in the background in which the contract was entered into, irresistibly lead in that direction. We are not impressed by the submission that by such interpretation it will put the Respondent in an advantageous position. Therefore, we think it would be appropriate to interpret the clause that it is a proper clause or substantial clause and not a curial or a procedural one by which the arbitration proceedings are to be conducted and hence, we are disposed to think that the seat of arbitration will be at London."

81. Mr Dutt, learned counsel had earnestly contended that in view of the decisions of the Supreme Court in ***Videocon Industries*** (*supra*) ***Harmony Innovation Shipping Ltd.*** (*supra*) and ***Reliance Industries*** (*supra*) it was clear that the parties had implicitly agreed to exclude Section 9 of the Act to the arbitral proceedings , because they had agreed that the agreement would be construed and considered in accordance with law in Singapore.

82. I am unable to accept the aforesaid contention mainly for the reason that the controversy considered by the Supreme Court in ***Dozco Industries Pvt Ltd, Videocon Industries***, ***Reliance Industries v. Union of India***, ***Union of India v. Reliance Industries*** and ***Harmony Innovation Shipping Ltd.*** (*supra*) was materially different from the question involved in the

present case. In those cases, the question before the Supreme Court was as to which law was applicable to the arbitral proceedings – which was the *lex arbitri.* An agreement that the proper law of arbitration (*lex arbitri*) of a country other than India would govern the arbitration agreement would necessarily exclude the Act as *lex arbitri* and consequently Part I of the Act.

83. In ***Reliance Industries*** cases (*supra*), the parties had expressly agreed that the arbitration agreement shall be governed by the laws of England. So was the case in ***Videocon Industries*** (*supra*). Undisputedly, if the parties had agreed that the proper law applicable to the arbitration would be that of a foreign country it would necessarily mean that the Act would not be the proper law governing the arbitration. The two are mutually exclusive.

84. In the present case, there is no dispute as to the law governing the arbitration. Clause 15.1 of the Agreement expressly provides that the laws as applicable in Singapore will apply to the entire contract. Further the seat of the arbitration is also in Singapore. The petitioners had also applied under Section 12 (6) of the International Arbitration Act, (IAA) - the law as applicable to the International Arbitration in Singapore - for the judgment in terms of the order passed by the Arbitral tribunal. In

paragraph 41 of the petition filed before the Singapore High Court, the petitioner has stated as under:-

> "41. It is undisputed that the IAA applies to SIAC 179 as Singapore is the seat of the arbitration (as confirmed by the Emergency Arbitrator in paragraph 10 of the Emergency Award [TAB 1]). The Plaintiffs understand that this Honourable Court has supervisory and/or curial jurisdiction over SIAC 179 and Section 12(6) of the IAA specifically provides that "all orders or directions made or given by an arbitral tribunal in the course of an arbitration shall, by leave of the High Court or a Judge thereof, be enforceable in the same manner as if they were orders made by a court." Accordingly, I believe that Singapore is an appropriate forum for the filing of this action for enforcement of the Emergency Award."

85. Thus, the question that needs to be addressed is: whether an agreement between the parties that a foreign law would be applicable to the arbitration, implicitly excludes the applicability of Section 9 of the Act?

86. As noted earlier, the very purpose of amending Section 2 (2) of the Act was to enable a party to approach the courts in India for interim relief in respect of the arbitral proceedings held or to be held outside India. The need for this amendment was highlighted by the Law Commission of India, in its 176th Report in the following words:-

> "Section 2(2) states that Part - I of the Act applies to arbitration in India. That would mean that in the case of arbitration between Indian nationals and also where one party is not an Indian national, and where the place of the arbitration is in India, Part I of the Act will apply. While the

> UNCITRAL Model Law permits certain Articles like 8, 9, 35 and 36 to apply to arbitrations outside the Country, there is an omission in this behalf in the 1996 Act. Consequently, for example in the absence of availability of Section 9 in the case of an arbitration outside India, the Indian party is unable to obtain interim measures from Indian Courts, before arbitration starts outside India. The absence of an express provision as stated above has led to conflicting judgments in the Delhi and Calcutta High Courts. It is proposed to allow Section 9 to the invoked whenever arbitration is outside India. Similarly, the provisions of Section 8, 27, 35 and 36 are proposed to be made available whenever arbitration is outside India. Almost all countries which have adopted the Model Law allow views of these provisions to arbitrations outside the country. The proposed clause (a) of Section 2(2) states that Part – I of the Act applies to domestic arbitration in India and the proposed clause (b) states that Sections 8, 9, 27, 35 and 36 will be available for international arbitrations outside India."

In its 176th report the Law Commission had proposed that Section 2 (2) of the Act be amended to read as under:-

> "(2) (a) Save as otherwise provided in clause (b), this Part shall apply where the place of arbitration is in India.
>
> (b) Sections 8, 9 and 27 of this Part shall apply to international arbitration (whether commercial or not) where the place of arbitration is outside India or where such place is not specified in the arbitration agreement.".

