SUPREME COURT OF INDIA

Centrotrade Minerals & Metal. Inc.

Vs.

Hindustan Copper Ltd.

C.A.No.2562 of 2006

(S.B. Sinha J.)

09.05.2006

JUDGMENT

S.B. SINHA, J:-

Leave granted.

Interpretation of an agreement containing a two tier arbitration vis-`- vis the applicability of Part I or Part II of the Arbitration and Conciliation Act, 1996 (for short, "the 1996 Act") is in question in these appeals which arise out of a judgment and order dated 28.07.2004 passed by a Division Bench of the Calcutta High Court in A.P.O.T. No. 182 of 2004.

FACTS :

M/s. Centrotrade Minerals and Metal Inc. (for short, "Centrotrade"), Appellant in SLP (C) No. 18611 of 2004 and the Hindustan Copper Limited (for short "HCL"), Appellant in SLP (C) No. 21340 of 2004 entered into a contract for sale of 15,500 DMT of Copper Concentrate to be delivered at Kandla Port in the State of Gujarat in two separate consignments.

The said goods were ultimately required to be used at the Khetri Plant of HCL situated in the State of Rajasthan. The seller in terms of the contract was required to submit a quality certificate from an internationally reputed assayer, mutually acceptable to the parties. After the consignments were delivered, the payments therefor had been made. However, a dispute arose between the parties as regard the dry weight of concentrate copper.

Clause 14 of the contract contained an arbitration agreement which reads as under:

"All disputes or differences whatsoever arising between the parties out of, or relating to, the construction, meaning and operation or effect of the contract or the breach thereof shall be settled by arbitration in India through the arbitration panel of the Indian Council of Arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration. If either party is in disagreement with the arbitration result in India, either party will have the right to appeal to a second arbitration in London, UK in accordance with the rules of conciliation and arbitration of the International Chamber of Commerce in effect on the date hereof and the results of this second arbitration will be binding on both the parties. Judgment upon the award may be entered in any court in jurisdiction."

Centrotrade invoked the arbitration clause. The Arbitrator appointed by the Indian Council of Arbitration made a NIL award. Centrotrade thereupon invoked the second part of the said arbitration agreement on or about 22nd February, 2000. An award was made pursuant thereto.

SUIT BY HCL :

HCL, during pendency of the proceedings before the arbitrator, filed a suit in the court at Khetri in the State of Rajasthan questioning initiation of the second arbitration proceeding before International Chamber of Commerce inter alia contending that the provision for second arbitration was void and a nullity. No interim order was passed therein despite having been prayed for, whereupon an appeal was preferred by HCL before the District Judge, which was also dismissed. In a revision filed by HCL, the High Court granted an injunction. In the meanwhile the sole arbitrator had commenced arbitration proceedings. Centrotrade filed a special leave application before this Court questioning the said order of injunction passed by the Rajasthan High Court and by an order dated 8th February, 2001, the said order of interim injunction was vacated.

ARBITRATION PROCEEDING :

Mr. Jeremy Cooke, Arbitrator held his sittings in London. HCL, in a series of letters to the International Court of Arbitration and to the Arbitrator, maintained that the arbitration agreement was void being opposed to public policy. Despite the same, they, through their attorney, consulted about the procedural aspects of the arbitration and had asked for their submissions in relation to the procedure, progress and substance of the dispute. HCL also received copies of all correspondence passed between Centrotrade and the Arbitrator and of all submissions made. They had been given every opportunity to take any point which they wished to take in their defence. Centrotrade served their submissions and supporting evidence by the orders made by the Arbitrator on 20th December, 2000, 19th January, 2001 and 3rd May, 2001. When no defence submission or supporting evidence was produced by HCL within the time prescribed, a fax was sent to them by the learned Arbitrator on 30th July, 2001 giving it one last opportunity to inform him by return of any intention on their part to put in a defence and to seek an extension of time for doing so. A further fax was sent on 9th August, 2001 whereby the Arbitrator informed the parties that he was proceeding with the award. On 11th August, 2001, the Arbitrator received a fax from Fox & Mandal (representing HCL) requesting for extension of time for one month to put in a defence, pursuant whereto on 16th August, it was directed that any submission in support of an application for extension of time for a defence and any submissions on the substantive merits of the dispute together with any evidence relied in relation to the application and any submissions made thereupon should be received by him by 31st August, 2001 in absence whereof he would not give any consideration thereto. On 27th August, 2001, Fox & Mandal sought for a further three weeks' extension of time for making their submissions and serving supporting evidence, pursuant whereto a time for filing those submissions of evidence was extended until 12th September, 2001. Submissions containing about seventy five pages were received by the Arbitrator on 13th September, 2001 without any supporting evidence or any justification for not complying with the earlier orders passed by him. The Arbitrator, however, considered the submissions made by HCL in making the award.

AWARD :

An award was passed by the said Arbitrator on 29th September, 2001 holding :

(i) the arbitration clause contained in clause 14 of the agreement is neither unlawful nor invalid.

(ii) the Arbitrator had jurisdiction to decide his own jurisdiction in terms of Article 8.3 of the ICC Rules as also Section 16 of the 1996 Act.

(iii) the claim of Centrotrade based on the report of Inspectorate Griffith was just. The arbitration award dated 15th June, 1999 was obviously wrong. There is no dispute about the actual figure of loss claimed by Centrotrade. There is no dispute as to the demurrage owing which, in accordance with Clause 9.2 of the contract, is to be calculated on the basis of a discharging rate of 1600 MT per WWD of 24 consecutive hours.

(iv) Centrotrade is entitled to interest as well as costs.

It was directed:

"(1) HCL do pay Centrotrade the sum of $152,112.33, inclusive of interest to the date of the Award in respect of the purchase price for the first shipment.

(2) HCL do pay Centrotrade the sum of $15,815.59, inclusive of interest to the date of this Award in respect of demurrage due on the first shipment.

(3) HCL do pay Centrotrade the sum of $284,653.53, inclusive of interest to the date of this Award in respect of the purchase price on the second shipment.

(4) HCL do pay Centrotrade their legal costs in this arbitration in the sum of $82,733 and in addition the costs of the International Court of Arbitration, the Arbitrator's fees and expenses totaling $29,000.

(5) HCL do pay Centrotrade compound interest on the above sums from the date of this Award at 6% p.a. with quarterly rests until the date of actual payment."

PROCEEDINGS BEFORE THE COURTS :

HCL filed an application purported to be under Section 48 of the 1996 Act in the Court of District Judge Alipore, Calcutta. HCL also filed a suit before the Civil Judge, Senior Division, Alipore which was marked as T.S. No. 78 of 2001 praying for a declaration that the ICC award is void and a nullity, as also for permanent injunction and damages.

Enforcement of Award :

Centrotrade, in the meanwhile, filed an application for enforcement of the said award dated 29th September, 2001 in the Court of the District Judge, Alipore which was numbered as Execution Case No. 1 of 2002. Upon an application made in terms of Clause 13 of the Letters Patents of the Calcutta High Court by Centrotrade, the said execution case was transferred to the Calcutta High Court.

A learned Single Judge of the said court by a judgment and order dated 10th March, 2004 allowed

the said execution petition. Aggrieved by and dissatisfied therewith, HCL preferred an appeal which was allowed by reason of the impugned order dated 20th May, 2004. Both the parties are before us questioning the correctness of the said judgment.

HIGH COURT JUDGMENT :

In its judgment, the High Court held:

(i) Although successive arbitration is not impermissible in India, but two successive awards are mutually destructive.

(ii) In his award, Mr. Cooke did not make any statement that he was overruling or setting aside or in any manner altering the Indian award.

(iii) Although the second award is binding on the parties but is not enforceable having regard to the first award.

(iv) The second award is not a foreign award within the meaning of Section 44 of the 1996 Act and, thus, Section 34 thereof would apply thereto in the facts and circumstances of the case.

