

(2017) 10 BOM CK 0011

BOMBAY HIGH COURT

Case No: 359 of 2017

Trammo DMCC

APPELLANT

Vs

Nagarjuna Fertilizers And
Chemicals Ltd.

RESPONDENT

Date of Decision: Oct. 9, 2017

Acts Referred:

- Code of Civil Procedure, 1908, Section 20, Section 13, Section 151, Section 44A, Order 21 Rule 41 - Other suits to be in

Hon'ble Judges: G. S. KULKARNI

Bench: SINGLE BENCH

Advocate: F.E.D Vitre, Naira Jeejeebhoy, I.M.Chagla, Gaurav Joshi

Judgement

1. A short but interesting issue arises in this petition filed under Section 9 of the Arbitration and Conciliation Act, 1996 (for short "the Act"), before the parties could be heard on the merits of the matter. The petitioner who holds a foreign arbitral award against the respondent, seeks interim reliefs pending enforcement and execution of a foreign arbitral award. On behalf of the respondent an objection has been raised as to the territorial jurisdiction of this Court to entertain this petition, referring to the amended provisions of the Act, incorporated by the Amendment Act No.3 of 2016, with effect from 23 October 2015 (for short "the 2015 amendment Act"). The focus of the arguments as advanced on behalf of the parties, thus are the provisions of the Act, as amended by the 2015 amendment Act. By virtue of the amended provisions, the definition of "Court" under Section 2(1)(e) of the Act stands amended inter alia in relation to an international commercial arbitration. Further a ""proviso"" has been inserted to sub-section (2) of Section 2, making the provisions of Sections 9, 27 and clause (a) of sub-section (1) and sub-section (3) of section 37 of the Act applicable to international commercial arbitrations, even if the place of

arbitration is outside India and an arbitral award made or to be made in such place is enforceable and recognised under the provisions of Part II of the Act. The definition of "Court" as contained in the "Explanation" to Section 47 of the Act also stands amended by conferring jurisdiction exclusively on the High Court to decide the questions forming the subject matter of the award.

FACTS

2. The controversy envelopes under the following factual matrix:-

(i) The petitioner in this petition has invoked Section 9 of the Act read with Section 151 of the Code of Civil Procedure, 1908 (for short "the CPC") seeking interim reliefs, to secure the award amounts, which would entail to its benefit in the international commercial arbitration held between the petitioner - Trammo DMCC (formerly known as Transammonia DMCC) as the claimant and the respondent. The arbitral awards were made and published in London, being (a) First Interim Final Award dated 4 December 2015 (as amended on 4 July 2016), (b) the First Costs Award dated 5 February 2016 as amended on 16 February 2016 and 4 July 2016; and (c) the Costs of Costs Award dated 10 March 2016 (as amended on 4 July 2016); (d) second Interim Final Award dated 20 September 2016; (e) third Interim Final Award dated 25 November 2016 (as amended on 14 December 2016). Under these Awards, the petitioner has claims to be entitled and the respondent liable to pay to the petitioner, an amount of US \$ 16,427,310.80 and GB ? 606,628.29.

(ii) It is not in dispute that the arbitral awards are foreign awards as defined under Section 44 of the Act. Under the provisions of the Act, the enforcement and recognition of the Arbitral Awards are governed by Part II of the Act. The respondent has not challenged the arbitral awards before the appropriate foreign Court. The petitioner, therefore, has also filed proceedings under Section 47 read with Section 49 of the Act before this Court, being Arbitration Petition (Lodg) No.340 of 2017, inter alia seeking enforcement and execution of the awards and for reliefs as more particularly prayed thereunder.

(iii) The petitioner, however, at an earlier point of time had bonafide believed, that the respondent possessed assets within the territorial jurisdiction of the Delhi High Court in the form of money lying in the respondent's bank account at New Delhi and accordingly had filed a petition [O.M.P. (EFA)(COM) No.4 of 2017] under Sections 47 and 49 of the Act before the Delhi High Court,

praying for enforcement and execution of the said arbitral awards. In the said petition an application I.A.no.4251 of 2017 was filed by the petitioner praying for a disclosure to be made by the respondent on oath, of the assets and properties of the respondent, inter alia under the provisions of the Order XXI Rule 41 of the Code of Civil Procedure. By an order dated 11 April 2017 the Delhi High Court directed the respondent to file a list of immovable assets as well as particulars and details of its bank accounts. The Court also directed the respondent not to create any further encumbrances on its immovable assets. The respondent had failed to comply with the said order dated 11 April 2017, the petitioner filed a contempt petition, against the respondent. The respondent thereafter on 4 July 2017 made a disclosure. It was revealed in the disclosure, that the respondent had created a charge on both the fixed and the current assets, in favour of its lenders, as well as for the purpose of securing 10.25% NCDs issued by the respondents. It was also revealed that the respondents' account in State Bank of India, New Delhi was closed prior to filing of the petition. Resultantly as the respondent did not have any assets within the territorial jurisdiction of the Delhi High Court, in these circumstances by an order dated 4 July 2017, the Delhi High Court permitted the petitioner to withdraw the said proceedings, with a liberty to take appropriate steps for enforcement of arbitral award before the appropriate Court.

(iv) The case of the petitioner is that as per the respondents' disclosure of immovable assets and the bank accounts, as filed before the Delhi High Court, there are monies lying in four bank accounts within the territorial jurisdiction of this Court. The averments in regard to the bank accounts in Mumbai and as to the territorial jurisdiction of this Court are set out in paragraph 31 and paragraph 38 of the petition. Paragraph 38 reads thus:-

"38. This Hon'ble Court has original jurisdiction to decide this matter and is the proper court because the Respondent has property within the territorial jurisdiction of this Hon'ble Court, in the form of monies lying in the following Banks:

(i) State Bank of Hyderabad, Mumbai (A/c.No.52119479899);

(ii) IDBI Bank, Mumbai (A/c. No.4103000067102);

(iii) IDBI Bank, Mumbai (A/c.No.133103000000268); and

(iv) ICICI Bank Limited, Pune (A/c. No.147505000039) Furthermore, Arbitration Petition (L) No.340 of 2017 for enforcement and execution of the Monetary Awards has also been filed by the Petitioner in this Hon"ble Court."

(v) On behalf of the Petitioner it is contended that by virtue of the proviso to sub-section (2) of Section 2 of the 2015 Amendment Act, the provisions of Section 9 of the Act have now become applicable to international commercial arbitrations even if the place of arbitration is outside India, the arbitral award made outside India is enforceable as recognised under Part II of the Act, and thus the petitioner is entitled to seek interim reliefs under the provisions of Section 9 of the Act pending the enforcement of the awards.

(vi) The respondent has raised an objection to the territorial jurisdiction of this Court, to entertain this petition under Section 9 of the Act. The respondent contends that the "Court" as provided in Section 9 of the Act is the "Court" as defined under Section 2(1)(e)(ii) of the Act in the case of international commercial arbitration, would be the High Court having jurisdiction to decide the questions forming the "subject matter of the arbitration", if the same had been the subject-matter of a suit. The contention of the respondent is that this is a case where the foreign arbitral tribunal has rendered an award and, in this situation the ""Court"" as defined under the "Explanation" to Section 47 of the Act is the appropriate "Court"" namely the High Court having original jurisdiction to decide the question forming "subject matter of the arbitral award" if the same had been the subject matter of a suit on its ordinary original civil jurisdiction. Thus,the objection is that no part of the cause of action as regards the subject matter of the arbitration has arisen within Maharashtra. It is contended that the respondent also does not have any place of business within the territorial jurisdiction of this Court, as also the principal office/registered office of the respondent is at Hyderabad, as could be seen from the cause title and paragraph 8 of the reply affidavit of the respondent, which is outside Maharashtra. It is contended that none of the requisites so as to confer the jurisdiction on this Court, as laid down under clause 12 of the Letters Patent or Section 20 of the Code of Civil Procedure are satisfied for the petitioner to invoke the jurisdiction of this court under Section 9 of the Act.

