ARVINDKUMAR ANUPALAL PODDAR
v.
STATE OF MAHARASHTRA
(Criminal Appeal No. 53 of 2010)

JULY 26, 2012

[SWATANTER KUMAR AND FAKKIR MOHAMED IBRAHIM KALIFULLA, JJ.]

Penal Code:

ss. 302/34 and 201/34 – Murder – Circumstantial evidence – Appellant stated to have killed his first wife – Trial court convicting him and his brother – High Court upholding the conviction of appellant but acquitting his brother – Held: The circumstances are consistent leading to the hypothesis of guilt of the appellant alone and none else and excluding every other hypothesis – The motive along with the chain of circumstances stood proved against the appellant go to show that the appellant alone was responsible for the killing of the deceased.

Evidence:

Circumstantial evidence – Conviction – Conditions to be fulfilled in a case of circumstantial evidence – Reiterated.

The appellant along with his brother (A-2) was prosecuted for causing the death of his first wife. The case of the prosecution was that in the morning of 6.12.2001, the appellant and his brother were seen by PW-1 and PW-6 going along with the deceased; that in the evening the two accused returned alone and their clothes were found to have been blood stained. On the following day, i.e. 7.12.2001, the appellant was stated to have proclaimed that the deceased had run away from home. In the morning of 8.12.2001, it was noticed that the

appellant along with his family was in the process of leaving the village. On information, the police reached the village. The appellant informed the I.O. that he had killed his wife. At his instance, a blood stained knife was recovered and the dead body was fished out which was found to have been partly eaten out by aquatic animals. At the instance of A-2 the blood stained clothes were seized. The trial court convicted both the accused u/ss 302/34 and 201/34 IPC and sentenced them to imprisonment for life. The High Court acquitted A-2, but maintained the conviction and sentence of the appellant.

Dismissing the appeal, the Court

HELD: 1.1 This Court in the case of Sharad Birdhichand Sarda* has held that in a case of circumstantial evidence, the following conditions must be fulfilled:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established; the circumstances concerned 'must or should' and not 'may be' established; it is a primary principle that the accused must be and not merely may be guilty before a court can convict him.

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.

(3) the circumstances should be of a conclusive nature and tendency;

(4) they should exclude every possible hypothesis except the one to be proved.

(5) there must be a chain of evidence so complete as

not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused." [para 11] [311-A-H; 312-A-B]

****Sharad Birdhichand Sarda v. State of Maharashtra* 1985 (1) SCR 88 =1984 (4) SCC 116; and *Shivaji Sahabrao Bobade v. State of Maharashtra* 1974 (1) SCR 489 = 1973 (2) SCC 793 – relied on**

1.2 In the case on hand, the conviction of the appellant I based on circumstantial evidence. The circumstances stated by the trial court and concretized by the High Court, in the instant case were: the deceased and the accused were last seen together on 06.12.2001 as per the version of PWs 1 and 6; the body of the deceased was recovered at the instance of the appellant as stated by PW-7; the recovery by the I.O. of the weapon, namely, the knife, from the place of occurrence, the knife containing blood stains; the nature of injuries found on the body of the deceased; as per the version of PW-5, the doctor who conducted the post mortem, the death was homicidal and the injuries could have been caused with the weapon marked in the case; frequent quarrels between the deceased and the accused as stated by PWs 1 and 2; the theory of the deceased having run away from the matrimonial home not properly explained by the appellant apart from the fact that no steps were taken by him to trace his wife; the appellant wanted to flee from the town itself and the clothes seized from the appellant were found containing human blood. These circumstances, as held by the courts below, were all established without any doubt and were conclusive in nature. They were not explainable with any other possibilities. [para 11-13] [312-H; 313-A-E]

1.3 The circumstances are consistent which lead to the only hypothesis of the guilt of the appellant alone and

none else and exclude every other hypothesis. They show that in all probabilities, the killing of the deceased could have been done only by the appellant. The deceased was the first wife of the appellant and he had a clear motive to eliminate her since there were constant fights between the deceased on the one side and the appellant and his second wife on the other, which he could not tolerate. The motive along with the chain of circumstances, which stood proved against the appellant, only go to show that the appellant alone was responsible for the killing of the deceased. The appellant has miserably failed to show any missing link in the chain of circumstances demonstrated by the prosecution for the offence alleged against him. He did not dispute the identity of the body at any point of time nor did he state anything in his statement u/s 313 CrPC, about the running away of his wife. If according to the appellant the deceased ran away from the matrimonial home he should have established the said fact to the satisfaction of the court as it was within his special knowledge. This Court is in full agreement with the conclusions of the High Court and there is no reason to interfere with the same. [para 13 and 14] [313-E-H; 314-A-C]

***Rukia Begum & Ors. v. State of Karnataka* 2011 (4) SCR 711 = 2011 (4) SCC 779; *Hanumant Govind Nargundkar & Anr. v. State of Madhya Pradesh* AIR 1952 SCR 1091 = 1952 SC 343; and *Prithipal Singh & Ors v. State of Punjab* 2012 (14) SCR 862 = 2012 (1) SCC 10 – relied on.**

***Govinda Reddy Krishna & Another v. State of Mysore* - AIR 1960 SC 29; *Naseem Ahmed v. Delhi Administration* 1974 (2) SCR 694 = 1974 (3) SCC 668; *Mustkeem @ Sirajudeen v. State of Rajasthan* 2011 (9) SCR 101 = 2011 (11) SCC 724 – referred to.**

Case Law Reference:

1952 SCR 1091	**relied on**	**para 11**
AIR 1960 SC 29	**referred to**	**para 11**
1974 (2) SCR 694	**referred to**	**para 11**
1985 (1) SCR 88	**relied on**	**para 11**
2011 (9) SCR 101	**referred to**	**para 11**
2011 (4) SCR 711	**relied on**	**para 11**
2012 (14) SCR 862	**relied on**	**para 14**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 53 of 2010.

From the Judgment & Order dated 24.04.2008 of the High Court of Bombay in Criminal Appeal No. 564 of 2006.

Gopal Prasad for the Appellant.

Sachin Pitale (for Asha Gopalan Nair) for the Respondents.

The Judgment of the Court was delivered

FAKKIR MOHAMED IBRAHIM KALIFULLA, J. 1. Accused No.1 is the appellant. The appeal is directed against the judgment of the High Court of Bombay in Criminal Appeal No.564 of 2006 dated 24.4.2008. By the judgment of the trial Court dated 25 & 28.11.2005 the appellant was convicted and sentenced to undergo life imprisonment apart from imposition of fine along with accused No.2 for offences under Section 302 read with Section 34, Indian Penal Code, and for causing disappearance of evidence under Section 201 read with Section 34, IPC and fine of Rs. 5,000/-each was also imposed and in default to suffer further rigorous imprisonment in custody. Both the accused preferred appeals before the High Court and the appeal preferred by accused No.2 in Criminal Appeal

No.563 of 2006 was allowed and he was acquitted of the charges punishable under Section 302 and 201, IPC while the appellant's appeal came to be dismissed confirming the conviction and sentence imposed on him by the learned Sessions Judge.

2. The case of the prosecution was that deceased Sita Devi was the first wife of the appellant, that on the date of occurrence, namely, on 06.12.2001 at 8 a.m. the appellant was seen going along with the deceased Sita Devi and accused No.2, who is none other than his brother. According to Sachidanand Baleshwar (PW-1) who is closely related to the deceased, the appellant told him that he is going with his wife for a stroll. It was stated that the appellant and A-2 were seen in the evening and the deceased was not with them at that time while their clothes were blood stained. On the next day, i.e. on 07.12.2001, appellant stated to have proclaimed that the deceased ran away from the matrimonial home.

3. On 08.12.2001, it was noticed that the appellant and his family were in the process of leaving the village by packing all their materials, the same was informed to Malvani police station, that PW-3 Sub-Inspector of Police of Malvani police station went to the residence of the appellant by around 12 noon when he was informed that the deceased was missing for the last two days and that the appellant and his second wife were planning to run away from the village. According to PW-3 the appellant informed that he took the deceased on 06.12.2001 in the morning to Gorai Creek where she was killed by him with the aid of a knife. PW-3 stated to have forwarded the complaint based on the information gathered by him to Borivali police station since the place of occurrence fell within their jurisdiction. All the papers stated to have been transferred around 1-1.30 p.m. along with the accused to the said police station.

4. Subsequently, at the instance of PW-4, A-2 was also

stated to have been apprehended through whom the clothes were also seized. At the instance of the appellant, the dead body of the deceased Sita Devi was stated to have been fished out from Gorai Creek and the same was found to have been lying entangled in the weeds and parts of the body were also found to have been eaten away by aquatic animals. PW-1 stated to have identified the body with the aid of toe ring and the petticoat of the deceased. The motive for the alleged offence was stated to be that both the wives of the appellant were indulging in frequent fights which irked the appellant and this ultimately resulted in the killing of his first wife Sita Devi.

5. The appellant and his brother A-2 were tried for offences under Section 302 read with Section 34, IPC as well as Section 201 read with Section 34, IPC. As stated earlier while the conviction and sentence imposed on the appellant came to be confirmed by the impugned common order of the High Court, the conviction and sentence imposed on the second accused came to be set aside for want of proof. For the prosecution, PWs 1 to 10 were examined and Exhibits 1-26 were marked. When the accused were questioned under Section 313 Cr.P.C. they simply denied the offence alleged against them. None was examined on the defence side. It was, therefore, based on the circumstances which linked the appellant to the death of the deceased, the conviction and sentence came to be imposed on him.

6. Assailing the judgment impugned in this appeal the learned counsel for the appellant contended that since the body of the deceased was found in mutated condition; half of which was eaten away by aquatic animals, the identification of the same was not proved. Learned counsel, therefore, contended that the conviction of the appellant based on such slender evidence cannot be sustained. The learned counsel also contended that there were very many missing links in the chain of circumstances and, therefore, the conviction imposed on the appellant is liable to be set aside.

7. As against the above submissions, learned counsel appearing for the respondent State submitted that the appellant was last seen with the deceased on 06.12.2001 by PW-1, that he was also seen on the same evening with blood stained clothes when the deceased was not found along with him, that at the instance of A-2 blood stained clothes were recovered as stated by PW-4 and that the theory of running away of the deceased from the matrimonial home was never pleaded before the Courts below. Learned counsel also contended that at no point of time the appellant disputed the identity of the body of the deceased in the course of trial. It was, therefore, contended that if the deceased had run away from the matrimonial home, it was for the appellant to explain the said situation in a satisfactory manner which the appellant failed to do. Learned counsel, therefore, contended that the impugned judgment does not call for interference.

8. Having heard learned counsel for the appellant as well as the respondent and having perused the judgment impugned in this appeal and all other material papers placed before us, we are also convinced that there is no merit in this appeal. The chain of circumstances noted by the Court below and approved by the High Court were that the deceased was last seen on 06.12.2001 at 8 a.m. along with the appellant and his brother, that even according to the appellant he was going to Gorai Creek for a stroll with his first wife, namely, the deceased Sita Devi, that when on the evening of the same day, the accused alone returned leaving behind the deceased and their clothes were found to be blood stained they were questioned as to the whereabouts of the deceased to which the appellant stated that she ran away from the home. The knife used was stated to have been recovered through the I.O. PW-2, the landlady in her evidence stated that she used to hear the frequent fights of the appellant with the deceased Sita Devi, that when the appellant was making preparations to leave the village on 08.12.2001, on suspicion the information was sent to the police and, at the instance of the appellant, the body of the deceased was

recovered in a decomposed state from the Creek. PW-5 the doctor who did the post mortem on 09.12.2001 at about 5.30 p.m. noted the following injuries:-

"External Injuries:

Swelling and bloating of trunk eyes.

Eyes absent due to PM animal bites. Soft portions of face like lips, ear, nose, cheek portions eaten by animals.

Tongue inside mouth. There is a mouth gag of blouse portion inside mouth inserted from left of mouth (corner).

Column 16-position of limbs

Lower extremities straight

Left forehead from elbow joint present and preserved but remaining portion up to shoulder joint muscular part eaten by animals.

Right humeros without muscles was present/lower forehead absent missing.

A- Except cervical verterbra all neck soft tissues and organs missing.

B- Sternum alongwith ribs upto costo chondrai junction missing.

- from L/3 of oesohaus present.

1) 3 cm x 0.5 cm incised would cut mark seen over C4/5 verterbra body obliquely placed inflittration staining seen at the marginer.

2) 1.0 cm x 0.5 cm IW of 0.5 cm x 0.5 cm over middle phalex of left thumb over palmer surface.

Internal injuries:

1) Brain

Membrance loose, matter softened due to advanced decomposition. Liquefying stag.

Thorax walls, ribs, cartilages absent as 17,13 order ribs loosed out and displaced.

Pleura, Larynx, Trachea and Bronchi missing due to animal bites.

Abdomen-stomach and its contents

L/3 onwards preserved alongwith stomach

The following items were kept back for C.A. and blood grouping:

1. Stomach and intestine

2. Liver/Spleen/Kideny for C.A.

3. Hairs, two teeth alongwith roots and lower end of hammerous bones for blood grouping.

4. skull preserved for superimposition technique."

9. According to PW-5, the death of the deceased was due to the cut injury in her throat and neck and the other injuries which were found to be fatal. He also opined that such injuries could have been caused by a sharp edged weapon like the one marked in the case. The suggestion that the injuries could have been caused if the person had fallen on a blunt surface was 'denied'. The clothes seized from the appellant were found to contain human blood.

10. The circumstances narrated above clearly establish the guilt of the appellant in the killing of the deceased who was his first wife and he had a clear motive to eliminate her since there

were constant fights between the deceased on the one side and the appellant and his second wife on the other which he could not tolerate.

11. As in the case on hand conviction imposed on the appellant is only based on circumstantial evidence, we feel that the various decisions of this Court laying down the principles of appreciating the circumstantial evidence while imposing the sentence can be highlighted. The earliest case on this subject was reported as *Hanumant Govind Nargundkar & Anr. v. State of Madhya Pradesh* -AIR 1952 SC 343. In para 10, the position has been succinctly stated as under:

> "10. xxx xxx xxx xxx
>
> It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused. In spite of the forceful arguments addressed to us by the learned Advocate-General on behalf of the State we have not been able to discover any such evidence either intrinsic within Ex.P-3A or outside and we are constrained to observe that the Courts below have just fallen into the error against which warning was uttered by Baron Alderson in the above mentioned case."

The decision in *Hanumant Govind* (supra) was followed in the Constitution Bench decision of this Court reported as

Govinda Reddy Krishna & Another v. State of Mysore - AIR 1960 SC 29. The said position was subsequently reiterated in the decision reported as *Naseem Ahmed v. Delhi Administration* - 1974 (3) SCC 668. In para 10 of the decision in *Naseem Ahmed* (supra), the legal position has been stated as under:

> "10. This is a case of circumstantial evidence and it is therefore necessary to find whether the circumstances on which prosecution relies are capable of supporting the sole inference that the appellant is guilty of the crime of which he is charged. The circumstances, in the first place, have to be established by the prosecution by clear and cogent evidence and those circumstances must not be consistent with the innocence of the accused. For determining whether the circumstances established on the evidence raise but one inference consistent with the guilt of the accused, regard must be had to the totality of the circumstances. Individual circumstances considered in isolation and divorced from the context of the over all picture emerging from a consideration of the diverse circumstances and their conjoint effect may by themselves appear innocuous. It is only when the various circumstances are considered conjointly that it becomes possible to understand and appreciate their true effect. If a person is seen running away on the heels of a murder, the explanation that he was fleeing in panic is apparently not irrational. Blood stains on the clothes can be attributed plausibly to a bleeding nose. Even the possession of a weapon like a knife can be explained by citing a variety of acceptable answers. But such circumstances cannot be considered in water-tight compartments. If a person is found running away from the scene of murder with blood-stained clothes and a knife in his hand, it would in a proper context, be consistent with the rule of circumstantial evidence to hold that he had committed the murder."

In the decision reported as *Sharad Birdhichand Sarda v. State of Maharashtra* -1984 (4) SCC 116, this Court has laid down the cardinal principles regarding appreciation of circumstantial evidence and held that whenever the case is based on circumstantial evidence, the following features are required to be complied with which has been set out by this Court in para 153 at page 185 which reads as under:

"153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in *Shivaji Sahabrao Bobade v. State of Maharashtra* where the following observations were made [SCC para 19, p.807: SCC (Crl.) p. 1047].

Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions.

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except

the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

The above principles have been followed and reiterated in the recent decision of this Court reported as *Mustkeem @ Sirajudeen v. State of Rajasthan* -2011 (11) SCC 724.

In the decision reported in *Rukia Begum & Ors. v. State of Karnataka* -2011 (4) SCC 779, this Court again restated the principles as under:

"17. In order to sustain conviction, circumstantial evidence must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused. Such evidence should not only be consistent with the guilt of the accused but inconsistent with his innocence. No hard-and-fast rule can be laid to say that particular circumstances are conclusive to establish guilt. It is basically a question of appreciation of evidence which exercise is to be done in the facts and circumstances of each case.

18. Here in the present case the motive, the recoveries and abscondence of these appellants immediately after the occurrence point out towards their guilt. In our opinion, the trial Court as also the High Court on the basis of the circumstantial evidence rightly came to the conclusion that the prosecution has been able to prove its case beyond all reasonable doubt so far as these appellants are concerned."

12. When we apply the above principles to the case on hand, the circumstances stated by the trial Court and concretized by the High Court, namely, were that the deceased

and the accused were last seen together on 06.12.2001 as per the version of PWs 1 and 6, the body of the deceased was recovered at the instance of the appellant as stated by PW-7, the recovery of knife by the I.O. from the place of occurrence, the frequent quarrels between the deceased and the accused as stated by PWs 1 and 2, the theory of the deceased having run away from the matrimonial home not properly explained by the appellant apart from the fact that no steps were taken by him to trace his wife, the weapon used, namely, the knife containing blood stains, that the nature of injuries found on the body of the deceased, that as per the version of PW-5, the post mortem doctor, the death was homicidal and that the injuries could have been caused with the weapon marked in the case , that the appellant wanted to flee from the town itself and that the clothes seized from the appellant were found containing human blood.

13. When the above circumstances relied upon by the Courts below for convicting the appellant are examined, we find that the principles laid down by this Court in the above referred to decisions are fully satisfied. The circumstances narrated above as held by the Courts below were all established without any doubt and are conclusive in nature. They were not explainable with any other possibilities. The circumstances are consistent which leads to the only hypothesis of the guilt of the appellant alone and none else and the said circumstances exclude every other hypothesis and show that in all probabilities, the killing of the deceased could have been done only by the appellant. The motive along with the chain of circumstances stood proved against the appellant only go to show that the appellant alone was responsible for the killing of the deceased. The appellant has miserably failed to show any missing link in the chain of circumstances demonstrated by the prosecution for the offence alleged against him.

14. We are in full agreement with the above conclusions of the High Court and we find no good grounds to interfere with the same. As rightly argued by learned counsel for the

respondent the appellant did not dispute the identity of the body at any point of time, that he did not state any thing in the course of 313 questioning about the running away of his wife and that there was no missing link in the chain of circumstances demonstrated before the Courts below. If according to the appellant the deceased ran away from the matrimonial home he should have established the said fact to the satisfaction of the Court as it was within his special knowledge. In this context it will be worthwhile to refer to the recent decision of this Court reported as *Prithipal Singh & Ors v. State of Punjab* - 2012 (1) SCC 10. In para 53, it has been held that a fact which is especially in the knowledge of any person then the burden of proving that fact is upon him and that it is impossible for the prosecution to prove certain facts particularly within the knowledge of the accused.

15. Having regard to our above conclusions, we do not find any merit in this appeal. The appeal fails and the same is dismissed.

R.P. Appeal dismissed.

RAMESH AHLUWALIA
v.
STATE OF PUNJAB & ORS.
(Civil Appeal No. 6634 of 2012)

SEPTEMBER 13, 2012

[SURINDER SINGH NIJJAR AND H. L. GOKHALE, JJ.]

Constitution of India, 1950:

Art. 226 – Writ petition against Management of a private unaided school by its employee – Held: Even a purely private body, where State has no control over its internal affairs, would be amenable to jurisdiction of High Court under Art. 226, for issuance of a writ of mandamus, provided such private body is performing public functions which are normally expected to be performed by State.

Art. 226 – Writ petition – Involving disputed questions of fact – Held: Since the writ petition clearly involves disputed questions of fact, it is appropriate that the matter should be decided by an appropriate tribunal/court – The remedy of appeal before State School Education Tribunal is clearly available to appellant – It would, therefore, be appropriate for appellant to avail the remedy of appeal before Education Tribunal – Remedy – Service law.

Administrative Law:

Bias – In disciplinary proceedings against employee of school, Principal appearing as witness of management – Principal also sitting as a member of Disciplinary Committee to hear appeal of employee – Held: Having supported the case of management, it was not appropriate for Principal to participate in proceedings of Disciplinary Committee – Actual and demonstrable fair play must be the hallmark of the proceedings and decisions of administrative and quasi

judicial tribunals, in particular, when decisions taken by these bodies are likely to cause adverse civil consequences to the persons against whom such decisions are taken – Order passed by Disciplinary Committee is quashed – Having regard to the fact situation and the time which has elapsed since the order of removal was passed, it would be inappropriate at this stage to relegate the appellant back to Disciplinary Committee – In the interest of justice, appellant is permitted to challenge the order of Disciplinary Authority before State School Education Tribunal – Jurisdiction – Education/Educational Institutions – Service law.

Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Ors. Vs. V.R. Rudani and Ors., **1989 (2) SCR 697 = 1989 (2) SCC 691,** *Unni Krishnan J.P. and Ors. Vs. State of Andhra Pradesh and Ors.* **1993 (1) SCR 594 = 1993 (1) SCC 645 and** *Zee Telefilms Ltd. & Anr. Vs. Union of India & Ors* **2005 (1) SCR 913 = 2005 (4) SCC 649***; T.M.A. Pai Foundation and Ors. vs. State of Karnataka and Ors.* **2002 (3) Suppl. SCR 587 = 2002 (8) SCC 481 – relied on.**

Zee Telefilms Ltd. & Anr. vs. Union of India & Ors., **2005 (1) SCR 913 = 2005 (4) SCC 649;** and *Pradeep Kumar Biswas Vs. Indian Institute of Chemical Biology & Ors.*, **2002 (3) SCR 100 = 2002 (5) SCC 111 – cited.**

Case Law Reference:

2005 (1) SCR 913	**cited**	**para 8**
1989 (2) SCR 697	**relied on**	**para 10**
1993 (1) SCR 594	**relied on**	**para 10**
2005 (1) SCR 913	**relied on**	**para 10**
2002 (3) SCR 100	**cited**	**para 8**
2002 (3) Suppl. SCR 587	**relied on**	**para 12**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6634 of 2012.

From the Judgment & Order dated 25.10.2010 of the High Court of Punjab & Haryana at Chandigarh in L.P.A. No. 368 of 2010 (O & M).

Sanjay Parikh, A.N. Singh, Mamta Saxena, Anitha Shenoy for the Appellant.

S.S. Ray, Rakhi Ray, R.S. Gulia, Vaibhav Gulia, Tara Chandra Sharma, Neelam Sharma for the Respondents.

The following Order of the Court was delivered

ORDER

1. Leave granted.

2. We have heard the learned counsel for the parties at length and also perused the entire records.

3. The Appellant Ramesh Ahluwalia was working as an Administrative Officer in the DAV Public School, Lawrence Road, Amritsar. He has been serving in that institution since April, 1983. At the relevant time, the Appellant was working as an Administrative Officer, to which post he was promoted by order dated August, 2005. It appears that one lady official Smt. Jaswinder Kaur made a complaint to the Principal of the School on 28th November, 2006 about the alleged misconduct of the Appellant on 17.11.2006. On the basis of the aforesaid misconduct, the Appellant was issued a warning letter by the Principal Smt. Neera Sharma on 9th December, 2006. On 21st December, 2006, Smt. Jaswinder Kaur made another written complaint addressed to the Manager.

4. The Appellant complains that without granting any opportunity of being heard, on February, 2007 he was downgraded and transferred to another school to work as an

Assistant. This order was also passed by Principal Smt. Neera Sharma. Again, on 8th February, 2007, Smt. Jaswinder Kaur submitted a further affidavit regarding her complaint. Therefore, a Memorandum/ Charge-sheet dated 17th March, 2007 was served upon the Appellant under Bye-law 47 of the Central Board of Secondary Education Affiliation Bye-Laws. After obtaining the explanation of the Appellant, the Manager of the Managing Committee of the school, being the Disciplinary Authority, appointed an Inquiry Officer and a regular inquiry was held against the Appellant.

5. We may notice here that the Principal Smt. Neera Sharma appeared before the Inquiry Officer as Management Witness No.2. Ultimately, the charges were said to have been proved against the Appellant. Subsequently, the Inquiry Report was served on the Appellant and he was given an opportunity to make a representation against the same. The Appellant submitted his representation detailing his various contentions. Upon consideration of the entire matter, it appears that the Disciplinary Authority passed an order on January, 2008 directing the Appellant to be removed from service.

6. Against the aforesaid order of removal, the Appellant submitted an appeal before the Disciplinary Committee under Bye-Law 49 of the CBSE Affiliation Bye-Laws. Bye-Law 49 of the said Bye-Laws provides as under:

"49. Disciplinary Committee

1) In case the employee wishes to appeal against the order of the Disciplinary Authority, the appeal shall be referred to a Disciplinary Committee. The

Disciplinary Committee shall consist of the following:

(a) The Chairman of the School Managing Committee or in his absence any member of the Committee, nominated by him.

(b) The Manager of the school, and where the disciplinary proceedings is against him/her any other person of the Committee nominated by the Chairman.

(c) A nominee of the Board appropriate authority. H/she shall act as an adviser.

(d) The Head of the school, except where the disciplinary proceeding is against him/her, the Head of any other school nominated by the CBSE or Director of Education in case the Act so provides.

(e) One teacher who is a member of SMC of the school nominated by the Chairman of the Committee.

2)The Disciplinary Committee shall carefully examine the findings of the inquiry officer reasons for imposing penalty recored by the Disciplinary Authority and the representation by the employee and pass orders as it may deem fit."

7. A perusal of the aforesaid Bye-Law clearly shows that an order of the Disciplinary Authority can be challenged before the Disciplinary Committee by way of filing an appeal. The constitution of the Disciplinary Committee includes, amongst others, Head of the school. In accordance with the aforesaid Bye-law, the Appellant duly submitted an appeal but the same was rejected by the Disciplinary Committee on 18th/19th of December, 2008.

8. Aggrieved by the aforesaid decision, the Appellant challenged the order of the Disciplinary Committee before the High Court by filing CWP No.11691/2009. The aforesaid writ petition has been dismissed by the learned Single Judge in limine, but by passing a speaking order. Relying on the judgment of this Court in *Zee Telefilms Ltd. & Anr. vs. Union of India & Ors.,* (2005) 4 SCC 649, the Appellant had submitted that he was entitled to invoke the extraordinary jurisdiction of

the High Court under Article 226 of the Constitution of India as the respondent school was performing public functions by providing education to young children. The aforesaid submission of the Appellant has been rejected by the learned Single Judge with the following observations:

> "After hearing counsel, for the Appellant, I do not find any force in the contention raised by him. The respondent school, being an unaided and a private school being managed by a Society, is not an instrumentality of the State, in my opinion, the Appellant has the efficacious remedy to challenge the impugned orders before the Civil Court. In the instant case, while challenging the impugned orders, the Appellant has raised certain disputed questions of facts. Thus, in the facts and circumstances of the case, I am not inclined to entertain this petition and the same is accordingly, dismissed with liberty to the Appellant to avail his alternative remedy."

9. Against the order passed by the learned Single Judge, the Appellant filed Letters Patent Appeal No.368 of 2010 before the Division Bench of the High Court. The Division Bench, vide its order dated 25th October, 2010, dismissed the LPA filed by the Appellant by observing that there is no infirmity in the order passed by the learned Single Judge. Hence, the present special leave petition by the Appellant.

10. Mr. Parikh, learned counsel appearing on behalf of the Appellant submitted that the judgment of the learned Single Judge as also of the Division Bench of the High Court are contrary to the law laid down by this Court in a catena of judgments. He has made a reference to the judgments of this Court in *Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Ors. Vs. V.R. Rudani and Ors.,* (1989) 2 SCC 691, *Unni Krishnan J.P. and Ors. Vs. State of Andhra Pradesh and Ors.* (1993) 1 SCC 645 and *Zee Telefilms Ltd. & Anr. Vs. Union of India & Ors.* (2005) 4 SCC 649 and submitted that even though the respondent

School would not fall within the definition of "State" or other authority/instrumentality of the State under Article 12 of the Constitution of India, yet the writ petition would be maintainable as the Managing Committee of the School is running schools throughout India and thus performing very important public functions.

11. On the other hand, Mr. S.S. Ray, learned counsel appearing on behalf of respondent Nos.2-4 submitted that no writ petition would be maintainable against the respondent - institution. In support of his submission, learned counsel has placed reliance in the case of *Pradeep Kumar Biswas Vs. Indian Institute of Chemical Biology & Ors.,* (2002) 5 SCC 111, particularly making reference to paragraph 40 of the aforesaid judgment. Paragraph 40 of the aforesaid judgment is extracted hereunder:

> "The picture that ultimately emerges is that the tests formulated in Ajay Hasia are not a rigid set of principles so that if a body falls within any one of them it must, ex hypothesi, be considered to be a State within the meaning of Article 12. The question in each case would be whether in the light of the cumulative facts as established, the body is financially, functionally and administratively dominated by or under the control of the Government. Such control must be particular to the body in question and must be pervasive. If this is found then the body is a State within Article 12. On the other hand, when the control is merely regulatory whether under statute or otherwise, it would not serve to make the body a State."

12. We have considered the submissions made by the learned counsel for the parties. In our opinion, in view of the judgment rendered by this Court in the case of *Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust* (supra), there can be no doubt that even a purely private body, where the State has no control over its internal affairs, would be amenable to the jurisdiction of the

High Court under Article 226 of the Constitution, for issuance of a writ of mandamus. Provided, of course, the private body is performing public functions which are normally expected to be performed by the State Authorities. In the aforesaid case, this Court was also considering a situation where the services of a Lecturer had been terminated who was working in the college run by the Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust. In those circumstances, this Court has clearly observed as under :

> "20. The term "authority" used in Article 226, in the context, must receive a liberal meaning unlike the term in Article 12. Article 12 is relevant only for the purpose of enforcement of fundamental rights under Article 32. Article 226 confers power on the High Courts to issue writs for enforcement of the fundamental rights as well as non-fundamental rights. The words "any person or authority" used in Article 226 are, therefore, not to be confined only to statutory authorities and instrumentalities of the State. They may cover any other person or body performing public duty. The form of the body concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body. The duty must be judged in the light of positive obligation owed by the person or authority to the affected party. No matter by what means the duty is imposed, if a positive obligation exists mandamus cannot be denied.
>
> 22. Here again we may point out that mandamus cannot be denied on the ground that the duty to be enforced is not imposed by the statute. Commenting on the development of this law, Professor de Smith states: "To be enforceable by mandamus a public duty does not necessarily have to be one imposed by statute. It may be sufficient for the duty to have been imposed by charter, common law, custom or even contract." We share this view. The judicial control over the fast expanding maze of bodies affecting the rights of the people should not be put

into watertight compartment. It should remain flexible to meet the requirements of variable circumstances. Mandamus is a very wide remedy which must be easily available "to reach injustice wherever it is found". Technicalities should not come in the way of granting that relief under Article 226. We, therefore, reject the contention urged for the appellants on the maintainability of the writ petition."

13. The aforesaid observations have been repeated and reiterated in numerous judgments of this Court including the judgment in *Unni Krishnan and Zee Telefilms Ltd.*(supra), brought to our notice by the learned counsel for the Appellant Mr.Parikh.

14. In view of the law laid down in the aforementioned judgments of this Court, the judgment of the learned Single Judge as also the Division Bench of the High Court cannot be sustained on the proposition that the writ petition would not be maintainable merely because the respondent – institution is a purely unaided private educational institution. The appellant had specifically taken the plea that the respondents perform public functions, i.e. providing education to children in their institutions throughout India.

15. We must, however, notice that the learned Single Judge has dismissed the writ petition also on the ground that it involves disputed questions of fact. Mr.Ray, learned counsel appearing on behalf of the respondents has submitted that the appellant actually has not been able to contradict any of the proven facts. According to the learned counsel, the remedy of the appellant is to file a civil suit, if so advised. Therefore, the writ petition has been rightly dismissed by the High Court.

16. Mr. Parikh, learned counsel for the appellant, however, submits that civil suit would not be an alternative efficacious remedy in the facts of this case. In support of this submission, he brought to our notice certain observations made by a

Constitution Bench of this Court in *T.M.A. Pai Foundation and Ors. vs. State of Karnataka and Ors.,* (2002) 8 SCC 481. Learned counsel pointed out that, in the aforesaid case, this Court had directed that the Appellate Tribunal should be set up in each district of each State to hear appeals over the decisions taken by the Disciplinary Bodies of even purely private educational institutions. It was emphasised that speedy resolution of the disputes between the teachers and the management is in the interest of all, i.e. students, management as well as the concerned teachers. It appears that at the time when the appeal of the appellant was heard, such a tribunal had not been set up in the State of Punjab. The appeal filed before the Disciplinary Committee was also not referred to the District Judge by the Disciplinary Committee.

17. We are of the considered opinion that since the writ petition clearly involves disputed questions of fact, it is appropriate that the matter should be decided by an appropriate Tribunal/Court.

18. At this stage, we are informed that the State of Punjab has set up a tribunal, namely, Punjab School Education Tribunal, Mohali, which is empowered to entertain appeals even where orders have been passed by unaided private educational institutions. In that view of the matter, the remedy of appeal is clearly available to the appellant. It would, therefore, be appropriate for the appellant to avail the remedy of appeal before the aforementioned Education Tribunal.

19. Mr. Parikh, learned counsel for the appellant has pointed out that the appellant's appeal having already been decided under the Bye-Law 49, the observations made by the aforesaid Disciplinary Committee may not influence the proceedings before the Appellate Authority. In our opinion, such an eventuality will not arise.

20. In the petition before the High Court as well as the appeal before this Court, the appellant has submitted that the

entire disciplinary proceedings are vitiated due to the participation of the Principal, who was biased against the appellant. In our opinion, the order passed by the Disciplinary Committee cannot be sustained on the short ground that Smt. Neera Sharma was a member of the aforesaid Disciplinary Committee. In our opinion, she was clearly disqualified from participating in any deliberations of the Disciplinary Committee as she had appeared as Management Witness No.2. It is well settled principle of law that no person can be a Judge in his own cause. Having supported the case of the management, it was not appropriate for Smt. Neera Sharma to participate in the proceedings of the Disciplinary Committee. Given the background of the allegations made by the appellant at all stages of the enquiry not only against the principle, but also the Manager of the School, it was necessary for her to disassociate from the proceedings, to nullify any plea of apprehended bias. Furthermore, when the appeal was being decided by the Disciplinary Committee with regard to the legality or otherwise of the order passed by the Disciplinary Authority, the decision of the Disciplinary Committee not only had to be fair but it also had to appear, to be fair. This is in conformity with the principle that justice must not only be done, but must also appear to be done. Actual and demonstrable fair play must be the hallmark of the proceedings and the decisions of the administrative and quasi judicial tribunals. In particular, when the decisions taken by these bodies are likely to cause adverse civil consequences to the persons against whom such decisions are taken. For the aforesaid reasons, the order dated 18th/19th December, 2008 passed by the Disciplinary Committee is hereby quashed and set aside.

21. At this stage, learned counsel appearing on behalf of the respondents submits that, in fact, the appeal filed by the appellant ought to be remitted back to the Disciplinary Committee which would not include Smt.Neera Sharma as a member of the said committee.

22. Having noticed the entire fact situation above and the time which have elapsed since the order of removal was passed, we are of the opinion that it would be inappropriate at this stage to relegate the appellant back to the Disciplinary Committee. In the interest of justice, we permit the appellant to challenge the order of the Disciplinary Authority dated January, 2008 before Punjab School Education Tribunal, Mohali. The appeal shall be filed by the appellant within thirty days from today. Since the order of the Disciplinary Authority was passed on January, 2008, the appeal may well be beyond limitation period.

23. Keeping in view the peculiar facts and circumstances of this case, we direct that the appeal filed by the appellant shall be decided by the aforesaid Education Tribunal on merits and the same shall not be rejected on the ground of limitation. If the appeal is filed by the appellant within the period stipulated above, the Education Tribunal shall take final decision thereon within a period of three months.

24. It is made clear that the Education Tribunal shall decide the appeal on the assumption that no opinion has been expressed by this Court on the merits or the controversy raised by the parties.

25. With the aforementioned observations and direction, the impugned judgments passed by the learned Single Judge as also the Division Bench of the High Court are set aside and the appeal is disposed of.

R.P. Appeal disposed of.

BHARAT ALUMINIUM CO.
v.
KAISER ALUMINIUM TECHNICAL SERVICE, INC.
(Civil Appeal No. 7019 of 2005)

SEPTEMBER 6, 2012

[S.H. KAPADIA, CJI. AND D.K. JAIN, SURINDER SINGH NIJJAR, RANJANA PRAKASH DESAI AND JAGDISH SINGH KHEHAR, JJ.]

Arbitration and Conciliation Act, 1996 – ss.2(2) and 9; Part I and Part II – Interpretation of s.2(2) – Scope of the provisions of Part I and Part II of the Act – Territoriality principle – Whether s.2(2) bars application of Part I of the Act to Arbitrations which take place outside India – Grant of interim measures by Indian Courts where seat of arbitration is outside India – Maintainability of inter-parte suit for interim relief – Held: The Act has accepted the territoriality principle which has been adopted in the UNCITRAL Model Law – s.2(2) makes declaration that Part I of the Act shall apply to all arbitrations which take place within India – Part I of the Act would have no application to International Commercial Arbitration held outside India – Therefore, such awards would only be subject to jurisdiction of the Indian courts when the same are sought to be enforced in India in accordance with the provisions contained in Part II of the Act – No overlapping or intermingling of the provisions contained in Part I with the provisions contained in Part II of the Act – S.2(2) not in conflict with any of the provisions either in Part I or in Part II of the Act – In a foreign seated international commercial arbitration, no application for interim relief would be maintainable u/s.9 or any other provision, as applicability of Part I of Act 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 – Part I of the Act applicable only to all the arbitrations which take place within the territory of India – Law declared to apply prospectively, to all the arbitration agreements executed hereafter.

An agreement was executed between the appellant and the respondent. The agreement contained an arbitration clause for resolution of disputes arising out of the contract. The arbitration clause itself indicated that by reason of the agreement between the parties, the governing law of the agreement was the prevailing law of India. However, the settlement procedure for adjudication of rights or obligations under the agreement was by way of arbitration in London and the English Arbitration Law was made applicable to such proceedings. Disputes arose between the parties with regard to the performance of the agreement. Negotiations to reach a settlement were unsuccessful and a written notice of request for arbitration was issued by the respondent to the appellant. The disputes were duly referred to arbitration which was held in England. The arbitral tribunal made two awards in England. The appellant thereafter filed applications under Section 34 of the Arbitration and Conciliation Act, 1996 for setting aside the aforesaid two foreign awards. The trial Court held that the applications were not maintainable and dismissed the same. The order was upheld by the High Court in appeal.

Whilst hearing of further appeal before a two Judge Bench of this Court, counsel for the appellant referred to the three-Judges Bench decision of this Court in *Bhatia International* which was followed in a recent decision of two Judges Bench in *Venture Global Engineering*. On account of difference of opinion amongst the Hon'ble Judges on the correctness of the said decisions in view of the interpretation of Clause (2)

of Section 2 of the Arbitration and Conciliation Act, 1996, the appeal was placed for hearing before a three Judge Bench, which thereafter directed the matters to be placed before the present Constitution Bench to consider the true scope of the provisions of Part I and Part II of the Arbitration Act, 1996.

