(2013) 03 BOM CK 0248

Bombay High Court

Case No: Arbitration Petition No. 160 of 2013

Konkola Copper Mines (PLC)		APPELLANT
	Vs	
Stewarts and Lloyds of India Limited		RESPONDENT

Date of Decision: March 19, 2013

Acts Referred:

- Arbitration Act, 1940 - Section 2(c), 31, 41
- Arbitration and Conciliation Act, 1996 - Section 1, 1(2), 11(6), 14, 15
- Civil Procedure Code, 1908 (CPC) - Section 9

Citation: (2013) 3 ARBLR 329 : (2013) 4 BomCR 619

Hon'ble Judges: R.D. Dhanuka, J

Bench: Single Bench

Advocate: G.R. Joshi instructed by Mr. D.P. Desai, for the Appellant; L.M. Acharya instructed by y Mr. Kunal Bhange, for the Respondent

Final Decision: Dismissed

Judgement

R.D. Dhanuka, J.

By this petition filed u/s 9 of the Arbitration & Conciliation Act, 1996, the petitioner seeks direction against the respondent to furnish security to secure the amounts awarded to the petitioner by the learned arbitrator by declaring an award on 9th January, 2013 in the sum of US # 3356203 equivalent to Rs. 181234926/- approximately as on 18th January, 2013 and seeks appointment of the Court Receiver and injunction against respondents. The respondents have filed affidavit dated 25th February, 2013 raising preliminary objection about territorial jurisdiction of this court to entertain this petition.

2. The learned counsel appearing on behalf of the respondents submits that the respondent carries on business at Kolkata. The Petitioner is having its registered office at Jambia. The contracts dated 10th August, 2006 and 18th August, 2006

which were subject matter of arbitration were received and executed by the respondent at Kolkata. The transaction between the petitioner and respondent took place at Kolkata. It is submitted that no part of cause of action in the pending arbitral proceedings has arisen within the territorial jurisdiction of this court nor the respondents has its registered office or branch office within the jurisdiction of this court. The learned counsel submits that this court does not fall within the purview of "Court" as contemplated by provisions of section 2(1)(e) of the Arbitration & Conciliation Act, 1996.

3. The learned counsel for the respondent placed reliance upon the judgment of the Supreme Court in the case of Bharat Aluminium Company and Others Vs. Kaiser Aluminium Technical Service, Inc. and Others etc. etc., and particularly paragraph 197.

4. The learned counsel submits that the Supreme Court has made it clear in para 197 that the Judgment in Bhatia International Vs. Bulk Trading S.A. and Another, was rendered by the Supreme Court on 13th March, 2002 and since then the said judgment has been followed by the High Courts as well as by Supreme court on numerous occasions. The learned counsel submits that the Supreme Court has held that the judgment in Venture Global Engineering Vs. Satyam Computer Services Ltd. and Another, had been rendered on 10th January, 2008 in terms of the ratio of the decision in Bhatia International. It was clarified that the law now declared by the Supreme Court in the case of Bharat Alluminium Co. (supra) shall apply prospectively to all arbitration agreement executed hereafter. The learned counsel therefore, submits that though venue of the arbitration proceedings was subsequently changed to Mumbai, the fact remains that the agreement entered into between the parties was prior to the date of the Supreme Court rendering the said decision in the case of Bharat Alluminium Co. and in view of the fact no cause of action has arisen in Mumbai and the parties having agreed that all disputes arising out of or in connection with the contract in question shall be finally settled under the rules of arbitration of International Chamber Commerce and the contract shall be governed, construed and interpreted in accordance with the laws of Republic of Jambia, both the parties had agreed expressly or in any event impliedly that Part I of the Arbitration & Conciliation Act, 1996 would be excluded and would not be applicable to the parties hereto.

5. Without prejudice to the aforesaid submissions, the learned counsel for the respondent submits that the respondents are in the process of challenging the impugned award by filing petition in the appropriate court and the petition would be filed shortly. The learned counsel submits that on merits, the petitioner is not entitled to seek any interim relief.

6. Mr. G.R. Joshi, the learned counsel on behalf of the petitioner on the other hand submits that the venue of arbitration proceedings was admittedly at Mumbai and the arbitration proceedings were held at Mumbai and therefore, in view of the

judgment of the Supreme Court in the case of Bharat Alluminium Co. (supra) even if contract was not executed in Mumbai or the respondent does not carry on business at Mumbai, this court has territorial jurisdiction to entertain this petition filed u/s 9 as per law laid down by the Supreme Court in the case of Bharat Alluminium Co (supra).

7. The learned counsel for the petitioner invited my attention to clause 24 of the General Conditions of Contract which records arbitration agreement between the parties which read as follows:

7. In the Request for Arbitration lodged by Claimant with the Secretariat of the ICC International Court of Arbitration ("ICC Secretariat"), on 21 March, 2011, Clause 24 of the GCC is said to provide as follows:

Any party to this contract shall have the right to have recourse to and be bound by the pre-arbitral referee procedure of the International Chamber of Commerce in accordance with its Rules for a Pre-Arbitral Referee Procedure.

Without prejudice to clause 20 and 21 of this contract, all disputes arising out of or in connection with this contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the sid Rules of Arbitration.

The venue for the arbitration contemplated in this contract shall be the Indian Capital, New Delhi.

Clause 21 of the General Condition of Contract reads as under:

The Contract shall be governed, construed and interpreted in accordance with the law of the Republic of Zambia.

8. The learned counsel invited my attention to the letter dated 10th May, 2011 addressed to ICC International Court of Arbitration conveying that the petitioner proposes the place of arbitration to be at Mumbai. By another letter dated 24th May, 2011, addressed by the respondents to the ICC International Court of Arbitration, the respondents conveyed their acceptance that the Mumbai, India as the place of arbitration as proposed by the petitioner. The learned counsel thus submits that in view of the agreement arrived at between the parties before commencement of arbitration hearing, that the venue of arbitration would be at Mumbai, the arbitration proceedings were held at Mumbai which was agreed place of arbitration. It is submitted that the place of arbitration decided by the parties at Mumbai was neutral venue. The learned counsel appearing for parties placed reliance upon Paragraphs 2, 10 to 10.3, 16 to 20, 24, 52 to 54, 58, 59, 63, 67, 75, 76, 78, 86, 89, 96 to 100, 194 and 197 of the judgment of the Supreme Court in the case of Bharat Alluminium Co. (supra) which read thus :

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

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

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

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

10. Mr. C.A. Sundaram, appearing for the Appellants in C.A. No. 7019 of 2005 submits that primarily the following five questions would arise in these cases: (a) What is meant by the place of arbitration as found in Sections 2(2) and 20 of the Arbitration Act, 1996?; (b) What is the meaning of the words "under the law of which the award is passed" u/s 48 of the Arbitration Act, 1996 and Article V(1)(e) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter referred to as "the New York Convention")?; (c) Does Section 2(2) bar the application of Part I of the Arbitration Act, 1996 (Part I for brevity) to arbitrations where the place is outside India?; (d) Does Part I apply at all stages of an arbitration, i.e., pre, during and post stages of the arbitral proceedings, in respect of all arbitrations, except for the areas specifically falling under Parts II and III of the Arbitration Act, 1996 (Part II and Part III hereinafter)?; and (e) Whether a suit for preservation of assets pending an arbitration proceeding is maintainable?