Submissions on behalf of the Respondent Objecting to the Jurisdiction

3. Briefly the contentions of the respondent are as under:-

(i) The "Court" under Section 9 of the Act is the "Court" defined under Section 2(1)(e) of the Act. Section 9 is contained in Part I of the Act. In the case of sections under Part I, the applicable definitions are contained in Section 2(1) of the Act which begins with the word "In this Part, unless the context otherwise requires ...". The term "Court" appearing in Section 9 of the Act is therefore, to be understood as per Section 2(1)(e) of the Act. Section 2(1)(e)(ii) of the Act is applicable to international commercial arbitration held in India and outside. As also Section 9 is applicable to both, domestic and international arbitration.

(ii) The proviso to Section 2(2) as incorporated by the 2015 Amendment Act which makes the provisions of Section 9, 27, 37(1)(a) and 37(3) of Part I of the Act applicable to international commercial arbitration taking place outside India, also does not provide for any special or different definition of "Court". The legislative intent is to retain the reference to "Court" under Section 9 to the definition of the "Court" under Section 2(1) (e) to even international commercial arbitration taking place outside India.

(iii) The petitioner's contention that for the purpose of a Section 9 application as purportedly filed in the aid of the enforcement proceedings, the reference to "Court" should be to a "Court" as defined under the explanation to Section 47 of the Act, is misconceived for the following reasons:

(a) Section 9 and Section 47 of the Act operate in different circumstances and fields. Section 9 is wider and applies to all arbitrations, i.e. domestic and/or international (whether taking place in India or abroad). It also applies at all stages of the arbitral proceedings. Section 47 however applies only to foreign awards which come up for enforcement under the New York Convention in India.

(b) The definition of "Court" under Explanation to Section 47 of the Act is made applicable only to the said section and the sections following it (in Chapter I of Part II of the Act).

(c) Notwithstanding the simultaneous amendment to the definition of "Court" under Section 2(1)(e) and the aforesaid explanation and the proviso to Section 2(2) of the Act with effect from 23 October 2015, the definition of "Court" for the purposes of applications under Section 9 in case of international commercial arbitration, taking place outside India has not been extended to "Court" as defined under the aforesaid explanation to Section 47.

(d) It is settled law that the "Court" as defined under Section 47 is a Court distinct from a Court as defined under Section 2(1)(e) of the Act. This is clear from the plain

language of the two sections. The Court as defined under Section 2(1)(e) is the "Court having jurisdiction to decide the questions forming the subject matter of the arbitration". Whereas under Section 47 the "Court" is a court having jurisdiction to decide questions forming the subject matter of the arbitral award." The subject matter of arbitration is, therefore, distinct from the subject matter of the award and the jurisdictions are therefore different and/or distinct.

(e) The proviso to Section 2(2) of the Act merely makes Sections 9, 27, 37(1)(a) and 37(3) applicable to international commercial arbitrations taking place outside India and does not change the wording/language of the said sections or the reference to the term "Court" used in those sections which fall under Part I read with the definitions provided therein. That the proviso to section 2(2) merely confers jurisdiction upon Courts in India to pass orders under Sections 9, 27, 37(1)(a) and 37(3) in respect of foreign seated arbitrations. An order passed by a jurisdictional Court in India would have effect throughout the territories of India.

(iv) It is then submitted that there would be incongruity if the definition of "Court" under Section 47 is applied to the proceedings under Section 9 of the Act. Incongruity is as under:-

(a) The same would do violence to the express language of the sections and the legislative intent behind the 2015 amendments.

(b) Different Courts would have jurisdiction with respect to proceedings under Section 9, prior to and subsequent to the rendering of the foreign award.

(c) The petitioner has no answer as to what would be the proper "Court" for proceedings under Sections 27, 37(1)(a) and 37(3) of the Act, which too have been made applicable to international commercial arbitrations seated outside India. Orders under Section 27 are generally orders issued in personam such as summoning a witness and are not dependent upon where the assets or monies of the respondent in a given case, may be located. In a given factual matrix, if the interpretation as being made by the petitioner is accepted, it would cause grave injustice as in the cases of an arbitration located outside India, applications under Section 9 of the Act could only be made in courts where certain assets of the respondent, therein, are located and not in courts where such respondent himself resides (though he may have no assets located there.)

(d) For these reasons the intention of the legislature continues for the amended definition of "Court" under Section 2(1)(e) of the Act to be applicable to the proceedings under Section 9, even where they relate to a foreign award

enforceable under Part II of the Act.

(v) No prejudice would be caused to the petitioner in case the submissions advanced by the respondents are upheld. This for the reason that firstly it is open for the petitioner to approach the High Court at Hyderabad as the registered office of the respondent is located therein. Any order passed by such High Court would apply to the respondent in personam and all over India. Secondly, that the apprehension of the petitioner that the respondent pending enforcement of the award would remove or siphon of any monies or assets available within the jurisdictions if reliefs were not granted by this Court, is misconceived. The application for enforcement of the arbitral award, where interim/ad-interim reliefs have been sought, is still pending in this Court and would not be affected by any judgment on the issue of jurisdiction of the present petition.

(vi) To support the above contentions, the respondent has placed reliance on the decision of the Supreme Court in the case "Bharat Aluminium Company Vs. Kaiser Aluminium Technical", (2012)9 SCC 552 the decision of the learned Single Judge of this Court in "Tata International Ltd. Vs. Trisuns Chemical Industry Limited, (2012)2 Mh.L.J. 242 and in the case of "Wireless Developers Inc. Vs. Indiagames Limited", 2012(3) Mh.L.J. 449

(vii) It is submitted that even assuming that the respondent does have offices in Pune, even then the said contention of the petitioner is incorrect. This for the reason that Section 2(1)(e)(ii) of the Act provides that the relevant High Court which has jurisdiction is one which has jurisdiction to decide the subject matter of the arbitration. The jurisdiction under Section 2(1)(e)(ii) of the Act is concerned, this Court can exercise such jurisdiction only if the appropriate courts in Pune had jurisdiction to hear a suit on the subject matter of the arbitration and consequently an appeal would lie to this Court. The courts in Pune, however, would have no jurisdiction as no part of the cause of action has arisen therein nor is the principal office of the respondent located therein, as required under Section 20 of the Code of Civil Procedure. Merely having a purported subordinate office in Pune is not sufficient to confer jurisdiction on Pune Courts and consequently upon this Court. To support this contention, a reliance is placed on the decision of the Supreme Court in the case "Jindal Vijaynagar Steel Vs. Jindal Praxair Oxygen Co.Ltd., (2006)11 SCC 521

4. Petitioner's contentions on the Respondent's objections

(i) This petition under Section 9 of the Act praying for interim measures to secure the amounts awarded to the petitioner, pending execution of the monetary foreign

awards, is maintainable, in a Court in India, in respect of the foreign award, to which Part II of the Act applies, in view of insertion of proviso to Section 2(2) of the Act as introduced by 2015 Amendment Act.