(v) Neither Part II of the Act nor Section 51 thereof states anywhere either expressly or by necessary implication, that the definition of 'Foreign Award' contained in Section 44 would apply notwithstanding the proper law of the contract being Indian Law.

SUBMISSIONS :

Mr. S. Sarkar, learned senior counsel appearing on behalf of Centrotrade submitted that:

(i) In a two-tier arbitration, the second arbitration proceedings having taken place in London, the award of Mr. Cooke was a foreign award within the meaning of Section 44 of the Act.

(ii) The learned Single Judge was satisfied that the HCL was not unable to present his case in the arbitration proceedings within the meaning of Section 48(1)(b) of the Act which finding having not been reversed by the Division Bench, no case has been made out for setting aside the award. Even otherwise refusal of an adjournment by an Arbitrator is not a ground for challenging an arbitral award.

Mr. Debabrata Ray Choudhury, learned counsel appearing on behalf of the HCL, on the other hand, submitted that:

(i) The definition of an award as contained in Section 2(2) of the 1996 Act must be read with the other provisions thereof, viz., Sections 2(5), 2(6) and 2(7) as also Section 42 thereof in view of the fact that the Indian law was applicable in relation to the contract in question.

(ii) Indian law in relation to enforcement of the terms and conditions of the contract being applicable, both the awards are governed by the Indian law.

(iii) The second part of the arbitration agreement contained in Clause 14 of the agreement is void

and of no effect being opposed to public policy. Having regard to the fact that the first award was made in terms of the Indian law, reference to the second arbitrator was impermissible inasmuch as the 1996 Act envisages only one award.

(iv) The object of the Act being to provide an integral framework and the parties having chosen Indian law, even assuming that Part II of the Act applies, Section 44 clearly makes an exception therefor in view of the decision of this Court in Bhatia International Vs. Bulk Trading S.A. and Another [(2002) 4 SCC 105].

(v) In any event, the Arbitrator did not give adequate opportunities of hearing and as the procedures prescribed under the ICC Rules were not followed, the award is liable to be set aside. The Arbitrator, having proceeded to prepare an award without the pleadings of the parties before him and considering only the first part of the written statement without waiting for the second part, misconducted himself at the proceeding. Had an opportunity been given, HCL could have cross-examined the expert on whose report, the award has been made.

(vi) Neither any issue was raised, nor any date was fixed for hearing and, as the parties were not given an opportunity to examine the witnesses, the award is liable to be set aside in terms of Section 48(1)(b) of the 1996 Act.

(vii) The judgment of the High Court to the extent that the arbitration clause has been held to be valid is erroneous.

VALIDITY OF THE AGREEMENT :

So far as the question of validity of the arbitration agreement between the parties is concerned, we may at the outset notice that the said question was specifically raised by HCL both before the learned Single Judge and the Division Bench of the High Court.

Both the learned Single Judge and the Division Bench held the said arbitration agreement to be valid. The Arbitrator as also the High Court in support of their findings on the said question relied upon the decisions of the Calcutta High Court in Hiralal Agarwalla & Co. Vs. Jokin Nahopier & Co. Ltd. [AIR 1927 Cal 647], the Bombay High Court in Fazalally Jivaji Raja Vs. Khimji Poonji and Co. [AIR 1934 Bom 476] and the Madras High Court in M.A. Sons Vs. Madras Oil & Seeds Exchange Ltd. & Anr. [AIR 1965 Mad. 392].

We, at the outset, would notice the decisions and the authorities which had been relied upon by the learned arbitrator as also by the High Court in support of the proposition that a two tier arbitration constitutes a valid agreement.

The question primarily before us is as to whether the validity of such arbitration agreement can be upheld having regard to the provisions of the 1996 Act.

In Hanskumar Kishan Chand Vs. The Union of India [AIR 1958 SC 947], interpretation of Section 19 of the Defence of India Act, 1939 fell for consideration. Section 19(1) provides for payment of compensation if any action is taken of the nature described in sub-section (2) of Section 299 of the Government of India Act, 1935. Section 19(1)(a) provided for the amount of compensation being fixed by the agreement whereas Section 19(1)(b) provided for reference to arbitrator in the event

such an agreement cannot be reached whose qualification was laid down under Sub-section (3) of Section 220 of the said Act for appointment as a Judge of a High Court. Section 19(1)(b) reads as under:

"Where no such agreement can be reached, the Central Government shall appoint as arbitrator a person qualified under sub-section (3) of Section 220 of the abovementioned Act for appointment as a Judge of a High Court."

Section 19(1)(c) provided for appointment by the Central Government of a person having expert knowledge as to the nature of the property acquired and for the nomination of an assessor by the person to be compensated for the purpose of assisting the arbitrator. Section 19(1)(e) contemplated that the arbitrator in making his award shall have regard to the provisions of sub-section (1) of Section 23 of the Land Acquisition Act, 1894 so far as the same can be made applicable. In terms of Section 19(1)(f), an appeal shall lie to the High Court against an award of the arbitrator except in cases where the amount thereof does not exceed an amount prescribed in this behalf by rule made by the Central Government. Section 19(1)(g) provided that save as provided in the said section and in any rules made thereunder nothing in any law for the time being in force shall apply to arbitrations under that section. Construing the aforementioned provisions, this Court held:

"14. The principles being thus well-settled, we have to see in the present case whether an appeal to the High Court under Section 19(l)(f) of the Act comes before it as a Court or as arbitrator. Under Section 19(l)(b), the reference is admittedly to an arbitrator. He need not even be a Judge of a Court. It is sufficient that he is qualified to be appointed a Judge of the High Court. And under the law, no appeal would have laid to the High Court against the decision of such an arbitrator. Thus, the provision for appeal to the High Court under section 19(1)(f) can only be construed as a reference to it as an authority designated and not as a Court. The fact that, in the present case, the reference was to a District Judge would not affect the position. Then again, the decision of the arbitrator appointed under Section l9(l)(b) is expressly referred to in Section 19(l)(f) as an award. Now, an appeal is essentially a continuation of the original proceedings, and if the proceedings under Section 19(l)(b) are arbitration proceedings, it is difficult to see how their character can suffer a change, when they are brought up before an Appellate Tribunal. The decisions in The Special Officer, Salsette Building Sites v. Dossabhai Bezonji. The Special Officer Salsette Building Sites v. Dassabhai Basanji Motiwala, Manavikraman Tirumalpad v. The Collector of the Nilgris and Secretary of State for India in Council v. Hindusthan Co-operative Insurance Society Limited proceed all on the view that an appeal against an award continues to be part of, and a further stage of the original arbitration proceedings. In our view, a proceeding which is at the inception an arbitration proceeding must retain its character as arbitration, even when it is taken up in appeal, where that is provided by the statute."

(Emphasis supplied)

In Hiralal Agarwalla (supra), Ghose, J. speaking for a Division Bench of the Calcutta High Court dealing with almost an identical matter, was of the opinion that a committee of appeal can hold a second round of arbitration, whether described as a fresh set of arbitration or not, as the substance of the matter has got to be looked at, and giving to the sections of the Indian Arbitration Act, the very best consideration will the learned Judge find in it which would prevent an award by a committee being the final award contemplated by the parties in certain eventualities being filed in the High Court. It was observed that, 'in other words, the contract contains as it were two submissions or a

submission within a submission'. Ghose, J., however, did not go into the question as to whether the first award could be filed in court. Buckland, J., concurring with the said judgment stated the law thus :

"The procedure whereby the dispute comes before the committee is called an appeal. What it is called is of no consequence; the fact remains that the committee is a body other than a Court of justice to whom the parties have agreed to refer their dispute. Such a proceeding is known to the law as an arbitration and those in whom the arbitration is lodged are known as arbitrators or an umpire"

In Fazalally Jivaji Raja (supra), the Bombay High Court followed Hiralal Agarwalla (supra). It also referred to a judgment of another learned Single Judge of the said High Court wherein it was observed :

"It is as much an award in respect of which the parties can seek relief under the Arbitration Act as an ordinary award made by arbitrators as contemplated by that Act from which there is no appeal to any Board as in the present case. This point is covered by the decision of the Court of appeal in (1893) 1 Q.B. 405, which has been referred to in the judgment of the lower Court. It is a decision under the English statute of 1889, corresponding to the Arbitration Act, and the point that has been argued by Mr. Desai on behalf of the appellants here was raised in that case and disallowed."

