

SUPREME COURT OF INDIA

Sasan Power Limited .

Vs.

North American Coal Corporation India Private Limited .

C.A.No.8299 of 2016

(Jasti Chelameswar and [Abhay M.Sapre,JJ.](#))

24.08.2016

JUDGMENT

Jasti Chelameswar,J.,

SLP(Civil)No.33227 of 2015

1. Leave granted.

2. The Appellant herein a company registered under the laws of India and an American company known as North American Coal Corporation (A Delaware Corporation) hereinafter referred to as the ‘American company’ entered into an agreement dated 1st January, 2009 for mine and development operations hereinafter referred to as “AGREEMENT-I” .

3. Under AGREEMENT-I, THE American company agreed to provide certain consultancy and other onsite services for a mine to be operated by the appellant herein in India. **Article XIII** of AGREEMENT-I provides for two things - (1) the governing law of the agreement,

¹Article XII insofar as it is relevant for our purpose reads as follows:-

“Section 12.1 Governing Law. This Agreement shall be governed by, and construed and interpreted in accordance with the laws of the United Kingdom without regard to its conflict of laws principles.

Section 12.2 Dispute Resolution; Arbitration. (a) Any and all claims, disputes, questions or controversies involving Reliance (i.e. SASAN) on the one hand and NAC on the other hand arising out of or in connection with this Agreement (collectively, “Disutes”) which cannot be finally resolved by such parties within 60 (sixty) days of arising by amicable negotiation shall be resolved by final and binding arbitration to be administered by the International Chamber of Commerce (the “ICC”) in accordance with its commercial arbitration rules then in effect (the “Rules”). The place of arbitration shall be London, England.

“Article XV Section 15.6. Successors and Assigns. This Agreement may be assigned by NAC to any Affiliate of NAC; with the previous written consent of Reliance, which consent shall not be unreasonably withheld. Without the written consent of NAC, which consent shall not be unreasonably withheld, Reliance shall not assign its rights under this Agreement or cause its obligations under this Agreement to be assumed by any other person. No assignment or other transfer shall release the assignor from its obligations or liabilities hereunder. Any assignment in violation of the foregoing shall be null and void ab initio. This agreement shall be binding upon and inure to the benefit of the parties hereto and their successors and permitted assigns.”

and (2) resolution of disputes, if any to arise between the parties, by arbitration.

4. Section 12.1 stipulates that (i) the governing law of the agreement shall be the law of the United Kingdom, (ii) the conflict of laws principles of England will have no application while interpreting AGREEMENT-I in accordance with the laws of the United Kingdom. Section 12.2 stipulates the arbitrator, seat of arbitration and the procedure to be followed in the arbitration (i) the arbitration is “to be administered by the International Chambers of Commerce (the ICC)”, (ii) the place of arbitration shall be London, (iii) such arbitration shall be conducted in accordance with the commercial arbitration rules of the ICC, in effect at the time of the arbitration.

5. Article XV Section 15.6 of the AGREEMENT-I provides for assignment:

“Article XV Section 15.6. Successors and Assigns. This Agreement may be assigned by NAC to any Affiliate of NAC; with the previous written consent of Reliance, which consent shall not be unreasonably withheld. Without the written consent of NAC, which consent shall not be unreasonably withheld, Reliance shall not assign its rights under this Agreement or cause its obligations under this Agreement to be assumed by any other person. No assignment or other transfer shall release the assignor from its obligations or liabilities hereunder. Any assignment in violation of the foregoing shall be null and void ab initio. This agreement shall be binding upon and inure to the benefit of the parties hereto and their successors and permitted assigns.”

6. On 1.4.2011, the appellant, the American company and the respondent herein, which is an Indian Company and a fully owned **subsidiary**² of the American company entered into an agreement (hereinafter AGREEMENT-II). By the said agreement, the American company purported to **assign**³ all its rights and obligations with the consent of the appellant to the Indian Company with effect from 1. 4.2011. A fact which is significant in the context of the questions argued in this appeal is that all the three signatories to the AGREEMENT-II agree that the American company is not relieved of its obligations and liabilities.

²Section 4 of the Companies Act.

³ “ASSIGNMENT AND ASSUMPTION

(1) NAC hereby transfers and assigns all of NAC’ s rights and obligations under the Agreement to NACC India. NAC hereby acknowledges that, as provide^{3d} in Section 15.6 of the Agreement, NAC’ s transfer and assignment of all of NAC’ s rights and obligations under the Agreement to NACC India does not release NAC, as assignor, from its obligations or liabilities under the Agreement. (2) NACC India hereby accepts the transfer and assignment of all of NAC’ s rights and hereby assumes all of NAC’ s obligations under the Agreement, and hereby agrees to perform such obligations in accordance with the terms of the Agreement.

CONSENT TO ASSIGNMENT AND ASSUMPTION

(3) Reliance hereby consents to NAC’ s transfer and assignment of all of NAC’ s rights and obligations under the Agreement to NACC India, and agrees that hereafter NACC India shall have the right to enforce all of NAC’ s rights under the Agreement

7. Disputes arose between the appellant and the respondent. The respondent by its letter dated 23.7.2014 purported to terminate the AGREEMENT-I. Thereafter, the respondent made a request for arbitration on 08.08.2014.

8. The appellant herein filed a suit (Suit No.4A of 2014 in the Court of the District Judge, Singrauli, Madhya Pradesh) seeking various reliefs. The reliefs insofar as they are relevant for our purpose are as follows:-

(i) Pass a decree of declaration in favour of the Plaintiff declaring Section 10.2 of the Agreement dated 01.01.2009 as null, void, inoperative and unenforceable.

(ii) Pass a decree of declaration declaring that the invoices raised by the defendant upon the plaintiff dated defendant's invoices dated 01.10.2013, 02.01.2014, 01.04.2014, 11.04.2014, 16.01.2014, 11.04.2014, and four invoices dated 21.07.2014 as also Section 10.2 of the Agreement are illegal, null and void and unenforceable.

(iii) Pass a decree of declaration declaring that not even a default having occurred as per Section 8.1, the letter of termination dated 23.7.2014 is illegal, null and void and inoperative and issuance of such a letter amounts to a breach of the contract by the defendant.

(iv) Pass a Decree of Declaration in favour of the Plaintiff and against the Defendant, thereby declaring the Governing Law and Arbitration Agreement being Article XII of the Agreement as null, void, inoperative and unenforceable; and that the Arbitration Agreement has no legal and binding force in the eyes of Law;

(v) Pass a decree for Permanent Injunction, in favour of the Plaintiff and against the Defendant, thereby restraining the Defendant or any other person on its behalf in any manner proceeding or continuing with the arbitration proceedings (bearing No.20432/TO) initiated by Defendant before the ICC in London against the Plaintiff.

(vi) Pass a decree of declaration that Request for Arbitration dated 8.8.2014 is null and void being contrary to Indian law.

9. It is relevant to take note of two facts. There is no prayer with respect to the AGREEMENT-II. The American company is not a party to the suit, inspite of the fact that the 1st relief sought in the suit is for a declaration of the illegality of one of the clauses of AGREEMENT-I to which only the appellant and American company are parties In the said suit, an ex-parte order came to be passed on 11.11.2014 injuncting the ICC from proceeding with the arbitration.