Answering the Reference, the Court

HELD:

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

1.1. The omission of the word "only" in Section 2(2) is not an instance of "CASUS OMISSUS". It is not the function of the Court to supply the supposed omission, which can only be done by Parliament. Legislative surgery is not a judicial option, nor a compulsion, whilst interpreting an Act or a provision in the Act. The provision contained in Section 2(2) is to be construed without adding the word "only" to the provision. It cannot be said that the omission of the word "only" from Section 2(2) indicates that applicability of Part I of the Arbitration Act, 1996 is not limited to the arbitrations that take place in India. A plain reading of Section 2(2) makes it clear that Part I is limited in its application to arbitrations which take place in India. The Parliament by limiting the applicability of Part I to arbitrations which take place in India has expressed a legislative declaration. It has clearly given recognition to the territorial principle. Necessarily therefore, it has enacted that Part I of the Arbitration Act, 1996 applies to arbitrations having their place/seat in India. [Paras 60, 62 and 63] [379-E-G; 381-C-F]

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

1.2. The Arbitration Act, 1996 consolidates the law on domestic arbitrations by incorporating the provisions to expressly deal with the domestic as well as international commercial arbitration; by taking into account the 1985 UNCITRAL Model Laws. It is not confined to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention'), which is concerned only with enforcement of certain foreign awards. The Arbitration Act, 1996 seeks to remove the anomalies that existed in the Arbitration Act, 1940 by introducing provisions based on the UNCITRAL Model Laws, which deals with international commercial arbitrations and also extends it to commercial domestic arbitrations. UNCITRAL Model Law has unequivocally accepted the territorial principle. Similarly, the Arbitration Act, 1996 has also adopted the territorial principle, thereby limiting the applicability of Part I to arbitrations, which take place in India. [Para 66] [383-G-H; 384-A-B]

1.3. Article 1(2) of the UNCITRAL Model Laws is a model and a guide to all the States, which have accepted the UNCITRAL Model Laws. The genesis of the word "only" in Article 1(2) of the Model Law can be seen from the discussions held on the scope of application of Article 1 in the 330th meeting, Wednesday, 19 June, 1985 of UNCITRAL. This would in fact demonstrate that the word "only" was introduced in view of the exceptions referred to in Article 1(2) i.e. exceptions relating to Articles 8, 9, 35 & 36 (Article 8 being for stay of judicial proceedings covered by an arbitration agreement; Article 9 being for interim reliefs; and Articles 35 & 36 being for enforcement of Foreign Awards). It was felt necessary to include the word "only" in order to clarify that except for Articles 8, 9, 35 & 36 which could have extra territorial effect if so legislated by the State, the other provisions would be applicable on a strict territorial basis. Therefore, the word "only" would have been necessary in case the

provisions with regard to interim relief etc. were to be retained in Section 2(2) which could have extra-territorial application. The Indian legislature, while adopting the Model Law, with some variations, did not include the exceptions mentioned in Article 1(2) in the corresponding provision Section 2(2). Therefore, the word "only" would have been superfluous as none of the exceptions were included in Section 2(2). [Para 68] [384-E-H; 385-A-B]

1.4. The omission of the word "only" in Section 2(2) of the Arbitration Act, 1996 does not detract from the territorial scope of its application as embodied in Article 1(2) of the Model Law. The article merely states that the Arbitration Law as enacted in a given state shall apply if the arbitration is in the territory of that State. The absence of the word "only" which is found in Article 1(2) of the Model Law, from Section 2(2) of the Arbitration Act, 1996 does not change the content/import of Section 2(2) as limiting the application of Part I of the Arbitration Act, 1996 to arbitrations where the place/seat is in India. It cannot be concluded that Part I would also apply to arbitrations that do not take place in India. [Paras 75, 76] [390-A-D]

1.5. India is not the only country which has dropped the word *"only"* from its National Arbitration Law. The word "*only*" is missing from the Swiss Private International Law Act, 1987 Chapter 12, Article 176 (1)(I). It is also missing in Section 2(1) of the 1996 Act (U.K.). Section 2(2) is an express parliamentary declaration/ recognition that Part I of the Arbitration Act, 1996 applies to arbitration having their place/seat in India and does not apply to arbitrations seated in foreign territories. The provisions have to be read as limiting the applicability of Part I to arbitrations which take place in India. If Section 2(2) is construed as merely providing that Part I of the Arbitration Act, 1996 applies to India, it would be ex facie superfluous/ redundant. No statutory provision is

necessary to state/clarify that a law made by Parliament shall apply in India/to arbitrations in India. Another fundamental principle of statutory construction is that courts will never impute redundancy or tautology to Parliament. Section 2(2) is not merely stating the obvious. Section 2(2) merely reinforces the limits of operation of the Arbitration Act, 1996 to India. [Paras 77, 78 and 79] [390-D-H; 391-A-C, F-G]

<u>Is Section 2(2) in conflict with Sections 2(4) and 2(5) -</u>

1.6. There is no doubt that the provisions of Section 2(4) and Section 2(5) would not be applicable to arbitrations which are covered by Part II of the Arbitration Act, 1996, i.e. the arbitrations which take place outside India. There is no inconsistency between Sections 2(2), 2(4) and 2(5). It cannot be said that limiting the applicability of part I to arbitrations that take place in India, would make Section 2(2) in conflict with Sections 2(4) and 2(5). [Para 85] [394-G-H; 395-A-B]

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

1.7. Section 2(7) does not, in any manner, relax the territorial principal adopted by Arbitration Act, 1996. It certainly does not introduce the concept of a delocalized arbitration into the Arbitration Act, 1996. Section 2(7) does not alter the proposition that Part I applies only where the "seat" or "place" of the arbitration is in India. Section 2(7) is enacted to reinforce the territorial criterion by providing that, when two foreigners arbitrate in India, under a Foreign Arbitration Act, the provisions of Part I *will* apply. Indian Courts being the supervisory Courts, will exercise control and regulate the arbitration proceedings, which will produce a "*domestically rendered international commercial award".* It would be a "foreign award" for the purposes of enforcement in a country other than India. [Paras 88, 93, 94] [395-E-F; 398-D, G-H, 399-A]

Party Autonomy

1.8. The choice of another country as the seat of arbitration inevitably imports an acceptance that the law of that country relating to the conduct and supervision of arbitrations will apply to the proceedings. It would, therefore, follow that if the arbitration agreement is found or held to provide for a seat / place of arbitration outside India, then the provision that the Arbitration Act, 1996 would govern the arbitration proceedings, would not make Part I of the Arbitration Act, 1996 applicable or enable Indian Courts to exercise supervisory jurisdiction over the arbitration or the award. It would only mean that the parties have contractually imported from the Arbitration Act, 1996, those provisions which are concerned with the internal conduct of their arbitration and which are not inconsistent with the mandatory provisions of the *English Procedural Law/Curial Law*. This necessarily follows from the fact that Part I applies only to arbitrations having their seat / place in India. [Paras 121, 122] [418-G-H; 419-A-B]

Section 28 -

1.9. The only purpose of Section 28 is to identify the rules that would be applicable to "substance of dispute". In other words, it deals with the applicable conflict of law rules. This section makes a distinction between purely domestic arbitrations and international commercial arbitrations, with a seat in India. Section 28(1)(a) makes it clear that in an arbitration under Part I to which Section 2(1)(f) does not apply, there is no choice but for the Tribunal to decide "the dispute" by applying the Indian "substantive law applicable to the contract". This is clearly to ensure that two or more Indian parties do not circumvent the substantive Indian law, by resorting to arbitrations. The provision would have an overriding

effect over any other contrary provision in such contract. On the other hand, where an arbitration under Part I is an international commercial arbitration within Section 2(1)(f), the parties would be free to agree to any other "substantive law" and if not so agreed, the "substantive law" applicable would be as determined by the Tribunal. The section merely shows that the legislature has segregated the domestic and international arbitration. Therefore, to suit India, conflict of law rules have been suitably modified, where the arbitration is in India. This will not apply where the seat is outside India. In that event, the conflict of laws rules of the country in which the arbitration takes place would have to be applied. [Para 123] [419-D-H; 420-A-B]

Part II

1.10. The regulation of *conduct* of arbitration and challenge to an award would have to be done by the courts of the country in which the arbitration is being conducted. Such a court is then the supervisory court possessed of the power to annul the award. This is in keeping with the scheme of the international instruments, such as the Geneva Convention and the New York Convention as well as the UNCITRAL Model Law. It also recognizes the territorial principle which gives effect to the sovereign right of a country to regulate, through its national courts, an adjudicatory duty being performed in its own country. Having accepted the principle of territoriality, it is evident that the intention of the parliament was to segregate Part I and Part II. Therefore, any of the provisions contained in Part I cannot be made applicable to Foreign Awards, as defined under Sections 44 and 53, i.e., the New York Convention and the Geneva Awards. This would be a distortion of the scheme of the Act. It is, therefore, not possible to accept the submission that provisions contained in Part II are supplementary to the provision

contained in Part I. The Parliament has clearly segregated the two parts. [Paras 128, 129] [423-B-D, G-H; 424-A-B]

Section 45

1.11. Section 45 falls within Part II which deals with enforcement proceedings in India and does not deal with the challenge to the validity of the arbitral awards rendered outside India. Section 45 empowers a judicial authority to refer the parties to arbitration, on the request made by a party, when seized of an action in a matter in respect of which the parties have made an agreement referred to in Section 44. It cannot be said that the use of expression "notwithstanding anything contained in Part I, or in the Code of Civil Procedure, 1908", in Section 45 of the Arbitration Act, 1996 necessarily indicates that provisions of Part I would apply to foreign seated arbitration proceedings. The existence of the non-obstante clause does not alter the scope and ambit of the field of applicability of Part I to include international commercial arbitrations, which take place out of India. [Paras 130, 133] [424-C-E; 426-G-H]

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

1.12. Section 48(1)(e) corresponds to Article V(1)(e) of the New York Convention. Section 48(1) sets out the defences open to the party to resist enforcement of a foreign award. The words "suspended or set aside", in Clause (e) of Section 48(1) cannot be interpreted to mean that, by necessary implication, the foreign award sought to be enforced in India can also be challenged on merits in Indian Courts. The provision merely recognizes that courts of the two nations which are competent to annul or suspend an award. It does not *ipso facto* confer jurisdiction on such Courts for annulment of an award made outside the country. Such jurisdiction has to be

specifically provided, in the relevant national legislation of the country in which the Court concerned is located. So far as India is concerned, the Arbitration Act, 1996 does not confer any such jurisdiction on the Indian Courts to annul an international commercial award made outside India. Such provision exists in Section 34, which is placed in Part I. Therefore, the applicability of that provision is limited to the awards made in India. If the arguments of the appellants are accepted, it would entail incorporating the provision contained in Section 34 of the Arbitration Act, 1996, which is placed in Part I of the Arbitration Act, 1996 into Part II of the said Act. This is not permissible as the intention of the Parliament was clearly to confine the powers of the Indian Courts to set aside an award relating to international commercial arbitrations, which take place in India. [Paras 136, 138] [429-D-E; 430-D-H; 431-A]

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

1.13. On a logical and schematic construction of the Arbitration Act, 1996, the Indian Courts do not have the power to grant interim measures when the seat of arbitration is outside India. A bare perusal of Section 9 would clearly show that it relates to interim measures before or during arbitral proceedings or at any time after the making of the arbitral award, but before it is enforced *in accordance with Section 36*. Section 36 necessarily refers to enforcement of domestic awards only. Therefore, the arbitral proceedings prior to the award contemplated under Section 36 can only relate to arbitrations which take place in India. The provision contained in Section 9 is limited in its application to arbitrations which take place in India. Extending the applicability of Section 9 to arbitrations which take place outside India would be to do violence to the policy of the

territoriality declared in Section 2(2) of the Arbitration Act, 1996. [Para 161, 163] [445-G-H; 446-A-B, F-G]

Is An Inter-Parte Suit For Interim Relief Maintainable –

1.14. It appears that as a matter of law, an inter-parte suit simply for interim relief pending arbitrations, even if it be limited for the purpose of restraining dissipation of assets would not be maintainable. There would be number of hurdles which the plaintiff would have to cross, which may well prove to be insurmountable. Pendency of the arbitration proceedings outside India would not provide a *cause of action* for a suit where the main prayer is for injunction. It is patent that there is no existing provision under the CPC or under the Arbitration Act, 1996 for a Court to grant interim measures in terms of Section 9, in arbitrations which take place outside India, even though the parties by agreement may have made the Arbitration Act, 1996 as the governing law of arbitration. [Paras 176, 179 and 197] [453-C-D; 454-D-E; 461-D-E]

Konkan Railway Corporation Ltd. & Anr. vs. Rani Construction Pvt. Ltd. **(2002) 2 SCC 388: 2002 (1) SCR 728;** *SBP & Co. Vs. Patel Engineering Ltd. & Anr.* **(2005) 8 SCC 618: 2005 (4) Suppl. SCR 688;** *Nalinakhya Bysack Vs. Shyam Sunder Haldar & Ors.* **1953 SCR 533;** *Punjab Land Devl. & Reclamation Corporation Ltd. Vs. Presiding Officer, Labour Court* **(1990) 3 SCC 682: 1990 (3) SCR 111;** *National Thermal Power Corporation v. Singer Company & Ors.* **(1992) 3 SCC 551: 1992 (3) SCR 106;** *Adhunik Steels Ltd. Vs. Orissa Manganese and Minerals Pvt. Ltd* **2007 (7) SCC 125: 2007 (8) SCR 213;** *State of Orissa Vs. Madan Gopal Rungta* **1952(1) SCR 28;** *U.P. Junior Doctors' Action Committee Vs. Dr. B. Sheetal Nandwani* **1997 Suppl (1) SCC 680;** *State of Uttar Pradesh Vs. Ram Sukhi Devi* **(2005) (9) SCC 733: 2004 (5) Suppl. SCR 74;** *Deoraj Vs. State of Maharashtra & Ors.* **(2004) 4 SCC 697: 2004 (3) SCR 920;** *Raja Khan Vs. Uttar*

Pradesh Sunni Central Wakf Board & Ors. **(2011) 2 SCC 741: 2010 (13) SCR 1131;** *ONGC Vs. Western Company of North America* **1987 (1) SCC 496: 1987 (1) SCR 1024;** *ABC Laminart Pvt. Ltd. Vs. A.P. Agencies, Salem* **1989 (2) SCC 163: 1989 (2) SCR 1;** *Interglobe Aviation Ltd. Vs. N. Satchidanan* **2011 (7) SCC 463: 2011 (6) SCR 1116;** *TDM Infrastructure Pvt. Ltd. Vs. U.E. Development India Pvt. Ltd.* **2008 (14) SCC 271: 2008 (8) SCR 775;** *Guru Nanak Foundation Vs. M/s. Rattan Singh & Sons.* **1981 (4) SCC 634: 1982 (1) SCR 842;** *Umed Vs. Raj Singh* **1975 (1) SCC 76: 1975 (1) SCR 918;** *R.S. Raghnath Vs. State of Karnataka & Anr.* **(1992) 1 SCC 335: 1991 (1) Suppl. SCR 387;** *Punjab Land Development and Reclamation Corporation Ltd., Chandigarh Vs. Presiding Officer, Labour Court, Chandigarh & Others.* **(1990) 3 SCC 682: 1990 (3) SCR 111;** *Gwalior Rayon Silk Mfg. (Wvg.) Co. Ltd. vs. Custodian of Vested Forests* **AIR 1990 SCC 1747: 1990 SCR 401;** *State of Orissa vs. Madan Gopal Rungta* **AIR 1952 SC 12: 1952 SCR 28;** *Cotton Corporation Limited vs. United Industrial Bank* **(1983) 4 SCC 625: 1983 (3) SCR 962 and** *Ashok Kumar Lingala vs. State of Karnataka.* **(2012) 1 SCC 321: 2011 (14) SCR 800 – referred to.**

Magor & St. Mellons RDC v. Newport Corporation **1951 (2) All ER 839;** *Duport Steels Ltd. v. Sirs* **(1980) 1 All ER 529;** *Reliance Industries Ltd. Vs. Enron Oil & Gas India Ltd.* **2002 (1) Lloyd Law Reports 645;** *Braes of Doune Wind Farm (Scotland) Limited Vs. Alfred McAlpine Business Services Limited* **[2008] EWHC 426 (TCC);** *Shashoua & Ors. Vs. Sharma* **[2009] EWHC 957 (Comm.);** *Siskina (Cargo Owners) Vs. Distos Compania Navieria* ***SA*** **1979 AC 210;** *Fourie Vs. Le Roux* **2007 (1) WLR 320; 2007 (1) All ER 1087;** *Naviera Amazonica Peruana S.A. Vs. Compania Internacionale De Seguros Del Peru* **1988 (1) Lloyd's Law Reports 116;** *Union of India Vs. McDonnell Douglas Corp.* **1993 (3) Lloyd's Law Reports 48;** *Hill Vs. William Hill (Park Lane) Ltd.* **1949 AC 530;** *Bergesen Vs. Joseph Muller*

Corporation **710 F.2d 928;** *James Miller & Partners Vs. Whitworth Street Estates (Manchester) Ltd.* **[1970] 1 Lloyd's Rep. 269; [1970] A.C.583;** *Black Clawson International Ltd. Vs. PapierIrke Waldhof-Aschaf-fenburg A.G.* **[1981] 2 Lloyd's Rep. 446;** *C Vs. D* **[2007] EWCA Civ 1282 (CA);** *Sulamerica CIA Nacional de Seguros SA v. Enesa Engenharia SA – Enesa.* **[2012 WL 14764;** ***A Vs. B,*** **[2007] 1 Lloyds Report 237;** *Karaha Bodas Co. LLC Vs. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* **335 F.3d 357;** *Karaha Bodas Co. LLC (Cayman Islands) Vs. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara – Pertamina (Indonesia)* **Yearbook Comm. Arb'n Vol. XXVIII (2003)** *International Electric Corporation Vs. Bridas Sociedad Anonima Petroleva, Industrial Y Commercial* **745 F Supp 172, 178 (SDNY 1990);** *International Standard Electric Corp. (US) Vs. Bridas Sociedad Anonima Petrolera (Argentina)* **(1992) VII Ybk Comm Arb 639;** *Investors Compensation Scheme Ltd. vs. West Bromwich Building Society* **[1998] WLR 1896 at 913;** *Bank of Credit & Commerce International SA vs. Ali & Ors.* **[2001] 2 WLR 735;** *Channel Tunnel Group Ltd. & Anr. Vs. Balfour Beatty Construction Ltd. & Ors.* **(1993) AC 334 – referred to.**

"Guide to the UNCITRAL Model Law on International Commercial Arbitration, Legislative History and Commentary" **by Howard M. Holtzmann and Joseph E. Beuhaus – referred to.**

CONCLUSION :-

2.1. The Arbitration and Conciliation Act, 1996 has accepted the territoriality principle which has been adopted in the UNCITRAL Model Law. Section 2(2) makes a declaration that Part I of the Arbitration Act, 1996 shall apply to all arbitrations which take place within India. Part I of the Arbitration Act, 1996 would have no application to International Commercial Arbitration held outside India. Therefore, such awards would only be subject to

the jurisdiction of the Indian courts when the same are sought to be enforced in India in accordance with the provisions contained in Part II of the Arbitration Act, 1996. The provisions contained in Arbitration Act, 1996 make it crystal clear that there can be no overlapping or intermingling of the provisions contained in Part I with the provisions contained in Part II of the Arbitration Act, 1996. [Para 198] [461-F-H; 462-A]

2.2. 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. [Para 199] [462-B-D]

2.3. Part I of the Arbitration Act, 1996 is applicable only to *all the arbitrations* which take place within the territory of India. In order to do complete justice, it is hereby ordered, that the law now declared by this Court shall apply prospectively, to all the arbitration agreements executed hereafter. [Paras 200, 201] [426-E-G]

Bhatia International Vs. Bulk Trading S.A. & Anr. **(2004) 2 SCC 105 and** *Venture Global Engineering Vs. Satyam Computer Services Ltd. & Anr.* **(2008) (4) SCC 190: 2008 (1) SCR 501 – overruled.**

Case Law Reference:

2002 (1) SCR 728	**referred to**	**Para 15, 60**

2005 (4) Suppl. SCR 688	**referred to**	**Para 15, 60**
1953 SCR 533	**referred to**	**Para 16,60,168**
1951 (2) All ER 839	**referred to**	**Para 16**
1990 (3) SCR 111	**referred to**	**Para 16**
(1980) 1 All ER 529	**referred to**	**Para 16, 61**
1992 (3) SCR 106	**referred to**	**Para 17,26**
2002 (1) LLR 645	**referred to**	**Para 18,124, 165**
[2008] EWHC 426 (TCC)	**referred to**	**Para 20,50, 51,54**
[2009] EWHC 957	**referred to**	**Para 20**
(2004) 2 SCC 105	**overruled**	**Para 23,199, 201**
***SA* 1979 AC 210**	**referred to**	**Para 23**
2007 (1) All ER 1087	**referred to**	**Para 23**
2007 (8) SCR 213	**referred to**	**Para 23**
1952(1) SCR 28	**referred to**	**Para 23**
1997 Suppl (1) SCC 680	**referred to**	**Para 23**
2004 (5) Suppl. SCR 74	**referred to**	**Para 23**
2004 (3) SCR 920	**referred to**	**Para 23**
2010 (13) SCR 1131	**referred to**	**Para 23**
2008 (1) SCR 501	**overruled**	**Para 26, 199, 201**
1987 (1) SCR 1024	**referred to**	**Para 26,51, 91**

1989 (2) SCR 1	**referred to**	**Para 26**
2011 (6) SCR 1116	**referred to**	**Para 29**
2008 (8) SCR 775	**referred to**	**Para 30**
1982 (1) SCR 842	**referred to**	**Para 35**
1988 (1) LLR 116	**referred to**	**Para 72,102, 111**
1993 (3) LLR 48	**referred to**	**Para 73**
1975 (1) SCR 918	**referred to**	**Para 78**
1949 AC 530	**referred to**	**Para 78**
710 F.2d 928	**referred to**	**Para 94**
[1970] A.C.583	**referred to**	**Para 105**
A.G. [1981] 2 LR. 446	**referred to**	**Para 105**
[2007] EWCA Civ 1282 (CA	**referred to**	**Para 116**
[2012 WL 14764	**referred to**	**Para 119**
[2007] 1 LR 237	**referred to**	**Para 128**
1991 (1) Suppl. SCR 387	**referred to**	**Para 132**
335 F.3d 357	**referred to**	**Para 151**
Ybk Comm Arb'n Vol. XXVIII (2003)	**referred to**	**Para 152**
745 F Supp 172, 178 (SDNY 1990	**referred to**	**Para 153**
(1992) VII Ybk Comm Arb 639	**referred to**	**Para 154**
[1998] WLR 1896 at 913	**referred to**	**Para 165**

[2001] 2 WLR 735	**referred to**	**Para 165**
1990 (3) SCR 111	**referred to**	**Para 169**
1990 SCR 401	**referred to**	**Para 175**
1952 SCR 28	**referred to**	**Para 180**
1983 (3) SCR 962	**referred to**	**Para 181**
2011 (14) SCR 800	**referred to**	**Para 182**
(1993) AC 334	**referred to**	**Para 190**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7019 of 2005.

From the Judgment and Order dated 10.08.2005 of the High Court of Judicature at Bilaspur (Chhattisgarh) in Misc. Appeal No. 889 of 2004.

WITH

Civil Appeal No. 6284 of 2004

Civil Appeal No. 3678 of 2007.

Transferred Case (C) No. 35 of 2007.

S.L.P (C) Nos. 3589-3590 of 2009

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

S.L.P (C) Nos. 27824 & 27841 of 2011.

C.A. Sundaram, Soli J. Sorabjee, P.H. Parekh, Dr. A.M. Singhvi, Harish N. Salve, Ciccu Mukhopadhya, Aspi Chenoy, S.K. Dholakia, Prashanto Chandra Sen, Ramesh Singh, Preetesh Kapur, Mehernaz Mehta, Aanchal Yadav, Mohit Sharma, Binu Tamta, Rohini Musa, Manu Krishnan, Prashant Mishra, Subramonium Prasad, Hiroo Advani, Shashank Garg, Animesh Sinha, Apar Gupta, Parmanand Pandey, E.R. Kumar, Sameer Parekh, Rukhmini Bobde, Subhasree Chatterjee, Vishal Prasad, Utsav Trivedi, Nupur, Sharma (For Parekh & Co.), Gopal Jain, R.N. Karanjawala, Manik Karanjawala, Nandini Gore, Amit Bhandari, Debmalya Banerjee, Sachi Lodha, Dhavel Vassonji, Ravi Gandhi, Sonia Nigam, Aditi Bhat,

Abhiruchi Mengi, Premtosh Mishra (For Karanjawala & Co.), Manu Nair, Abhijeet Sinha, Adit S. Pujari, Vaibhav Mishra, Saransh Bajaj, Kirpa Pandit (For Suresh A. Shroff & Co.), Anirudh Das, Saanjh N. Purohit, Prashant Kalra (For Suresh A Shroff & Co.), Sanjay Kumar, Omar Ahmad (For Suresh A. Shroff & Co.), Anip Sachthey, Mohit Paul, Shagun Matta, Prateek Jalan, Rohan Dakshini, Ruby Singh Ahuja, Jatin Mongia, Siddhant Kochhar, Rashmikant, Shruti Katakey, Vijendra Kumar, Shaikh Chand Saheb, Rameshwar Prasad Goyal, A.V. Rangam, Buddy A. Ranganadhan, Richa Bharadwaj, Dharmendra Rautray, Tara Shahani, Ankit Khushu, Pramod Nair, Divyam Agarwal, Dheeraj Nair, E.C. Agrawala, Mahesh Agarwal, Rishi Agrawala, Radhika Gautam, Nakul Dewal, V.P. Singh Raghav Dhawan, Tejas Karia, Nitesh Jain, Aashish Gupta, Dushyant Manocha, Tarunima Vijra (For Suresh A. Shroff & Co.), Ramesh Singh, A.T. Patra, Mohit Sharma, (For O.P. Khaitan & Co.), Ramesh Babu M.R., Shekhar Prasad Gupta, Sushrat Jindal for the Appearing Parties.

The Judgment of the Court was delivered by

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

> "In the midst of hearing of these appeals, learned counsel for the appellant has referred to the three-Judges Bench decision of this Court in Bhatia International Vs. Bulk Trading S.A. & Anr., (2002) 4 SCC 105. The said decision was followed in a recent decision of two Judges Bench in Venture Global Engineering Vs. Satyam Computer Services Ltd. & Anr. 2008 (1) Scale 214. My learned brother Hon'ble Mr. Justice Markandey Katju has reservation on the correctness of the said decisions in view of the interpretation of Clause (2) of Section 2 of the Arbitration and Conciliation Act, 1996. My view is otherwise.

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

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

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

"Article 17.1 – Any dispute or claim arising out of or relating to this Agreement shall be in the first instance, endeavour to be settled amicably by negotiation between the parties hereto and failing which the same will be settled by arbitration pursuant to the English Arbitration Law and subsequent amendments thereto.

Article 17.2 – The arbitration proceedings shall be carried out by two Arbitrators one appointed by BALCO and one by KATSI chosen freely and without any bias. The court of Arbitration shall be held wholly in London, England and shall use English language in the proceeding. The findings and award of the Court of Arbitration shall be final and binding upon the parties.

Article 22 – Governing Law – This agreement will be governed by the prevailing law of India and in case of Arbitration, the English law shall apply."

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

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

6. Aggrieved by the aforesaid judgment, the appellant filed two miscellaneous appeals being Misc. Appeal Nos. 889 of 2004 and Misc. Appeal No.890 of 2004 in the High Court of Judicature at Chattisgarh, Bilaspur. By an order dated 10th August, 2005, a Division Bench of the High Court dismissed the appeal. It was held as follows:

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

The aforesaid decision has been challenged in this appeal.

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

8. We may, however, briefly notice the facts in Bharati Shipyard Ltd. Vs. Ferrostaal AG & Anr. in SLP (C) No.27824 of 2011 as it pertains to the applicability of Section 9 of the Arbitration Act, 1996. In this case, the appellant, an Indian Company, entered into two Shipbuilding Contracts with respondent No.1 on 16th February, 2007. The appellant was to construct vessels having Builders Hull No.379 which was to be completed and delivered by the appellant to the respondent No.1 within the time prescribed under the two Shipbuilding Contracts. The agreement contained an arbitration clause. The parties initially agreed to get their disputes settled through arbitral process under the Rules of Arbitration of the International Chamber of Commerce (ICC) at Paris, subsequently, mutually agreed on 29th November, 2010 to arbitration under the Rules of London Maritime Arbitrators Association (LMAA) in London. This agreement is said to have been reached between the parties in the interest of saving costs and time. Prior to agreement dated 29th November, 2010 relating to arbitration under LMAA Rules, respondent No.1 had filed two requests for arbitration in relation to both the contracts under Article 4 of ICC Rules on 12th November, 2010

recognizing that the seat of arbitration is in Paris and the substantive law applicable is English Law. In its requests for arbitration, respondent No.1 had pleaded in paragraphs 25 and 26 as under:

"Applicable Law:

25. The Contract Clause "Governing Law, Dispute and Arbitration Miscellaneous" provides that the Contract shall be governed by the Laws of England." The rights and obligations of the parties are therefore to be interpreted in light of English Law (the applicable law).

26. In summary:

a) disputes arising out of the Contract between the parties are to be resolved by arbitration under the ICC Rules;

b) the seat of arbitration is Paris; and

c) the substantive law to be applied in the arbitration shall be English Law."

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

10. Learned District Judge, Dakshina Kannada, Mangalore granted an ex parte ad interim injunction in both the applications restraining the appellant from encashing the bank guarantee on 16th November, 2010. The appellant appeared and filed its statement of objections. After hearing, the learned District Judge passed the judgments and orders on 14th

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

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

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

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

13. We have heard very lengthy submissions on all aspects of the matter. All the learned counsel on both sides have made elaborate references to the commentaries of various experts in the field of International Commercial Arbitration. Reference has also been made to numerous decisions of this Court as well as the Courts in other jurisdictions.

14. Mr. C.A. Sundaram, appearing for the appellants in C.A. No. 7019 of 2005 submits that primarily the following five questions would arise in these cases:- (a) What is meant by the place of arbitration as found in Sections 2(2) and 20 of the Arbitration Act, 1996?; (b) What is the meaning of the words

"under the law of which the award is passed" under Section 48 of the Arbitration Act, 1996 and Article V(1)(e) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter referred to as "the New York Convention")?; (c) Does Section 2(2) bar the application of Part I of the Arbitration Act, 1996 (Part I for brevity) to arbitrations where the place is outside India?; (d) Does Part I apply at all stages of an arbitration, i.e., pre, during and post stages of the arbitral proceedings, in respect of all arbitrations, except for the areas specifically falling under Parts II and III of the Arbitration Act, 1996 (Part II and Part III hereinafter)?; and (e) Whether a suit for preservation of assets pending an arbitration proceeding is maintainable?

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

16. Mr. Sorabjee has emphasised that the omission of word "only" in Section 2(2) is not an instance of "CASUS

1. (2002) 2 SCC 388.
2. (2005) 8 SCC 618.

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

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

3. 1953 SCR 533.
4. 1951 (2) All ER 839.
5. (1990) 3 SCC 682.
6. (1980) 1 All ER 529.

arbitration outside India. Therefore, arbitrations conducted under Part I, may have geographical location outside India. Similarly, if Part I was to apply only where the place of arbitration is in India then the words "Where the place of arbitration is situated in India" in Section 28(1) were wholly unnecessary. Further, the above words qualify only Sub-section (1) of Section 28 and do not qualify Sub-section (3). The necessary implication is that Sub-section (3) was intended to apply even to foreign-seated arbitration so long as parties have chosen Arbitration Act, 1996 as law of the arbitration, which could only be if Part I is to apply to such arbitration. Therefore, it is submitted by the learned counsel that the 'seat' is not the "centre of gravity" as far as the Arbitration Act, 1996 is concerned. The Arbitration Act, 1996 is "subject matter centric" and not "seat-centric". In support of this, the learned counsel placed strong reliance on the provision contained in Section 2(1) (e), which provides that "jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject matter of a suit". This, according to the learned counsel, is an essential precondition for a Court to assume jurisdiction under Part I. The definition of Court in Section 2(1)(e) would necessarily mean that two foreign parties, in order to resolve a dispute arising outside India and governed by foreign law cannot invoke jurisdiction of an Indian Court by simply choosing India as the seat of arbitration. It is further submitted that in the absence of Section 9 of the Arbitration Act, 1996, no interim relief can be granted unless it is in aid of final/ substantive relief that must be claimed in the suit. On the other hand, a suit claiming any permanent relief on the substance of the dispute would tantamount to a waiver of the arbitration clause by the plaintiff. It is, therefore, submitted by the learned counsel that supplying word "only" in Section 2(2) will in many cases leave a party remediless. It is further submitted that Section 2(7) clearly shows that part I would apply even to arbitrations which take place outside India. If Section 2(7) was to be restricted only to arbitrations which take place in India, there would be no need for such a provision. It is emphasised

that the provision clearly states that it applies to an award made "under this part". The aforesaid term is a clear indication to an arbitration which takes place outside India, where the parties have chosen the Arbitration Act, 1996 as the governing law of the arbitration. *Mr. Sorabjee relied on National Thermal Power Corporation Vs. Singer Company & Ors.*[7], and submitted that Section 2(7) is a positive re-enactment of Section 9(b) of the Foreign Awards (Recognition and Enforcement) Act, 1961 (hereinafter referred to as the '1961 Act'). It is emphasised that Section 2(7) has been placed in Part I only to bring it in conformity with Article V(1)(e) of the New York Convention, which has been incorporated and enacted as Section 48(1)(e). The aforesaid section even though it is dealing with enforcement of awards, necessarily recognizes the jurisdiction of courts in two countries to set aside the award, namely, the courts of the country in which arbitration takes place and the country under the law of which the award was made. It is submitted that both the expressions must necessarily be given effect to and no part of the act or the section can be disregarded by describing them as fossil.

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

19. Mr. Sundaram points out that the Arbitration Act, 1996 departs from the strict territorial criterion/principle as not only it retains the features of New York Convention but significantly departs from Model Law. The Model Law has sought to bring in an era of localized/territorial arbitration (Article 1(2)). On the other hand, the Arbitration Act, 1996 recognizes and provides for de-localized arbitration. He emphasised that under Model

7. (1992) 3 SCC 551.

8. 2002 (1) Lloyd Law Reports 645.

Law, all provisions referred to localized arbitration except the exceptions in Article 1(2). Under the Arbitration Act, 1996, all provisions are de-localized, except where "place" qualification has been provided for.

20. He further submitted that in all commentaries of International Commercial Arbitration, the expression *"place"* is used interchangeably with *"seat"*. In many cases, the terms used are *"place of arbitration"*; *"the arbitral situs"*; the *"locus arbitri"* or *"the arbitral forum"*. Relying on the judgment in *Braes of Doune Wind Farm (Scotland) Limited Vs. Alfred McAlpine Business Services Limited*[9] which has been affirmed in *Shashoua & Ors. Vs. Sharma*[10], he submitted that internationally "seat" is interpreted as being the "juridical seat". Therefore, when the parties opt for a given law to govern the arbitration, it is considered to supplant the law of the geographical location of the arbitration. Therefore, the mere geographical location is not the deciding factor of the seat. He relies on the observations made by Gary B. Born in his book 'International Commercial Arbitration', which are as follows :

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

9. [2008]EWHC 426 (TCC).

10. [2009] EWHC 957 (Comm.).

chosen as the place of the arbitration. The choice of the arbitral seat can be (and usually is) made by the parties in their arbitration agreement or selected on the parties' behalf by either the arbitral tribunal or an arbitral institution."

21. He submits that whist interpreting the word "place" in Section 2(2), the provisions contained in Section 20 would have relevance as Section 20 stipulates that the parties are free to agree on the place of arbitration. The interpretation on the word "place" in Section 2(2) would also have to be in conformity with the provisions contained in Section 2(1) (e). Further more, Section 2(2) has to be construed by keeping in view the provisions contained in Section 2(7) which would clearly indicate that the provisions of Part I of the Arbitration Act, 1996 are not confined to arbitrations which take place within India. Whilst arbitration which takes place in India by virtue of Section 2(2) would give rise to a "domestic award"; the arbitration which is held abroad by virtue of Section 2(7) would give rise to a "deemed domestic award"; provided the parties to arbitration have chosen the Arbitration Act, 1996 as the governing law of arbitration.

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

New York Convention in Articles V(1)(a) and V(1)(e) has recognized that the courts in both the countries i.e. country in which the arbitration is held and the country "under the law of which the award is made" as a court of competent jurisdiction to question the validity of the arbitral proceedings/award. He, however, points out that the jurisdiction of the domestic court is neither conferred by the New York Convention nor under Part II of the Arbitration Act, 1996, since Part II merely deals with circumstances under which an award may be enforced/may be refused to be enforced. These circumstances include annulment proceedings in one of the two competent courts, whether or not any of the two courts have jurisdiction to annul the proceedings/ award, would depend on the domestic law of the country concerned. The Geneva Convention had brought with it the predominance of the seat, particularly with reference to the setting aside of the award. The two jurisdictions were inserted in the New York Convention to dilute the predominance of the "seat" over the party autonomy. He further submitted that the apprehension that the two courts of competent jurisdiction could give conflicting verdicts on the same award is unfounded. Even if there were parallel proceedings, it would merely be a question of case management by the relevant courts in deciding which proceedings should be continued and which stayed.

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

11. (2004) 2 SCC 105.

right can not be filed. All that could then be filed, therefore, would be a bare suit for injunction restraining another party from parting with property. The interlocutory relief would also be identical till such time as the injunction is made permanent. Such a suit would not be maintainable because :- (a) an interlocutory injunction can only be granted depending on the institutional progress of some proceeding for substantial relief, the injunction itself must be part of the substantive relief to which the plaintiff's cause of action entitles him. In support of this proposition, he relies on *Siskina (Cargo Owners) Vs. Distos Compania Navieria SA*[12]*, Fourie Vs. Le Roux*[13] and *Adhunik Steels Ltd. Vs. Orissa Manganese and Minerals Pvt. Ltd.*[14]; (b) the cause of action for any suit must entitle a party for a substantive relief. Since the substantive relief can not be asked for as the dispute is to be decided by the arbitrator, the only relief that could be asked for would be to safeguard a property which the plaintiff may or may not be entitled to proceed against, depending entirely on the outcome of another proceeding, in another jurisdiction, or which the country has no seisin; (c) in such a suit, there would be no pre-existing right to give rise to a cause of action but the right is only contingent / speculative and in the absence of an existing / subsisting cause of action, a suit can not be filed; (d) the absence of an existing / subsisting cause of action would entail the plaint in such a suit to be rejected under Order VII Rule 11a. Further, no interlocutory injunction can be granted unless it is in aid of a substantive relief and therefore a suit simply praying for an injunction would also be liable to be rejected under Order VII Rule 11; (e) no interim relief can be granted unless it is in aid of and ancillary to the main relief that may be available to the party on final determination of rights in a suit. Learned counsel refers to *State of Orissa Vs. Madan Gopal Rungta*[15] in support of the

12. 1979 AC 210.

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

14. 2007 (7) SCC 125 at 136.

15. 1952(1) SCR 28.

submission; (f) such a suit would be really in the nature of a suit for interim relief pending an entirely different proceeding. It is settled law that by an interim order, the Court would not grant final relief. The nature of such a suit would be to grant a final order that would in fact be in the nature of an interim order. Here the learned counsel refers to *U.P. Junior Doctors' Action Committee Vs. Dr. B. Sheetal Nandwani*[16], *State of Uttar Pradesh Vs. Ram Sukhi Devi*[17], *Deoraj Vs. State of Maharashtra & Ors.*[18] and *Raja Khan Vs. Uttar Pradesh Sunni Central Wakf Board & Ors.*[19] He submits that the intention of the Indian Parliament in enacting the Arbitration Act, 1996 was not to leave a party remediless.

24. Mr. Gopal Subramanium submits that the issue in the present case is that in addition to the challenge to the validity of an award being made in courts where the seat is located, are domestic courts excluded from exercising supervisory control by way of entertaining a challenge to an award? He submits that the issue arises when it is not possible, in a given case, to draw an assumption that the validity of the award is to be judged according to the law of the "place" of arbitration. The Arbitration Act, 1996 has removed such vagueness. The Arbitration Act, 1996 clearly states that in respect of all subject matters over which Courts of Judicature have jurisdiction, the National Courts will have residual jurisdiction in matters of challenge to the validity of an award or enforcement of an award. He reiterates the submissions made by other learned senior counsel and points out that the Arbitration Act, 1996 is not seat centric. This, according to learned senior counsel, is evident from numerous provisions contained in Part I and Part II. He points out all the sections which have been noticed earlier. According to learned senior counsel, the definition of

16. 1997 Suppl (1) SCC 680.

17. (2005) (9) SCC 733.

18. (2004) 4 SCC 697.

19. (2011) 2 SCC 741.

International Commercial Arbitration in Section 2(1)(f) is party centric. This definition is not indexed to the seat of arbitration. Similarly, the definition in Section 2(1)(e) is subject matter centric. According to him, there is a crucial distinction between the definition of international arbitration in the Model Law and the definition of international commercial arbitration under the 1961 Act. From the above, he draws an inference that seat of arbitration being in India is not a pre-requisite to confer jurisdiction on the Indian Courts under the Arbitration Act, 1996. He points out that Section 2(1)(e) contemplates nexus with "the subject matter of the arbitration". The use of this expression in the definition gives a clear indication of the manner in which jurisdiction is conferred. If an international arbitration takes place, irrespective of the seat, and the subject matter of that arbitration would otherwise be within the jurisdiction of an Indian Court, such Indian Court would have supervisory jurisdiction. Therefore, if "the closest connection" of the arbitration is with India, and if the Indian Courts would normally have jurisdiction over the dispute, the Indian Courts will play a supervisory role in the arbitration. Restricting the applicability of Part I of the Arbitration Act, 1996 to the arbitration where the seat is in India cannot, according to Mr. Subramanium, provide a coherent explanation of sub-section 2(1)(e) without doing violence to its language. He also makes a reference to the opening words of Section 28 "where the place of arbitration is situate in India". He then submits that if the legislature had already made it abundantly clear that Section 2(2) of the Arbitration Act, 1996 operated as a complete exclusion of Part I of the aforesaid Act to arbitrations outside India, the same proposition need not subsequently be stated as a qualifier in Section 28.

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

each part. However, Part I of the Arbitration Act, 1996 prescribed the entire procedure for the conduct of an arbitration, whereas Part II is only for recognition and enforcement of certain foreign awards. Therefore, he submits that Part I and Part II cannot be read separately but have to be read harmoniously in order to make Arbitration Act, 1996 a complete code. He points out that even though certain provisions of Part I are mirrored in Part II, at the same time, certain provisions of Part I which are necessary for arbitration are not covered by Part II. He points out that although Section 45, which is in part II, enables a court to make a reference to arbitration; there is no other provision like Section 11 to resolve a situation when an arbitrator is not being appointed as per the agreed arbitral procedure. Therefore, Section 11(9) specially provides for reference in an international commercial arbitration. He further points out that the use of phrase "notwithstanding anything contained in Part I" clearly indicates that Section 45 is to apply, irrespective of any simultaneous application of similar provision in Part I. This section clearly contemplates that provisions of Part I would apply to matters covered by Part II. Mr. Subramanium then points out that there is no provision in Part II for taking the assistance of the court for interim relief pending arbitration, like Section 9 in Part I. Section 27, according to Mr. Subramanium, is another indication where the assistance of the Indian Court would be taken in aid of arbitration both within and outside India. He reiterates that Sections 34 and 48 of the Arbitration Act, 1996 are to be read harmoniously. He submits various provisions of Part I are facilitative in character, excepting Section 34 which involves a challenge to an award. He points out that Section 2(4) and Section 2(5) also indicate that the Arbitration Act, 1996 applies to all arbitration agreements irrespective of the seat of arbitration. He submits that the harmonious way to read Section 34 as well as Section 48 of the Arbitration Act, 1996 is that where a challenge lies to an award, the legislature must have intended only one challenge. Thus, if an attempt is made to execute an award as a decree of the court under Section 36 of Part I, there can be

no doubt that if there is no adjudication under Section 34, there can still be a resistance which can be offered under Section 48. Similarly, by virtue of Section 48(3) if an award is challenged under Section 34 before a competent court, the enforcement proceeding would be adjourned and the court may order suitable security. There will be only one challenge to an award, either under Section 34 or Section 48. Referring to Section 51, Mr. Gopal Subramanium submits that the rights available under Part II are in addition to rights under Part I. This section firstly postulates a hypothesis that the Chapter on New York Convention awards had not been enacted. It further makes mention, in such a scenario, of certain rights already occupying the field that is intended to be covered by the chapter on New York conventions. It also mentions that such rights are coextensive with the rights under the chapter on the New York Convention. Therefore, the fact that certain provisions in Part II of the Arbitration Act, 1996 appear to function in the same field as provisions in Part I, does not mean that the provisions of Part I cease to have effect, or that the provisions of Part I are no longer available to a party. This, according to Mr. Subramanium, is in consonance with the history of New York Convention and the Model Law, which shows that the Model Law was intended to fill the gaps left by the New York Convention as well as function as a complete code. He, therefore, urges that the sections which have come to be considered essential for the success of arbitration, such as Sections 9, 11 and 34, must be considered also available to the parties seeking recognition and enforcement of foreign awards.

26. Finally, he submits that the decision in Bhatia International (supra) is a harmonious construction of Part I and Part II of the Arbitration Act, 1996. He further submits that the case of *Venture Global Engineering Vs. Satyam Computer Services Ltd. & Anr.*[20] (hereinafter referred to as "Venture Global Engineering") has been correctly decided by this Court.

20. [2008 (4) SCC 190].

Mr. Subramanium further pointed out that the judgments of this Court in the case of *ONGC Vs. Western Company of North America*[21] and *National Thermal Power Corporation Vs. Singer Company & Ors.* (supra) have appropriately set aside the awards challenged therein even though the same were not made in India.

