(2004) 07 CAL CK 0058

Calcutta High Court

Case No: A.P.O.T. No. 182 of 2004 and E.O.S. No. 11 of 2003

Hindustan Copper Limited		APPELLANT
	Vs	
Centrotrade Minerals and Metals Inc.		RESPONDENT

Date of Decision: July 28, 2004

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 2, 34, 36, 44, 48

Citation: AIR 2005 Cal 133 : (2006) 1 ARBLR 414 : (2005) 1 CHN 448

Hon'ble Judges: Ajoy Nath Ray, Acting C.J.; Arun Kumar Mitra, J

Bench: Division Bench

Advocate: S.K. Kapoor, Debabrata Roychowdhury, R. Kapoor and Joseph N. Banerjee, for the Appellant;Siddhartha Mitra, Tapati Ghosh and Suparna Roy Chatterjee, for the Respondent

Final Decision: Allowed

Judgement

1. This is an appeal from an order passed on the 10th March, 2004 by the Arbitration Court whereby His Lordship directed the appellant before us who was the respondent before His Lordship to make the payment under what His Lordship held to be a foreign award, within three weeks from the date of the order. On failure of such payment necessary orders would be passed by His Lordship for execution of the decree.

2. The decree there is none, i.e., in the sense that there is no decree passed by any Court of Law. The execution was to be of an award passed by one Mr. Cooke, Q.B. sitting in England and the said award is dated 29th September, 2001.

3. The said clause is set out below:-

"14. Arbitration.- All disputes or differences whatsoever arising between the parties out of, or relating to, the construction, meaning and operation or effect of the contract or the

breach thereof shall be settled by arbitration in India through the arbitration panel of the Indian Council of Arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration.

If either party is in disagreement with the arbitration result in India, either party will have the right to appeal to a second arbitration in London, UK in accordance with the rules of conciliation and arbitration of the international chamber of commerce in effect on the date hereof. The results of this second arbitration will be binding on the both parties, judgment upon the award may be entered in any Court in jurisdiction."

4. The contract between the parties was for supply of dry copper by the respondent, an American company to the appellant, which is a Government company. The first part of the arbitration agreement was also resorted to by the parties. By an award dated 15th June, 1999, the claim of the respondent was dismissed by the Indian Arbitrator and a nil award was passed.

5. The first argument made by the respondent Centrotrade is that successive arbitrations of the type envisaged in the clause quoted above are not unknown to law. If that argument fails, naturally the respondent would fail there and then.

6. We are, however, of the opinion that successive arbitrations, as a matter of general law, are not impermissible in India. There are" authorities of the High Courts of Calcutta, Bombay and Madras to this effect. The Calcutta case is Heeralal Agarwalla and Co. Vs. Joakim Nahapiet and Co. Ltd., ; the Bombay case, by a Single Learned Judge followed Hiralal"s case and is reported at Fazalally Jivaji Raja Vs. Khimji Poonja and Co., . The Madras case is that of M.A. and Sons Vs. Madras Oil and Seeds Exchange Ltd. and Another, . These cases all concern successive arbitrations and in all those the agreements were found to be valid.

7. One of the main points argued by the appellant is that the Arbitration Agreement is itself invalid. Such invalidity was pressed on various grounds. One of the grounds was that successive arbitrations are not permitted at all. In our opinion that ground must be overruled.

8. The next important points is to decide whether the two successive awards which have come into being by operation of the said Clause 14 are destructive of each other (this point was not argued in the Court below but must be considered by us in the interest of justice and finality), or whether the second award is truly and properly an award in the nature of an appellate decree whereby it wiped off the first award and substituted itself in its place and stead in the same manner as an appellate decree of a regular Court of Law wipes and substitute itself in the place of an impugned decree of the first Court.

9. It will be seen from that case that the Court was dealing with a two-tier arbitration which had been provided for by the by-laws of the association of traders being the said exchange. In similar manner the Bombay case dealt with the exchange or association of

Cotton Traders and the Calcutta case dealt with the Association of Block Baled Jute Traders.

10. In the Calcutta case the Division Bench was concerned with only the filing of the second award. The second award was allowed to be filed as the Court held that successive arbitration is a permissible procedure in law. There are, however, important passages in the judgment of both the learned Judges that they were not making any comment as to what should happen, should the first award get filed in the Court also, like the second award.