16. Mr. Sundaram further submitted that in all commentaries of International Commercial Arbitration, the expression "place" is used interchangeably with "seat". In many cases, the terms used are "place of arbitration"; "the arbitral situs"; the "locus arbitri" or "the arbitral forum". Relying on the judgment in Braes of Doune Wind Farm (Scotland) Limited v. Alfred McAlpine Business Services Limited which has been affirmed in Shashoua and Ors. v. Sharma, he submitted that internationally "seat" is interpreted as being the "juridical seat". Therefore, when the parties opt for a given law to govern the arbitration, it is considered to supplant the law of the

geographical location of the arbitration. Therefore, the mere geographical location is not the deciding factor of the seat. He relies on the observations made by Gary B. Born in his book ''International Commercial Arbitration'', which are as follows:

A concept of central importance to the international arbitral process is that of the arbitral seat (alternatively referred to as the "place of arbitration", the "siege" "ort", the arbitral "situs" the "locus arbitri" or the arbitral "forum"). The arbitral seat is the nation where an international arbitration has its legal domicile, the laws of which generally govern the arbitration proceedings in significant respects, with regard to both "internal" and "external" procedural matters.

As discussed elsewhere, the arbitral seat is the location selected by the parties (or, sometimes, by the arbitrators, an arbitral institution, or a court) as the legal or juridical home or place of the arbitration. In one commentator''s words, the "seat" is in the vast majority of cases the country chosen as the place of the arbitration. The choice of the arbitral seat can be (and usually is) made by the parties in their arbitration agreement or selected on the parties'' behalf by either the arbitral tribunal or an arbitral institution.

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

18. Mr. Sundaram emphasised that if Section 2(2) had not been on the Statute book there would be no doubt that if an arbitration was governed by the Arbitration Act, 1996, Part I would ipso facto become applicable to such arbitration, and u/s 2(7), irrespective of where the arbitral proceedings took place, it would become a deemed domestic award, giving rise to the incidence arising therefrom. By the inclusion of Section 2(2), the legislature has also made the Arbitration Act, 1996 and Part I applicable when the seat or place of arbitration is in India even if not conducted in accordance with Indian Arbitral laws thereby domestic what would otherwise have been a non-domestic award having been conducted in accordance with a Foreign Arbitration Act. By making such provisions, the Indian Parliament has honoured the commitment under the New York Convention. He submits that New York Convention in Articles V(1)(a) and V(1) (e) has recognized that the courts in both the countries i.e. country in which the arbitration is held and the country "under the

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

19. Learned Counsel have submitted that the findings in the case of Bhatia International Vs. Bulk Trading S.A. and Another, (hereinafter referred to as "Bhatia International") that if Part I was not made applicable to arbitrations conducted outside India would render "party remediless" is wholly correct. It is not open to a party to file a suit touching on the merits of the arbitration, since such suit would necessarily have to be stayed in view of Section 8 or Section 45 of the Arbitration Act, 1996. He submits that the only way a suit can be framed is a suit "to inter alia restrict the Defendant from parting with properties". He submits that if the right to such property itself is subject matter of an arbitration agreement, a suit for the declaration of such right can not be filed. All that could then be filed, therefore, would be a bare suit for injunction restraining another party from parting with property. The interlocutory relief would also be identical till such time as the injunction is made permanent. Such a suit would not be maintainable because:(a) an interlocutory injunction can only be granted depending on the institutional progress of some proceeding for substantial relief, the injunction itself must be part of the substantive relief to which the Plaintiff''s cause of action entitles him. In support of this proposition, he relies on Adhunik Steels Ltd. Vs. Orissa Manganese and Minerals Pvt. Ltd., ; (b) the cause of action for any suit must entitle a party for a substantive relief. Since the substantive relief can not be asked for as the dispute is to be decided by the arbitrator, the only relief that could be asked for would be to safeguard a property which the Plaintiff may or may not be entitled to proceed against, depending entirely on the outcome of another proceeding, in another jurisdiction, or which the country has no seisin; (c) in such a suit, there would be no preexisting right to give rise to a cause of action but the right is only contingent / speculative and in the absence of an existing / subsisting cause of action, a suit can not be filed; (d) the absence of an existing / subsisting cause of action would entail

the plaint in such a suit to be rejected under Order VII Rule 11a. Further, no interlocutory injunction can be granted unless it is in aid of a substantive relief and therefore a suit simply praying for an injunction would also be liable to be rejected under Order VII Rule 11; (e) no interim relief can be granted unless it is in aid of and ancillary to the main relief that may be available to the party on final determination of rights in a suit. Learned Counsel refers to The State of Orissa Vs. Madan Gopal Rungta, in support of the submission; (f) such a suit would be really in the nature of a suit for interim relief pending an entirely different proceeding. It is settled law that by an interim order, the Court would not grant final relief. The nature of such a suit would be to grant a final order that would in fact be in the nature of an interim order. Here the Learned Counsel refers to State of Uttar Pradesh and Others Vs. Ram Sukhi Devi, , Deoraj Vs. State of Maharashtra and Others, and Raja Khan v. Uttar Pradesh Sunni Central Wakf Board and Ors. He submits that the intention of the Indian Parliament in enacting the Arbitration Act, 1996 was not to leave a party remediless.