(ii) To support the contention that this court has territorial jurisdiction to entertain this petition, the petitioner relies on the amended provisions of the Act as inserted by the 2015 Amendment Act and more particularly the legislative object and intent behind insertion of proviso to sub-section (2) of Section 2 of the Act. It is submitted that by introduction of the proviso to Section 2(2) of the Act, extending the applicability of Section 9 to the enforcement of a foreign award under Part II, was based on the recommendation in the 246th Report of the Law Commission. The object being to aid the effective enforcement of foreign awards, that Section 9 was made applicable to enforcement proceedings in regard Part II awards by introduction of sub-section (2) of Section 2 of the Act.

(iii) It is submitted that 246th Report is considered by the learned Single Judge of this Court in "Aircon Beibers FZE Vs. Heligo Charters Pvt.Ltd.", 2017 SCC Online Bom 631 where the Court held that Section 9 petition was maintainable as regards the assets within the jurisdiction of the High Court, after a foreign award was made and during the pendency of the enforcement proceedings under Section 47. It is thus submitted that the provisions of Section 9(1) of the Act which makes provision for an application to a Court (at any time after the making of the arbitral award but before it is enforced in accordance with Section 36), are applicable to a foreign award (a Part II award) which has been made even before it is enforced under Section 47 of the Act.

(iv) Relying on the decision of the learned Single Judge of this Court in Tata International Ltd. Vs. Trisuns Chemical Industry Limited (supra) it is submitted that the Court in the said decision has set out the reasons as to why "cause of action" test of the "Court having jurisdiction over the subject-matter of the arbitration" would be inapplicable in the matter of enforcing foreign awards.

(v) Relying on the decision of Division Bench of this Court in "Wireless Developers Inc. Vs. Indiagames Limited" (supra) in the context of the distinction between jurisdiction qua "subject matter of the arbitration" and "subject matter of the award", it is submitted that identical reason and logic would apply to a proceeding under Section 9 of the Act seeking interim measures, after the foreign award is made and pending its enforcement under Section 47 of the Act.

(vi) The respondent's objection that Section 9 petition should have been filed at Hyderabad where its registered office and all its main properties are located, is not

an answer to the question whether this Court has jurisdiction to decide the present Section 9 application. The fact that Andhra Pradesh High Court may also have jurisdiction does not mean that this Court has no jurisdiction.

(vii) As regards the objection on behalf of the respondent that Section 2(1)(e)(ii) is contained in Part-I and does not apply to foreign seated arbitrations, it is submitted that this Court has jurisdiction to entertain and decide the Enforcement Petition being the "Court" as defined in the Explanation to Section 47 of the Act. This submission is sought to be supported by the petitioners relying on the decision in Bharat Aluminium Company Vs. Kaiser Aluminium Technical Services (supra) (Balco Judgment), wherein the Supreme Court in paragraph 97 refers to the ""Court"" under the Explanation to Section 47, to mean a High Court within whose jurisdiction "the assets/person" is located against which/whom the enforcement of the foreign award is sought.

(viii) The petitioner then rely on the decision of the Supreme Court in the case "Brace Transport Corporation of Monrovia, Bermuda Vs. Orient Middle East Lines Ltd., Saudi Arabia & Ors", 1995 Supp(2) SCC 280 referring to the observations of the Court in paragraph 13, it is contended that the "subject matter of the awards" being money, the Enforcement Petition is properly filed in the Court within whose jurisdiction the assets and properties of the respondents are to be found and in this case monies are lying in the respondents' bank accounts in Mumbai.

(ix) Thus the "Court" for the purpose of Section 9 proceedings relating to enforcement proceedings under Section 47 (Part II), is the "Court" as defined in the Explanation to Section 47 and not the "Court" defined under Section 2(1)(e) of the Act.

(x) A plain reading of the definition of "Court" as contained in Section 2(1)(e) of the Act, shows that it has no application in relation to the jurisdiction of the "Court" with regard to the proceedings relating to a foreign award under Part II of the Act. Section 2(1)(e) applies to (a) domestic arbitrations with a seat in India and (b) international commercial arbitration having its seat in India. The present arbitration and the consequent awards, do not fall in either of the sub-clauses of Section 2(1)(e).

(xi) Applying the definition of "Court" in Section 2(1)(e)(ii) for the purposes of Section 9 application relating to enforcement proceedings of a foreign award in the manner suggested by the respondent will render ineffective the legislative intent and the purpose of the proviso to Section 2(2) of the Act, in making Section 9 applicable to Part II awards and proceedings. Section 2(1)(e)(ii) definition of "Court"

will not apply to such Section 9 proceedings covered under the proviso to Section 2(2).

(xii) To uphold the respondents' contention would result in a legal anomaly namely that this Court (under the Explanation to Section 47) has jurisdiction to enforce the foreign awards under Sections 47 and 49, but lacks jurisdiction to consider and grant appropriate interim measures to ensure that the award is not rendered a mere paper award and that the successful party is properly secured in aid of effective enforcement of such an award in proceedings under Section 47 of the Act.

(xiii) An award passed under Part I of the Act can be enforced in the same manner as if it were a decree (unless an application for setting aside such award is preferred under section 34 of the Act in a court as defined under S.2(1)(e) of the Act). On the other hand, an Award to which Part II of the Act applies, constitutes a cause of action in favour of the Claimant and is not deemed to be a decree, until the court is satisfied that the foreign award is enforceable. (Section 49 of the Act).

(xiv) A foreign award imposes a duty or an obligation on the respondent to pay the amount awarded. In such a case, a party could institute a suit in India on the basis of the foreign award, in which event, the original cause of action which resulted in the award would be irrelevant. Similarly, for the purposes of Section 9, the "court" under section 2(1)(e) of the Arbitration Act in the context of a foreign award would be the court having jurisdiction for enforcement of the Award. The original cause of action is irrelevant. In such a case, a court within whose jurisdiction there are assets of the respondent would be the "court" also under section 2(1)(e) of the Act. This interpretation is also supported by the decisions referred to above.

(xv) The Court must reject the respondents' submission that this Court has no jurisdiction in view of the definition of "Court" in Section 2(1) (e)(ii) of the Act, because the respondent "does not dwell" or "carry on business" or "personally work for gain" within the jurisdiction of this Court nor has any cause of action arisen within the jurisdiction of this Court and hence, none of the ingredients of clause 12 of the Letters Patent or Section 20 of the Code of Civil Procedure are present, so as to confer jurisdiction on this Court.

(xvi) The respondents' contentions must be rejected as the definition of "Court" in Section 2(1)(e) would have no application to a Section 9 application filed for interim measures where a foreign award has been made and proceedings for its enforcement are pending under Section 47 of the Act, which is in Part II of the Act.

(xvii) Even if the definition in Section 2(1)(e) applies, the Court having jurisdiction would be the same as the enforcing court since the foreign award itself becomes the cause of action for which a suit could be filed on such award in the jurisdiction where the assets lie.

(xvi) Any other interpretation would render ineffective and frustrate the object of the 2015 amendment to Section 2(2) of the Act by introduction of the proviso to that section, extending the applicability of Section 9 to enforceability of Part II awards.

(xvii) In the case of an award for money, the subject matter of the award would be money referring to paragraph 16 of the decision in the case "Brace Transports" (supra). The location of the money would confer jurisdiction on a court for enforcing such award, whether under Part II or by way of a suit. Petitioner submits that in the present case the respondent admittedly has money within the jurisdiction of this Court and therefore, this Court also has jurisdiction to grant interim reliefs under Section 9 of the Act pending enforcement of the awards.