87. The Consultation Paper placed by the Government of India in public domain also highlighted the need for amending Section 2 of the Act to enable the parties to approach the Courts in India for interim relief under Section 9 of the Act in the following words:-

> "(xvii) It may be stated that it is the broad principle in International Commercial arbitration that a law of the country where it is held, namely, the Seat or forum or laws arbitri of the arbitration, governs the arbitration. However, if all the provisions of Part I are not made applicable to International Commercial arbitration where the seat of arbitration is not in India, some practical problems are arising. There may be cases where the properties and assets of a party to arbitration may be in India. Section 9 of the Act which falls in Part I provide for interim measures by the Court. As per Section 9, a party may, apply to a court for certain interim measures of protection including for preservation, interim custody or sale of goods, securing the amount in disputes, detention, preservation or inspection of any property, interim injunction etc. If provision of Section 9 is not made applicable to International Commercial arbitration where seat of arbitration is not in India, a party may be out of remedy if the assets and property are in India. In cases of international arbitration where the seat of arbitration is outside India, a serious controversy has arisen in the Indian Courts. These are cases where interim measures could not be granted by Indian courts under Section 9 to an Indian national before commencement of arbitration (or after the award) against property of a foreign party. By the time the Indian party takes steps to move the courts in the country in which the seat of arbitration is located, the property may have been removed or transferred."

88. The Law Commission of India in its 246th Report also proposed amendments to Section 2 (2) of the Act (as quoted herein before) as it felt that the same were necessary. The reasons for such amendments were explained, as under:-

> "(i) Where the assets of a party are located in India, and there is a likelihood that that party will dissipate its assets in the near future, the other party will lack an efficacious remedy if the seat of the arbitration is abroad. The latter party will have two possible remedies, but neither will be efficacious. First,

the latter party can obtain an interim order from a foreign Court or the arbitral tribunal itself and file a civil suit to enforce the right created by the interim order. The interim order would not be enforceable directly by filing an execution petition as it would not qualify as a "judgment" or "decree" for the purposes of sections 13 and 44A of the Code of Civil Procedure (which provide a mechanism for enforcing foreign judgments). Secondly, in the event that the former party does not adhere to the terms of the foreign Order, the latter party can initiate proceedings for contempt in the foreign Court and enforce the judgment of the foreign Court under sections 13 and 44A of the Code of Civil Procedure. Neither of these remedies is likely to provide a practical remedy to the party seeking to enforce the interim relief obtained by it.

That being the case, it is a distinct possibility that a foreign party would obtain an arbitral award in its favour only to realize that the entity against which it has to enforce the award has been stripped of its assets and has been converted into a shell company.

(ii) While the decision in BALCO was made prospective to ensure that hotly negotiated bargains are not overturned overnight, it results in a situation where Courts, despite knowing that the decision in Bhatia is no longer good law, are forced to apply it whenever they are faced with a case arising from an arbitration agreement executed pre- BALCO."

89. It is also necessary to reiterate that amendment to Section 2 (2) of the Act was made on the basis of the United Nations Commission on International Trade Law (UNCITRAL) Model Law as adopted on 21.06.1985 and as amended on 07.07.2006. Article 1.2 of UNCITRAL Model Law reads as under:-

"Article 1. Scope of Application

(1) xxxx xxxx xxxx xxxx

(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 territory of this State. (Article 1(2) has been amended by the Commission at its thirty-ninth session, in 2006)"

90. The Article 9, 17H, 17I and 17J, of the Model Law are relevant and are set out below:-

"Article 9. Arbitration agreement and interim measures by court

It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

xxxx xxxx xxxx xxxx

Article 17 H. Recognition and enforcement

(1) An interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued, subject to the provisions of article 17 I.

(2) The party who is seeking or has obtained recognition or enforcement of an interim measure shall promptly inform the court of any termination, suspension or modification of that interim measure.

(3) The court of the State where recognition or enforcement is sought may, if it considers it proper, order the requesting party to provide appropriate security if the arbitral tribunal has not already made a determination with respect to security or where such a decision is necessary to protect the rights of third parties.

Article 17 I. Grounds for refusing recognition or enforcement

(1) Recognition or enforcement of an interim measure may be refused only:

(a) At the request of the party against whom it is invoked if the court is satisfied that:

(i) Such refusal is warranted on the grounds set forth in article 36(1)(a)(i), (ii), (iii) or (iv); or

(ii)The arbitral tribunal's decision with respect to the provision of security in connection with the interim measure issued by the arbitral tribunal has not been complied with; or

(iii)The interim measure has been terminated or suspended by the arbitral tribunal or, where so empowered, by the court of the State in which the arbitration takes place or under the law of which that interim measure was granted; or

(b) If the court finds that:

(i)The interim measure is incompatible with the powers conferred upon the court unless the court decides to reformulate the interim measure to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance; or

(ii) Any of the grounds set forth in article 36(1)(b)(i) or (ii), apply to the recognition and enforcement of the interim measure.