20. Mr. Gopal Subramanium submits that the issue in the present case is that in addition to the challenge to the validity of an award being made in courts where the seat is located, are domestic courts excluded from exercising supervisory control by way of entertaining a challenge to an award? He submits that the issue arises when it is not possible, in a given case, to draw an assumption that the validity of the award is to be judged according to the law of the "place" of arbitration. The Arbitration Act, 1996 has removed such vagueness. The Arbitration Act, 1996 clearly states that in respect of all subject matters over which Courts of Judicature have jurisdiction, the National Courts will have residual jurisdiction in matters of challenge to the validity of an award or enforcement of an award. He reiterates the submissions made by other learned senior Counsel and points out that the Arbitration Act, 1996 is not seat centric. This, according to learned senior Counsel, is evident from numerous provisions contained in Part I and Part II. He points out all the sections which have been noticed earlier. According to learned senior Counsel, the definition of International Commercial Arbitration in Section 2(1)(f) is party centric. This definition is not indexed to the seat of arbitration. Similarly, the definition in Section 2(1)(e) is subject matter centric. According to him, there is a crucial distinction between the definition of international arbitration in the Model Law and the definition of international commercial arbitration under the 1961 Act. From the above, he draws an inference that seat of arbitration being in India is not a pre-requisite to confer jurisdiction on the Indian Courts under the Arbitration Act, 1996. He points out that Section 2(1)(e) contemplates nexus with "the subject matter of the arbitration". The use of this expression in the definition gives a clear indication of the manner in which jurisdiction is conferred. If an international arbitration takes place, irrespective of the seat, and the subject matter of that arbitration would otherwise be within the jurisdiction of an Indian Court, such Indian Court would have supervisory jurisdiction. Therefore, if "the closest

connection" of the arbitration is with India, and if the Indian Courts would normally have jurisdiction over the dispute, the Indian Courts will play a supervisory role in the arbitration. Restricting the applicability of Part I of the Arbitration Act, 1996 to the arbitration where the seat is in India cannot, according to Mr. Subramanium, provide a coherent explanation of Sub-Section 2(1)(e) without doing violence to its language. He also makes a reference to the opening words of Section 28 "where the place of arbitration is situate in India". He then submits that if the legislature had already made it abundantly clear that Section 2(2) of the Arbitration Act, 1996 operated as a complete exclusion of Part I of the aforesaid Act to arbitrations outside India, the same proposition need not subsequently be stated as a qualifier in Section 28.

25. Finally, he submits that the decision in Bhatia International (supra) is a harmonious construction of Part I and Part II of the Arbitration Act, 1996. He further submits that the case of Venture Global Engineering Vs. Satyam Computer Services Ltd. and Another, (hereinafter referred to as "Venture Global Engineering") has been correctly decided by this Court. Mr. Subramanium further pointed out that the judgments of this Court in the case of Oil and Natural Gas Commission Vs. Western Company of North America, and National Thermal Power Corporation v. Singer Co. and Ors. (supra) have appropriately set aside the awards challenged therein even though the same were not made in India.

52. In Paragraph 14 of the Judgment, it is held as follows:

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

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

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

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

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

53. It is held that the definition of international commercial arbitration u/s 2(1)(f) makes no distinction between international commercial arbitrations held in India or outside India. Further it is also held that the Arbitration Act, 1996 no where provides that its provisions are not to apply to international commercial arbitrations which take place in a non-convention country. Hence, the conclusion at Paragraph 14(a). On the basis of the discussion in Paragraph 17, this Court reached the conclusion recorded at Paragraph 14(b). The conclusions at Paragraph 14(c) is recorded on the basis of the reasons stated in Paragraphs 19, 20, 21, 22 and 23. Upon consideration of the provision contained in Sections 2(7), 28, 45 and 54, it is held that Section 2(2) is only an inclusive and clarificatory provision. The provision contained in Section 9 is considered in Paragraphs 28, 29, 30 and 31. It is concluded in Paragraph 32 as follows:

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

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

37. In view of the legal position derived from Bhatia International we are unable to accept Mr. Nariman''s argument. It is relevant to point out that in this proceeding we are not deciding the merits of the claim of both parties, particularly, the stand taken in the suit filed by the Appellant herein for setting aside the award. It is for the court concerned to decide the issue on merits and we are not expressing anything on the same. The present conclusion is only with regard to the main issue whether the aggrieved party is entitled to challenge the foreign award which was passed outside India in terms of Sections 9 /34 of the Act. Inasmuch as the three-Judge Bench decision is an answer to the main issue raised, we are unable to accept the contra view taken in various decisions relied on by Mr. Nariman. Though in Bhatia International the issue relates to filing a petition u/s 9 of the Act for interim orders the ultimate conclusion that Part I would apply even for foreign awards is an answer to the main issue raised in this case.

58. With utmost respect, upon consideration of the entire matter, we are unable to support the conclusions recorded by this Court in both the judgments i.e. Bhatia International (supra) and Venture Global Engineering (Supra).

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

Section 1 - Short title, extend and commencement -

(1)...

(2) It extends to the whole of India (except the State of Jammu and Kashmir).

63. The crucial difference between the views expressed by the Appellants on the one hand and the Respondents on the other hand is as to whether the absence of the word "only" in Section 2(2) clearly signifies that Part I of the Arbitration Act, 1996 would compulsorily apply in the case of arbitrations held in India, or would it signify that the Arbitration Act, 1996 would be applicable only in cases where the arbitration takes place in India. In Bhatia International and Venture Global Engineering (supra), this Court has concluded that Part I would also apply to all arbitrations held out of India, unless the parties by agreement, express or implied, exclude all or any of its provisions. Here again, with utmost respect and humility, we are unable to agree with the aforesaid conclusions for the reasons stated hereafter.

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

75. We are also unable to accept the submission of the Learned Counsel for the Appellants that the Arbitration Act, 1996 does not make seat of the arbitration as the centre of gravity of the arbitration. On the contrary, it is accepted by most of the

experts that in most of the National Laws, arbitrations are anchored to the seat/place/situs of arbitration. Redfern in Paragraph 3.54 concludes states that "the seat of the arbitration is thus intended to be its centre of gravity." This, however, does not mean that all the proceedings of the arbitration have to take place at the seat of the arbitration. The arbitrators at times hold meetings at more convenient locations. This is necessary as arbitrators often come from different countries. It may, therefore, on occasions be convenient to hold some of the meetings in a location which may be convenient to all. Such a situation was examined by the court of appeal in England in Naviera Amazonica Peruana S.A. v. Compania Internacionale De Seguros Del Peru therein at p.121 it is observed as follows:

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

76. It must be pointed out that the law of the seat or place where the arbitration is held, is normally the law to govern that arbitration. The territorial link between the place of arbitration and the law governing that arbitration is well established in the international instruments, namely, the New York Convention of 1958 and the UNCITRAL Model Law of 1985. It is true that the terms "seat" and "place" are often used interchangeably. In Redfern and Hunter on International Arbitration, 5th Edn. (para 3.51), the seat theory is defined thus: "The concept that an arbitration is governed by the law of the place in which it is held, which is the ''seat'' (or ''forum'' or locus arbitri) of the arbitration, is well established in both the theory and practice of international arbitration. In fact, the 1923 Geneva Protocol states: ''The arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place.'' The New York Convention maintains the reference to ''the law of the country where the arbitration took place "(Article V(1)(d))" and, synonymously to ''the law of the country where the award is made'' [Article V(1)(a) and (e)]. The aforesaid observations clearly show that New York Convention continues the clear territorial link between the place of arbitration and the law governing that arbitration. The

author further points out that this territorial link is again maintained in the Model Law which provides in Article 1(2) that "the provision of this law, except Articles 8, 9, 35 and 36 apply only if the place of arbitration is in the territory of the State". Just as the Arbitration Act, 1996 maintains the territorial link between the place of arbitration and its law of arbitration, the law in Switzerland and England also maintain a clear link between the seat of arbitration and the lex arbitri. Swiss Law states: "the provision of this chapter shall apply to any arbitration if the seat of the arbitral tribunal is in Switzerland and if, at the time when the arbitration agreement was concluded, at least one of the parties had neither its domicile nor its habitual residence in Switzerland. See Swiss Private International Law Act, 1987, Chapter 12 Article 176 (1).

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

86. In view of the aforesaid observations, we have no doubt that the provisions of Section 2(4) and Section 2(5) would not be applicable to arbitrations which are covered by Part II of the Arbitration Act, 1996, i.e. the arbitrations which take place outside India. We, therefore, see no inconsistency between Sections 2(2), 2(4) and 2(5). For the aforesaid reasons, we are unable to agree with the conclusion in Bhatia International that limiting the applicability of part I to arbitrations that take place in India, would make Section 2(2) in conflict with Sections 2(4) and 2(5).

89. That Part I and Part II are exclusive of each other is evident also from the definitions section in Part I and Part II. Definitions contained in Section 2(i)(a) to (h) are limited to Part I. The opening line which provides "In this part, unless the context otherwise requires...", makes this perfectly clear. Similarly, Section 44 gives the definition of a foreign award for the purposes of Part II (Enforcement of Certain Foreign Awards); Chapter I (New York Convention Awards). Further, Section 53 gives the interpretation of a foreign award for the purposes of Part II (Enforcement of Certain Foreign Awards); Chapter II (Geneva Convention Awards). From the aforesaid, the intention of the Parliament is clear that there shall be no overlapping between Part I and Part II of the Arbitration Act, 1996. The two parts are mutually exclusive of each other. To accept the submissions made by the Learned Counsel for the Appellants would be to convert the "foreign award" which falls within Section 44, into a domestic award by virtue of the provisions contained u/s 2(7) even if the arbitration takes place outside India or is a foreign seated arbitration, if the law governing the arbitration agreement is by choice of the parties stated to be the Arbitration Act, 1996. This, in our opinion, was not the intention of the Parliament. The territoriality principle of the Arbitration Act, 1996, precludes Part I from being applicable to a foreign seated arbitration, even if the agreement purports to provide that the Arbitration proceedings will be governed by the Arbitration Act, 1996.
Section 2(1)(e) of the Arbitration Act, 1996 reads as under:

2. Definitions

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

...

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

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

97. The definition of Section 2 includes "subject matter of the arbitration" to give jurisdiction to the courts where the arbitration takes place, which otherwise would not exist. On the other hand, Section 47 which is in Part II of the Arbitration Act, 1996 dealing with enforcement of certain foreign awards has defined the term "court" as a court having jurisdiction over the subject-matter of the award. This has

a clear reference to a court within whose jurisdiction the asset/person is located, against which/whom the enforcement of the international arbitral award is sought. The provisions contained in Section 2(1)(e) being purely jurisdictional in nature can have no relevance to the question whether Part I applies to arbitrations which take place outside India.

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

20. Place of arbitration

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

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

(3) Notwithstanding Sub-section (1) or Sub-section (2), the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, good or other property.

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

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

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

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

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

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

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

(ii) Whether the specific designation of a foreign seat, necessarily carrying with it the choice of that country''s Arbitration/curial law, would prevail over and subsume the conflicting selection choice by the parties of the Arbitration Act, 1996.

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

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

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

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

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

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

9. Relying upon the said judgment, the learned counsel for the petitioner submits that the Supreme Court has held that the legislature has intentionally given jurisdiction to two courts i.e. court which would have jurisdiction where cause of action is located and the courts where the arbitration takes place. It is submitted that the law laid down by the Supreme Court is clear that the courts where arbitration takes place would be required to exercise supervisory control over the arbitral process. This would be irrespective of the fact that the obligations to be performed under the contract were to be performed at any other place. The learned counsel submits that thus both the courts would have jurisdiction i.e. the court within whose jurisdiction the subject matter of the suit is situated and the court within the jurisdiction of which the dispute resolution i.e. arbitration is located.

10. Mr. Joshi, the learned counsel appearing for the petitioner invited my attention to the balance sheet of the respondents to demonstrate that the respondents have been selling and liquidating all its assets and are heavily indebted in support of his plea that interim measures therefore, is required to be granted in favour of the petitioner so as to secure the amount awarded by the arbitral tribunal in favour of the petitioner.

11. In rejoinder, the learned counsel appearing for the respondent placed reliance upon the judgment of the Supreme Court in the case of Dozco India P. Ltd. Vs. Doosan Infracore Co. Ltd., . The learned counsel invited my attention to the arbitration clause considered by the Supreme Court in the case of Dozco India Vs. Dousan Infracore in Para 4 of the said judgment which reads thus:

4. The petition is countered on behalf of the respondent who opposes the same on account of maintainability. According to the respondent, only the Rules of Arbitration of International Chamber of Commerce would apply in accordance with the Agreement between the parties. It is contended by the respondent that this Court will have no jurisdiction much less u/s 11(6) of the Act to appoint Arbitrator, particularly, because it has been specifically agreed in Article 22 and 23 which are as under:

Article 22. Governing Laws - 22.1: This agreement shall be governed by and construed in accordance with the laws of The Republic of Korea.