27. Mr. E.R. Kumar appearing in SLP (C) No. 31526-31528 of 2009 has adopted the submissions made by Mr. Subramanium. In addition, he submits that the National Arbitral Law, i.e., Part I of the Arbitration Act, 1996 necessarily applies to all arbitrations arising between domestic parties and pertaining to a domestic dispute. Thus, even if the parties in such a case agree with the situs to be abroad, the same will not ipso facto take such arbitrations outside the applicability of Part I and operate to exclude the jurisdiction of Indian Courts therein. In other words, two Indian parties involved in a purely domestic dispute can not contractually agree to denude the Courts of this country of their jurisdictions with respect to a legal dispute arising between them in India. He submits that such a contract would be void under Section 23 and Section 28 of the Indian Contract Act.

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

29. He submits that the UNCITRAL Model Law has defined the term *"international"* in a broad and expansive manner allowing full sway to *"party autonomy"*. Under the Model Law, it is open to the parties to give international flavour to an

21. 1987 (1) SCC 496.

22. 1989 (2) SCC 163.

23. 2011 (7) SCC 463.

otherwise purely domestic relationship, merely by choosing a situs of arbitration abroad [Article 1(3)(b)(i)] or even merely by labelling the arbitration an international one. [Article 1(3)(c)].

30. The Indian law has consciously and correctly departed from the same and chosen only the nationality test for defining an arbitration as *"international"* as is apparent from Section 2(1)(f) of the Arbitration Act, 1996. Relying on the provision of Sections 2(2), 20 and 28, he further submits that Arbitration Act, 1996 precludes Indian parties to a purely domestic dispute from choosing a place of arbitration outside India. Mr. Kumar goes even further to submit that when both the parties are Indian, the substantive law governing the dispute must necessarily be Indian irrespective of the situs of the arbitration and irrespective of any provision in the contract between the parties to the contrary. He submits that the same principle applies with equal force to the arbitration law too, that is to say, that if it is not open to two Indian parties with regard to an entirely domestic dispute to derogate from the Indian laws of contract, evidence etc., it is equally not open to them derogate from the Indian arbitrational law either. He relies on judgment of this Court in the case of *TDM Infrastructure Pvt. Ltd. Vs. U.E. Development India Pvt. Ltd.,*[24] Paragraphs 19, 20 and 23. He, however, very fairly points out that this was a case under Section 11 and the point in issue here did not specifically arise for consideration in the said case.

History of Arbitration in India -

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

24. 2008 (14) SCC 271.

has appointed; (iv) the reasons of the remedy.

32. Resolution of disputes through arbitration was not unknown in India even in ancient times. Simply stated, settlement of disputes through arbitration is the alternate system of resolution of disputes whereby the parties to a dispute get the same settled through the intervention of a third party. The role of the court is limited to the extent of regulating the process. During the ancient era of Hindu Law in India, there were several machineries for settlement of disputes between the parties. These were known as *Kulani* (village council), *Sreni* (corporation) and *Puga* (assembly).[25] Likewise, commercial matters were decided by Mahajans and Chambers. The resolution of disputes through the panchayat was a different system of arbitration subordinate to the courts of law. The arbitration tribunal in ancient period would have the status of panchayat in modern India.[26] The ancient system of panchayat has been given due statutory recognition through the various Panchayat Acts subsequently followed by Panchayati Raj Act, 1994. It has now been constitutionally recognized in Article 243 of the Constitution of India.

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

The Indian Scenario -

34. The first Indian Act on Arbitration law came to be passed in 1899 known as Arbitration Act, 1899. It was based on the English Arbitration Act, 1899. Then came the Code of Civil Procedure, 1908. Schedule II of the Code contained the provisions relating to the law of Arbitration which were extended to the other parts of British India. Thereafter the Arbitration Act, 1940 (Act No.10 of 1940) (hereinafter referred to as the "1940

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

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

Act") was enacted to consolidate and amend the law relating to arbitration. This Act came into force on 1st July, 1940. It is an exhaustive Code in so far as law relating to the domestic arbitration is concerned. Under this Act, Arbitration may be without the intervention of a Court or with the intervention of a Court where there is no suit pending or in a pending suit. This Act empowered the Courts to modify the Award (Section 15), remit the Award to the Arbitrators for reconsideration (Section 16) and to set aside the Award on specific grounds (Section 30). The 1940 Act was based on the English Arbitration Act, 1934. The 1934 Act was replaced by the English Arbitration Act, 1950 which was subsequently replaced by the Arbitration Act, 1975. Thereafter the 1975 Act was also replaced by the Arbitration Act, 1979. There were, however, no corresponding changes in the 1940 Act. The law of arbitration in India remained static.

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

> "Interminable, time consuming, complex and expensive court procedures impelled jurists to search for an alternative forum, less formal, more effective and speedy for resolution of disputes avoiding procedural claptrap and this led them to Arbitration Act, 1940 ("Act" for short). However, the way in which the proceedings under the Act are conducted and without an exception challenged in Courts, has made lawyers laugh and legal philosophers weep. (Emphasis supplied). Experience shows and law reports bear ample testimony that the proceedings under the Act have become highly technical accompanied by

27. 1981 (4) SCC 634.

> unending prolixity, at every stage providing a legal trap to the unwary. Informal forum chosen by the parties for expeditious disposal of their disputes has by the decisions of the Courts been clothed with 'legalese' of unforeseeable complexity. This case amply demonstrates the same."

36. This was the arena of domestic arbitration and domestic award.

International Scenario -

37. Difficulties were also being faced in the International sphere of Trade and Commerce. With the growth of International Trade and Commerce, there was an increase in disputes arising out of such transactions being adjudicated through Arbitration. One of the problems faced in such Arbitration, related to recognition and enforcement of an Arbitral Award made in one country by the Courts of other countries. This difficulty was sought to be removed through various International Conventions. The first such International Convention was the Geneva Protocol on Arbitration Clauses, 1923, popularly referred to as "the 1923 Protocol". It was implemented w.e.f. 28th July, 1924. This Protocol was the product of the initiative taken by the International Chamber of Commerce (ICC) under the auspices of the League of Nations. The 1923 Protocol sought to make arbitration agreements and arbitration clauses in particular enforceable internationally. It was also sought to ensure that Awards made pursuant to such arbitration agreements would be enforced in the territory other than the state in which they were made. The 1923 Protocol proved to be inadequate. It was followed by the Geneva Convention on the execution of Foreign Arbitrated Awards, 1927 and is popularly known as the "Geneva Convention of 1927". This convention was made effective on 25th July, 1929. India became a signatory to both the 1923 Protocol and the 1927 Convention on 23rd October, 1937. It was to give effect to both the 1923 Protocol and 1927 Convention that the Arbitration (Protocol and Convention) Act, 1937 was enacted in India.

Again a number of problems were encountered in the operation of the 1923 Protocol and the 1927 Geneva Convention. It was felt that there were limitations in relation to their fields of application. Under the 1927 Geneva Convention a party in order to enforce the Award in the Country of an origin was obliged to seek a declaration in the country where the arbitration took place to the effect that the Award was enforceable. Only then could the successful party go ahead and enforce the Award in the country of origin. This led to the problem of "double exequatur", making the enforcement of arbitral awards much more complicated. In 1953 the International Chamber of Commerce promoted a new treaty to govern International Commercial Arbitration. The proposals of ICC were taken up by the United Nations Economic Social Council. This in turn led to the adoption of the convention on the Recognition and Enforcement of Foreign Arbitral Awards at New York in 1958 (popularly known as "the New York Convention"). The New York Convention is an improvement on the Geneva Convention of 1927. It provides for a much more simple and effective method of recognition and enforcement of foreign arbitral awards. It gives much wider effect to the validity of arbitration agreement. This convention came into force on 7th June, 1959. India became a State Signatory to this convention on 13th July, 1960. The Foreign Awards (Recognition and Enforcement) Act, 1961 was enacted to give effect to the New York Convention. Thus prior to the enactment of the Arbitration Act, 1996, the law of Arbitration in India was contained in the Protocol and Convention Act, 1937, the Arbitration Act, 1940 and the Foreign Awards (Recognition and Enforcement) Act, 1961. There were no further amendments in the aforesaid three acts. Therefore, it was generally felt that the arbitration laws in India had failed to keep pace with the developments at the international level.

The Arbitration Act, 1996

The Objects and Reasons of the Act

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

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

The main objectives of the bill are as under:-

> "(i) to comprehensively cover international and commercial arbitration and conciliation as also domestic arbitration and conciliation;
>
> (ii) to make provision for an arbitral procedure which is fair, efficient and capable of meeting the needs of the specific arbitration;
>
> (iii) to provide that the arbitral tribunal gives reasons for its arbitral award;
>
> (iv) to ensure that the arbitral tribunal remains within the limits of its jurisdiction:

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

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

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

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

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

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

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

"AND WHEREAS the said Model Law and Rules make significant contribution to the establishment of a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations;

AND WHEREAS it is expedient to make law respecting

arbitration and conciliation, taking into account the aforesaid Model Law and Rules;"

Scheme of the Arbitration Act, 1996 -

40. The Arbitration Act, 1996 is divided into four parts. Part I which is headed "Arbitration"; Part II which is headed "Enforcement of Certain Foreign Awards"; Part III which is headed "Conciliation" and Part IV being "Supplementary Provisions". We may notice here that it is only Parts I and II which have relevance in the present proceedings.

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

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

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

43. Internationally, the Arbitration Law developed in different countries to cater for the felt needs of a particular country. This necessarily led to considerable disparity in the National Laws on arbitration. Therefore, a need was felt for improvement and harmonization as National Laws which were,

often, particularly inappropriate for resolving international commercial arbitration disputes. The explanatory note by the UNCITRAL Secretariat refers to the recurring inadequacies to be found in outdated National Laws, which included provisions that equate the arbitral process with Court litigation and fragmentary provisions that failed to address all relevant substantive law issues. It was also noticed that "even most of those laws that appear to be up-to-date and comprehensive were drafted with domestic arbitration primarily, if not exclusively, in mind". It further mentions that "while this approach is understandable in view of the fact that even today the bulk of cases governed by arbitration law would be of purely domestic nature, the unfortunate consequence is that traditional local concepts are imposed on international cases and the needs of modern practice are often not met." There was also unexpected and undesired restrictions found in National Laws, which would prevent the parties, for example, from submitting future disputes to arbitration. The Model Law was intended to reduce the risk of such possible frustration, difficulties or surprise. Problems also stemmed from inadequate arbitration laws or from the absence of specific legislation governing arbitration which were aggravated by the fact that National Laws differ widely. These differences were frequent source of concern in international arbitration, where at-least one of the parties is, and often both parties are, confronted with foreign and unfamiliar provisions and procedures. It was found that obtaining a full and precise account of the law applicable to the arbitration is, in such circumstances, often expensive, impractical or impossible.

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

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

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

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

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

48. In *Bhatia International,* the appellant entered into a contract with the 1st respondent on 9th May, 1997. This contract contained an arbitration clause, which provided that arbitration was to be as per the rules of the International Chamber of Commerce (for short "ICC"). On 23rd October, 1997, the 1st respondent filed a request for arbitration with ICC. Parties agreed that the arbitration be held in Paris, France. ICC appointed a sole arbitrator. The 1st respondent filed an application under Section 9 of the Arbitration Act, 1996 before the IIIrd Additional District Judge, Indore, M.P. against the appellant and the 2nd respondent. One of the interim reliefs sought was an order of injunction restraining these parties from alienating, transferring and/or creating third-party rights, disposing of, dealing with and/or selling their business assets and properties. The appellant raised the plea of maintainability of such an application. The appellant contended that Part I of the Arbitration Act, 1996 would not apply to arbitrations where the place of arbitration is not in India. This application was dismissed by the IIIrd Additional District Judge on 1st February,

2000. It was held that the Court at Indore had jurisdiction and the application was maintainable. The appellant filed a writ petition before the High Court of Madhya Pradesh, Indore Bench. The said writ petition was dismissed by the judgment dated 10th October, 2000, which was impugned in the appeal before this Court. On behalf of the appellants, it was submitted that Part I of the Arbitration Act, 1996 only applies to arbitrations where the place of arbitration is in India. It was also submitted that if the place of arbitration is not in India then Part II of the Arbitration Act, 1996 would apply. Reliance was also placed on Section 2(1)(f). With regard to Section 2(4) and (5), it was submitted that the aforesaid provisions would only apply to arbitrations which take place in India. It was submitted that if it is held that Part I applies to all arbitrations, i.e., even to arbitrations whose place of arbitration is not in India, then sub-section (2) of Section 2 would become redundant and/or otiose. It was also pointed out that since Section 9 and Section 17 fall in Part I, the same would not have any application in cases where the place of arbitration is not in India. It was emphasised that the legislature had deliberately not provided any provision similar to Section 9 and Section 17 in Part II. It was also submitted that a plain reading of Section 9 makes it clear that it would not apply to arbitrations which take place outside India. It was further submitted that Section 9 provides that an application for interim measures must be made before the award is enforced in accordance with Section 36, which deals with enforcement of domestic awards only. On the other hand, provisions for enforcement of foreign awards are contained in Part II. It was submitted that Section 9 does not talk of enforcement of the award in accordance with Part II. It was further submitted that there should be minimum intervention by the Courts in view of the underlying principle in Section 5 of the Arbitration Act, 1996. On the other hand, the respondents therein had made the submissions, which are reiterated before us. In Paragraph 14 of the Judgment, it is held as follows:-

"14. At first blush the arguments of Mr Sen appear very attractive. Undoubtedly sub-section (2) of Section 2 states that Part I is to apply where the place of arbitration is in India. Undoubtedly, Part II applies to foreign awards. Whilst the submissions of Mr Sen are attractive, one has to keep in mind the consequence which would follow if they are accepted. The result would:

(a) Amount to holding that the legislature has left a lacuna in the said Act. There would be a lacuna as neither Part I or II would apply to arbitrations held in a country which is not a signatory to the New York Convention or the Geneva Convention (hereinafter called "a non-convention country"). It would mean that there is no law, in India, governing such arbitrations.

(b) Lead to an anomalous situation, inasmuch as Part I would apply to Jammu and Kashmir in all international commercial arbitrations but Part I would not apply to the rest of India if the arbitration takes place out of India.

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

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

49. It is held that the definition of international commercial arbitration under Section 2(1)(f) makes no distinction between

international commercial arbitrations held in India or outside India. Further it is also held that the Arbitration Act, 1996 no where provides that its provisions are not to apply to international commercial arbitrations which take place in a non-convention country. Hence, the conclusion at Paragraph 14(a). On the basis of the discussion in Paragraph 17, this Court reached the conclusion recorded at Paragraph 14(b). The conclusions at Paragraph 14(c) is recorded on the basis of the reasons stated in Paragraphs 19, 20, 21, 22 and 23. Upon consideration of the provision contained in Sections 2(7), 28, 45 and 54, it is held that Section 2(2) is only an inclusive and clarificatory provision. The provision contained in Section 9 is considered in Paragraphs 28, 29, 30 and 31. It is concluded in Paragraph 32 as follows:-

> "32. To conclude, I hold that the provisions of Part I would apply to all arbitrations and to all proceedings relating thereto. Where such arbitration is held in India the provisions of Part I would compulsorily apply and parties are free to deviate only to the extent permitted by the derogable provisions of Part I. In cases of international commercial arbitrations held out of India provisions of Part I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions. In that case the laws or rules chosen by the parties would prevail. Any provision, in Part I, which is contrary to or excluded by that law or rules will not apply."

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

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

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

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

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

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

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

and *Venture Global Engineering* (Supra).

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

> "Section 1 - Short title, extend and commencement –
>
> (1) ……,
>
> (2) It extends to the whole of India (except the State of Jammu and Kashmir)."

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

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

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

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

58. In view of the above, we are unable to discern any anomaly as held in *Bhatia International* (supra). We also do not discern any inconsistency between Section 1 and Section 2(2) of the Arbitration Act, 1996.

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

59. The crucial difference between the views expressed by the appellants on the one hand and the respondents on the other hand is as to whether the absence of the word "only" in Section 2(2) clearly signifies that Part I of the Arbitration Act, 1996 would compulsorily apply in the case of arbitrations held in India, or would it signify that the Arbitration Act, 1996 would be applicable only in cases where the arbitration takes place in India. In Bhatia International and *Venture Global Engineering*

(supra), this Court has concluded that Part I would also apply to all arbitrations held out of India, unless the parties by agreement, express or implied, exclude all or any of its provisions. Here again, with utmost respect and humility, we are unable to agree with the aforesaid conclusions for the reasons stated hereafter.

60. It is evident from the observation made by this Court in *Konkan Railway Corporation Ltd. & Anr.* (supra) that the Model Law was taken into account in drafting of the Arbitration Act, 1996. In Paragraph 9, this Court observed "that the Model Law was only taken into account in the drafting of the said Act is, therefore, patent. The Arbitration Act, 1996 and the Model Law are not identically drafted". Thereafter, this Court has given further instances of provisions of the Arbitration Act, 1996, not being in conformity with the Model Law and concluded that "The Model Law and judgments and literature thereon are, therefore, not a guide to the interpretation of the Act and, especially of Section 12 thereof". The aforesaid position, according to Mr. Sorabjee has not been disagreed with by this Court in *SBP & Co.* (supra). We agree with the submission of Mr. Sorabjee that the omission of the word "only" in Section 2(2) is not an instance of "CASUS OMISSUS". It clearly indicates that the Model Law has not been bodily adopted by the Arbitration Act, 1996. But that can not mean that the territorial principle has not been accepted. We would also agree with Mr. Sorabjee that it is not the function of the Court to supply the supposed omission, which can only be done by Parliament. In our opinion, legislative surgery is not a judicial option, nor a compulsion, whilst interpreting an Act or a provision in the Act. The observations made by this Court in the case of *Nalinakhya Bysack* (supra) would tend to support the aforesaid views, wherein it has been observed as follows:-

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

61. Mr. Sorabjee has also rightly pointed out the observations made by Lord Diplock in the case of *Duport Steels Ltd.* (supra). In the aforesaid judgment, the House of Lords disapproved the approach adopted by the Court of Appeal in discerning the intention of the legislature, it is observed that:-

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

28. LR (1891) AC 531 at Page 549.

29. 6 Moo PC 1 : 4 MIA 179.

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

Parliament's opinion on these matters that is paramount." (emphasis supplied)

In the same judgment, it is further observed:-

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

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

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

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

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

1996 clearly indicates that law of arbitration in India at the time of enactment of the Arbitration Act, 1996, was substantially contained in three enactments, namely, The Arbitration Act, 1940; The Arbitration (Protocol and Convention) Act, 1937 and The Foreign Awards (Recognition and Enforcement) Act, 1961. It is specifically observed that it is widely felt that the Arbitration Act, 1940, which contains the general law of arbitration, has become outdated. It also mentions that the Law Commission of India, several representative bodies of trade and industry and experts in the fields of arbitration have proposed amendments to the Arbitration Act, 1940, to make it more responsive to contemporary requirements. It was also recognized that the economic reforms initiated by India at that time may not become fully effective, if the law dealing with settlement of both domestic and international commercial dispute remained out of tune with such reforms. The objects and reasons further make it clear that the general assembly has recommended that all countries give due consideration to the Model Law adopted in 1985, by the UNCITRAL, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice. Paragraph 3 of the statement of objects and reasons makes it clear that although the UNCITRAL Model Laws are intended to deal with international commercial arbitration and conciliation, they could, with appropriate modifications, serve as a Model Law for legislation of domestic arbitration and conciliation. Therefore, the bill was introduced seeking to consolidate and amend the law relating to domestic arbitration, international commercial arbitration, enforcement of foreign arbitral award and to define the law relating to conciliation, taking into account the UNCITRAL Model Law and Rules. We have set out the main objects of the bill a little earlier, Paragraph 3(5) of which clearly states that one of the objects is "to minimize the supervisory role of Courts in arbitral process".

65. Much of the debate before us was concentrated on the comparison between Article 1(2) of UNCITRAL and Section

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

66. Whilst interpreting the provisions of the Arbitration Act, 1996, it is necessary to remember that we are dealing with the Act which seeks to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards. The aforesaid Act also seeks to define the law relating to conciliation and for matters connected therewith or incidental thereto. It is thus obvious that the Arbitration Act, 1996 seeks to repeal and replace the three pre-existing Acts, i.e., The Arbitration Act, 1940; The Arbitration (Protocol and Convention) Act, 1937 and the Foreign Awards (Recognition and Enforcement) Act, 1961. Section 85 repeals all the three Acts. Earlier the 1937 Act catered to the arbitrations under the Geneva Convention. After the 1958 New York Convention was ratified by India, the 1961 Act was passed. The domestic law of arbitration had remained static since 1940. Therefore, the Arbitration Act, 1996 consolidates the law on domestic arbitrations by incorporating the provisions to expressly deal with the domestic as well as international commercial arbitration; by taking into account the 1985 UNCITRAL Model Laws. It is not confined to the New York Convention, which is concerned only with enforcement of certain foreign awards. It is also necessary to appreciate that

the Arbitration Act, 1996 seeks to remove the anomalies that existed in the Arbitration Act, 1940 by introducing provisions based on the UNCITRAL Model Laws, which deals with international commercial arbitrations and also extends it to commercial domestic arbitrations. UNCITRAL Model Law has unequivocally accepted the territorial principle. Similarly, the Arbitration Act, 1996 has also adopted the territorial principle, thereby limiting the applicability of Part I to arbitrations, which take place in India.

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

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

68. The aforesaid article is a model and a guide to all the States, which have accepted the UNCITRAL Model Laws. The genesis of the word "only" in Article 1(2) of the Model Law can be seen from the discussions held on the scope of application of Article 1 in the 330th meeting, Wednesday, 19 June, 1985 of UNCITRAL. This would in fact demonstrate that the word "only" was introduced in view of the exceptions referred to in Article 1(2) i.e. exceptions relating to Articles 8, 9, 35 & 36 (Article 8 being for stay of judicial proceedings covered by an arbitration agreement; Article 9 being for interim reliefs; and Articles 35 & 36 being for enforcement of Foreign Awards). It was felt necessary to include the word "only" in order to clarify that except for Articles 8, 9, 35 & 36 which could have extra territorial effect if so legislated by the State, the other provisions would be applicable on a strict territorial basis. Therefore, the word "only" would have been necessary in case the provisions with regard to interim relief etc. were to be retained in Section 2(2) which could have extra-territorial application. The Indian

legislature, while adopting the Model Law, with some variations, did not include the exceptions mentioned in Article 1(2) in the corresponding provision Section 2(2). Therefore, the word "only" would have been superfluous as none of the exceptions were included in Section 2(2).

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

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

> "72. Divergent views were expressed as to whether the Model Law should expressly state its territorial scope of application and, if so, which connecting factor should be the determining criterion……."
>
> *"73, As regards the connecting factor which should determine the applicability of the (Model) Law in a given State, there was wide support for the so-called strict territorial criterion, according to which the Law would apply where the place of arbitration was in that State……"*
>
> *"74. Another view was that the place of arbitration should not be exclusive in the sense that parties would be precluded from choosing the law of another State as the law applicable to the arbitration procedure……"*
>
> *"78. The Commission requested the secretariat to prepare, on the basis of the above discussion, draft provisions on the territorial scope of application of the Model Law in general, including suggestions as to possible exceptions of the general scope……"*
>
> *"80. In discussing the above proposal, the Commission decided that, for reasons stated in support of the strict territorial criterion (see above, para 73), the applicability of the Model Law should depend exclusively on the place of arbitration as defined in the Model Law……"*
>
> *"81. The Commission agreed that a provision implementing that decision, which had to be included in article 1, should be formulated along the following lines: "The provisions of this Law, except articles 8, 9, 35 and 36 apply only if the place of arbitration is in the territory of this State……"*

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

> "…in early discussions of this issue, Article 27, dealing with court assistance in taking evidence was included in the list of exceptions. At that time, the draft of that Article provided for such assistance to foreign arbitrations. The provision was subsequently changed to its present format, and, by virtue of Article 1(2), it applies only to arbitrations in the enacting State. Assistance in taking evidence for use in foreign arbitrations can be provided only under any

rules on the question in other laws of the State.

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

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

72. We are also unable to accept the submission of the learned counsel for the appellants that the Arbitration Act, 1996 does not make seat of the arbitration as the centre of gravity of the arbitration. On the contrary, it is accepted by most of the experts that in most of the National Laws, arbitrations are anchored to the seat/place/situs of arbitration. Redfern in Paragraph 3.54 concludes states that *"the seat of the arbitration is thus intended to be its centre of gravity."* This, however, does not mean that all the proceedings of the arbitration have to take place at the seat of the arbitration. The

arbitrators at times hold meetings at more convenient locations. This is necessary as arbitrators often come from different countries. It may, therefore, on occasions be convenient to hold some of the meetings in a location which may be convenient to all. Such a situation was examined by the court of appeal in England in *Naviera Amazonica Peruana S.A. Vs. Compania Internacionale De Seguros Del Peru*[31] therein at p.121 it is observed as follows :

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

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

31. 1988 (1) Lloyd's Law Reports 116.

32. 1993 (3) Lloyd's Law Reports 48.

74. It must be pointed out that the law of the seat or place where the arbitration is held, is normally the law to govern that arbitration. The territorial link between the place of arbitration and the law governing that arbitration is well established in the international instruments, namely, the New York Convention of 1958 and the UNCITRAL Model Law of 1985. It is true that the terms "seat" and "place" are often used interchangeably. In Redfern and Hunter on International Arbitration, 5th Edn. (para 3.51), the seat theory is defined thus: "The concept that an arbitration is governed by the law of the place in which it is held, which is the 'seat' (or 'forum' or locus arbitri) of the arbitration, is well established in both the theory and practice of international arbitration. In fact, the 1923 Geneva Protocol states: 'The arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place.' The New York Convention maintains the reference to 'the law of the country where the arbitration took place "(Article V(1)(d))" and, synonymously to 'the law of the country where the award is made' [Article V(1)(a) and (e)]. The aforesaid observations clearly show that New York Convention continues the clear territorial link between the place of arbitration and the law governing that arbitration. The author further points out that this territorial link is again maintained in the Model Law which provides in Article 1(2) that "the provision of this law, except Articles 8, 9, 35 and 36 apply only if the place of arbitration is in the territory of the State". Just as the Arbitration Act, 1996 maintains the territorial link between the place of arbitration and its law of arbitration, the law in Switzerland and England also maintain a clear link between the seat of arbitration and the *lex arbitri*. Swiss Law states: "the provision of this chapter shall apply to any arbitration *if the seat of the arbitral tribunal is in Switzerland* and if, at the time when the arbitration agreement was concluded, at least one of the parties had neither its domicile nor its habitual residence in *Switzerland*.[33]

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

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

76. For the reasons stated above, we are unable to support the conclusion reached in *Bhatia International* and *Venture Global Engineering* (supra), that Part I would also apply to arbitrations that do not take place in India.

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

78. We do not agree with the learned counsel for the appellants that there would be no need for the provision contained in Section 2(2) as it would merely be stating the obvious, i.e., the Arbitration Act, 1996 applies to arbitrations having their place/seat in India. In our opinion, the provisions

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

> "It is to be observed that though a Parliamentary enactment (like Parliamentary eloquence) is capable of saying the same thing twice over without adding anything to what has already been said once, this repetition in an Act of Parliament is not to be assumed. When the legislature enacts a particular phrase in a statute the presumption is that it is saying something which has not been said immediately before. The Rule that a meaning should, if possible, be given to every word in the statute implies that, unless there is good reason to the contrary, the words add something which has not been said immediately before."

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

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

35. 1949 AC 530 at P 546.

Arbitration Act, 1996 could also apply to arbitrations which do not take place in India. Therefore, Section 2(2) merely reinforces the limits of operation of the Arbitration Act, 1996 to India.

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

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

81. We may now take up the submission of the learned counsel that Sections 2(4) and 2(5) specifically make Part I applicable to all arbitrations irrespective of where they are held. This submission is again a reiteration of the conclusions recorded in Bhatia International at Paragraph 14C and reiterated in Paragraphs 21 and 22. We have earlier held that Section 2(2) would not be applicable to arbitrations held outside India. We are unable to accept that there is any conflict at all between Section 2(2) on the one hand and Sections 2(4) and 2(5) on the other hand. Section 2(4) provides as under :

> "This Part except sub-section (1) of Section 40, Sections 41 and 43 shall apply to every arbitration under any other enactment for the time being in force, as if the arbitration

were pursuant to an arbitration agreement and as if that other enactment were an arbitration agreement except in so far as the provisions of this Part are inconsistent with that other enactment or with any rules made thereunder."

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

83. Similarly, the position under Section 2(5) would remain the same. In our opinion, the provision does not admit of an interpretation that any of the provisions of Part I would have any

application to arbitration which takes place outside India. Section 2(5) reads as under:-

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

84. This sub-clause has been made subject to sub-clause (4) and must be read in the backdrop of Section 2(2) of the Arbitration Act, 1996. Section 2(2) of the aforesaid Act provides that this part shall apply where the place of arbitration is in India. Section 2(5) takes this a step further and holds that this Part shall apply to all arbitrations and proceedings relating thereto, where the seat is in India [a corollary of Section 2(2)] and if it is not a statutory arbitration or subject of an agreement between India and any other country. The exception of statutory enactments was necessary in terms of the last part of sub-clause (4), which provides for non application of this Part to statutory arbitrations in case of inconsistency. Thus, barring the statutory enactments as provided for under Section 2(4) of the Arbitration Act, 1996 and arbitrations pursuant to international agreement, all other arbitration proceedings held in India shall be subject to Part I of the said Act. Accordingly, the phrase 'all arbitrations' in Section 2(5) means that Part I applies to all where Part I is otherwise applicable. Thus, the provision has to be read as a part of the whole chapter for its correct interpretation and not as a stand alone provision. There is no indication in Section 2(5) that it would apply to arbitrations which are not held in India.

85. In view of the aforesaid observations, we have no doubt that the provisions of Section 2(4) and Section 2(5) would not be applicable to arbitrations which are covered by Part II of the Arbitration Act, 1996, i.e. the arbitrations which take place outside India. We, therefore, see no inconsistency between

Sections 2(2), 2(4) and 2(5). For the aforesaid reasons, we are unable to agree with the conclusion in *Bhatia International* that limiting the applicability of part I to arbitrations that take place in India, would make Section 2(2) in conflict with Sections 2(4) and 2(5).

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

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

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

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

88. In our opinion, the aforesaid provision does not, in any manner, relax the territorial principal adopted by Arbitration Act, 1996. It certainly does not introduce the concept of a delocalized arbitration into the Arbitration Act, 1996. It must be remembered that Part I of the Arbitration Act, 1996 applies not only to purely domestic arbitrations, i.e., where none of the parties are in any way "foreign" but also to "international commercial arbitrations" covered within Section 2(1)(f) held in India. The term "domestic award" can be used in two senses: one to distinguish it from "international award", and the other to distinguish it from a "foreign award". It must also be remembered that "foreign award" may well be a domestic award in the country in which it is rendered. As the whole of the Arbitration Act, 1996 is designed to give different treatments to the awards made in India and those made outside India, the

distinction is necessarily to be made between the terms "domestic awards" and "foreign awards". The Scheme of the Arbitration Act, 1996 provides that Part I shall apply to both "international arbitrations" which take place in India as well as "domestic arbitrations" which would normally take place in India. This is clear from a number of provisions contained in the Arbitration Act, 1996 viz. the Preamble of the said Act; proviso and the explanation to Section 1(2); Sections 2(1)(f); 11(9), 11(12); 28(1)(a) and 28(1)(b). All the aforesaid provisions, which incorporate the term "international", deal with pre-award situation. The term "international award" does not occur in Part I at all. Therefore, it would appear that the term "domestic award" means an award made in India whether in a purely domestic context, i.e., domestically rendered award in a domestic arbitration or in the international context, i.e., domestically rendered award in an international arbitration. Both the types of awards are liable to be challenged under Section 34 and are enforceable under Section 36 of the Arbitration Act, 1996. Therefore, it seems clear that the object of Section 2(7) is to distinguish the domestic award covered under Part I of the Arbitration Act, 1996 from the "foreign award" covered under Part II of the aforesaid Act; and not to distinguish the "domestic award" from an "international award" rendered in India. In other words, the provision highlights, if any thing, a clear distinction between Part I and Part II as being applicable in completely different fields and with no overlapping provisions.

89. That Part I and Part II are exclusive of each other is evident also from the definitions section in Part I and Part II. Definitions contained in Section 2(i)(a) to (h) are limited to Part I. The opening line which provides "In this part, unless the context otherwise requires……", makes this perfectly clear. Similarly, Section 44 gives the definition of a foreign award for the purposes of Part II (Enforcement of Certain Foreign Awards); Chapter I (New York Convention Awards). Further, Section 53 gives the interpretation of a foreign award for the purposes of Part II (Enforcement of Certain Foreign Awards);

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

90. The additional submission of Mr. Sorabjee is that Section 9-B of the 1961 Act, which was in negative terms, has been re-enacted as Section 2(7) of the Arbitration Act, 1996 in positive terms. Section 9-B of the 1961 Act, was as under:

"9. Saving – Nothing in this Act shall –

……

(b) apply to any award made on an arbitration agreement governed by the law of India."

91. We are of the opinion that the Section has been intentionally deleted, whereas many other provisions of the 1961 Act have been retained in the Arbitration Act, 1996. If the provision were to be retained, it would have been placed in Part II of the Arbitration Act, 1996. In our opinion, there is no link between Section 2(7) of the Arbitration Act, 1996, with the deleted Section 9-B of the 1961 Act. It was by virtue of the aforesaid provision that the judgments in *Singer Company & Ors.* (supra) and *ONGC v. Western Company of North*

America (supra) were rendered. In both the cases the foreign awards made outside India were set aside, under the 1940 Act. By deletion of Section 9-B of the 1961 Act, the judgments have been rendered irrelevant under the Arbitration Act, 1996. Having removed the mischief created by the aforesaid provision, it cannot be the intention of the Parliament to reintroduce it, in a positive form as Section 2(7) of the Arbitration Act, 1996. We, therefore, see no substance in the additional submission of Mr. Sorabjee.

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

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

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

36. 710 F.2d 928.

regulate the arbitration proceedings, which will produce a *"domestically rendered international commercial award"*. It would be a *"foreign award"* for the purposes of enforcement in a country other than India. We, therefore, have no hesitation in rejecting the submissions made by the learned senior counsel for the appellants, being devoid of merit.

Party Autonomy

95. Learned counsel for the appellants have submitted that Section 2(1)(e), Section 20 and Section 28 read with Section 45 and Section 48(1)(e) make it clear that Part I is not limited only to arbitrations which take place in India. These provisions indicate that Arbitration Act, 1996 is subject matter centric and not exclusively seat centric. Therefore, "seat" is not the "centre of gravity" so far as the Arbitration Act, 1996 is concerned. We are of the considered opinion that the aforesaid provisions have to be interpreted by keeping the principle of territoriality at the forefront. We have earlier observed that Section 2(2) does not make Part I applicable to arbitrations seated or held outside India. In view of the expression used in Section 2(2), the maxim expressum facit cessare tacitum, would not permit by interpretation to hold that Part I would also apply to arbitrations held outside the territory of India. The expression "this Part shall apply where the place of arbitration is in India" necessarily excludes application of Part I to arbitration seated or held outside India. It appears to us that neither of the provisions relied upon by the learned counsel for the appellants would make any section of Part I applicable to arbitration seated outside India. It will be apposite now to consider each of the aforesaid provisions in turn. Section 2(1)(e) of the Arbitration Act, 1996 reads as under:

"2. Definitions

(1) In this Part, unless the context otherwise requires –

……

(e) "Court" means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject matter of the arbitration if the same had been the subject matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes."

96. We are of the opinion, the term *"subject matter of the arbitration"* cannot be confused with *"subject matter of the suit"*. The term *"subject matter"* in Section 2(1)(e) is confined to Part I. It has a reference and connection with the process of dispute resolution. Its purpose is to identify the courts having supervisory control over the arbitration proceedings. Hence, it refers to a court which would essentially be a court of the seat of the arbitration process. In our opinion, the provision in Section 2(1)(e) has to be construed keeping in view the provisions in Section 20 which give recognition to party autonomy. Accepting the narrow construction as projected by the learned counsel for the appellants would, in fact, render Section 20 nugatory. In our view, the legislature has intentionally given jurisdiction to two courts i.e. the court which would have jurisdiction where the cause of action is located and the courts where the arbitration takes place. This was necessary as on many occasions the agreement may provide for a seat of arbitration at a place which would be neutral to both the parties. Therefore, the courts where the arbitration takes place would be required to exercise supervisory control over the arbitral process. For example, if the arbitration is held in Delhi, where neither of the parties are from Delhi, (Delhi having been chosen as a neutral place as between a party from Mumbai and the other from Kolkata) and the tribunal sitting in Delhi passes an interim order under Section 17 of the Arbitration Act, 1996, the appeal against such an interim order under Section 37 must lie to the Courts of Delhi being the Courts having supervisory jurisdiction over the arbitration proceedings and the tribunal. This would be

irrespective of the fact that the obligations to be performed under the contract were to be performed either at Mumbai or at Kolkata, and only arbitration is to take place in Delhi. In such circumstances, both the Courts would have jurisdiction, i.e., the Court within whose jurisdiction the subject matter of the suit is situated and the courts within the jurisdiction of which the dispute resolution, i.e., arbitration is located.

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

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

"20. Place of arbitration –

(1) The parties are free to agree on the place of arbitration.

(2) Failing any agreement referred to in sub-section (1), the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

(3) Notwithstanding sub-section (1) or sub-section (2), the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers

appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, good or other property."

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

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

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

"The preceding discussion has been on the basis that there is only one "place" of arbitration. This will be the place chosen by or on behalf of the parties; and it will be designated in the arbitration agreement or the terms of the reference or the minutes of proceedings or in some other

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

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

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

(ii) Whether the specific designation of a foreign seat, necessarily carrying with it the choice of that country's Arbitration / curial law, would prevail over

and subsume the conflicting selection choice by the parties of the Arbitration Act, 1996.

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

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

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

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

"All contracts which provide for arbitration and contain a foreign element may involve three potentially relevant systems of law. (1) The law governing the substantive contract. (2) The law governing the agreement to arbitrate and the performance of that agreement. (3) The law governing the conduct of the arbitration. In the majority of cases all three will be the same. But (1) will often be different from (2) and (3). And occasionally, but rarely, (2) may also differ from (3)."

104. It is observed that the problem about all these

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

105. On the facts of the case, it was observed that since there was no contest on Law 1 and Law 2, the entire issue turned on Law 3, "The law governing the conduct of the arbitration. This is usually referred to as the *curial or procedural law, or the lex fori."* Thereafter, the Court approvingly quoted the following observation from Dicey & Morris on the Conflict of Laws (11th Edition): "English Law does not recognize the concept of a de-localised" arbitration or of "arbitral procedures floating in the transnational firmament, unconnected with any municipal system of law". It is further held that "accordingly every arbitration must have a "seat" or "locus arbitri" or "forum" which subjects its procedural rules to the municipal law which is there in force". The Court thereafter culls out the following principle "Where the parties have failed to choose the law governing the arbitration proceedings, those proceedings must be considered, at any rate prima facie, as being governed by the law of the country in which the arbitration is held, on the ground that it is the country most closely connected with the proceedings". The aforesaid classic statement of the Conflict of Law Rules as quoted in Dicey & Morris on the Conflict of Laws (11th Edition) Volume 1, was approved by the House of Lords in *James Miller & Partners Vs. Whitworth Street Estates (Manchester) Ltd.*[37] Mr. Justice Mustill in the case of *Black Clawson International Ltd. Vs. PapierIrke Waldhof-Aschaffenburg A.G*[38], a little later characterized the same proposition as "the law of the place where the reference is conducted, the lex fori". The Court also recognized the proposition that "there is equally no reason in theory which precludes parties to agree that an arbitration shall be held at a place or in country X but

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

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

subject to the procedural laws of Y". But it points out that in reality parties would hardly make such a decision as it would create enormous unnecessary complexities. Finally it is pointed out that it is necessary not to confuse the legal "seat" of an arbitration with the geographically convenient place or places for holding hearings.

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

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

Court notices the singular importance of determining the location of "juridical seat" in terms of Section 3, for the purposes of Section 2, in the following words:-

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

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

109. The material Clauses of the EPC Contract were:

1.4.1. The Contract shall be governed by and construed in accordance with the laws of England and Wales and, subject to Clause 20.2 (Dispute Resolution), the Parties agree that the courts of England and Wales have exclusive jurisdiction to settle any dispute arising out of or in connection with the contract.

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

(b) Any reference to arbitration shall be to a single arbitrator… and conducted in accordance with the Construction Industry Model Arbitration Rules

February 1998 Edition, subject to this Clause (Arbitration Procedure)…

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

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

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

Rule 1.6 applied:

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

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

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

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

113. Upon consideration of the entire material, the Court formed the view that it does have jurisdiction to entertain an

application by either party to the contract in question under Section 69 of the (English) Arbitration Act, 1996. The court gave the following reasons for the decision:–

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

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

(c) The second part of Clause 1.4.1 has some real meaning if the parties were agreeing by it that, although the agreed disputes resolution process is arbitration, the parties agree that the English Court retains such jurisdiction to address those disputes as the law of England and Wales permits. The Arbitration Act, 1996 permits and requires the Court to entertain applications under Section 69 for leave to appeal against awards which address disputes which have been referred to arbitration. By allowing such applications and then addressing the relevant questions of law, the Court will settle such disputes; even if the application is refused, the court will be applying its jurisdiction under the Arbitration Act, 1996 and providing resolution in relation to such disputes.

(d) This reading of Clause 1.4.1 is consistent with Clause 20.2.2 (c) which confirms that the arbitration agreement is subject to English Law and that the "reference" is "deemed

to be a reference to arbitration within the meaning of the Arbitration Act, 1996." This latter expression is extremely odd unless the parties were agreeing that any reference to arbitration was to be treated as a reference to which the Arbitration Act, 1996 was to apply. There is no definition in the Arbitration Act, 1996 of a "reference to arbitration", which is not a statutory term of art. The parties presumably meant something in using the expression and the most obvious meaning is that the parties were agreeing that the Arbitration Act, 1996 should apply to the reference without qualification.

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

(f) In the context of this particular case, the fact that, as both parties seemed to accept in front of me, the Scottish Courts would have no real control or interest in the arbitral proceedings other than in a criminal context, suggests that they can not have intended that the arbitral proceedings were to be conducted as an effectively "delocalized" arbitration or in a "transnational firmament", to borrow Lord Justice Kerr's words in the *Naviera Amazonica* case.

(g) The CIMAR Rules are not inconsistent with my view. Their constant references to the Arbitration Act, 1996 suggest that the parties at least envisaged the possibility

that the Courts of England and Wales might play some part in policing any arbitration. For instance, Rule 11.5 envisages something called "the Court" becoming involved in securing compliance with a peremptory order of the arbitrator. That would have to be the English Court, in practice."

114. These observations clearly demonstrate the detailed examination which is required to be undertaken by the court to discern from the agreement and the surrounding circumstances the intention of the parties as to whether a particular place mentioned refers to the "venue" or "seat" of the arbitration. In that case, the Court, upon consideration of the entire material, concluded that Glasgow was a reference to the "venue" and the "seat" of the arbitration was held to be in England. Therefore, there was no supplanting of the Scottish Law by the English Law, as both the seat under Section 2 and the "juridical seat" under Section 3, were held to be in England. Glasgow being only the venue for holding the hearings of the arbitration proceedings. The Court rather reiterated the principle that the selection of a place or seat for an arbitration will determine what the "curial law" or "lex fori" or "lex arbitri" will be. It was further concluded that where in substance the parties agreed that the laws of one country will govern and control a given arbitration, the place where the arbitration is to be heard will not dictate what the governing law or controlling law will be. In view of the above, we are of the opinion that the reliance placed upon this judgment by Mr.Sundaram is wholly misplaced.