10. Thereafter, the respondent filed two applications, one (I.A. No.5/15) under Order 7 Rule 11(d) CPC read with Section 45 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “1996 Act”) praying that the dispute be referred to arbitration and the second (I.A. No. 4/15) under Order 39 Rule 4 CPC seeking vacation of the injunction order. The applications were contested by the appellant unsuccessfully. The suit was dismissed. The operative portion of the judgment reads:

“On the basis of the above discussions, the application filed by the defendant/applicant as I.A. No.5 under Order 7 Rule 11-D CPC read with Sec. 45 of the Arbitration and Conciliation Act, 1996 is allowed, resultantly the present plaint of the plaintiff is rejected. I.A. No.4 under Order 39 Rule 4 CPC is also allowed on the same ground on which I.A. No.5 has been allowed. Resultantly, the orders/directions of this Court dated 11.11.2014 and 2.12.14, 7.1.15 and 11.3.15, restraining the defendant from proceeding further with the arbitration proceeding No.20432/T.O. before ICC, London are set aside.”

Aggrieved by the same, the appellant carried the matter to the High Court of Madhya Pradesh. The High Court dismissed the appeal and held:

“71. Finally, we may observe that once it is found by us that parties by mutual agreement have decided to resolve their disputes by arbitration and when then on their own, chose to have the seat of arbitration in a foreign country, then in view of the provisions of Section 2(2) of the Act of 1996, Part 1 of the Act, will not apply in a case where the place of arbitration is not India and if Part 1 does not apply and if the agreement in question fulfills the requirement of Section 44 then Part II will apply and when Part II applies and it is found that agreement is not null or void or inoperative, the bar created under Section 45 would come into play and if bar created under Section 45 comes into play then it is a case where the Court below had no option but to refer the parties for arbitration as the bar under Section 45 would also apply and the suit itself was not maintainable.

72. Accordingly, in the facts and circumstances, we find no error in the order passed by the learned District Judge, warranting record deration.

73. Appeal is therefore, dismissed. No order on costs.”

Hence the present appeal.

11. One of the grounds of appeal is that the High Court has erroneously rejected the contention of the appellant that two Indian companies are prevented from entering into an agreement for arbitration of their dispute to be seated outside India. We do not find from the impugned judgment anything to indicate that such a submission was made before the High Court. On the other hand, learned counsel for the appellant specifically submitted during the course of the argument before us that he is not making that submission before us.

12. The argument before us was confined only to the question whether two Indian companies can enter into an agreement with a stipulation that their agreement “be governed by, construed and interpreted in accordance with the laws of the United Kingdom” . Various submissions incidental to that main submission were made and would be taken note of at the appropriate place.

13. Parties have filed written submissions after the conclusion of the arguments before this Court. In the written submissions filed by the appellant, it is stated that three questions “of general importance arise for the consideration and decision of this Court” and they are;

“Q.(1) Whether it is permissible under the consolidated Indian law of arbitration (now contained in the Arbitration and Conciliation Act 1996) for two Indian Companies (each incorporated and registered in India) to agree to refer their commercial disputes (that might arise between them) to a binding arbitration, (ad hoc or institutional), with place of arbitration outside India, and with governing law being English law?

Q.(2) Whether two Indian companies, Sasan Power Ltd. and NACC India Ltd., each of whom have been incorporated and registered in India could in law be said to have “made an agreement referred to in Section 44” of the 1996 Act, so as to confer jurisdiction and authority on the competent Court (District Court of Singrauli, Madhya Pradesh) to refer the parties to ICC arbitration in London under Section 45 of the Arbitration and Conciliation Act 1996?

Q.(3) Whether the arbitration agreement in Clause XII was invalid and void for being in breach of Clause (a) of Section 28 of the Indian Contract Act 1872 (not being saved by the Exception Clause), and also void because of the provisions of Section 23 of the Indian Contract Act, 1872, and hence not referable to arbitration under Section 45 of the Arbitration and Conciliation Act, 1996?”

14. We presume that Question No.I insofar as it pertains to the “place of arbitration” found its way into the written submission by oversight as the said submission was expressly given up at the time of the argument. From the questions projected by the appellant, it can be seen that the entire case of the appellant is built up on the assumption that the parties to the arbitration agreement are only two Indian companies. The substance of the other two questions is that parties herein (two Indian companies) could not enter into an agreement with a stipulation that the governing law for the construction and interpretation of the AGREEMENT-I to be the law of United Kingdom. The appellant also raise a further question that in view of the fact that both the parties to the dispute in the *arbitration*⁴ being

⁴Admittedly, already initiated on a request of the Respondent on 8.8.2014 - Admitted, See prayers V and VI of the plaint.

companies registered in India whether the respondent could have invoked Section 45 of the 1996 Act and the courts below were justified in referring the dispute to arbitration purportedly in discharge of the statutory obligation under Section 45.

15. The basic prayer in the suit is twofold i.e. for declaration that Article X Section 10.2 and Article XII of the AGREEMENT-I are null and void. The remaining prayers in the suit are either incidental or ancillary to these two prayers. The appellant's grievance regarding the Article X, Section 10.2 is to be found in *paragraphs 39-41*⁵. According to the copies of the plaint supplied to us by the appellant, Section 10.2 of AGREEMENT-I is "contrary to 5.7.3 of the Contract Act". We presume 5.7.3 refers Section 73 of the Indian Contract Act, 1872!?

16. Before we examine this question of law, certain indisputable facts are to be noted:

"1) The rights and obligations of the American company (under AGREEMENT-I) were purported to have been assigned in favour of the respondent by AGREEMENT-II.

2) From a copy of the AGREEMENT-II filed along with the appeal it is clear that the representatives of all the 3 companies, i.e., the AMERICAN and the two INDIAN companies (parties herein) signed the AGREEMENT-II.

5 Para 39- "The Plaintiff submits that Section 10.2 of the Association Agreement reproduced hereinafter "Limitation on Damages in no event shall either party be liable to the other for any consequential, incidental, special punitive or indirect damages, including loss of profits, revenue or business opportunities. Reliance acknowledges and agrees that its exclusive remedies against NAC and its direct and indirect owners and Affiliates for any breach or other violation of this Agreement are set forth in Sections 6.3(b) and 8.2 and that in no event shall any damages recoverable against NAC and its direct and indirect owners and Affiliates exceed U.S. \$1,000,000" which sets a cap on the damages that may be recovered by the Plaintiff is contrary to the principle that when a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it. Section 10.2 of the Association Agreement is consequently liable to be declared null and void and set aside as being contrary to 5.7.3 of the Contract Act."

Para 40- "It is submitted that the section 10.2 should be construed as a clause merely to prevent breach of contract, and is not a measure of damages accrued to the Plaintiff. The Section 10.2 since it puts a cap on the liquidated damages is unenforceable, illegal and liable to be declared as null and void."

