



Mr.Prashant Pratap, Senior Advocate, a/w. Ms.Trupti Agarwal, Mr.Ashwini Sinha i/b. Mr.Manoj Khatri for the Respondent in Arbitration Petition No. 406 of 2013 and for Petitioner in Arbitration Petition No.259 of 2013.

**CORAM : R.D. DHANUKA, J.**

**RESERVED ON : 10<sup>th</sup> APRIL, 2014**

**PRONOUNCED ON : 9<sup>th</sup> MAY, 2014**

### **JUDGMENT**

Petitioners in Arbitration Petition No. 259 of 2013 are the original claimants in the arbitration proceedings and seek a declaration that the arbitration award dated 30<sup>th</sup> January, 2013 is enforceable as a decree of this court and seeks enforcement of the said award under sections 44 to 49 of the Arbitration and conciliation Act, 1996 (for short the said Act). Respondents to this petition are the original respondents in the arbitration proceedings. Arbitration Petition No. 406 of 2013 is filed by the original respondents to the arbitration proceedings under section 34 of the said Act inter alia praying for setting aside the partial award dated 7<sup>th</sup> December, 2009 and partial final award dated 30<sup>th</sup> January, 2013. The petitioners in Arbitration Petition No. 259 of 2013 i.e. Perma Container (UK) Line Ltd. are hereinafter referred to as the claimant. The original respondents i.e. Perma Container Line (India) Pvt. Ltd. are hereinafter referred to as the respondent. Some of the relevant facts for the purpose of deciding these two petitions are as under :-

2. The claimant company is registered under the Laws of England, United Kingdom and carries on business of transporting cargo in containers. Respondent is a company registered under the provisions of the Indian Companies Act, 1956. The respondent was registered on 6<sup>th</sup> July, 2004 with an authorised share capital of

Rs.1 crores. According to the claimant, it was intention of the claimant that they would appoint respondent as their agents in India. There were two directors, Mr. Ajith Menon and Mr.F.C.George. It is case of the claimant that Mr.Ajith Menon was in complete management and control of the respondent and was responsible for its day to day activities and operated the bank accounts of the respondents and took all decisions in respect of the activities of the respondent whether financial or otherwise at all relevant times. Mr.George was at all relevant times and still an employees of Simotech Shipping, an associate company of the claimant and based in Dubai and was so employed in Dubai at all relevant times and was not involved in day to day activities or running of the respondent.

3. On 1<sup>st</sup> April, 2004, the claimant and respondent entered into an agency agreement by which the claimant appointed the respondent as its agent for the purpose of handling the cargo services of the claimant in Mumbai, Nhava-Sheva, Kandla, Mundra, ICD Delhi and ICD Ludhiana on the terms and conditions setout therein. According to the claimant the said agency agreement was for a period of one year. Upon expiry of the said period, parties entered into a fresh agency agreement dated 1<sup>st</sup> August, 2005 appointing the respondent as agent of the claimant in the territories mentioned therein on the terms and conditions setout in the said agreement.

4. Clause 11 of the said agreement provided that the respondent will be responsible for all collections including freight collection, line demurrage, terminal handling charges etc. Clauses 30, 31 and 32 provided for preparation of the monthly disbursements account and for remittance of surplus funds by the respondent to the claimant. Clause 36 of the said agreement provided that the said agreement shall continue until terminated by either party giving one month notice

to the other in writing. Clause 38 of the said agreement provided that the agreement shall be construed as having been entered into at London and will be governed by English Law. Clause 39 provided that the agreement shall be governed by and construed in accordance with English Law and any dispute arising out of the agreement shall be referred to arbitration in London. Clause 38 and 39 of the said agreement are extract as under :-

**Clause 38** provided that the Agreement shall be construed as having been entered into at London and will be governed by English Law.

**Clause 39** provided that the Agreement shall be governed by and construed in accordance with English law and any dispute arising out of the Agreement shall be referred to arbitration in London; one arbitrator being appointed by each party in accordance with the Arbitration Act, 1950 and 1979 or any statutory modification or re-enactment thereof for the time being in force. On receipt by one party in writing of the other party's arbitrator, that party shall appoint their arbitrator within fourteen days failing which the decision of the single arbitrator appointed shall apply. If the arbitrators properly appointed do not agree, they shall appoint an umpire whose decision shall be final.

5. Under the said agreement dated 1<sup>st</sup> August, 2005 the respondent was required to perform the duties of marketing, operation, container monitor and accounting and finance and was responsible for all collections including freight collections line demurrage, terminal handling charges, etc. It is case of the claimant that the respondent was required to prepare the monthly disbursement account and to sent to the claimant togetherwith remittance of surplus funds to the claimants before 15<sup>th</sup> of each month. According to the claimant there was huge delay by the respondent in sending the disbursement accounts in the surplus funds collected affecting the business of the claimant. As per claimant, in June 2007, the claimant

took over the agency in respect of Mumbai from the respondent and allowed the respondent to continue to act as agents in the other locations. It is case of the claimant that the respondent did not remit the entire surplus to the claimant as per monthly disbursement account and made only part remittance. According to the claimant as of December, 2007 there was an outstanding of about US \$ 10,33,247 which the respondent was required to remit to the claimant. By e-mail dated 28<sup>th</sup> December, 2007 the respondent confirmed that they would remit US \$ 1,50,000 by 29<sup>th</sup> December, 2007 and the balance at the earliest. Respondent however did not make the said payment. By e-mail dated 31<sup>st</sup> December, 2007 the respondent informed the claimant that US \$ 2,00,000 would be remitted either the same day or the next day and US \$ 3,00,000 would be remitted by 10<sup>th</sup> January 2008 and the balance US \$ 2,60,000 would be remitted within another week.

6. It is the case of the claimant that the outstanding of the respondent to the claimant increased to US \$ 14,06,379.80 during the period February – April 2008 as the respondent continued to act as agents and collected freight from various exporters but did not remit the same to the claimant. On 19<sup>th</sup> April, 2008, the respondent stated that they had plan to remit US\$ 2,50,000 on 21<sup>st</sup> April, 2008 and US \$ 2,50,000 on 25<sup>th</sup> April, 2008 and informed that they would take three to four months to collect the backlog and to be on schedule to remit the monies on time. It is the case of the claimant that at the meeting between the parties held on 20<sup>th</sup> May, 2008, Mr.Ajith Menon of the respondent agreed that the outstanding remittance for February 2008 i.e. US \$ 428848, March 2008 i.e. US \$ 4,08,752 and April 2008 i.e. US \$ 4,25,000 - US \$ 4,50,000 would be paid in three equal installments to be paid not later than 15<sup>th</sup> July, 2008, 15<sup>th</sup> August 2008 and 15<sup>th</sup> September 2008. It was also agreed that the balance outstanding for January 2008 would after reconciliation be paid by 1<sup>st</sup> June 2008.

7. On 10<sup>th</sup> July, 2008 the respondent stated that they would remit US \$ 1,32,000 in respect of January 2008 outstanding on 14<sup>th</sup> July 2008 leaving outstandings of February, March and April 2008 in respect of which it was stated that it would revert after a week on payment. It is case of the claimant that till November 2008 the outstandings for February, March and April 2008 were not paid by the respondent. The outstandings from May to November 2008 also remained unpaid. According to the claimant a sum of US \$ 20,80,640.40 was due and payable by the respondent to the claimant. On 5<sup>th</sup> November 2008 the claimant terminated the agency agreement by issuing a notice.

8. On 12<sup>th</sup> November 2008 after receipt of notice of termination Mr.Ajith Menon of the respondent sent e-mail dated 12<sup>th</sup> November 2008 admitting that he had every intentions to pay but could not pay and requested the claimant for support. By e-mail sent on 13<sup>th</sup> November, 2008 Mr.Ajith Menon of the respondent reiterated his intentions to pay but wanted the agency to be restored after payment of UYS \$ 5,00,000 and agreed that the balance would be paid after the agency was restored.

9. By letter dated 26<sup>th</sup> November 2008 the respondent alleged for the first time that the agency agreement dated 1<sup>st</sup> August 2005 had come to an end and another agency agreement dated 1<sup>st</sup> July, 2007 was entered into. It is however case of the claimant that since claimant did not restore the agency, respondent suddenly changed its stand and falsely denied that any amount was due to the claimant and falsely demanded compensation of US \$ 6 million for termination of agency agreement for giving alleged assurance of joint venture. On 3<sup>rd</sup> February, 2009 the claimant invoked the arbitration agreement by issuing a notice to the respondent. On 28<sup>th</sup> April 2009 the claimant filed arbitration petition (490 of 2009) in this court

under section 9 of the said Act against the respondent inter alia praying for interim measures. On 5<sup>th</sup> May 2009 this court granted interim reliefs in favour of the claimant in terms of prayer (c), (e) and (g) of the said petition. On 8<sup>th</sup> May 2009 the interim reliefs granted on 5<sup>th</sup> May 2009 was modified.

10. On 9<sup>th</sup> September 2009 the learned Single Judge of this court disposed of Arbitration Petition No. 490 of 2009 and continued the interim reliefs granted earlier pending arbitration proceedings and granted liberty to the respondent to furnish security to the extent of US \$ 20,13,030. It was observed that the conduct of the respondent of admitting the amount initially with a request to grant time to pay and now total denial of the claim, is a factor that goes against the respondent. It was also observed that the respondent nos. 1 and 2 agreed in writing the liability/amount, but are now disputing the same. On 14<sup>th</sup> May, 2009 the claimant appointed Mr. Timothy Nicholas Young, Queens Council as arbitrator and notified the respondent and called upon the respondent to appoint an arbitrator within 14 days as per arbitration clause in the arbitration agreement dated 1<sup>st</sup> August, 2005 and as per the arbitration agreement dated 1<sup>st</sup> August 2005. Since respondent did not appoint any arbitrator, by notice dated 3<sup>rd</sup> June, 2009 the claimant informed the respondent that if arbitrator is not appointed by the respondent, Mr. Timothy Nicholas Young, would be appointed as sole arbitrator. On 15<sup>th</sup> June 2009 the arbitrator appointed by the claimant sent a fax to the respondent giving them an opportunity to appoint an arbitrator. Respondent however did not appoint any arbitrator. On 6<sup>th</sup> July, 2009 the claimant requested Mr. Young to confirm acceptance as sole arbitrator.