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

claimants made an application to the High Court in New Delhi seeking interim measures of protection under Section 9 of the Arbitration Act, 1996, prior to the institution of arbitration proceedings. Following the commencement of the arbitration, the defendant and the joint venture company raised a challenge to the jurisdiction of the arbitral tribunal, which the panel heard as a preliminary issue. The tribunal rejected the jurisdictional objection. The tribunal then made a cost award ordering the defendant to pay $140,000 and £172,373.47. The English Court gave leave to the claimant to enforce the costs award as a judgment. The defendant applied to the High Court of Delhi under Section 34(2)(iv) of the Arbitration Act, 1996 to set aside the costs award. The claimant had obtained a charging order, which had been made final, over the defendant's property in the UK. The defendant applied to the Delhi High Court for an order directing the claimants not to take any action to execute the charging order, pending the final disposal of the Section 34 petition in Delhi seeking to set aside the costs award. The defendant had sought unsuccessfully to challenge the costs award in the Commercial Court under Section 68 and Section 69 of the 1996 Act (U.K.) and to set aside the order giving leave to enforce the award. Examining the fact situation in the case, the Court observed as follows:-

"The basis for the court's grant of an anti-suit injunction of the kind sought depended upon the seat of the arbitration. *An agreement as to the seat of an arbitration brought in the law of that country as the curial law and was analogous to an exclusive jurisdiction clause.* Not only was there agreement to the curial law of the seat, but also to the Courts of the seat having supervisory jurisdiction over the arbitration, so that, by agreeing to the seat, *the parties agreed that any challenge to an interim or final award was to be made only in the courts of the place designated as the seat of the arbitration.*

Although, 'venue' was not synonymous with 'seat', in an

arbitration clause which provided for arbitration to be conducted in accordance with the Rules of the ICC in Paris (a supranational body of rules), a provision that 'the venue of arbitration shall be London, United Kingdom' did amount to the designation of a juridical seat……."

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

"There was a little debate about the possibility of the issues relating to the alleged submission by the claimants to the jurisdiction of the High Court of Delhi being heard by that court, because it was best fitted to determine such issues under Indian Law. Whilst I found this idea attractive initially, we are persuaded that it would be wrong in principle to allow this and that it *would create undue practical problems in any event. On the basis of what I have already decided, England is the seat of the arbitration and since this carries with it something akin to an exclusive jurisdiction clause, as a matter of principle the foreign court should not decide matters which are for this court to decide in the context of an anti-suit injunction."[emphasis supplied]*

116. In making the aforesaid observations, the Court relied on judgments of the Court of Appeal in *C Vs. D*[39]. Here the Court of Appeal in England was examining an appeal by the defendant insurer from the judgment of Cooke, J. granting an anti-suit injunction preventing it from challenging an arbitration award in the U.S. Courts. The insurance policy provided "any dispute arising under this policy shall be finally and fully determined in London, England under the provisions of the English Arbitration Act, 1950 as amended". However, it was further provided that "this policy shall be governed by and construed in accordance with the internal laws of the State of New York….". A partial award was made in favour of the claimants. It was agreed that this partial award is, in English

39. [2007] EWCA Civ 1282 (CA).

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

"14. The main submission of Mr Hirst QC for the defendant insurer was that the judge had been wrong to hold that the arbitration agreement itself was governed by English law merely because the seat of the arbitration was London. He argued that the arbitration agreement itself was silent as to its proper law but that its proper law should follow the proper law of the contract as a whole, namely New York law, rather than follow from the law of the seat of the arbitration namely England. The fact that the arbitration itself was governed by English procedural law did not mean that it followed that the arbitration agreement itself had to be governed by English law. The proper law of the arbitration agreement was that law with which the agreement had the most close and real connection; if the

insurance policy was governed by New York law, the law with which the arbitration agreement had its closest and most real connection was the law of New York. It would then follow that, if New York law permitted a challenge for manifest disregard of the law, the court in England should not enjoin such a challenge."

The Court of Appeal held:-

"16. I shall deal with Mr Hirst's arguments in due course but, in my judgment, they fail to grapple with the central point at issue which is whether or not, by choosing London as the seat of the arbitration, the parties must be taken to have agreed that proceedings on the award should be only those permitted by English law. In my view they must be taken to have so agreed for the reasons given by the judge. The whole purpose of the balance achieved by the Bermuda Form (English arbitration but applying New York law to issues arising under the policy) is that judicial remedies in respect of the award should be those permitted by English law and only those so permitted. Mr Hirst could not say (and did not say) that English judicial remedies for lack of jurisdiction on procedural irregularities under sections 67 and 68 of the Arbitration Act, 1996 Were not permitted; he was reduced to saying that New York judicial remedies were also permitted. That, however, would be a recipe for litigation and (what is worse) confusion which cannot have been intended by the parties. No doubt New York law has its own judicial remedies for want of jurisdiction and serious irregularity but it could scarcely be supposed that a party aggrieved by one part of an award could proceed in one jurisdiction and a party aggrieved by another part of an award could proceed in another jurisdiction. Similarly, in the case of a single complaint about an award, it could not be supposed that the aggrieved party could complain in one jurisdiction and the satisfied party be entitled to ask the other jurisdiction

to declare its satisfaction with the award. There would be a serious risk of parties rushing to get the first judgment or of conflicting decisions which the parties cannot have contemplated.

17. *It follows from this that a choice of seat for the arbitration must be a choice of forum for remedies seeking to attack the award".....*

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

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

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

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

119. The same question was again considered by the High Court of Justice, Queen's Bench Division, Commercial Court (England) in *Sulamerica CIA Nacional de Seguros SA v.*

Enesa Engenharia SA – Enesa.[40] The Court noticed that the issue in this case depends upon the weight to be given to the provision in Condition 12 of the Insurance policy that "the seat of the arbitration shall be London, England." It was observed that this necessarily carried with it the English Court's supervisory jurisdiction over the arbitration process. It was observed that "this follows from the express terms of the Arbitration Act, 1996 and, in particular, the provisions of Section 2 which provide that Part I of the Arbitration Act, 1996 applies where the seat of the arbitration is in England and Wales or Northern Ireland. This immediately establishes a strong connection between the arbitration agreement itself and the law of England. It is for this reason that recent authorities have laid stress upon the locations of the seat of the arbitration as an important factor in determining the proper law of the arbitration agreement." The court thereafter makes a reference to the observations made in the case of *C. vs. D* by the High Court as well as the Court of Appeal. In Paragraph 12, the observations made have particular relevance which are as under:

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

40. [2012 WL 14764].

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

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

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

122. It would, therefore, follow that if the arbitration agreement is found or held to provide for a seat / place of arbitration outside India, then the provision that the Arbitration Act, 1996 would govern the arbitration proceedings, would not

make Part I of the Arbitration Act, 1996 applicable or enable Indian Courts to exercise supervisory jurisdiction over the arbitration or the award. It would only mean that the parties have contractually imported from the Arbitration Act, 1996, those provisions which are concerned with the internal conduct of their arbitration and which are not inconsistent with the mandatory provisions of the English Procedural Law/Curial Law. This necessarily follows from the fact that Part I applies only to arbitrations having their seat / place in India.

Section 28 -

123. It was submitted by the learned counsel for the appellants that Section 28 is another indication of the intention of the Parliament that Part I of the Arbitration Act, 1996 was not confined to arbitrations which take place in India. We are unable to accept the submissions made by the learned counsel for the parties. As the heading of the Section 28 indicates, its only purpose is to identify the rules that would be applicable to "substance of dispute". In other words, it deals with the applicable conflict of law rules. This section makes a distinction between purely domestic arbitrations and international commercial arbitrations, with a seat in India. Section 28(1)(a) makes it clear that in an arbitration under Part I to which Section 2(1)(f) does not apply, there is no choice but for the Tribunal to decide "the dispute" by applying the Indian "substantive law applicable to the contract". This is clearly to ensure that two or more Indian parties do not circumvent the substantive Indian law, by resorting to arbitrations. The provision would have an overriding effect over any other contrary provision in such contract. On the other hand, where an arbitration under Part I is an international commercial arbitration within Section 2(1)(f), the parties would be free to agree to any other "substantive law" and if not so agreed, the "substantive law" applicable would be as determined by the Tribunal. The section merely shows that the legislature has segregated the domestic and international arbitration. Therefore, to suit India, conflict of law rules have

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

Part II

124. It was next submitted by the counsel for the appellants that even some of the provisions contained in Part II would indicate that Part I of the Arbitration Act, 1996 would not be limited to the arbitrations which take place in India. It was pointed out that even though Part II deals specifically with recognition and enforcement of certain foreign awards yet provision is made for annulment of the award by two Courts, i.e., Courts of the country in which the award was made or the Courts of the country under the law of which the award was made. This, according to the learned counsel, recognizes the concurrent jurisdictions of Courts in two countries to set aside the award. They rely on Section 48(1)(e) of the Arbitration Act, 1996, which corresponds to Article V(1)(e) of the New York Convention. Mr. Sorabjee has emphasised that both these expressions must necessarily be given effect to and no part of the Act or section can be disregarded by describing the same as a "fossil". This is in reply to the submission made by Mr. Salve on the basis of the history of the inclusion of the term "under the law of which" in Article V(1)(e). Mr. Sorabjee has emphasised that the word "under the law of which" were specifically inserted in view of the Geneva Convention, which limited the jurisdiction to only one Court to set aside the award namely "the country in which the award was made." He, therefore, submits that this specific intention must be given effect to. Not giving effect to the words "under the law of which

the award was made", will allow many awards to go untested. At this stage, Mr. Sorabjee had relied on *Reliance Industries Ltd.* (supra). We must notice here that Mr. Sundaram in his submissions has not gone so far as Mr. Sorabjee. According to Mr. Sundaram, the jurisdiction of a domestic Court over an arbitration is neither conferred by the New York Convention, nor under Part II, since Part II merely deals with circumstances under which the enforcing court may or may not refuse to enforce the award. That circumstance includes annulment of proceedings in a competent court, i.e., the Court in the country where the arbitration is held or the Court having jurisdiction in the country under the laws of which the arbitral disputes have been conducted. According to Mr. Sundaram, providing two such situs for the purposes of annulment does not ipso facto amount to conferring of jurisdiction to annul, on any domestic Court. The provision only provides that if the annulment proceedings are before such Courts, the award may not be enforced. Therefore, to see if an arbitral award can be annulled by the Court of the country, one has to look at the jurisdiction of such Courts under the domestic law. The relevance of New York Convention and Article V(1)(e) ends there, with merely recognizing possibility of two Courts having jurisdiction to annul an award. Mr. Subramanium emphasised that provisions contained in Part II can not be said to be a complete code as it necessarily makes use of the provisions of Part I. Since Part I prescribes the entire procedure for the conduct of an arbitration and Part II is only to give recognition to certain foreign awards, the two parts have to be read harmoniously in order to make the Indian Arbitration Law a complete code. He submits that Part I can not be read separately from Part II as certain provisions of Part I, which are necessary for arbitrations are not covered by Part II. He gives an example of the provision contained in Section 45, which empowers the term "judicial authority" to refer parties to arbitration when seized of an action in a matter, in respect of which parties have made an agreement as referred to in Section 44. The aforesaid provision contains a non-obstante clause. This clearly indicates that it is contemplated by the legislature

that provisions of Part I would apply to matters covered by Part II. He, therefore, points out that if Part I were to apply only to arbitrations that take place in India, then Indian Courts would not be able to grant any interim relief under Section 9 to arbitrations which take place outside India. He also points out that there are a number of other provisions where Indian Courts would render assistance in arbitrations taking place outside India. Learned senior counsel has also pointed out the necessity to read Sections 34 and 48 of the Arbitration Act, 1996 harmoniously. He points out that barring Section 34, which involves the challenge to an award, the other provisions in Part I and Part II are facilitative in character.

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

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

127. In Part I, Section 8 regulates the commencement of arbitration in India, Sections 3, 4, 5, 6, 10 to 26, 28 to 33 regulate the *conduct* of arbitration, Section 34 regulates the *challenge* to the award, Sections 35 and 36 regulate the *recognition* and *enforcement* of the award. Sections 1, 2, 7, 9, 27, 37, 38 to 43 are ancillary provisions that either support the arbitral process or are structurally necessary. Thus, it can be seen that Part I deals with all stages of the arbitrations which take place in India. In Part II, on the other hand, there are no

provisions regulating the *conduct* of arbitration *nor* the challenge to the award. Section 45 only empowers the judicial authority to refer the parties to arbitration outside India in pending civil action. Sections 46 to 49 regulate the *recognition* and *enforcement* of the award. Sections 44, 50 to 52 are structurally necessary.

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

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

129. Having accepted the principle of territoriality, it is evident that the intention of the parliament was to segregate Part I and Part II. Therefore, any of the provisions contained in Part I can not be made applicable to Foreign Awards, as

41. [2007] 1 Lloyds Report 237.

defined under Sections 44 and 53, i.e., the New York Convention and the Geneva Awards. This would be a distortion of the scheme of the Act. It is, therefore, not possible to accept the submission of Mr. Subramanium that provisions contained in Part II are supplementary to the provision contained in Part I. The Parliament has clearly segregated the two parts.

Section 45

130. We are unable to accept the submission that the use of expression "notwithstanding anything contained in Part I, or in the Code of Civil Procedure, 1908", in Section 45 of the Arbitration Act, 1996 necessarily indicates that provisions of Part I would apply to foreign seated arbitration proceedings. Section 45 falls within Part II which deals with enforcement proceedings in India and does not deal with the challenge to the validity of the arbitral awards rendered outside India. Section 45 empowers a judicial authority to refer the parties to arbitration, on the request made by a party, when seized of an action in a matter in respect of which the parties have made an agreement referred to in Section 44. It appears that inclusion of the term "judicial authority" in Sections 5 and 8 of the Arbitration Act, 1996, has caused much confusion in the minds of the learned counsel for the appellants. In our opinion, there is no justification for such confusion. Such use of the term "judicial authority", in Section 5 and Section 8 of the Arbitration Act, 1996, is not a recognition by the Parliament that Part I will apply to international commercial arbitrations held outside India. The term "judicial authority" is a legacy from the 1940 Act. The corresponding provision of Section 34 of the 1940 Act, which covered purely domestic arbitrations, between two or more Indian parties, within the territory of India, also refers to "judicial authority". It is nobody's contention that by using the term "judicial authority", the Parliament had intended the 1940 Act to apply outside India. In our opinion, the term "judicial authority" has been retained especially in view of policy of least intervention, which can not be limited only to the Courts. This

is clearly in recognition of the phenomenon that the judicial control of commercial disputes is no longer in the exclusive jurisdiction of Courts. There are many statutory bodies, tribunals which would have adjudicatory jurisdiction in very complex commercial matters. Section 5 would be equally applicable to such bodies. The use of the term "judicial authority" in no manner has any reference to arbitrations not held in India It is in conformity with Clause (V) of the objects and reasons for the Arbitration Act, 1996, which has been given statutory recognition in Section 5.

131. The learned senior counsel had also pointed out that since Section 19 of the Arbitration Act, 1996 clearly provides that the arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908, there was no need for the non-obstante clause. But the reason, in our view, is discernable from Section 3 of the 1961 Act, which also contains a non-obstante clause with reference to the Arbitration Act, 1940. Section 45 in the Arbitration Act, 1996 is a repetition of the non-obstante clause in Section 3 in the 1961 Act. It is not unusual for a consolidating act to retain the expressions used in the previous Acts, which have been consolidated into a form of Principal Act. A consolidating Act is described in Halsbury's law of England, Fourth Edition Reissue, Para 1225 as under:-

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

132. Similarly, a certain amount of 'carpentry' has been done in the Arbitration Act, 1996 whilst consolidating the earlier three Acts. Therefore, in section 45 of the Arbitration Act, 1996, the reference to 1940 Act has been replaced by reference to Part I, which now covers the purely domestic arbitrations, earlier covered by the 1940 and the new additions, i.e. the international commercial arbitrations, which take place in India. It appears that the Parliament in order to avoid any confusion has used the expression "notwithstanding anything contained in Part I" out of abundant caution, i.e., "ex abundanti cautela". A three judge bench of this Court in *R.S. Raghnath Vs. State of Karnataka & Anr.*[42], considering the nature of the non-obstante clause observed that:-

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

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

42. (1992) 1 SCC 335.

English Arbitration Act, 1950 was similar to Section 34 of the Arbitration Act, 1940 in India. Section 1(2) of the English Arbitration Act, 1975 was similar to Section 3 of the Foreign Awards Act, 1961.

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

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

135. Much emphasis has been laid by the learned counsel for the appellants on the expression that enforcement of a foreign award may be refused when the award "has been set aside or suspended ….." "under the law of which" that award was made. The aforesaid words and expressions appear in Section 48, which is contained in Part II of the Arbitration Act, 1996 under the title "enforcement of certain foreign awards". The Courts in India under Chapter I of Part II of the aforesaid Act have limited powers to refuse the enforcement of foreign awards given under the New York Convention. It would be apposite to notice the provisions of Section 48 at this stage, which are as under:-

"48.Conditions for enforcement of foreign awards.-

(1) Enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the court proof that----

(a) the parties to the agreement referred to in section 44 were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration.

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

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

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

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

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

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

Explanation.----Without prejudice to the generality of

clause (b), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption.

(3) If an application for the setting aside or suspension of the award has been made to a competent authority referred to in clause (e) of sub-section (1) the Court may, if it considers it proper, adjourn the decision on the enforcement of the award and may also , on the application of the party claiming enforcement of the award, order the other party to give suitable security."

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

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

……

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

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

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

(b) the recognition or enforcement of the award would be contrary to the public policy of that country.

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

138. Thus, the intention of the legislature is clear that the Court may refuse to enforce the foreign award on satisfactory proof of any of the grounds mentioned in Section 48(1), by the party resisting the enforcement of the award. The provision sets out the defences open to the party to resist enforcement of a foreign award. The words "suspended or set aside", in Clause (e) of Section 48(1) can not be interpreted to mean that, by necessary implication, the foreign award sought to be enforced in India can also be challenged on merits in Indian Courts. The provision merely recognizes that courts of the two nations which are competent to annul or suspend an award. It does not ipso facto confer jurisdiction on such Courts for annulment of an award made outside the country. Such jurisdiction has to be specifically provided, in the relevant national legislation of the country in which the Court concerned is located. So far as India is concerned, the Arbitration Act, 1996 does not confer any such jurisdiction on the Indian Courts to annul an international commercial award made outside India. Such provision exists in Section 34, which is placed in Part I. Therefore, the applicability of that provision is limited to the awards made in India. If the arguments of the learned counsel for the appellants are accepted, it would entail incorporating the provision contained in Section 34 of the Arbitration Act, 1996, which is placed in Part I of the Arbitration Act, 1996 into Part II of the said Act. This is not permissible as the intention of the Parliament was clearly to confine the powers of the Indian Courts to set aside an award relating to international

commercial arbitrations, which take place in India.

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

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

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

"While, therefore, there appears to be no justification,

based in reason and principle, for providing for an exception to the general rule of recognition and enforcement for the forum at the place of arbitration, the drafters of the Convention compounded their error by providing for two fora for an annulment action. For Article V(1)(e) envisages that an annulment action may be brought "in the country in which….the award was made" or "in the country….under the law of which the award was made." The disjunctive used in the Convention's text naturally raises the question of whether the second forum is available only if the first is not or whether the party seeking annulment has the option of selecting either or even to try its luck in both. The legislative history of the Convention sheds illuminating light on the issue.

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

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

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

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

144. The creation of such a situation is apparent from the judgment of this Court in *Venture Global Engineering* (supra). In the aforesaid judgment, the award was made by the London Court of International Arbitration on 3rd April, 2006. Respondent No.1, on 14th April, 2006, filed a petition to recognize and enforce the award before the United States District Court, Eastern District Court of Michigan, in the United States of America (for short the 'US Court'). The appellant entered appearance to defend this proceeding before the US Court by filing a cross petition. In the said petition, it took objection to the enforcement of the award, which had directed transfer of shares. The objection was that the direction was in violation of Indian laws and regulations, specifically the Foreign Exchange Management Act (in short the 'FEMA') and its notifications. Two weeks later on 28th April, 2006, the appellant filed a suit in the

City Civil Court, Secunderabad seeking declaration to set aside the award and permanent injunction on the transfer of shares. On 15th June, 2006, the District Court passed an ad interim ex parte order of injunction, inter alia, restraining respondent No.1 for seeking or effecting the transfer of shares either under the terms of the award or otherwise. Respondent No.1 filed an appeal challenging the said order before the High Court of Andhra Pradesh. The High Court admitted the appeal and directed interim suspension of the order of the District Judge, but made it clear that "respondent No.1 would not affect the transfer of shares till further orders".

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

> "31. On close scrutiny of the materials and the dictum laid down in the three-Judge Bench decision in Bhatia International we agree with the contention of Mr. K.K. Venugopal and hold that paras 32 and 35 of Bhatia International make it clear that the provisions of Part I of the Act would apply to all arbitrations including international commercial arbitrations and to all proceedings relating thereto. We further hold that where such arbitration is held in India, the provisions of Part I would compulsorily apply and parties are free to deviate to the extent permitted by the provisions of Part I. It is also clear that even in the case of international commercial arbitrations held out of India provisions of Part I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions. We are also of the view that such an

interpretation does not lead to any conflict between any of the provisions of the Act and there is no lacuna as such. The matter, therefore, is concluded by the three-Judge Bench decision in *Bhatia International*

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

37. In view of the legal position derived from *Bhatia International* we are unable to accept Mr. Nariman's argument. It is relevant to point out that in this proceeding, we are not deciding the merits of the claim of both parties, particularly, the stand taken in the suit filed by the appellant herein for setting aside the award. It is for the court concerned to decide the issue on merits and we are not expressing anything on the same. The present conclusion is only with regard to the main issue whether the

aggrieved party is entitled to challenge the foreign award which was passed outside India in terms of Sections 9/ 34 of the Act. Inasmuch as the three-Judge Bench decision is an answer to the main issue raised, we are unable to accept the contra view taken in various decisions relied on by Mr. Nariman. Though in *Bhatia International*[1] the issue relates to filing a petition under Section 9 of the Act for interim orders the ultimate conclusion that Part I would apply even for foreign awards is an answer to the main issue raised in this case.

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

"the appellant (i.e. Respondent 1) shall not effect the transfer of shares of the respondents pending further orders" was in effect from 27-6-2006 till 28-12-2006. The judgment of the US District Court was on 13-7-2006 and 31-7-2006 when the award was directed to be enforced as sought by Respondent 1, notwithstanding the injunction to the effect that the appellant (Respondent 1 herein) "shall not effect the transfer of shares of the respondents pending further orders". The first respondent pursued his enforcement suit in Michigan District Courts to have a decree passed directing — "… VGE shall deliver to Satyam or its designee, share certificates in a form suitable for immediate transfer to Satyam evidencing all

of the appellant's ownership interest in Satyam Venture Engineering Services (SVES), the party's joint venture company". Further, "VGE (the appellant herein) shall do all that may otherwise be necessary to effect the transfer of its ownership interest in SVES to Satyam (or its designee)". It is pointed out that obtaining this order by pursuing the case in the US District Courts, in the teeth of the prohibition contained in the order of the High Court, would not only be a contempt of the High Court but would render all proceedings before the US courts a *brutum fulmen*, and liable to be ignored. Though Mr. R.F. Nariman has pointed out that the High Court only restrained the respondent from effecting transfer of the shares pending further orders by the City Civil Court, Secunderabad, after the orders of the trial court as well as limited order of the High Court, the first respondent ought not to have proceeded with the issue before the District Court, Michigan without getting the interim orders/directions vacated.

47. In terms of the decision in *Bhatia International* we hold that Part I of the Act is applicable to the award in question even though it is a foreign award. We have not expressed anything on the merits of claim of both the parties. It is further made clear that if it is found that the court in which the appellant has filed a petition challenging the award is not competent and having jurisdiction, the same shall be transferred to the appropriate court. Since from the inception of ordering notice in the special leave petition both parties were directed to maintain status quo with regard to transfer of shares in issue, the same shall be maintained till the disposal of the suit. Considering the nature of dispute which relates to an arbitration award, we request the court concerned to dispose of the suit on merits one way or the other within a period of six months from the date of receipt of copy of this judgment. Civil appeal is allowed to this extent. No costs."

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

147. The expression "under the law" has also generated a great deal of controversy as to whether it applies to "the law governing the substantive contract" or "the law governing the arbitration agreement" or limited only to the procedural laws of the country in which the award is made.

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

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

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

Case Law –

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

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

"Article V(1)(e) of the Convention provides that a court of

43. 335 F.3d 357.

secondary jurisdiction may refuse to enforce an arbitral award if it "has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made." Courts have held that the language, "the competent authority of the country …… under the law of which, that award was made" refers exclusively to procedural and not substantive law, and more precisely, to the regimen or scheme of arbitral procedural law under which the arbitration was conducted, and not the substantive law….. applied in the case."……..

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

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

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

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

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

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

45. 745 F Supp 172, 178 (SDNY 1990).

46. (1992) VII Ybk Comm Arb 639.

> "Decisions of foreign courts under the Convention uniformly support the view that the clause in question means procedural and not substantive (that is, in most cases, contract law)….
>
> Accordingly, we hold that the contested language in Article V(1)(e) of the Convention……refers *exclusively to procedural* and *not substantive law,* and more precisely to the regimen or scheme of arbitral procedural law under which the arbitration was conducted."

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

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

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

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

(emphasis supplied)

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

158. At this stage, we may notice that in spite of the aforesaid international understanding of the second limb of Article V(1)(e), this Court has proceeded on a number of occasions to annul an award on the basis that parties had chosen Indian Law to govern the substance of their dispute. The aforesaid view has been expressed in *Bhatia International* (supra) and Venture Global Engineering (supra). In our opinion, accepting such an interpretation would be to ignore the spirit underlying the New York Convention which embodies a consensus evolved to encourage consensual resolution of

complicated, intricate and in many cases very sensitive International Commercial Disputes. Therefore, the interpretation which hinders such a process ought not to be accepted. This also seems to be the view of the national courts in different jurisdictions across the world. For the reasons stated above, we are also unable to agree with the conclusions recorded by this Court in *Venture Global Engineering* (supra) that the foreign award could be annulled on the exclusive grounds that the Indian law governed the substance of the dispute. Such an opinion is not borne out by the huge body of judicial precedents in different jurisdictions of the world.

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

159. We have earlier noticed the submissions made by the learned counsel for the parties wherein they had emphasised that in case the applicability of Part I is limited to arbitration which take place in India, no application for interim relief would be available under Section 9 of the Arbitration Act, 1996, in an arbitration seated outside India. It was further emphasised that in such circumstances, the parties would be left remediless. Dr. Singhvi, in order to get out of such a situation, had submitted that remedy under Section 9 would still be available. According to Dr. Singhvi, Section 9 is a stand alone provision which cannot be effected by the limit contained in Section 2(2). He submits that the provisions contained in Section 9 do not impede the arbitral process. Its only purpose is to provide an efficacious, preservatory, interim, conservatory, emergent relief necessary for protecting the subject matter of arbitration, pending the conclusions of the proceedings. He also emphasised that interim orders of foreign courts are not, ipso facto or ipso jure, enforceable in India and, absent Section 9, a party will be remediless in several real life situations. He, therefore, urged that this Court could give a purposive interpretation of Section 9 to ensure that the Courts in India have the jurisdiction to take necessary measures for preservation of assets and/or to prevent dissipation of assets.

Dr. Singhvi submitted that the decision in Bhatia International (supra) is correct, in so far as it relates to the grant of interim injunction under Section 9 of the Arbitration Act, 1996. He did not say before us that the courts in India would have any power to annul the award under Section 34 of the Arbitration Act, 1996, in matters where arbitrations have taken place at abroad. But at the same time, he canvassed that the provisions contained in Section 9 cannot be equated with the provisions contained in Section 34. The remedy under Section 9 is interim and subservient to the main arbitration proceedings, whereas remedy under Section 34 would interfere with the final award. Further more, annulment of the award under Section 34 would have extra-territorial operation whereas Section 9 being entirely asset focused, would be intrinsically territory focused and intra-territorial in its operation. He submitted that the ratio in *Bhatia International* on the core issue, i.e., grant of interim measures under Section 9, is correct. Although, he was not much concerned about the other issues, of annulment or enforcement of the award, he has reiterated the submissions made by the other learned counsel, on Sections 2(2), 2(1)(f) and 2(5).

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

161. Schematically, Section 9 is placed in Part I of the Arbitration Act, 1996. Therefore, it can not be granted a special status. We have already held earlier that Part I of the Arbitration Act, 1996 does not apply to arbitrations held outside India. We may also notice that Part II of the Arbitration Act, 1996, on the other hand, does not contain a provision similar to Section 9. Thus, on a logical and schematic construction of the Arbitration Act, 1996, the Indian Courts do not have the power to grant interim measures when the seat of arbitration is outside India. A bare perusal of Section 9 would clearly show that it relates to interim measures before or during arbitral proceedings or

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

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

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

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

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

165. In this connection, Mr. Sorabjee has relied upon the judgment of the English High Court in *Reliance Industries Limited* (supra). In the aforesaid case, the contracts were governed by the Indian law as their proper law. The disputes were to be determined by the arbitration in London. The procedural law applicable was English Law. The distinction between the proper law of the JOA's and the procedural law was known to the parties. At the arbitration hearing, the parties agreed that the principles of construction of contracts in Indian Law were the same as in English Law. The parties further agreed that the English Law principles on the construction of contracts were those set out by Lord Hoffmann in *Investors Compensation Scheme Ltd. vs. West Bromwich Building Society,*[47] as explained and expanded by Lord Hoffmann in *Bank of Credit & Commerce International SA vs. Ali & Ors.*[48] In their awards, the three arbitrators stated (at paragraph 73) that they would apply those principles to construe the contracts under consideration in making their Partial Arbitral Awards. The question raised at the threshold was whether the applicant-Reliance can apply for permission to appeal to the Commercial Court in England and Wales "on a question of law arising out of an award made in the proceedings" under Section 69 (1) of the Arbitration Act, 1996 (English). So the "threshold" issue was whether any point of construction of the contracts, assuming that would be a question of law at all, is a "question of law of England and Wales" within Section 82(1) of the Arbitration Act, 1996. It was accepted by the applicant that unless the question of law concerned "the law of England and Wales, then leave to appeal cannot be granted." The issue before the Court was as to whether the questions of construction of JOA's are questions of Indian Law because the contracts are governed by Indian Law. The parties did not, as a matter of fact, vary the proper law of the contracts for the purposes of arbitration hearing in London. As the parties agreed that the Indian Law applied to

47. [1998] WLR 1896 at 913.

48. [2001] 2 WLR 735 at 749.

the contracts, the arbitrators had to apply Indian Law when construing the contracts. Although the parties agreed that Indian Law and English Law principles of construction were the same, ultimately the arbitrators were applying Indian Law rather than English Law to construe the contract. The Court rejected the submission of the applicant that the arbitrators had applied the English Law. The Court observed that:-

> "27. I am unable to accept the submissions of Mr.Akenhead. The parties agreed that the contracts were to be governed by Indian Law as their proper law. The parties also agreed that disputes should be determined by arbitration in London. The parties were carful to ensure that English Law would be the procedural law applicable to arbitration proceedings that arose as a result of disputes arising out of the JOAs. The distinction between the proper law of the JOAs and the procedural law was also well in the minds of the arbitrators as they drew particular attention to it in paragraph 26 of their Partial Awards. The effect of those contractual provisions is, as the arbitrators also recognized, that all procedural matters were to be governed by English law as laid down in Part 1 of the 1996 Act. The parties must be taken to have appreciated that fact also.
>
> 28. The consequence is that if and when disputes under the contracts were referred to arbitration, as a matter of the procedural law of the arbitrations (English Law), the tribunal had to decide those disputes in accordance with the proper law of the contracts as chosen by the parties – unless the parties agreed to vary the contracts' terms, which they did not. Therefore, if as in this case, the arbitrators had to decide issues of construction of the JOAs, then they were bound to do so using principles of construction established under the proper law of the contracts, i.e. Indian law.

29. As it happens the parties agreed that the principles of

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

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

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

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

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

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

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

170. In view of the aforesaid, we are unable to agree with the submission made by Dr. Singhvi that provision contained in Section 9 can be made applicable even to arbitrations which take place outside India by giving the same a purposive

49. (1990) 3 SCC 682.

interpretation. In our opinion, giving such an interpretation would be destructive of the territorial principles upon which the UNCITRAL Model Laws are premised, which have been adopted by the Arbitration Act, 1996.

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

> "Notwithstanding the conventional principle that the duty of Judges is to expound and not to legislate, the courts have taken the view that the judicial art interpretation and appraisal is imbued with creativity and realism and since interpretation always implied a degree of discretion and choice, the courts would adopt, particularly in areas such as, constitutional adjudication dealing with social and defuse (sic) rights. Courts are therefore, held as "finishers, refiners and polishers of legislation which comes to them in a state requiring varying degrees of further processing" (see *Corocraft Ltd. v. Pan American Airways,* All ER at p. 1071 D, WLR at p. 732, *State of Haryana v. Sampuran Singh,* AIR at p. 1957). If a language used is capable of bearing more than one construction, in selecting the true meaning, regard must be had to the consequences, resulting from adopting the alternative constructions. A construction that results in hardship, serious inconvenience, injustice, absurdity or anomaly or which leads to inconsistency or uncertainty and friction in the system which the statute purports to regulate has to be rejected and preference should be given to that construction which avoids such results."

172. From the above, it is evident that the provisions of the Arbitration Act, 1996 were interpreted keeping in mind the consequences in limiting the applicability of Part I to arbitrations which take place in India. The Court also acted as "finishers",

"refiners" and "polishers" of the Arbitration Act, 1996 assuming that the Arbitration Act, 1996 required varied degrees of further "processing". In our opinion, as demonstrated whilst discussing the various provisions of the Arbitration Act, 1996 in earlier part of judgment, the intention of the Parliament is available within the text and the context of the provisions. As observed by Lord Simonds in *Magor & St.Mellons Vs. Newport Corporation* (supra), if the gap or lacuna is disclosed, it would be for the Parliament to rectify the same. Such a task cannot be undertaken by the Court.

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

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

175. It must further be emphasised that the definition of "foreign awards" in Sections 44 and 53 of the Arbitration Act, 1996 intentionally limits it to awards made in pursuance of an agreement to which the New York Convention, 1958 or the Geneva Protocol, 1923 applies. It is obvious, therefore, that no remedy was provided for the enforcement of the 'non convention awards' under the 1961 Act. Therefore, the non convention award cannot be incorporated into the Arbitration Act, 1996 by process of interpretation. The task of removing any perceived lacuna or curing any defect in the Arbitration Act, 1996 is with the Parliament. The submission of the learned

counsel is, therefore, rejected. The intention of the legislature is primarily to be discovered from the language used, which means that the attention should be paid to what has been said and also to what has not been said. [See: *Gwalior Rayon Silk Mfg. (Wvg.) Co. Ltd. vs. Custodian of Vested Forests,* [AIR 1990 SCC 1747 at page 1752]. Here the clear intention of the legislature is not to include the Non-convention Awards within the Arbitration Act, 1996.

Is An Inter-Parte Suit For Interim Relief Maintainable –

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

177. Civil Courts in India, by virtue of Section 9 of the Code of Civil Procedure, 1908 (for short the 'CPC'), have the jurisdiction to try all suits of a civil nature, excepting suits which are either expressly or impliedly barred. Fundamental to the maintainability of a civil suit is the existence of a cause of action in favour of the plaintiff. This is evident from the various provisions contained in the CPC. However, it would be appropriate to notice that Order VII Rule 1 gives the list of the particulars which have to be mandatorily included in the plaint. Order VII Rule 1(e) mandates the plaintiff to state the facts constituting the cause of action and when it arose. Order VII Rule 11(a) provides the plaint shall be rejected where it does not disclose a cause of action. A cause of action is the bundle of facts which are required to be proved for obtaining relief prayed for in the suit. The suit of the plaintiff has to be framed in accordance with Order II. Order II Rule 1 provides that every suit shall as far as practicable be framed so as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them. The aforesaid rule is required to be read along with Rule 2 which provides that every suit shall

include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any court. The aforesaid provisions read together would lead to the firm conclusion that the existence of cause of action is a sine qua non for the maintainability of a civil suit.

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

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

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

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

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

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

> "10……But power to grant temporary injunction was

50. AIR 1952 SC 12.

51. (1983) 4 SCC 625.

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

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

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

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

52. (2012) 1 SCC 321.

Rule 1(1)(i). Mocatta, J. gave leave and at the same time granted an injunction in the terms asked for in Paragraph 2 of the writ petition. Subsequently, Kerr, J. set aside the notice of the writ but maintained the injunction pending in appeal. On the cargo-owners appeal, the Court of Appeal by a majority reversed the judgment of Kerr, J. and restored the Mareva injunction as originally granted by Mocatta, J. The matter reached the House of Lords by way of an appeal against the majority judgment of the Court of Appeal. The House of Lords on appeal held that there was no jurisdiction to commence substantive proceedings in England. Therefore, the writ and all subsequent proceedings in the action had to be set aside. Consequently there could be no Mareva injunction. It was held that a Mareva injunction was merely an interlocutory injunction and such an injunction could only be granted as "…. ancillary and incidental to the pre-existing cause of action".

185. Lord Diplock observed that "it is conceded that the cargo owners' claim for damages for breach of contract does not of itself fall within any of the sub-rules of Order 11, Rule 1(1); nor does their claim for damages for tort." It is further observed that "what is contended by the counsel for the cargo-owners is that if the action is nevertheless allowed to proceed, it will support a claim for Mareva injunction restraining the ship owners from disposing of their assets within the jurisdiction until judgment and payment of the damages awarded thereby; and that this of itself is sufficient to bring the case within sub-rule (i) which empowers the High Court to give leave for service of its process on persons outside the jurisdictions". Interpreting Order 11 Rule 1(i), it was held that the word used in sub-rule (i) are terms of legal art. The sub-rule speaks of "the action" in which a particular kind of relief, "an injunction" is sought. This pre-supposes the existence of a cause of action on which to found "the action". *A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own.* It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by

him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the Court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action. It is granted to preserve the status quo pending the ascertainment by the Court of the rights of the parties and the grant to the plaintiff of the relief to which his cause of action entitles him, which may or may not include a final injunction.

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

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

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

(i) The English Court would not assert a substantive jurisdiction over a defendant just because he had assets within the jurisdiction. The contrary proposition would have had the unsatisfactory consequence as observed by Lord Diplock in Siskina that the Court would find itself asserting jurisdiction over a foreigner to decide the merits of substantive proceedings which had nothing to do with England.

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

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

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

> "For present purposes it is sufficient to say that the doctrine of Siskina, put at its highest, is that the right to an interlocutory injunction cannot exist in isolation, but is always incidental to and dependent on the enforcement of a substantive right, which usually although not invariably takes the shape of a cause of action. If the underlying right itself is not subject to the jurisdiction of the English Court, then that Court should never exercise its power under Section 37(1) by way of interim relief."

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

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

> "We are concerned here with powers which the Court already possesses under Section 37 of the Act of 1981.

53. (1993) AC 334.

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

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

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

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

195. However, the House of Lords pointed out in Paragraph 31 of the judgment that the relief can now be granted under English Law by virtue of express provision contained in Section 25 of the Civil Jurisdiction and Judgment Act, 1982, as extended to the Civil Jurisdiction and Judgments Act (Interim Relief) Order, 1997. This order enables the High Court "to grant interim relief" in relation to "proceedings that have been or are about to be commenced in a foreign state".

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

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

CONCLUSION :-

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

there can be no overlapping or intermingling of the provisions contained in Part I with the provisions contained in Part II of the Arbitration Act, 1996.

199. With utmost respect, we are unable to agree with the conclusions recorded in the judgments of this Court in *Bhatia International* (supra) and *Venture Global Engineering* (supra). In our opinion, the provision contained in Section 2(2) of the Arbitration Act, 1996 is not in conflict with any of the provisions either in Part I or in Part II of the Arbitration Act, 1996. In a foreign seated international commercial arbitration, no application for interim relief would be maintainable under Section 9 or any other provision, as applicability of Part I of the Arbitration Act, 1996 is limited to all arbitrations which take place in India. Similarly, no suit for interim injunction simplicitor would be maintainable in India, on the basis of an international commercial arbitration with a seat outside India.

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

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

202. The reference is answered accordingly.

B.B.B. Reference Answered.

ASHOK

v.

RAJENDRA BHAUSAHEB MULAK

(Civil Appeal No. 7591 of 2012)

OCTOBER 18, 2012

[T.S. THAKUR AND GYAN SUDHA MISRA, JJ.]

Election Laws – Conduct of Election Rules, 1961 – r.39 – Election petition – On ground of improper reception of votes – Election to State Legislative Council – Two main contestants, appellant and respondent – Respondent won by a thin margin of 4 votes – Appellant filed election petition challenging the election of respondent on the plea of breach of the Election Rules stating that at least 5 out of 14 votes had been cast by such voters who were accompanied by another person to the voting compartment at the time of actual casting of vote in the election which was in breach of r.39 (5) to 39 (8) and hence reception of such votes by including them at the time of counting of votes ought to be declared as illegal – Election petition dismissed by the High Court at the threshold on the ground that it failed to declare material particulars which could be held to have materially affecting the election result – Whether the election petition in question indicated absence of 'material particulars' which materially affected the result of the election so as to entertain a challenge to the same – Matter referred to three Judge bench in view of conflicting views expressed by the two Hon'ble Judges.

In the election to the Maharashtra State Legislative Council from the Nagpur Local Authorities Constituency, there were two main contestants, namely the appellant and the respondent. The appellant polled 198 votes as against 202 votes polled in favour of the respondent. The respondent thus won by a thin margin of 4 votes.

The appellant filed an election petition challenging the election of the respondent on the plea of breach of the Conduct of Election Rules, 1961 stating that at least 5 out of 14 votes had been cast by such voters who were accompanied by another person to the voting compartment at the time of actual casting of vote in the election which was in breach of Rule 39 (5) to 39 (8) of the Election Rules and hence reception of such votes by including them at the time of counting of votes ought to be declared as illegal. The election petition was dismissed by the High Court on the ground that it failed to declare material particulars which could be held to have materially affecting the election result. The High Court found the election petition deficient on account of the absence of a specific averment to the effect that the votes that were improperly received were cast in favour of the successful candidate i.e. the respondent. Hence the present appeal.

Referring the matter to the larger Bench, the Court

HELD:

Per T.S. Thakur, J.