Para 41 "Upon a declaration by this Hon' ble Court that Section 10.2 of the said Agreement is null and void, the Plaintiff is entitled to the aforesaid damages. The plaintiff reserves its remedy of seeking damages under Order II rule 2 of Civil Procedure Code and would file proceedings once a aforesaid declaration is made by this Hon' ble Court."

3) Under the AGREEMENT-II it is agreed that such an assignment does not release the American company from its obligations or liabilities under AGREEMENT-I.

4) Apart from that, it was agreed between the parties that certain clauses of AGREEMENT-I would be substituted with new **clauses** ⁶.

Another important feature of AGREEMENT-II is that the parties agreed - “except as amended by this amendment, the agreement shall remain in effect as written” . The expression ‘agreement’ is defined in AGREEMENT-II as follows:-

"WHEREAS, Reliance and NAC are parties to that certain Association Agreement for Mine Development and Operations, dated as of January 1, 2009, as amended by that certain First Amendment, dated as of September 30, 2009 (as amended, the "AGREEMENT")." - i.e. AGREEMENT as amended by 30.09.2009 agreement.

In other words, the appellant never raised any objection regarding the consistency of Section 10.2 of Article X and Article XII of AGREEMENT-I with the Indian Contract Act either when the appellant entered into AGREEMENT-II or when the parties acted upon it.”

17. At the outset we would like to examine the legal nature of the transaction covered by the AGREEMENT-II. It can be seen from the **tenor**⁷ of the AGREEMENT-II that it is a tripartite agreement. The assignment to be effective between the American company and the respondent requires the consent of the appellant in view of Section 15.6 of **AGREEMENT-I**⁸. The consent given by the appellant herein is qualified. The appellant retained its right against the American company for the enforcement of obligations and liabilities under AGREEMENT-I owed by the American company to the appellant. Therefore, the rights and obligations flowing out of AGREEMENT-II between the three parties are interdependent. What exactly are such rights and obligations and their legal implications require an elaborate

⁶Section 5.3 and 5.6 of Article V came to be substituted.

* See para 6 of the agreement

⁷ “This Assignment and Assumption Agreement, Consent and Second Amendment to Association Agreement for Mine Development and Operations (this “Amendment”) is made and entered into effective as of April 1, 2011 by and between Sasan Power Limited, an Indian company (“Reliance”), The North American Coal Corporation, a Delaware corporation (“NAC”), and North American Coal Corporation India Private Limited, an Indian company (“NACC India”) that is 99% owned by NAC and 1% owned by TRU Global Energy Services, L.L.C., a wholly-owned subsidiary of NAC.”

⁸ “NAC hereby acknowledges that, as provide³d in Section 15.6 of the Agreement, NAC’ s transfer and assignment of all of NAC’ s rights and obligations under the Agreement to NACC India does not release NAC, as assignor, from its obligations or liabilities under the Agreement.”

enquiry and no argument in this behalf has been advanced before us. The appellant's case that the transaction covered by the AGREEMENT-II is an assignment is a question which requires examination. Because it is neither the nomenclature adopted by the parties to an agreement nor their understanding of law that determines the true nature and the legal character of the agreement. The rights and obligations created under the agreement determine the legal character of an agreement.

18. An assignment is understood to be the transfer from one person to another (referred to in law as the assignor and assignee respectively) the whole or part of an existing right or interest in intangible property presently owned by the assignor. The right or interest itself is not **extinguished**⁹.

19. It is settled law that there can only be an assignment of rights arising under a contract but not the **"burden of a contract"**¹⁰. In *Tolhurst v. The Associated Portland Cement Manufacturers Limited*¹¹, held as follows-

"It is, I think, quite clear that neither at law nor in equity could the burden of a contract be shifted off the shoulders of a contractor on to those of another without the consent of the contractee ... this can only be brought about by the consent of all three, and involves the release of the original debtor . it is equally clear that the benefit of a contract can be assigned"

The Court of Appeal further laid down- (i) Assignment of the benefit of the contract IS PERMISSIBLE where the consideration has been executed and nothing remains but to enforce the obligation against the party who has received the consideration; and

(ii) "There is, however, another class of contracts, where there are mutual obligations still to be enforced and where it is impossible to say that the whole consideration has been executed. Contracts of this class cannot be assigned at all in the sense of discharging the original contractee and creating privity or quasi privity with a substituted person." The decision of the Court of Appeal was affirmed by the **House of Lords**¹¹.

⁹ See A.G. Guest and Ting Khai Liew, *Guest on the Law of Assignment*, 2nd ed. Pg. 1 (Sweet and Maxwell, UK).

¹⁰ *Jaffer Meher Ali v. Budge-Budge Jute Mills Co.*, ILR (33) Cal 702 at page 707- "...the rule as regards the assignability of contracts in this country is that the benefit of a contract...as distinguished from the liability thereunder may be assigned...This rule is however subject to two qualifications: first that the benefit sought to be assigned is not coupled with any liability or obligation that the assignor is bound to fulfil...that the contract is not one which has been induced by the personal qualifications or considerations as regards the parties to it"

¹¹ *Tolhurst v. The Associated Portland Cement Manufacturers Limited*, (1903) AC 414

20. In the facts and circumstances of the case on hand as indicated by the record, the AGREEMENT-II appears to be falling under the 2nd of the above mentioned two classes of the contracts. There is no discharge of the original contractee i.e., the American company's obligations. There are mutual obligations (arising out of AGREEMENT-I) still to be enforced. The American company legally cannot claim to have been discharged from the obligations arising under AGREEMENT-I and in fact has not been discharged. On the other hand, the appellant by an express covenant under AGREEMENT-II retained its rights to enforce obligations (arising under AGREEMENT-I) against the American company (See Footnote 3). AGREEMENT-II perhaps only creates an **agency**¹² where the American company is the principal and the respondent its agent or what is described in some cases as sub-contracting or an arrangement for vicarious performance". We hasten to add that we are not expressing any conclusive opinion on this question as no arguments in this behalf are advanced by either side before us. We only conclude that the transaction covered by AGREEMENT II is not an assignment.

21. However, the appellant's suit is based on its understanding that the respondent stepped into the shoes of the American company. Therefore, both "in fact and law" the AGREEMENT-II is between the parties to this appeal! (two Indian companies).

"15. ... The Assignment agreement was signed in India. Hence, NACC US novated the Association Agreement in favour of the Defendant. The Defendant stepped in to the shoes of NACC US and, in fact and law, the **Assignment agreement**¹³ is one between the Plaintiff and the Defendant. A reference to the Association Agreement hereafter, shall, unless the context otherwise requires, mean the Association Agreement or between the **Plaintiff and the Defendant**.¹⁴"

22. In law, novation means-

"... there being a contract in existence, some new contract is substituted for it, either between the same parties (for that might be) or between different parties, the consideration mutually being the discharge of the old **contract**"¹⁵.

¹¹[1902] 2 K.B. 660, Collins MR

¹² The Indian Contract Act though does not define the expression agency defines agent and principal under Sec. 182.

"Section 182: An 'agent' is a person employed to do any act for another, or to represent another in dealings with third persons. The person for whom such act is done, or who is so represented, is called the 'principal'."