11. This is the point of the two awards destroying each other in case the second award is not truly and properly an appellate award. Although the point is new before us, the parties were again and again told by us during arguments that we would deal with this important point.

12. For the purpose of resolving this issue, one has to look at the arbitration clause and construe it according to the well-settled principles which govern the construction of contracts of agreeing parties. The principle is that words have to be given their plain meaning; if possible each word has to be ascribed some meaning. The intention of the parties is to be gathered from the expression given by them to their intentions by way of the words which form the contract.

13. There are other principles of construing contracts also, but in construing a hard-core business or commercial contract, the above principles reign supreme.

14. The first point to note about the said Clause 14 is that the word "appeal" does occur in the clause. Apart from the occurrence of this word, however, there is not a single other indication which shows that the second award would wipe out the first award like on a true and proper appeal.

15. Mr. Cooke in his award has not said a single sentence to the effect that he is overruling, or setting aside or modifying or in any manner altering the Indian award. The manner in which Mr. Cooke has proceeded is the manner in which an arbitrator, in seisin of a matter afresh and for the first time would proceed.

16. In Clause 26(b) of the award he has specifically said that he has no jurisdiction probably to make awards in regard to the costs of the Indian Arbitration.

17. About his own fees/costs he has made awards; about other matters also he has made specific awards under different heads and the total award converted into rupees would be of the order of Rs. 3 crore.

18. Thus, we see that the second arbitrator has not proceeded as if he is an arbitrator exercising appellate powers.

19. A bare reading of the arbitration clause will show that it has not been drafted by person who are either very happy with the English language, or very conversant with the English legal terminology. We do not say this for the purpose of disparaging anybody, but we say this for understanding, in its true and proper light the word "appeal" which occurs in the said clause. If the clause is drafted in impeccable in legal terminology, the word "appeal" will carry much greater weight than if it is used by somebody, who, comparatively speaking, is clumsy with these things.

20. The phrase used is that "either party will have the right to appeal to a second arbitrator in London". The clause uses the word "appeal" in the same sense as one appeals to mercy, or one appeals to a person wielding power, asking him to exercise that power in favour of oneself, or one appeals to somebody to do something for oneself.

21. The clause says that such appeal will be made "if either party is in disagreement with the arbitration result in India". The usual phrase prefixing an appeal is that the prospective appellant is aggrieved by the order from which he is seeking appeal.

22. The second stage of arbitration is simply called "a second arbitration". The simple construction and the plain meaning of this would be that the parties are to go before a second arbitrator once again, even though they have already argued out their case before the first and such arguments have already resulted in an award.

23. The second award is made expressly binding by the following phrase:

"The results of this second arbitration will be binding on the both parties". The correct way would be to say, both the parties. "Results" is again non technical, award would be the correct term of art. The respondent argued that this expression of binding nature mentioned in regard to the second award only necessarily means that the first award is not similarly binding. We are, with respect, wholly unable to agree. It does not need any contractual expression by parties to say that the award to be passed upon their arbitration will be binding upon them. The law of arbitration starts with the premise that an award is binding on the parties who have gone to arbitration. Were it not so, arbitration would have no meaning.

24. We, therefore, have before us an independent and antecedent award which is binding by the Indian Law of Arbitration. It is also a domestic award to which Part I of the Arbitration and Conciliation Act, 1996 applies.

25. Since we are of the opinion that the arbitration clause is a valid one, it also follows that the second award passed by Mr. Cooke is equally binding upon the parties. Whether that award is governed by Part II of the 1996 Act or by Part I, we shall deal with later. But whether it is a foreign award or it is a domestic award, a binding award it is.

26. The clause goes on to say that "judgment upon the award may be entered in any Court in jurisdiction". The words "in jurisdiction" show again the inept nature of the

draftsmanship of this clause. The normal phrase is to say, the Court having jurisdiction.

27. We do not blame the draftsman, however, for thinking about judgment upon award although that concept has left the field after the passing of the 1996 Act. The Act came into operation after the contract was drafted and signed. This clause is therefore, of not much effect.