(xviii) Even if the provisions Section 2(1)(e) were to be applied in the same manner, it is applied to arbitration under Part I, this Court has jurisdiction to decide the Section 9 application as the respondent admittedly has offices and carries on business through its distribution offices in Pune, which is within the jurisdiction of this Court.

Issue arising for consideration

5. Thus, the issue which arises for consideration is "whether the "court" as referred to in Section 9 of the Act in the case of international commercial arbitrations which take place outside India, is a "court" as defined under Section 2(1)(e) or as defined in the Explanation to Section 47 of the Act.

Discussion and Conclusion

6. The controversy thus arises revolving around the provisions of Section 2(1)(e) of the Act which defines "Court", Proviso to Section 2(2) which inter alia makes applicable the provisions of Section 9 falling in Part I to international commercial arbitration and the ""Explanation"" below Section 47 of the Act which also defines ""Court"" for the purposes of Part II of the Act dealing with foreign awards. It would be appropriate to extract the said provisions. Section 2(1)(e), Section 2(2) Section 9 and Section 47 read thus:-

"2. Definitions- (1) In this Part, unless the context otherwise requires, -

....

(e) "Court" means-

(i) in the case of an arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject- matter of the arbitration if the same had been the subject- matter of a suit, but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes;

(ii) in the case of international commercial arbitration, the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit , and in other cases, a High Court having jurisdiction to hear appeals from decrees of Courts subordinate to that High Court."

... ..

(2) This Part shall apply where the place of arbitration is in India.

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

.. ..

Section 9 Interim measures, etc. by Court - (1) A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a Court-

(i)

(ii) for an interim measure of protection in respect of any of the following matters, namely:-

(a)

(b) securing the amount in dispute in the arbitration;

(e) such other interim measure of protection as may appear to the Court to be just and convenient, and that the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it."

The Explanation defining the "Court" under Section 47 reads thus:-

"47. Evidence-

(1).... ..

(2)

(Explanation- In this section and in the sections following in this Chapter, "Court" means the High Court having original jurisdiction to decide the questions forming the subject-matter of the arbitral award if the same had been the subject-matter of a suit on its original civil jurisdiction and in other cases, in the High Court having jurisdiction to hear appeals from decrees of Courts subordinate to such High Court.)"

7. The proviso to Section 2(2) as inserted by the 2015 amendment Act, inter alia makes applicable the provisions of Section 9 to international commercial arbitration even if the place of arbitration is outside India, and the arbitral award made or to be made in such place is enforceable and recognized under the provisions of Part II of the Act. The genesis for the legislature to bring about the said amendment is the recommendations of the Law Commission in its 246th Report . To appreciate the background surrounding the legislative consideration, it would be profitable to refer to paragraphs 38 to 41 of the 246th Report of the Law Commission which concern "Judicial interventions in foreign seated arbitrations" which reads thus:

"JUDICIAL INTERVENTIONS IN FOREIGN SEATED ARBITRATIONS

38. Section 2(2) of the Arbitration and Conciliation Act, 1996 (the "Act"), contained in Part I of the Act, states that "This Part shall apply where the place of arbitration is in India." In comparison, Article 1(2) of the UNCITRAL Model Law provides: "The provisions of this Law, except articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of this State." The central issue, therefore, that was before the two judge Bench of the Supreme Court in *Bhatia International vs. Interbulk Trading SA*, (2002) 4 SCC 105, and before the five-judge Bench in *Bharat Aluminum and Co. vs. Kaiser Aluminium and Co.*, (2012) 9 SCC 552 (hereinafter called "BALCO") was whether the exclusion of the word "only" from the Indian statute gave rise to the implication that Part I of the Act would apply even in some situations where the arbitration was conducted outside India.

39. The Supreme Court in *Bhatia*, held that Part I mandatorily applied to all arbitrations held in India. In addition, Part I applied to arbitrations conducted outside India unless it was expressly or impliedly excluded. While *Bhatia* was a case arising out of section 9, the same principle was extended by the Supreme Court to sections 11 and 34 as well (in *Venture Global v Satyam Computer*, (2008) 4 SCC 190; *Indtel Technical Services v W.S. Atkins*, (2008) 10 SCC 308; *Citation Infowares Ltd v Equinox Corporation*, (2009) 7 SCC 220; *Dozco India v Doosan Infrastructure*, (2011) 6 SCC 179; *Videocon Industries v Union of India*, (2011) 6 SCC 161). As a result, Indian Courts were competent to provide interim relief pending arbitration, appoint arbitrators and set aside arbitral awards even if the arbitration was conducted outside India. These powers existed unless Part I was expressly or impliedly excluded. Further, an implied exclusion was construed not on the basis of conflict of laws principles but in an ad hoc manner. This position now stands overruled following *BALCO*.

40. The Supreme Court in *BALCO* decided that Parts I and II of the Act are mutually exclusive of each other. The intention of Parliament that the Act is territorial in nature and sections 9 and 34 will apply only when the seat of arbitration is in India. The seat is the "centre of gravity" of arbitration, and even where two foreign parties arbitrate in India, Part I would apply and, by virtue of section 2(7), the award would be a "domestic award". The Supreme Court recognized the "seat" of arbitration to be the juridical seat; however, in line with international practice, it was observed that the arbitral hearings may take place at a location other than the seat of arbitration. The distinction between "seat" and "venue" was, therefore, recognized. In such a scenario, only if the seat is determined to be India, Part I would be applicable. If the seat was foreign, Part I would be inapplicable. Even if Part I was expressly included "it would only mean that the parties have contractually imported from the Arbitration Act, 1996, those provisions which are concerned with the internal conduct of their arbitration and which are not inconsistent with the mandatory provisions of the [foreign] Procedural Law/Curial Law." The same cannot be used to confer jurisdiction on an Indian Court. However, the decision in *BALCO* was expressly given prospective effect and applied to

arbitration agreements executed after the date of the judgment.

41.While the decision in BALCO is a step in the right direction and would drastically reduce judicial intervention in foreign arbitrations, the Commission feels that there are still a few areas that are likely to be problematic.

(i) Where the assets of a party are located in India, and there is a likelihood that that party will dissipate its assets in the near future, the other party will lack an efficacious remedy if the seat of the arbitration is abroad. The latter party will have two possible remedies, but neither will be efficacious. First, the latter party can obtain an interim order from a foreign Court or the arbitral tribunal itself and file a civil suit to enforce the right created by the interim order. The interim order would not be enforceable directly by filing an execution petition as it would not qualify as a "judgment" or "decree" for the purposes of sections 13 and 44A of the Code of Civil Procedure (which provide a mechanism for enforcing foreign judgments). Secondly, in the event that the former party does not adhere to the terms of the foreign Order, the latter party can initiate proceedings for contempt in the foreign Court and enforce the judgment of the foreign Court under sections 13 and 44A of the Code of Civil Procedure. Neither of these remedies is likely to provide a 25 practical remedy to the party seeking to enforce the interim relief obtained by it. That being the case, it is a distinct possibility that a foreign party would obtain an arbitral award in its favour only to realize that the entity against which it has to enforce the award has been stripped of its assets and has been converted into a shell company. (ii) While the decision in BALCO was made prospective to ensure that hotly negotiated bargains are not overturned overnight, it results in a situation where Courts, despite knowing that the decision in Bhatia is no longer good law, are forced to apply it whenever they are faced with a case arising from an arbitration agreement executed pre BALCO.