Yet again in M.A. Sons (supra), a Division Bench of the Madras High Court following Hiralal Agarwalla (supra), observed : "An award made pursuant to a proper arbitration agreement is final, subject, of course, to the consequences of any such term of the contract. Here, the agreement provided that the parties would abide by any modification or alteration in the by-laws as governing the contract when it subsisted or was in issue between the parties. We must, therefore, hold that the second respondent had a right of appeal."

In 'The Law of Arbitration' 7th Edition by S.D. Singh at page 359, it is stated :

"31. Hearing before Appeal Committees. Rules of certain Chambers provide for an appeal against an award to an Appeal committee constituted under arbitration rules of those Chambers, Managing Committees of these Chambers themselves act as appeal committees and the rules also provide for the quorum of these committees to hear appeals against an award. When provision is made for such appeals, proceedings for the hearing of an appeal against an award, are part of the proceedings in the reference."

It is not necessary for us to comment on the correctness or otherwise of the said decisions except observing that they were decided having regard to the provision of the 1940 Act and not the 1996 Act. Question is whether the said arbitration would be valid in terms of the provisions of the 1996 Act and in particular when two awards of the Arbitrators are governed by two different parts thereof. THE 1996 ACT :

The United Nations Commission on International Trade Law (UNCITRAL) adopted in 1985 the Model Law on International Commercial Arbitration. The General Assembly of the United Nations recommended that all countries give due recognition thereto. The 1996 Act, as noticed hereinbefore, seek 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 "United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June, 1958)", the New York Convention in common legal parlance, has been ratified by India on 13th July, 1960. By virtue of its Article VII, the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 ceases to have effect between the contracting States. Considering that the New York Convention has been ratified by 108 nations and less than five sovereign contracting states of the Geneva Convention have not become signatories to the New York Convention, Chapter II of Part II of the 1996 Act already has minimal applicability and may soon have none at all, reducing that Chapter to a surplusage. Prior to coming into force of the 1996 Act, all matters relating to arbitration, both domestic and foreign, was governed by several statutes, viz., the Arbitration Act, 1940 (for short "the 1940 Act"), Arbitration (Protocol and Convention) Act, 1937 and the Foreign Awards (Recognition and Enforcement) Act, 1961 (for short "the 1961 Act"). India is a signatory to the UN Convention. The 1996 Act was enacted pursuant to the commitment of the Government of India to make an appropriate legislation amending and consolidating the law in terms of UNCITRAL Model Law and Rules.

Chapter 1 Part I applies where the place of arbitration is in India, as would appear from sub-section (2) of Section 2 of the 1996 Act. In terms of sub-section (3) of Section 2, the said part would not affect any other law for the time being in force by virtue of which certain disputes may not be submitted to arbitration. Sub-section (4) of Section 2 reads 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 in consistent with that other enactment or with any rules made thereunder."

Sub-section (7) of Section 2 provides that arbitral award made under the said Part shall be considered as a domestic award. The interpretation clause contained in Section 2 uses the words 'unless the context otherwise requires'. Section 2(b) of the 1996 Act defines an "arbitration agreement" to mean an agreement referred to in Section 7. Section 7 defines an arbitration agreement for the purpose of Chapter I to mean an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship whether contractual or not. In Section 2(c) arbitral award has been defined to include an interim award whereas in Section 44, foreign award has been defined to mean an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies. An arbitrator is appointed in terms of Section 11 of the Act, providing inter alia, therein that the parties are free to agree on a procedure for appointing the arbitrator or arbitrators subject to sub-section (6) thereof, wherewith we are not concerned in this case. Section 12 lays down the grounds for challenging an award; sub-section (3) whereof provides :

"(3) An arbitrator may be challenged only if

(a) circumstances exist that gives rise to justifiable doubts as to his independence or impartiality, or

(b) he does not possess the qualifications agreed to by the parties."

Section 13 provides that the parties are free to agree on a procedure for challenging an arbitral award, in terms whereof the jurisdiction of an arbitrator on the grounds specified under sub-section (3) of Section 12 can be questioned before the arbitrator himself. Section 16 authorizes the arbitral tribunal to rule on its own jurisdiction. Chapter 6 of the Act lays down the rules applicable to the substance of a dispute, in terms whereof the arbitral tribunal is required to decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India.

Sub-section (2) of Section 28 of the Act provides that the arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorized it to do so. Sub-section (3) thereof enjoins a duty upon the arbitral tribunal to decide all cases in accordance with the terms of the contract and to take into account the usages of the trade applicable to the transaction. Section 31 provides for the form and contents of the arbitral award. Section 32 provides for termination of proceedings; in terms of sub-section (1) whereof the arbitral proceedings shall be terminated by the final arbitral award or by an order of the arbitral tribunal under sub- section (2).

An application for setting aside an arbitral award can be filed in terms of Section 34 which occurs in Chapter VII of the 1996 Act. Sub-section (2) of Section 34 lays down the grounds upon which such arbitral award can be set aside. Such an application is required to be filed within three months from the date on which the parties making that application had received the arbitral award. The court, however, has jurisdiction to entertain such an application within a further period of thirty days, but not thereafter.

Section 35 postulates finality of an arbitral award. Such an award is binding not only on the parties but also on persons claiming under them respectively. Section 36 of the 1996 Act reads as under:

"Enforcement.- Where the time for making an application to set aside the arbitral award under section 34 has expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the Court."

The expression 'Arbitral Award has not been defined in Part I, but the expression 'foreign award' has been defined in Section 44 of Part II, which reads as under :

"44. Definition.- In this Chapter, unless the context otherwise requires, "foreign award" means an arbitral award on differences between persons arising out of legal relationship, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960

(a) in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies, and

(b) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which the said Convention applies."

Whereas Part I deals with the domestic arbitration, Part II deals with the enforcement of certain

foreign awards.

We may notice that Section 9(b) of the 1961 Act contained that nothing in that Act would apply to any award made on an arbitration agreement governed by the law of India. Part II of the 1996 Act makes an exception to the effect that unlike Section 9(b) of the 1961 Act, it makes the position absolutely clear that the character of an award is determined by the place where it is made.

Section 48 provides for conditions for enforcement of foreign awards. Section 49 lays down that where the court is satisfied that the foreign award is enforceable under the said chapter, the award shall be deemed to be a decree of that court.

The 1996 Act contains a coherent and model framework. It envisages only one award under one set of rules. It does not contemplate multi-layer awards governed by different sets of rules. It has introduced several changes of which three are worth taking note of : (i) fair resolution of a dispute by an impartial tribunal without any unnecessary delay or expenses; (ii) Party autonomy is paramount subject only to such safeguards as are necessary in public interest; and (iii) The arbitral tribunal is enjoined with a duty to act fairly and impartially.

The important shortcomings that are very much apparent from bear reading of the Arbitration and Conciliation Act, 1996 can be said as follows: (i) No provision is made for expediting awards or the subsequent proceedings in Courts where applications are filed for setting aside awards.

(ii) An aggrieved party has to start again from the District court for challenging the award.

In this respect it would be pertinent to mention about Arbitration and Conciliation (Amendment) Bill, 2003. It was based on the comprehensive review of the Arbitration and Conciliation Act, 1996 undertaken by the Law Commission of India in its 176th Report. Few of the salient features of the Bill are:

(i) it provides that where the place of arbitration is in India, Indian Law will apply whether the arbitration is between the Indian Parties or an International arbitration in India.