1.1. The averments made in the election petition sufficiently disclosed a cause of action inasmuch as the essential, the pivotal and the basic facts relevant to the charge levelled by the appellants had been stated with sufficient clarity by them in their respective election petitions. The question whether the votes improperly received were polled in favour of one or the other candidate was not an essential or material fact the absence whereof could possibly result in the summary dismissal of the election petitions. [Para 8] [486-A-C]

1.2. The interpretation of Section 100(1)(d) of the Representation of People Act, 1951 and in particular the

true import of the expression "the result of the election in so far as it concerns a returned candidate has been materially affected" is a serious issue, which may arise for consideration but only after the election petition is tried by the High Court and after the parties have adduced whatever evidence may be available to them. [Para 15] [493-D-E]

1.3. There can indeed be fact situations where the Court may legitimately hold even in the absence of affirmative evidence, that the result of the election was materially affected by improper acceptance of the nomination paper or the improper reception of votes. [Para 17] [496-C-D]

1.4. Apart from the fact that the averments made in the election petitions in the present case are specific and the individuals who have cast their votes have been named and reason given why the votes cast by them were improperly received, the petitioner has alleged that exclusion of five votes cast by the persons named in the petition would materially affect the result of the election. The question whether any votes were improperly received and if so, whether such reception had materially affected the result of the election are matters to be examined at the trial after the parties have adduced evidence in support of their respective cases. Dismissal of the election petitions at the threshold was in the facts and circumstances not justified. In the result, the judgment passed by the High Court is set aside and the election petitions are restored to be tried by the High Court on merits in accordance with law. [Para 18] [496-G-H; 497-A-C]

Shiv Charan Singh S/o Angad Singh v. Chandra Bhan Singh S/o Mahavir Singh and Ors. **(1988) 2 SCC 12: 1988 (2) SCR 713 and** *T.H. Musthaffa v. M.P. Varghese* **(1999) 8 SCC 692: 1999 (3) Suppl. SCR 162 – distinguished.**

Cheedi Ram v. Jhilmit Ram and Ors. **(1984) 2 SCC 281: 1984 (1) SCR 966 – relied on.**

Dipak Chandra Ruhidas v. Chandan Kumar Sarkar **(2003) 7 SCC 66: 2003 (2) Suppl. SCR 72;** *Deputy Collector, Northern Sub-Division Panaji v. Comunidade of Bambolim* **(1995) 5 SCC 333: 1995 (2) Suppl. SCR 359;** *Virender Nath Gautam v. Satpal singh and Ors.* **2007 3 SCC 617: 2006 (10) Suppl. SCR 413;** *Vashist Narain Sharma v. Dev Chandra* **AIR (1954) SC 513: 1955 SCR 509:** *Swantraj and Ors. v. State of Maharashtra* **(1975) 3 SCC 322: 1974 (3) SCR 287;** *Kanwar Singh v. Delhi Administration* **AIR 1965 SC 871: 1965 SCR 7;** *State of Tamil Nadu v. N.K. Kandaswami* **(1974) 4 SCC 745;** *Samant N. Balakrishna and Anr. v. George Fernandez and Ors.***(1969) 3 SCC 238: 1969 (3) SCR 603– referred to.**

Heydon's **case (1584) 76 E.R. 637;** *Seaford Court Estates Ltd. v. Asher* **(1949) 2 All E.R. 155 and** *Inayatullah v. Divanchand Mahajan* **15 ELR 210 – referred to.**

Maxwell on the Interpretation of Statutes **– referred to.**

Case Law Reference:

2003 (2) Suppl. SCR 72	**referred to**	**Para 2, 5**
1995 (2) Suppl. SCR 359	**referred to**	**Para 5**
2006 (10) Suppl. SCR 413	**referred to**	**Para 8**
1988 (2) SCR 713	**distinguished**	**Para 9**
1999 (3) Suppl. SCR 162	**distinguished**	**Para 9, 18**
1955 SCR 509	**referred to**	**Para 9,11, 15**
1974 (3) SCR 287	**referred to**	**Para 12**
(1584) 76 E.R. 637	**referred to**	**Para 12**

1965 SCR 7	**referred to**	**Para 13**
(1974) 4 SCC 745	**referred to**	**Para 14**
(1949) 2 All E.R. 155	**referred to**	**Para 14**
1969 (3) SCR 603	**referred to**	**Para 15**
15 ELR 210	**referred to**	**Para 15**
1984 (1) SCR 966	**relied on**	**Para 15**

Per Gyan Sudha Misra, J. (dissenting)

1.1. On the prevailing facts, it is apparent that the petitioner/appellant is indulging in a process which amounts to speculation and conjecture in absence of material particulars; for instance, if it were the specific plea of the petitioner that all 14 votes or at least 4 votes which were cast in which the voters were alleged to have been accompanied by another person were in fact polled in favour of the respondent so as to influence the election result, the plea of the petitioner could be held as amounting to materially affecting the election result. But in absence of this candid relevant and factual detail, the election petition obviously is based only on such averment, which will have to be held speculative and conjectural in nature and can hardly be held to be disclosing 'material facts with material particulars' so as to conclude that it materially affected the result of the election. Even assuming that the election petition were to be allowed in spite of absence of such material particulars, the net result would be the recounting of the votes by declaring 14 votes as invalid which were alleged to have been polled in breach of the election rules but could hardly be identified or deciphered. [Para 16] [509-D-H; 510-A]

1.2. In the absence of any identification mark of those votes which are alleged to have been polled by voters

accompanied by another person and is alleged to be in breach of the Rules cannot possibly be identified so as to treat them as invalid votes and if that is so, the election petition is clearly based on vague material and hence would be unjust to allow the election to be questioned by entertaining the election petition where the losing candidate/the petitioner had himself not alleged any corrupt practice in holding the election but merely a breach of the election rule in regard to which he had not complained at all at the time of election or even thereafter but straightway filed the election petition challenging the election on the basis of an alleged CD after the election result was declared. Thus, the entertainment of an election petition on such speculative material can hardly be held to be disclosing material facts with material particular which would justify the challenge to an election by entertaining an election petition as the same does not spell out material particulars which would affect the election result. [Para 17] [510-C-F]

1.3. It is well settled legal position that no evidence can be led on a matter unless there is a pleading thereon. Therefore, unless it was pleaded that the invalid votes were cast in favour of the returned candidate, no evidence can be led to that effect. In a petition seeking to challenge an election on the ground stated in Section 100 (1) (d) (iii) and (iv) of the Representation of People Act, 1951, it was imperative for the petitioner to plead the most crucial and vitally material fact that the invalid votes were cast in favour of the returned candidate because then alone could it be pleaded and proved that "the result of the election, in so far as it concerns a returned candidate, has been materially affected" within the meaning of Section 100 (1) (d). The words "in so far as it concerns a returned candidate" and "has been materially affected" read with clauses (iii) and (iv) clearly show the legislative intent to place the burden of pleading and proving that

the improper reception of votes or violation of law in regard to casting of votes benefited the returned candidate and materially affected his election as a returned candidate. It is not enough to show mere improper reception of votes or reception of votes or non-compliance with law. In the present case, lack of pleading that the votes were cast in favour of the respondent leads to absence of cause of action for the petition for invalidating the election under Section 100 (1) (d) (iii) and (iv). Merely because the margin of difference between the winner and the loser was four votes and five votes were disputed by the petitioner would not give rise to any valid cause of action. [Paras 18, 19] [510-G-H; 511-A-F]

1.4. There is substance in the view taken by the High Court in the impugned judgment, that the election petitioner only pointed out a possibility of result of election being different if 14 or 5 votes were to be excluded from counting. The objection is only that those votes ought not to have been taken into consideration while counting the votes. In absence of identification of those votes which are alleged to have been cast by the voters in the company of another person, it would be difficult to identify them so as to infer as to which are the votes which ought not to have been reckoned for counting by declaring them invalid. In that event even if the petitioner's election petition were to be allowed, the entire trial would result into an exercise in futility leading the controversy nowhere. The election petition filed by the petitioner indicates absence of 'material particulars' which materially affected the result of the election so as to entertain a challenge to the same. To contend that the alleged breach of secrecy would render the entire election result as void so as to order for a re-poll in spite of absence of any objection by the defeated candidates or his representative in this regard at the time of polling would be an outrageous contention which is fit to rejected outright. [Para 21] [512-E-H; 513-A-B]

1.5. The impugned judgment and order of the High Court is not required to be interfered with and the election petition was rightly held to be fit for rejection for want of material facts and material particulars which could materially affect the result of the election. [Para 22] [513-D]

Kalyan Kumar Gagoi v. Ashutosh Agnihotri, **2011 (1) SCALE 516;** *Mulayam Singh Yadav v. Dharampal Yadav* **(2001) SCC 98 and** *Vashisht Narain Sharma v. Dev Chandra and others* **AIR 1954 S.C. 513: 1955 SCR 509 – relied on.**

R.P. Moidutty v. P.T. Kunju Mohammad & Anr. **2000 (1) SCC 481 and** *Jabar Singh v. Genda Lal* **(1964) SCR 54 – referred to.**

Mayar (HK) Ltd v. Owners & Parties **(2006) 3 SCC 100: 2006 (1) SCR 860 – held inapplicable.**

Case Law Reference:

2000 (1) SCC 481	**referred to**	**Para 3**
2011 (1) SCALE 516	**relied on**	**Para 4, 15**
(2001) SCC 98	**relied on**	**Para 12**
1955 SCR 509	**relied on**	**Para 16**
2006 (1) SCR 860	**held inapplicable**	**Para 19**
(1964) SCR 54	**referred to**	**Para 20**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7591 of 2012.

From the Judgment and Order dated 02.08.2010 of the High Court of Judicature of Bombay Bench at Nagpur in Election Petition No. 1 of 2010.

WITH

C.A. No. 7592 of 2012.

Ravi Shankar Prasad, PS Narasimha , Vinod A Babde, V.C. Daga, SS Shamshery, Vikramjeet Banerjee, Anil S. Killer, R.C. Kohli, Shriram Parakkat, Kishor Lampat, Vishnu Shankar Sain, Samab Samshery, Shally Bhasin Maheshwari, Kamna Sagar, Shivaji M. Jadhav, SK Jain, Sarv Preet, Nitin Popli, Jayant Bhatt for the Appearing Parties.

The Judgments and order of the Court was delivered by

T.S. THAKUR, J. 1. High Court of Judicature at Bombay, Nagpur Bench has dismissed Election Petitions No.1 and 2 of 2010 filed by the appellants-petitioners in these appeals. The High Court has taken the view that although the election petitions did not allege the commission of any corrupt practice against the returned candidate (respondent herein) and although the petitions sufficiently established the authenticity of thePage 3 documents relied upon by the petitioners yet the petitions were deficient inasmuch as the same did not disclose as to how the election of the returned candidate was materially affected by the alleged improper reception of the votes polled in the election. The hallmark of the order passed by the High Court is a copious reference to the decisions of this Court no matter some if not most of them had no or little relevance or application to the facts of the case before it, in the process adding to the bulk of the order under challenge. At the heart of the conclusion arrived at by the High Court is the argument that even when the election petitions contain specific averments alleging improper reception of 14 votes with the names of those who cast those votes, the same do not go further to state as to in whose favour the said votes were actually polled. This, according to the High Court, was an essential requirement for disclosure of a cause of action inasmuch as in the absence of a statement that the improperly received votes were polled and counted in favour of the returned candidate, neither the election petitions disclosed a cause of action nor was it possible to say that the result of thePage 4 election was materially affected by the narrow margin of the victory notwithstanding. We cannot do

better than extract from the judgment of the High Court the passages from which the reasoning underlying the conclusion drawn by the High Court can be deduced albeit with some amount of difficulty. The High Court observed:

> "The Election Petitioners here only point out a possibility of result of election being different if 14 or 5 votes can be excluded. It is not their case that said votes when displayed revealed that they were in favour of Rajendra or not in favour of Ashok. The Pssolling Agent of Petitioner at Kamptee is not being quoted or relied upon by Shri Ashok Mankar. Here, there are only two contestants and difference between them is of 4 votes only. The objection is about receipt of 14 or 5 votes. Several questions having bearing on result of said election being materially affected in so far as returned candidate is concerned, arise. The Petitioners have not pointed out the beneficiary of those 14 or 5 votes. It is not their plea that all those voters cast their vote in favour of Returned Candidate or did not vote in favour of defeated candidate. There is no plea about their political affinities either to associate or dis-associate them with BJP or National Congress (I) political parties. The said votes now can not be traced out & segregated. Hence when "displayed" what was seen & the vote was cast in whose favour ought to have been pleaded.
>
> Election Petitioners can not seek rejection of 14 votes or 5 votes which according to them can be identified and ask for recount without even asserting that those votes or any number out of it has gone to Returned Candidate. These votes may have been excluded only if they were cancelled before they were inserted in ballot box as per Rule 39 of 1961 Rules. Otherwise, those votes can then be subjected only to Rule 56. If any violations or breaches of their duties by staff at Polling Station at Kamptee is to be alleged, it is apparent that adequate pleadings are must for said purpose. Timely protest by agent of Ashok

would have been one such fact. If any thing was displayed and it was adverse to Ashok's interest, why objection was not lodged then & there is again an important factor. It is the result of election in so far as it concerns the returned candidate which is required to be proved as materially affected. Only possibility of election getting affected is not sufficient to un-sit the elected candidate.

Section 100 (1)(d)(iii) & (iv) requires pleading of illegalities as also irregularities and also of facts indicating material effect thereof on the election of the returned candidate. Only after these pleadings,evidence in relation thereto can come on record & not otherwise. Opinion of High Court contemplated by S.100(1) is possible only after due opportunity to returned candidate. Hence pleading of this material fact of link between the victory & lacunae/ omissions is prerequisite to formation of this opinion. A "triable issue" cannot be said to arise till then as no cause of action surfaces. Election Petitions cannot in its absence demonstrate how the result of election in so far as it concerns returned candidate is materially affected. Respondent's success with slender margin, in the absence of specific plea of any connection between it & alleged irregularities or illegalities and facts showing that connection, by itself cannot be the material fact. Pleading such link or connection cannot be pleading a material particular. The Election Petitions cannot be said to be "complete" without any whisper of such connection. Both Election Petitioners have avoided to plead vital link between the alleged breaches and the success of Returned Candidate. This omission cannot be allowed to be cured by amendment as limitation for filing Election petition has long expired and "material facts" cannot be now permitted to be added."

2. When these special leave petitions came up for hearing before this Court on 3rd April, 2012, Mr. V.A. Bobde, learned

senior counsel for the respondents, raised a preliminary objection to the maintainability of the petitions. It was contended by Mr. Bobde that the impugned judgment and order of the High Court dismissing the election petitions filed by the petitioners being appealable under Section 116A of the Representation of People Act, 1950, the petitioners could not maintain the special leave petitions under Article 136 of the Constitution which deserves dismissal on that ground alone. Reliance inPage 6 support was placed by Mr. Bobde upon a decision of this Court in *Dipak Chandra Ruhidas v. Chandan Kumar Sarkar* (2003) 7 SCC 66.

3. Section 116A of the Representation of the People Act, 1951 provides for appeals to this Court both on facts as also on questions of law from every order made by the High Court under Section 98 or 99 of the Act. Sub-section (2) of Section 116A prescribes a period of 30 days for filing of such appeals while proviso to sub-section (2) empowers this Court to entertain an appeal even after the expiry of the said period if the appellant shows sufficient cause for not preferring the appeal within such period.

4. Section 98 of the Act provides for the orders that the High Court shall make at the conclusion of the trial in an election petition. These orders could be in the nature of dismissal of an election petition or declaring the election of all or any of the returned candidates to be void or declaring the election of all or any of the returned candidates to be void and the petitioner or any other candidate to have been declared elected. Section 86 of the Act deals with the trial of election petitions and, inter alia, provides that the HighPage 7 Court shall dismiss an election petition which does not comply with the provisions of Sections 81 or 82 or Section 117 of the Act. Any such dismissal may come after the parties go to trial or even at the threshold. An election petition which does not call for dismissal on the ground that the same violates any one of the three provisions, namely, Section 81 or 82 or 117 may still be dismissed

summarily and without the parties going to trial on the merits of the controversy under Order VII Rule 11 of CPC. Any such order if may not be qualifying for a challenge before this Court under Section 116A as an appeal is under that provision limited to only such orders as are passed under Section 98 of the Act at the conclusion of the trial of election petition. Strictly speaking, it could well be said that an order which does not fall within the four corners of Section 98 inasmuch as the same is not passed at the conclusion of the trial of an election petition may not qualify for being challenged in appeal under Section 116A including an order dismissing the petitions summarily under Section 86 of the Act for non-compliance of the provisions of the Sections 81, 82 and 117. What is important and whatPage 8 makes a difference is the presence of an explanation under Section 86(1) that by a legal fiction makes an order passed under Section 86 of the Act to be an order under Section 98 thereof explanation reads :

> "Explanation to Section 86: An order of the High Court dismissing an election petition under this sub-section shall be deemed to be an order made under clause (a) of Section 98."

5. The fiction is, however, limited to orders passed under Section 86(1) alone namely to cases where dismissal is for non-compliance with the provisions of Sections 81, 82 and 117 of the Act. It does not extend to dismissal under Order VII Rule 11 of the CPC for non-compliance with the provisions of Section 83 of the Act. In other words, if a petition does not state the material facts on which the petitioner relies as required under Section 83(1)(a) and thereby fails to disclose any cause of action and is consequently dismissed by the Court in exercise of its powers under Order VII, Rule 11 CPC, such an order of rejection of the petition is not in terms of Explanation to Section 86 treated as an order made under Section 98 so as to be appealable under Section 116A of the Act. Mr. Prasad was, therefore, perfectly justified in arguing that since the High

Court has, in the instant case, dismissed the election petitions not under Section 86 to which the Explanation appearing thereunder is attracted but under Order VII Rule 11 for the alleged failure of the petitioners to state the material facts on which they relied, the order passed by the High Court was not appealable under Section 116A. The only difficulty which was encountered by us in holding that the special leave petitions were maintainable is a decision of this Court in *Dipak Chandra Ruhidas* case (supra) where this Court has taken the view that Section 116A must be interpreted liberally and an order dismissing the election petition on the ground that the averments do not state material facts would be appealable under Section 116A. With utmost respect to the Hon'ble Judges comprising the Bench, we find that conclusion to be contrary to the scheme of the Act. We were, therefore, inclined to make a reference to a larger Bench for reconsideration of that view, for the same, in our opinion, extends the fiction created under the Explanation to Section 86 even to case where the Court does not invoke Section 86 while passing an order of dismissal but exercises its power of rejection of the plaint/petition under Order VII Rule 11 CPC. It is noteworthy that an order under Order VII Rule 11 CPC by reason of Section 2(2) of the CPC is a decree hence appealable under Section 96 of the Code. Since, however, the right of appeal under the Representation of the People Act is regulated by Section 116A, the fact that an order rejecting a plaint under Order VII Rule 11 CPC would have been in the ordinary course appealable before the higher Court hearing such appeals would not make any difference. Inasmuch as the right of appeal is a creature of the statute, and Section 116A does not provide for an appeal against an order passed under Order VII Rule 11 CPC read with Section 83 of the Representation of the People Act, 1951 no resort can be taken to that provision by a process of interpretation of the Explanation to Section 86 or an artificial extension of the legal fiction beyond the said provision. Mr. Prasad was not, however, very keen to pursue his argument to its logical end for obvious reasons. A reference to a larger bench would inevitably delay

the disposal of these appeals and even the election petitions. Mr. Prasad, therefore, chose the alternative course available to him and sought permission of this Court to convert the SLPs into appeals under Section 116A of the Act. Two applications, one seeking permission to convert the petitions into an appeal under Section 116A and the other seeking condonation of delay in the filing of the appeals were accordingly made by the petitioner. Having heard learned counsel for the parties at some length we are inclined to allow both these applications in both the special leave petitions. Whether or not an appeal was maintainable against the impugned order was and continues to be a highly debatable issue as seen in the foregoing paragraphs. The petitioners appear to have been advised that the orders could be challenged only by way of SLPs. That advice cannot in the circumstances of the case, be said to be a reckless piece of advice nor can the petitioners be accused of lack of diligence in the matter when the SLPs were admittedly filed within the period of limitation stipulated for the purpose. The decision of this Court in *Deputy Collector, Northern Sub-Division Panaji v. Comunidade of Bambolim* (1995) 5 SCC 333, recognizes a bonafide mistake on the part of the counsel in pursuing a remedy as a good ground for condonation of delay in approaching the right forum in the right kind of proceedings. The limitation prescribed for filing an appeal under Section 116A is just about 30 days from the date of the order. There is, therefore, a delay of nearly 20 days in the filing of the appeal which deserves to be condoned. We accordingly allow the applications for conversion and for condonation of delay in both the special leave petitions and direct that the SLPs shall be treated as appeals filed under Section 116A of the Representation of the People Act.

6. That brings us to the merits of the controversy in the election petitions filed by the appellants. The election petitions specifically alleged improper reception of votes which had according to the appellant materially affected the result of the election. It is common ground that there were only two

contestants namely the appellant-Ashok and the respondent-Rajendra Bhausaheb Mulak. The election was to the Maharashtra State Legislative Council from Nagpur Local Authorities Constituency. Result of the election declared on 21st January, 2010 showed that the appellant Ashok had polled 198 ballots as against 202 votes polled in favour of the respondent-Rajendra Bhausaheb Mulak. The respondent thus won by a margin of only four votes. The election-petitioners' case as set out in the election petition was that the election was materially affected by the improper reception of as many as 14 votes out of a total of 400 votes in the course of elections. Specific averments, in regard to the votes so cast, were made in the election petition including averments based on the CD recording at each polling station obtained officially by the electionpetitioner from the concerned authorities under the Right to Information Act, 2005. In para 11 to 17 of the election petition, the petitioner made specific averments regarding violation of the provisions of the Act and the Rules and improper reception of as many as 14 votes by voters who were named in these paragraphs. In para 17, the petitioner had further asserted that the improper reception of the 14 votes had materially affected the result of the election. Para 11 to 17 may at this stage be reproduced for ready reference:

> "11…….. On going through the said CD relating to Kamptee Polling Station, that was supplied by the Office of the Collector-cum-District Election Officer, Nagpur it was found that a voter namely, Mrs. Begum Shehnaz Begum Akhtar entered the polling station along with another voter Shri Abdul Shakoor Usman Gani @ Shakoor Nagani who had accompanied her to the Polling booth in utter breach of the Election Rules and Handbook of the Returning Officer issued by the Election Commission of India under Art. 324 of the Constitution of India. Shri Abdul Shakoor Usman Gani @ Shakoor Nagani marked the ballot paper that had been issued to Mrs. Begum Shehnaz Begum Akhtar and thereafter displayed the said ballot

paper to those present in the room where the ballot box had been kept and thereafter put the ballot paper in the ballot box. This act is visible from the CD that has been supplied to the petitioner by the Office of the Collector-cum-District election Officer, Nagpur. In accordance with Rule 39(4) of the Election Rules, no other voter can be allowed to enter a voting compartment when another elector is inside it. Thus, there has been violation of Rule 39 (4) of the Election Rules as one voter Ms. Begum Shehnaz Begum Akhtar was accompanied by another voter Shri AbdulShakoor Usman Gani @ Shakir Nagani and both voters entered the voting compartment together. Thus, there has also been a breach of Rule 39(5) to 39(8) of the Election Rules where there is breach of secrecy by display of the ballot paper, the vote in question is required to be cancelled by making an endorsement to that effect on the reverse of the ballot paper. However, the Returning Officer failed in his boundened duty in cancelling the said vote though its secrecy was blatantly violated in his very presence and permitted the same to be put in the ballot box. The petitioner submits that from the CD supplied by the Office of the respondent No.2 he has taken still photographs. The copies of the aforesaid photographs are filed along with the Election Petition as **Document No.17**.

12. The petitioner further submits that from the said CD, it was further revealed that another lady voter Ms.Rashida Khatoon Mohammed Tahir entered the polling booth at Kamptee Police Station accompanied by one Shri Niraj yadav, another voter at the said election. Both Ms.Rashida Khatoon Mohammed Tahir and Shri Niraj Yadav together went to the voting compartment along with the ballot paper that had been issued to Ms.Rashida Khatoon Mohammed Tahir. This act of two voters going together in the voting compartment at the same time was in violation of rule 39(4) of the Election Rules. There Shri Niraj Yadav marked the ballot paper that had been issued to Ms.Rashida Khatoon

Mohammed Tahir. Thereafter, Shri Niraj Yadav displayed the marked ballot paper to others who were present in the polling booth and thereafter put the ballot paper in the ballot box. Thus, there was, again breach of secrecy of the vote polled on behalf of Ms.Rashida Khatoon Mohammed Tahir. As per the guidelines mentioned in the Handbook of the Returning Officer, it was the duty of the Presiding Officer, it was the duty of the Presiding officer to cancel the said ballot paper on account of violation of its secrecy, the same having been displayed to others and the voter being accompanied by another voter. Though the Presiding Office was very much present in the said room where this entire exercise took place, he remained merely a mute witness and failed to cancel the aforesaid vote as being void. Thus, the vote cast by Ms.Rashida Khatoon Mohammed Tahir was required to be cancelled and could not be taken into consideration. Thus, there has been a breach of Rule 39(5) to 39(8) of the Election Rules. The petitioner submits that from the CD supplied by the Office of the respondent No.2 he has taken still photographs. The copies of the aforesaid photographs are filed along with the Election Petition as Document No.18.

13. The petitioner further submits that it is clear from the CD relating to Kamptee Poling Station that another voter Shri Abdul Shakoor Usman Gani @ Shakoor Nagani, thereafter, exercised his franchise by marking the ballot paper issued to him. He, thereafter, came out of the voting compartment without folding the ballot paper in violation of rule 39(2)(c) of the Election Rules and, on the contrary, displayed the marked ballot paper to the Presiding Officer and others present there. Again, the Presiding Officer failed to act in accordance with the provisions of Rule 39(5) to 39(8) of the Election Rules as well as the guidelines prescribed in the Handbook of the Returning Officer issued by the Election Commission of India and failed to cancel the aforesaid vote on account of breach

of its secrecy. On the contrary, the Presiding Officer allowed said Shri Abdul Shakoor Usman Gani @ Shakoor Nagani to put his vote in the ballot box. On account of breach of its secrecy the aforesaid vote of Shri Abdul Shakoor Usman Gani @ Shakoor Nagani could not have been taken into consideration as a valid vote. The petitioner submits that from the CD supplied by the Office of the respondent No.2 he has taken still photographs. The copies of the aforesaid photographs are filed along with the Election Petition as Document No.19.

14. The petitioner submits that after viewing the CD supplied from the Office of the Collector-cum-District Election Officer, Nagpur, it can be seen that another voter Shri Niraj Yadav took his ballot paper to the voting compartment and after marking the same, came out of the voting compartment without folding the ballot paper. This action was in breach of Rule 39(2) (c) of the Election Rules. The said Shri Niraj Yadav displayed his marked ballot paper to the Presiding Officer and others present in the polling booth, thereby violating the secrecy of voting. The Presiding Officer was very much present in the said room but, instead of cancelling the said vote on account of breach of its secrecy, permitted the said voter to put the said vote in the ballot box. Therefore, on account of violation of secrecy of the vote cast by Shri Niraj Yadav the same was required t be cancelled and it could not have been enlisted as a valid vote. There was, thus, breach of Rule 39(5) to 39(8) of the Election Rules. The petitioner submits that from the CD supplied by the Office of the respondent No.2 he has taken still photographs. The copies of the aforesaid photographs are filed along with the Election Petition as Document No.20.

15. The petitioner further submits that after viewing the CD supplied by the Office of the Collector-cum-District Election Officer, Nagpur, it is seen that another voter Shri Mushtaq

Ahmed Abdul Shakoor exercised his franchise by marking his ballot paper. However before coming out of the voting compartment, said Shri Mushtaq Ahmed Abdul Shakoor did not fold the ballot paper as required by Rule 39(2)(c) of the Election Rules; but, on the contrary, he displayed the marked ballot paper to the Presiding officer and others who were present in the said room. The Presiding Officer was required to have cancelled the aforesaid vote on account of breach of its secrecy as required by rule 39(5) to 39(8) of the Election Rules and the guidelines mentioned in the Handbook of the Returning Officer issued by the Election Commission of India. However, instead of cancelling the aforesaid vote as invalid, the Presiding Officer permitted Shri Mushtaq Ahmed Abdul Shakoor to put the said ballot paper in the ballot box in violation of the laid down voting procedure and in violation of Rule 39(2)(c) of the Election Rules. Therefore, the vote cast by Shri Mushtaq Ahmed Abdul Shakoor could not have been enlisted as a valid vote as there was breach of secrecy during the actual polling. The petitioner submits that from the CD supplied by the Office of the respondent no.2 he has taken still photographs. The copies of the aforesaid photographs were filed along with the Election Petition as Document No.21.

16.The petitioner submits that a perusal of the CD supplied from the offie of the Collector-cum-District Election Officer, Nagpur pertaining to Kamptee Polling Station, it can be seen that various voters were carrying a spy pen with in-built camera along with them. The said voters as can be identified from the CD are Smt. Savita Sharma, S/shri Siddartha Rangari, Moreshwar Patil, Dilip Bandebuche, Prashant Nagarkar, Mukund Yadav, Mohammed Arshad Mohd. Altaf, Ukesh Lehandas and Smt. Pratibha Meshram. The aforesaid voters carried articles other than those that were permitted to be carried in the voting compartment in violation of the voting

procedure and rules framed thereunder. In this regard, it is submitted that Rule 39(2)(b) read with Rule 70 of the Election Rules require an elector to record his vote on the ballot paper with the article supplied by the authorities for the said purpose. Under Rule 73(2)(e), a ballot paper marked by an elector otherwise supplied for the said purpose becomes invalid. It is submitted that each elector was supplied with a marked pen so as to mark the ballot paper. The above-mentioned voters carried a additional camera as can be seen from the CD referred to above. The spy pen is quite distinct from an ordinary pen on account of its size, colour and design, so much so that it can easily be differentiated from an ordinary pen. Thus, it is submitted that the Election Rules especially Rule 39 (2)(b), Rule 70 & Rule 73(2)(e) were violated during the course of polling at Kamptee Polling Station. The petitioner submits that from the CD supplied by the Office of the respondent No.2 he has taken still photographs. The copies of the aforesaid photographs are filed along with the Election Petition as Document No.22.

17.The petitioner submits that the votes that were cast by Mrs. Begum Shehaz Begum Akhtar and Ms. Rashida Khatoon Mohammed Tahit at the Kamptee Polling Station with the aid of other voters, namely, Shri Abdul Shakoor usman Gani @ Shakoor Nagani and Shri Niraj Yadav respectively, were in violation of the provisions of Rule 39(4) of the Election Rules. It is submitted that the said two voters, namely, Mrs. Begum Shehnaz Begum Akhtar and Ms.Rashida Khatoon Mohammed Tahir were neither illiterate, blind or infirm so as to take the aid of any companion. The report on the election submitted by the Returning Officer under paragraph 3 of Chapter XV of the said Act, especially Item No.16, indicates that there was no such voter who was illiterate, blind or infirm who had voted with the help of a companion. In any event, a companion cannot be another voter and Rule 39(4) of the

Election Rules specifically prohibits one elector from entering the voting compartment when another elector is inside it. Therefore the said two votes polled by Mrs. Begum Shehnaz Begum Akhtar and Ms. Rashida Khatoon Mohammed Tahir cannot be taken into consideration as valid voters. Similarly, insofar as the votes polled by Shri Abdul Shakoor Usman Gani @ Shakoor Nagani, Niraj Yadav and Shri Mushtaq Ahmed Abdul Shakoor are concerned, they are also required to be excluded from consideration inasmuch as the said voters have displayed the marked ballot paper before putting the same in the ballot box. Rule 39(2)(c) requires the voter to fold the ballot paper so as to conceal his vote after he has marked the ballot paper. There being breach of aforesaid rule, the secrecy of voting has been violated. Similarly, there is breach of provision of Rules 39(5) to 39(8) of the Election Rules. Therefore, the said votes are required to be excluded from being considered as valid votes. It is further submitted that as many as nine voters, namely Smt. Savita Sharma, S/shri Siddartha Rangari, Moreshwar Patil, Dilip Bandebuche, Prashant Nagarkar, Mukund Yadav, Mohammed Arshad Mohd. Altaf, Ukesh Lehandas and Smt. Pratibha Meshram having carried an article other than that which was permissible to be carried in the voting compartment, have breached the provisions of Rule 39(2)(b) of said rules and there being breach of provisions of Rules 39(5) to 39(8) of the Election Rules, the votes polled by aforesaid nine voters also deserved to be excluded from being considered as valid votes. Similarly, the vote of Smt. Nirmala Rahul Gajbe that was polled at Narkhed Polling Station, where she was found carrying a spy-pen fitted with camera also deserved to be excluded form being considered as a valid vote,Page 18 there being breach of provisions of Rule 39(2)(b) read with Rule 39(5) to 39(8) of the Election Rules. Therefore in all, said 14 votes are required to be excluded from being considered as valid votes. The result of the election has

been materially affected. Therefore, the election of the returned candidate is required to be declared as void under Section 100 (1)(d) (iii) and (iv) of the said Act and it further needs to be declared that the petitioner is validly elected in place of the returned candidate under section 100 (a) of the said Act, the petitioner having received majority of the valid votes. The copy of the Handbook for Returning Officer issued by the Election Commission of India and supplied to the petitioner from the Officer of respondent No.2 is filed along with the Election Petition and Marked as **Document No.23.**"

7. The High Court has noticed the above averments and recorded a finding that the same satisfied the requirement of Section 83 of the Act inasmuch as the material facts inregard to the alleged improper reception of votes had been stated by the petitioner. The High Court has said:

"In pleadings itself, authenticity of all these document is prima-facie sufficiently established. Essential facts to prove breaches of Rules with relevant legal provisions are sufficiently brought on record by him.

"xxxxxxxxx"

Here, in both Petitions case of wrongful receipt of invalid or void votes sufficient in number to change the result is already pleaded. As held in Laxmi Kant Bajpayi vs. Haji Yaqoob, supra, where election petition was under Section 83 read with Section 100 (1) (d) (iii) & (iv) of 1951 Act, & the pleadings in election Petitioner reveal a clear complete picture of the circumstances and disclose a definite cause of action, the election petition cannot be summarily dismissed."

8. The High Court all the same found the election petition deficient on account of the absence of a specific averment to the effect that the votes that were improperly received were cast

in favour of the successful candidate. We find sthat reason to be unsustainable. The averments made in the election petition, in our opinion, sufficiently disclosed a cause of action inasmuch as the essential, the pivotal and the basic facts relevant to the charge levelled by the appellants had been stated with sufficient clarity by the petitioners in their respective election petitions. The question whether the votes improperly received were polled in favour of one or the other candidate was not an essential or material fact the absence whereof could possibly result in the summary dismissal of the election petitions. We draw support for that view from the decision of this Court in *Virender Nath Gautam v. Satpal Singh and Ors.* (2007) 3 SCC 617. That was also a case where the election-petitioner had been defeated by a narrow margin of 51 votes only. The challenge to the election was founded on the plea that as many as 188 votes had been wrongly counted n spite of the fact that all those votes were invalid votes and that since the margin was only 51 votes, wrong counting of 188 invalid votes materially affected the result of the election. It was further alleged that 37 votes of dead persons had been cast and they were thus void and could not, therefore, have been counted. The petitioner gave names of all the 37 voters and annexed death certificates of 36 of such persons. So also there were allegations that there was double voting by 60 voters in violation of Section 62(4) of the Act. Another 19 votes were challenged on the ground of being void as the voters had exercised their right to vote in two constituencies. In addition there were allegations of material irregularities in counting of postal ballot papers. The High Court had despite such assertions dismissed the election petition holding that there was nothing to show as to how many votes of dead persons had been cast in favour of the returned candidate. The High Court also held that the election petition did not disclose as to how the petitioner came to know about dead persons casting their votes nor was it indicated as to how the petitioner came to know about the persons listed having voted in two different constituencies. Reversing the view taken by the High Court, this Court observed that the election petition

stated all the requisite material facts and that the High Court committed an error in examining the correctness of the allegations at an intermediary stage which could be done only at the time of trial. As to whether the election-petitioner was required to make a statement that the void votes were polled in favour of the returned candidates this Court held that the same was not a material fact to be stated in the petition. This Court observed:

> "49. On the basis of our conclusions and reasoning in respect of paras 8(i) to (iii), the finding of the High Court on para 8(iv) also cannot be said to be in consonance with law. Whether or not six persons had been issued voting papers twice and whether or not those voters had polled in favour of the returned candidate cannot be said to be a material fact to be stated in the election petition. What are required to be stated in the petition are material facts to maintain the petition."

9. The High Court has in support of its conclusion drawn support from the decisions of this Court in *Shiv Charan Singh S/o Angad Singh v. Chandra Bhan Singh S/o Mahavir Singh and Ors.* (1988) 2 SCC 12 and *T.H. Musthaffa v. M.P. Varghese* (1999) 8 SCC 692 to hold that in order to succeed, the election-petitioners have to prove by adducing evidence, that the result of the election was materially affected by the improper reception of votes. There can be no quarrel with this proposition that in order to succeed the election petitioners have not only to prove by leading requisite evidence that votes were improperly received but also that such improper reception materially affected the result of the election in so far as the returned candidate was concerned. The question is whether an election petition could be dismissed summarily on the ground that production of any such evidence was not possible. In *Shiv Charan Singh's* case (supra), this Court was dealing with an appeal under Section 116A of the Act after the High Court had tried the election petition on merits and held the election of the

returned candidate to be void with a direction to the election commission to hold a fresh election. In that case, the margin of victory of the returned candidate was no more than 4497, over Roshan Lal, the candidate who polled the 2 nd highest number of votes. Kanhaya Lal, the candidate who had polled 17841 votes was held ineligible to contest being less than 25 years of age. The High Court was of the view that since the number of votes polled by Kanhaya Lal whose nomination papers were wrongly accepted were far more than the margin of victory the election of the retuned candidate was materially affected by the improperPage 23 acceptance of the nomination paper of Kanhaya Lal. This Court did not agree with that reasoning. Relying upon the decision of this Court in *Vashist Narain Sharma v. Dev Chandra* AIR 1954 SC 513, this Court held that the margin of victory being less than the votes polled by an improperly nominated candidate did not by itself mean that the result of the election was materially affected. The election petitioner, observed this Court is required to lead evidence to prove as a fact that the result of the election was indeed materially affected, no matter it may be difficult and even impossible for the election petitioner to adduce, any such proof. This Court observed:

> "The result of the election can be affected only on the proof that the votes polled by the candidate whose nomination paper had wrongly been accepted would have been distributed in such a manner amongst the remaining candidates that some other candidate (other than the returned candidate) would have polled the highest number of valid votes. In other words the result of the election of the candidate cannot be held to have been materially affected unless it is proved that in the absence of the candidate whose nomination paper was wrongly accepted in the election contest, any other candidate (other than the returned candidate) would have polled the majority of valid votes. In the absence of any such proof the result cannot be held to have been materially affected. The burden to

prove this material effect is difficult and many times it is almost impossible to produce the requisite proof. But the difficulty in proving this fact does not alter the position of law. The legislative intent is clear that unless the burden howsoever difficult it may be, is discharged, the election cannot be declared void. The difficulty of proving the material effect was expressly noted by this Court in Vashist Narain Sharma and Paokai Haokip cases and the court observed that the difficulty could be resolved by the legislature and not by the courts. Since then the Act has been amended several times, but Parliament has not altered the burden of proof placed on the election petitioner under Section 100(1)(d) of the Act. Therefore the law laid in the aforesaid decisions still holds the field. It is not permissible in law to avoid the election of the returned candidate on speculations or conjectures relating to the manner in which the wasted votes would have been distributed amongst the remaining validly nominated candidates. Legislative intent is apparent that the harsh and difficult burden of proving material effect on the result of the election has to be discharged by the person challenging the election and the courts cannot speculate on the question. In the absence of positive proof of material effect on the result of the election of the returned candidate, the election must be allowed to stand and the court should not interfere with the election on speculation and conjectures."

10. There are two dimensions to the above observations. The first is that the election petition had been allowed by the High Court after a full fledged trial. It was not a case of summary dismissal of an election petition on the ground that no evidence can be produced to prove that the result of the election in so far as the returned candidate was materially affected by improper reception of any vote as is the position in the case at hand. The High Court in the case at hand failed to notice that difference and hastened to conclude that the election petition

could not be tried with whatever chances the petitioner may have had to avoid the election in question.

11. The second dimension is that although the legal position emerging from the decisions is of vintage value, it may have the effect of obliterating Section 100(1)(d)(i) and (iii) of the Act. We say it with utmost respect for the Judges who delivered the decisions in the two cases referred to above that the decisions require the election petitioners to produce evidence in what would be a totally hypothetical situation defying any attempt to show that the votes polled by a candidate whose nomination was improperly accepted would have been polled in his absence in a fashion that would have materially affected the result of the election so far as the elected candidate is concerned. So also it would be near impossible to satisfactorily prove in a given case that the improperly received votes would have gone to one or the other candidate. The question is whether an election petitioner can be asked to prove something that is not amenable to proof and whether by doing so a ground that is recognised by the statute as a valid ground for declaring the election to be void can be rendered otiose or sterile. What is noteworthy is that the difficulty which would arise in giving effect to Section 100(1)d(i) and (iii) has been noticed by this Court in *Vashist Narain Sharma's* case (supra) but instead of finding an answer to the same the Court has left the issue to be resolved by the legislature, in the following words:

> "It is impossible to accept the ipse dixit of witnesses coming from one side or the other to say that all or some of the votes would have gone to one or the other on some supposed or imaginary ground. The question is one of fact and has to be proved by positive evidence. If the petitioner is unable to adduce evidence in a case such as the present, the only inescapable conclusion to which the Tribunal can come is that the burden is not discharged and that the election must stand. Such result may operate harshly upon the petitioner seeking to set aside the

election on the ground of improper acceptance of a nomination paper, but neither the Tribunal, nor this Court is concerned with the inconvenience resulting from the operation of the law. How this state of things can be remedied is a matter entirely for the legislature to consider."

12. In *Swantraj and Ors. v. State of Maharashtra* (1975) 3 SCC 322, this Court said that every legislation is a social document and judicial construction seeks to decipher the statutory mission, language permitting, taking cue from the rule in *Heydon's* case (1584) 76 E.R. 637, of suppressing the evil and advancing the remedy. This Court held that what must tilt the balance is the purpose of the statute, its potential frustration and judicial avoidance of the mischief by a construction whereby the licensing meets the ends of ensuring pure and potent remedies for the people. This Court placed much reliance upon the following passage from *Maxwell on the Interpretation of Statutes*:

"There is no doubt that 'the office of the Judge is, to make such construction as will suppress the mischief, and advance the remedy, and to suppress all evasions for the continuance of the mischief. To carry out effectively the object of a statute, it must be so construed as to defeat all attempts to do, or avoid doing, in an indirect or circuitous manner that which it has prohibited or enjoined: quando aliquid prohibetur, prohibetur et omne pe quod devenitur ad illud.

This manner of construction has two aspects. One is that the courts, mindful of the mischief rule, will not be astute to narrow the language of a statute so as to allow persons within its purview to escape its net. The other is that the statute may be applied to the substance rather than the mere form of transactions, thus defeating any shifts and contrivances which parties may have devised in the hope of thereby falling outside the Act. When the courts find an

attempt at concealment, they will, in the words of Wilmot, C.J. 'brush away the cobweb varnish, and shew the transactions in their true light'."