42.The above issues have been addressed by way of proposed Amendments to sections 2(2), 2(2A), 20, 28 and 31."

Chapter III PROPOSED AMENDMENTS TO THE ARBITRATION AND CONCILIATION ACT, Amendment of Section 2

1. In section 2 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the principal Act),-

(i)

(ii) In sub-section (1), clause (e), after the words "Court means -" add subsection (i) beginning with the words "in the case of an arbitration other than international commercial arbitration," before the words "the principal Civil Court of original jurisdiction" In sub-section (1), clause (e) replace sub-clause (ii) by following: 38 "(ii) in the case of an international commercial arbitration, the High Court exercising jurisdiction over the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subjectmatter of the arbitration if the same had been the subject-matter of a suit, but does not include any Court of a grade inferior to such High Court, or in cases involving grant of interim measures in respect of arbitrations outside India, the High Court exercising jurisdiction over the court having jurisdiction to grant such measures as per the laws of India, and includes the High Court in exercise of its ordinary original civil jurisdiction."

[NOTE: This is to solve the problem of conflict of jurisdiction that would arise in cases where interim measures are sought in India in case of arbitrations seated outside India. This also ensures that in International Commercial Arbitrations, jurisdiction is exercised by the High Court, even if such High Court does not exercise ordinary original civil jurisdiction.]

(vi).....

Also insert the following proviso "Provided that, subject to an express agreement to the contrary, the provisions of sections 9, 27, 37 (1)(a) and 37 (3) shall also apply to international commercial arbitration even if the seat of arbitration is outside India, if an award made, or that which might be made, in such place would be enforceable and recognized under Part II of this Act." [NOTE: This proviso ensures that an Indian Court can exercise jurisdiction with respect to these provisions even where the seat of the arbitration is outside India.] The Supreme Court in a recent decision in "Indus Mobile Distribution Pvt. Ltd. Vs. Datawind Innovations Pvt. Ltd. & Ors.", (2017) 7 SCC 678 has also referred to the above recommendations of the Law Commission in considering the issue in regard to the seat of arbitration as falling under Section 20 of the Act. In "Aircon Beibers FZE Vs. Heligo Charters Pvt.Ltd." the learned Single Judge of this Court taking into consideration the above recommendations of the Law Commission and the intent of the amended provisions as inserted by the 2015 Amendment Act, held that Section 9 of the Act had become available pending enforcement of a foreign award.

8. The legislative approval to the above recommendations of the Law Commission is also clear from the statement of objects and reasons of the Arbitration and Conciliation (Amendment Bill) 2015 replacing the Arbitration and Conciliation (Amendment) Ordinance, 2015. The relevant extract of the statement of objects and reasons reads thus:-

STATEMENT OF OBJECTS AND REASONS The general law relating to arbitration is contained in the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act). The Act, which is based on the UNCITRAL Model Law on International Commercial Arbitration, as adopted in 1985 by the United Nations Commission on International Trade Law (UNCITRAL), applies to both international as well to domestic arbitration.

2. The Act was enacted to provide for speedy disposal of cases relating to arbitration with least court intervention. With the passage of time, some difficulties in the applicability of the Act have been noticed. Interpretation of the provisions of the Act by courts in some cases have resulted in delay of disposal of arbitration proceedings and increase in interference of courts in arbitration matters, which tend to defeat the object of the Act. With a view to overcome the difficulties, the matter was referred to the Law Commission of India, which examined the issue in detail and submitted its 176th Report. On the basis of the said report, the Arbitration and Conciliation (Amendment) Bill, 2003 was introduced in the Rajya Sabha on 22nd December, 2003. The said Bill was referred to the Department-related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice for examination and Report. The said Committee, submitted its Report to the Parliament on 4th August, 2005, wherein the Committee recommended that since many provisions of the said Bill were contentious, the Bill may be withdrawn and a fresh legislation may be brought after considering its recommendations. Accordingly, the said Bill was withdrawn from the Rajya Sabha.

3. On a reference made again in pursuance of the above, the Law Commission examined and submitted its 246th Report on "Amendments to the Arbitration and Conciliation Act, 1996" in August, 2014 and recommended various amendments in the Act. The proposed amendments to the Act would facilitate and encourage Alternative Dispute Mechanism, especially arbitration, for settlement of disputes in a more user-friendly, cost effective and expeditious disposal of cases since India is committed to improve its legal framework to obviate in disposal of cases.

4. As India has been ranked at 178 out of 189 nations in the world in contract enforcement, it is high time that urgent steps are taken to facilitate quick enforcement of contracts, easy recovery of monetary claims and award of just compensation for damages suffered and reduce the pendency of cases in courts and hasten the process of dispute resolution through arbitration, so as to encourage investment and economic activity.

5..... ..

6. It is proposed to introduce the Arbitration and Conciliation (Amendment) Bill, 2015, to replace the Arbitration and Conciliation (Amendment) Ordinance, 2015, which inter alia, provides for the following, namely:--

(i) to amend the definition of "Court" to provide that in the case of international commercial arbitrations, the Court should be the High Court;

(ii) to ensure that an Indian Court can exercise jurisdiction to grant interim measures, etc., even where the seat of the arbitration is outside India;

(iii)"

(emphasis supplied)

9. It is thus evident from the above legislative background that the intent of the 2015 Amendment Act and the legislative concern in incorporating the proviso to Section 2(2) and amending the definition of "court" as falling under section 2(1)(e) was to enable the Indian Courts to exercise jurisdiction inter alia under Section 9 of the Act, even where seat of the international commercial arbitration was outside India, even when such High Court does not exercise ordinary original civil jurisdiction. Thus the principal object being when the assets of the party are located in India and there is likelihood that a party will dissipate its assets in the near future, an efficacious remedy be provided to a party to seek an appropriate interim reliefs, to avoid a distinct possibility, that the foreign party would obtain an arbitral award only to realise that the entity against which it has to enforce the award renders the award only to be a paper award.

10. It is in the above conspectus and by applying the principle of harmonious construction to ascertain the object and the intention of the legislation and the mischief the legislation seeks to obviate, the amending provisions qua the jurisdiction of this Court are required to be considered.

11. The opening words of the definition clause are of some significance. Section 2(1) "the definition clause" begins with the expression "In this part unless the context otherwise requires". Thus the contextual meaning of the definition of "Court" would be required to be considered. Clause (ii) of sub-section 2(1)(e) in defining "Court" in case of international commercial arbitration provides the "Court" to mean "High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming subject matter of arbitration, if the same had been the subject matter of a suit". This definition applied in the context of the proviso to sub-section (2) of Section 2, which inter alia makes applicable the provisions of Section 9 to international commercial arbitrations, brings about an unworkable effect, in precluding a party holding an award to

approach the court in view of the court lacking jurisdiction going by the wordings in Section 2(1)(e)(ii) of the Act, to the effect that it shall be the High Court having jurisdiction to decide the question forming the subject matter of the arbitration. This for the reason that when the award is pronounced the words "subject matter of the arbitration if the same had been the subject matter of the suit", as used in Section 2(1)(e)(ii) would lose their relevance, inasmuch as that it is a situation where there is no claimant/plaintiff and/or a defendant, it is only the award and the enforcement of the liability under the award which become relevant, and for that purpose the assets moveable or immoveable of the party suffering the award become the subject matter of concern.