28. What does one do with the two awards which one has got? Even at the cost of appearing frivolous, I am compelled to say that the two awards reminded me of something which I used to think in very early it as a Judge, although I never gave expression to it in public before. It was not worth it then. I used to think that a Judge"s job would become very easy if he could satisfy both the plaintiff and the defendant and the best way to do this would be to say that as far as the plaintiff is concerned the suit is decreed with costs and as far as the defendant is concerned the suit is dismissed with costs.

29. What was a mere frivolity in my own silent mind has not become an expression of reality. We can see absolutely no reason which the two awards are not each and brother binding. So far as the Indian award is concerned, it has, so to speak, dismissed the suit with costs, perhaps. So far as the award in London is concerned it has, so to speak, decreed (Awarded) the suit (i.e., in a reference) in favour of the plaintiff Centrotrade with costs. Both parties are, therefore, rendered happy.

30. We are of the opinion that a clause of this cure, which before us, although legal and valid, is capable of producing a result like the above and the result is, in no manner that we can see, illegal. We shall proceed to state why it is not absurd either. A successive arbitration of this nature will produce a positive result if the first award makes an award of money but the second award dismisses the claim only in part but not to the whole extent. To the extent the second award makes the can celation, the first award cannot be enforced because the second award will be put up in resistance in execution. There the second award, although not an appellate award, would have nonetheless the effect of an appellate award square and proper.

31. In the present situation before us, however, and we can say this at least in hindsight, it was senseless for the parties, and more so Centrotrade to go in for a second arbitration when they should have realised that whatever the award that might result in their favour in such a second reference, its execution could never be had, because a conflicting nil award which had already been passed, would be put up in resistance by the appellant, Hindustan Copper. In a situation of this nature it is the first award which exhibits the characteristic of an appellate award although it has come before the second. In short, where the parties specify that two awards might be made and both are on the same plane as here, the lesser award takes precedence over the higher, and only that part of the claim which has been awarded in both the arbitrations can be executed and money obtained on that basis.

32. To our mind, the above points are points of the greatest importance in this case and we have had to deal with these at length after hearing arguments by learned counsel on these matters although arguments in the Court below wore not made on these all important points. Now for the foreign award point.

33. The London award was sought to be enforced under Part II of the 1996 Act. Applications were made under Sections 47, 48 and 49 of the said Act. If the second award were binding and productive, and we held that it is really a domestic award, we would have no hesitation in treating the said execution application as an enforcement application u/s 36 of the said Act, which deals with enforcement of Indian awards, and we would not have any hesitation about relieving the respondent from quoting or proceeding upon wrong sections. That of course assumes that they have the right to execute at all. The point of the award being a foreign award, and thus the Court having more limited powers of not enforcing it in India was argued at great length before us. We must give our opinion on this point as the argument ran, that if a foreign award has been brought before the Court and all necessary evidence in that regard is given, then short of the items mentioned in Section 48 of the 1996 Act, the Court cannot but enforce it.

34. Before dealing with this point, we make it clear that a foreign award is no more binding and no more sacrosanct than a domestic award, which has either not been set aside, or which has passed the test of challenge before an Indian Court. Even if we were of opinion that Mr. Cooke''s award is a foreign award, of which opinion we are not, even then the above discussions would still hold good and the award would still be unenforceable in India because of the existence of the nil award passed under the rules of the Indian Council of Arbitration. This is because of Section 48(e) of the 1996 Act.

35. This sub-section states that enforcement of a foreign award may be refused if;

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

36. The phrase in the above sub-section that the award has not yet become binding refers, perhaps in the very large majority of cases, to that period of time when, either the time for making an application for setting aside of the award before a foreign court has not elapsed, or to that period of time when such application is pending adjudication there. But there is no indication anywhere in the Act that the above phrase is limited to this contingency alone.

37. In a case of the present nature, where the London award has not become binding yet, because the Indian nil award still goes on existing or co-existing with the London award, we have no doubt in our mind that the party i.e. the appellant here, can set up the defence, and show to the Executing Court that the London award has not yet become binding. It would be wrong to attach any special or extra aura to an award, even if it is a

foreign award properly so-called. Foreign awards deserve all the respect, but not any more than Indian awards do. If an Indian award is not binding because there is another contrary Indian award making it of no effect, then and in that event a foreign award can be equally not binding because a contrary Indian award makes it emasculated.