Article 23. Arbitration - 23.1: All disputes arising in connection with this Agreement shall be finally settled by arbitration in Seoul, Korea (or such other place as the parties may agree in writing), pursuant to the rules of agreement then in force of the International Chamber of Commerce

(emphasis supplied)

12. The learned counsel also placed reliance upon Paragraph 15, 19 and 20 of the said judgment which reads thus:

15. If we see the language of Article 23.1 in the light of the Article 22.1, it is clear that the parties had agreed that the disputes arising out of the Agreement between them would be finally settled by the arbitration in Seoul, Korea. Not only that, but the rules of arbitration to be made applicable were the Rules of International Chamber of Commerce. This gives the prima facie impression that the seat of arbitration was only in Seoul, South Korea. However, Ms. Mohana, learned Counsel appearing on behalf of the petitioner drew our attention to the bracketed portion and contended that because of the bracketed portion which is to the effect "or such other place as the parties may agree in writing", the seat could be elsewhere also. It is based on this that Ms. Mohana contended that, therefore, there is no express exclusion of Part I of the Act. It is not possible to accept this contention for the simple reason that a bracket could not be allowed to control the main clause. Bracketed portion is only for the purposes of further explanation. In my opinion, Shri Gurukrishna Kumar, learned Counsel appearing on behalf of the respondent, is right in contending that the bracketed portion is meant only for the convenience of the arbitral Tribunal and/or the parties for conducting the proceedings of the arbitration, but the bracketed portion does not, in any manner, change the seat of arbitration, which is only Seoul, Korea. The language is clearly indicative of the express exclusion of Part I of the Act. If there is such exclusion, then the law laid

down in Bhatia International v. Bulk Trading S.A. and Anr. (cited supra) must apply holding:

In cases of international commercial arbitrations held out of India provisions of Part I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions. In that case, the laws or rules chosen by the parties would prevail. Any provision in Part I, which is contrary to or excluded by that law or rules will not apply.

19. In respect of the bracketed portion, however, it is to be seen that it was observed in that case:

...It seems clear that the submissions advanced below confused the legal "seat" etc. of an arbitration with the geographically convenient place or places for holding hearings. This distinction is nowadays a common feature of international arbitrations and is helpfully explained in Redfern and Hunter in the following passage under the heading " The Place of Arbitration:

The preceding discussion has been on the basis that there is only one "place" of arbitration. This will be the place chosen by or on behalf of the parties; and it will be designated in the arbitration agreement or the terms of reference or the minutes of proceedings or in some other way as the place or "seat" of the arbitration. This does not mean, however, that the arbitral tribunal must hold all its meetings or hearings at the place of arbitration. International commercial arbitration often involves people of many different nationalities, from many different countries. In these circumstances, it is by no means unusual for an arbitral tribunal to hold meetings - or even hearings -in a place other than the designated place of arbitration, either for its own convenience or for the convenience of the parties or their witnesses....

It may be more convenient for an arbitral tribunal sitting in one country to conduct a hearing in another country - for instance, for the purpose of taking evidence..... In such circumstances, each move of the arbitral tribunal does not of itself mean that the seat of the arbitration changes. The seat of the arbitration remains the place initially agreed by or on behalf of the parties.

These aspects need to be borne in mind when one comes to the Judge''s construction of this policy.

It would be clear from this that the bracketed portion in the Article was not for deciding upon the seat of the arbitration, but for the convenience of the parties in case they find to hold the arbitration proceedings somewhere else than Seoul, Korea. The part which has been quoted above from the decision in Naviera Amozonica Peruana S.A. v. Compania Internationacional De Seguros Del Peru (cited supra) supports this inference.

20. In that view, my inferences are that:

1. a clear language of Articles 22 and 23 of the Distributorship Agreement between the parties in this case spell out a clear agreement between the parties excluding Part I of the Act.

2. the law laid down in Bhatia International v. Bulk Trading S.A. and Anr. (cited supra) and Indtel Technical Services Private Ltd. v. W.S. Atkins Rail Ltd. (cited supra), as also in Citation Infowares Ltd. v. Equinox Corporation (cited supra) is not applicable to the present case.

3. Since the interpretation of Article 23.1 suggests that the law governing the arbitration will be Korean law and the seat of arbitration will be Seoul in Korea, there will be no question of applicability of Section 11(6) of the Act and the appointment of Arbitrator in terms of that provision.

13. Considering the judgment of the Supreme Court in the case of Bhatia International (supra), the Supreme Court in the said judgment of Dozco India (supra) held that the law laid down in Bhatia International was not applicable to the facts of that case.

14. The learned counsel for the respondents also placed reliance upon the judgment of the Karnataka High Court in the case of Globe Cogeneration Power Limited Vs. Sri. Hiranyakeshi Sahakari Sakkere Karkhane Niyamit, and particularly paragraph Nos. 16 and 19, 28, 31 and 35 which reads thus:

16. In the premise of the definition of the word "Court" in Section 2(1)(e) of the Act and since a party has to make an application to a "Court" u/s 9 of the Act for interim reliefs, in order to decide the question whether the petition filed by the appellant herein u/s 9 of the Act before the Bangalore Court is maintainable or not and whether the Bangalore Court has jurisdiction to entertain that petition or not, it becomes necessary for the Court to first decide whether the Bangalore Court is having jurisdiction to decide the questions forming the subject-matter of the arbitration, if the same had arisen in a suit. This question need not detain the Court for long. The dispute brought before the Bangalore Court relates to and arises out of an arbitration agreement entered into between the parties. It needs to be noticed that in the present case, the parties to the agreement are not in Bangalore; contract was not made in Bangalore; lease deed was not executed in Bangalore; the property in respect of which interim relief is sought u/s 9 of the Act is not situated in Bangalore and even the work under the contract is required to be performed not in Bangalore. If these are admitted facts, the simple question for the Court to decide is whether the Bangalore Court would have jurisdiction to entertain a suit filed u/s 9 of the CPC in terms of Sections 15 to 20. thereof. The straightforward answer to the question is that Bangalore Court has no jurisdiction to entertain such suit. If that is the answer, the same answer is the answer to the question whether the petition filed by the appellant herein u/s 9 of the Arbitration Act, 1996, before the Bangalore Court is maintainable.

28. Sri D.L.N. Rao, learned Counsel for the appellant, would, however, submit that having regard to the fact that the Act permits the parties to resolve the disputes between them by way of arbitration at a chosen place with minimal intervention of the Courts and since the parties in this case have agreed to settle the disputes between them in Bangalore, we should interpret the provisions of Section 2(1)(e) in such a way as to hold that the Bangalore Court has jurisdiction to entertain the application filed by the appellant u/s 9 of the Act. Sri D.L.N. Rao would contend that such interpretation is justified because of Sub-clause (9) of Clause 14 of the PDA entered into between the parties, which clause, in unmistakable terms reflects the intention of the parties that the Bangalore Court alone has jurisdiction to entertain the disputes between them. In other words, what Sri D.L.N. Rao submits is that we should adopt rule of ''purposive interpretation'' while construing the definition of "Court" in Section 2(1)(e) of the Act.