¹³ Perhaps it is "association agreement". Whether it is a typographical error in the copy supplied to us or in the original plaint itself or the draftsman's error – god only knows. If read as 'assignment agreement' the pleading in our opinion makes no sense

¹⁴ Paragraph 15 of Plaint RCS No. 4A of 2014.

¹⁵ Lord Selborne L.C. in *Scarf v. Jardine* (1882) 7 App. Cas. 345, 351.

23. The pleading is wholly untenable in law for the following reasons

“(i) There cannot be any novation between the American company and the respondent because prior to the AGREEMENT-II, there was no agreement whatsoever between them.

(ii) The respondent cannot be said to have stepped into the shoes of the American company because the obligations under AGREEMENT-I owed by the American company to the appellant were not discharged by the AGREEMENT-II. It is on the basis of such a flawed understanding of law regarding the nature of the AGREEMENT-II the appellant raises the esoteric proposition whether two Indian Companies could have stipulated that their agreement be governed by the laws of the United Kingdom.”

24. Adjudication of the dispute raised by the respondent in the arbitration would necessarily involve examination of the rights and obligations of the American company under AGREEMENT-I and AGREEMENT-II. Therefore, it is a dispute between three parties (of which one is an American company) with a foreign element i.e. rights and obligations of the American company. Hence, the stipulation regarding the governing law cannot be said to be an agreement between only two Indian companies.

25. At this stage, we must deal with the submission made on behalf of the appellant that there was a concession by the respondent before the High Court that AGREEMENT-II is not a tripartite agreement but a **bipartite agreement**¹⁶. What is the number of parties to a document is a question of fact. When a fact is **in issue**¹⁷, the same is required to be proved in accordance with the provisions of the Evidence Act. Disposition of the property whether it be by way of a contract or grant or any other, if reduced to writing, parties are prohibited from giving any evidence regarding the terms of such **disposition**¹⁸ except the document itself or ‘secondary evidence’¹⁹ of that document. Provided that such secondary evidence is

¹⁶ 20.. That apart, Shri A. Krishnan, learned counsel for the respondent, at the very outset had admitted that the findings recorded by the learned District Judge to say that the Assignment Agreement is a tripartite agreement is not correct and the objection in this regard raised by Shri V.K. Tankha, learned Senior Advocate, may be accepted, he agrees that the same is a Bi parte agreement.

¹⁷ The Indian Evidence Act, 1872 - Section 3. Facts in issue.- The expression “facts in issue” means and includes - any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature, or extent of any right, liability, or disability, asserted or denied in any suit or proceeding, necessarily follows.

¹⁸ Section 91 - Evidence of terms of contracts, grants and other dispositions of property reduced to form of documents - When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.

¹⁹ Section 63 - Secondary evidence. Secondary evidence means and includes.- (1) certified copies given under the provisions hereinafter contained;

(2) Copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy, and copies compared with such copies;

(3) Copies made from or compared with the original;

(4) Counterparts of documents as against the parties who did not execute them;

(5) Oral accounts of the contents of a documents given by some person who has himself seen it.

otherwise admissible under the Evidence Act. Though oral evidence can be secondary evidence under Section 63(5), Section 64 mandates that documents must be proved by primary evidence except in exceptional circumstances specified under the other provisions of Evidence Act. Logically, a concession at the bar regarding the content of a written agreement including the fact as to who are the parties to the document, in our opinion, does not stand on any different footing than the oral evidence of the parties. The concession made by the counsel for the respondent is not secondary evidence admissible under any of the clauses of Section 65 of the Evidence Act. Therefore, in our opinion, the concession made at the bar by the learned counsel (for the respondent herein) before the High Court does not preclude the respondent from asserting that AGREEMENT-II is a tripartite agreement. The tenor and content and the fact that representatives of the three companies signed the document cannot be ignored simply on the basis of an uninformed concession made at the bar.

26. Therefore, the question whether two Indian companies could enter into an agreement to be governed by the laws of another country would not arise in this case. So long as the obligations arising under the AGREEMENT-I subsists and the American company is not discharged of its obligations under the AGREEMENT-I, there is a 'foreign element' therein and the dispute arising therefrom. The autonomy of the parties in such a case to choose the governing law is well recognized in law. In fact, **Section 28(1)(b)**²⁰ of the 1996 Act expressly recognizes such autonomy.

27. We then proceed to examine the question whether the suit filed by the appellant is maintainable or barred by Section 45 of the 1996 Act as contended by the respondents or any other provisions of the 1996 Act or any other law, because if a suit is barred by law the Court is bound to take note of the bar whether such a question is raised by the parties or not. To begin with a survey of the history and background of the 1996 Act and its scheme would be helpful in answering the various questions that arise in this appeal.

²⁰ Section 28. Rules applicable to substance of dispute.— (1) Where the place of arbitration is situate in India,—
(a) in an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;
(b) in international commercial arbitration,—
(i) the arbitral tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute;
(ii) any designation by the parties of the law or legal system of a given country shall be construed, unless otherwise expressed, as directly referring to the substantive law of that country and not to its conflict of laws rules;
(iii) failing any designation of the law under clause (a) by the parties, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute.

(2) The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorised it do so.

(3) While deciding and making an award, the arbitral tribunal shall, in all cases, take into account the terms of the contract and trade usages applicable to the transaction

28. The history and development of the law of arbitration in this country was very succinctly captured by this Court in *Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc. etc.*, (2012) 9 SCC 552²¹ (for short “BALCO”). It traced out the origin and development of not only the domestic law of arbitration in India but also the international arrangements regarding arbitration agreements and awards made in one country but sought recognition or enforcement in another country - the Geneva Protocol on Arbitration Clauses, 1923 and the Geneva Convention on Execution of Foreign Arbitral Awards, 1927 and the New York Convention, 1958. It also indicated how two consequential enactments known as the Arbitration (Protocol and Convention) Act, 1937 and the Foreign Awards (Recognition and Enforcement) Act, 1961 came to be made by the Parliament to give effect to the above international arrangements.

29. All the three international legal instruments dealt with the various aspects of problems which could arise out of an international commercial arbitration, such as the recognition of arbitration agreements entered into and enforcement of arbitral awards made in countries other than the one in which the arbitration agreement is entered into or award is sought to be enforced. Whereas the two *enactments dealt*²² with the enforcement of “foreign awards” and matters incidental thereto in this country.

30. With the increase of international trade and commerce in the second half of the 20th Century, all the abovementioned assignments were considered inadequate and, therefore, the United Nation Commission on International Trade Law adopted a model law on international arbitration popularly known as UNCITRAL. The General Assembly of the United Nations by a resolution dated 11.12.1985 recommended that “all States give due consideration to the Model Law on an 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”. Pursuant to the said recommendation, the 1996 Act came to be made by the Parliament. It is in four parts. Relevant for enquiry are only Parts I and II.