(ii) it also provides for the Arbitration Division in the High Courts and also for its jurisdiction and special procedure for enforcement of awards made under the Arbitration Act, 1940 including awards made outside India.

DIFFERENCE BETWEEN THE 1996 ACT AND THE 1940 ACT :

The 1996 Act makes a radical departure from the 1940 Act. It has embodied the relevant rules of the modern law but does not contain all the provisions thereof. The 1996 Act, however, is not as extensive as the English Arbitration Act.

Different statutes operated in the field in respect of a domestic award and a foreign award prior to coming into force of the 1996 Act, namely, the 1940 Act, the Arbitration (Protocol and Convention) Act, 1937 and the Foreign Awards (Recognition and Enforcement) Act, 1961. All the aforementioned statutes have been repealed by the 1996 Act and make provisions in two different parts, namely, matters relating to domestic award and foreign award respectively.

The Scheme of 1996 Act is absolutely distinct and different from the 1940 Act as also the 1961 Act.

In the 1940 Act, no reason was required to be stated in the award unless otherwise agreed upon. In the 1996 Act, reasons are required to be stated unless agreed to otherwise by the parties. The court's intervention is sought to be minimized under the provisions of the 1996 Act not only having regard to the concerns expressed in the international community as regard delay in the arbitration proceedings but also in view of the fact that an award under the 1996 is to be a reasoned one. In a large number of judgments, this Court has emphasized that the extent of power of the court's intervention in relation to a reasoned award and unreasoned one would be different. Whereas in relation to an unreasoned award, the court's jurisdiction to interfere with the award was absolutely limited, a greater latitude had been given in relation to a reasoned award.

After the 1996 Act came into force, under Section 16 of the Act the party questioning the jurisdiction of the arbitrator has an obligation to raise the said question before the arbitrator. Such a question of jurisdiction could be raised if it is beyond the scope of his authority. Such a question was required to be raised during arbitration proceedings or soon after initiation thereof as a preliminary issue. Such a decision would be subject to challenge under Section 34 of the Act. In the event, the arbitrator opined that he had no jurisdiction in relation thereto an appeal thereagainst was provided for under Section 37 of the Act.

In terms the 1940 Act, an award was required to be made a rule of court. In such a proceeding, an objection in terms of Section 30 of the 1940 Act would be entertained. Sub-section (2) of Section 30 of the 1996 Act enjoins a duty upon the Arbitrator to promote settlement. Such an application was required to be filed within the period specified therefor under the Limitation Act, 1963.

Section 31 of the 1996 Act is in tune with Article 31 of the Model Law. The requirements contained therein, most of which are mandatory, are specified therein. Whereas under the 1940 Act only an interim award or final award could be made; four types of awards are contemplated under the 1996 Act, viz., interim award, additional award, settlement or agreed award and final award.

Section 33 of the 1996 Act clearly postulates that the Arbitrator has the jurisdiction to correct and interpret an award in terms whereof, he may amend his core award.

AWARD UNDER THE 1996 ACT :

Section 34 of the Act provides for the mode and manner in which an arbitral award can be questioned. Such a course can be taken only by filing an application which shall be in accordance with sub-section (2) and sub- section (3). An award in the Indian part of the award, thus, could be set aside only by filing an application. The law, therefore, does not contemplate that despite the rigour of Section 34 of the Act, an award which although not challenged and becomes enforceable and executable still can be subject matter of a foreign award. An award as soon as it becomes enforceable, it becomes final and binding in terms of Section 35 of the Act. The award, which is finally being either made by way of partial award or final award, after the expiry of a period of thirty days becomes a decree in terms of Section 36 of the 1996 Act. When an award has been made, signed and delivered to the parties, it is final and binding on the parties and persons claiming under them respectively.

By reason of Section 36 of the 1996 Act, a legal fiction has been created to the effect that on expiry

of the period prescribed for setting aside an award as envisaged under Section 34 of the Act, the award becomes capable of being executed and enforced. The concept of provision for an appeal before another forum from an award and that too when a part of the award would be a domestic award and another part would be a foreign award is not contemplated under the 1996 Act.

An appeal as against an award in terms of an agreement may be or may not be filed within the time specified under Section 34 of the Act. Even the appellate arbitrator (if we may use the said term) would have no jurisdiction to pass an order of injunction staying the operation of the original award of the arbitrator. The 1996 does not contemplate that only because an appeal has been filed against the award, the time envisaged under Section 34 shall cease to run. If during pendency of the so-called appeal an award becomes a decree, the appellate arbitrator cannot set aside the said decree. An appeal contemplates that the procedure before both the authorities would be the same. An appeal is a continuation of the same proceeding. It does not comprehend two different procedures, two separate sets of evidences. An appeal does not take away the nature of the award. In other words, two different nature of the awards is not contemplated; only because there is a provision for appeal. We are not oblivious of the fact that rules of some chambers contemplate such a provision but in such an event the one that is made by the first arbitrator does not become final. The appeal committee follows the same procedure, relies upon the same evidence unless additional evidence either by consent of the parties or otherwise is permitted. By reason of such a procedure applicability of different set of rules is not envisaged. It is within the same jurisdiction. It does not contemplate two different and distinct jurisdictions. But in the present case, parties were not bound by any such agreement of trade or community association. As the parties were individual companies and only guided by their agreement, the above situation may not be applicable.

It is not in dispute that the provisions contained in Part I and Part II of the 1996 Act are distinct and different. Procedures for enforcing such awards are different. Consequences of the awards made under two different parts are absolutely different.

What can be contemplated under the UNCITRAL Model Rule is Med- Arb contracts or similar such contracts and not a contract of present nature.

According to Section 34(3) of the 1996 Act, the maximum period of limitation for making an application is three months from the date on which the applicant had received the arbitral award or the request under section 33 was disposed of and another thirty days from the last day of the third month. Section 34 which refers to "challenge to arbitral award" strives to balance between the party autonomy and judicial control of the arbitral result with the object of speed and efficiency. The balance has to come down strongly in favour of finality, and against judicial review, except in few circumstances. So, the main object of the provision is to determine the whether the award has become final and binding or not. Thus, the section depicts a position whereby an arbitral award can be challenged for the purpose of setting aside of the same at the first instance without much delay. The Court would set aside the award only on certain circumstances. Thereby, it is the legislative intention that such a matter is settled without much delay or much intervention of court. So, the finality of the challenged award would be decided by Court under section 34 of the 1996 Act and appeals are allowed against certain orders of courts or tribunals on certain grounds under Section 37 of the Act [Furthermore, section 37(3) provides that no second appeal shall lie from an order passed in appeal, although it does not take away the right to appeal in Supreme Court]. Throughout, the provisions nowhere it is mentioned that an appeal can be made or an application can be filed against the award to a separate arbitration board or forum. So, the finality and legality has to be determined

by the Court if it is so challenged. Otherwise, reference to a second arbitration panel would consume more time as arbitrators would decide the matter after listening the dispute afresh. Presuming that the reference to the arbitrator is made for second time and subsequently arbitrator gives an award, it would be more time consuming and complex if validity of the first award is challenged along with second award. So, following the scheme of the 1996 Act, it is more viable and convenient to accept the first award without opting for second time arbitration and then to decide it, if the award is challenged.

There can be a situation where an appeal is made against foreign award decided and settled abroad and the appeal will be made in India according to our domestic statute. For example, when one of the parties is an international company or organisation, first the arbitration will be done according to New York Convention in foreign country and thereafter, if there is any grievance against the award challenge can be made in India under the Act of 1996.