11. On 13<sup>th</sup> July, 2009 the learned arbitrator gave an opportunity to the respondent to appoint an arbitrator. There was no response from the respondent.

On 15<sup>th</sup> July, 2009 Mr.Young accepted his appointment as sole arbitrator and notified the parties. On 19<sup>th</sup> July 2009 the Division Bench of this court dismissed the appeal filed by the respondent (Appeal No. 230 of 2010) challenging the order dated 09<sup>th</sup> September 2009 passed by the learned Single Judge under section 9 of the said Act. On 22<sup>nd</sup> November, 2010 respondent filed Special Leave Petition in the Supreme Court. The Supreme Court issued notice but refused to grant stay. The Special Leave Petition was subsequently withdrawn by the respondents.

12. The respondent raised a preliminary objection before the learned sole arbitrator to the jurisdiction of the learned arbitrator. Both parties had filed their submissions before the learned arbitrator on the issue of jurisdiction. By a partial award on jurisdiction made by the learned arbitrator on 7<sup>th</sup> December 2009 the learned arbitrator held that there was an arbitration clause in the agency agreement dated 1<sup>st</sup> August 2005 and that he had jurisdiction to determine disputes arising out of the agency agreement and the claims made thereunder. It is case of the claimant that though there is a specific provisions in English Arbitration Act, 1996 permitting challenge to the partial award on jurisdiction, respondent did not file any proceedings under the provisions of that Act challenging the partial award on jurisdiction.

13. On 21<sup>st</sup> June 2011 the claimant filed its claim submissions in the arbitration inter alia praying for recovery of US \$ 20,83,448.40 and profits made by the respondent from the monies of the claimant as constructive trustee. On 30<sup>th</sup> September 2011, the respondent filed its defence and also a counter claim for damages for alleged misrepresentations made in respect of a potential joint venture and damages for loss of profits against the claimants.

14. On 3<sup>rd</sup> October, 2011 the learned arbitrator issued further directions for reply submissions, discovery, identification of witnesses, exchange of witness statements, expert evidence and for fixing a hearing date. It is case of the claimant that on 18<sup>th</sup> May 2012 both parties completed formal disclosure. On 23<sup>rd</sup> May 2012, the claimant made a request for additional disclosure which was in respect of the counter claim for damages made by the respondent based on alleged misrepresentations and on the constructive trust point raised by the claimant.

15. On 25<sup>th</sup> May, 2012 the respondent sent a fax and required that the time table fixed by the learned arbitrator to be altered as they required 28 days i.e. upto 20<sup>th</sup> June, 2012 to locate the documents for which the disclosure was sought. By letter dated 30<sup>th</sup> May, 2012, the claimant opposed the said request and suggested a compromise that the additional disclosure be given in three weeks i.e. by 20<sup>th</sup> June 2012 and identification of witnesses by 1<sup>st</sup> June 2012. On 30<sup>th</sup> May 2012, the learned arbitrator stated that the compromise suggested by the claimant was not unreasonable. On 31<sup>st</sup> May 2012, the respondent informed that the witnesses would be identified only after the additional discovery sought by the claimant was provided by the respondent.

16. On 7<sup>th</sup> June 2012, the learned arbitrator issued procedural order rejecting submissions of the respondent dated 31<sup>st</sup> May 2012 and extended time till 11<sup>th</sup> June 2012 for compliance which was in respect of identification of witnesses. On 11<sup>th</sup> June 2012 the parties exchanged their list of witnesses. The respondent proposed hearing in January 2013. The claimant proposed hearing in September/October 2012. On 19<sup>th</sup> June 2012, the respondent stated that it would take 2–3 weeks to retrieve all the documents for which discovery was sought by the claimant and it would take 1-2 weeks to photocopy such documents and in all 1-2 months may be

granted for giving inspection. The respondent however stated that even if discovery was completed by October 2012, no disruption would be caused to the hearing in January 2013. On 21<sup>st</sup> June 2012 the learned arbitrator fixed the hearing for seven days starting not before 7<sup>th</sup> January 2013.

17. By letter dated 27<sup>th</sup> September 2012, the respondent stated that the documents were voluminous and would fill one full room and would take 10-12 weeks for scanning and eight weeks to complete the listing and therefore hearing in the week of 7<sup>th</sup> January 2013 as envisaged was highly unrealistic. On 24<sup>th</sup> October, 2012 the respondent submitted that the documents consisted of 14 lacs sheets of papers and would fill two large containers and would take 12 weeks for them to scan the documents after which inspection can be completed. It is stated that the respondent would be required to complete a list of the documents and in the circumstances the hearing starting on 7<sup>th</sup> January, 2013 was highly unrealistic.

18. It is the case of the claimant that on 25<sup>th</sup> October, 2012, in view of the failure of the respondent to give additional disclosure in connection with the specific request made and the time sought by the respondent to provide the disclosure and the expense of the entire exercise, claimant would give up 8 of their requests for specific disclosure and consequently no disclosures may be made in respect of the counter claim of the respondent. In so far as remaining 11 categories of documents are concerned, as the same was relating to the claim for constructive trust made by the claimant, the claimant proposed that those documents would be relevant only in the event the claimant succeeds in establishing the liability and the matter then would turn to quantum. The claimant proposed postponement of the disclosure of those documents until a ruling on liability was made by the tribunal. The claimant proposed that the hearing proceeds as planned on 7<sup>th</sup>

January, 2013 and no change was necessary.

19. On 25<sup>th</sup> October, 2012 the respondent conveyed their disagreement with the contention of the claimant and proposed the hearing to be bifurcated into liability and quantum and did not agree that the claimant would abandon its request for discovery in that manner and sought a postponement of the proposed hearing in the month of January, 2013. The claimant set out their position by letter dated 31<sup>st</sup> October, 2012 and made submissions as to why a bifurcation of issues of liability and quantum was the best way of proceeding further in the light of the voluminous discovery that would be necessary only to decide the quantum issue and that was completely unnecessary in regard to the primary claim of the claimant for the amount of US\$ 2,083,448.80 and submitted that the hearing fixed on 7<sup>th</sup> January, 2013 should proceed on that basis with the issue of liability determined in respect of both the claims and counter claims.

20. On 1<sup>st</sup> November, 2012 the learned arbitrator proposed that he would make procedural order for proceeding with the hearing on the issue of liability on the basis of the pleadings and no further disclosure was necessary. The learned arbitrator however invited further submissions the parties might wish to make on the proposed order. On 7<sup>th</sup> November, 2012 the respondent made further submissions as to why the hearing should not be bifurcated into liability on quantum. On 7<sup>th</sup> November, 2012 the learned arbitrator after considering further submissions confirmed that he was not persuaded that the order indicated earlier should be changed and made an order for the hearing to proceed on the issues of liability on 7<sup>th</sup> January, 2013.

21. By letter dated 8<sup>th</sup> November, 2012 the respondent for the first time raised

the issue of conflict of interest of the learned arbitrator and sought information as to how many times he had been nominated as arbitrator or counsel by the solicitors of claimant in the last three years. In response to the letter dated 8<sup>th</sup> November, 2012 the learned arbitrator informed that to his knowledge he had been instructed once in the last three years as counsel by the previous solicitors of the claimant namely Thomas Cooper and once as counsel by the present solicitors of the claimant namely Squire Sanders.

22. By letter dated 9<sup>th</sup> November, 2012 the solicitors of respondent submitted that there was one other matter in which the learned arbitrator had acted as counsel instructed by the solicitors of claimant which the learned arbitrator had not disclosed and alleged that the said amounted to misrepresentation and that the respondent had no confidence in the learned arbitrator and he should therefore, recuse himself. By letter dated 9<sup>th</sup> November, 2012 the learned arbitrator stated that if he had made an error in regard to any case where he was appointed as counsel by the solicitors of the respondents, then if reminded he would put up the record straight and did not deem necessary to recuse himself.

23. By letter dated 10<sup>th</sup> November, 2012 learned abitrator suggested the parties that the respondent may wish to apply to the High Court to challenge his impartiality or parties can agree upon another sole arbitrator who were available and willing to proceed with the hearing on 7<sup>th</sup> January, 2013. By letter dated 12<sup>th</sup> November, 2012 the solicitors of the respondent alleged that the learned arbitrator had acted as counsel instructed by the solicitors of the claimant in the case of ***Cosco Bulk Carrier Company Vs. Armada Shipping*** which was not disclosed by the learned arbitrator and amounted to misrepresentation. The learned arbitrator was called upon to recuse himself.

24. By letter dated 12<sup>th</sup> November, 2012, the learned arbitrator stated that he had not noticed the involvement of the solicitors of the claimant in the case of Cosco Versus Armada because the actual instructions had come from a Swiss insolvency lawyer and the solicitors of the claimant had played no significant role except to seek a formal opinion and the case was listed under the name of Swiss Lawyer in his files and not Squire Sanders. The learned arbitrator rejected the allegations of alleged bias and refused to recuse himself, however, suggested that if a formal application was made, he would deal with it or the respondent could make an application to the High Court.