(iii)Any determination made by the court on any ground in paragraph (1) of this article shall be effective only for the purposes of the application to recognize and enforce the interim measure. The court where recognition or enforcement is sought shall not, in making that determination, undertake a review of the substance of the interim measure.

Article 17 J. Court-ordered interim measures

> A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in the territory of this State, as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration."

91. The Article 17-J of the Model Law specifically provides that the Court shall have the same powers for issuing interim measures in relation to the arbitral proceedings irrespective of the seat of such arbitral proceedings. In terms of the UNCITRAL Model Law, arbitral proceedings are governed by the law as applicable at the seat of the arbitration; nonetheless, it would be open for the Courts to issue interim orders even in respect of the arbitral proceedings that are held outside the State. The object of amending Section 2(2) of the Act is *inter alia* to incorporate such provision in the Act.

92. The contention that the parties have impliedly agreed to exclude Section 9 of the Act, has to be considered in the above backdrop.

93. It is seen that the parties had expressly agreed that the arbitration shall be governed by the SIAC Rules. It is relevant to note that Rule 26.3 of the SIAC Rules, expressly provides that:-

> "26.3 A request for interim relief made by a party to a judicial authority prior to the constitution of the Tribunal, or in exceptional circumstances thereafter, is not incompatible with these Rules."

[Rule 30.3 of SIAC Rules, 2016 is similarly worded to Rule 26.3 quoted above.]

94. This is *pari materia* to Article 9 of the Model Rules. The SIAC Rules must be read as a part of the agreement between the parties and the only conclusion that can be drawn is that the parties had expressly agreed that seeking an interim order from the Courts would not be incompatible with the arbitral proceedings .

95. The SIAC Rules are clearly in conformity with the UNCITRAL Model Law and permit the parties to approach the Court for interim relief. As pointed out earlier, UNCITRAL Model Law expressly provides for courts to grant interim orders in aid to proceedings held outside the State. And, the proviso to Section 2 (2) of the Act also enables a party to have recourse to Section 9 of the Act notwithstanding that the seat of arbitration is outside India. Thus, the inescapable conclusion is that since the parties had agreed that the arbitration be conducted as per SIAC Rules, they had impliedly agreed that it would not be incompatible for them to approach the Courts for interim relief. This would also include the Courts other than

Singapore. It is relevant to mention that IAA is based on UNCITRAL Model Law and SIAC Rules are also complimentary to IAA/UNCITRAL Model law.

96. In the circumstances, the contention that the parties by agreeing that the proper law applicable to arbitration would be the law in Singapore have excluded the applicability of Section 9 of the Act.

97. The only question that now remains to be considered is whether the petitioner can approach this Court for an interim relief considering that it has already approached the Arbitral Tribunal in Singapore and thereafter, also obtained a judgment in terms of the interim order from the Singapore High Court.

98. It is relevant to mention that Article 17H of the UNCITRAL Model Law contains express provisions for enforcement of interim measures. However the Act does not contain any provision *pari materia* to Article 17H for enforcement of interim orders granted by an Arbitral Tribunal outside the India. Section 17 of the Act is clearly not applicable in respect of arbitral proceedings held outside India.

99. In the circumstances, the emergency award passed by the Arbitral Tribunal cannot be enforced under the Act and the only method for enforcing the same would be for the petitioner to file a suit.

100. However, in my view, a party seeking interim measures cannot be precluded from doing so only for the reason that it had obtained a similar order from an arbitral tribunal. Needless to state that the question whether the interim orders should be granted under section 9 of the Act or not would have to be considered by the Courts independent of the orders passed by the arbitral tribunal. Recourse to Section 9 of the Act is not available for the purpose of enforcing the orders of the arbitral tribunal; but that does not mean that the Court cannot independently apply its mind and grant interim relief in cases where it is warranted.

101. It is relevant to note that the provisions under Article 17 I (2) of the Model Law, the court enforcing an interim order passed by an Arbitral Tribunal in prescribed form undertakes a review of the substance of interim measure the Model Law. To that extent, a Court while examining a similar relief under Section 9 of the Act would be unfettered by the findings or the view of the Arbitral Tribunal.

102. The decisions of this Court in ***Sri Krishan*** (*supra*) and ***Indiabulls Financial Services Ltd. & Ors. v. Jubilee Plots and Housing Private Ltd.***: **2009 SCC OnLine Del 2458** referred to by Mr Dutt have no applicability in the facts of this case. In those cases, it was held that a person disobeying the orders passed under Section 17 of the Act would be guilty of contempt

as provided under Section 27 (5) of the Act. Clearly, a person guilty of not following the interim orders of the arbitral tribunal in Singapore cannot be proceeded for the contempt under Section 27 of the Act, as contended by Mr Dutt.

103. In the circumstances, I am of the view that the present petition is maintainable and accordingly, it is to be considered on its merits.

VIBHU BAKHRU, J

OCTOBER 07, 2016
RK/pkv