Even the principles analogous to Order XLI, Rule 1 of the Code of Civil Procedure envisages that filing of an appeal shall automatically not mean stay of the operation of the decree. In that view of the matter, mere filing of an appeal would not make the award unenforceable. No prayer for stay of the operation of the award had been prayed for nor the appellate arbitrator had directed stay of the operation of the award. The 1996 Act does not contemplate that the arbitrator would be entitled to sit in appeal over an executable decree. Even the doctrine of merger shall not apply inasmuch as the said doctrine contemplates an appellate authority who can pass the same type of order which could be passed by the original authority. If by fiction of law an award becomes a decree without the intervention of the court, the nature of an award which can be passed by the appellate arbitrator, would loose the character of an award. The doctrine of merger, therefore, would not apply. A decree, whether by reason of a statute or a legal fiction created under the statute, would have different and distinct connotation vis-`-vis an award. By agreement of the parties, a private adjudicator cannot sit in appeal over an enforceable decree. A decree passed by a court of law may be set aside by that court itself in exercise of its review jurisdiction or by an appellate court created in terms of a statute. A private adjudicator, it will bear repetition to state, cannot overturn a decree created by a legal fiction. A legal fiction, it is well settled, must be given its full effect. [See Bhavnagar University v. Palitana Sugar Mill (P) Ltd. and Others, (2003) 2 SCC 111, Ashok Leyland Ltd. v. State of T.N. And Another, (2004) 3 SCC 1 and Bharat Petroleum Corporation Ltd. v. P. Kesavan and Another, (2004) 9 SCC 772.]

A domestic award, in view of the statutory scheme, is subject to the supervision of a court of law. Its jurisdiction encompasses within its purview over the entire process of arbitration. An award is finally subject to a party agreeing to take recourse to the provisions of Section 34 of the 1996 Act and it becomes a decree. An award can be set aside only if the court comes to the conclusion that one or the other grounds contained in Section 34 of the Act exist. A challenge to the domestic award can, thus, be made only before a national court designated by the Act itself and on the grounds specified in Section 34 of the Act. A fortiori, the validity of a domestic award cannot be questioned before any other forum including the forum chosen by the parties, if any.

We may also notice that Section 66 of the English Arbitration Act provides for obtaining leave from the court for enforcing an award. The Indian law does not contain such a provision. Therefore, if a leave is not granted, a claimant may pursue an independent cause of action which accrues when an award is not honored. Sub-section (3) of Section 66 of English Arbitration Act provides that leave to enforce shall not be given where, or to the extent that, the person against whom it is sought to be

enforced shows that the tribunal lacked substantive jurisdiction to make the award. Section 34 of the Indian Arbitration Act does not make such a provision. But, the Indian law is also to be construed in the light of the Model Rule. Model Rules being referred to as the 1996 Act does not contain any specific provision in this behalf where, thus, the domestic law is silent, the court may interpret a provision in the light of the international conventions. [See Liverpool & London S.P. & I Asson. Ltd. v. M.V. Sea Success I, (2004) 9 SCC 512, Pratap Singh v. State of Jharkhand, (2005) 3 SCC 551 and Zee Telefilms Ltd. v. Union of India, (2005) 4 SCC 649] UNCITRAL Model Rule does not contemplate such a situation.

JURISDICTION ISSUE :

An award made on the basis of an invalid agreement would be a nullity. Such an award would be coram non judice. [See Smith v. East Elloe Rural District Council, (1956) 1 All ER 855]. The law in this behalf in India is clear and explicit. An order passed by a Tribunal lacking inherent jurisdiction would be a nullity. Where such a lack of jurisdiction is established, the same goes to the root of the matter. [Balvant N. Viswamitra and Others v. Yadav Sadashiv Mule (Dead) Through LRS. and Others , (2004) 8 SCC 706].

The 1996 Act, puts domestic awards and foreign awards in two different and distinct compartments, subject of course to certain overlapping provisions as has been noticed in some decisions of this Court.

It may not, therefore, be possible to hold that the 1996 Act contemplates that an arbitration award can be an admixture of domestic award and foreign award.

The 1996 Act in no uncertain terms speaks of an arbitration agreement, as would appear from the interpretation clause contained in clause 2(b) as also Section 7 thereof, which excludes the concept of two tier arbitration capable of being enforced under two different chapters.. A multi-tier arbitration may be held to be operative and valid when it was governed solely by the 1940 Act or the 1961 Act inasmuch as in such an event, the procedure laid down therein could have been followed. The 1996 Act, however, on the other hand, repeals and replaces not only the 1940 Act but also the 1961 Act and provides for different forums and different procedures for resolution of a dispute through an arbitrator. It is inconceivable that one part of the arbitration agreement shall be enforceable as a domestic award but the other part would be enforceable as a foreign award. An award made in terms of one arbitration agreement can either be a domestic award or a foreign award; wherefor different procedures have been laid down, even when the consequences from such award are different and when the grounds thereof are also different and distinct. The fundamental legislative policy brought out by the 1996 Act, thus, being not in consonance with having two tier arbitration which had two different statutes governed by two different provisions and would be subject to different procedures, in our opinion, is not valid. Whereas, in the decisions and authorities relied upon by Mr. Cooke, the second arbitration was also before the same institution governed by the laws of the same country, in the instant case, the Indian law would be applicable in relation to the first part of the arbitration, namely, the Indian Council of Arbitration, whereas second part thereof would be governed by International Chamber of Commerce, Paris Rules. Both parts of the arbitration proceeding, therefore, have not been carried out under the same institution. An arbitration agreement envisioning different procedures at different stages cannot be countenanced under the 1996 Act. Had the appeal been provided within the set-up of Indian Council of Arbitration, subject to the compliance of time frame, probably the agreement would have been

valid. But, it is not so. As observed in Hiralal Agarwalla (supra), such a submission must be within a submission. In such an event the first award may not be capable of being filed in court to which question Ghosh, J. did not go into.

A person may waive his right. Such waiver of right is permissible even in relation to a benefit conferred under the law. But it is trite that no right can be waived where public policy or public interest is involved. Jurisdiction on a tribunal/ court is a creature of statute. Jurisdiction on Arbitration can be conferred by agreement between the parties. But, the contract between the parties must be in obedience to law and not in derogation thereof. Contracting out is permissible provided it does not deal with a matter of public policy. An agreement under no circumstances can violate the Public Policy.

The appellate Arbitrator, therefore, could not have made an award in terms whereof a deemed decree passed by a court of India capable of being enforced in terms of Section 34 of the 1996 Act would stand set aside. The said award, therefore, is contrary to the legislative policy in India.

A jurisdictional issue can be raised in two ways. A party to an arbitration proceeding may take part in arbitral proceedings and raise the question of jurisdiction before the arbitral tribunal. He may also challenge the jurisdiction of the arbitrator without participating in the arbitral proceedings.

Under the English Arbitration Act, an appeal on jurisdiction would involve rehearing of the matter by the court at which the party can adduce evidence and reargue the entire issue of evidence. There is absolutely no reason as to why the said principle shall not apply to India. If a jurisdictional issue can be raised before the court even for the first time, the court would be entitled to take on records even the fresh hearing, it goes without saying that it would also be entitled to determine the jurisdictional fact.

In Primetrade AG v. Ythan Ltd. [(2006) 1 All ER 367], jurisdictional issue based on interpretation of documents executed by the parties fell for consideration having regard to the provisions of the Carriage of Goods by Sea Act, 1992. It was held that as the appellant therein did not become holder of the bills of lading and alternatively as the conditions laid down in Section 2(2) were not fulfilled, the arbitrator had no jurisdiction to arbitrate in the disputes and differences between the parties.

PUBLIC POLICY :

Lord Mustill had once said that "The great advantage of arbitration is that it combines strength with flexibilityFlexible because it allows the contestants to choose the procedure which fit nature of the dispute and the business context in which it occurs." Arbitration was meant to be a speedy, expeditious and cost-effective method of dispute reconciliation. So, the primary object of ADR movement is avoidance of vexation, expense and delay and promotion of the ideal of "access to justice".

But, then the contract must be within the legal framework.