12. In this context it would be appropriate that the position in law is examined. The Supreme Court in *Bharat Aluminium Company Vs. Kaiser Aluminium Technical (BALCO)* (supra) in paragraph 97, considering the provisions of Section 2(1)(e) and Section 47 of the Act as it stood prior to the amendment when the provisions used the words "subject-matter of the arbitration" and "subject matter of the award" respectively, held that the words "subject matter of the award" gave a clear reference to a court within whose jurisdiction the asset/person is located, against which/whom the enforcement of the international arbitral award is sought. The observations in paragraph 97 of the decision read thus:-

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

(emphasis supplied)

13. *Brace Transport Corporation of Monrovia, Bermuda Vs. Orient Middle East Lines Ltd., Saudi Arabia & Ors.* (supra), was a case where the appellant foreign company was holding a foreign award and had approached the Civil Court at Bhavnagar in a civil suit for recovery of the part of the amount awarded against the first and the second respondents. The suit came to be filed before the said court as the vessel which belonged to the applicant and sold to the first and the second respondent was berthed at the Alang port which was in the jurisdiction of Bhavnagar Civil Court. The Civil Court had granted an injunction restraining the third and the fourth respondent from disposing of, breaking or removing the vessel. The respondents had objected to the jurisdiction of the Court to try and entertain the suit. A revision application filed before the High Court against the said

order came to be allowed holding that the Civil Court lacked territorial jurisdiction. The Supreme Court considering the provisions of Section 5(1) of the Foreign Awards (Recognition and Enforcement) Act, 1961 which provided that "any person interested in a foreign award may apply to any court having jurisdiction over the subject-matter of the award that the award be filed in court." and section 6 which provided that "where the court is satisfied that the foreign award is enforceable under the said Act, it shall order the award to be filed and shall proceed to pronounce judgment according to the award, held that as the vessel was already sold by the first and the second respondents to the third respondent and by the third respondent to the fourth respondent, it was no more the asset of the first and the second respondent and the award cannot be executed there against, as also the Civil Court at Bhavnagar had no jurisdiction to enforce the maritime lien. The contention as urged on behalf of the appellant that the subject matter of the award was money, and that the first and the second respondent had money in the jurisdiction of Bhavnagar Court, that the award being an award for money, its subject-matter may be said to be money, just as the subject matter of a money decree may be said to be of money was accepted by the Court. The Court accordingly permitted the appellant to move an application to pray for interim reliefs. Speaking for the Court Mr. Justice Bhargava (as the Lordship then was) observed as under:-

"13. Before we deal with the facts of the case before us, a statement of some broad principles is necessary. The New York Convention speaks of "recognition and enforcement" of an award. An award may be recognised, without being enforced; but if it is enforced, then, it is necessarily recognised. Recognition alone may be asked for as a shield against re-agitation of issues with which the award deals. Where a court is asked to enforce an award, it must recognise not only the legal effect of the award but must use legal sanctions to ensure that it is carried out. In the Law and Practice of International Commercial Arbitration by Redfern and Hunter (1986 Edn.) it is said (at pages 337 and 338):

"A party seeking to enforce an award in an international commercial arbitration may have a choice of country in which to do so; as it is sometimes expressed, the party may be able to go forum shopping. This depends upon the location of the assets of the losing party. Since the purpose of enforcement proceedings is to try to ensure compliance with an award by the legal attachment or seizure of the defaulting party's assets, legal proceedings of some kind are necessary to obtain title to the assets seized or their proceeds of sale. These legal proceedings must be taken in the State or States in which the property or other assets of the losing party are located.

* * *

In other words, the place of arbitration will have been chosen as a neutral forum. It will be rare for the parties to have assets situated within this neutral country; and the award if it has to be enforced, must generally be enforced in a country other than that in which it was made. This is why it is so important that international awards should be recognisable and enforceable internationally and not merely in the country in which they are made; moreover, unlike the place of arbitration, the place of recognition and enforcement will not be chosen by or on behalf of the parties. It will depend upon the circumstances of each particular case.

... ..

Whether it becomes necessary to enforce an international award, the position is different. The first step is to determine the country or countries in which enforcement is to be sought. In order to reach this decision the party seeking enforcement needs to locate the State or States in which the losing party has (or is likely to have) assets available to meet the award.

14.

15. It was then submitted by Dr.Ghosh that the subject-matter of the award was money and the first and second respondents had money in the jurisdiction of the Bhavnagar court in the form of part of the purchase price of the said vessel payable to them by the third and fourth respondents.

This being an award for money its subject-matter may be said to be money, just as the subject-matter of a money-decree may be said to be money.

17. The appellant's application to the Bhavnagar court stated, as reproduced above, that the first and second respondents had no assets within the jurisdiction of Bhavnagar court or elsewhere in India. However, having regard to the object of the said Act, note may be taken of events that have transpired subsequently. The case of the fourth respondent before the Bhavnagar court was that it had paid over the full purchase price of the said vessel to the third respondent. Thereupon the Bhavnagar court enjoined the third respondent from paying the amount of Rs.6,40,000/- to the first and second respondents and permitted the fourth respondent to break the said vessel. When this Court called upon the third and fourth respondents to deposit the amount of Rs.6,40,000 in its Registry, it was as we find from the record, the third respondent which made the deposit. The deposit was made without protest and the third respondent has not appeared before this Court to contend that the amount of Rs.6,40,000 was not due to the first and second respondents as part of the purchase price of the said vessel. It can,

therefore, be said that the third respondent was holding monies in the amount of Rs.6,40,000 of the 1 and 2 st respondents nd .

(emphasis supplied)

14. In *Wireless Developers Inc. Vs. Indiagames Limited*" (supra) decided by the Division Bench of this Court, the appellant had invoked the jurisdiction under Section 47 of the Act as the bank accounts of the respondents as in the said case were within the jurisdiction of the Bombay High Court. The Court held that money being in Mumbai, was sufficient to confer jurisdiction on the High Court, following the decision of the Supreme Court in *Brace Transport Corporation of Monrovia, Bermuda Vs. Orient Middle East Lines Ltd., Saudi Arabia & Ors.* (supra). The court having examined the provisions of Section 2(1)(e) of the Act as also the "Court" as defined in the explanation to Section 47 held as under:-

"19. It is clear from a reading of the aforesaid provisions defining the Court and the aforesaid two judgments and considering the reason and logic behind the distinction as also the analogous provisions with regard to enforcement of decrees that since the appellant claims that it can execute the award within the territorial jurisdiction of this Court that itself bestows this Court with the territorial jurisdiction, it having within its territorial limits the subject matter of the award which is money in the form of the bank account.

(emphasis supplied)

15. In *Tata International Ltd. Vs. Trisuns Chemical Industry Limited* (supra) the learned Single Judge of this Court considering the distinction between the "subject matter of arbitration" and "subject matter of award" as appearing in the definition of "court" under Section 2(1)(e) and the "Explanation" to Section 47 respectively, held that in regard to an award for money the subject matter can be said to be money and the petition for enforcement of the foreign award can be filed in the court where the party may have money. It was held that if the party had a foreign award in its favour, it can seek to enforce the award in any part of the country where it is sought to be enforced as long as money is available or suit for recovery of money can be filed. The Court in paragraphs 6 to 9 held thus:-

"6. We then come to the issue as to the meaning of the expression subject matter of the Award and whether that would mean also subject matter of the arbitration proceedings. This is important because under Section 2(e) the expression with reference to the expression Court means the subject matter of the arbitration. The subject matter of the arbitration would include contracts. The subject matter of an Award cannot include a contract as adjudication in respect of the claims under the

contract has been done and has resulted into an award. The subject matter of the Award therefore, is liable to be construed to mean what is the relief finally awarded by the Award. It may be in the form of money, it can be for specific performance, or the like. Under the Foreign Awards (Recognition and Enforcement) Act, 1961, the said issue was in issue before the Apex Court in the case of *Brace Transport Corporation of Monrovia Bermuda v. Orient Middle East Lines Ltd. Saudi Arabia and Ors.*, 1993(4) Scale 33. Two paragraphs from the judgment may be reproduced.