25. On 14<sup>th</sup> November, 2012 the claimant filed written submissions on the independence of the arbitral tribunal and requested the learned arbitrator to proceed with the reference. On 21<sup>st</sup> November, 2012, the respondent filed written submissions challenging the independence and impartiality of the learned arbitrator. On 22<sup>nd</sup> November, 2012 the learned arbitrator gave a ruling on the recusal application and rejected he said application. On 27<sup>th</sup> November, 2012 the respondents through their solicitors stated that the respondent had made a decision not to participate in the arbitration and would challenge any award or decision made if an attempt is made to enforce the award in India. On 19<sup>th</sup> December, 2012, the witness statements of Mr. Ali Mahami and Mr. Syed Mateen examined by the claimant served on the respondent's solicitors.

26. On 4<sup>th</sup> January, 2013 the claimant served skeleton arguments on behalf of the claimant on the solicitors of the respondent. On 7<sup>th</sup> January, 2013 the arbitration hearing took place in London. Respondent was absent. It is the case of the claimant that the witnesses of the claimant were extensively questioned by the learned arbitrator. Hearing was concluded on 8<sup>th</sup> January, 2013. On 30<sup>th</sup> January,

2013 the learned arbitrator made an award in favour of the claimant and held that the respondent shall pay to the claimants a sum of US\$ 2,080,640.40 as principal amount, shall pay the sum of US\$ 680,000 being interest on the sum awarded pursuant to section 49 of the Arbitration Act, 1996. The learned arbitrator dismissed the counter claim for damages made by the respondent and reserved the jurisdiction to consider and determine any claim for an indemnity in respect of Indian tax in the event that such a claim should be made or enforced by Indian Revenue Authorities against the respondents in future.

27. The learned arbitrator also directed that the respondent shall pay to the claimant the costs of and occasioned by the arbitration to be assessed on the standard basis as to which he reserved jurisdiction to assess those costs if they were not agreed. The learned arbitrator assessed and settled his own costs of the reference excluding the costs of the partial award on jurisdiction which had already been paid as UK Pounds 59,600 plus VAT totaling to Pound 71,520 to be paid by the respondent. The learned arbitrator also directed the respondent to pay the claimant interest on all the sums awarded pursuant to section 49(3) of Arbitration Act, 1996 from the date of award till payment. Copy of the said award was sent to the respondent by the claimant on 2<sup>nd</sup> February, 2013.

28. On 14<sup>th</sup> February, 2013 the learned arbitrator issued a clarificatory memorandum clarifying the rate of interest and the date and the judgment rate from the date of award on all sums awarded pursuant to Arbitration Act. On 14<sup>th</sup> February, 2013 the claimant issued notice to the respondent through claimant's advocate calling upon the respondent to make payment of the sums awarded. The respondents did not make any payment to the claimant. On 20<sup>th</sup> February, 2013 the claimant lodged Arbitration Petition No. 259 of 2013 against the respondent

under section 44 to 49 of the Arbitration and Conciliation Act, 1996 along with Order 21 of Code of Civil Procedure, 1908 inter alia praying for a declaration that the arbitration award dated 30<sup>th</sup> January, 2013 is enforceable as a decree of this court and applied for enforcement of the said award. On 22<sup>nd</sup> February, 2013 this court passed an ad interim order in terms of prayer clause (c ) and (d) of the Arbitration Petition No. 259 of 2013 in favour of the claimant.

29. On 29<sup>th</sup> April, 2013 the respondent lodged Arbitration Petition No. 406 of 2013 against the claimant in this court under section 34 and 12 of the Arbitration and Conciliation Act, 1996 inter alia praying for setting aside the partial award dated 7<sup>th</sup> December, 2009 and partial final award dated 30<sup>th</sup> January, 2013 issued by the learned sole arbitrator and also applied for declaration that both these awards were null and void and of no effect.

30. I have heard the learned counsel for both the parties on the issue of maintainability of both these petitions and also on merits which submissions are dealt with in the latter part of this judgment.

31. In so far as ARBP No.406 of 2013 is concerned, Mr Pratap learned senior counsel appearing for the claimant (respondent to this petition) raised an issue of maintainability of this petition filed under Section 34 of the Arbitration and Conciliation Act 1996 impugning the awards rendered by the learned arbitrator on various grounds.

32. In response to the preliminary objection raised by the claimant, Mr D'vitre learned senior counsel on this issue submitted that present petition is filed U/s 34 of Arbitration Act 1996 and the filing of the enforcement petition by the claimant

does not affect the statutory right of the respondent (petitioner in this petition) to file the present petition U/s 34 of the Act to set aside the impugned awards. It is submitted that petition U/s 34 is maintainable in view of the judgment of Supreme Court case of ***Bhatia International V/s Bulk Trading S.A and Anr., reported in 2002 (4) Supreme Court Cases 105*** and in view of Judgment in case of ***Venture Global Engineering V/s Satyam Computer Services Ltd. reported in(2008)4 Supreme Court Cases 190.***

33. It is submitted by the learned senior counsel that in the arbitration petition filed by the claimant U/s 9 of the Arbitration Act in this Court, the claimant had specifically relied upon the judgments of Supreme Court in case of ***Bhatia International (supra)*** and ***Venture Global Engineering (supra)*** and had contended that the claimant was entitled to invoke Part I of the Act and thus are estopped from contending that the petitioner to this petition is not entitled to invoke Part I of the Arbitration Act while seeking to set aside the impugned award in the arbitration petition before this Court. My attention is invited to paragraph 44 of the arbitration petition filed by the claimant under section 9 of the Arbitration Act in this Court in which claimant has placed reliance on the aforesaid two judgments of the Supreme Court. It is submitted that this court while disposing of the said arbitration petition by order dated 9<sup>th</sup> September 2009, held that Part I of the Act is not excluded and is applicable. It is submitted by the learned senior counsel that the present arbitration agreement is before the decision of the Supreme Court in case of ***Bharat Alluminium Co. Ltd.*** and thus this case is governed by the law governed by the Supreme Court in case of ***Bhatia International (supra)*** and ***Venture Global Engineering (supra)***.

34. Learned senior counsel submits that in case of **Venture Global Engineering (supra)**, the case was invoking applicability of Part I and section 34 of Arbitration Act 1996 to the forum/International Commercial arbitration. It is submitted that in case of **Venture Engineering (supra)** and Particularly in para 37 of the said judgment, it is held that the ratio of the case in **Bhatia International (supra)** was not confined to section 9 but took within its sweep the entire Part I of the Arbitration Act 1996 including section 34. It is submitted that in the said judgment it is held that the fact that a Party could take recourse to the provision of Sec.48 in Part II of the Act regarding enforcement of the forum award did not prevent the applicability of section 34 of the Act to forum awards.

35. Mr D'vitre learned senior counsel submits that the claimant themselves had invited this Court to adjudicate on and determine the question of applicability of Part I and section 9 of the Act to the arbitration proceedings. The learned senior counsel placed reliance on various paragraphs of the judgments delivered by this Court in petition under Section 9 in support of the submission that this Court had adjudicated upon and determined the plea of jurisdiction in favour of the claimant who were the petitioners to the said petition which judgment of the learned single Judge is upheld by the Division Bench and ultimately by the Supreme Court. It is submitted that this determination inter Parties is binding on the Parties in all future proceedings involving the arbitration. It is submitted that the learned single Judge has also taken into account the fact that the agreement between the Parties was governed by English law and that the English arbitration Act was applicable.

36. It is submitted that even if a judgment inter Parties is erroneous, the same binds the Parties and the binding effect of such judgment does cease even on account of having inter change in the law or even by overruling of the judgments

inter Parties. learned senior counsel placed reliance on the judgment of Supreme Court in case of **Gorie Gouri Naidu & Anr. Vs. Thandrothu Bodemma & Ors., reported in (1997) 2 Supreme Court Cases 552.** Paragraphs 2 and 4 of the said judgment read thus. :

2. *The appellants before this Court are the heirs of the defendant No. 4 in O.S. No. 10 of 1973 filed in the Court of the learned Single Judge Parvathi Puram by the respondent M. Thandrothu Bodemma. The said suit was filed by the aforesaid plaintiff for partition and separate possession of her half share in the A and F Schedule of the plaintiff property alongwith past and future profits. Such suit was dismissed by the learned Subordinate Judge but the appeal preferred before the High Court being appeal No. 514 of 1968 was allowed by the High Court and the plaintiff thereafter preferred appeal No. 29 of 1977 before the Andhra Pradesh High Court. Such appeal was also dismissed by the High Court inter alia holding that parties to the family settlement were estopped from challenging the validity of such deed when being partitioned, they had derived benefits by the said family settlement. The plaintiff thereafter preferred an appeal before the Division Bench under Clause 15 of the Letters Patent. Such appeal has been allowed by the impugned judgment and the Division Bench has held that all the four deed of gifts which were executed by Gowramma were declared void and it was not open for the donees under the said deeds to claim any title. The suit was therefore decreed by the Division Bench.*

4. *It however appears to us that previously between the parties another suit was instituted in the Court of the learned Subordinate Judge Srikakulam being original suit No. 50 of 1954. In the said suit, the validity of the deed of gifts made by Gosaramma was questioned. It was held by the learned Subordinate Judge that the said deed of gifts were not valid under the Hindu Law. The appeal was taken to the Andhra Pradesh High Court being appeal No. 514 of 1968 and by judgment dated 12.2.1971, the High Court disposed of the said appeal No. 514 of 1968 wherein the High Court held that such deed of gift was invalid in law. By the impugned judgment, the*