In terms of the laws of India governing the field, the parties cannot contract out of the statute and take recourse to such a procedure which would for all intent and purport make the provisions of Sections 34 and 36 of the 1996 Act nugatory by entering into contractual arrangement or otherwise. The 1996 Act does not postulate that the parties can contract out of the provisions thereof. The

arbitration agreement of the parties, therefore, must be made strictly in terms of the provisions of the 1996 Act.

The Arbitration Act, 1991 (the Statute of Canada) which is amended by the Statutes of Ontario, 2006 expressly provide for "Contracting Out" under which the parties to an arbitration agreement may agree, expressly or by implication, to vary or exclude any provision of this Act except few circumstances, like, equality and fairness, setting aside of award, enforcement of award, etc.

Contracting out of the appeals procedure is possible before any dispute arises in all cases under the Arbitration Act, 1996 (U.K.). The Act contains express provision that every award shall contain reasons unless it is an agreed award or the parties have expressly agreed to dispense with the reasons (Section 52). The parties may want to dispense with reasons if neither side is contemplating an appeal and they do not want to incur the additional costs involved. Thus control over whether reasons should be given will be placed in the hands of the parties, rather than in the hands of the arbitral tribunal or the court.

The Act confers a number of powers on the arbitral tribunal unless parties otherwise agree. For example, under Section 48, under Section 35, and under Section 39. There are also powers conferred on the court but which are nevertheless subject to the contrary agreement of the parties, such as to entertain appeals on questions of law in limited arbitration, also to take certain other steps short of dismissal where a party fails to comply with a peremptory order Section 47 to make awards on different issues.

But Indian statute, i.e., the 1996 Act does not provide such "contracting out" provision so that parties can fix / determine, by their terms of agreement, the procedure of appeal after the award is made.

Such a contractual arrangement, having regard to the provisions contained in Section 23 of the Indian Contract Act shall be void being opposed to public policy. The parties, it is trite, cannot by contract or otherwise confer jurisdiction on a forum which is prohibited by law in force in India. The law in force in India does not permit to limit or avoid the operation of the statutory provisions.

The expression 'public policy' in India has been used for three different situations, namely, (i) an arbitral award may be set aside under Section 34(2)(b) of the 1996 Act if it is in conflict with the public policy of India; (ii) enforcement of a foreign award (New York Convention Award) may be refused under Section 48(2)(b) if the enforcement of the award would be contrary to the public policy of India; and (iii) a foreign award (Geneva Convention Award) may be enforceable under Section 57(1)(b) if the enforcement of the award is not contrary to the public policy or law of the India.

The expression 'public policy' will have the same connotation in respect of an arbitration agreement or an award. The judicial intervention in such matters has never been free from difficulty. Whereas refusing enforcement of an arbitral award has been viewed with much skepticism, the English Courts are more often than not have refused to enforce a foreign award on public policy ground holding that common law recognizes that English public policy is paramount. In some jurisdiction even serious procedural defects in the arbitral proceedings had been held to provide for enough justification for refusal to afford foreign award. [Russell on Arbitration, 22nd edition, 2003, page 389, para 8-046 and Chitty on Contract, 29th edition, 2004, page 961, para 16-045]. We do not see

any reason as to why the Indian law should be held to be different.

Even under the 1940 Act, this Court in Renusagar Power Co. Ltd. v. General Electric Co. [(1994) Supp 1 SCC 644] laid down that the arbitral award can be set aside if it is contrary to: (a) fundamental policy of Indian Law, (b) the interests of India; or (c) justice or morality. A narrower meaning to the expression 'public policy' was given therein by confining the scope of judicial review intervention of the arbitral award only when the aforementioned three grounds set forth therein. An apparent shift can, however, be noticed from the decision of this Court in Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd. (for short 'ONGC')[(2003) 5 SCC 705]. This Court therein referred to an earlier decision of this Court in Central Inland Water Transport Corporation Ltd. v. Brojo Nath Ganguly [(1986) 3 SCC 156] wherein the applicability of the expression 'public policy' on the touchstone of Section 23 of the Indian Contract Act and Article 14 of the Constitution of India came to be considered. This Court therein was dealing with unequal bargaining power of the workmen and the employer and came to the conclusion that any term of the agreement which is patently arbitrary and/ or otherwise arrived at because of the unequal bargaining power would not only be ultra vires Article 14 of the Constitution of India but also hit by Section 23 of the Indian Contract Act. In ONGC (supra), this Court apart from the three grounds stated in Renusagar (supra) added another ground thereto for exercise of the court's jurisdiction in setting aside the award if it is patently arbitrary stating:

"What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term "public policy" in Renusagar case it is required to be held that the award could be set aside if it is patently illegal. The result would be award could be set aside if it is contrary to:

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality, or

(d) in addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void."

By referring to the aforementioned decisions, we do not mean to say that we agree with the law laid down therein but we have referred thereto only for the purpose of finding out whether the expression 'public policy' is construed narrowly or broadly. It does not, however, make any substantial difference for determining the question in the sense that arbitration agreement contained in clause 14 is opposed to public policy as it is violative of the Indian statutes.

Section 23 of the Indian Contract Act, 1872 embodies the doctrine of public policy as evolved by

the common law. It takes within its sweep transactions:

(i) the consideration or object whereof is forbidden by law; or (ii) of such a nature, if permitted, would defeat the provisions of any law; or

(iii) if fraudulent or involves or implies injury to the person or property of another where the court regards it immoral, or opposed to public policy.

In various decisions, this Court has taken into consideration some of the well-known authorities for determining the question as to whether the executive can be given a power to decide as to what would be a public policy.

In Godawat Pan Masala Products I.P. Ltd. v. Union of India [(2004) 7 SCC 68], it was held that it is always in the domain of the judiciary to interpret what is morality at a given point of time.

The doctrine of public policy undoubtedly is governed by precedents. Its principles have been crystalised under different heads. [See Gherulal Parakh v. Mahadeodas Maiya, 1959 Supp (2) SCR 406, Central Inland Water Transport Corpn. Ltd. v. Brojo Nath Ganguly, (1986) 3 SCC 156, Zoroastrian Coop. Housing Society Ltd. v. District Registrar, Coop. Societies (Urban), (2005) 5 SCC 632 and State of Rajasthan and Others v. Basant Nahata, (2005) 12 SCC 77.]

In the 1940 Act, there was no specific provision for setting aside the arbitration award on the ground that the same was in conflict with the public policy in India. Section 30(c) was held to be wide enough to cover the heads generally comprehended by the expression "public policy".

In Dharma Prathishthanam v. Madhok Construction Pvt. Ltd. [(2005) 9 SCC 686 : 2004 (3) Arb. LR 432(SC)], a 3-Judge Bench of this Court held that where the appointment of an arbitrator and the reference of a dispute to him is void ab initio, the resulting award would also be liable to be set aside being totally incompetent or invalid. Thus, if an award is set aside to be enforced, the same may be declined for the reason that it is nullity, incapable of being enforced.

An agreement which is illegal would vitiate the arbitration agreement as also an award, but in some cases an arbitration agreement may be valid or even the arbitrator may determine the question of illegality of the contract. [See Harbour Assurance Co (UK) Ltd v. Kansa General International Co Ltd, (1993) 3 All ER 897] What would, however, be the nature of the illegality would depend upon the law in force of the country.

An arbitration agreement must satisfy the requirements of its definition as contained in Section 7 of the Arbitration Act. Within the meaning of Section 7, an arbitration agreement must mean a valid arbitration agreement. Section 44 of the Arbitration Act defines a foreign award. The said definition, however, would not apply where 'unless the context otherwise requires' clause is attracted.

A definition clause, therefore, does not necessarily apply in all possible contexts in which the word may be found therein. The expression came to be considered in a decision of this Court in Bennett Coleman and Co. (P) Ltd. v. Punya Priya Das Gupta [(1969) 2 SCC 1] wherein it was held that the definitions of 'a newspaper employee' and 'a working journalist' have to be construed in the light of and subject to the context unless otherwise required.