31. The place chosen by the parties for arbitration and incorporated in Clause 10-V of the PDA is in accordance with the liberty granted to the parties u/s 20 of the Act. Section 20 of the Act provides that the parties are free to agree on the place of arbitration. In this case, we are not called upon to decide on the place of arbitration in terms of Clause 10-V of PDA, but on the question whether the Bangalore Court is a "Court" within the meaning of Section 2(1)(e) of the Act. Simply because the parties to the PDA have chosen Bangalore as the place of arbitration, it cannot be said that the Bangalore Court is the "Court" for the purpose of Section 9 or Sections 27, 34, 37, 47 and 56 of the Act regardless of the fact whether the Bangalore Court is a "Court within the meaning of Section 2(1)(e) of the Act in the facts and circumstances of this case.

35. There is absolutely no scope for the Court to apply the rule of "purposive construction". Firstly, the provisions of Section 2(1)(e) of the Act are quite plain, unambiguous and they are not capable of bearing more than one construction. Secondly, if the construction suggested by Sri D.L.N. Rao is not accepted, it will not result in any hardship, serious inconvenience, injury or anomaly. Thirdly, we also do not find any absurdity that may entail by interpreting the provisions of Section 2(1)(e) of the Act by applying rule of literal interpretation or popularly known as ''Golden rule''. Fourthly, simply because the parties have agreed to resolve the disputes between them at Bangalore, by way of arbitration, only on that ground we cannot hold that the Bangalore Court is the "Court" within the meaning of Section 2(1)(e) of the Act and that it has jurisdiction to entertain the application filed u/s 9 of the Act. The question whether a particular Court established under a statute has jurisdiction or not to entertain a dispute is of vital importance and fundamental consideration for the State as well as its citizens in the domain of administration of justice, and therefore, where that question has been settled by the lawmaker by exercising the power vested in it by the Constitution by enacting a law, the parties who are governed by that law cannot confer jurisdiction on an incompetent Court contrary to or in breach of such enacted law to decide the disputes between them

by their consent or agreement. It is well settled that the parties by consent cannot confer jurisdiction on a Court to decide disputes if such Court has no jurisdiction to entertain such disputes in terms of law.

15. The learned counsel for the respondent then placed reliance upon the judgment of this court in the case of Raman Lamba and others Vs. D.M. Harish and others, , judgment of Madras High Court in the case of M/s. Sabson (India) Pvt. Ltd., Bangalore Vs. Neyveli Lignite Corporation Ltd. and others, , judgment of Delhi High Court in the case of Inox Air Products Ltd. Vs. Rathi Ispat Ltd., and particularly paragraphs 25, 26, 30 and 31 of the said judgment which read thus:

25. Faced with this situation, counsel for the plaintiff sought to urge that the venue of the arbitration proceedings referred to in the arbitration agreement was at New Delhi, and hence this Court has jurisdiction to treat the suit as a petition u/s 9 of the Arbitration & Conciliation Act, 1996. Counsel for the defendant, on the contrary, seeks to urge that the situs of arbitration is wholly irrelevant for the purpose of deciding whether the jurisdiction to entertain even a petition u/s 9 of the Act vests in this Court. The place of arbitration, he urges, will not confer jurisdiction as would be clear from a reading of Section 2(1)(e) of the Act.

26. Reliance was placed, in the above context, by counsel for the defendant on several judgments of this Court. Thus, the question as to whether situs of arbitration confers jurisdiction on the court was considered by a learned Single Judge of this Court in Sushil Ansal v. State. In the said case, the contract was entered into at Lucknow in respect of the works executed at Kanpur and disputes arose which were referred to decision by a sole arbitrator, who made his award. The petition was filed in this Court u/s 14 & 17 of the Arbitration Act, for filing of the award and making the same as rule of the court, claiming that this Court had jurisdiction on the ground that the arbitrator was appointed at Delhi and that he had made the award at Delhi. This Court after examining the provisions of Sections 41, 31 & 2(c) of the Arbitration Act, 1940, held:

Thus one has to ascertain what are the questions forming the subject matter of the reference to arbitration which resulted in the award. Suppose those question arise in a suit then find out which would be the competent Court to decide such suit. The Court competent to decide such questions in the suit would be the Court having jurisdiction to decide the present petition under the Arbitration Act for making the award a rule of the Court.

The Court held further that:

The matters, as alleged by the petitioner, relating to appointment of arbitrator at New Delhi, making of award by him at New Delhi and the Union of India having its headquarters at New Delhi are not the questions forming the subject matter of reference and Therefore do not confer jurisdiction upon this Court.

30. In Ge Countrywide Consumer Financial Services Ltd. v. Mr. Surjit Singh Bhatia, the same learned Single Judge of this Court (Hon''ble Mr. Justice Badar Durrez Ahmed) reiterated that this Court would have no territorial jurisdiction nor could territorial jurisdiction be conferred upon it merely because of the agreed venue of the arbitration and that it was vital to consider the competency of the court for deciding the subject matter of the dispute had a suit been filed instead of invocation of arbitration clause.

31. Having regard to the above settled position of law, I have no hesitation in holding that notwithstanding the fact that there is an arbitration agreement, providing for the conduct of arbitration proceedings in Delhi, this Court has no jurisdiction to entertain a petition u/s 9 of the Arbitration & Conciliation Act, 1996 or for that matter any other petition under the said Act, in view of the fact that this Court lacks inherent jurisdiction to decide the subject matter of the dispute.

16. The learned counsel submits that the original venue of arbitration agreed upon between the parties was New Delhi which place only has to be considered as place of venue. Merely because at the commencement of arbitration proceedings, for sake of convenience of both the parties, if the venue was shifted to other place, that would not be construed as place of arbitration for the purpose of deciding jurisdiction. It is submitted that if for the sake of convenience geographical location was changed to Mumbai, it would not change the situs of arbitration which would remain to be either Jambia or New Delhi.

17. The learned counsel places reliance upon the judgment of the Supreme Court in the case of Bhatia International and more particularly paragraphs 20, 21, 32, 33 and 34 which read thus:

20. Section 2(e) defines "Court" as follows:

2(e) "Court" means the principle 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.

A Court is one which would otherwise have jurisdiction in respect of the subject matter. The definition does not provide that the Courts in India, will not have jurisdiction if an international commercial arbitration takes place outside India. Courts in India would have jurisdiction even in respect of an international commercial arbitration. As stated above an ouster of jurisdiction cannot be implied. An ouster of jurisdiction has to be express.