13. Reference may also be made to the decision of this Court in Kanwar Singh v. Delhi Administration (AIR 1965 SC 871), where this Court observed: "It is the duty of the court in construing a statute to give effect to the intention of the legislature. If, therefore, giving a literal meaning to a word used by the draftsman, particularly in a penal statute, would defeat the object of the legislature, which is to suppress a mischief, the court can depart from the dictionary meaning or even the popular meaning of the word and instead give it a meaning which will 'advance the remedy and suppress the mischief'."

14. In *State of Tamil Nadu v. N.K. Kandaswami* (1974) 4 SCC 745, this Court held that while interpreting a penal provision which is also remedial in nature a construction that would defeat its purpose or have the effect of obliterating it from the statute book should be eschewed and that if more than one constructions are possible the Court ought to choose a construction that would preserve the workability and efficacy of the statute rather than an interpretation that would render the law otiose or sterile. This Court relied upon the following passage from the *Seaford Court Estates Ltd. v. Asher* [1949] 2 All E.R. 155 wherein Lord Denning, L.J. observed:

"The English language is not an instrument of mathematical precision. Our literature would be much poorer if it were. This is where the draftsmen of Acts of Parliament have often been unfairly criticised. A judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that, or have beenguilty of some or other ambiguity. It would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a judge cannot simply fold his

hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give 'force and life' to the intention of the legislature. ... A judge should ask himself the question how, if the makers of the Act had themselves come across this ruck in the texture of it, theywould have straightened it out? He must then do so as they would have done. A judge must not alter the material of which the Act is woven, but he can and should iron out the creases."

15. The interpretation of Section 100(1)(d) and in particular the true import of the expression "the result of the election in so far as it concerns a returned candidate has been materially affected" is a serious issue, which may arise for consideration but only after the election petition is tried by the High Court and after the parties have adduced whatever evidence may be available to them. All that we need to say for the present is that the decision of this Court in *Vashist Narain Sharma's* case (supra) and *Samant N. Balakrishna and Anr. v. George Fernandez and Ors.* (1969) 3 SCC 238, and *Inayatullah v. Divanchand Mahajan* 15 ELR 210, requiring positive proof of the adverse effect of the improper acceptance of a nomination paper or improper reception of votes, on the result of the election qua the returned candidate have been considered and explained by a three-Judge Bench of this Court in *Cheedi Ram v. Jhilmit Ram and Ors.* (1984) 2 SCC 281. That was a case where the margin of victory was just about 373 votes, while the votes polled by the candidate whose nomination papers were improperly accepted were many times more. There was no evidence, as indeed there could be none, to show as to how those votes would have got distributed among the remaining candidates if the nomination papers had not been improperly accepted. This Court held that a Court cannot lay down an

impossible standard of proof and hold that the fact required to be proved was not proved on that standard. This Court further held that in the facts of a given case, a Court could hold a fact as proved if a reasonable probability supported that conclusion. Applying that test this Court held that the improper acceptance of the nomination papers of Moti Ram, one of the candidates, had materially affected the election of the returned candidate. Chinnappa Reddy J. speaking for the Court conceptualised three situations that would arise in such cases in the following words:

> "….True, the burden of establishing that the result of the election has been materially affected as a result of the improper acceptance of a nomination is on the person impeaching the election. ThePage 31 burden is readily discharged if the nomination which has been improperly accepted was that of the successful candidate himself. On the other hand, the burden is wholly incapable of being discharged if the candidate whose nomination was improperly accepted obtained a less number of votes than the difference between the number of votes secured by the successful candidate and the number of votes secured by the candidate who got the next highest number of votes. In both these situations, the answers are obvious. The complication arises only in cases where the candidate, whose nomination was improperly accepted, has secured a larger number of votes than the difference between the number of votes secured by the successful candidate and the number of votes got by the candidate securing the next highest number of votes…."

16. The Court then dealt with the third situation out of the three mentioned above and held:

> "…..In this situation, the answer to the question whether the result of the election could be said to have been materially affected must depend on the facts, circumstances and reasonable probabilities of the case, particularly on the

difference between the number of votes secured by the successful candidate and the candidate securing the next highest number of votes, as compared with the number of votes secured by the candidate whose nomination was improperly accepted and the proportion which the number of wasted votes (the votes secured by the candidate whose nomination was improperly accepted) bears to the number of votes secured by the successful candidate. If the number of votes secured by the candidate whose nomination was rejected is not disproportionately large as compared with the difference between the number of votes secured by the successful candidate and the candidate securing the next highest number of votes, it would be next to impossible to conclude that the result of the election has been materially affected. But, on the other hand, if the number of votes secured by the candidate whose nomination was improperly accepted is disproportionately large as compared with the difference between the votes secured by the successful candidate and the candidate securing the next highest number of votes and if the votes secured by the candidate whose nomination was improperly accepted bears a fairly high proportion to the votes secured by the successful candidate, the reasonable probability is that the result of the election has been materially affected and one may venture to hold the fact as proved. Under the Indian Evidence Act, a fact is said to be proved when afterPage 32 considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. If having regard to the facts and circumstances of a case, the reasonable probability is all one way, a court must not lay down an impossible standard of proof and hold a fact as not proved. In the present case, the candidate whose nomination was improperly accepted had obtained 6710 votes, that is, almost 20 times the difference between the number of votes secured by the

successful candidate and the candidate securing the next highest number of votes. Not merely that. The number of votes secured by the candidate whose nomination was improperly accepted bore a fairly high proportion to the number of votes secured by the successful candidate — it was a little over one-third. Surely, in that situation, the result of the election may safely be said to have been affected."

17. We find ourselves in respectful agreement with the above reasoning. There can indeed be fact situations where the Court may legitimately hold even in the absence of affirmative evidence, that the result of the election was materially affected by improper acceptance of the nomination paper or the improper reception of votes. Beyond that we do not wish to say anything on this aspect at this stage.

18. In *T.H. Musthaffa's* case (supra) relied upon by the High Court, also the election petition was tried on merits and on the basis of evidence adduced by the parties, the Court had eventually dismissed the same. In an appeal against the said order under Section 116 A of the Act, this Court noted that the allegations made in the course of the petition regarding acceptance of invalid votes was deficient inasmuch as the number of votes that were liable to be rejected was not stated. This Court also noted that there was no indication as to how many of such votes had been polled in favour of the returned candidates to enable it to determine whether the same had materially affected the result of the election. In the absence of any such plea, the High Court could not have, declared this Court, granted the relief of recount and the refusal of the High Court to do so was justified. There is nothing in that decision which advances the case of the respondent-returned candidate before us. Apart from the fact that the averments made in the election petitions in the present case are specific and the individuals who have cast their votes have been named and reason given why the votes cast by them were improperly

received, the petitioner has alleged that exclusion of five votes cast by the persons named in the petition would materially affect the result of the election. Suffice it to say that the question whether any votes were improperly received and if so, whether such reception had materially affected the result of the election are matters to be examined at the trial after the parties have adduced evidence in support of their respective cases. Dismissal of the election petitions at the threshold was in the facts and circumstances not justified. In the result, we allow these appeals, set aside the judgment and order passed by the High Court and restore the election petitions to be tried by the High Court on merits in accordance with law. No costs.

GYAN SUDHA MISRA, J. 1. Having deliberated over the arguments and counter arguments advanced on behalf of the appellant and the respondent in the light of the ratio of a catena of decisions as to what would constitute 'material facts' and 'material particulars' which could be held to be materially affecting the result of the election so as to entertain an election petition challenging the same, as also the reasonings assigned in the impugned judgment and order of the High Court, I have not been able to persuade myself to take a view that the judgment and order dismissing the election petition of the appellant is fit to be set aside.

2. The petitioner had filed an election petition challenging the election of the respondent not on the ground of indulgence in corrupt practice in any manner but on the plea of breach of the Conduct of Election Rules, 1961 at the instance of a few voters and inaction of the Presiding Officer at the polling station by failing to mark them as invalid votes. It has been alleged by the petitioner that at least 5 out of 14 votes had been cast by such voters who were accompanied by another person to the voting compartment at the time of actual casting of vote in the election which was in breach of Rule 39 (5) to 39 (8) of the Election Rules and hence reception of such votes by including them at the time of counting of votes ought to be declared as

illegal. It is for this purpose that he filed an election petition which has been dismissed on the ground that it failed to declare material particulars which could be held to have materially affecting the election result.

3. Thus, this matter does not relate to a case where the respondent returned candidate is alleged to have indulged in corrupt practice but it is based specifically on the ground of breach of the Election Rules. But even in cases where the election petition is filed on the ground of corrupt practice, this Court time and again has held that "the electoral process in a democracy undoubtedly is too sacrosanct to be permitted or allowed to be polluted by corrupt practice and if the court records a finding of commission of corrupt practice by a returned candidate or his election agent or by any other person with the consent of returned candidate or his election agent, then the election of the returned candidate shall be declared to be void and in that event challenge to such election obviously would be entertained." But at the same time it cannot be overlooked as was observed by the Supreme Court in the case of *R.P. Moidutty vs. P.T. Kunju Mohammad & Anr.,* 2000 (1) SCC 481 and a series of authorities too numerous to mention, that it is basic to the law of election and election petition, that in a democracy, the mandate of the people expressed in the form of their ballot, must prevail and be respected by the Court and that is why the election of a successful candidate is not to be set aside lightly since the consequences flowing from the allegation of corrupt practice or alleged breach of any Rule affecting the election of a returned candidate is far more serious and hence the Supreme Court time and again has held that utmost care and caution are required to be applied while dealing with the allegation of indulgence in corrupt practices at the instance of the defeated candidate as in the process, misappreciation of evidence and hence error of judgment in coming to a definite conclusion cannot be ruled out.

4. It is in this backdrop that the preliminary question as to

whether the election petition filed by the respondent is fit to be dismissed on the ground of lack of material facts with material particulars which materially affects the result of the election assumes great significance and hence are fit to be taken care of at the stage when the election petitions are entertained. In this context, it is further apt to remember that this Court in the case of *Kalyan Kumar Gagoi Vs. Ashutosh Agnihotri,* 2011 (1) SCALE 516 has held – "that the election of the returned candidate should not normally be allowed to be set aside unless there are cogent and convincing reasons. The success of a winning candidate at an election cannot be lightly interfered with. This is all the more so when the election of a successful candidate is sought to be set aside for no fault of his but of someone else". That is why the scheme of Section 100 of the Representation of People Act, 1961 especially clause (d) of sub-section (1) thereof clearly prescribes that in spite of the availability of grounds contemplated by sub-clauses (i) to (iv) of clause (d), the election of a returned candidate cannot be voided unless and until it is proved that the result of the election in so far as it concerns a returned candidate is materially affected. It is no doubt true that such material facts and material particulars depend upon the facts of each case and no rule of universal application can be applied to test the correctness of the allegation that material facts clearly affect the result of the election and it is the fact of each case which will be relevant for determination as to whether the election petition was fit to be rejected on the plea of lack of material facts and material particulars or it was fit to be entertained if the same disclosed a cause of action for consideration by the court so as to entertain the election petition. But the language of Section 100 (1) (c) of the Representation of People Act, 1951 is too clear for any speculation about possibility.

5. Fortunately, for the respondent/returned candidate, the basis of the election petition filed by the appellant in the instant matter is not on the allegation of indulgence in corrupt practice but breach of the rule of secrecy of the ballot by the voters and

inaction on the part of the Presiding Officer to mark them as invalid votes as the specific allegation is improper reception and acceptance of at least 5 votes out of the 14 votes which according to the appellant has materially affected the result of the election due to which he had filed election petition challenging the election of the respondent who has won the election by a thin margin of 4 votes.

6. Admittedly, the common ground is that there were mainly two contestants, namely, the appellant –Ashok and the respondent Rajendra Bhausaheb Mulak for the election to the Maharashtra State Legislative Council from Nagpur Local Authorities Constituency. The result of the election which was declared on 21.1.2010 admittedly showed that the appellant Ashok had been polled 198 votes as against 202 votes polled in favour of the respondent-Rajendra Bhausaheb Mulak. The respondent thus has won by a thin margin of 4 votes. The election petitioner's case as set out in the election petition admittedly was that the election was materially affected by the improper reception of votes and as many as 14 votes out of a total of 400 votes were invalid which were polled in the course of the election by voters who were accompanied by another person to the voting compartment which was a breach of the election rules to the Representation of People Act, 1951. Specific averments in regard to such polling of votes is that the voter namely Mrs. Begam Shehaz Begum Akhtar entered the polling station along with another voter Abdul Shakoor Usman Gani @ Shakoor Nagani who had accompanied her to the voting compartment in utter breach of the election rules and hand book of the returning officer issued by the Election Commission of India under Article 324 of the Constitution of India. Similarly, another lady voter Ms. Rashida Khatoon Mohammed Tahir was alleged to have entered the polling booth at Kamptee Polling Station accompanied by one Shri Niraj Yadav, yet another voter at the said election was accompanied by Shri Niraj Yadav who went to the voting compartment along with the ballot paper which had been issued to Ms. Rashida

Khatoon Mohammed Tahir. Further, two other voters namely Abdul Shakoor and Usman Gani were alleged to have voted and by showing their ballot to others on the polling booth and in all 14 votes polled by 14 voters were thus alleged as to have been polled by the voters in breach of Rule 39(5) to 39(8) of the Election Rules, 1951 as the Presiding Officer did not cancel the said votes although the irregularities were clear and apparent which happened in front of him. The petitioner/ appellant thus took the categorical plea that "if 5 votes are treated as cancelled and excluded from consideration then it can be said with certainty that the petitioner had received majority of the valid votes and therefore, petitioner deserved to be declared as elected. The petitioner thus wanted the Court to assume that the said disputed votes were cast in favour of the respondent No.1, without specifically pleading this vital and material fact.

7. However, learned counsel for the petitioner conveniently ignored and overlooked that it is not the case of the petitioner-appellant that all the 14 votes which were alleged to have been polled in breach of the Rules were polled in favour of the respondent. In absence of this vital 'material particular', the plea of the petitioner that inclusion of all such votes in which the voter had been accompanied by another person had materially affected the result of the election, does not disclose a cause of action which would lead to the irresistible conclusion that it has materially affected the result of the election. The petitioner however sought to fill in this material lacuna by raising pleas in this regard at a much later stage.

8. There is yet another important aspect of the matter regarding breach of the Rules admittedly, neither the petitioner nor any of his representative had raised any objection at the time of polling that the voter was accompanied by another person while casting his vote or that the secrecy of the votes were breached. The petitioner has taken this plea in the election petition for the first time that he had seen such accompaniment

in the CD which he procured at a later stage after declaration of the election result completely overlooking that if no such plea or objection had been raised at the time of actual polling, then after declaration of the result, breach of such rules viz. Rules 39 (5) to 39 (8) could not have been allowed to be raised straightaway by way of an election petition for the first time as that clearly amounts to absence of ingredients of such breach and absence of material particulars in regard to the polling, relying merely on the CD which he claims to have procured later rendering the entire plea of materially affecting the result of the election to be speculative in nature and hence fit to be rejected outright.

9. It is relevant in this context to refer to Rule 39 of The Conduct of Election Rules, 1961. Relevant extracts of the said Rule is quoted hereinbefore for facility of reference.

> 39. Maintenance of secrecy of voting by electors within polling station and voting procedure. – (1) Every elector to whom a ballot paper has been issued under rule 38 or under any other provision of these rules, shall maintain secrecy of voting within the polling station and for that purpose observe the voting procedure hereinafter laid down.
>
> (2) The elector on receiving the ballot paper shall forthwith –
>
> (a) proceed to one of the voting compartments;
>
> (b) there make a mark on the ballot paper with the instrument supplied for the purpose on or near the symbol of the candidate for whom he intends to vote;
>
> (c) fold the ballot paper so as to conceal his vote;
>
> (4) No elector shall be allowed to enter a voting compartment when another elector is inside it.

(5) If an elector to whom a ballot paper has been issued, refuses, after warning given by the Presiding Officer, to observe the procedure as laid down in sub-rule (2), the ballot paper issued to him shall, whether he has recorded his vote thereon or not, be taken back from him by the Presiding Officer or a polling officer under the direction of the Presiding Officer.

(6) After the ballot paper has been taken back, the Presiding Officer shall record on its back the words "Cancelled : voting procedure violated" and put his signature below those words.

(7) All the ballot papers on which the words "Cancelled : voting procedure violated" are recorded, shall be kept in a separate cover which shall bear on its face the words "Ballot papers : voting procedure violated".

(8) Without prejudice to any other penalty to which an elector, from whom a ballot paper has been taken back under sub-rule (5), may be liable, the vote, if any, recorded on such ballot paper shall not be counted.

10. It is clear on perusal of the aforesaid Rules that the procedure for casting of votes clearly envisages that if the voting procedure has been violated, an objection should have been raised by the candidate or his representative as the Presiding Officer under Rule 6 was required to mark "Cancelled: voting procedure violated" and put his signature below those words. Thereafter, all the ballot papers on which the words "Cancelled: voting procedure violated" are recorded is required to be kept in separate cover which shall bear on its face the words "Ballot papers: voting procedure violated".

11. In continuation, Rule 8 further lays down that without prejudice to any other penalty to which an elector, from whom a ballot paper has been taken back under sub-rule (5), may be liable, the vote, if any, recorded on such ballot paper shall not

be counted. Thus, this Rule although does not envisage a penalty to the voter, it is clearly laid down that such ballot paper shall not be counted for the purpose of election. An inference can clearly be drawn from this Rule that the candidate or his representative is expected to raise objection at the time of actual polling regarding violation of Rules 5, 6, 7 and 8 of Section 39 so that the votes which were alleged to have been polled in breach of the aforesaid Rules could be cancelled by the Presiding Officer. The election petitioner admittedly has not lodged any complaint anywhere regarding the inaction of the Presiding Officer by writing on the back of the ballot paper – "Cancelled : voting procedure violated" and put his signature below those words. If the Presiding Officer violates to discharge his duty in this regard obviously it must be construed that a complaint ought to have been registered somewhere for cancellation of such ballot papers and if the said action has been taken by the petitioner, then it was open for him to challenge the same by way of an election petition at the appropriate stage. But the admitted position in the matter is that the petitioner or his representative or anyone else connected to the polling had nowhere complained of any such violation of the voting procedure and at later stage that he saw such violation on the CD which he had later procured from the Collector. But in absence of any complaint by the candidate at the time of polling, is not capable of establishing as to how these rules could be alleged to have been violated expecting the Presiding Officer to cancel the votes on account of violation of the procedures and keep them in a separate packet so as to prevent them from counting. The CD on which the petitioner was relied to prove violation of Rules 39 (5) to 39 (8) cannot possibly establish absence of any protest lodged by the candidate or his agent regarding violation of the procedure as the very basis of challenge alleging violation of Rule 39 is based on allegation but not supported by material particulars so as to establish violation of Rule 39 of The Election Rules, 1961.

12. It is further to be taken note that there was total non-compliance of the provisions of Section 81 (3) of the RP Act, 1951 as the original CD which formed an integral part of the Election Petition, was not produced along with the Election Petition and what was produced as Document No.11 was merely a truncated, doctored and an edited copy thereof. Thus in absence of the original CD containing full video recording of the polling, there was non-compliance of Section 81 (3) thereby making the petition liable to be dismissed. In the case of *Mulayam Singh Yadav Vs. Dharampal Yadav* reported in (2001) SCC 98 this Hon'ble Court in a similar circumstance has held as follows:

> "7. The principal question, therefore, that we have to decide is whether Schedule 14 and the video cassette therein referred to are an integral part of the Election Petition and whether the failure to file the Original thereof in the court along with the Election Petition attracts Section 81 and therefore, Section 86 (1) of the RP Act, 1951.
>
> "11. Whether or not schedule 14 is an integral part of the Election Petition does not depend on whether or not the draftsman of the Election Petition has so averred. It has to be decided objectively, taking into account all relevant facts and circumstances. Schedule 14 is one sof 25 schedules which is, as a matter of fact, part of the bound Election Petition,… Clearly, the video cassette mentioned and verified in schedule 14 is as much an integral part of the Election Petition as the papers and documents mentioned and verified in the other schedules… Further, that the video cassette mentioned and verified in Schedule 14 is a part of the Election Petition and was intended to be such is evident from the affidavit of the first respondent verifying the allegation of corrupt practice made in the Election Petitioner. Therein, the first respondent has verified the correctness of what is stated in para 83 of the election petition, which refers to schedule 14 and which has been quoted above and to schedule 14 itself. Yet again,

> that the video cassette mentioned and verified in schedule 14 is and was intended to be a part of the Election Petition is shown by the fact that 15 video cassettes which were copies of the video cassettes mentioned and verified in schedule 14 were filed in the High Court along with the Election Petition for being served upon the respondents."
>
> "13. We are, therefore, satisfied that the video cassettes mentioned and verified in schedule 14 is an integral part of the Election Petition and that it should have been filed in Court along with copies thereof for service upon the respondents to the Election Petition. Whereas 15 copies thereof were filed for serving upon the respondents, the video cassette itself was not filed. The Election Petition as filed was, therefore, not complete."

13. It is further to be noted that in order to make out a cause of action for challenging the election under Section 100 (1) (d) (iii) (iv) all the material facts have to be pleaded which are necessary to show that the election of the returned candidate was 'materially affected' by the improper reception of votes or improper reception of any vote which is void or by non-compliance of the provisions of the Constitution or of the Act or of the rules or orders made under the Act. In the present case, petitioner's only allegation is that certain votes were improperly accepted because of non-observance of the election rules. According to the petitioner, these disputed votes which are more than the margin of votes between the returned candidate and the petitioner are required to be excluded from being considered as valid votes. If these disputed votes, are treated as cancelled and excluded from consideration then according to the petitioner he receives majority of the valid votes and deserves to be declared as elected. These allegations, as has been rightly held by the High Court, are not sufficient to demonstrate as to how the result of the election in so far it concerned the returned candidate is 'materially affected'. The High Court, in my opinion, has rightly held that

The Election Petitioners only point out a possibility of the result of election being different if 14 or 5 votes can be excluded. It is not their case that the said votes when displayed revealed that they were in favour of Rajendra and not in favour of Ashok. The petitioners have not pointed out the beneficiary of those 14 or 5 votes. It is not their plea that all those voters cast their vote in favour of returned candidate or did not cast in favour of defeated candidate. There is no plea about their political affinities either to associate or disassociate with any political party. The said votes now cannot be traced out or segregated. Hence when 'displayed' what was seen and the vote was cast in whose favour ought to have been pleaded which is missing. Thus, link between the victory and lacunae/omissions is pre-requisites to formation of this opinion. A triable issue cannot be said to arise till then as no cause of action surfaces.

14. In absence of any allegation that the disputed votes were cast in favour of the returned candidate, the petitioner failed to make out a case that the election was 'materially affected' merely on the ground of alleged improper acceptance of the said votes. The material fact which ought to have been pleaded in the Election Petition was not only that the disputed votes ought not to have been accepted, but those votes were cast in favour of respondent No.1 and if they were not so accepted, then the result of the election would be materially affected. These facts become material in the present case especially because the petitioner had not alleged any corrupt practice against the respondent No.1 and the petitioner himself had come up with a case that the ballot papers were displayed to those present in the room were the ballot box had been kept. Pleading these material facts for the first time at the stage in the SLP is impermissible and cannot be taken cognizance of. Thus, the contention of the respondent that the material facts so as to make out a cause of action have not been pleaded stands vindicated.

15. The present SLP is devoid of merits and substance also in view of the recent judgment of *Kalyan Kumar Gagoi Vs.*

Ashutosh Agnihotri reported in 2011 (1) SCALE 516 wherein it was held as follows:

> "14. It may be mentioned here that in this case non-compliance to the provisions of Representation of People Act, 1951 and the Election Rules of 1961 was by the officers, who were in charge of the conduct of the election and not by the elected candidate. It is true that if clause (iv) is read in isolation, then one may be tempted to come to the conclusion that any non-compliance with the provisions of the Constitution or of the Act of 1951 or any Rules of 1961, Rules or Orders made under the Act would render the election of the returned candidate void. But one cannot forget the important fact that clause (d) begins with a rider, namely, that the result of the election in so far it concerns a returned candidate must have been materially affected. This means that if it is not proved to the satisfaction of the court that the result of the election in so far as it concerned a returned candidate has been materially affected, the election of the returned candidate would not be liable to be declared void notwithstanding non-compliance with the provisions of the Constitution or of any Rules of 1961, Rules or Orders made thereunder. It is well to remember that this Court has laid down in several reported decisions that the election of the returned candidate should not normally be set aside unless there are cogent and convincing reasons. The success of a winning candidate at an election cannot be lightly interfered with. This is all the more so when the election of a successful candidate is sought to be set aside for no fault of his but of someone else. That is why the scheme of Section 100 of the Act especially clause (d) of sub-section (1) thereof clearly prescribes that in spite of the availability of grounds contemplated by sub-clauses (i) to (iv) of clause (d), the election of a returned candidate cannot be voided unless and until it is proved that the result

of the election in so far as it concerns a returned candidate is materially affected."

16. It is further worthwhile to take note of the legal position reflected in the decision of the Court in the matter of *Vashisht Narain Sharma Vs. Dev Chandra and Others,* AIR 1954 S.C. 513 wherein this Court observed as follows:

> "It is not permissible in law to avoid the election of the returned candidate on speculation or conjectures relating to the manner in which the wasted votes would have been distributed amongst the remaining validly nominated candidates ..... In the absence of positive proof of material effect on the result of the election of the returned candidate, the election must be allowed to stand and the Court should not interfere with the election on speculation and conjectures."

When the case of the petitioner/appellant is examined on the anvil of the aforesaid position and on the prevailing facts, it is apparent that the petitioner/appellant is indulging in a process which amounts to speculation and conjecture in absence of material particulars; for instance, if it were the specific plea of the petitioner that all 14 votes or at least 4 votes which were cast in which the voters were alleged to have been accompanied by another person were in fact polled in favour of the respondent so as to influence the election result, the plea of the petitioner could be held as amounting to materially affecting the election result. But in absence of this candid relevant and factual detail, the election petition obviously is based only on such averment, which will have to be held speculative and conjectural in nature and can hardly be held to be disclosing 'material facts with material particulars' so as to conclude that it materially affected the result of the election. Even assuming that the election petition were to be allowed in spite of absence of such material particulars, the net result would be the recounting of the votes by declaring 14 votes as invalid which were alleged to have been polled in breach of the

election rules but could hardly be identified or deciphered. To clarify it further, it may be stated that even if the election petition were to be allowed by declaring the 14 votes as invalid, it is inconceivable as to how those 14 votes which were alleged to have been polled by those voters who had been accompanied by another person could be identified so as to hold that the alleged invalid votes materially affected the result of the election.

17. What is sought to be emphasized is that in the absence of any identification mark of those votes which are alleged to have been polled by voters accompanied by another person and is alleged to be in breach of the Rules cannot possibly be identified so as to treat them as invalid votes and if that is so, the election petition is clearly based on vague material and hence would be unjust to allow the election to be questioned by entertaining the election petition where the losing candidate/ the petitioner had himself not alleged any corrupt practice in holding the election but merely a breach of the election rule in regard to which he had not complained at all at the time of election or even thereafter but straightway filed the election petition challenging the election on the basis of an alleged CD after the election result was declared. Thus, the entertainment of an election petition on such speculative material can hardly be held to be disclosing material facts with material particular which would justify the challenge to an election by entertaining an election petition as the same does not spell out material particulars which would affect the election result.

18. It is well settled legal position that no evidence can be led on a matter unless there is a pleading thereon. Therefore, unless it was pleaded that the invalid votes were cast in favour of the returned candidate, no evidence can be led to that effect. In a petition seeking to challenge an election on the ground stated in Section 100 (1) (d) (iii) and (iv), it was imperative for the petitioner to plead the most crucial and vitally material fact that the invalid votes were cast in favour of the returned

candidate because then alone could it be pleaded and proved that "the result of the election, in so far as it concerns a returned candidate, has been materially affected" within the meaning of Section 100 (1) (d). The words "in so far as it concerns a returned candidate" and "has been materially affected" read with clauses (iii) and (iv) clearly show the legislative intent to place the burden of pleading and proving that the improper reception of votes or violation of law in regard to casting of votes benefited the returned candidate and materially affected his election as a returned candidate. It is not enough to show mere improper reception of votes or reception of votes or non-compliance with law. In addition it has to be pleaded and proved that this materially affected the election in so far as it concerns the returned candidate. The language of Section 100 (1) (d) (iii) and (iv) itself clearly indicates the requirement of pleading the vitally material fact that the votes were improperly or unlawfully cast in favour of the returned candidate. In the present case, lack of pleading that the votes were cast in favour of the respondent leads to absence of cause of action for the petition for invalidating the election under Section 100 (1) (d) (iii) and (iv).

19. Thus, merely because the margin of difference between the winner and the loser was four votes and five votes were disputed by the petitioner would not give rise to any valid cause of action. The petitioner's contention in this regard is unsustainable in law. Thus, the ratio of the judgment in the case of *Mayar (HK) Ltd Vs. Owners & Parties,* (2006) 3 SCC 100 is of no assistance to the petitioner as it is settled legal position that merely because the wasted votes or accepted or rejected votes are more than the margin, it cannot be said that the election has been materially affected.

20. Since the petitioner had failed to plead material facts as contemplated under Section 83 (1) (a) of the RP Act, which alone could give cause of action for claiming that the election of the respondent was materially affected within the meaning

of Section 100 (1) (d) (iii) and (iv), the petition was rightly dismissed. In the matter of *T.H. Musthaffa Vs. M.P. Varghese* (Supra), this Court relying upon the ratio of this Court in *Jabar Singh Vs. Genda Lal,* (1964) SCR 54, it was held that the scope of the enquiry in a case under Section 100 (1) (d) (iii) is to determine whether any votes had been improperly cast in favour of the returned candidate or any votes had been improperly refused or rejected in regard to any other candidate. These are the only two matters which would be relevant for deciding whether the election of a returned candidate had been materially affected or not. But, in view of the facts of this case where the petitioner has failed to disclose as to whether the alleged improper reception of 14 or 5 votes were cast in favour of which candidate, it is clear that the election petition failed to disclose material particulars in this regard so as to give rise to a cause of action apart from the fact that no objection was raised at the time of actual polling.

21. I thus find substance in the view taken by the High Court in the impugned judgment, that the election petitioner herein has only pointed out a possibility of result of election being different if 14 or 5 votes were to be excluded from counting. The High Court appears to be correct in my view while stating that the case of the petitioner is not that the said votes reveal that they were in favour of respondent - Rajendra or not in favour of petitioner - Ashok. But the objection is only that those votes ought not to have been taken into consideration while counting the votes. As already stated in absence of identification of those votes which are alleged to have been cast by the voters in the company of another person, it would be difficult to identify them so as to infer as to which are the votes which ought not to have been reckoned for counting by declaring them invalid. In that event even if the petitioner's election petition were to be allowed, the entire trial would result into an exercise in futility leading the controversy nowhere. It is in view of this inevitable consequence that I hold that the election petition filed by the petitioner indicates absence of 'material particulars' which

materially affected the result of the election so as to entertain a challenge to the same. To contend that the alleged breach of secrecy would render the entire election result as void so as to order for a repoll in spite of absence of any objection by the defeated candidates or his representative in this regard at the time of polling would be an outrageous contention in my view which is fit to rejected outright. Fortunately, this is not even the contention of the petitioner and rightly so, as he has confined his challenge only to the extent of challenging the validity of 5 or 14 votes alleging breach of secrecy, which materially affected the election result. This contention is extremely fragile and hence has no force for the reasoning recorded hereinbefore.

22. I am, therefore, conclusively of the view that the impugned judgment and order of the High Court is not required to be interfered with and the election petition was rightly held to be fit for rejection for want of material facts and material particulars which could materially affect the result of the election.

ORDER

In view of conflicting views expressed by us, we refer this matter to a three Judge Bench for resolving the conflict. The Registry shall place the record before Hon'ble the Chief Justice of India for constituting an appopriate Bench.

B.B.B. Matter referred to Larger Bench.

VOLTAS LIMITED
v.
TEHSILDAR, THANE & ORS.
(Civil Appeal No. 8557 of 2003)

NOVEMBER 8, 2012

[G.S. SINGHVI AND SUDHANSU JYOTI MUKHOPADHAYA, JJ.]

Land Acquisition Act, 1894 – Land Acquisition (Companies) Rules, 1963 – State Government acquired land and issued order of allotment in favour of appellant-company – High Court held that there was a breach of terms and conditions of the order of allotment and, therefore, it was open to the respondents to take appropriate proceedings in accordance with law, including recovery of unearned income – Justification – Held: From the terms and conditions of the allotment order, it is apparent that a restriction was imposed on appellant-company to transfer the land or change use of the land etc. only with prior permission of the State Government – Appellant-company had decided to develop the land as per Housing Scheme through a Developer and had so intimated to the State Government which agreed to the proposal – State Government thus allowed the appellant-company to change the use of the land and to develop it for purposes other than that for which it was originally allotted and such permission was in accordance with the terms and conditions mentioned in the order of allotment – High Court therefore erred in holding that appellant-company breached terms and conditions of the order of allotment – Further, the order of allotment and the housing scheme did not stipulate any charge on the unearned income – Nothing on record to suggest the basis on which the respondents determined such unearned income – Also no prior hearing was given to the appellant-company – Settled law that no Penal order can be

passed without giving any notice and hearing to the affected person – Impugned orders were passed without giving such notice and hearing to appellant-company; thus passed in violation of the Rules of Natural Justice – Matters remitted to Competent Authority to decide whether appellant-company was liable to pay any amount towards unearned income.

The Government of Maharashtra acquired the land in question in favour of the appellant–company and issued a Sanad (order of allotment) with the specific condition that the Company shall not in any way whatsoever, alienate the said land or any portion thereof by way of sale, mortgage, gift, lease, exchange or otherwise howsoever except with the prior permission in writing, of the Government. It was also mentioned in the order of allotment, that the land will be vested with the company and shall be held by it as its property, to be used for the purpose of constructing dwelling houses for workmen employed by the Company and the provisions of the amenities directly connected therewith, subject to the provisions of the Maharashtra Land Revenue Code, 1966 and the Rules framed thereunder. After about 24 years, the order of allotment was stayed and the Company was called upon to show cause as to why the land should not be forfeited and the amount of Rs.14,11,45,851/- towards unearned income be not charged as it violated the terms and conditions of the order of allotment by granting rights to the developers for the construction of houses and selling them after development, thereby benefiting to a large extent. After submission of their reply, the respondents issued the impugned orders imposing charge towards unearned income and the demand notice, against which two writ petitions were preferred by the Company. Both the writ petitions were dismissed by the impugned common judgement passed by the High Court which held that there was a breach of terms and conditions of the order of allotment and, therefore, it was

open to the respondents to take the appropriate proceedings in accordance with law, including the recovery of unearned profit.

In the instant appeals, the following questions arose for consideration: (i) whether the appellant-company breached any of the terms and conditions of the order of allotment; (ii) whether the notice of demand of 50% of unearned income was legal and valid; and (iii) whether the appellant-company was required to be heard before passing of the impugned orders.

Allowing the appeals, the Court

HELD: 1.1. The conditions at Clauses 2, 4, 5, 7 and 10 of the 'order of allotment' dated 20.1.1969 relate to conditional restrictions on the alienation of land or its use for any purpose other than that for which it was allotted. From the terms and conditions of the order of allotment, it is apparent that there is a restriction imposed on the appellant-company to transfer the land or change of use of the land etc. which can be made only with a prior permission of the State Government. [Paras 20, 21] [525-H; 526-A; 528-F]

1.2. The appellant-company decided to develop the land as per the Housing Scheme dated 11.1.1984 through the Developer M/s Eversmile Construction Company Pvt. Ltd. This was intimated to the State Government which agreed to the proposal, as is clear from the State Government's letter dated 2.12.1989 issued from the Department of Housing and Special Assistance, Government of Maharashtra, Bombay. The State Government at the request of the Developer, M/s Eversmile Construction Company Pvt. Ltd. also extended the period of completion for the housing scheme, vide letter dated 25th June, 1991. [Para 27] [539-B-D]

1.3. It is therefore held that the State Government allowed the appellant-company to change the use of the land and to develop the surplus land for purposes other than that for which the said land was originally allotted and such permission was in accordance with the terms and conditions as mentioned in the order of allotment dated 20.1.1969. The first question is thus answered in negative, in favour of the company. [Para 28] [539-D-E]

2.1. The order of allotment dated 20.1.1969 and the housing scheme dated 11.1.1984 do not stipulate any charge on the unearned income of the Company. The respondents have failed to show the provision under which the Company is required to pay 50% of its unearned income. [Para 29] [539-F]

2.2. The communication dated 2.12.1991 between the Additional Secretary of the State and the Competent Authority discloses the entitlement of the State to charge part of the unearned income in certain cases where lands have been provided to the industrial units after acquiring land under the Urban Land Ceiling Act but part of which is subsequently declared surplus under the Urban Land Ceiling Act but allowed to be retained. As per the said guideline, in case, the land acquired is declared excess but allowed to be retained by a scheme framed under Section 21 of the Urban Land Ceiling Act, then 50% of the unearned income is to be recovered subject to the conditions prescribed therein. [Para 30] [539-G-H; 540-A-B]

2.3. The respondents failed to show the category to which the appellant-company belongs for determining its liability towards unearned income. The respondents have not produced GO dated 21.11.1957; in absence of 1957 policy it is not possible to decide whether the company is liable to pay any amount towards unearned income as per the said policy. The second question is, therefore, not answered and left open for determination. [Paras 31, 32] [542-B-C]

3. Admittedly, no hearing was given to the Company before passing the impugned orders. There is nothing on record to suggest the basis on which the respondents determined the unearned income. It is a settled law that no Penal order can be passed without giving any notice and hearing to the affected person. In the present case, admittedly, the impugned orders were passed without giving such notice and hearing to the company; the impugned orders were passed in violation of the Rules of Natural Justice. The third question is thus answered in affirmative in favour of the company. [Para 33] [542-D-F]

4. The High Court failed to notice the facts of the case and erred in holding that the Company breached terms and conditions of the order of allotment. The impugned orders and the demand notice dated 6.3.2002 issued by the Collector and the order passed by the High Court are set aside. The matters are remitted to the Competent Authority to decide whether the Company is liable to pay any amount towards part of the unearned income. [Para 34, 35] [542-F-H; 543-A]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8557 of 2003.

From the Judgment & Order dated 10.03.2003 of the Division Bench of Bombay High Court in Writ Petition No. 1481 of 2002.

WITH

Civil Appeal No. 8558 of 2003.

Shyam Divan, Pratap Venugopal, Anuj Sarma for the Appellant.

Uday B. Dube, Asha Gopalan Nair for the Respondents.

The Judgment of the Court was delivered by

SUDHANSU JYOTI MUKHOPADHAYA, J. 1. The Government of Maharashtra acquired the land in question in favour of the appellant - Voltas Limited, (hereinafter referred to as 'Company' for short) and issued a Sanad (order of allotment) with the specific condition that the Company shall not in any way whatsoever, alienate the said land or any portion thereof by way of sale, mortgage, gift, lease, exchange or otherwise howsoever except with the prior permission in writing, of the Government. After about 24 years, the order of allotment was stayed and the Company was called upon to show cause as to why the land should not be forfeited and the amount of Rs.14,11,45,851/- towards unearned income be not charged as it violated the terms and conditions of the order of allotment by granting rights to the developers for the construction of houses and selling them after development, thereby benefiting to a large extent. After submitting their reply, the respondents issued the impugned orders against which two writ petitions were preferred by the Company for setting aside the orders imposing the charge towards unearned income and the demand notice, both of which were dismissed by the impugned common judgement dated 10th March, 2003. The Division Bench of the Bombay High Court held that there was a breach of terms and conditions of the order of allotment and, therefore, it was open to the respondents to take the appropriate proceedings in accordance with law, including the recovery of unearned profit.

2. For proper understanding of the question involved, it is necessary to state a few facts as hereunder:

The appellant, a Public Limited Company engaged in manufacturing air conditioners, refrigerators and other items, set up a factory in the year 1966 at Thane, to carry out manufacturing activities and for the said purpose, purchased land admeasuring about 98,000 sq. mtrs. at village Majiwada

from a private party. For additional land needed to effectively continue with the manufacturing process, the Company approached the Government of Maharashtra with the request to acquire land for the company under the provisions of the Land Acquisition Act, 1894 read with the Land Acquisition (Companies) Rules, 1963. On its request, the State of Maharashtra acquired more than one lakh square metres of land and handed it over to the Company. An order of allotment was issued in favour of the Company on 20.1.1969 with certain terms and conditions mentioned in the said order, the Condition No.7 of which reads as under:

> "The Company shall not in anywise whatsoever alienate the said land or any portion thereof by way of sale, mortgage, gift, lease, exchange or otherwise howsoever except with previous permission in writing of the Government."

3. It was also mentioned in the order of allotment, that the land will be vested with the Company and shall be held by it as its property, to be used for the purpose of constructing dwelling houses for workmen employed by the Company and the provisions of the amenities directly connected therewith, subject to the provisions of the Maharashtra Land Revenue Code, 1966 and the Rules framed thereunder. It was also stipulated that, except with the previous permission in writing of the Government, the land shall not be transferred, for any purpose other than that for which it was acquired. A condition regarding the construction of work was also imposed, with a further proviso, that should the Company commit a breach of the terms and conditions, the transfer of land in favour of the Company would be treated as null and void and the land would revert back to the Government.

4. In the year 1976, the Urban Land (Ceiling and Regulation) Act, 1976 (hereinafter referred to as "the Urban Land Ceiling Act") came to be enacted. In accordance with the

provisions of Section 20 of the Urban Land Ceiling Act, the Company submitted an application for holding land in excess of the ceiling limit by grant of an exemption. The Company also made an application under Section 21 of the Urban Land Ceiling Act on 23.3.1979 for granting an exemption for utilising the land for construction of dwelling units to accommodate the weaker sections of society. Pursuant to the application, a Scheme under Section 21 of the Urban Land Ceiling Act was passed by the competent authority on 11.1.1984, permitting the Company to use the land for the stated purpose.

According to the Company, it complied with the said order and to implement it, entered into an agreement with one "Eversmile Construction Private Limited" (hereinafter referred to as 'developers), for development of the land.

5. Since one of the conditions of the allotment order, was that the Company could not alienate the land in any manner without prior permission of the Government, the Company wrote a letter to the Collector and also to the Competent Authority, Thane on 30.9.1986 and sought clarification as to whether the conditions imposed under the Exemption Orders dated 11.1.1984 would prevail over and supersede the conditions of the order of allotment dated 20.1.1969. In reply to the said letter the Deputy Collector and Competent Authority, Thane, Urban Agglomeration issued a clarification on 29.10.1986 stating that the condition relating to alienation of land without prior permission as mentioned in the order of allotment, would stand overridden by the terms of exemption granted under Section 21, which reads as follows:

> "With reference to your above letter I have to inform you that the conditions stipulated in this office Order No. ULC/ TA/F-62/SR-18 dated 11.1.1984 though inconsistent with the conditions of the original sanad, having over riding effect, stand operative (vide section 42 of the Urban Land (Ceiling & Regulation) Act, 1976."