*Division Bench of the Andhra Pradesh High Court has held that in view of such declaration of the said deed of gifts as invalid, no claim of title on the basis of the said deed of gift or family settlement can be made. In our view, such decision of the Division Bench is justified since the said earlier decision in declaring the deeds of gift as invalid, is binding between the parties. There is no occasion to consider the principle of estoppel since considered by the learned Single Judge in the facts and circumstances of the case for holding the said transfers as valid, in view of the earlier adjudication on the validity of the said deeds in the previous suit between the parties. The law is well settled that even if erroneous, an inter party judgment binds the party if the court of competent jurisdiction has decided the lis. We, therefore, find no reason to interfere with the impugned decision of the High Court. This appeal therefore fails and is dismissed without any order as to costs.*

37. Mr D'vitre learned senior counsel submits that the claimant is estopped by principles of issue estoppel and of "Cause of action estoppel" from questioning the applicability of Part I of the Act to this proceedings. It is submitted that a cause of action estoppel arises where in two different proceedings identical issues were raised, in which event the later proceedings between the same Parties shall be dealt with similarly as was done in the previous proceedings. Such bar is absolute in relation to all points decided and answered except allegation of fraud and collusion. It is submitted that in the present case, the jurisdiction of the Court exists very much to set aside the award. In support of the aforesaid submission the learned senior counsel placed reliance on the judgment of Supreme Court in case of ***Bhanukumar Jain Vs. Archanakumar & Anr., reported in (2005) 1 Supreme Court Cases 787.*** Paragraphs 29 and 32 of the said judgment read thus :

*29. There is a distinction between 'issue estoppel' and 'res judicata' [See Thoday v. Thoday,*

32. *The said dicta was followed in Barber v. Staffordshire Country Council, . A cause of action estoppel arises where in two different proceedings identical issues are raised, in which event, the latter proceedings between the same parties shall be dealt with similarly as was done in the previous proceedings. In such an event the bar is absolute in relation to all points decided save and except allegation of fraud and collusion. [See C. (a minor) v. Hackney London Borough Council, .*

38. Mr D'vitre learned senior counsel submits that it is held by the Supreme Court in case of **Bhatia International (supra)** and **Global Venture (supra)** that Parties are free to exclude applicability of Part I either by express agreement or by implication. If Part I applies and is not excluded, Section 34 would be also applicable. It is submitted that the undisputed fact that the claimant had filed a petition under Section 9 which is under Part I in this Court by relying upon the judgment of Supreme Court in case of **Bhatia International and Venture Global (supra)**, which clearly indicates of the intention of the claimant that Part I of the Act was not excluded from being applicable to the Parties. The Division Bench of this Court accepted the argument of the claimant that Part I of the Act is not excluded. This Court has to consider that the intention of Parties by acts clearly indicates that Part I is not excluded.

39. It is submitted by the learned senior counsel that the principle and policy of law which is reflected in provisions like Order 47 Rule 1 sub rule 2 explanation of the Code of Civil Procedure would be attracted to inter parties judgment and any decision on a question of law on which the judgment of the Court is based even if has been reversed or modified by the subsequent decision of the superior Court in another Court shall not be a ground for review of such judgment. It is submitted that the claimant therefore cannot be allowed to raise issue of jurisdiction of this

Court in entertaining petition under section 34 of the Arbitration Act filed by the petitioner in this case in this Court and are estopped from raising such issue. Mr. D'vitre learned senior counsel submits that the observation of the Division Bench of this Court in the appeal filed by the petitioner therein that the petitioner has pleaded or raised the issue that Part I would not apply, also would indicate that both Parties have accepted the applicability of Part I to the present arbitration proceedings and both have understood the same position.

40. Mr. Pratap learned senior counsel appearing on behalf of the claimant on the other hand placed reliance on clause 38 and 39 of the Agency Agreement dated 1<sup>st</sup> August 2005 and would submit that under the said agreement it was specifically provided that agreement shall be construed as having been entered into at London and will be governed by English law. It is also provided that the dispute arising out of such agreement shall be referred to arbitration in London. Law governing the contract is English law. Curial law applicable to the arbitration would be English law. English Arbitration Act 1996 applies to the facts of this case. Learned senior counsel submits that the awards impugned by the petitioners in this case are foreign awards within the meaning of Section 44 of the Act.

41. It is submitted that since the impugned awards are foreign awards petition for impugning such foreign awards under Part I of the Act is not maintainable. There cannot be two petitions one for enforcement under Part II and second for setting aside under Part I. It is submitted that the award being a foreign award petition to enforce the award is maintainable under Part II of the Act. Petitioner has not raised any objection that the petition seeking enforcement of the foreign award filed by the claimant is not maintainable under Part II of the Act. It is submitted that proper law of contract is English law. Law governing the arbitration

is English law. Seat of arbitration was in London. Part I of the Arbitration & Conciliation Act 1996 is excluded expressly or in any case impliedly. Learned senior counsel placed reliance on the judgment of this Court in case of **Louis Drefus Commodities Asia Ltd. Vs. Govind Rubber Ltd.** delivered on 4/2/2013 in ARBP No. 174 of 12 in support of the aforesaid submissions.

42. Mr. Pratap learned senior counsel submits that a foreign award can be straight way executed and there is no need to file separate petition for enforcement and execution. It is submitted that since the petition under Part II is filed prior in point of time, this Court shall proceed to decide the petition for enforcement before considering a later petition under section 34. Reliance is placed on the Judgment of Supreme Court in case of **Fuerst Day Lawson Ltd. Vs. Jindal Exports Ltd. (2001)6 SCC 356.**

43. Learned senior counsel placed reliance on the judgment of Supreme Court **Sumitomo Heavy Industries Ltd. Vs. ONGC Ltd. & Ors. (1998)1 SCC 305** and Judgment of Supreme Court in case of **National Thermal Power Corporation Vs. Singer Company and Others (1992) 3 SCC 551**, in support of the submission that the law governing the arbitration petition would apply to the enforcement of the award and for an action questioning the validity of the award. It is submitted that judgment in case of **Bhatia International (supra)** has not over turned these principles enunciated in case of **National Thermal (supra) and Sumitomo Heavy Industries Ltd. (supra)**. Learned senior counsel placed reliance on the judgment of Division Bench of this Court in case of **Sakuma Exports Vs. Louis Drefus Commodities** delivered on 6/8/13 in Appeal 337 of 2014. Relying upon these judgments, it is urged that this Court has no jurisdiction to entertain the petition under Sec.34 challenging the validity of foreign arbitral award.

44. In so far as submission of Mr D'vitre learned senior counsel that issue of jurisdiction of this Court and applicability of Part I of the Act has already become final between the same parties is concerned, it is submitted by the learned senior counsel that jurisdiction is a pure question of law in the present case. Even if this Court has erroneously assumed jurisdiction under a statute, it does not mean the Court cannot decline jurisdiction in another set of proceedings between the same parties if there are several subsequent judgments of this Court and Division Bench of this Court clarifying the legal position in regard to the jurisdiction of Court under the statute. It is submitted that the Court cannot compel to erroneously exercise jurisdiction merely because it did so in the past. It is submitted that there is no estoppel against law. As per legal position today, remedy under Section 34 for setting aside a foreign award under Section 34 is not maintainable. This was not the position when petition under Section 9 was filed and heard in 2009. The claimant cannot be estopped from objection to the jurisdiction of this Court to entertain the petition under Section 34 irrespective of what the claimant might have contended in 2009 as to the legal position. It is for the Court to decide the correct position irrespective of what party may contend.

45. It is submitted that parties cannot by consent, confer the jurisdiction of Court which otherwise does not have jurisdiction. Learned senior counsel placed reliance on the judgment of Supreme Court in case of ***Videocon Industries Ltd. Vs. Union of India (2011) 6 SCC 161*** and in case of ***Yograj Infrastructure Vs. Ssang Yong Engg. & Construction Co. Ltd. 2011(9) SCC 735*** and would submit that it is clearly held by the Supreme Court in the aforesaid Judgments and also in the judgment of Division Bench in case of ***Sakuma Exports (supra)*** that no part of Part I of Arbitration Act including Section 34 would be applicable to set aside the foreign arbitral award. Mr Pratap learned senior counsel submits that in the

Special Leave Petition filed by the petitioner herein impugning the order passed by the Division Bench on 19/07/2010, one of the ground of challenge was that petition under section 9 was not maintainable. The petitioner however withdrew the said Special Leave Petition. The said issue was not decided by the Supreme Court.

46. Learned senior counsel placed reliance on paragraph 26-011 of **Chitty on Contracts 28<sup>th</sup> Edition** and would submit that the order passed by learned single Judge on 9/9/09 in petition under Section 9 can estop the claimant only if there was a final and conclusive judgment on merits by a Court of competent jurisdiction, there was identity of the parties and subject matter in the two sets of proceedings. It is submitted that the order dated 9/9/09 is not a final and conclusive on the issue of jurisdiction on merits and there is no identity of subject matter in the proceedings filed under Section 9 and proceedings filed by the claimant for enforcement of the foreign award. Reliance is placed on para 51 of the order passed by the learned single Judge which recorded that the interim relief granted to continue till arbitral tribunal at London passes such other order or directions. Liberty is also granted to the parties to raise defenses before the arbitral tribunal at London or to file an application for such other measures. It is submitted that the said order was a prima facie view of the matter, by very nature, being passed in the interim or interlocutory proceeding in aid of arbitration. It was not a suit where there was a final adjudication and determination.

47. Mr. Pratap learned senior counsel submits that a view taken by learned single Judge of this Court in petition under Section 9 was a prima facie view. There was no issue before the learned single Judge whether Part-I of the Act was applicable or not to such petition. The Division Bench by its order dated 19/07/10 has held that issue of Part-I was not raised by the respondent before the learned

single Judge. It is submitted that in any event, change in law subsequent to the previous proceedings, is an exceptional circumstance and issue of estoppel would not apply. It is submitted that proceedings under Section 9 are not suit and any findings recorded in Section 9 application is always prima facie and would not bind or control the enforcement proceedings.