"14. It was then submitted by Dr. Ghosh that the subject matter of the award was money and the 1st and 2nd respondents had money in the jurisdiction of the Bhavnagar Court in the form of part of the purchase price of the said vessel payable to them by the 3rd and 4th respondents."

"15. This being an award for money its subject matter may be said to be money, just as the subject matter of the money decree may be said to be money."

7. It is therefore, clear that in respect of an award for money, subject matter can be said to be money. In other words, therefore, petition for enforcement of the foreign award can be filed in the Court where the party may have money. This is important consideration considering a party need not be tied down as in the case of Part I where the subject matter is the subject matter of the arbitration. In other words, if the party has a foreign award in its favour, it can seek to enforce the award in any part of the country where it is sought to be enforced as long as money is available or suit for recovery of money can be filed. In my opinion, therefore, expression subject matter of the award to the explanation under Section 47 is different from the expression subject matter of the arbitration under Section 2(e) of Part I of the Act.

8. A foreign award if allowed to be enforced is a deemed decree. It can be enforced anywhere that the respondents may have money. In other words it is in the nature of forum hunting. The expression subject matter of the award and the subject matter of the arbitration agreement are two different and distinct expressions. In respect of a foreign award, if the expression subject matter of the award was to mean the same thing as the subject matter of the arbitration agreement, in most cases there would be no Court available where the award could be enforced as the entire cause of action in respect of the subject matter of the arbitration could be the foreign country. Merely because in the instant case, the contract was entered into in India cannot result in a different interpretation. The expression as the explanation itself permits forum hunting if that expression can be used. After considering all these provisions a similar view was taken in *Arbitration Petition Lodg. No. 427 of 2001* in the case of *Naval Gent Marline Ltd. v. Shivnath Rai Harnarain (I) Ltd. and Ors.*, decided on 5th July, 2001 in which at the ad interim

stage, apart from other issues, the issue as to the meaning of the expression "subject matter of the award" was in issue and has been similarly answered.

(emphasis supplied)

16. The position in law which can be derived from the aforesaid decisions is that the Award as held by the petitioner being a money award, the "subject matter of the award" is money and thus, the proceedings for enforcement of the award can be filed in the court where the respondent have money. The petitioner in holding a foreign award can certainly seek to enforce the award in any part of the country where the award can be sought to be enforced as long as the money is available or the suit for recovery of money can be filed.

17. Now the question remains is "whether section 2(1)(e)(ii) when it defines "court" to mean the High Court having jurisdiction to decide the question forming the subject matter of the arbitration would create any impediment preventing the petitioner to invoke Section 9 before this Court. In my opinion, a cumulative reading of the amended provisions would not create such a hurdle for the petitioner to invoke the jurisdiction of this Court and maintain this petition. The reason being that Section 2 the definition clause begins with the words "In this Part, unless the context otherwise requires-". The definition of "Court" as contained in Section 2(1)(e)(ii), in the present context would create a incongruity to enforce the provisions Section 9 of the Act as made applicable by the 2015 Amendment Act. This inasmuch as the petitioner would be prevented to seek interim measures in enforcing the money award, when the money is lying within the territorial jurisdiction of the Courts only for the reason that it is not the subject matter of arbitration. This is opposed to the plain and clear intention of the legislature as incorporated by the 2015 Amendment Act as noted above. It cannot be conceived that on the one hand the legislature permits a party holding a foreign award to invoke Section 9 of the Act and further permit invoking of the provisions of Sections 47 to 49 of the Act to enforce the foreign awards, and for that matter to approach the appropriate court having jurisdiction to decide the question forming the subject matter of arbitral award, as if the same had been the subject matter of the suit as the explanation to Section 47 would provide. However, on the other hand at the same time, when it comes to adopting proceedings under Section 9 to secure the sums awarded being the money to secure the award is available within the jurisdiction of the Court, it would render the Court lacking such jurisdiction by application of Section 2(1)(e)(ii). This is surely not the intention of the legislature. Any interpretation which would defeat the intention of the legislature is required to be avoided. Thus, in my opinion, considering the amended provisions and in the facts of the present case when the petitioner is holding a foreign award and when the money is available within the jurisdiction of this Court as contained in the bank accounts of the respondent at Mumbai, the principles of "contextual interpretation" of Section 2(1)(e)(ii) would be required to be adopted considering the opening words of Section 2(1) "In this Part, unless the context otherwise requires--" and adverting to this principle of interpretation it would be required to be held that the "Court" as defined under the

explanation to Section 47, would be the appropriate court when the petitioner is seeking interim reliefs under Section 9 of the Act pending the enforcement of the foreign award.

18. The above interpretation would be well supported by considering the law laid down by the Supreme Court in this regard. It is well settled that the statutory definitions will be required to be read subject to the qualification expressed in the definition clauses, which create them. In "Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai & Ors.", (1998)8 SCC 1, the Supreme Court held that there may be sections in the Act where the meaning may have to be departed from on account of the subject or context in which the words have used and that this would be to give effect to the opening sentence in the definition section namely "unless there is anything repugnant in the subject or context." In this situation the Court is required not only to look at the words but also to look at the context, the collocation and the objection of such words relating to such matter and interpret the meaning intended to be conveyed by the use of such words under the said circumstances. The Supreme Court in paragraph 28 has observed thus:-

"28. Now the principle is that all statutory definitions have to be read subject to the qualification variously expressed in the definition clauses which created them and it may be that even where the definition is exhaustive inasmuch as the word defined is said to mean a certain thing, it is possible for the word to have a somewhat different meaning in different sections of the Act depending upon the subject or context. That is why all definitions in statutes generally begin with the qualifying words, similar to the words used in the present case, namely "unless there is anything repugnant in the subject or context". Thus there may be sections in the Act where the meaning may have to be departed from on account of the subject or context in which the word had been used and that will be giving effect to the opening sentence in the definition section, namely "unless there is anything repugnant in the subject or context". In view of this qualification, the Court has not only to look at the words but also to look at the context, the collocation and the object of such words relating to such matter and interpret the meaning intended to be conveyed by the use of the words under those circumstance". (See : Vanguard Fire and General Insurance Co. Ltd. Madras vs Fraser & Ross, AIR 1960 SC 971)."

19. Again in "TATA Power Company Ltd. Vs. Reliance Energy Ltd. & Ors.", (2009)16 SCC 659 the Supreme Court considered the principles of contextual interpretation in interpreting Section 23 of the Electricity Act, 2003. The Court observed thus:-

"Supply - Contextual Meaning

96. It was submitted by the respondents that in any event the word "supply" as used in Section 23 should be given the same meaning as is given to it in Section 2(70) of the Act i.e. the sale of electricity to a licensee or consumer. Accordingly by

its very nature, supply would have a supplier and a receiver and any direction which is aimed at ensuring or regulating supply by its very nature would have to be directed to both the supplier and the receiver.