31. Part-II of the 1996 Act is headed “Enforcement of Certain Foreign Awards”. It contains provisions (Section 44 to 60 divided into two Chapters I and II) dealing with the enforcement of foreign awards falling under two categories i.e. New York Convention Award and Geneva Convention Awards. Sections 44 to 52 (falling under Chapter I) deal with the New York Convention Awards, the remaining sections (falling under Chapter-II) deal with Geneva Convention Awards. Both the classes of Awards are referred to as “foreign awards” in Chapters I and II of Part-II. **Section 44(a)**²³ **and 53(a)**²⁴ define the expression “foreign award” for the purposes of Chapters I and II respectively to mean an arbitral

²¹ See para 32 to 38 of *Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc. etc.* (2012) 9 SCC 552.

²² Repealed by Section 85 of the 1996 Act.

²³ “Section 44 ... in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies,”

²⁴ “Section 53(a) in pursuance of an agreement for arbitration to which the Protocol set forth in the Second Schedule applies,.

award in pursuance of an agreement for arbitration to which the convention set forth in Ist or protocol and convention set forth in the IInd Schedule of the Act respectively applies. Such foreign awards are deemed to be a decree of a **Court**²⁵. Various conditions which render a foreign award unenforceable are specified in Sections 48 and 57 respectively. The other provisions deal with matters incidental to the enforcement of foreign awards. It is significant to note that Part II does not deal with any matter pertaining to any step anterior to the making of an (foreign) arbitral award.

32. We now deal with the scheme of Part I of the 1996 Act. It contains provisions which defines an arbitration agreement, its form and content, the procedure for appointment of arbitrators, jurisdiction of arbitral tribunals, the procedure to be followed by the arbitral tribunals, form and content of the arbitral awards, the forum before which and the procedure by which the arbitral award can be challenged and all matters incidental and ancillary to the above-mentioned aspect of the arbitration.

33. This Court in *Bhatia International v. Bulk Trading S.A. & Another*(2002) 4 SCC 105, considered the question whether Part 1 of 1996 Act would apply to an arbitration where the place of arbitration is *outside India*²⁶. On consideration of the matter, this Court held as follows:

“32. To conclude, we hold that the provisions of Part 1 would apply to all arbitrations and to all proceedings relating thereto. Where such arbitration is held in India the provisions of Part 1 would completely apply and parties are free to deviate only to the extent permitted by the derogable provisions of Part 1. In cases of international commercial arbitrations held out of India provisions of Part 1 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 1, which is contrary to or excluded by that law or rules will not apply.”

²⁵ See Sections 49 and 68

²⁶ *The parties had a contractual relationship and the contract contained an arbitration clause which provided that in the event of any dispute the matter would be resolved by arbitration as per the International Chamber of Commerce. Eventually, the dispute arose and the respondent before this Court filed a request for arbitration under ICC. ICC appointed the sole arbitrator and parties agreed that the arbitration be held in Paris. The first respondent*

“32. To conclude, we hold that the provisions of Part 1 would apply to all arbitrations and to all proceedings relating thereto. Where such arbitration is held in India the provisions of Part 1 would completely apply and parties are free to deviate only to the extent permitted by the derogable provisions of Part 1. In cases of international commercial arbitrations held out of India provisions of Part 1 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 1, which is contrary to or excluded by that law or rules will not apply.”

34. However, in a subsequent judgment in BALCO, a larger bench of this Court disagreed²⁷ with the conclusions recorded in Bhatia International and held as follows:

“194. ... 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 the 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.

196. 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.”

However, such a declaration of law was directed to operate only prospectively²⁸.

35. In view of the law laid down in BALCO, it is the submission of the appellant that since the AGREEMENT-I and AGREEMENT-II are anterior to BALCO judgment, the case on hand is governed by the law declared by this Court in Bhatia International (supra).

thereafter moved an application under Section 9 of the 1996 Act in the Court of Addl District Judge, Indore against the appellant. Such an application was resisted on the ground of maintainability successfully by the appellant upto the High Court. Therefore, the appeal to this Court.

27 Para 195. With utmost respect, we are unable to agree with the conclusions recorded in the judgments of this Court in Bhatia International v. Bulk Trading S.A., (2002) 4 SCC 105 and Venture Global Engg. v. Satyam Computer Services Ltd. (2008) 4 SCC 190. 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 simpliciter would be maintainable in India, on the basis of an international commercial arbitration with a seat outside India.”

28 Para 197 of the BALCO case reads-

“The judgment in Bhatia International [(2002) 4 SCC 105] was rendered by this Court on 13-3-2002. Since then, the aforesaid judgment has been followed by all the High Courts as well as by this Court on numerous occasions. In fact, the judgment in Venture Global Engg. [(2008) 4 SCC 190] has been rendered on 10-1-2008 in terms of the ratio of the decision in Bhatia International [(2002) 4 SCC 105] . 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.”

36. The case of the appellant has been that in view of the assignment under AGREEMENT-II, the dispute becomes purely a dispute between two Indian companies (parties to this appeal). Therefore, any arbitration agreement between such companies cannot be an agreement to which the (New York) Convention set forth in the First Schedule of the 1996 Act applies. If such Convention does not apply, the question of application of Section 45 does not arise. In view of the judgment of this Court in Bhatia International, only Part-I of the 1996 Act applies and, therefore, Interlocutory Application No.5 of 2015 is liable to be rejected.

37. From a plain reading of Part I of the 1996 Act, having regard to the scheme of the Act and language of Section 2(2), Part I of the Act applies to all arbitrations which take place in India. It is irrelevant whether any one of the parties to such arbitration agreement is an Indian entity (either a citizen or body corporate incorporated in India etc.) or not. If two non-Indian entities agree to have their disputes resolved through the process of arbitration with seat of arbitration in India, such an arbitration would obviously be governed by the provisions of Part I of the Act. By virtue of the law declared by this Court in the case of Bhatia International (supra), even if the seat of arbitration is not in India, if one of the parties to such arbitration is an *Indian entity*²⁹, Part I would apply unless parties by an agreement in such a case choose to exclude the application of all or some of the provisions of Part I by an *agreement*³⁰.

38. The question, therefore, is whether the arbitration agreement in question is one falling exclusively under Part-I of the 1996 Act or falling under both parts of the 1996 Act. Bhatia International never declared that the arbitration agreement falling under the scope of Part-I of the 1996 Act would automatically cease to fall under Part-II of the 1996 Act. On the other hand there are observations to the **contra**³¹. A recent judgment of this **Court**³² clearly

²⁹ Though Bhatia's case did not make it express, the requirement of some legal connection between the arbitration and India either the territory or sovereignty is essential and therefore necessarily implicit in the declaration made in the judgment. Hence the requirement of at least one of the parties to be an Indian entity.

³⁰ Parties to the AGREEMENT I agreed to exclude the application of Part I of the Arbitration Act except Sec. 9 thereof. The relevant part of Art. XII Sec. 12.2 (a) reads as follows: "Save and except the provision under Section 9, the provisions of the Part I of (Indian) Arbitration and Conciliation Act, 1996, as amended (the "Arbitration Act") shall not apply to the arbitration.