38. The novice''s argument or the argument of the beginner, that the existence of the nil Indian Award will never allow the London award to become binding, and therefore the phrase "has not yet becoming binding" occurring in Section 41(l)(e) does not fit the situation, is, obviously, easily answered. When the Judge decides whether the London award is to be put into execution or not, he is concerned with the time which has then arrived; and he will decide whether at that time the London award has become binding or whether it has not become binding even then; he is not concerned about the future, immediate or distant. If the resistor can show that the award has not become yet binding, then and in that event, even if it is a foreign award, enforcement of it might be refused by the Judge.

39. We now have to address ourselves to the issue as to whether the London award is a foreign award within the meaning of Section 44 of the 1996 Act.

40. The said section is quoted below. The heading of Part II of the Act, which starts with this section is also quoted:

"Part II

ENFORCEMENT OF CERTAIN FOREIGN AWARDS

CHAPTER I

New York Convention Awards

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, and

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

41. Mr. Mitra who placed very ably the case of the respondent before us submitted that once clause (a) and (b) are satisfied, the award becomes a foreign award there and then. According to him the important matter in deciding whether the award is a foreign one is to

see where the arbitration took place. If it is a convention country, which has not been left out or excluded by the Central Government, then that is the end of the matter.

42. He placed several authorities, English and American, supporting this view. We shall refer to a few of those foreign materials but it is of the paramount importance to bear in mind when dealing with the Indian Act which is the result of the Indian adoption of the UNCITRAL Model Law, that such adoption has varied from country to country. The Model Law itself has no force in India ex proprio vigore. The preamble of the 1996 Act will show that the Model Law was adopted only by a Commission of the United Nations, the General Assembly of which merely recommended its adoption by the different signatory nations. What the Indian adoption is, what form it has taken, is to be seen from the 1996 Act. The preamble in this regard is quoted below :

"Preamble

WHEREAS the United Nations Commission on International Trade Law (UNCITRAL) has adopted the UNCITRAL Model Law on International Commercial Arbitration in 1985;

AND WHEREAS the General Assembly of the United Nations has recommended that all countries give due consideration to the said Model Law, in view of the desirability of uniformity of the law or arbitral procedures and the specific needs of international commercial arbitration practice;

AND WHEREAS the UNCITRAL has adopted the UNCITRAL Conciliation Rules in 1980;

AND WHEREAS the General Assembly of the United Nations has recommended the use of the said Rules in cases where a dispute arises in the context of international commercial relations and the parties seek an amicable settlement of that dispute by recourse to conciliation;

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

AND WHEREAS it is expedient to make law respecting arbitration and conciliation, taking into account the aforesaid Model Law and Rules;".

43. In the English Arbitration Act, 1996, Section 2 makes it clear that the provisions of the first part of that Act apply where the seat of the arbitration is in England and Wales or Northern Ireland. Then said section goes on to state which other section of the Act will apply even if the arbitration is not in the said mentioned territory. Section 67 of the English Act, which deals that setting aside of the award will apply, according to Section 2 when the seat of arbitration is in England and Wales or Northern Ireland but will not apply, in any case or event, if the seat of arbitration is not there.

44. Our Indian Law giving jurisdiction to the Arbitration Court is substantially different. Section 2(e) of our Act clarifies, in practically the same manner as was clarified in the Act of 1940 that a Court means a principal Court of Civil jurisdiction which would have jurisdiction to entertain a suit if the subject-matter of the reference were to form the subject-matter of that hypothetical suit.

45. Now, immediately, the differences in jurisdiction area seen, as would arise in regard to the London award according to English Law and Indian Law. If the Law in India were the same as in England, no Indian Court would have jurisdiction to set aside the London award but, because a part of the cause of action has arisen in India, i.e., the agreements were signed in India and delivery of Copper took place here, an Indian Court would be a Court of Competent Jurisdiction to entertain a challenge to the award of Mr. Cooke, although it was made in London and not made in India.

46. This difference of the laws in the two countries i.e., England and India arises because of the different adoptions made by these two countries of the same UNCITRAL Model Law. There is no prohibition either in the National Laws of the two countries or in that body of law known as International Law, to restrain or restrict such differences in adoption.