21. Now let us look at sub-sections (2), (3), (4) and (5) of Section 2. Sub-section (2) of Section (2) provides that Part I would apply where the place of arbitration is in India. To be immediately noted that it is not providing that Part I shall not apply where the

place of arbitration is not in India. It is also not providing that Part I will "only" apply where the place of arbitration is in India (emphasis supplied). Thus the Legislature has not provided that Part I is not to apply to arbitrations which take place outside India. The use of the language is significant and important. The Legislature is emphasising that the provisions of Part I would apply to arbitrations which take place in India, but not providing that the provisions of Part I will not apply to arbitrations which take place out of India. The wording of sub-section (2) of Section 2 suggests that the intention of the Legislature was to make provisions of Part I compulsorily applicable to an arbitration, including an international commercial arbitration, which takes place in India. Parties cannot, by agreement, override or exclude the non-derivable provisions of Part I in such arbitrations. By omitting to provide that Part I will not apply to international commercial arbitrations which take place outside India the affect would be that Part I would also apply to international commercial arbitrations held out of India. But by not specifically providing that the provisions of Part I apply to international commercial arbitrations held out of India, the intention of the Legislature appears to be to ally parties to provide by agreement that Part I or any provision therein will not apply. Thus in respect of arbitrations which take place outside India even the non-derivable provisions of Part I can be excluded. Such an agreement may be express or implied.

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

33. Faced with this situation Mr. Sen submits that, in this case the parties had agreed that the arbitration be as per the rules of ICC. He submits that thus by necessary implication Section 9 would not apply. In our view in such cases the question would be whether Section 9 gets excluded by the ICC Rules of Arbitration. Article 23 of ICC Rules reads as follows:

Conservatory and Interim Measures 1. Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the Arbitral Tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate. The Arbitral Tribunal may make the granting of any such measure subject to appropriate security being furnished by the requesting party. Any such measure shall take the form of an order, giving reasons, or of an Award, as the Arbitral Tribunal considers appropriate.

2. Before the file is transmitted to the Arbitral Tribunal, and in appropriate circumstances even thereafter, the parties may apply to any competent judicial

authority for interim or conservatory measures. The application of a party to a judicial authority for such measures or for the implementation of any such measures ordered by an Arbitral Tribunal shall not be deemed to be an infringement or a waiver of the arbitration agreement and shall not affect the relevant powers reserved to the Arbitral Tribunal. Any such application and any measures taken by the judicial authority must be notified without delay to the Secretariat. The Secretariat shall inform the Arbitral Tribunal thereof.

34. Thus Article 23 of the ICC rules permits parties to apply to a competent judicial authority for interim and conservatory measures. Therefore, in such cases an application can be made u/s 9 of the said Act.

18. The learned counsel submits that the law laid down by the Supreme court in the case of Bharat Alluminium Co. in Paragraphs 96 to 100 would apply with prospective effect and thus present proceeding filed by the petitioner is proceeded only on erroneous footing that the law would apply with retrospective effect and have filed the present proceedings before this court not having jurisdiction. The learned counsel submits that the view taken by the Supreme Court in the case of Bhatia International has been overruled by the Constitute Bench of Supreme Court in Bharat Alluminium with prospective effect. It is submitted that as the parties had agreed that the contract would be governed, construed and interpreted in accordance with the laws of Republic of Jambia, by virtue of said agreement parties have excluded applicability of Part I of Arbitration & Conciliation Act, 1996 and thus this case would be governed by the law laid down by the Supreme Court prior to the rendering of judgment in the case of Bharat Alluminium Co. (supra). Mr. Joshi, the learned counsel appearing on behalf of the petitioner submits that all these issues which were raised by the parties in the case of Bharat Alluminium Co. were not considered by the Supreme Court in the case of Bhatia International. The said judgment in the case of Bharat Alluminium Co. would thus be prospective to the limited extent and on limited issue.

19. On reading of the judgment in case of Bhatia International (supra), it is clear that the Supreme Court after considering the definition of ''Court'' u/s 2(1) (e) of the Act held that the said definition does not provide that the Courts in India will not have jurisdiction if an international commercial arbitration takes place outside India. It is held that the Courts in India would have jurisdiction even in respect of an international commercial arbitration and ouster of jurisdiction cannot be implied but has to be express. The Supreme Court held that the provisions of Part I would apply to all arbitrations and all proceedings relating thereto. Where such arbitration is held in India the provisions of Part I would compulsory apply and parties are free to deviate only to the extent permitted by the derogable provisions of Part I. It is held that in cases of international commercial arbitrations held out of India provisions of Part I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions. It is held that in that case the laws or rules chosen by the

parties would prevail. Any provision, in Part I, which is contrary to or excluded by that law or rules will not apply. It is also held that Part I is to apply also to international commercial arbitrations which take place out of India, unless the parties by agreement, express or implied exclude it or any of its provisions. The judgment of the Supreme Court in case of Bhatia International (supra), thereafter has been followed in series of judgments by the Supreme Court as well as by various courts including this court.

20. On perusal of the judgment in case of Bharat Aluminium Company (supra), it is clear that parties had agreed that the court of Arbitration shall be held wholly in London, England and shall use English language in the proceeding. It was also agreed that the agreement shall be governed by the prevailing law of India and in case of arbitration English Law shall apply.

21. Para 10 of the judgment in case of Bharat Aluminium Company (supra), indicates that the question which arose for consideration of the Supreme Court in the said judgment as referred in paragraphs 10 to 10.5 was what was the meaning of "place of arbitration" as found in section 2(2) and section 20 of the Arbitration Act, 1996. one of the question was whether section 2(2) bar the application of Part I of the Arbitration Act, 1996 to arbitrations where the place is outside India. The question also arose before the Supreme Court was whether Part I apply in all stages of an arbitration, i.e., pre, during and post stages of the arbitral proceedings, in respect of all arbitrations, except for the areas specifically falling under Parts II and III of the Arbitration Act, 1996. The issue also arose whether the law laid down by the Supreme Court in case of Bhatia International (supra) has been correctly decided by the court.

22. In paragraph 58 of the judgment in case of Bharat Aluminium Company (supra), it is held by the Supreme Court that the court was unable to support the conclusions recorded by the Supreme Court in the judgments i.e. Bhatia International (supra) and Venture Global Engineering (Supra). It is also held that the conclusion recorded in para 14(b) in Bhatia International (supra) can not be supported by either the text or context of the provisions in Section 1(2) and proviso thereto.

23. In paragraph 63 of the said judgment, the Supreme Court held that the court was unable to agree with the conclusion of the Supreme Court in case of Bhatia International (supra) and Venture Global Engineering (Supra) that Part I would also apply to all arbitrations held out of India, unless the parties by agreement, express or implied, exclude all or any of its provisions. In paragraph 67, the Supreme Court held that on a plain reading of section 2(2), it is clear that Part I is limited in its application to arbitrations which take place in India. In paragraphs 75 and 76 of the said judgment, the Supreme Court held that the arbitrators at times hold meetings at more convenient locations and law of the seat or place where the arbitration is held, is normally the law to govern that arbitration. The territorial link between the place of arbitration and the law governing the arbitration is well established in the

international instruments, namely, the New York Convention of 1958 and the UNCITRAL Model Law of 1985. It is held that the terms "seat" and "place" are often used interchangeably.