³¹ See paras 26 and 32 of Bhatia International

³² Union of India v. Reliance Industries Limited & Others (2015) 10 SCC 213-15. However, this Court in Bhatia International v. Bulk Trading S.A., (2002) 4 SCC 105, resurrected this doctrine of concurrent jurisdiction by holding, in para 32, that even where arbitrations are held outside India, unless the parties agree to exclude the application of Part-I of the Arbitration Act, 1996, either expressly or by necessary implication, the courts in India will exercise concurrent jurisdiction with the court in the country in which the foreign award was made. Bhatia International was in the context of a Section 9 application made under Part I of the 1996 Act by the respondent in that case for interim orders to safeguard the assets of the Indian company in case a foreign award was to be executed in India against it. The reductio ad absurdum of this doctrine of concurrent jurisdiction came to be felt in a most poignant form in the judgment of Venture Global Engg v. Satyam Computer Services Ltd., (2008) 4 SCC 190, by which this Court held that a foreign award would also be considered as a domestic award and the challenge procedure provided in Section 34 of Part I of the 1996 Act would therefore apply. This led to a situation where the foreign award could be challenged in the country in which it is made; it could also be challenged under Part-I of the 1996 Act in India; and could be refused to be recognised and enforced under Section 48 contained in Part II of the 1996 Act." recorded that Bhatia International judgment leads to such a possibility. However, with reference to the agreements entered into subsequent to BALCO, this question does not arise. It is only for the interregnum between the date of the 1996 Act and the date of the judgment, in BALCO such a question arises.

39. To determine the question, whether an arbitration agreement governed by the law laid down by Bhatia International is one which falls exclusively within the operation of Part-I or one which falls within the operation of both Part-I and Part-II of the 1996 Act, depends on three factors

- “i. who are the parties to the arbitration agreement;
- ii. the venue of the arbitration; and
- iii. in a foreign seated arbitration where one of the parties is not an Indian entity whether parties agreed to exclude the application of Part I.”

40. In any case, whether an arbitration agreement is exclusively governed by the provisions of either Part-I or by Part-II of the 1996 Act or both (as discussed earlier), judicial authorities seized of an action in respect of which there exists an arbitration agreement are bound to refer the dispute between the parties to arbitration and are precluded under Sections 8 and 45 from adjudicating the dispute (of course) subject to the other conditions stipulated in the two sections.

41. The instant appeal as already noticed arises out of an order in Interlocutory Application No.5 of 2015 filed by the respondent herein in the suit filed by the appellant herein. In the Interlocutory Application, the respondent made two prayers ³³, (i) to reject the plaint in the suit filed by the appellant being barred by law; and (ii) to refer the dispute between the appellant and the respondent to arbitration as contemplated under the AGREEMENT.

42. Insofar as the first of the abovementioned two prayers is concerned, the applicant's/respondent case is to be found at para nos.16 and 17 of the application. In substance, the plea is that the suit is barred by virtue of Section 45 of the 1996 Act and, therefore, the plaint is liable to be rejected. Section 45 reads as follows:

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

³³ “i. Refer the disputes between the Applicant and the Respondent to Arbitration (bearing ICC No.20432/TO as contemplated under the Agreement;

ii. Reject the Plaint in C.S. (O.S.) 4A of 2014 as being barred by law and pass any other Orders that this Court may deem fit in the interest of justice.” Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.”

It can be seen from Section 45 that a judicial authority in this country when seized of an action in a matter in respect of which the parties have made an agreement referred to in Section 44 “shall refer the parties to arbitration” at the request of one of the parties to the agreement. The agreement referred to in Section 45 is one contemplated in Section 44. **Section 44**³⁴ contemplates an arbitration agreement to which the New York Convention applies.

43. Section 45, permits an enquiry into the question whether the arbitration agreement is “null and void, inoperative and incapable of being performed” .

44. The appellant’ s case as evidenced by the plaint in its suit is that parts of the AGREEMENT-I though created valid rights and obligations between the (original) parties thereto ceased to be valid subsequent to the assignment under AGREEMENT-II. Because (according to the appellant’ s understanding) the parties to AGREEMENT-II are only two companies incorporated in India. They could not have agreed that the governing law of the agreement should be the law of the United Kingdom. According to the appellant, such a stipulation in the agreement would be contrary to the public policy and hit by Sections 23 of the Indian Contract Act, 1872. Therefore, the arbitration agreement initiated by the respondent cannot be proceeded with.

45. It is settled law that an arbitration agreement is an independent or “self contained” agreement. In a given case, a written agreement for arbitration could form part of another agreement, described by Lord Diplock as the “substantive **contract**”³⁵ by which parties create contractual rights and obligations. Notwithstanding the fact that all such rights and obligations arising out of a substantive contract and the agreement to have the disputes (if any, arising out of such substantive contract) settled through the process of arbitration are contained in the same document, the arbitration agreement is an independent agreement. Arbitration agreement/clause is not that governs rights and obligations arising out of the substantive contract: It only governs the way of settling disputes between the **parties**.³⁶

46. In our opinion, the scope of enquiry (even) under the Section 45 is confined only to the question whether the arbitration agreement is “null and void, inoperative or incapable of being performed” but not the legality and validity of the substantive contract.

³⁴ Relevant portion of Section 44 reads as follows:

“44. Definition.— In this Chapter, unless the context otherwise requires, “foreign award” means 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, 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, (b)

³⁵ Aughton Ltd. v. MF Kent Services Ltd. (1991) 57 BLR 1 (CA)

“the status of a so-called ‘arbitration clause’ included in a contract of any nature is different from other types of clauses because it constitutes a ‘self contained contract collateral or ancillary to’ ‘the substantive contract’. These are the words of Lord Diplock in *Bremer Vulkan v. South India Shipping* [1981] AC 909. It is a self-contained contract, even though it is, by common usage, described as an “arbitration clause”. It can, for example, have a different proper law from the proper law of the contract to which it is collateral. This status of “self-contained contract” exists irrespective of the type of substantive contract to which it is collateral. .

³⁶ See *T.W. Thomas & Co. Ltd. v. Portsea Steamship Co. Ltd.* (1912) AC 1

47. The case of the appellant as disclosed from the plaint is that Article X, Section 10.2 is inconsistent with some provisions of the Indian Contract Act, 1872, and hit by Section 23 of the Indian Contract Act (as being contrary to public policy). It is a submission regarding the legality of the substantive contract. Even if the said submission is to be accepted, it does not invalidate the arbitration agreement because the arbitration agreement is independent and apart from the substantive contract. All that we hold is that the scope of enquiry under the Section 45 does not extend to the examination of the legality of the substantive contract. The language of the Section is plain and does not admit of any other construction. For the purpose of deciding whether the suit filed by the appellant herein is maintainable or impliedly barred by Section 45 of the 1996 Act, the Court is required to examine only the validity of the arbitration agreement within the parameters set out in Section 45, but not the substantive contract of which the arbitration agreement is a part.