48. Learned senior counsel placed reliance on the judgment delivered by the Court of Appeal in case of *Thoday Vs. Thoday (1964)2 WLR 371* in support of the submission that a party can be estopped to relitigate the matter only if the cause of action or the plea in defense in the second action is precisely the same and has been raised in the previous case and where that has been the subject matter of a full examination and adjudication in the previous case. If an issue is not dealt with, there would be no estoppel. It is submitted that since the cause of action or plea in the petition for enforcement of the arbitral awards is different from what was pleaded or was subject matter of the petition under Section 9, claimant cannot be held to be estopped from raising the plea. Mr Pratap learned senior counsel placed reliance on the Judgment of Supreme Court in case of *Bhatia International (supra)* and in particular paragraphs 26 and 32 and submits that even according to the said judgment, in case of international commercial arbitration held out of India, provisions of Part-I would apply unless the parties by agreement expressly or impliedly excludes any or all of its provisions. In that case, the laws or rules chosen by the parties would prevail. It is submitted that in this case, the parties have expressly chosen that the law governing the contract and arbitration agreement as English law. Consequently the law applicable to the enforcement of award is English law. This Court has thus no jurisdiction to entertain the petition under Section 34.

49. It is submitted that the proper law governing the parties was expressly chosen by the parties by selecting English law and that law would govern the arbitration agreement. The seat of the arbitration was in the U.K. and all the proceedings were taken place in London. Mr. Pratap learned senior counsel submitted that even if earlier Court has erroneously assumed jurisdiction by applying Part-I, in another proceeding based on different cause of action, same Court can decline to exercise jurisdiction based on subsequent judgments of Supreme Court and this Court. Court has to construe arbitration agreement not based on the pleadings of parties but has to be based on construction of arbitration agreement and by applying law based on the judgments. It is submitted that law governing arbitration agreement would apply to the petition for enforcement and for setting aside an arbitral award. The remedy of the respondent to challenge the arbitral awards is under English law which they have failed to exercise.

50. Mr D'vitre learned senior counsel in rejoinder submits that the learned single Judge in the order passed under Section 9 has considered the issue of jurisdiction and has held that this Court has jurisdiction to grant interim measures. It is submitted that unless there is exclusion of entire Part-I, Part-I applies even to foreign award. It is submitted that this Court has determined the plea of jurisdiction which is concluded after considering the plea and judgments of Supreme Court. Reliance is placed on paragraphs 13, 15 and 18, 38 and 39 of the order passed by the learned single Judge in petition under Section 9. It is submitted that the view of the learned single Judge in the matter between the same parties based on interpretation of the agreement is concluded and binding on both parties. Cause of action was pleaded and is decided. Learned senior counsel placed reliance on the judgment of Supreme Court in case of *Venture Global (supra)* and in particular paragraphs 32, 33, 35 and 37 and would submit that the

judgment of Supreme Court in case of ***Bhatia International (supra)*** is not confined to application filed under Section 9 only but to entire Part-I including Section 34. It is submitted that the order passed by the learned single Judge is by a competent Court having jurisdiction and thus petition filed by the respondent under Section 34 is maintainable challenging the foreign award and for the purpose of jurisdiction, Section 42 of the Act would be attracted.

51. On the merits of the petition for enforcement of the foreign award and on merits of the petition filed under Section 34 impugning the foreign awards, both the learned senior counsel made detailed submissions and filed written submissions which are being dealt with in the later part of this judgment.

52. Mr Pratap learned senior counsel invited my attention to the objections raised by the respondent to the petition for enforcement of the foreign award principally on the following grounds :

- (i) Respondent was under some incapacity under Section 48(i)(a).
- (ii) Respondent was otherwise unable to present its case under Section 48(i) (b).
- (iii) The learned arbitrator did not disclose his interest and generally the conduct of the learned arbitrator including his finding of forgery though it was not an issue, gave rise to an apprehension of bias and the award is thus contrary to justice or morality and in conflict with public policy under Section 48(ii) (b).
- (iv) Award deals with a difference not contemplated by and not falling within the terms of the submissions to arbitration and it contained decision of matters beyond the scope of the submission to arbitration.

53. Learned senior counsel invited my attention to various issues framed by the learned arbitrator and the findings rendered thereon in the impugned award. In so far as the objection of the respondent about alleged incapacity of the respondent is concerned, it is submitted that such incapacity referred in Section 48(i)(a) has to be incapacity of a party to enter into an arbitration agreement i.e not having a legal capacity to enter into a contract, otherwise it is invalid. It is submitted that it is neither pleaded nor argued by the respondent that they did not have the legal capacity to enter into an arbitration agreement. Ground of incapacity thus raised under Section 48(i)(a) is not attracted at all to the facts of this case.

54. In so far as objection raised by the respondent that they were unable to present its case is concerned, learned senior counsel invited my attention to various correspondence on record, pleadings filed by both parties and minutes of the arbitration meeting on this issue. It is submitted that both the parties had completed standard discovery on 18/05/2012 of the documents they wished to rely upon in support of their claim and defence in counterclaim. On 23/05/2012 the claimant had made a request for additional disclosure in respect of the counterclaim for damages made by the respondent as well as the claimant's case based on constructive trust. Respondent had sought time of 28 days to provide disclosure by letter dated 25/05/2012 but did not provide disclosure and sought one to two months time by letter dated 19/06/2012 for giving inspection maintaining that no disruption would be caused to the hearing fixed in January 2013. Even after lapse of three months, no discovery was provided by the respondent. On 27/09/2012, the respondent informed that they would take 10 to 12 weeks for the documents to be scanned and 8 weeks to complete listing. No list of documents was even prepared for a period of over 4 months since the date of making request for additional discovery.

55. Only on 24/10/12 the respondent alleged that the documents compiled of 14 lacs sheets of papers which would fill two containers and would take 12 weeks to scan such documents and only thereafter inspection could be completed. Even at that stage, list of documents was not prepared or provided. By the said letter the respondent contended that the date of hearing schedule to start on 7/1/2013 was highly unrealistic. It is submitted that in these circumstances to avoid any further delay, the claimant decided to drop their request for discovery in respect of the counterclaim of the respondent which could cause no prejudice of any nature whatsoever to the respondent. If according to the respondent, such documents were relevant to their counterclaim, they ought to have produced the same as part of their standard discovery on 18/05/2012. In so far as other documents in respect of which discovery was sought by the claimant were relating to the claim for constructive trust of the claimant which would have been relevant only for determination of quantum of the claim of the claimant if it was established as a question of fact that the claimant had not consented to use their funds by the respondent. Only if the claimant was able to prove that they had not given their consent, the question of constructive trust and the profits made from use of the funds would arise for which, the documents would require.

56. It is submitted by the learned senior counsel that the claimants had accordingly submitted that the issue of liability and quantum be bifurcated and the hearing be proceeded with on 11<sup>th</sup> January, 2013 only in respect of the issue of liability and discovery in respect of the claim of the claimants for constructive trust as was sought by the claimant be postpone until after the issue of liability was determined. The learned arbitrator agreed that the documents in respect of which discovery was sought pertain to quantum of the claim of the claimants as regards constructive trust and not liability and accordingly made a procedural order on 7<sup>th</sup>

November 2012 to the effect that the hearing on 7<sup>th</sup> January 2013 would proceed on issues of liability only. It is submitted that the prejudice if any was to the claimants and not the respondents. The petitioner had made a request for additional discovery and it was open to the petitioner to withdraw its request for such discovery in view of the gross delay committed by the respondent in offering inspection. The respondent cannot make any grievance in respect of the withdrawal of the claimants request for additional recovery.

57. The learned arbitrator had made it clear in the order dated 7<sup>th</sup> November, 2010 that the hearing would proceed on the issue of liability in respect of both the claims and counter claim and the hearing would deal with the preliminary issue on liability which are to be agreed by the parties on the basis of the pleadings as exchanged failing which held would decide that. The preliminary issues of liability were to be agreed on the basis of the pleadings which includes the claim and the counter claim. It is submitted that the respondent could participate at the hearing and could make submissions on the issue of liability after which the learned arbitrator could have fixed a further hearing on the issues of quantum that might arise. It was always open to the respondent to produce witness statements and documents which were relevant through their witnesses at the hearing on liability. For the period of over five months from May 2012 to October 2012 the respondent did not provide the disclosure of documents and thus cannot be permitted to urge that because the learned arbitrator decided to bifurcate the issues of liability and quantum, the respondent was unable to present his case. Learned senior counsel submits that the respondent by letter dated 27<sup>th</sup> November, 2012 took a deliberate and conscious decision not to participate any further in the arbitration stating that they would not file any witness statements, will not attend the hearing and will challenge any attempt to enforce the award in India. It was not their case in the said

letter that they were unable to present their case. The respondents were fully conscious of the fact that they had remedy under Indian Law to oppose enforcement if the claimant attempted to enforce such award in India and were thus conscious of the fact that the respondent would not be entitled to apply to set aside the award which was completely different from opposing enforcement.

58. In the alternative it is submitted that since the claimant did not pursue its claim for constructive trust, the issue about discovery of documents in regard to the said claim was redundant and of no consequence. Learned senior counsel invited my attention to the minutes of the meeting of the learned arbitrator in support of his submission that though several opportunities given to the respondent, respondent had refused to avail of such opportunity and had made their stand clear consciously not to participate any further in the arbitration proceedings in any manner whatsoever by letter dated 27<sup>th</sup> November, 2012.