24. In paragraph 78, it is held that the Supreme Court was unable to support the conclusion reached in Bhatia International (supra) and Venture Global Engineering (supra), that Part I would also apply to arbitrations that do not take place in India. In paragraph 86, it is held that the provisions of section 2(4) and Section 2(5) would not be applicable to arbitrations which are covered by Part II of the Arbitration Act, 1996, i.e. the arbitrations which take place outside India and that there is no inconsistency between Sections 2(2), 2(4) and 2(5). In paragraph 89, it is held that Part I and Part II are exclusive of each other is evident also from the definitions section in Part I and Part II. It is held that the intention of the Parliament is clear that there shall be no overlapping between Part I and Part II of the Arbitration Act, 1996. The two parts are mutually exclusive of each other.

25. In para 96, it is held by the Supreme Court that court where the arbitration takes place shall be required to exercise supervisory control over the arbitral process. In para 100, it is held that in an international commercial arbitration, having a seat in India, hearings may be necessitated outside India and in such circumstances, the hearing of the arbitration will be conducted at the venue fixed by the parties, but it would not have the effect of changing the seat of arbitration which would remain in India. It is held that the seat of the arbitration remains the place initially agreed by or on behalf of the parties and the said view is correct depiction of the practical considerations and the distinction between "seat" (Section 20(1) and 20(2)) and "venue" (Section 20(3)). It is held that only if the agreement of the parties is construed to provide for the "seat"/"place" of Arbitration being in India, Part I of the Arbitration Act, 1996 would be applicable. Part I would be inapplicable to the extent inconsistent with the arbitration law of the seat, even if the agreement purports to provide that the Arbitration Act, 1996 shall govern the arbitration proceedings.

26. In para 193, it is held that there is no existing provision under the CPC or under the Arbitration Act, 1996 for a court to grant interim measures in terms of section 9, in arbitrations which takes place outside India, even though the parties by agreement may have made the Arbitration Act, 1996 as the governing law of arbitration.

27. In paragraphs 194 to 196 of the said judgment, it is held that Part I of the Arbitration Act, 1996 would have no application to International Commercial Arbitration held outside India and such awards would only be subject to the jurisdiction of the Indian courts when the same are sought to be enforced in India in accordance with the provisions contained in Part II of the Arbitration Act, 1996 and that there can be no overlapping or intermingling of the provisions contained in Part I with the provisions contained in Part II of the Arbitration Act, 1996. It is held that section 2(2) of the Act is not in conflict with any of the provisions either in Part I

or in Part II of the Arbitration Act, 1996. In a foreign seated international commercial arbitration, no application for interim relief would be maintainable u/s 9 or any other provision, as applicability of Part I of the Arbitration Act, 1996 is limited to all arbitrations which take place in India. In the concluding para, it is held that Part I of Arbitration Act, 1996 is applicable only to all arbitrations which take lace within the territory of India.

28. In para 197, Supreme Court clarified that the judgment in case of Bhatia International (supra), was rendered by the Supreme Court on 13th March, 2002 and since then the said judgment had been followed by all the High Courts as well as Supreme Court on numerous occasions. It was clarified that the law now declared by the Supreme Court in case of Bharat Aluminium Company (supra), shall apply prospectively, to all the arbitration agreements executed hereafter.

29. The said judgment in case of Bharat Aluminium Company (supra), is decided on 6th September, 2012. It is not in dispute that the agreement entered into between the parties herein is much prior to 6th September, 2012. Perusal of the ratio laid down by the Supreme Court in case of Bharat Aluminium Company (supra), it is clear that the law laid down by the Supreme Court in case of Bhatia International (supra) is overruled with prospective effect.

30. This court (R.D. Dhanuka, J.) in case of BG Strategic Advisors vs. Arshiya International Ltd., delivered a judgment on 6th November, 2012 in Arbitration Petition No. 740 of 2012 while considering the application filed u/s 9 of he Arbitration and Conciliation Act, 1996 after referring to the judgment of the Supreme Court in case of Bhatia International (supra), and Bharat Aluminium Company (supra) held that the ratio of the Supreme Court in case of Bharat Aluminium Company (supra) was made applicable prospectively to all arbitration agreements executed after pronouncement of the said judgment. In the said judgment, this court after considering the agreement entered into between the parties, which recorded that both the parties had agreed to follow the laws of Florida, it is held that the parties had intended to exclude the provisions of Part I of the Arbitration Act, 1996 which exclusion can be implied from the provisions of the agreement between the parties. This Court held that it was implied that the provisions of Part I would not apply and thus the proceeding filed u/s 9 of the Arbitration Act, 1996 was thus not maintainable. Considering the facts of this case, it is clear that both the parties had agreed that all disputes arising out of contract or in connection therewith shall be finally settled under the rules of arbitration of International Chamber Commerce. Both parties agreed that the venue for the arbitration contemplated under the contract shall be the Indian Capital, New Delhi. It was agreed that the contract shall be governed, construed and interpreted in accordance with the law of the Republic of Zambia.

31. In my view as the law laid down by the Supreme Court in case of Bhatia International (supra), has been overruled by the Constitution Bench of the Supreme

Court in case of Bharat Aluminium Company (supra), with prospective effect and in view of the agreement entered into between the parties is much prior to the date of the decision in case of Bharat Aluminium Company (supra) and in view of the agreement between the parties referred to aforesaid, it is clear that the parties had intended to exclude the provisions of Part I of the Arbitration Act, 1996.

32. In my view, the seat of the arbitration initially agreed by the parties in the contract would remain the place of arbitration. Merely because before commencement of the arbitration proceedings, both parties agree that venue/place of the arbitration shall be at Mumbai for the sake of convenience, that would not confer jurisdiction on this court to entertain application u/s 9 of the Arbitration and Conciliation Act, 1996 and Part I of the Act would not be applicable to the facts of this case even on that ground. In my view, the present proceedings thus filed by the petitioner u/s 9 of the Arbitration Act, 1996 is not maintainable as the provisions of Part I would not apply.

I, therefore, pass the following order:-

(a) Arbitration petition is not maintainable in this court and is dismissed.

(b) It is made clear that this court has not expressed any view on the merits of the claim filed by the petitioner.

(c) There shall be no order as to costs.