47. The different ways of such adoption have resulted in the concept of foreign award being itself different according to the Laws of the two countries. In our opinion, the true and core criterion to determine whether the award is a foreign award or not is to ask the question, whether an Indian Court would be competent to entertain a challenge to the award u/s 34 of the 1996 Act. This proposition we shall try to establish and confirm on the basis of various authorities dealt with below but it is our firm opinion that this is the key to the riddle which is the riddle of the determination of an award as a foreign award or otherwise. A running common theme of Arbitration Law in the few countries of which we are aware is this, that some Competent Court somewhere retains supervisory jurisdiction over the award. It is not lawful for the parties to say that they will go to arbitration and the award never be challengeable in any Court of Law. The Nationality of the Court which is competent to set aside the award.

48. Unless the two conditions (a) and (b) of Section 44 of the 1996 Act are satisfied an award cannot be considered to be a foreign award in India but even if those conditions are satisfied there remains a category of awards which are not foreign awards; the opening words of Section 44 are a pointer to this category. The opening words state that the definition of foreign award according to location will hold unless the context otherwise requires.

49. In Section 48(1)(e) which we have out above, and which is one of the governing conditions of enforcement of a foreign award, it is mentioned that a foreign award might not be enforceable if a competent authority of the country in which that award was made has set it aside or a competent authority of the country under the law of which it was

made, has set it aside. The words to note with emphasis in this regard are "competent authority".

50. A competent authority is not defined in the 1996 Act but Court is defined; that definition we have mentioned above. If an award is to be set aside by a competent authority, which must mean a foreign Court, then and in that event the award is a foreign award. If however the award, although made, say in England, might be set aside by an Indian Court, then that award is not a foreign award. This is where the opening words of exception mentioned in the beginning of Section 44 come in. Suppose parties who are of India, enter into a contract which has no connection with any country but India, and yet agree that their arbitration will take place in London.

51. Suppose further that the parties specify in their contract that Indian Law will govern the relationships of the parties in the working out of the contract and also in the matter of the arbitration itself. In such an event, even if the arbitration were to be held in England, and the award were to be made in London, the award would not be a foreign award in the eye of Indian Law. The Courts in India would be competent to entertain an application for challenge to the award. We note that according to English law the English Courts would also be competent to entertain an application for challenging the award.

52. We are not concerned with what the English Court will do. We are concerned with this that the Indian Court would have jurisdiction u/s 34 to entertain an application for setting aside, and once that is decided and established, it will not matter whether any other Court in any other country of the World also has to set aside the award according to the National law of that country, it becomes a domestic award automatically.

53. There are several Supreme Court cases which lend a lot of support to this point of view. The first case in this regard cited by Mr. Kapoor appearing for the appellant is the case of National Thermal Power Corporation Vs. The Singer Company and others, . In that case the Delhi High Court had refused to entertain an application for setting aside of an award since the seat of Arbitration was London. The Delhi High Court had opined that the English Courts alone had jurisdiction to set aside the award. This opinion was held by the High Court although it was expressly incorporated in the agreement that the laws applicable to the contract shall be the laws in force in India. The Supreme Court opined in paragraph 8 that the fundamental question is what the law which governs the agreement, and if that law is Indian Law, the award would not be a foreign award. In paragraph 26 Their Lordships said that the proper law of the arbitration agreement is normally the same as the proper law of the contract. In paragraph 26 it was opined that in respect of procedural matters concerning the conduct of arbitration, the English Courts would have jurisdiction, but the overriding principle is that the Courts of the country whose substantive laws govern the arbitration agreement are the competent Courts and they have exclusive competence in respect of the arbitration agreement. Only matters of procedure would remain under the concurrent supervision of the English Courts.

54. In paragraph 27 it was opined that the Indian Courts had overriding jurisdiction and control over the arbitration because Indian Law was the governing law. In paragraph 34 it was stated that an award is foreign not merely because it is made in the territory of a foreign State but because the arbitration agreement is not governed by the law of India.

55. The Court stated these principles in a general way. A fair reading, with all due respect, of these principles leaves no manner of doubt in one''s mind that the Court was emphasising the necessity of the following features for an award to be classified as a foreign award in India:

(i) A foreign award has to be made on foreign soil,

(ii) If the contract containing the arbitration clause contains a term that the proper law is Indian law, it will be a pointer against the award being a foreign award.