59. In so far as objection raised by the respondent that the learned arbitrator was biased, prejudiced and had failed to disclose interest and generally from his conduct demonstrated a bias and that the award was in conflict with public policy on that ground is concerned, Mr. Pratap learned senior counsel submits that the objection of the respondent is based on the alleged premise that the learned arbitrator had not disclosed the fact that he had appeared as counsel instructed by the solicitors of the claimant in a completely unrelated matter between different parties in February, 2011. it is submitted that the learned arbitrator had explained on this issue that he had forgotten that the solicitors of the claimants were involved in that matter on record as the proceedings were filed in the English high court and the instructions came from the Swiss lawyer directly to the learned arbitrator as senior counsel (QC) and not from the solicitors of the claimant and which did not

amount to a failure to disclose interest whether under the provisions of English Arbitration Act or under the IBA guide lines or under Indian law. Learned senior counsel submits that similar situation was considered by this court in the case of ***Oil and Natural Gas Commission Vs. Offshore Enterprises Inc.(1993) 1 MhLJ 243***, delivered by the division bench of this court. This court held that the members of the bar while acting as arbitrators cannot be suspected of partiality towards the party in a reference merely because the advocate arbitrators are often briefed in other litigations by the firm of solicitors/advocate to represent one of the parties in the reference. Learned counsel submits that the judgment of division bench of this court squarely applies to the facts of this case where the learned arbitrator was well known senior advocate (Queen's counsel) and was briefed by the firm of solicitors to advise on an unrelated issue and/or appearing in that matter not concerning any of the parties in the reference and that also more than a year ago whereas division bench of this court in the case of ***ONGC (supra)*** had considered the situation when it was during the currency of the arbitration.

60. Mr. Pratap learned senior counsel distinguished the judgment of Delhi High Court in case of ***Shakti Bhog foods Limited Versus Kola Shipping Ltd. 2012 (3) Arbitration Law Reporter 372 (Delhi)*** relied upon by Mr. D'Vitre learned senior counsel for the respondent. It is submitted that the Delhi high court had considered IBA guidelines which provided that where the arbitrator currently serves or has served within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties or an affiliate of one of the parties, it would amount to a failure to disclose interest and the award would be opposed to public policy of India. Learned senior counsel submits that howsoever in this case the learned arbitrator has acted as a counsel in 2011 not for any of the parties to the arbitration and not on the related issues but he was instructed by the same firm of

solicitors who were representing the claimant. The said judgment is distinguished also on the issue that in that case though the petition under section 34 was filed under Part I of Arbitration and Conciliation Act to challenge a foreign award, it was expressly conceded by the respondent that petition under section 34 under Part I was maintainable and was not opposed. Learned senior counsel invited my attention to the correspondence exchanged between the parties on this issue and the minutes of the meeting of the learned arbitrator clarifying his position repeatedly. It is submitted that the learned arbitrator and rejected the objection and made an award on the recusal application made by the respondent which award could have been challenge by the respondent under the English Arbitration Act. If the respondent failed that the arbitrator was biased and failed to disclose his interest but the respondent did not exercise any such remedy. Learned senior counsel submits that the objection of the respondent that the learned arbitrator was biased or his conduct gave any rise to the apprehension of bias on such grounds is totally frivolous and in any event is not a ground available under section 48 of the Arbitration and Conciliation Act for opposing enforcement of the foreign award.

61. In so far as objection of the respondent that the learned arbitrator had dealt with the difference not contemplated or by not falling within the terms of the submissions to arbitration and in particular in making a finding of forgery, though such forgery was not expressly pleaded is concerned, the learned senior counsel submits that the award made by the learned arbitrator in favour of the claimant and against the respondent in the sum of US door 2 Million is not based on the finding of forgery. The claimant had specifically disputed the validity of 2007 agreement and the signature appearing thereon and have denied the same in its pleadings and in particularly in paragraph 23 of the statement of claim and para 4(b) of reply and defence to counter claim. The respondent was fully aware about such plea of the

claimant and was not taken by any surprise. Respondent fully knew that if the contention of the claimant was accepted then the agreement could be considered a forgery and could have led evidence to prove the existence and validity of alleged agreement dated 1<sup>st</sup> June, 2007, the respondent however, did not challenge the evidence produced by the claimant that the agreement was not signed by Mr. Prasantha Dissanayake. Such statement of the said Mr. Prasantha Dissanayake dated 7<sup>th</sup> January, 2009 was part of the documents of the claimant provided to the respondent in the month of May, 2012 as a part of standard discovery.

62. It is submitted that the advocate of the respondent had in fact referred to such statement in the letter which was annexed to the petition filed by the claimant under section 9 before this court and thus could have easily obtained a statement from Mr. Prasantha Dissanayake confirming that he had signed the disputed agreement of 2007 and/or denying the declaration relied upon by the claimant. The statement of Mr. Prasantha Dissanayake cannot be allowed to be challenged by the respondent in this proceedings. The respondent not having raised such plea in the arbitration or in this proceedings regarding the signature of Prasantha Dissanayake as appearing in his declaratory statement and in the agreement of 2005. It is submitted that the learned arbitrator in any event did not rely only on the statement of Mr. Prasantha Dissanayake but took into consideration all the surrounding facts and circumstances including the evidence of the two witnesses examined by the claimant which have gone unchallenged disputing and denying the 2007 agreement. It is submitted that in any event the said alleged 2007 agreement was only in respect of 4 ICDs at Delhi, Ludhiana and Nagpur and Ahmedabad whereas respondent continued to act as agents at the Port of Kandala and Mundra in 2008 as per 2005 agreement which they could not have under 2007 agreement.

63. It is submitted that on receipt of termination notice in respect of 2005 agreement, the respondent did not raise any objection that 2005 agreement had ceased to exist as canvassed in the petition filed by the respondent and on the contrary it was stated that they had every intention to pay the amounts. The learned arbitrator was thus justified in rendering a finding on the evidence that the agreement was a forgery which was a corollary or an inescapable conclusion from the finding that the said agreement as not signed by Mr. Prasantha Dissanayake and not proved by the respondent. It was not necessary for the arbitrator to frame issue of forgery. It is submitted that the respondent not having participated in the arbitration and not having provided any evidence to support the validity of agreement, though the same was expressly disputed and denied by the claimant including the signature appearing thereon, the respondent cannot be allowed to urge that the learned arbitrator accepted the unchallenged evidence of the claimant as the adequacy or sufficiency of the evidence cannot be question as along as there is some evidence. Even if such finding was unnecessary as canvassed by the respondent it would not indicates any element of bias or prejudice on the part of the learned arbitrator. My attention is invited to various paragraphs from the award on this issue.

64. Learned senior counsel submits that the learned arbitrator has allowed the claim of he claimant based on various documents including the balanceshseets of the respondent in which the respondent had admitted the liability and undertaken to pay the dues of the claimant and had sought time to clear such liability. Learned senior counsel invited my attention to various correspondence and documents on record in support of this plea.

65. It is submitted by Mr.Pratap, learned senior counsel that the respondent had

not argued that the learned arbitrator had no jurisdiction under the 2005 agreement. The only objection raised by the respondent was that the 2007 agreement superseded the agency agreement of 2005. The learned arbitrator had accordingly framed issue no.9 i.e. 'was the 2005 agreement superseded by the 2007 agreement and did the agency relationship continued by conduct until the claimants terminated it by a letter dated 5<sup>th</sup> November, 2008'. This issue as framed on the basis of pleadings of the claimant was answered by the learned arbitrator holding that the 2005 agreement continued in effect as a binding contract until its termination in November 2008, there was no material supersession of 2005 agreement even assuming that the 2007 agreement existed. The 2007 agreement did not say that it superseded the 2005 agreement and the respondent continued to perform under the 2005 agreement until terminated by a notice on 5<sup>th</sup> November, 2008. It is submitted that the learned arbitrator has rendered a finding of fact that the agency relationship under the 2005 agreement continued until terminated by notice dated 5<sup>th</sup> November, 2008 and held that the arbitrator had jurisdiction under the arbitration clause in 2005 agreement to decide the disputes between the parties.

66. In so far as challenge to the recusal award dated 22<sup>nd</sup> November, 2012 is concerned, it was open to the respondent to challenge the recusal award dated 22<sup>nd</sup> November, 2012 under the provisions of section 68(2) (a) read with section 33(1) (a) of the English Arbitration Act, 1996 within 28 days as provided in section 70 (3) of the said Act which was not impugned by the respondent under the provisions of the English Arbitration Act. Though the learned arbitrator has expressly suggested the respondent that they may apply to the High Court for his removal if they apprehended any bias, the respondent did not file any such proceedings for removal of arbitrator. It is submitted that in any event there is no provision under part (II) of the Act which allows the award to be challenge on the ground of alleged

bias of the learned arbitrator unlike section 13(5) of the Arbitration and Conciliation Act, 1996 read with section 34 of the Act. It is submitted that merely because ruling of the learned arbitrator on the application of the claimant to bifurcate the hearing of the liability and quantum and refusal to postpone the hearing date fixed and making a finding of forgery based on the evidence before him which were not to the liking of the respondent, the respondent cannot raise any doubt as to the independent or impartiality of the learned arbitrator. In any event the respondent having failed to challenge the recusal award under the English Arbitration Act cannot be allowed to impugn the said award in this proceedings.

67. In so far as apprehension of the respondent of future bias on the ground that the learned arbitrator reserved his jurisdiction in respect of indemnity claim is concerned, it is submitted that there was no demand made by the authorities for payment of such tax in last 6 years. The claim of the respondent was totally speculated. The learned arbitrator has held that when cause of action would arise, arbitration agreement could be invoked. The learned arbitrator accordingly reserved his jurisdiction to decide any such claim if made by the respondent in future based upon any demand that may be made by the income tax authorities. The learned arbitrator did not reject the claim outright and gave the liberty to the respondent to approach the learned arbitrator if and when the demand was raised by the income tax authorities in future and has in fact assisted the respondent who would not have to go through the entire process all over again. It is submitted that such a claim may or may not arise in future as no demand has been made for last 6 years post the termination of the agreement by the tax authorities in India and such claim is entirely speculating. Since the learned arbitrator has not acted with bias or was totally impartial or independent, no such reservation of the arbitrator to act as arbitrator in future can be challenged by the respondent.