97. However, when the question arises as to the meaning of a certain provision in a statute, it is not only legitimate but proper to read that provision in its context. The legal principle is that all statutory definitions have to be read subject to the qualification variously expressed in the definition clause which created them and it may be that even where the definition is exhaustive inasmuch as the word defined is said to mean a certain thing, it is possible for the word to have some what different meaning in different sections of the Act depending upon the subject or context. That is why all definitions in statutes generally begin with the qualifying words "unless there is anything repugnant to the subject or context". [See Whirlpool Corporation v. Registrar of Trade Marks, Mumbai and others, (1998) 8 SCC 1 ; Garhwal, Mandal Vikas Nigam Ltd. v. Krishna Travel Agency, (2008) 6 SCC 732 and National Insurance Co. Ltd. v. Deepa Devi, (2008) 1 SCC 414] .

98. Accordingly the word "supply" contained in Section 23 refer to "supply to consumers only" in the context of Section 23 and not to supply to licensees. On the other hand, in Section 86(1)(a) "supply" refers to both consumers and licensees. In Section 10(2) the word "supply" is used in two parts of the said Section to mean two different things. In the first part it means "supply to a licensee only" and in the second part "supply to a consumer only". Further in first proviso to Section 14, the word "supply" has been used specifically to mean "distribution of electricity". In Section 62(2) the word "supply" has been used to refer to "supply of electricity by a trader".

99. To assign the same meaning to the word "supply" in Section 23 of the Act, as is assigned in the interpretation section, it is, in our opinion, necessary to take recourse to the doctrine of harmonious construction and read the statute as a whole. Interpretation of Section indisputably must be premised on the scheme of the statute. For the purpose of construction of a statute and in particular for ascertaining the purpose thereof, the entire Act has to be read as a whole and then chapter by chapter, section by section and word by word. (See Reserve Bank of India, v. Peerless General Finance and Investment Co. Ltd, (1987) 1 SCC 424] ; Peerless General Finance and Investment Co. Ltd. v. Reserve Bank of India, [(1992) 2 SCC 343] and National Insurance Co. Ltd. v. Swaran Singh, [(2004) 3 SCC 297].

100. Thus, in a case where interpretation of a Section vis-a-vis the scheme of the Act, the purport and object of the legislation, particularly having regard to the mischief it seeks to remedy; the chapter heading as also the marginal note, in our opinion, are relevant. "

20. In view of the above discussion, the contentions as urged on behalf of the respondent cannot be accepted. If the interpretation of the provisions of Section 2(1)(e)(ii) of the Act as sought to be placed on behalf of the respondent is accepted, it would bring about an anomalous situation defeating the intent of the legislative provisions, as derived from a cumulative reading of the amending provisions as noted above. The purpose and object of the amended provisions of the 2015 Act must certainly prevail over a narrow interpretation which would defeat the purpose and object of the 2015 Amendment Act. The petitioner who holds monetary awards against the respondent would be prevented from approaching the court for interim reliefs where the assets of the respondent are available within the jurisdiction of this Court. As clearly seen from observations in paragraph 97 of the *Bharat Aluminium Company Vs. Kaiser Aluminium Technical (BALCO)* (supra), then in *Brace Transport Corporation of Monrovia, Bermuda Vs. Orient Middle East Lines Ltd., Saudi Arabia & Ors.* (supra), *Wireless Developers Inc. Vs. Indiagames Limited* (supra), and *Tata International Ltd. Vs. Trisuns Chemical Industry Limited* (supra), the Court would have territorial jurisdiction if the monies/the bank accounts are located within the jurisdiction of the Court. The legislature would not envisage a situation that a party can invoke jurisdiction of the Court to enforce a monetary award under Section 47 and 49 of the Act, however, for any relief of the nature Section 9 inter alia contemplates the jurisdiction of the same Court would not be available. This would create a complete incongruity in giving effect to the provisions of Section 9 in a situation as in the present case and defeat the legislative intent.

21. Further from a bare reading of the definition of "Court" in clause (ii) of Section 2(1)(e) as incorporated by the 2015 Amendment Act, it is clear that it inter alia speaks in relation to international commercial arbitration, the High Court having ordinary original civil jurisdiction, which would have jurisdiction to decide the questions forming the "subject matter" of the arbitration, if as same had been the "subject matter of a suit" and in other cases a High Court having jurisdiction to hear appeals from decisions of Courts subordinate to that Court. In the present case once the arbitral tribunal has delivered its award, the relevance to expression "subject matter of the arbitration if the same had been the subject matter of a suit", would fade away or lose its colour, rendering the definition unworkable for the purposes of Section 9 reliefs, which becomes available to the arbitration awardee. This for the reason, as illustratively in the present facts, on the international commercial arbitration resulting into a pronouncement of an award, there is no question of an arbitral dispute pending before the arbitral tribunal. The original cause of action loses its relevance and the center of gravity and the cause of action is the foreign award and its enforcement. The legislature in this situation could not have contemplated to confer jurisdiction for an application under Section 9 on a "Court" as defined under section 2(1)(e)(ii) of the Act. Thus section 2(1)(e)(ii) with its ingredients and facets such as "the relevancy of the cause of action", "carrying on business", "having an office", being the determinative factors to decide the jurisdiction of a Court fade into insignificance.

22. Another significant aspect which cannot be overlooked is that Section 2(1)(e)(ii) is not made applicable to foreign awards falling in Part II of the Act. It is thus clear that when neither the arbitration nor the award in question would fall under Section 2(1)(e)(ii) of the Act there cannot be any applicability of the said provision. Thus necessarily recourse would be required to be taken to the definition of "Court" as contained in the "Explanation" to Section 47 falling in Part II of the Act, so as to hold that it is this provision which becomes relevant to confer jurisdiction on this court to entertain the Section 9 petition, pending the enforceability of the foreign award in question. Such legal fiction of applicability of Part II of the Act qua the definition of "Court" under the Explanation to Section 47 is a fall out of the 2015 Amendment Act. In my opinion, considering the legislative scheme as brought about by the 2015 Amendment Act, it is not possible, in the circumstances, to resort to any other interpretation. A party in enforcing a foreign award and seeking recourse to Section 9 of the Act, cannot be left without an effective remedy, in a situation akin to the facts in the present case. This interpretation in my opinion suffices and fulfills the legislative intent in making Section 9 inter alia available in enforcement of foreign awards.

23. In the above circumstances, the submissions as urged on behalf of the respondent that the petitioner cannot seek a relief in respect of the bank account at Pune, also cannot be accepted, as the definition of "Court" under "Explanation" to Section 47 would confer jurisdiction on this High Court as the assets/bank accounts of the respondent are situated within the jurisdiction of this Court and not the principal Civil Court of original jurisdiction, as provided in the pre-amended provisions. Significantly now both the amended provisions namely Section 2(1)(e) and "Explanation" to Section 47 respectively confer jurisdiction only on the concerned High Court. Thus, the reliance on behalf of the respondent on the judgment of the Supreme Court in the case "Jindal Vijayanagar Steel (JSW Steel Ltd.) Vs. Jindal Praxair Oxygen Co.Ltd.", (2006) 11 SCC 521 in the facts of the present case is unfounded.

24. In view of the above deliberation, in the present case it would be the "Court" as defined in "Explanation" to Section 47 which would be the Court having jurisdiction to entertain the Section 9 petition, and this Court would accordingly have jurisdiction to entertain this petition.