(iii) If the supervision of the arbitration, i.e., the power to set aside the award lies with the Indian Courts because the proper law of arbitration is Indian Law, then the award cannot be a foreign award.

56. After discussion of these general principles the Supreme Court went on to state that u/s 9 of the Foreign Awards Enforcement Act, 1961, the said Act provided under Sub-Section 9(b) specifically that it would not apply to any award made on an arbitration agreement governed by the law of India.

57. In our case also the parties have expressly stipulated that the governing law shall be Indian law. In Clause 16 of the contract it is stated that the contract is to be construed and is to take effect as a contract made in accordance with the laws of India. Mr. Cooke applied Indian law and recognised that Indian Law is the governing law of the contract.

58. Mr. Mitter said that even if all these are true, Section 9(b) of the Foreign Awards Act has not been adopted in Part II of the 1996 Act; although almost all other important provisions of the said Act have been adopted. He showed us that Section 51 of the 1996 Act reproduces Section 9(a) of the 1961 Act but notably omits to mention Section 9{b) which is the clause saying contracts governed by the Indian Law from producing foreign awards.

59. Mr. Mitter''s argument was that so notable an omission cannot but point to the legislative intent that even if Indian law is the governing law of an arbitration contract today, nonetheless the award under the contract will be a foreign contract if it is made on a foreign convention territory, as defined in Section 44.

60. With all due respect, we are unable to agree. Neither Part II of the 1996 Act, nor Section 51 states anywhere either expressly or by necessary implication that the definition of Section 44 will apply notwithstanding the proper law of the contract being Indian law. All that has happened by reason of the dropping of Section 9(b) is that the

Court is now compelled to see on its own, even if the proper law of the contract is Indian Law, whether the Indian Courts would have jurisdiction to set aside the award made on foreign soil. We are of the opinion that in the very small handful of cases where parties might choose and agree to apply Indian Law to their contract and nonetheless confer jurisdiction on a foreign Court, say the English Courts, for retaining supervisory jurisdiction over the award in matters like setting aside of it, only in that small handful of cases will the award be a foreign award as per Part II of the 1996 Act, although it would not have been a foreign award under the provisions of the now repealed Foreign Awards Enforcement Act. We are compelled to draw this fine distinction, that the Courts might sometimes be called upon to determine just like what the proper law of the contract is, what the proper forum or Court for determination of the contractual or arbitral dispute is. The doctrine by which a Court applies a foreign law in the matter of determination of disputes before it is, if we right in our view, the Doctrine of Renvoi.

61. If the parties so agree and if the circumstances of a particular contract so indicate, that although the proper law of the contract is Indian law, the English Courts will none the less have jurisdiction over the award made under the contract, then this doctrine would come into play. In setting aside the award, the English Court would have to apply Indian law. In such a case if we go back to Section 48(1) we shall see that the English Court would be "the competent authority" to set aside the award because the parties by their contract and by the circumstances in which they have placed themselves, have blocked or debarred the Indian Courts from supervising the award although the award was to be made under the Indian law. There are no special contractual clauses of circumstances of that nature here.

62. We have also noted Mr. Mitter"s submission that the opening words of Section 44 of the 1996 Act are similar to the opening words of Section 2 of the 1961 Act. According to him these words still necessitated the insertion of Section 9(b) in the 1961 Act. Thus these words cannot have the effect of giving the exclusionary importance to the proper law of contracts being Indian Law as it had to be given such special exclusionary effect by specific insertion of Section 9(b).

63. In our opinion this is not the correct way of looking at the words in a statute. The significance that the very same words might have had in an older statute, can be different and quite radically different from those same words occurring in a subsequent statute. Although in the earlier Act these words might not have had an implicit reference to the proper law of the contract, yet in the present statute in Section 44 these words do have that implicit reference.