48. This Court in *Hindustan Petroleum Corpn. Ltd. v. Pinkcity Midway Petroleums*, (2003) 6 SCC 503, which was a case where there was a dealership agreement between the parties for supply of petroleum products to the respondents before this Court. On the ground that the dealer committed certain irregularities in business, supply of petroleum products was suspended by the appellant for a period of 30 days and along with the penalty of Rs.15,000/-. The dealer filed a civil suit seeking a declaration that the action of the HPCL was illegal and arbitrary. In the said suit, HPCL filed an application praying that the dispute be referred to arbitration in view of the arbitration agreement between the parties. The said application was dismissed by the civil court holding that the dispute between the parties was not covered by the arbitration agreement which finding came to be confirmed by the High Court in a Revision. Dealing with the question, this Court held:

“16. It is clear from the language of the section, as interpreted by the Constitution Bench judgment in *Konkan Rly.* that if there is any objection as to the applicability of the arbitration clause to the facts of the case, the same will have to be raised before the Arbitral Tribunal concerned. ... the courts below ought not to have proceeded to examine the applicability of the arbitration clause to the facts of the case...”

If it is impermissible for a civil court to examine whether a dispute is really covered by the arbitration agreement, we see no reason to hold that a civil court exercising jurisdiction under Section 45 could examine the question whether the substantive agreement (of which the arbitration agreement is a part) is a valid agreement. No doubt that HPCL case was in the context of the bar contained in Section 8 of the 1996 Act. But the same principles of interpretation apply even for the interpretation of Section 45.

49. The stipulation regarding the governing law contained in Article XII Section 12.1 is an independent stipulation applicable to both the substantive agreement and the arbitration agreement. Either of the agreements can survive in an appropriate case without the other. For example, if in a given case, (of a across border contract) parties can agree upon for the governing law but do not have any agreement for settlement of dispute through arbitration, it

would not make any legal difference to the governing law clause (if otherwise valid) and bind the parties. The judicial forum before which the dispute (if any arises) falls for adjudication is normally obliged to apply such chosen governing law - a principle of international law recognized by this **Court**³⁷. Similarly, it is possible in a given case, parties to a substantive contract in a cross border transaction agree for the resolution of the disputes, if any, to arise out of such contract through arbitration without specifying the governing law. In such case, it would be the duty of the arbitrator to ascertain the “proper law” applicable to the case in terms of the established principles of international law. It is also possible that in a given case parties agree that the governing law of the substantive contract be that of one country and the governing law of the arbitration agreement be of another **country**³⁸. The principles of law in this regard are well settled. In all of the cases, the validity of either of the clauses/agreements does not depend upon the existence of the other. Therefore, the examination of the question of consistency of Article X Section 10.2 (part of the substantive contract) with Section 23 of the Contract Act are beyond the scope of the enquiry while adjudicating the validity of the arbitration agreement either under Section 45 or Section 8 (amended or original) of the 1996 Act. Therefore, the submissions of the appellant in this regard are required to be rejected.

50. We are left with only one question. Relief No.(iv) claimed in the suit of the appellant is for decree of declaration “against the defendant” , respondent herein, that Article XII of AGREEMENT-I is “null and void, inoperative and unenforceable” . Obviously Prayer No.(iv) is also based on the assumption that the dispute is exclusively between the appellant and the respondent, and therefore, there could not be an agreement between them for arbitration of their disputes arising out of the substantive agreement to be governed by the laws of the United Kingdom. In view of our conclusion that the dispute is not exclusively between two parties to the suit, such a relief could not be given in the suit, because the prayer itself is misconceived.

51. In view of the above, we see no reason to interfere with the conclusions recorded by the courts below. The appeal is, therefore, dismissed with costs.

³⁷ *Reliance Industries Limited & Another v. Union of India*, (2014) 7 SCC 603

“76.4Therefore, the remedy against the award will have to be sought in England, where the juridical seat is located. However, we accept the submission of the appellant that since the substantive law governing the contract is Indian law, even the courts in England, in case the arbitrability is challenged, will have to decide the issue by applying Indian law viz. the principle of public policy, etc., as it prevails in Indian law.

³⁸ *In fact, the transaction which was the subject matter of dispute in Union of India v. Reliance Industries Limited & Others*, (2015) 10 SCC 213 is one such. The substantive agreement is governed by the Indian law and the arbitration agreement by the law of England. See Para 2 of the said judgment.

JUDGMENT

Abhay Manohar Sapre,J.

52. I have had the advantage of going through the elaborate, well considered and scholarly draft judgment proposed by my esteemed Brother Jasti Chelameswar, J. I entirely agree with the reasoning and the conclusion, which my erudite Brother has drawn, which are based on remarkably articulate process of reasoning. However, having regard to the issues involved, which were ably argued by learned counsel appearing in the case, I wish to add few lines of concurrence.

53. The question that arises for consideration in this appeal is whether the Courts below were justified in allowing the application filed by the respondent (defendant) under Section 45 of the Arbitration and Conciliation Act, 1996 (for short "The Act") read with Order VII Rule 11 of the Code of Civil Procedure 1908 (in short "the Code") in a civil suit filed by the appellant (plaintiff) for declaration and, in consequence, were justified in dismissing the appellant's civil suit?

54. The aforementioned question arose in the context of the facts, which are succinctly stated by my learned Brother in his judgment. I need not, therefore, repeat the same facts again in my judgment.

55. Though both the learned senior counsel appearing for the parties argued several issues elaborately in support of their respective contentions but in my view, the aforesaid question including three questions posed by the appellant in their written submissions (quoted in Para 13 by my learned Brother in his judgment) need to be examined in the first instance by finding out the true nature and import of the two agreements referred to as (Agreement-I and Agreement-II) and relied on by the parties and also after taking into consideration the law laid down by this Court in the case of Bhatia International Aluminium Company vs. Kaiser Aluminium Technical Services Inc. (in short "Balco"), (2012) 9 SCC 552.

56. At the outset, I may take note of the rule of interpretation, which is applicable while construing any Deed. The learned Judge Vivian Bose, J. speaking for the Bench in his inimitable style of writing succinctly laid down the rule in a leading decision of this Court in Pandit Chunchun Jha vs. Sheikh Ebadat Ali & Anr., AIR 1954 SC 345 in following words:
"Deed - Construction - (T.P. Act, 1882, S. 8)

Where a document has to be construed, the intention must be gathered, in the first place, from the document itself. If the words are express and clear, effect must be given to them and any extraneous enquiry into what was thought or intended is ruled out. The real question in such a case is not what the parties intended or meant but what is the legal effect of the words which they used. If, however, there is ambiguity in the language employed, then it is permissible to look to the surrounding circumstances to determine what was intended."

57. Perusal of Agreement-I indicates that it is executed between the appellant (an Indian company) and the American Company (NAC) whereas Agreement-II indicates that it is executed between the appellant, respondent (NACC-an Indian Company) and an American Company (NAC). Secondly, the Agreement-II is styled as "Assignment and Assumption Agreement".

58. The question that arises for consideration is whether Agreement-II is a "Deed of Assignment" ? While dealing with the principles relating to transfer of actionable claims under Section 130 of the Transfer of Property Act, 1882, the learned author Sir D.F. Mulla in his celebrated commentary on Transfer of Property Act (11th Edition page 1028) dealt with the issue of "Assignment of Contracts" and explained its meaning and further explained as to what can be assigned by the contract.