6. In the meantime, at the instance of the Company and permission of the State Government, the Developer proceeded with the following work:

> Filed applications to the municipal and other authorities for commencement of work; Cutting and falling of trees and filling of land; Construction of roads as per development plans; Laying down of sewerage lines and water lines; Recreational area providing gardens, parks, pathways, plantation of trees etc.; Sub-stations and electrical cabling etc.
>
> On getting permission, over 1200 flats were constructed and possession of over 600 flats was given in between July 1986 and 1989.

7. A writ petition was filed by certain employees before the Bombay High Court in Writ Petition No.2197 of 1987, challenging the exemption order dated 11.1.1984, issued under Section 21 of the Urban Land Ceiling Act and the order granting development of the land. The said writ petition was dismissed by the Bombay High Court on 18.6.1987.

8. In spite of the dismissal of the writ petition, after 25 years of implementation of the housing scheme, the Collector, Thane stayed the said scheme by a letter dated 15.2.1989 followed by the letter dated 27.2.1989.

The stay order was however not given effect which is clear from the order dated 25.6.1991, issued by the State Government, whereby the application filed by the builder was entertained and he was further allowed an eight years extension for completion of the housing project.

9. Pursuant to the information sought for by the Competent Authority, the Additional Secretary, Housing & Special Assistance Department, Government of Maharashtra by its letter dated 2.12.1991 informed the Competent Authority about

the Government policy with regard to lands originally acquired for industrial units but part of which were subsequently declared excess under the Urban Land Ceiling Act. By the said letter, the circumstances under which 50% of the unearned income can be recovered from the land holder, if allowed to be retained and developed, was intimated.

10. In the meantime, the State Government granted further extension to the builder for completion of the housing project by orders dated 29.12.1993 and 1.7.1999.

11. While the work was in progress, the Collector by letter dated 5.2.2002 informed the Company that the land allotted to it for construction of residences for its employees, was not utilized for the said purpose and instead the developer had been given the right for construction of the housing project and to sell them after development. It was alleged that by such action, the Company breached the terms and conditions of the order of allotment and, thereby, was liable to pay 50% of its unearned income to the State Government. As such the amount had not been deposited, the Company was asked to show cause as to why the land should not be confiscated.

12. The Company denied the allegation and explained vide reply dated 15.2.2002 but the same was not taken into consideration. The Collector vide impugned order dated 18.2.2002 held that the Company breached the terms and conditions of the order of allotment and thereby was liable to pay 50% of the difference amount of the unearned income amounting to Rs. 14,11,45,851/-.

13. Being aggrieved the Company moved before the High Court. Initially a writ petition, W.P.No.1481 of 2002 was filed by the Company to set aside orders dated 5.2.2002, 18.2.2002 and the demand notice dated 6.3.2002. During the pendency of the said writ petition, the respondents issued orders dated 30.3.2002, 13.5.2002 and 9.10.2002 and called upon the

Company to pay 75% of the amount, i.e. Rs.5,63,70,555/- towards 'unearned income', which was challenged by the Company in the second writ petition, W.P. No.7457 of 2002.

14. The respondents in their counter-affidavit informed the High Court that they have no objection if the matter is remanded to the Collector, for fresh determination. Accordingly, the order of demand was set aside and the matter was remitted to the Collector, Thane for a fresh determination of "unearned income" but with adverse observations against the Company.

15. The arguments of the learned counsel for the Company are as follows:

(a) In absence of a specific finding regarding breach of any condition, the proceeding against the Company is not warranted.

(b) In view of Section 42 of the Urban Land Ceiling Act, the conditions mentioned in the housing project scheme dated 11.1.1984 has an overriding effect on the conditions specified in the original order of allotment.

(c) The Company is not liable to pay any portion of differential amount of the unearned income, in absence of its determination; and

(d) In absence of any notice and hearing given to the Company, the demand for payment of a portion of unearned income is violative of the principles of natural justice and fair play.

16. The learned counsel for the respondents countered this argument by stating that the additional land was acquired in favour of the Company which was to be used for the stated purpose. The terms and conditions have been specified in the order of allotment dated 20.1.1969. They are applicable to the total acquired land, including the land which was declared to

be in excess and allowed to be retained. The principal object was the construction of dwelling houses for the workmen employed by the Company and for providing amenities to them. As per the terms and conditions, the Company cannot alienate the land or any part thereof, either by way of sale, mortgage, gift, lease or otherwise. In the event of a breach of condition, the transaction can be declared null and void and the land would revert back to the State Government.

It was further contended that the Company constructed a huge housing and commercial complex known as "Vasant Vihar" in contravention of terms and conditions. For the said reason the notice for reverting the land was rightly issued on the Company. Further, as the Company disposed the land in favour of the builder, it was asked to deposit 50% of the difference of the unearned income, which is legal and in accordance with the law.

17. We have heard the learned counsel for the parties and perused the record.

18. The correctness of the impugned order can be determined with reference to the following questions:

(i) whether the Company breached any of the terms and conditions of the order of allotment;

(ii) whether the notice of demand of 50% of unearned income is legal and valid; and

(iii) whether the Company was required to be heard before passing of the impugned orders;

19. We will first consider the question in regard to the breach of the terms and conditions of the order of allotment, if any, committed by the Company.

20. The conditions at Clauses 2, 4, 5, 7 and 10 of the

'order of allotment' dated 20.1.1969 relate to conditional restrictions on the alienation of land or its use for any purpose other than that for which it was allotted and read as follows:

"2. The Company shall -

(i) Not, except with the previous sanction in writing, of the Government use the transferred land for any purpose other than that for which it is acquired;

(ii) undertake the work of erecting, constructing building or buildings required by the Company within six months from the date on which possession of the said land is handed over to the Company and complete the case within three years from the aforesaid date;

Provided that if the Government is satisfied, after making such enquiry as it may deem necessary that the company was prevented by reasons beyond its control from erecting, constructing or executing the buildings within the aforesaid period of three years, it may extend the time for completion by a period not exceeding one year at a time.

Provided further that the total period of extension shall not exceed three years.

(v) not use the said land or any building or work that may be erected or executed upon it for any purpose which in the opinion of the Government is objectionable.

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4. (a) If the Company commits a breach of any of the terms and conditions hereof, Government may make an order declaring that the transfer of the said land to the Company is null and void and thereupon the said land shall revert back to the Government and the Government

may by the said order further direct that an amount not exceeding one-fourth of the account paid by the Company to the Government as cost of acquisition under Sub-section (1) of Section 41 of the said Act, shall be forfeited to the Government as damages and the balance shall be refunded to the Company. The order so made shall be final and binding on the Company.

(b) The Company may with the previous permission in writing of the Government and within three months from the date of the Government Order passed under rule 5(1)(iv) of the said Rules declaring the transfer of the said land to the Company as null and void, remove all such buildings, erections or structures as may be then standing upon the said land shall deliver up the said land to the Government in good order and levelled to the satisfaction of the Executive Engineer, Thane Division.

5. If the Company utilises only a portion of the said land for the purpose for which it has been acquired and Government is satisfied that the Company can continue to utilise the portion of the said land used by it, even if the unutilized part thereof is resumed, Government may, make an order declaring the transfer of the said land with respect to the unutilised portion shall revert back to the Government and Government may by the said order further direct that an amount not exceeding one-fourth of the amount paid by the Company as cost of acquisition under sub-section(1) of Section 41 of the said Act, as is relatable to the unutilized portion and be forfeited to the Government as damages and the balance of the portion shall be refunded to the Company. The order so made shall be final and binding on the Company. Provided further that the order referred to in this condition shall not be made, unless the Company has been given as opportunity of being heard in the matter and that there is

any dispute the said land such dispute shall be referred to the Court within whose jurisdiction the said land or any part thereof, is situated and the decision of that Court thereon, shall be final and binding on the Company.

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7. The Company shall not analyse whatsoever alienate the said land or any portion thereof by way of sale, mortgage, gift, lease, exchange or otherwise however except with previous permission in writing of the Government.

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10. Any moneys payable to the Government by the Company or any persons claiming under it by reason of any term and condition imposed by the Government as aforesaid shall without prejudice to any other rights and remedies of the Government be recovered from the Company or such person/s as arrears of land revenue."

21. From the terms and conditions of the order of allotment, it is apparent that there is a restriction imposed on the Company to transfer the land or change of use of the land etc. which can be made only with a prior permission of the State Government, such as;

(i) No land can be transferred for any purpose other than that for which it is allotted without prior permission of the State Government. **[Clause 2(i)]**.

(ii) The construction to be completed within the prescribed time frame. Extension of time for completion of the construction of buildings etc. can be granted only by the State Government **[Clause 2(ii)]**.

(iii) The Company cannot alienate the land or any portion thereof by way of sale, mortgage, gift, lease, exchange or otherwise except with the prior permission of the State Government in writing **[Clause 7]**

The following penal clause has also been specified:

(i) In case the Company commits any breach of conditions and transfers the land or portion thereof or changes the use of the land other than for the stated purpose without prior permission, the Government may declare the transfer as null and void and revert back the allotted land to itself **[Clause 4(a)]**.

(ii) In case the Company utilises only a portion of the land for the stated purpose and does not use the rest of the portion of the land within the specified period, the State Government may revert back such unutilised portion of land and may direct that an amount not exceeding one-fourth of the amount paid by the Company for the cost of acquisition, as is relatable to the unutilised portion, be forfeited as damages **[Clause 5]**.

However, no such final order can be passed without giving an opportunity of hearing to the Company as per the proviso to Clause 5, which reads as follows:

> *"Provided further that the order referred to in this condition shall not be made, unless Company has been given an opportunity of being heard in the matter and that where there is any dispute in the said land such dispute shall be referred to the Court within whose jurisdiction the said land or any part thereof, is situated and the decision of that Court thereon, shall be final and binding on the Company."*

22. Admittedly, regarding that portion of the acquired land which was declared surplus, the Company wanted to retain it for weaker section. On an application filed by the Company, the Competent Authority approved the housing scheme under

Section 21(1) of the Urban Land Ceiling Act by its letter dated 11.1.1984 with conditions and restrictions, as follows:

"Circle No.ULC/TA/F-62/SR-18
Collectorate and Competent Authority to:
Thane Urban Agglomeration,
Collectorate, Thane

Dated: 11.1.1984

Read: The Scheme approved by the Collector and the Competent Authority No.3, Thane's Order No.ULC/TA/F-62/II dated 13.2.1979.

2) The declaration filed by M/s. Voltas Ltd. under Section 21(1) of the Urban Land (Ceiling and Regulation) Act, 1976.

DECLARATION UNDER SECTION 21(1) OF THE URBAN LAND (CEILING AND REGULATION) ACT, 1976

WHEREAS M/s. Voltas Limited holds vacant land in excess of the ceiling limit in the Thane Urban Agglomeration the details of which are given in the Schedule I, hereto appended;

AND WHEREAS the said declarant has applied to hold the said land in excess of the ceiling limit for undertaking construction of houses for Weaker Section of the Society under Section 21(1) of the Urban Land (Ceiling & Regulation) Act, 1976;

AND WHEREAS the Competent Authority is satisfied that having regard to the location of the land the purpose for which the land is proposed to be used;

AND WHEREAS the Competent Authority is satisfied that the scheme contained in this declaration for construction

of houses for weaker section of the society by M/s. Voltas Ltd. is in conformity with the scheme approved by the Authority specified in this regard by the State Government;

NOW THEREFORE in exercise of the powers conferred by sub-section (1) of Section 21 of the Act, after having recorded in writing the reasons for making this order, the Competent Authority, hereby allows the said declarant to continue to hold the vacant land in excess of the ceiling limit for construction of houses for weaker section of society, as specified in Schedule I, subject to the following terms and conditions:

(1) Any construction of tenements for weaker section of society under the Scheme by the said declarant shall necessarily be in accordance with the prevailing Municipal Corporation Regulations, Town Planning requirements and such other regulations. In case land development is necessary before construction, it shall be carried out by the said declarants at their own cost. The vacant plots for school, shopping centre, dispensary, recreational ground etc. shall be provided in the layout shall be constructed by the said declarant at their own cost.

(2) The said M/s Voltas Ltd. shall utilise at least 33% of the permissible built up area as per density regulations under this Scheme.

(3) The land allowed to be retained in excess of the ceiling limit under this order shall be fully utilized by the said declarant for the purpose of construction of tenements of the plinth area not exceeding 40 sq. mtrs. and tenements having plinth area less than 80 sq. mtrs in respect of the lands specified at Annexure-I.

(4) The said M/s. Voltas Ltd. on receipt of the exemption shall commence construction within a period of two years and shall complete the project within a period of six years.

(5) The said M/s Voltas Ltd. shall reserve 10% of the dwelling unit for the sale to the allottees nominated by the Government and additional 10% tenements shall be received for the sale to the nominees of Collector, Thane.

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(7) The said M/s Voltas Ltd. shall not sell or otherwise transfer the dwelling unit to a person if he or his family also owns a dwelling unit in the same urban agglomeration and he shall obtain from the intending purchasers of dwelling unit an affidavit to this effect.

(8) The selling price of the 10% tenements to be sold to Government nominees shall not exceed Rs.1345 per sq. mtrs. of plinth area (e.g. Rs.125 per sq.ft. of pinth) area and there will be no price restriction on the remaining 90% tenements to be sold in the open market.

(9) The said M/s Voltas Ltd. shall convey the land under the building the land to be kept open as per building regulations to the buyers of the tenements as and when they form Co-operative Housing Society.

(10) The said M/s Voltas Ltd. shall transfer only tenements constructed under this Scheme or building alongwith the land appurtenant and vacant land to the extent necessary to be kept unbuilt as per the Municipal Regulations and other statutory requirement if in the lay-out for the Scheme the concerned Municipal Authority has stipulated certain reservations for various public amenities such land, as well as the internal roads of the lay-out, shall be transferred by the said declarant to the concerned Municipal Authority without charging any

consideration. Internal roads shall be brought upto the standard laid down by the Municipal Authority before they are transferred.

(11) The entire construction programme shall be regulated by the Maharasthra Ownership flats (Regulation of the promotion of construction, sale, management and transfer) Act, 1965, if the said person collects advances to finance the Scheme from the prospective occupants.

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(15) In case the said declarant fails to complete the housing Scheme and give possession to the intending purchasers, to the extent it is not complied with, the exemption shall be deemed to be withdrawn and the land with structures shall be acquired under the Urban Land (Ceiling and Regulation) Act,76 as if it were vacant land.

(16) If at any time Competent Authority to satisfy that there is breach of any of the conditions mentioned in the order it shall be competent for the Competent Authority by order to withdraw the order from the date specified in the order.

(17) Provided that before making any such order the Competent Authority shall give the reasonable opportunity to the person making representation against the proposed withdrawal.

(18) When order is withdrawn or is deemed to be withdrawn under these conditions the provisions of the Chapter III of the said Act shall apply to the land as if the land has not been allowed to be retained in excess of the ceiling limit under this order.

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(20) Due publicity in the local newspapers should be given by the applicant before starting the booking of the flats.

(21) Declarant shall surrender 30% of their present land under Weaker Section Housing Scheme particularly as shown in "Yellow verge" for public purpose viz. for Maharashtra Housing Area Development Authority.

Sd/-

Collector & Competent Authority No.3

Thane Urban Agglomeration, Thane."

23. A question was raised by the Company as to which of the terms and conditions, including the restrictions imposed by the order of allotment as well as the housing scheme, under Section 21 will prevail over other. The Competent Authority by its reply dated 29.10.1986 clarified and intimated the Company that the conditions and restrictions in the order of allotment as regards the alienation of the land without permission, would be over-ridden by the exemption granted and the terms and conditions mentioned in the order of housing scheme. The said letter reads as follows:

"No. ULC/TA/F.62/SR-18

Office of the Competent Authority
Thane Urban Agglomeration,
Mahatma Phule Sahakar Bhavan,
2nd Floor, Kadva Lane, Thane

Date: 29.10.1986

To,

Estate Manager,
M/s Voltas Limited,
Central Administration Deptt.,

19, J.N. Heredia Marg,
Ballard Estate, Bombay - 400036.

Sub: Exemption order No. ULC/TA/F-62/SR-18

Dated 11.1.84 in respect of land at Majiwade, Thane.

Ref: Your letter Majiwada dated 30.9.1986.

Sir,

With reference to your above letter I have to inform you that the conditions stipulated in this office Order No. ULC/TA/F-62/SR-18 dated 11.1.1984 though inconsistent with the conditions of the original sanad, having over riding effect, stand operative (vide section 42 of the Urban Land (Ceiling & Regulation) Act, 1976.

Yours faithfully,

Sd/-

Dy. Collector &
Competent Authority,
Thane Urban Agglomeration & Kms.
Peripherial Area of Gr. Bombay.

As approved by the Collector."

24. In order to implement the said housing scheme dated 11.1.1984, the Company engaged the builder with the knowledge of the State Government as is apparent from the letters of extension issued by the State Government from time to time including the letter dated 2.12.1989 whereby the State Government extended the period of construction. The letter reads as follows:

"No. HWS-1086/(313)/D/XV.
Housing and Special Assistance Department

Mantralaya, Bombay-400 032
Date: 2.12.89

M/s Eversmile Construction Company Pvt. Ltd.,

Conwood House, Yashodham
Gen. A.K. Vaidya Marg,
Goregaon (East), Bombay - 400 063.

Gentlemen:

Please refer to your letter No. A/ECC/3515(A), dated the 13th November, 1989 seeking clarification regarding the period for completion of the economically weaker section housing Scheme sanctioned on 1,46,610.25 sq. mtrs. of surplus vacant land sanctioned by Collector, Thane u/s. 21 of the Urban Land Ceiling Act, 1976 vide orderNo.ULC/TA/F-62/SR-18, dated 11th Janurary 1984.

Government have now decided that a period of 8 years should be allowed for completion of housing Schemes on land admeasuring 10 acres or more. I am therefore, directed to inform you that your firm has time upto 11th January 1992 for completion of the project. Kindly note that all other terms and conditions of the exemption order remain unchanged and shall continue to be binding upon the landholders M/s. Voltas Ltd. and your Firm.

Yours faithfully,

(S.V. Yadkikar)
Under Secretary to Government

Copy to:

- *Collector, Thane*
- *City Engineer, Thane Municipal Corporation, Thane*

- *Deputy Collector and Competent Authority, Thane Select File"*

25. The completion of the project was extended from time to time and the developer engaged by the Company was granted further time by the State Government by a letter dated 25.6.1991, which reads as follows:

"No. HWS-1086/(313)/D.XV.
Housing & Special Assistance Department
Mantralaya, Bombay-400 032
25th June 1991

Shri. D.N. Shah

M/s Eversmile Construction Company Pvt. Ltd.,
Conwood House, Yashodham
Gen. A.K. Vaidya Marg,
Goregaon (East), Bombay - 400 063.

SUB: Order bearing No. Ulc/Ta/F-62/Sr-18 dated: 11th January 1984

Sir,

Please refer to your letter No. A/ECC/91/862 dated 17th April, 1991 seeking an extension in time for completion of construction on 1,46,610.25 sq. mtrs. of Surplus vacant land which has been permitted to be retained for weaker sections housing vide the captioned order dated 11th January 1984.

2. I am directed to state that in supersession of Govt. letter of even number dated 2.12.1989, the State Govt. is pleased to grant a further extension of 2 years for completion of construction on the exempted land. You would be required to complete construction on or before 11th January 1994.

Yours faithfully,

(S.S. Jadhav)
Under Secretary to Government"

26. In this case, learned counsel for the respondent could not lay his hand on any specific breach of the terms and conditions with regard to the surplus land. There is no allegation of breach of any terms and conditions of the order of allotment in regard to rest of the land which has not been declared surplus.

From the housing scheme dated 11.1.1984 it is apparent that the State Government allowed the change in its utilization for developmental purposes other than stipulated. By the said housing scheme dated 11.1.1984 the excess land was allowed to be developed for construction of the houses for the weaker sections; for school, shopping centre, dispensary, recreationary ground, etc. The Company was allowed to utilise at least 33% of the built up area for its purpose and the rest for other purposes. The development work was done by the Company at its own cost; 10% of the dwelling unit was reserved in favour of the State Government to be sold to its nominated allottees and an additional 10% of the tenements were to be sold to the nominees of the Collector. The sale price of the 10% tenements reserved for the nominee of the State Government was fixed at Rs. 1345/- per sq. mtrs. of plinth area; no price restriction was made for the remaining 90% tenements which are to be sold in the open market. The Company was asked to give due publication in the local newspapers for booking of flats to be sold in the open market with the further condition that 30% of their land was to be surrendered to the Maharashtra Housing Area Development Authority.

27. The Company decided to develop the land as per the Housing Scheme dated 11.1.1984 through the Developer M/s Eversmile Construction Company Pvt. Ltd. This was intimated to the State Government which agreed to the proposal, as is clear from the State Government's letter dated 2.12.1989 issued from the Department of Housing and Special

Assistance, Government of Maharashtra, Bombay. The State Government at the request of the Developer, M/s Eversmile Construction Company Pvt. Ltd. also extended the period of completion for the housing scheme, vide letter dated 25th June, 1991.

28. We, therefore, hold that the State Government allowed the Company to change the use of the land and to develop the surplus land for purposes other than that for which the said land was originally allotted and such permission is in accordance with the terms and conditions as mentioned in the order of allotment dated 20.1.1969. The first question is thus answered in negative, in favour of the company.

29. Turning now to the second question, we find that the order of allotment dated 20.1.1969 and the scheme dated 11.1.1984 do not stipulate any charge on the unearned income of the Company. The respondents have failed to show the provision under which the Company is required to pay 50% of its unearned income.

30. The communication dated 2.12.1991 between the Additional Secretary of the State and the Competent Authority discloses the entitlement of the State to charge part of the unearned income in certain cases where lands have been provided to the industrial units after acquiring land under the Urban Land Ceiling Act but part of which is subsequently declared surplus under the Urban Land Ceiling Act but allowed to be retained. As per the said guideline, in case, the land acquired is declared excess but allowed to be retained by a scheme framed under Section 21, then 50% of the unearned income is to be recovered subject to the conditions prescribed therein which reads as follows:

"NO.ULC 1089 (0007)/D-13

Housing & Special Assistance Department
Mantrallay, Mumbai - 400 032
Date: 2.12.91.

To

The Additional Collector &
Competent Authority,
Mumbai (Pune)

The Dy. Collector & Competent Authority

Thane/Ulhasnagar/Pune/solapur/Kolhapur/Nagpur Nashik

Subject: Lands which have been provided to the Industrial Units after acquiring as per Part Seven of the Land Acquisition Act 1894.

Schemes which have been sanctioned as per Urban Land Ceiling Act, 1976.

Instructions have been given as per the Semi-official letter dated 13.3.1987 bearing some number that as the Government is again entitled for the rights of holding on the lands which have been acquired and provided to the Industrial Units as per the Part Seven of the Land Acquisition Act 1894 but which have not been brought in the use within the prescribed time limit and if such lands will be included by the Industrial Units in the Statement u/s 6 of the Urban Land Ceiling Act 1976 the same should be pointed to the Revenue and Forest Department.

In this connection you are being informed that as per provisions Part Seven of the Land Acquisition Act 1894, if the Schemes have not been actually

started which have been sanctioned u/s 20 and 21 of the Urban Land Ceiling Act 1976, then exemption granted for the lands should be cancelled.

If an accordance with the Exemption Order if the development work on the land which has been acquired/allotted as per Section 20 and 21 is in progress then 50% amount of undecided income in such case should be recovered from the landholder.

If at that time in accordance with the existing Scheme if the landholder had returned 40% and 30% additional land to the Government, then in such case, 50% unearned income should not be recovered.

Sd/-

(H.M. Komalkar)
Additional Secretary,
Government of Maharashtra.

Copy forwarded to:

The Desk Officer,
Desk No.13, 14, 15 and 16
Housing & Special Assistance Department,
Desk 13, Selection File
The Collector, Mumbai

Suburban/Thane/Pune/Nagpur/Nashik/Solapur/Kohapur/ Sangali"

31. In the present case, the respondents have failed to show the category to which the Company belongs for determining its liability towards unearned income.

32. Before this Court the respondents have not produced GO dated 21.11.1957; in absence of 1957 policy it is not possible to decide whether the company is liable to pay any amount towards unearned income as per the said policy. The second question is, therefore, not answered and left open for determination.

33. So far as the third question is concerned, admittedly, no hearing was given to the Company before passing the impugned orders. There is nothing on record to suggest the basis on which the respondents determined the unearned income.

It is a settled law that no Penal order can be passed without giving any notice and hearing to the affected person. In the present case, admittedly, the impugned orders were passed without giving such notice and hearing to the company; the impugned orders were passed in violation of the Rules of Natural Justice. The third question is thus answered in affirmative in favour of the company.

34. The High Court failed to notice the aforesaid facts and erred in holding that the Company breached terms and conditions of the order of allotment.

35. For the reasons aforesaid, we cannot uphold the impugned orders and the demand notice dated 6.3.2002 issued by the Collector and the order passed by the High Court. All the aforesaid orders are accordingly set aside. The matters are remitted to the Competent Authority to decide whether the Company is liable to pay any amount towards part of the unearned income. Before passing such order, the Competent Authority will issue a fresh show cause notice to the company referring therein the rule/order/guideline, if any, pursuant to which the company is liable to pay part of the unearned income.

The company may file an effective show cause reply within four weeks thereof. Thereafter, the Competent Authority after hearing the Company will decide the question and pass an appropriate order in accordance with law. The appeals are allowed with the aforesaid observations and directions but there shall be no order as to costs.

B.B.B. Appeals allowed.

SHANTIBHAI J. VAGHELA AND ANR.
v.
STATE OF GUJARAT AND ORS.
(Criminal Appeal No. 1805 of 2012)

NOVEMBER 9, 2012

[P. SATHASIVAM AND RANJAN GOGOI, JJ.]

Code of Criminal Procedure, 1973 – s.482 – Two minors residing in a Ashram went missing – Couple of days later, their dead bodies found from the bed of the river located by the side of the Ashram – FIR lodged against seven inmates of the Ashram u/s.304 IPC and other offences – Quashed by High Court insofar as s.304 IPC was concerned – Justification – Held: There was absence of any acceptable material disclosing commission of offence u/s.304 IPC – Principal allegations made in the FIR- of not carrying out a prompt search of the missing children; of delay in lodging of formal complaint with the police and failure to take adequate measures to guard the access from the ashram to the river, cannot make out a case punishable u/s.304 IPC – Further, the post mortem report pointed to the possibility of death due to drowning – High Court, thus, did not err in exercising its jurisdiction to interdict investigation of the offence u/s.304 IPC against the accused named in the FIR – Such power, though must be exercised sparingly, has to be invoked if the facts of any given case so demand – This is precisely what the High Court did in the present case without departing from any of the well settled principles of law – Penal Code, 1860 – s.304.

Two children studying and also residing in a Gurukul located in a Ashram went missing. A couple of days later, their dead bodies were found from the bed of the river located by the side of the Ashram. FIR was formally lodged in respect of the incident alleging commission of offences under Section 304/34 of IPC and Section 23 of

the Juvenile Justice (Care and Protection) Act, 2000. Seven inmates of the Ashram were named as accused. The specific stand taken in the FIR was that had a prompt search been carried out, possibly, the children could have been found alive or, at least, the dead bodies could have been recovered earlier so as to enable an effective post-mortem of the bodies to determine the precise cause of death. It was also alleged that the Ashram authorities had advised the parents of the children to resort to various tantric practices to find out about the whereabouts of the children instead of promptly approaching the police. The failure of the said authorities to effectively man the gates behind the ashram adjoining the river bed was also highlighted in the FIR as another omission on the part of the ashram authorities so as to give rise to the commission of the offence of culpable homicide.

The High Court, however, quashed the FIR insofar as Section 304 IPC was concerned, and therefore the present appeals.

Dismissing the appeals, the Court

HELD: 1. Commission of the offence of culpable homicide would require some positive act on the part of the accused as distinguished from silence, inaction or a mere lapse. Allegations of not carrying out a prompt search of the missing children; of delay in the lodging of formal complaint with the police and failure to take adequate measures to guard the access from the ashram to the river, which are the principal allegations made in the FIR, cannot make out a case of culpable homicide not amounting to murder punishable under Section 304 IPC. To attract the ingredients of the said offence something more positive than a mere omission, lapse or negligence on the part of the named accused will have to be present. Such statements are conspicuously absent in the FIR

filed in the present case. A reading of the relevant part of the opinion of the Forensic Medicine Department of the Medical College would go to show that possibility of death of the children by drowning cannot be ruled out. Expert opinion available on record indicates that mere absence of diatom will not exclude the aforesaid possibility. The relevant part of the post mortem report, as extracted, indicates presence of mud in the trachea of the children which fact also point to the possibility of death by drowning. The absence of any injuries on the body of the deceased; the attack on the bodies by wild animals and the possibility of the taking away of the missing organs of one of the deceased by wild animals are all mentioned in the post-mortem report. The said facts cannot be excluded or ignored while construing the prima facie liability of the accused named in the FIR. The absence of any positive material to show the practice of black magic in connection with the incident is another significant fact that has to be taken note of. Taking into account all the aforesaid facts it cannot be said that the High Court, in the present case, had committed any error in exercising its jurisdiction to interdict the investigation of the offence under section 304 IPC against the accused named in the FIR. Such power, though must be exercised sparingly, has to be invoked if the facts of any given case so demand. This is precisely what the High Court had done in the present case without departing from any of the well settled principles of law. Nevertheless, the powers of the Trial Court under Section 216 or Section 323 CrPC will always be available for exercise if subsequent facts would justify resort to either of the provisions. [Paras 19, 20] [562-E-H; 563-A-G]

Asmathunnisa v. State of Andhra Pradesh rep. by the Public Prosecutor, High Court of Andhra Pradesh, Hyderabad **(2011) 11 SCC 259: 2011 (3) SCR 1116;** *Central Bureau of*

Investigation & Ors. v. Keshub Mahindra & Ors. **(2011) 6 SCC 216: 2011 (6) SCR 384; and** *Narmada Bai v. State of Gujarat & Ors.* **(2011) 5 SCC 79: 2011 (5) SCR 729 – relied on.**

Case Law Reference:

2011 (3) SCR 1116	**relied on**	**Para 19**
2011 (6) SCR 384	**relied on**	**Para 20**
2011 (5) SCR 729	**relied on**	**Para 20**

CRIMINAL APPELATE JURISDICTION : Criminal Appeal No. 1805 of 2002.

From the Judgment & Order dated 10.01.2011 of the High Court of Gujarat at Ahmedabad in Special Criminal Application No. 770 of 2009.

WITH

Crl. Appeal Nos. 1806-1807 of 2012.

H.P. Raval, ASG, Colin Gonsalves, Shekhar Naphade, Sevtlana C., Iyyer, Jyoti Mendiratta, Hemantika Wahi, Pinky Behra, Devadatt Kamat, Rajesh Inamdar, Vipin Sandhu, Rauf Rahim, Vikas Malhotra, Sunil Roy, Anando Mukherjee, P.K. Dey, Shriniwas Khalap, Palash Konwar, B.V. Balram Das, Arvind Kumar Sharma, Sanjay Jain for the Appearing Parties.

The Judgment of the Court was delivered by

RANJAN GOGOI, J. 1. Leave granted.

2. The present appeals seek to challenge a judgment dated 10.01.2011 passed by the High Court of Gujarat at Ahmedabad allowing Criminal Miscellaneous Application No. 13519 of 2009 filed by the accused (respondents herein) seeking quashing of the criminal case registered against them under Section 304 of the Indian Penal Code. By its aforesaid order the High Court has also dismissed Special Criminal Application No. 770 of 2009 filed by the appellants, Shantibhai

J. Vaghela and Prafulbhai J. Vaghela, seeking investigation of the aforesaid case against the accused by the Central Bureau of Investigation. The High Court has, however, directed that the proceedings against the accused -respondents so far as the offence under Section 304A of the IPC and Section 23 of the Juvenile Justice (Care and Protection) Act, 2000 may continue.

3. The core facts in which the aggrieved parties had moved the High Court may now be noticed:

The appellants - Shantibhai J. Vaghela and Prafulbhai J. Vaghela, who are related to each other, are the fathers of one Dipesh (born 1998) and Abhishek (born 1999). The aforesaid two children were admitted in Class VI and V respectively in a Gurukul located in an Ashram of Sant Shree Asharamji situated at Motela. They were residing in the Gurukul of the Ashram. On 03.07.2008 both the children had gone to the dining hall of the Gurukul at about 8.00 PM to have their dinner. At the time of taking the attendance of the students after dinner, the watchman, one Shri Naresh Dangar, could not find the children and therefore had informed the said fact to Gruhapati Shri Pankajbhai Saksena. On receipt of the said information the aforesaid person, i.e. Pankajbhai Saksena contacted the appellant - Prafulhai J. Vaghela on telephone to convey the information that the children were not to be found in the Gurukul. Both the appellants - Shantibhai B. Vaghela and Prafulbhai J. Vaghela immediately came to the Gurukul and after meeting Pankajbhai Saksena and some other persons working in the Gurukul, the appellants went in search of the missing children. However, they could not be recovered till about 12.30 AM. At the suggestion of Shri Pankajbhai Saksena that the children may have gone to sleep in some other place the search for the children was abandoned and resumed at about 6.00 AM of the following morning, i.e., 04.07.2008. Though the search had continued throughout the day the children could not be located. The appellants insisted that the Ashram should inform the police about the disappearance of the two children. However, the

Ashram authorities avoided doing so on one pretext or the other and eventually the appellants themselves informed the concerned police station at about midnight of 04/05.07.2008. On 05.07.2008 at about 6.30 PM the dead bodies of the children were found from the bed of the river Sabarmati which was located by the side of the Ashram. The dead bodies were promptly sent for post-mortem examination and, thereafter, were handed over to the respective families for cremation.

4. It appears that there was a public out cry over the incident and the State Government by Notification dated 21.07.2008 appointed a Commission of Inquiry consisting of a retired Judge of the High Court of Gujarat. It appears that an elaborate inquiry/investigation of the incident was carried out, initially, by the Sabarmati Police Station of Ahmedabad city and, thereafter, by the CID Crime Branch under the direct supervision of Deputy Inspector General of Police. In the course of the inquiry, statements of the several inmates of the Ashram were recorded. Of particular significance would be the examination of one Hetalben Swarupbhai who had first noticed the dead bodies floating in the Sabarmati river at about 10.00 AM of 04.07.2008. In the course of the aforesaid inquiry/ investigation summons under Section 160 of the Code of Criminal Procedure were issued to Journalists of different newspapers as well as the electronic media to gather information with regard to the incident in question. Similarly, a press note was also issued in the newspapers asking for information in respect of the incident. However, there was no response to the summons issued or the press note published by the investigating agency. While the aforesaid inquiry/ investigation was continuing, the appellants - Shantibhai J. Vagehla and Prafulbhai J. Vaghela instituted Special Criminal Application No.770 of 2009 in the High Court. In the said application details of the incident, as noticed above, were mentioned by the appellants who had sought an order directing the Superintendent of Police, CBI, Gandhinagar (impleaded as respondent No.2) to register the criminal offence(s) as may be disclosed by the statements made in the application filed

before the High Court and for further directions to carry out a proper investigation in respect of the incident of the mysterious death of the two children.

5. During the pendency of the aforesaid Special Criminal Application No.770 of 2009, FIR dated 07.11.2009 was formally lodged by one Shri H.B. Rajput, Inspector, CID Crime, Gandhinagar in the Gandhinagar Police Station in respect of the incident alleging commission of offences under Section 304/34 of the Indian Penal Code and Section 23 of the Juvenile Justice (Care and Protection) Act. Seven inmates of the Ashram were named as the accused who were suspected to be involved with the offences alleged.

6. The FIR lodged against the seven inmates of the Ashram, in so far as the offence under Section 304 IPC is concerned, came to be challenged before the High Court by the accused named therein. Criminal Miscellaneous Application No. 13519 of 2009 filed by the aforesaid accused was heard along with Special Criminal Application No. 770 of 2009 filed by appellants - Shantibhai J. Vaghela and Prafulbhai J. Vaghela. Both the applications were disposed of by the High Court by the impugned order dated 10.01.2011. As already noticed, the High Court, on the basis of the conclusion that no offence against the accused under Section 304 IPC was made out, has quashed the FIR in so far as the aforesaid provision of the Penal Code is concerned. However, investigation and further steps with regard to the offence under Section 304 A and Section 23 of the Juvenile Justice (Care and Protection) Act is concerned was permitted to continue. The High Court by the aforementioned order also disposed of Special Criminal Application No. 770 of 2009 filed by the two appellants as having become infructuous. Aggrieved by the said aforesaid order dated 10.01.2011 the State of Gujarat and the parents of the deceased children - Shantibhai J. Vaghela and Prafulbhai J. Vaghela have instituted the present appeals. It may be specifically noticed, at this stage, that while the appeals had remained pending before the Court, charge sheet dated

31.08.2012 under section 304-A/34 and section 114 IPC as well as Section 23 of the Juvenile Justice (Care and Protection) Act has been submitted against the 7 accused named in the FIR dated 7.11.2009.

7. We have heard Shri Colin Gonsalves, Learned senior counsel for the appellants Shantibhai J. Vaghela and Prafulbhai J. Vaghela, Mrs. H. Wahi, learned counsel for the State, Shri Shekhar Naphade, learned senior counsel for the respondents and Shri H.P. Raval, ASG.

8. Shri Gonsalves has very elaborately taken us through the materials on record particularly the FIR dated 07.11.2009, the post-mortem reports and the several correspondences exchanged between the officers of the investigating agency and the Department of Forensic Medicine, BJ Medical College, Ahmedabad as well as the Deputy Director of the State Forensic Laboratory with regard to certain findings recorded in the post-mortem report. It has been submitted that a consideration of the aforesaid materials clearly indicate that the High Court was not justified in interdicting the investigation of the case registered in so far as the offence under Section 304 IPC is concerned. According to the learned counsel, there is ample room for due investigation of the said offence and, therefore, the same should be allowed to be brought to its logical conclusion. It is further submitted that notwithstanding the filing of the charge sheet dated 31.08.2012 there is ample power in the court to order investigation in so far as the offence under Section 304 IPC is concerned. It is also contended that having regard to the pre-eminent social status of the Bapuji Ashram and the evident role of the Ashram authorities in scuttling the fair investigation of a palpable crime, further investigation by the independent agency like the CBI should be ordered by this court.

9. Learned counsel for the State of Gujarat has submitted that the State is aggrieved by only that part of the order by which investigation of the offence under Section 304 IPC has been

interfered with by the High Court. Learned State counsel has categorically submitted that further/fresh investigation in so far as the offence under Section 304 IPC is concerned can be effectively performed by the State Police and in fact the State is agreeable to constitute a Special Investigation Team for the said purpose if so ordered by the court.

10. In reply, Shri Naphade, learned senior counsel for the accused, has urged that registration of a FIR alleging a specific criminal offence against any person and investigation of the same can be made only on the basis of some acceptable material disclosing the commission of the offence alleged. No such basis is discernible in the present case. According to learned counsel a reading of FIR does not reveal any material to establish any of the ingredients of the offence under Section 304 IPC against any of the accused. What has been alleged in the FIR, according to learned counsel, is negligence or lapses on the part of the Ashram authorities in not conducting a timely, proper and effective search of the missing children; in not informing the police about the incident and in not blocking the passage from the Ashram to the Sabarmati river. The High Court, according to learned counsel, therefore, rightly ordered investigation of the offence under Section 304 A IPC and charge sheet has been filed against all the accused under the aforesaid Section of the Penal Code. Shri Naphade has further urged that no material, whatsoever, has been brought on record to implicate any of the accused with the offence under Section 304 IPC. Shri Naphade has also submitted that the post-mortem report does not rule out and, in fact, the same strongly suggests that death of children had occurred due to drowning and the injuries on the bodies and the disappearance of some of the vital organs of deceased - Dipesh is due to the attack on the dead body by wild animals. Learned counsel, therefore, has contended that no case for further investigation, much less by an independent agency, is made out.

11. It may be appropriate at this stage to notice the opinion rendered by the Department of Forensic Medicine, BJ Medical

College, Ahmedabad with regard to the cause of death of Dipesh and Abhishek which may be conveniently extracted below:

"Deceased Dipesh Prafulbhai Vaghela:

-Body is in stage of decomposition and mutilation.

-No ante mortem injury is detected over available parts of body.

-Toxicology report shows "No chemical poison detected.

-FSL report shows "Presence of diatoms could not detected.

Considering above, FSL report and postmortem findings possibility of death due to drowning cannot be ruled out, however, "no definite opinion regarding cause of death can be given."

Deceased Abhishek Shantilal Vaghela:

"-Body is in stage of decomposition.

-No ante mortem injury is detected over available parts of body.

-Toxicology report shows "No chemical poison detected".

-FSL report shows "Presence of diatoms could not detected.

Considering above, FSL report and postmortem findings possibility of death due to drowning cannot be ruled out. However, "no definite opinion regarding cause of death can be given."

12. To appreciate the contentions advanced by the rival parties, relevant portions of the post-mortem report of Dipesh Prafulbhai Vaghela may also be extracted hereunder:

" . . . . . .

(2) External examination

. . . . . .

(12) Proof of dead body & it signs - (during examination of dead body its - hips, waist, dead body & thighs or some growth, blackening of some parts after death if any) if swelling of any part then examination of fluid in it & condition of the skin.		*Body is in state of decomposition hence PM lividity is not appreciated. Foul smell is coming from body. The skin and soft tissue are missing at lower part of frontal neck front and sides of chest and abdomen, lower part of right leg, distal part of both the feet. Rest of the skin of face available part of front of neck, lower part of thighs and legs are discoloured brownish black while available part of back of scalp neck chest abdomen gluteal region and upper part of front and back of thighs are less discolored. Marbeling is present on both the lower limbs specially on anterior aspects. Skin is easily peeled off at places, scalp, hair easily peeled off maggots of size 0.2 to 0.5 cms. crowling all over the body. External genetelia distended due to decomposition. Chest and*

	abdominal cavity are exposed, both sides of ribs and vertebral column are seen externally. Sternum, both clavicles and costal cartilages found missing. Mass of tissue line attached with neck contain trachea, oesophagus part of both lungs heart covered with peri cardium and part of stomach. Rest of abdominal organs are missing. Both the upper limbs are missing with scapulae. Skin and soft tissue in lower part of right leg missing under line bones exposed. Distal part of right foot including toes missing, metatarsals are exposed. Distal part of left foot including toes missing metatarsals exposed the missing tissues of the body is attached with the changes of post mortem phenomena. Margins of missing tissues are pale, irregular without vital reactions and nibbling due to animals appreciated.
(13) Appearance of dead body- normal or swollen, condition of eyes, condition of tongue, face, type of discharges from ears or nostrils (if any).	*Facial features are bloated and distorted. Eyes open, eye balls softened decomposed and protruded. Mouth is open tongue protruded outside oral cavity.*

	No discharge noted from ear, nose and mouth. Both the ears are eaten up in pinna region, margins irregular, pale and without vital reaction.
(14) Condition of skin - blood stain etc. If probability of drowning then imprints of biting by aquatic animal (cutis Anserina) if any, record be made regarding wrinkles on skin.	*Nibbling due to animals found in both pinna right lower limbs, both feet chest abdomen. Margins are pale, irregular and without vital reactions.*
. . . . .	
(3) Internal examination	
. . . . .	
(20) Chest:- (c) Larynx, trachea and thyroid bone	c) Trechia & larynx identified food particles and mud found present and appreciated in trechea thyroid bone and larynx identified and intact. No injury appreciated in available parts including soft tissue of n
.....	
(21)	Missing
Small intestine & its contents	
Large intestine & Its contents	Missing
Liver its wt. & gall bladder	
Stomach & suprarenals	Missing
Spleen (with wt.)	Missing
Kidneys (with wt.)	Missing
Bladder	Missing

Genitalia	No injury found.