64. If we take a different view, the result would be in supportible according to common sense also. The New York convention is not of modern origin or something which happened in the 1990"s. It had taken place in or about the year 1958. As a result of that convention the Foreign Awards Act, 1961 was enacted. It provided that if the proper law of the contract is Indian Law, the award will not be a foreign award. That same New York

convention is the basic subject-matter of Part II of the 1996 Act. The provisions regarding enforcement of foreign award have remained practically the same. The New York convention has not altered. All that has happened is that the UNCITRAL Model Law has been recommended for adoption by the United Nations in 1985. On the basis of such adoption such a big change cannot take place without express words, the big change being that the proper law of the contract will have not bearing at all on the nature of the award being foreign or otherwise, but that only the situs of the arbitration will be the important and the sole factor.

65. Our legislature has not adopted the UNCITRAL model in that fashion. Had it done so, it would also have provided, like in the English Act that the National Court can set aside an award made in India and India only. But our Act does not say so. Accordingly, it still preserves the importance of the contract being governed. by Indian law. Short of other cogent factors and circumstances including specific terms in the contract, and award governed by Indian law would be an Indian award although it was made on foreign soil.

66. Mr. Kapur then gave us the case of Sumitomo Heavy Industries Ltd. Vs. ONGC Ltd. and Others, , where also the importance of the proper law of the contract was discussed; however, this case also was at least partly decided on Section 9(b) of the 1961 Act. The next case of Bhatia International reported at Bhatia International Vs. Bulk Trading S.A. and Another, is, however, a case where Section 9(b) of 1961 Act does not come into play. This is a case where the venue of arbitration was in Paris and where parties had invoked Section 9 of the 1996 Act for the purpose interlocutory reliefs.

67. It was opined in paragraph 21 of the Reports that although Section 2(2) of the Act provides that the first part shall apply where the place of arbitration is in India, yet that sub-section does not say that the first part shall not apply where the place of arbitration is not in India. On the basis of this finding, the Court did grant relief under Part I to an arbitration which was being held in Paris. This is perhaps contrary to what would be permitted under the English Arbitration Act, 1996. But we are not in England. We are in India and we have to apply Indian Law. On the basis of the Bhatia case it cannot but now be held that Section 34 might become applicable in many of the cases where the proper law of arbitration and contract is Indian Law even if the venue of arbitration is abroad; once Section 34 becomes applicable the award ceases to be a foreign award, as we have explained above. Mr. Mitter gave us several American cases and passages from Russel and also passages from the Law and Practice of International Commercial Arbitration, a book by Redfern and Hunter. These foreign authorities no doubt support the view that according to their law the procedural law governing arbitration includes the supervisory power of setting aside the award and such arbitral law would be the law of the country where the arbitration takes place, even if the proper law of the contract is the law of a different country.

68. This paramount and all pervading importance given to the venue of the arbitration is an Anglo-American feature which has not yet found place in Indian Law. According to our

law the proper law of the contract is a much more important and determinative factor than the venue of arbitration.

69. We are accordingly of opinion that the award of Mr. Cooke is not a foreign award and is not enforceable under Part II but is enforceable u/s 36 of Part I of the 1996 Act.

70. A point of appealability was argued on the basis of Section 50 of the 1996 Act. That point would not arise if the award is not a foreign award. Even if the point arose, the order being an order in execution, we would have no hesitation in holding that a Letters Patent appeal under Clause 15 would lie to the Division Bench, the first Judge being one of the High Court itself. Authorities were cited in this regard but the matter being clear we do not need to traverse the old ground once again. We make it clear that the application for execution was transferred to the High Court by itself from Alipore; but once that is done, the Original Side order, even if passed in its extraordinary civil jurisdiction is still subject to a Letters Patent Appeal.

71. The award not being a foreign award, section 48 is not so restrictive with regard to it and in fact it does not apply at all. We have entered into the point whether the award is a foreign award or not more because sometimes there now prevails an unjustified aura about any award which is branded as a foreign award. The point also was dealt with by us because of the great time spent by the parties on this point, and because the appealability point was connected with it. The principal reason why we do not find the award of Mr. Cooke to be enforceable is that it cannot be said to have become binding in the face of a conflicting nil Indian award.

72. The appeal is accordingly allowed. The impugned order is set aside. The London award is declared to be inexecutable so long as the Indian nil award stands. The execution of the award passed by Mr. Cooke is refused. The appellants will be entitled to their costs both before us and in the Court below.

73. All parties and all others concerned to act on an authenticated copy of this judgment and order on the usual undertakings.