68. In so far as claim of the respondent for reimbursement of tax rejected by the learned arbitrator is concerned, it is submitted that the learned arbitrator has kept perpetual jurisdiction with him to decide the issue in future. Successive or multiple references are permissible. The learned arbitrator having acted bias could not even otherwise keep perpetual jurisdiction with him. It is submitted that in view of Double Taxation Avoidance Treaty between India and UK, no deduction of tax was made in India as tax was supposed to have been deducted in UK. Learned counsel submits that even on merits the finding of the learned arbitrator recorded on this issue shows inconsistency and in particular paragraph 96 if read with para 201, 202 and 204. It is submitted that the respondent can not be forced to continue before the same arbitrator in these circumstances.

69. Learned senior counsel submits that none of the objections raised by the respondent opposing enforcement of the foreign award are made out by the respondent. The grounds of such objections are very limited. Learned senior counsel placed reliance on the judgment of the Supreme Court in case of ***Shri Lal Mahal Ltd vs. Progetto Grano S.P.A. in Civil Appeal No. 5085 of 2013 JT 2013(11) SC 84*** and in particular paragraphs 22, 25 to 28, 43, 44 and 45. The said judgment is also relied upon in support of the submission that the court hearing petition for enforcement of a foreign award cannot consider the findings of fact rendered by the learned arbitrator in such foreign award under section 48 (2) (b). It is submitted that none of the grounds invoked by the respondent for objecting to the enforcement of the foreign award fall under any of the provisions under section 48.

70. Mr.Pratap learned senior counsel submits that in so far as grounds raised under section 34 of the Arbitration and Conciliation Act in Arbitration Petition

No.259 of 2013 are concerned, since the said petition itself is not maintainable in view of Part I of the Act not being applicable in respect of a foreign award, no such grounds can be allowed to be urged by the respondent herein. In any event, the grounds under section 34 and grounds of objections under section 48 are different. Scope of objection under section 48 is much narrow than the grounds permitted under section 34 while challenging a domestic award. It is submitted that if this court comes to the conclusion that Part I is applicable in the facts of this case, no grounds are made out for impugning the foreign award even under section 34 of the Act and thus petition under section 34 deserves to be rejected as not maintainable or in the alternative on the merits and the petition filed by the claimant for enforcement of the foreign award deserves to be allowed.

71. Mr. D'vitre learned senior counsel appearing on behalf of the respondent (Ori. ARBP No.406 of 2013) submits that the respondent company was incorporated in India in 2004 with Mr C. F. George as 50% shareholder representing the interest of the claimant and balance 50% held by the Indian promoter Mr Ajith Menon. Mr C. F. George is also a director on the board of the parent company of the claimant (Simatech) and of its other group companies. The claimant company had a 50% shareholding and stake in the respondent company through its representative Mr C. F. George. The claimant was aware of and consented to the functioning of the respondent company at all material times, including the use of funds due to the claimant company by the respondent for those purposes.

72. Learned senior counsel submits that the claimant had given up the constructive trust claims and the tracing claims and not pressed in the *ex-parte* hearing held on 7th-8th January 2013. Thus about 80% of the claims made by the

claimants were not pressed and/or given up. There was no express plea raised by the claimant in any of the pleadings that the agency agreement of 2007 was a forgery although such an express plea had been earlier raised in petition filed under Section 9 before this Court. The learned arbitrator decided that he had jurisdiction in the matter essentially on the premise that the disputes were referred under 2005 agreement which was an undisputed agreement. The finding of the learned arbitrator that the agreement dated 1/6/07 is forgery is based on no pleadings. No issue was framed by the learned arbitrator regarding alleged forgery. The respondent was never informed by the learned arbitrator that he would decide the issue of forgery against the respondent and thus the said finding is without any notice to the respondent and in violation of principles of natural justice. Copy of issues was not even sent to the respondent and the issue is decided behind the back of the respondent. It is submitted that forgery is a very serious issue and it involves criminal consequences and penalties. Determination of and consideration of such an issue without notice to one of the parties, is not only improper, but it shocks the judicial conscience. It is submitted that decision of the learned arbitrator on the issue of forgery which was not even raised, confirms the apprehension of the respondent of bias against the learned arbitrator.

73. Learned senior counsel submits that the learned arbitrator placed reliance on an unsubstantiated, unproved alleged declaration claimed to have been made by Mr Dissanayake which was relied upon in the affidavit dated 7/12/2013 of Mr Menon and in the witness statement dated 14/12/2012 of Mr Ali Maghami. There was no assertion in witness statement of Mr Maghami that the alleged declaration was signed by Mr Dissanayake in his presence. The claimant as well as Mr Dissanayake were aware of the existence of 2007 agreement as the purported declaration allegedly signed by Mr Dissanayake claims that no such agreement was

signed after May 2007. It is submitted that since Mr Dissanayake was not examined as a witness in the arbitration proceedings as he had already left the employment of the claimant which was a false assertion, the learned arbitrator could not have rendered any such finding of forgery. Mr Dissanayake was the General Manager of “ Interworld Shipping LLC ”, which is a company in Dubai and was the agent of the claimant.

74. Learned senior counsel submits that though the learned arbitrator has placed reliance on proceedings under Section 9 filed in this Court, he has however ignored the crucial and material piece of evidence which was on record of that proceeding i.e the uncontested statement of Mr Ajith Menon on oath that is paragraph 4 of his affidavit dated 23/7/09 asserting that Mr Prasantha Dissanayake had telephonically confirmed in July 2009 that the claimants were pressurizing him to execute a letter falsely claiming that he had not executed the agreement dated 1/6/07. The learned arbitrator also did not consider the letter dated 2/7/2009 addressed by the advocate of the respondent to the advocate of the claimant pointing out these facts. The award is vitiated on this ground alone. Reliance is placed on judgment of SC on this issue in case of ***K.P. Poulose Vs. State of Kerala & Ors. (1975)2 SCC 236.***

75. Learned arbitrator rendered reasons by taking a very casual and cavalier approach to the stamp and signature on the 2007 agreement by holding that the stamps could be easily manufactured and the signature of Mr Dissanayake was not by any means the most of the complex of structures; quite the reverse. It is submitted that the burden that the 2007 agreement was forged was in any event on the claimant. But the learned arbitrator has shifted such burden upon the respondent illegally. Learned senior counsel submits that if such finding of forgery rendered by the learned arbitrator which amounts to a serious criminal

charge is not set aside, such award would be a decree of this Court and would be executed by the claimant by filing criminal proceedings against the respondent based on such perverse finding which are without jurisdiction, such award would be thus in conflict with public policy under Section 34 of the Act and even under the narrower ground of public policy while considering the objection to the enforcement of a foreign award as held by the SC in case of ***Shri Lal Mahal Ltd. (supra)***.

76. Mr D' vitre learned senior counsel submits that the other reasons given by the learned arbitrator is based on the absence of material attestation of agreement dated 01/07/2007. It is submitted that the notarial attestation on 2004 and 2005 agreements were not on the date of the agreements but after lapse of considerable time. The agreement dated 1/8/2004 was attested on 27/10/04 and the agreement 1/8/2005 bears the attestation of notary dated 24/09/2005 which clearly indicates that the attestations were no more than certification of the documents being a proof of and not the attestations of signatures on the dates of the agreements. The finding of the learned arbitrator on the notarization of the document is thus perverse.

77. Mr. D'vitre placed reliance on the judgment reported in 2006 1 Lloyds Law Reporters 701 and in particulars paragraphs 4, 6, 20 to 22, 24 to 32 in support of his submission that the respondent herein was unable to present his case for want of notice that learned arbitrator would decide the issue of forgery and as to what material would be considered against the respondent by the learned arbitrator. The relevant paragraph Nos. 4, 6, 20 to 22, 24 to 32 read thus :

4. The case arises out of a business agreement dated 4 October

1999, which agreement includes an arbitration agreement. Mr Kanoria, Mr Guinness, Kanoria Information Technology and Systems Ltd (which later changed its name to eSols Worldwide Ltd) and CPL were parties to this agreement. It was governed by Indian law.

6. The arbitration agreement in the business agreement provided that the seat of the arbitration should be Mumbai, India, and that the arbitration should be conducted under the rules of the ICA by a sole arbitrator, applying Indian law.

20. Mr Flannery has introduced into evidence this afternoon, without objection from Mr Young (and that is no matter for surprise), a document headed "Oral submissions made on behalf of Mr Ajav Kanoria, Indekka Software Pvt Ltd and eSols Worldwide Ltd at the time of the hearing in the arbitration proceedings held on 22nd March 2003 before the Sole Arbitrator Mr Justice Chandrachud (Former Chief Justice of India)". The document so far as relevant reads:

"Tony Guinness as the person owning and controlling Corporate Partnerships Limited had an obligation to ensure that he himself and Corporate Partnerships Limited acted only in terms of the agreement and no other with respect to these agreements. Thus, Tony Guinness is the person liable for any breach of business in terms of the conduct of business to be carried out by the Information Technology Division.