Abhishek Shantilal Vaghela:

" . . . . . .

(2) External examination

. . . . . .

(12) Proof of dead body & it signs - (during examination of dead body its - hips, waist, dead body & thighs or some growth, blackening of some parts after death if any) if swelling of any part then examination of fluid in it & condition of the skin.	*Body is in stage of decomposition hence PM lividity is not appreciated. Foul smelling gas coming from the body brown black discoloration of skin found on face, chest, abdomen, both upper limbs and lower part of both the thighs and both legs while upper part of thighs back of chest, gluteal region is less discolouration. Skin is early peeled off at places scalp hair early peeled off. Marbelling is present on chest shoulder and thighs more on anterior aspects. Maggots of size 0.2 to 0.5 cms. Crawling all over the body at places. Abdomen and external genetalia distended due to decomposition gases. Anal canal rectum part of sigmoid colon is prolapsed out of anus due to decompositions toes of right foot except greater toe are missing degloving of skin of both hands found present due to decomposition.*
(13) Appearance of dead body- normal or swollen, condition of eyes, condition of tongue, face, type of discharges from ears or nostrils (if any).	*Facial features are blotted and distorted. Eyes open eye ball soften decomposed and protruded out from its sockets. Mouth is semi-opened, tongue protruded out from oral cavity. White frothy fluid is coming from nose and mouth. <u>Both the ears are eaten in pinna region by animals.</u>*
(14) Condition of skin - blood stain etc. If probability of drowning then imprints of biting by aquatic animal (cutis Anserina) if any, record be made regarding wrinkles on skin.	*<u>Both ears in pinna region and toes of right foot except greater toe eaten by animals.</u>*
. . . . .	
(17) Blunt or cut injuries on external parts of body, its type, condition size and direction be noted with proper care and probable time of injury and its reason be noted.	*1. <u>Both ears in pinna region are missing. Margins are irregular pale without vital reactions nibbled by animals.</u>*
Petechial haemorrhage or collection seen if any, then condition of muscles and ligaments under the skin of that area?	*2. Second, third, fourth and fifth toes of right foot are missing meta torsals bones exposed, margins irregular and pale, <u>No, vital reactions found. Present nibbling by animals appreciated.</u>*

Notice:- if there are innumerable injuries which can't be noted in given space, then a signed supplement be attached to it with details	*No, ante mortem injury detected over the available parts of the body.*
. . . . .	.....

(3) Internal examination

(20)	
(c) Larynx, trachea and thyroid bone	c) No injury found in soft tissue and muscles of neck. Hyoid bone and thyroid cartilage intact few food particles and mud appreciated in trechia

13. We have already referred to the series of communications exchanged between the officers of the investigating agency and the Department of Forensic Medicine, BJ Medical College, Ahmedabad as well as the Deputy Director of the State Forensic Laboratory in an earlier part of this order. Such communications are in the form of queries made by the investigating agency and the replies of either the Department of Forensic Medicine of the BJ Medical College or the authorities of the State Forensic Laboratory to such queries. The relevant contents of the said correspondence placed before us may be summarized below:

1. Though there are tear marks over the clothes there are no cut marks found on the bodies of the deceased.

2. Presence of diatoms in cases of death by drowning may not always be found e.g. in case of dry drowning. At times the drowning medium (water) may not contain any diatoms.

3. Food particles and mud were found in trachea of both the deceased.

4. Animal bites were present on the bodies of both the deceased particularly in the region of the ears and toes in the case of deceased Abhishek and additionally in the feet, chest and abdomen of deceased Dipesh.

5. No shaving of scalp hairs was found in either case and also no injuries over the neck to draw blood were detected.

6. The disappearance of organs from the body of the deceased - Dipesh may have been due to wild animals pulling or carrying the same away.

14. Before proceeding any further in the matter it will be appropriate for us to notice the tenor of allegations mentioned in the FIR dated 07.11.2009 filed in respect of the incident in question. The aforesaid FIR was filed after more than one year of the incident and after holding of a detailed inquiry/ investigation into the incident. What has been alleged in the FIR is that on account of the delay on the part of the accused in organising a prompt and effective search of the missing children they could not be recovered alive, and in fact, even the dead bodies of the children could not be traced out for several days. The specific stand taken in the FIR is that had a prompt search been carried out, possibly, the children could have been found alive or, at least, the dead bodies could have been recovered earlier so as to enable an effective post-mortem of the bodies to determine the precise cause of death. It is also alleged that the Ashram authorities had advised the parents of the children to resort to various tantric practices to find out about the whereabouts of the children instead of promptly approaching the police. The failure of the said authorities to effectively man the gates behind the ashram adjoining the river bed have also been highlighted in the FIR as another omission on the part of

the ashram authorities so as to give rise to the commission of the offence of culpable homicide.

15. Two other aspects of the matter also need to be dealt with at this stage. In the opinion rendered by the Department of Forensic Medicine BJ medical College, Ahmedabad with regard to cause of death of the two children, as extracted above, it is recorded that "presence of diatoms could not be detected". Relevant literature has been laid before the court to show that: "diatoms are among the well known water planktons..... Every water body has its own diatom diversity..... Diatoms are commonly found in water bodies like ponds, lakes, canals and rivers etc. but their concentration can be low or high in a particular water body, depending upon the season....."

16. The following extract from the works/literature placed before the court would also require a mention to understand the significance of the absence of diatoms as mentioned in the report of the Department of Forensic Medicine BJ Medical College, Ahmedabad.

> *"When drowning takes place, diatoms enter into the lung cavity of a person through the aspirated water and this water exerts a pressure on lung cavity and rupturing of the lung alveoli takes place. Through these entrances diatoms can enter into heart, liver, kidney, brain and bone marrow.....Analysis of diatoms present in the lungs, liver, spleen, blood and bone marrow has for many years been undertaken as a confirmatory test in possible drowning cases. <u>However, the diatom test has been controversial since numerous cases of false negative and false positive results have been documented</u>....."*

17. The second significant fact which has to be noted is the meaning of the expression "without vital reactions" as appearing in different parts of the post mortem reports under Col. 12,13,14 of part II - external examination. In the statement

of the doctor who had conducted the post-mortem on the dead bodies of the children (as testified before the commission of enquiry appointed by the State Government), it has been explained that "if a person is living and is injured then whatever injury is caused, the process causing the injury is called vital reaction." In fact in a published medical work placed before the Court by the learned counsel for the respondent, Shri Naphde, it is mentioned that when a wound is inflicted on a living organism a series of events is triggered called vital reaction.

18. Section 299 IPC defines culpable homicide as causing of death by doing an act with the intention of causing of death or with the intention of causing such bodily injury as is likely to cause death or with the knowledge that by such act death is likely to be caused. Under Section 300 IPC all acts of culpable homicide amount to murder except what is specifically covered by the exceptions to the said Section 300. Section 304 of Indian Penal Code provides for punishment for the offence of culpable homicide not amounting to murder.

19. Commission of the offence of culpable homicide would require some positive act on the part of the accused as distinguished from silence, inaction or a mere lapse. Allegations of not carrying out a prompt search of the missing children; of delay in the lodging of formal complaint with the police and failure to take adequate measures to guard the access from the ashram to the river, which are the principal allegations made in the FIR, cannot make out a case of culpable homicide not amounting to murder punishable under Section 304 IPC. To attract the ingredients of the said offence something more positive than a mere omission, lapse or negligence on the part of the named accused will have to be present. Such statements are conspicuously absent in the FIR filed in the present case. A reading of the relevant part of the opinion of the Forensic Medicine Department of the BJ Medical College Ahmedabad would go to show that possibility of death of the children by

drowning cannot be ruled out. Expert opinion available on record indicates that mere absence of diatom will not exclude the aforesaid possibility. The relevant part of the post mortem report, as extracted, indicates presence of mud in the trachea of the children which fact also point to the possibility of death by drowning. The absence of any injuries on the body of the deceased; the attack on the bodies by wild animals and the possibility of the taking away of the missing organs of the deceased Dipesh by wild animals are all mentioned in the post-mortem report. The said facts cannot be excluded or ignored while construing the prima facie liability of the accused named in the FIR. The absence of any positive material to show the practice of black magic in connection with the incident is another significant fact that has to be taken note of. Taking into account all the aforesaid facts it cannot be said that the High Court, in the present case, had committed any error in exercising its jurisdiction to interdict the investigation of the offence under section 304 IPC against the accused named in the FIR. Such power, though must be exercised sparingly, has to be invoked if the facts of any given case so demand. This is precisely what the High Court had done in the present case without departing from any of the well settled principles of law emanating from the long line of decisions of this court noticed in *Asmathunnisa Vs. State of Andhra Pradesh rep. by the Public Prosecutor, High Court of Andhra Pradesh, Hyderabad*[1].

20. Our above view, naturally, has to be understood to be confined to the present stage of the proceedings and without, in any way impairing the powers of the Trial Court under Section 216 or Section 323 of the Code of Criminal Procedure. In fact we reiterate as held by this court in *Central Bureau of Investigation & Ors. Vs.Keshub Mahindra & Ors.*[2] that the powers under the aforesaid provisions of the Code will always be available for exercise if subsequent facts would justify resort

1. (2011) 11 SCC 259.

2. (2011) 6 SCC 216.

to either of the provisions. We also deem it appropriate to add that though several decisions of this court had been placed before us to demonstrate that it is open to this Court to direct further investigation by the CBI even after the State police may have filed the charge sheet upon completion of its investigation, we do not consider it necessary to go into any of the said decisions in view of our conclusions as recorded above. The mere reiteration of the availability of the judicial power to direct further investigations even after filing of the charge sheet as held in *Narmada Bai Vs. State of Gujarat & Ors.*[3] would suffice for the present.

21. Consequently, and in the light of the foregoing discussions we dismiss the appeals subject to our observations as above.

B.B.B. Appeals dismissed.

3. (2011) 5 SCC 79.

NATIONAL INSURANCE COMPANY LTD.
v.
BALAKRISHNAN & ANOTHER
(Civil Appeal No. 8163 of 2012)

NOVEMBER 20, 2012

[K. S. RADHAKRISHNAN AND DIPAK MISRA, JJ.]

Motor Vehicles Act, 1988 – ss.140, 147 and 166 – Compensation claim – Insurance policy – Nature of – "Act policy" and "comprehensive/ package policy" – Distinction between – Managing Director of company met with accident while travelling in a car registered in name of the company and sustained bodily injuries – He filed compensation claim – Car in question insured with appellant-insurer – Dispute over liability of appellant-insurer – Held: In the instant case, the insurance policy in question mentions the policy to be a "comprehensive policy" but there has to be a scanning of the terms of the entire policy to arrive at the conclusion whether it is really a "package policy" to cover the liability of an occupant in a car – While a "comprehensive/ package policy" would cover the liability of the insurer for payment of compensation for the occupant in a car, an "Act Policy" stands on a different footing – An "Act Policy" cannot cover a third party risk of an occupant in a car – Matter remitted to tribunal to scrutinize the policy in question – If said policy found to be a "Comprehensive/Package Policy", liability be fastened on the insurer – Insurance.

Respondent no.1, Managing Director of respondent no.2-company, met with an accident while travelling in a car registered in the name of respondent no.2 and sustained bodily injuries. The car in question was insured with the appellant. Respondent no.1 claimed compensation before the Motor Accident Claim Tribunal

under Sections 140, 147 and 166 of the Motor Vehicles Act, 1988. The tribunal held that the appellant-insurer was liable to indemnify as the owner of the vehicle was the company, and the injured was travelling in the car as a third party and accordingly granted compensation.

The appellant-insurer filed appeal before the High Court contending that respondent no.1 was the legal owner of the car though the vehicle was insured in the name of the respondent no.2-company and, therefore, the liability was to the limited extent as stipulated in the policy. The High Court, however, treated respondent no.2-company to be the owner of the vehicle and repelled the stand that the Managing Director was the owner, and further held that as he was only an occupant of the car, the insurance company was liable to indemnify the owner for the claim put forth by the victim. The High Court opined that if no premium is paid to cover the owner, the insurer is not liable to make good the loss but if another person travels with the owner and suffers injuries, the insurer is liable to pay the compensation. Being of this view, the High Court dismissed the appeal and hence, the present appeal by the insurer.

Partly allowing the appeal, the Court

HELD: 1.1. A "comprehensive/package policy" would cover the liability of the insurer for payment of compensation for the occupant in a car. An "Act Policy" stands on a different footing from a "Comprehensive/ Package Policy". The Insurance Regulatory and Development Authority (IRDA), which is presently the statutory authority, has clarified the position by issuing circulars. As IRDA has commanded the insurance companies stating that a "Comprehensive/ Package Policy" covers the liability, there cannot be any dispute in that regard. An "Act Policy" cannot cover a third party

risk of an occupant in a car. But, if the policy is a "Comprehensive/Package Policy", the liability would be covered. [Para 21] [585-D-G]

1.2. In the instant case, the question that emerges for consideration is whether in the case at hand, the policy is an "Act Policy" or "Comprehensive/Package Policy". There has been no discussion either by the tribunal or the High Court in this regard. The policy issued by the insurer only mentions the policy to be a "comprehensive policy" but this Court is inclined to think that there has to be a scanning of the terms of the entire policy to arrive at the conclusion whether it is really a "package policy" to cover the liability of an occupant in a car. [Para 22] [586-A-C]

1.3. The matter is remitted to the tribunal to scrutinize the policy in a proper perspective and, if necessary, by taking additional evidence and if the conclusion is arrived at that the policy in question is a "Comprehensive/ Package Policy", the liability would be fastened on the insurer. [Para 23] [586-C-D]

Yashpal Luthra and Anr. v. United India Insurance Co. Ltd. and Another **2011 ACJ 1415 – approved.**

United India Insurance Co. Ltd., Shimla v. Tilak Singh and Others **(2006) 4 SCC 404; 2006 (3) SCR 758** *New India Assurance Co. Ltd. v. Asha Rani* **(2003) 2 SCC 223: 2002 (4) Suppl. SCR 543;** *Oriental Insurance Co. Ltd. v. Jhuma Saha (Smt) and Others* **(2007) 9 SCC 263: 2007 (1) SCR 979;** *Dhanraj v. New India Assurance co. Ltd.* **(2004) 8 SCC 553: 2004 (4) Suppl. SCR 711;** *National Insurance Co. Ltd. v. Laxmi Narain Dhut* **(2007) 3 SCC 700: 2007 (3) SCR 579;** *Oriental Insurance Company Ltd. v. Meena Variyal and Others* **(2007) 5 SCC 428: 2007 (4) SCR 641;** *National Insurance Co. Ltd. v. Swaran Singh* **(2004) 3 SCC 297: 2004 (1) SCR 180;** *Oriental Insurance Company Ltd. v. Sudhakaran K. V. and Others* **(2008) 7 SCC 428: 2008 (9) SCR 367;** *New India Assurance Company Limited v. Sadanand Mukhi and Others* **(2009) 2 SCC 417: 2008 (17) SCR 1313;** *United India Insurance Co. Ltd. v. Davinder Singh* **(2007) 8 SCC 698: 2007 (11) SCR 337;** *Bhagyalakshmi and Others v. United Insurance Company Limited and Another* **(2009) 7 SCC 148: 2009 (7) SCR 1031 and** *Amrit Lal Sood and Another v. Kaushalya Devi Thapar and Others* **(1998) 3 SCC 744: 1998 (2) SCR 284 – referred to.**

Case Law Reference:

2006 (3) SCR 758	**referred to**	**Paras 8,12**
2002 (4) Suppl. SCR 543	**referred to**	**Paras 8,10, 12,14**
2007 (1) SCR 979	**referred to**	**Paras 9,14**
2004 (4) Suppl. SCR 711	**referred to**	**Para 9**
2007 (3) SCR 579	**referred to**	**Paras 10,14**
2007 (4) SCR 641	**referred to**	**Para 11**
2004 (1) SCR 180	**referred to**	**Para 12**
2008 (9) SCR 367	**referred to**	**Para 13**
2008 (17) SCR 1313	**referred to**	**Para 14**
2007 (11) SCR 337	**referred to**	**Para 14**
2009 (7) SCR 1031	**referred to**	**Para 15**
1998 (2) SCR 284	**referred to**	**Para 15**
2011 ACJ 1415	**approved**	**Para 17**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8163 of 2012.

From the Judgment & Order dated 02.03.2011 of the High

Court of Madras bench at Madurai in CMA (MD) No. 1624 of 2008.

Dr. Meera Agarwal, R.C. Misra, M.A. Krishna Moorthy for the appearing parties.

The judgment of the Court was delivered by

DIPAK MISRA, J. 1. Leave granted.

2. The singular issue that arises for consideration in this appeal is whether the first respondent, the Managing Director of the respondent No. 2, a company registered under the Companies Act, 1956, is entitled to sustain a claim against the appellant-insurer for having sustained bodily injuries. Succinctly stated, the facts are that the respondent No. 1 met with an accident about 8.30 p.m. on 23.3.2001 while travelling in the Lancer car bearing registration No. TN 49 K 2750 belonging to the respondent No. 2, as it dashed against a bullock cart near Muthandipatti Pirivu Road-I. He knocked at the doors of the Motor Accident Claim Tribunal (for short "the the tribunal") in MACOP No. 357 of 2004 under Sections 140, 147 and 166 of the Motor Vehicles Act, 1988 (for brevity "the Act") claiming compensation of Rs.20,00,000/- jointly and severally from the appellant as well as the company on the foundation that the vehicle in question was insured with the appellant-company. Be it noted, the amount was calculated on the basis of pecuniary and non-pecuniary damages.

3. The insurer resisted the claim on the grounds that the claimant had suppressed the fact that he was the Managing Director of the company and hence, the application deserved to be thrown overboard; that even if the petition was entertained the insurance company could not be held liable to indemnify the respondent as the appellant was himself the owner being the Managing Director and under no circumstances he could be treated as a third party; that the policy taken by the company did not cover an occupant in the vehicle but only covered the

owner for a limited quantum and hence, the claim was not allowable as sought for.

4. The tribunal, in its award dated 19.4.2007, addressed to the issues of rash and negligent driving of the driver, injuries sustained by the insured and the liability of the insurance company. On the basis of the material brought on record, it came to hold that the accident had occurred due to rash and negligent driving of the driver of the 1st respondent; that the claimant was injured in the accident; that regard being had to the injuries sustained he was entitled to get Rs.8,63,200/- as compensation with interest @ 7.5% per annum from the date of the petition till the date of deposit; and that the insurance company was liable to indemnify as the owner of the vehicle was the company, and the injured was travelling in the car as a third party.

5. Being dissatisfied with the award passed by the tribunal, the insurer preferred C.M.A. (M.D.) No. 1624 of 2008 before the Madurai Bench of Madras High Court and in appeal it was urged that the victim, the Managing Director, who was running the hospital in the name of his deceased father, was the legal owner of the car though the vehicle was insured in the name of the company and, therefore, the liability was to the limited extent as stipulated in the policy. It was also canvassed, in any case, he was a non-fare paying passenger in the car for which no extra premium was paid and hence, the liability could not be fastened on the insurer. The High Court treated the company to be the owner of the vehicle and repelled the stand that the Managing Director was the owner, and further held that as he was only an occupant of the car the insurance company was liable to indemnify the owner for the claim put forth by the victim. It is worthy to note that the High Court opined that if no premium is paid to cover the owner, the insurer is not liable to make good the loss but if another person travels with the owner and suffers injuries the insurer is liable to pay the compensation. Being of this view, the High Court dismissed the appeal. Hence, the present appeal by the insurer.

6. We have heard the learned counsel for the parties and perused the record. As has been indicated at the beginning, the seminal issue is whether the appellant-company is liable to make good the compensation determined by the tribunal to the victim in the accident. On a scrutiny of the award passed by the tribunal which has been given the stamp of approval by the High Court, it is manifest that the 1st respondent was the Managing Director of the respondent No. 2 and the vehicle was registered in the name of the company but the Managing Director had signed on behalf of the company in the R. C. book of the car that was involved in the accident. The High Court has returned a finding that the company and the Managing Director are two different legal entities and hence, the Managing Director cannot be equated with the owner. On that foundation, the claimant has been treated as a passenger and, accordingly, liability has been fastened on the insurer. The learned counsel appearing for the insurer would contend that assuming he is the owner being a signatory in the R.C. book, the liability of the company is limited upto Rs.2,00,000/- and under no circumstances a non-fare paying passenger would be covered under the policy. In oppugnation, the learned counsel for the respondent-claimant has proponed that barring the insurer and the insured, all others are third parties and, therefore, he is covered by the policy. It is also urged by him that as he had travelled as an occupant in a private car he is a third party vis-à-vis the insurer and hence, it is bound to indemnify the owner as the risk of the third party is covered.

7. As per the command of Section 146 of the Act, the owner of a vehicle is obliged to obtain an insurance for the vehicle to cover the third party risk. Section 147 deals with the requirements of policies and limits of liability. Section 147 (1) which is relevant for the present purpose is reproduced below:-

"147. **Requirement of policies and limits of liability.** – (1) In order to comply with the requirements of this Chapter, a policy of insurance must be a policy which -

(a) is issued by a person who is an authorised insurer; and

(b) insurers the person or classes of persons specified in the policy to the extent specified in sub – section (2) –

(i) against any liability which may be incurred by him in respect of the death of or bodily [injury to any person, including owner of the goods or his authorised representative carried in the vehicle] or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place ;

(ii) against the death of or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place;

Provided that a policy shall not be required –

(i) to cover liability in respect of the death, arising out of and in the course of his employment, of the employee of a person insured by the policy or in respect of bodily injury sustained by such an employee arising out of and in the course of his employment other than a liability arising under the Workmen's Compensation Act, 1923 (8 of 1923) in respect of the death of, or bodily injury to, any such employee -

(a) engaged in driving the vehicle, or

(b) if it is a public service vehicle, engaged as a conductor of the vehicle or in examining tickets on the vehicle or

(c) if it is a goods carriage, being carried in the vehicle, or

(ii) to cover any contractual liability.

Explanation. – For the removal of doubts, it is hereby declared that the death of or bodily injury to any person or damage to any property of a third party shall be deemed

to have been caused by or to have arisen out of, the use of a vehicle in a public place notwithstanding that the person who is dead or injured or the property which is damaged was not in a public place at the time of the accident, if the act or omission which led to the accident occurred in a public place."

On a scanning of the aforesaid provision, it is evident that the policy of insurance must be a policy which complies with the conditions enumerated under Section 147 (1) (a) & (b). It also provides where a policy is not required and also stipulates to cover any contractual liability.

8. In *United India Insurance Co. Ltd., Shimla v. Tilak Singh and Others,*[1] this Court referred to the concurring opinion rendered in a three-Judge Bench decision in *New India Assurance Co. Ltd. V. Asha Rani*[2] and ruled thus:-

"In our view, although the observations made in Asha Rani case were in connection with carrying passengers in a goods vehicle, the same would apply with equal force to gratuitous passengers in any other vehicle also. Thus, we must uphold the contention of the appellant Insurance Company that it owed no liability towards the injuries suffered by the deceased Rajinder Singh who was a pillion rider, as the insurance policy was a statutory policy, and hence it did not cover the risk of death of or bodily injury to a gratuitous passenger."

It is worthy to note that in the said case the controversy related to gratuitous passenger carried in private vehicle.

9. In *Oriental Insurance Co. Ltd. v. Jhuma Saha (Smt) and Others,*[3] the controversy related to fastening of liability on the insurer for the death of the owner of a registered vehicle,

1. (2006) 4 SCC 404.
2. (2003) 2 SCC 223.
3. (2007) 9 SCC 263.

Maruti van. The Court observed that the accident did not involve any other motor vehicle than the one which he was driving and as the liability of the insurer Company is to the extent of indemnification of the insured against the respondent or an injured person, a third person or in respect of damages of property, the insured cannot be fastened with any liability under the provisions of the Motor Vehicles Act, and, therefore, the question of the insurer being liable to indemnify the insured does not arise. Thereafter, the Bench referred to the decision in *Dhanraj v. New India Assurance co. Ltd.*[4] and ruled thus:-

"The additional premium was not paid in respect of the entire risk of death or bodily injury of the owner of the vehicle. If that be so, Section 147 (b) of the Motor Vehicles Act which in no uncertain terms covers a risk of a third party only would be attracted in the present case."

10. In *National Insurance Co. Ltd. v. Laxmi Narain Dhut*[5], after elaborately referring to the analysis made in *Asha Rani* (supra), the Bench stated thus:-

"Section 149 is part of Chapter XI which is titled "Insurance of Motor Vehicles against Third-Party Risks". A significant factor which needs to be noticed is that there is no contractual relation between the insurance company and the third party. The liabilities and the obligations relatable to third parties are created only by fiction of Sections 147 and 149 of the Act."

In the said case, it has been opined that although the statute is a beneficial one qua the third party, yet that benefit cannot be extended to the owner of the offending vehicle.

11. In *Oriental Insurance Company Ltd. v. Meena Variyal and Others*[6], the facts were that a Regional Manager of the

4. (2004) 8 SCC 553.
5. (2007) 3 SCC 700.
6. (2007) 5 SCC 428.

company, which was the owner of the vehicle, was himself driving a vehicle of the company and met with an accident and eventually succumbed to the injuries. It was contended by the insurer before this Court that the policy did not cover the employee of the owner who was driving the vehicle while attending the business of the employer-company and the deceased was not a third party in terms of the policy or in terms of the Act. It was also urged that the same would be the position even if the deceased was only travelling in the car in his capacity as a Regional Manger of the owner-company and the vehicle was being driven by the driver. This Court observed that a contract of insurance is ordinarily a contract of indemnity and when a car belonging to an owner is insured with the insurance company and it is being driven by a driver employed by the insured, when it meets with an accident, the primary liability under law for payment of compensation is that of the driver. Once the driver is liable, the owner of the vehicle becomes vicariously liable for payment of compensation. It is this vicarious liability of the owner that is indemnified by the insurer. Dealing with the said liability, the Bench analysed the language employed under Section 147 (1) of the Act and observed as follows:-

> "The object of the insistence on insurance under Chapter XI of the Act thus seems to be to compulsorily cover the liability relating to their person or properties of third parties and in respect of employees of the insured employer, the liability that may arise under the Workmen's Compensation Act, 1923 in respect of the driver, the conductor and the one carried in a goods vehicle carrying goods. On this plain understanding of Section 147, we find it difficult to hold that the Insurance Company, in the case on hand, was liable to indemnify the owner, the employer Company, the insured, in respect of the death of one of its employees, who according to the claim, was not the driver. Be it noted that the liability is not one arising under the Workmen's Compensation Act, 1923 and it is doubtful, on the case

> put forward by the claimant, whether the deceased could be understood as a workman coming within the Workmen's Compensation Act, 1923. Therefore, on a plain reading of Section 147 of the Act, it appears to be clear that the Insurance Company is not liable to indemnify the insured in the case on hand."

12. After so stating, the Bench adverted to the decisions in *National Insurance Co. Ltd. v. Swaran Singh*[7]*, Laxmi Narain Dhut* (supra), *Asha Rani* (supra) and *Tilak Singh* (supra) and opined that a policy in terms of Section 147 of the Act does not cover persons other than third parties. Eventually, it ruled thus:-

> "The victim was the Regional Manager of the Company that owned the car. He was using the car given to him by the Company for use. Whether he is treated as the owner of the vehicle or as an employee, he is not covered by the insurance policy taken in terms of the Act—without any special contract—since there is no award under the Workmen's Compensation Act that is required to be satisfied by the insurer. In these circumstances, we hold that the appellant Insurance Company is not liable to indemnify the insured and is also not obliged to satisfy the award of the Tribunal/Court and then have recourse to the insured, the owner of the vehicle."

13. In *Oriental Insurance Company Ltd. v. Sudhakaran K. V. and Others*[8]*,* a two-Judge Bench, while dealing with the issue whether a pillion rider on a scooter would be a third party within the meaning of Section 147 of the Act, after referring to number of authorities, stated thus:-

> "The contract of insurance did not cover the owner of the vehicle, certainly not the pillion-rider. The deceased was

7. (2004) 3 SCC 297.
8. (2008) 7 SCC 428.

travelling as a passenger, stricto sensu may not be as a gratuitous passenger as in a given case she may not (sic) be a member of the family, a friend or other relative. In the sense of the term which is used in common parlance, she might not be even a passenger. In view of the terms of the contract of insurance, however, she would not be covered thereby.

xxx xxx xxx xxx xxx

The law which emerges from the said decisions, is: (i) the liability of the insurance company in a case of this nature is not extended to a pillion-rider of the motor vehicle unless the requisite amount of premium is paid for covering his/her risk; (ii) the legal obligation arising under Section 147 of the Act cannot be extended to an injury or death of the owner of vehicle or the pillion-rider; (iii) the pillion-rider in a two-wheeler was not to be treated as a third party when the accident has taken place owing to rash and negligent riding of the scooter and not on the part of the driver of another vehicle."

14. In *New India Assurance Company Limited v. Sadanand Mukhi and Others,*[9] the son of the owner of the insured while driving the motor cycle met with an accident and died. The accident allegedly took place as a stray dog came in front of the vehicle. The stand of the insurance company was that in view of the relationship between the deceased and the owner of the vehicle being father and son the deceased was not a third party. The Bench relied on the decisions in *Tilak Singh* (supra), *Jhuma Saha* (supra), *Meena Variyal* (supra), *Laxmi Narain Dhut* (supra) and *United India Insurance Co. Ltd. v. Davinder Singh*[10] and came to hold that the insurance company was not liable to indemnify the owner.

9. (2009) 2 SCC 417.

10. (2007) 8 SCC 698..

15. At this juncture, we may refer with profit to a two-Judge Bench decision in *Bhagyalakshmi and others v. United Insurance Company Limited and Another*[11] wherein the learned Judges took note of the contention of the learned senior counsel for the claimant-appellant which was to the effect that after the deletion of the second proviso appended to Section 95(1)(b) of the Motor Vehicles Act, 1939 in the 1988 Act, the liability of a passenger in a private vehicle must also be included in the policy in terms of the provisions of the 1988 Act. The Bench reproduced the policy, referred to Section 64-B of the Insurance Act, 1938, took note of the role of the Tariff Advisory Committee and referred to the decisions in *Amrit Lal Sood and Another v. Kaushalya Devi Thapar and Others,*[12] *Asha Rani* (supra), *Tilak Singh* (supra), *Jhuma Saha* (supra) and *Sudhakaran K. V. and Others* (supra) and observed thus:-

> "Before this Court, however, the nature of policies which came up for consideration were Act policies. This Court did not deal with a package policy. If the Tariff Advisory Committee seeks to enforce its decision in regard to coverage of third-party risk which would include all persons including occupants of the vehicle and the insurer having entered into a contract of insurance in relation thereto, we are of the opinion that the matter may require a deeper scrutiny."

On a perusal of the aforesaid paragraph, it is clear as crystal that the decisions that have been referred to in *Bhagyalakshmi* (supra) involved only "Act Policies". The Bench felt that the matter would be different if the Tariff Advisory Committee seeks to enforce its decision in regard to coverage of third party risk which would include an occupant in a vehicle. It is worth noting that the Bench referred to certain decisions of Delhi High Court and Madras High Court and thought it appropriate to refer the matter to a larger Bench. Be it noted,

11. (2009) 7 SCC 148.

12. (1998) 3 SCC 744.

in the said case, the Court was dealing with comprehensive policy which is also called a package policy. In that context, in the earlier part of the judgment, the Bench had stated thus:-

> "The policy in question is a package policy. The contract of insurance if given its face value covers the risk not only of a third party but also of persons travelling in the car including the owner thereof. The question is as to whether the policy in question is a comprehensive policy or only an Act policy."

16. Thus, it is quite vivid that the Bench had made a distinction between the "Act policy" and "comprehensive policy/ package policy". We respectfully concur with the said distinction. The crux of the matter is what would be the liability of the insurer if the policy is a "comprehensive/package policy". We are absolutely conscious that the matter has been referred to a larger Bench, but, as is evident, the Bench has also observed that it would depend upon the view of the Tariff Advisory Committee pertaining to enforcement of its decision to cover the liability of an occupant in a vehicle in a "comprehensive/ package policy" regard being had to the contract of insurance.

17. At this stage, it is apposite to note that when the decision in *Bhagyalakshmi* (supra) was rendered, a decision of High Court of Delhi dealing with the view of the Tariff Advisory Committee in respect of "comprehensive/package policy" had not come into the field. We think it apt to refer to the same as it deals with certain factual position which can be of assistance. The High Court of Delhi in *Yashpal Luthra and Anr. V. United India Insurance Co. Ltd. and Another*[13], after recording the evidence of the competent authority of Tariff Advisory Committee (TAC) and Insurance Regulatory and Development Authority (IRDA), reproduced a circular dated 16.11.2009 issued by IRDA to CEOs of all the Insurance Companies restating the factual position relating to the liability of Insurance companies in respect of a pillion rider on a two-wheeler and occupants in a

13. 2011 ACJ 1415.

private car under the comprehensive/package policy. The relevant portion of the circular which has been reproduced by the High Court is as follows:-

> "IRDA
>
> Ref: IRDA/NL/CIR/F&U/073/11/2009
> 16.11.2009
>
> To
>
> CEOs of all general insurance companies
>
> Re: Liability of insurance companies in respect of occupants of a Private car and pillion rider on a two-wheeler under Standard Motor Package Policy (also called Comprehensive Policy).
>
> Insurers' attention is drawn to wordings of Section (II) 1 (ii) of Standard Motor Package Policy (also called Comprehensive Policy) for private car and two-wheeler under the (erstwhile) India Motor Tariff. For convenience the relevant provisions are reproduced hereunder:-
>
> 'Section II - Liability to Third Parties
>
> 1. Subject to the limits of liabilities as laid down in the Schedule hereto the company will indemnify the insured in the event of an accident caused by or arising out of the use of the insured vehicle against all sums which the insured shall become legally liable to pay in respect of -
>
> (i) death or bodily injury to any person including occupants carried in the vehicle (provided such occupants are not carried for hire or reward) but except so far as it is necessary to meet the requirements of Motor Vehicles Act, the Company shall not be liable where such death or injury arises out of and in the course of employment of such person by the insured.'
>
> It is further brought to the attention of insurers that the above provisions are in line with the following circulars earlier

issued by the TAC on the subject:

(i) Circular M.V. No. l of 1978 - dated 18th March, 1978 (regarding occupants carried in Private Car) effective from 25th March, 1977.

(ii) MOT/GEN/10 dated 2nd June, 1986 (regarding pillion riders in a two-wheeler) effective from the date of the circular.

The above circulars make it clear that the insured liability in respect of occupant(s) carried in a private car and pillion rider carried on two-wheeler is covered under the Standard Motor Package Policy. A copy each of the above circulars is enclosed for ready reference.

The Authority vide circular No. 066/IRDA/F&U/Mar-08 dated March 26, 2008 issued under File & Use Guidelines has reiterated that pending further orders the insurers shall not vary the coverage, terms and conditions wording, warranties, clauses and endorsements in respect of covers that were under the erstwhile tariffs. Further the Authority, vide circular No. 019/IRDA/NL/F&U/Oct-08 dated November 6, 2008 has mandated that insurers are not permitted to abridge the scope of standard covers available under the erstwhile tariffs beyond the options permitted in the erstwhile tariffs. All general insurers are advised to adhere to the afore-mentioned circulars and any non-compliance of the same would be viewed seriously by the Authority. This is issued with the approval of competent authority.

Sd/-
(Prabodh Chander)
Executive Director"
[emphasis supplied]

18. The High Court has also reproduced a circular issued by IRD dated 3.12.2009. It is instructive to quote the same:-

"IRDA

IRDA/NL/CIR/F&U/078/12/2009
3.12.2009.

To

All CEOs of All general insurance companies (except ECGC, AIC, Staff Health, Apollo)

Re: Liability of insurance companies in respect of occupant of a private car and pillion rider in a two-wheeler under Standard Motor Package Policy (also called Comprehensive Policy).

Pursuant to the Order of the Delhi High Court dated 23.11.2009 in MAC APP No. 176/2009 in the case of Yashpal Luthra v. United India and Ors., the Authority convened a meeting on November 26, 2009 of the CEOs of all the general insurance companies doing motor insurance business in the presence of the counsel appearing on behalf of the Authority and the leaned *amicus curie.*

Based on the unanimous decision taken in the meeting by the representatives of the general insurance companies to comply with the IRDA circular dated 16th November, 2009 restating the position relating to the liability of all the general insurance companies doing motor insurance business in respect of the occupants in a private car and pillion rider on a two wheeler under the comprehensive/package policies which was communicated to the court on the same day i.e. November 26, 2009 and the court was pleased to pass the order (dt. 26.11.2009) received from the Court Master, Delhi High Court, is enclosed for your ready reference and adherence. In terms of the said order and the admitted liability of all the general insurance companies doing motor insurance business in respect of the occupants in a private car and pillion rider on a two-wheeler under the comprehensive/package policies, you are advised to confirm to the Authority, strict compliance of the circular

dated 16th November, 2009 and orders dt. 26.11.2009 of the High Court. Such compliance on your part would also involve:

withdrawing the plea against such a contest wherever taken in the cases pending before the MACT, and issue appropriate instructions to their respective lawyers and the operating officers within 7 days;

with respect to all appeals pending before the High Courts on this point, issuing instructions within 7 days to the respective operating officers and the counsel to withdraw the contest on this ground which would require identification of the number of appeals pending before the High Courts (whether filed by the claimants or the insurers) on this issue within a period of 2 weeks and the contest on this ground being withdrawn within a period of four weeks thereafter;

With respect to the appeals pending before the Hon'ble Apex Court, informing, within a period of 7 days, their respective advocates on record about the IRDA Circulars, for appropriate advice and action. Your attention is also drawn to the discussions in the CEOs meeting on 26.11.2009, when it was reiterated that insurers must take immediate steps to collect statistics about accident claims on the above subject through a central point of reference decided by them as the same has to be communicated in due course to the Honourable High Court. You are therefore advised to take up the exercise of collecting and collating the information within a period of two months to ensure necessary & effective compliance of the order of the Court. The information may be centralized with the Secretariat of the General Insurance Council and also furnished to us.

IRDA requires a written confirmation from you on the action taken by you in this regard.

This has the approval of the Competent Authority.

Sd/-

(Prabodh Chander)
Executive Director"

[emphasis added]

19. It is extremely important to note here that till 31st December, 2006 the Tariff Advisory Committee and, thereafter, from 1st January, 2007, IRDA functioned as the statutory regulatory authorities and they are entitled to fix the tariff as well as the terms and conditions of the policies by all insurance companies. The High Court had issued notice to the Tariff Advisory Committee and the IRDA to explain the factual position as regards the liability of the insurance companies in respect of an occupant in a private car under the "comprehensive/ package policy". Before the High Court, the Competent Authority of IRDA had stated that on 2nd June, 1986, the Tariff Advisory Committee had issued instructions to all the insurance companies to cover the pillion rider of a scooter/motorcycle under the "comprehensive policy" and the said position continues to be in vogue till date. It had also admitted that the "comprehensive policy" is presently called a "package policy". It is the admitted position, as the decision would show, the earlier circulars dated 18th March, 1978 and 2nd June, 1986 continue to be valid and effective and all insurance companies are bound to pay the compensation in respect of the liability towards an occupant in a car under the "comprehensive/package policy" irrespective of the terms and conditions contained in the policy. The competent authority of the IRDA was also examined before the High Court who stated that the circulars dated 18th March, 1978 and 2nd June, 1986 of the Tariff Advisory Committee were incorporated in the Indian Motor Tariff effective from 1st July, 2002 and they continue to be operative and binding on the insurance companies. Because of the aforesaid factual position, the circulars dated 16th November 2009 and 3rd December, 2009, that have been reproduced hereinabove, were issued.

20. It is also worthy to note that the High Court, after referring to individual circulars issued by various insurance companies, eventually stated thus:-

> "In view of the aforesaid, it is clear that the comprehensive/ package policy of a two wheeler covers a pillion rider and comprehensive/package policy of a private car covers the occupants and where the vehicle is covered under a comprehensive/package policy, there is no need for Motor Accident Claims Tribunal to go into the question whether the Insurance Company is liable to compensate for the death or injury of a pillion rider on a two-wheeler or the occupants in a private car. In fact, in view of the TAC's directives and those of the IRDA, such a plea was not permissible and ought not to have been raised as, for instance, it was done in the present case."

21. In view of the aforesaid factual position, there is no scintilla of doubt that a "comprehensive/package policy" would cover the liability of the insurer for payment of compensation for the occupant in a car. There is no cavil that an "Act Policy" stands on a different footing from a "Comprehensive/Package Policy". As the circulars have made the position very clear and the IRDA, which is presently the statutory authority, has commanded the insurance companies stating that a "Comprehensive/Package Policy" covers the liability, there cannot be any dispute in that regard. We may hasten to clarify that the earlier pronouncements were rendered in respect of the "Act Policy" which admittedly cannot cover a third party risk of an occupant in a car. But, if the policy is a "Comprehensive/ Package Policy", the liability would be covered. These aspects were not noticed in the case of *Bhagyalakshmi* (supra) and, therefore, the matter was referred to a larger Bench. We are disposed to think that there is no necessity to refer the present matter to a larger Bench as the IRDA, which is presently the statutory authority, has clarified the position by issuing circulars which have been reproduced in the judgment by the Delhi High Court and we have also reproduced the same.

22. In view of the aforesaid legal position, the question that emerges for consideration is whether in the case at hand, the policy is an "Act Policy" or "Comprehensive/Package Policy". There has been no discussion either by the tribunal or the High Court in this regard. True it is, before us, Annexure P-1 has been filed which is a policy issued by the insurer. It only mentions the policy to be a "comprehensive policy" but we are inclined to think that there has to be a scanning of the terms of the entire policy to arrive at the conclusion whether it is really a "package policy" to cover the liability of an occupant in a car.

23. In view of the aforesaid analysis, we think it apposite to set aside the finding of the High Court and the tribunal as regards the liability of the insurer and remit the matter to the tribunal to scrutinize the policy in a proper perspective and, if necessary, by taking additional evidence and if the conclusion is arrived at that the policy in question is a "Comprehensive/ Package Policy", the liability would be fastened on the insurer. As far as other findings recorded by the tribunal and affirmed by the High Court are concerned, they remain undisturbed.

24. Consequently, the appeal is allowed to the extent indicated above and the matter is remitted to the tribunal for the purpose of adjudication as directed hereinabove. There shall be no order as to costs.

B.B.B. Appeal partly allowed.