An award made outside India, even if governed by Indian law, may be a foreign award but it must satisfy two conditions, viz., that it is made (i) in pursuance of an agreement in writing for arbitration to which the New York Convention applies and (ii) in one of such territories which the Central Government has notified in the Official Gazette to be a territory to which the New York Convention applies. In this case, it appears that New York Convention does not apply in its entirety in the sense that the first part of the award would be governed by the ICA Rules whereas the second part would be governed by Paris Rules.

The question as regard the legislative policy vis-avis the arbitration agreement, therefore, will have to be considered from the said angle.

In Montrose Canned Foods Ltd. v. Eric Wells (Merchants) Ltd, (1965) Lloyd's Rep 597], where buyers alleged various procedural defects in arbitration proceedings, and applied to the court for an order setting aside or remitting the award, Megaw J held that he had the jurisdiction to make an order despite the existence of an appeal procedure and he exercised his discretion to remit the award. Magaw J proceeded on the basis that there was no contractual provision requiring the buyers to exhaust appeal procedure before applying to the court for review. This may raise the question whether it is permissible to exclude any right of access to the courts pending the hearing of an appeal. Megaw J assumed that such provision would be valid. But there should be question whether riles of that type can survive the public policy rule that the parties cannot oust the jurisdiction of the courts.

In Brace Transport Corporation of Monrovia, Bermuda v. Orient Middle East Lines Ltd., Saudia Arabia and others [AIR 1994 SC 1715], this Court held that when a court is asked to enforce an award, its legal effect must not only be recognized but legal sanctions must also be granted to ensure that it is carried out. If an award is a nullity, question of its enforcement would, thus, not arise.

It is of some significance to note that in terms of Section 45 of the 1996 Act, the court may refer the parties to arbitration unless it finds that the said agreement is null and void. Thus, if a court while exercising its jurisdiction under Section 45 of the 1996 Act is required to arrive at a finding as regards validity of the arbitration agreement, there is absolutely no reason as to why it cannot do so while enforcing an award.

If the parties did not expressly make a choice of the law governing the arbitration agreement, a presumption would arise that the proper law governing the arbitration would be the same as law of the country in which arbitration is agreed to be held. Sub-section (2) of Section 2 of the 1996 Act categorically states that Part I would apply where the place of arbitration is in India and, thus, by necessary implication, ousts the applicability thereof if the place of arbitration is outside India, subject, may be, to just exceptions.

Clause 16 of the agreement reads as under:

"16. Construction:

The contract is to be constructed and to take effect as a contract made in accordance with the laws of India."

In the instant case, indisputably, the law which would govern the arbitration agreement is, in view of Clause 16 of the agreement, the Indian Law.

We are not unmindful that the decision of this Court in Oil & Natural Gas Corporation Ltd. vs. Saw Pipes Ltd. [(2003) 5 SCC 705] had invited considerable adverse comments but the correctness or otherwise of the said decision is not in question before us. It is only for a larger Bench to consider the correctness or otherwise of the said decision. The said decision is binding on us. The said decision has been followed in a large number of cases. [See The Law and Practice of Arbitration and Conciliation by O.P. Malhotra, Second edition, page 1174.]

In the said treatise, the learned author has considered the correctness of ONGC (supra) from a large conspectus and opined at page 1184-1185:

"This survey of the contemporary English and Indian authorities reveals no justification to fault ONGC. It is carefully calibrated judgment supported by research into comparative law and sound rationale. This decision only modifies and expands the scope of public policy of India as adumbrated in Renusagar. It adds one more head, i.e., patent illegality of the award provided that the illegality goes to the root of the matter or is so unfair and unreasonable that it shocks the conscience of the court. Contrarily, it supports Renusagar in letter and spirit. If the court had not so modified the law, it would have failed in its duty to prevent subversion of societal goals and endangering the public good.."

One may agree with the said view of the learned author or may not but, as at present advised, we have to abide by the decision in ONGC (supra) and, thus, the doctrine of public policy must be held to be a ground for setting aside an arbitration agreement and consequently an award.

Such patent illegality, however, must go to the root of the matter. The public policy, indisputably, should be unfair and unreasonable so as to shock the conscience of the court. Where the Arbitrator, however, has gone contrary to or beyond the expressed law of the contract or granted relief in the matter not in dispute would come within the purview of Section 34 of the Act.

What would be a public policy would be a matter which would again depend upon the nature of transaction and the nature of statute. For the said purpose, the pleadings of the parties and the materials brought on record would be relevant so as to enable the court to judge the concept of what was a public good or public interest or what would otherwise be injurious to the public good at the relevant point as contradistinguished by the policy of a particular government. [See State of Rajasthan v. Basant Nahata, (2005) 12 SCC 77.]

It is not in dispute that the conditions precedent for applying Part II of the 1996 Act have not been fulfilled in the instant case. Section 51 thereof to which reference has been made provides for a saving clause in relation to a right which had accrued to a party. A fine distinction exists between 'to determine proper law' and 'to determine proper forum of court'. The effect of a foreign award is different from the effect of the domestic award. In terms of Section 46 of the Act, the foreign awards are binding.

PRECEDENTS :

We may at this juncture notice some of the decisions cited at the Bar.

In National Thermal Power Corporation Vs. The Singer Company and others [AIR 1993 SC 998], this Court was construing the provisions of the 1961 Act. What would be the proper law in the context of an arbitration proceeding was stated, thus:

"Proper law is thus the law which the parties have expressly or impliedly chosen, or which is imputed to them by reason of its closest and most intimate connection with the contract. It must, however, be clarified that the expression 'proper law' refers to the substantive principles of the domestic law of the chosen system and not to its conflict of laws rules. The law of contract is not affected by the doctrine of renvoi. (See Dicey, Vol. II, p. 1164.)"

In Sumitomo Heavy Industries Ltd. Vs. ONGC Ltd. and Others [(1998) 1 SCC 305] this Court was dealing with a case prior to coming into force of the 1996 Act. This Court in that case noticed the provisions contained in Section 47 of the 1940 Act and Section 9(b) of the 1961 Act stating:

"17By reason of Section 9(b), the 1961 Act does not apply to any award made on an arbitration agreement governed by the law of India. The 1961 Act, therefore, does not apply to the arbitration agreement between the appellant and the first respondent. The 1940 Act applies to it and, by reason of Section 14(2) thereof, the courts in India are entitled to receive the award made by the second respondent. We must add in the interests of completeness that it is not the case of the appellant that the High Court at Bombay lacked the territorial jurisdiction to do so."

In Bhatia International Vs. Bulk Trading S.A. and Another [(2002) 4 SCC 105] this Court was considering a pre-award situation. Therein the court was concerned with the power of the court to issue interim order and in that context it fell for consideration whether Sections 9 and 17 occurring in Part I of the 1996 Act would apply to the arbitration proceedings falling under Part II. It was opined:

"26The general provisions will apply to all Chapters or Parts unless the statute expressly states that they are not to apply or where, in respect of a matter, there is a separate provision in a separate Chapter or Part. Part II deals with enforcement of foreign awards. Thus Section 44 (in Chapter I) and Section 53 (in Chapter II) define foreign awards, as being awards covered by arbitrations under the New York Convention and the Geneva Convention respectively. Part II then contains provisions for enforcement of "foreign awards" which necessarily would be different. For that reason special provisions for enforcement of foreign awards are made in Part II. To the extent that Part II provides a separate definition of an arbitral award and separate provisions for enforcement of foreign awards, the provisions in Part I dealing with these aspects will not apply to such foreign awards. It must immediately be clarified that the arbitration not having taken place in India, all or some of the provisions of Part I may also get excluded by an express or implied agreement of parties. But if not so excluded the provisions of Part I will also apply to "foreign awards". The opening words of Sections 45 and 54, which are in Part II, read "notwithstanding anything contained in Part I". Such a non obstante clause had to be put in because the provisions of Part I apply to Part II."