59. The learned author said, "The benefit of a contract can be assigned but not the burden, for the promisor cannot shift the burden of his obligation without a novation."

60. The learned author quoted a passage from an old case of Calcutta High Court authored by J Sale, J. in *Jaffer Meher Ali vs. Budge-Budge Jute Mills Co.*, (1906) ILR 33 (Calcutta) 702 which reads as under:

“The rule as regards the assignability of contracts in this country is that the benefit of a contract for the purchase of goods as distinguished from the liability thereunder may be assigned, understanding by the term benefit, the beneficial right or interest of a party under the contract and the right to sue to recover the benefits created thereby. This rule is, however, subject to two qualifications; first, that the benefit sought to be assigned is not coupled with any liability or obligation that the assignor is bound to fulfil, and next that the contract is not one which has been induced by personal qualifications or considerations as regards the parties to it.”

61. In my view, the law laid down by the Calcutta High Court in the case of *Jaffer Meher Ali* (supra) is the correct principle of law on the subject.

62. As mentioned above, examination of the Agreement-I would go to show that firstly, Agreement-I is executed between the appellant and the American Company (NAC) whereas the Agreement-II is executed between the appellant, respondent (NACC-India) and American Company (NAC). In other words, Agreement-I is a bi-party agreement between an Indian Company (appellant) and American Company (NAC) whereas Agreement-II is a tripartite agreement between the three companies viz., two Indian companies (appellant and the respondent) and third-an American company(NAC); Secondly, the Agreement-II recognizes transfer of the rights of the original contractee, i.e., American Company (NAC) coupled with their obligations specified in the Agreement-I; Thirdly, the obligations specified in the Agreement-I are not fully performed much less to the satisfaction of the parties concerned but are still to be performed inter se qua each other; Fourthly, by virtue of the terms of the Agreement-II, the parties are still under obligation to perform and, if necessary, enforce their

respective rights and obligations arising out of Agreement-I against each other depending upon the nature of breaches when committed by any of the parties; Fifthly, Agreement-II appears to be in the nature of amendment to the Agreement-I because while recognizing the existence of Agreement-I parties have incorporated some new clauses and added one new party to the Agreement-II, i.e., the respondent (NACC-India) herein.

63. Keeping in view the aforementioned facts which, in my view, emerge from the reading of two agreements and applying the aforementioned principle of law, I am of the considered opinion that the Agreement-II is not a "Deed of Assignment". It is, inter alia, for the reason that it seeks to transfer interest in the contract with burden, i.e., obligations of a contracting party.

64. In my considered opinion, once it is noticed that firstly, the Agreement-II is a tri-partite agreement between the appellant-an Indian company, the respondent-an Indian company (NACC-India) and the original contractee party, i.e., an American Company (NAC) and secondly, the Agreement-II is essentially in the nature of an amendment to the Agreement-I, Sections 12.1 and 12.2(a) to (f) of Article XII of the Agreement-I become a part of Agreement-II.

65. A fortiori, all the three parties to the Agreement-II are then bound or/and become entitled to take recourse to Article XII and Sections 12.1, 12.2(a) to (f) of the Agreement-I for enforcement of their respective rights and obligations against each other in terms of respective clauses of Agreement-I and Agreement-II.

66. That apart, in my view, reading of Agreement-I and Agreement-II also does not indicate that any novation of contract has emerged inter se parties. It is for the reason that in order to constitute a "Novation of contract", it is necessary to prove, in the first place, that the contract is in existence and second, such contract is substituted by a new contract either by the same parties or different parties with a mutual consideration of discharge of the old contract.

67. In other words, the novation of contract comprises of two elements. First is the discharge of one debt or debtor and the second is the substitution of a new debt or debtor. The novation is not complete unless it results in substitution, recession or extinguishment of the previous contract by the new contract. Mere variation of some terms of a contract does not constitute a novation. (See Pollock & Mulla Indian Contract and Specific Relief Acts, 13th Edition, pages 1225-1226).

68. As observed supra, execution of Agreement-II has not resulted in substituting or rescinding or extinguishing Agreement-I. On the other hand, it recognized the existence of Agreement-I and resulted in its amendment by adding some new clauses and one party.

69. In these circumstances, it is not possible to hold that as a result of execution of Agreement-II, novation of contract has come in to be inter se parties.

70. This takes me to examine the legal position arising in the case, namely, that if one party to the arbitration agreement is a foreign company then whether such agreement becomes an "international commercial arbitration" within the meaning of Section 2(f) of the Act.

71. In this case, I find that NAC is an American company and being a party to Agreement-I as also to Agreement-II along with two Indian companies (appellant and the respondent), a fortiori, Agreement-I and Agreement-II become an "international commercial arbitration" within the meaning of Section 2(f) of the Act which, in clear terms, provides that if one of the parties to the agreement is a foreign company then such agreement would be regarded as "international commercial arbitration".

72. One can not dispute the legal position arising in the light of law laid down by this Court in Balco's case (supra) (See Para 197 at page 648 of the decision) that the case at hand would be governed by the law laid down in the case of Bhatia International (supra) because the case at hand arose prior to Balco regime. The law laid down in Bhatia International is contained in para 32, which reads as under:

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

(Emphasis supplied)

73. Article XII of Agreement-I deals with governing law and dispute resolution. It consists of Sections 12.1 and 12.2(a) to (f). Section 12.1 provides that the agreement shall be governed by laws of U.K whereas Section 12.2(a) provides that firstly, all the disputes shall be resolved by ICC as per ICC rules; Secondly, the place of arbitration shall be London; and thirdly, the provisions of part I of the Act will not apply to the arbitration in question.

74. In my opinion, Sections 12.1 and 12.2(a) of Article XII are in conformity with the law laid down in Bhatia International (supra) and thus satisfy the test laid down therein. These sections are, therefore, capable of being given effect to in the manner provided therein by the parties inter se for deciding their disputes, which have arisen between them in relation to Agreement-I and Agreement-II.

75. In the light of foregoing discussion, we need not consider any other argument of learned counsel for the parties.

76. Before parting with the case, we consider it apposite to deal with one issue relating to the exercise of jurisdiction by the Court under Section 45 of the Act which reads as under:

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

77. Mere reading of Section 45 would go to show that the use of the words "shall" and "refer the parties to arbitration" in the section makes it legally obligatory on the Court to refer the parties to the arbitration once it finds that the agreement in question is neither null and void nor inoperative and nor incapable of being performed. In other words, once it is found that the agreement in question is a legal and valid agreement, which is capable of being performed by the parties to the suit, the Court has no discretion but to pass an order by referring the parties to the arbitration in terms of the agreement.

78. respondent (defendant) under Section 45 of the Act by recording the findings that the agreement in question is legal and proper and capable of being performed but it did not pass any consequential order as required under Section 45 by referring the parties to the arbitration in terms of Section 12.2(a) and instead simply dismissed the suit as not maintainable.

79. In our view, the order thus needs a modification to this extent only so as to make the order in conformity with the requirement of Section 45 of the Act.

80. In the light of foregoing discussion and subject to aforesaid modification of the impugned order, I entirely agree with the reasoning and the conclusion arrived at by my learned Brother.