[Emphasis supplied]

Although correctness of the said decision is open to question, we need not go into the same as at present advised.

In Furest Day Lawson Ltd. Vs. Jindal Exports Ltd. [(2001) 6 SCC 356], this Court opined that "Once the court decides that the foreign award is enforceable, it can proceed to take further effective steps for execution of the same. There arises no question of making foreign award a rule of court/decree again"; but enforceability thereof would depend upon the validity of the arbitration agreement.

In Sundaram Finance Ltd. vs. NEPC India Ltd. [(1999) 2 SCC 479], this Court held:

"The 1996 Act is very different from the Arbitration Act, 1940. The provisions of this Act have, therefore, to be interpreted and construed independently and in fact reference to the 1940 Act may actually lead to misconstruction. In other words, the provisions of the 1996 Act have to be interpreted being uninfluenced by the principles underlying the 1940 Act. In order to get help in construing these provisions, it is more relevant to refer to the UNCITRAL Model Law rather than the 1940 Act."

In Sundaram Finance (supra), this Court categorically held that an interim order can be passed under the 1996 Act in terms of Section 9 only during the arbitral proceedings or before the arbitral proceedings; whereas under the 1940 Act, the party could have applied for appointing arbitrator even when no matter was pending before the court.

In Thyssen Stahlunion GMBH Vs. Steel Authority of India Ltd. [(1999) 9 SCC 334], it was held:

"Present-day courts tend to adopt a purposive approach while interpreting the statute which repeals the old law and for that purpose to take into account the objects and reasons which led to the enacting of the new Act. We have seen above that this approach was adopted by this Court in M.M.T.C. Ltd. case. Provisions of both the Acts, old and new, are very different and it has been so observed in Sundaram Finance Ltd. case. In that case, this Court also said that provisions of the new Act have to be interpreted and construed independently and that in fact reference to the old Act may actually lead to misconstruction of the provisions of the new Act. The Court said that it will be more relevant, while construing the provisions of the new Act, to refer to the UNCITRAL Model Law rather than the old Act. In the case of Kuwait Minister of Public Works v. Sir Frederick Snow and Partners the award was given before Kuwait became a party to the New York Convention recognised by an Order in Council in England. The House of Lords held that though a foreign award could be enforced in England under the (U.K.) Arbitration Act, 1975 as when the proceedings for enforcement of the award were initiated in England Kuwait had become a party to the Convention. It negatived the contention that on the date the award was given Kuwait was not a party to the New York Convention."

At this juncture, we may notice a decision in Adam v. Cape Industries [(1990) 1 Ch 433], wherein, although the court was dealing with the enforcement of foreign judgments, it laid down the principles relevant to the enforcement of New York Convention awards stating that where it was alleged that a New York Convention award should not be enforced because such enforcement would do substantial injustice and, therefore, was contrary to public policy in respect whereof the following had, normally, to be included amongst the relevant considerations :

? the nature of the procedural injustice;

? whether the party resisting enforcement had invoked the supervisory jurisdiction of the seat of the

arbitration; ? whether a remedy was available under that jurisdiction; ? whether the courts of that jurisdiction had conclusively determined the complaint in favour of upholding the award; ? if the party resisting enforcement had failed to invoke that remedial jurisdiction, for what reason and, in particular, whether it was acting unreasonably in failing to do so.

ANALYSIS:

It is not in dispute that the contention of HCL from the beginning was that the provision contained in the second part of the arbitration is void ab initio and of no effect. As noticed hereinbefore, it even filed a suit prior to entering into the reference by the Arbitrator. Even after the award was passed, proceedings before appropriate courts had been initiated. In its written statement filed before the arbitral tribunal, the question as regards the jurisdiction of the arbitrator was questioned by it. The learned arbitrator had, relying on or on the basis of the decisions, referred to hereinbefore, and also an opinion rendered by a former judge of this Court held that such an arbitration agreement is valid in law. In terms of Section 16 of the 1996 Act, the arbitrator, keeping in view the fact that the question as regard his jurisdiction had been raised was bound to decide the same before entering into the merit of the matter. Only in the event, it came to the conclusion that the arbitral tribunal had the requisite jurisdiction, it could have proceeded to determine the merit of the matter. We say so in view of the fact that in the event an arbitrator was of the opinion that he had no jurisdiction in the matter, the arbitration clause being invalid in law, Centrotrade could have preferred an appeal in terms of sub-section (2) of Section 37 of the 1996 Act. The question as regard lack of inherent jurisdiction on the part of the arbitrator in view of the second part of the arbitration clause being opposed to the public policy could have been raised by HCL in terms of Section 34 of the 1996 Act.

Even if it is held that two tier arbitration is permissible, under the 1996 Act it might lead to an incongruity. A two tier arbitration is invalid in law in the context of the 1996 Act having regard to Section 23 of the Contract Act as statutory jurisdiction cannot be waived by contract. It is, thus, amply clear that the very scheme of the 1996 Act does not contemplate a two tier arbitration agreement of this nature.

Conditions as regard non-existence or invalidity of an arbitration agreement can, in our opinion, be raised while resisting enforcement of a foreign award. Section 4 of the 1996 Act contemplates existence of an arbitration agreement which would mean a valid arbitration agreement. If the arbitration agreement is void and of no effect, it is non est in the eye of law and, thus, cannot be enforced. An arbitrator derives its jurisdiction from a reference which would mean a dispute and difference to be adjudicated upon in pursuance of or in furtherance of a valid arbitration agreement. It is not in dispute that the parties agreed that the Indian law shall apply. The validity or legality of a contract, thus, must be judged on the touch-stone of Section 23 of the Indian Contract Act. If a contract is opposed to a public policy, the same is void and of no effect.

CONCLUSION:

It is doubtful whether the decisions of the Calcutta, Bombay and Madras High Court could have been held to be valid if a situation of the present nature had arisen therein, namely, both the 1940 and 1961 Acts are applicable in relation to two different awards made at two different point of time. The said decisions, therefore, might have been held to be good only in terms of the provisions of the 1940 Act or the 1961 Act but the ratio thereof cannot be extended to the cases falling under both the parts of the 1996 Act.

To bring clarity in the matter, we may notice the dichotomy arising herein. If the first award was to be enforced (although no occasion arose therefor), it could have been done only in terms of Part I of the Act. Despite invocation of second part of the arbitration agreement, it would not cease to be a decree in terms of Section 36 of the Act unless the operation thereof was directed to be stayed. In other words, the first award of the arbitral tribunal, on the expiry of the period specified for challenging the award, became a decree despite invocation of the second part thereof. It is difficult to comprehend that despite a part of the award becoming a decree of the court, the same would not be binding upon the arbitral tribunal. Section 34 of the 1996 Act provides for setting aside a domestic Indian award. It unlike the English Arbitration Act does not permit the parties to limit or avoid the operation of the statutory provisions.

Furthermore, the grounds for questioning a domestic award and a foreign award are different. In the context of the 1996 Act, an arbitration agreement which would otherwise be contrary to the provisions of the laws governing the contract between the parties would be void being opposed to public policy.

The High Court's judgment, therefore, in my considered view, cannot be sustained.

It is, thus, not necessary for us to advert to other questions raised at the Bar. Although we do not agree with the reasons assigned by the High Court, but we uphold the conclusion thereof on different grounds.

For the reasons aforementioned, Civil Appeal arising out of SLP (Civil) No.18611 of 2004 filed by M/s Centrotrade Minerals and Metal Inc., is dismissed and Civil Appeal arising out of SLP (Civil) No.21340 of 2005 preferred by Hindustan Copper Ltd. is allowed. In the peculiar facts and circumstances of the case, the parties shall pay and bear their own costs.