Tony Guinness has acted with a deliberate and malafide intention in not spinning out the division into a separate company so that he can continue to exercise control on the business using the proceeds generated therein for his own purpose and not for the purposes defined in the agreements. Clause 18 and 19 of Business Agreement where under the two individuals were restricted from alienating their controlling interest in the companies which were parties to the agreement and were responsible for operating the business also substantiate the contention [that] the two companies were merely a vehicle to conduct the business on behalf of the two

individuals. The companies were controlled by two individuals and the fact that they were restricted to part with their interest in their companies, clearly establishes that the companies were merely vehicles of convenience and that the business was actually that of the two individuals and the two individuals were in their personal capacity responsible for running the business and incurring costs as provided for by the Business Agreement.

This is a clear case where the beneficiaries were the two individuals with power to exercise all business decisions vested in the two individuals and such powers were indeed exercised by the two individuals. Thus Tony Guinness in his individual capacity is directly responsible for any break-up of the terms of the agreement specially where expenses in excess of those specially provided for in the agreement were incurred by the Information Technology Division of CPL.

To sum up, this is a clear case where two individuals join to start a business and for reasons of convenience the conduct of business is so structured that the two companies owned by some individuals are used as vehicles for conducting the business but the business is owned by the individuals run both through their respective companies for benefits to each of them. But where one of the two parties acts in a malafide manner because it has control over the funds to the detriment of the other.”

21. Mr Flannery accepted that this document evidenced submissions that were put before the arbitrator, and also that this document provided for the first time an explanation for what on the face of it was the surprising result reached by the arbitrator. What Mr Flannery could not explain was how it was that this document has been placed before this court for the first time and that Gloster J was not informed of it. He has also accepted, as he must, that no notice of these allegations was given to Mr Guinness at any stage -- neither in time for him to meet them in the arbitration, nor afterwards by way of explanation for the award made against him, nor indeed at any moment up to this day.

22. This evidence greatly alters the nature of the case to be advanced on behalf of Mr Guinness that he was unable to present his case. It seems to me quite clear on the natural wording of that clause that a party to an arbitration is unable to present his case if he is never informed of the case that he is called upon to meet. That was the position in this case. So far as Mr Guinness was concerned, there did not appear to be any valid case that he had to meet. There appeared to be an allegation that he was liable for the debt of a company, and he sought to meet that allegation by writing a simple letter, drawing attention to what appeared to be the obvious fact that he was not liable for the debt of the company. That, as we now see, was not the case that he had to meet. He never had a fair chance to meet that case.

24. Accordingly, I find that there is good ground for applying the provision that recognition or enforcement of the award may be refused. Mr Flannery has emphasised that the provision says "may", and submitted that this court has a jurisdiction whether to refuse enforcement, which it should not exercise. It should not exercise that jurisdiction, he submits, because Mr Guinness failed to take advantage of the opportunity that had been open to him to challenge the award before the Indian court. That is correct. Mr Guinness made such a challenge, but it was ruled out as being out of time.

25. As to that submission, I would first express doubt as to whether the broad discretion that Mr Flannery suggests exists is available to the court. Mr Young has drawn our attention to the observation of Mance LJ in *Dardana Ltd v Yukos Oil Co* [2002] 2 Lloyd's Rep 326, 330:

"8. .... Mr Malek QC maintains that the appellants can also resist recognition and enforcement, on the basis that it was and is for the respondents, under sections 100 and 102, to show a valid arbitration agreement in writing. He suggests that this is fair, since section 103(2) offers no more than what he described as 'discretionary' relief, whereas any entitlement to rely on sections 100 and 102 would be as a matter of right. I am not impressed by that suggestion. Section 103(2) cannot

introduce an open discretion. The use of the word 'may' must have been intended to cater for the possibility that, despite the original existence of one or more of the listed circumstances, the right to rely on them had been lost, by for example another agreement or estoppel. Support for this is found in van den Berg, *The New York Convention of 1958* (Kluwer), page 265." 26. Even if there is a wider discretion, I would not exercise it on the facts of this case. This is an extreme case of potential injustice. It hardly lies in the mouths of the appellants to seek the exercise of discretion in circumstances where the facts that could have led to injustice have only come to the attention of the court at the ninth hour. For those reasons I would dismiss this appeal.

27. THE MASTER OF THE ROLLS: I agree.

28. LORD JUSTICE MAY: I also agree that this appeal should be dismissed.

29. The limited circumstances in which an English court could be persuaded to refuse recognition or enforcement of an arbitration award to which the New York Convention applies are those to be found in sections 103(2) and (3) of the Arbitration Act 1996. The authorities make clear that the court is not concerned to investigate the merits of the dispute which is the subject of the award.

30. Section 103(2) and (3) are more concerned with the fundamental structural integrity of the arbitration proceedings. Section 103(2) of the 1996 Act is expressed in discretionary terms. Paragraph 8 of the judgment of Mance LJ in *Dardana v Yukos Oil* [2002] 2 Lloyd's Rep 326 at 330 suggests that section 103(2) cannot introduce an open discretion. Speaking generally, that is not surprising when the limited circumstances in which an English court can be persuaded to refuse enforcement of a New York Convention award concern, as I think, the structural integrity of the arbitration proceedings. If the structural integrity is fundamentally unsound, the court is unlikely to make a discretionary decision in favour of enforcing the award.

31. In the present case the arbitrator made a money award against Mr Guinness personally when the claim which had been submitted to arbitration contained no material which showed in any way that Mr Guinness rather than his company might be personally liable. Gloster J was told in terms on behalf of the appellants that the papers before her disclosed no juridical basis for the claim against the individual director. The same in substance appeared in the written submissions to this court. All that might be said was that the written claim in the arbitration appeared to contain a prayer that an award should be made against Mr Guinness personally. The antecedent material did not plead a case in support of that prayer.

32. Only today Mr Flannery has referred us to a document, to which the Lord Chief Justice has referred, which was not before the judge. This document appears to contain an account of oral submissions made to the arbitrator in Mr Guinness' absence. This document records that the very well-known case of *Saloman v Saloman* was referred to. I agree with the Lord Chief Justice that it makes an argument for lifting the corporate veil only on account of malafides. It is accepted that no notice was given to Mr Guinness, in the arbitration claim or otherwise, that it would be said that the arbitrator should lift the corporate veil by reason of malafides or, as I would call it, fraud. It is elementary in this jurisdiction that a case of fraud may not be advanced without the party alleged to have been fraudulent having been given due notice of it. No apparent case was made against Mr Guinness in the written claim that was made and served on him to that effect. The failure to give him notice of this kind of case such as I have described does, I think, amount to a failure in the nature of a breach of natural justice. I agree that it comes within section 103(2)(c) of the 1996 Act. Mr Guinness was not given proper notice of at least a highly material part of the arbitration proceedings so far as he was concerned, and he was unable to present his case because he was never given notice of the basis of the case against him personally.

78. It is submitted that the impugned award deserves to be set aside and enforcement thereof shall be refused also on the ground that the learned arbitrator had effectively deprived the respondent of an effective opportunity of hearing and to rely on the documents. The respondent were thus unable to present their case. The proceedings were conducted in the matter which would indicate that the arbitrator had showed his readiness to accept the case of the claimant without offering any effective opportunity to the respondent to present its case.

79. Mr. D'vitre learned senior counsel submits that respondent herein cannot be penalized because claimant had invoked part I when filed petition under section 9 and relied upon the judgment of the Supreme Court in the case of **Bhatia International (Supra)**. It is submitted that non challenge of partial award is of no consequence. If petition under section 34 is maintainable all the provisions of part I would be attracted. The claimant is entitled to challenge the partial award along with final award under section 34 of the Act. It is submitted that even if respondent herein would have challenged such partial award before English Court and would have failed in such petition, respondent herein was not precluded from resisting enforcement of such award under section 48 of the Act. It is submitted that even if the respondent had not challenged the jurisdictional award in English court, respondent can challenged the said award in India. If such award is not valid under Indian law, such award cannot be enforced.

80. Mr. D'vitre learned counsel then would submit that though 90% of the claims made by the claimant were not pressed and/or given up at the time of hearing, the learned arbitrator has allowed entire payment of arbitration cost which conduct shows that the learned arbitrator was totally biased.

81. Mr. D'vitre learned senior counsel submits that the bias of the learned arbitrator and/or apprehension of the respondent of bias on the part of the arbitrator is confirmed from the fact that statement of claim was filed by the claimants merely after two years from the arbitrator assuming jurisdiction and about eighteen months after the partial award on jurisdiction and inspite of that the respondent arbitrator was not willing to grant proper opportunity to the respondent to rely upon the documents or to give proper opportunity to present his case. The date of 7<sup>th</sup> January, 2013 fixed by the learned arbitrator was tentative and ought to have been changed in view of the respondent having sought further time for producing documents being in volumes. The learned arbitrator did not hear any of the parties or invite any submissions prior to the issuance of the ruling on 1<sup>st</sup> November, 2013. The learned arbitrator treated the date of 7<sup>th</sup> January, 2013 as immutable and unalterable and no condition could be imposed as a condition precedent that new arbitrator if appointed would hear the matter at the hearing on 7<sup>th</sup> Jan. 2013.

82. Mr. D'vitre placed reliance on para 74, 83 and 92 of the judgment of Delhi High Court in case of ***Shakti Bhog Foods Limited Vs. Kola Shipping Ltd. And anr. 2012 (3) Arb.LR. 372 (Delhi)*** in support of the submission that the learned arbitrator was easily persuaded to accept anything suggested by the claimant and in support of the submission that the learned arbitrator had failed to disclose his interest. The relevant paragraphs read thus :

“74. Another factor, and a fairly serious one, that vitiates the impugned Award is the failure by Mr. Oakley to make a disclosure, at the time of his acceptance of his appointment as Arbitrator, and thereafter, that he had acted as Arbitrator, on behalf of Respondent No. 1, in a related dispute between the head owners and Respondent No. 1.

84. General Standard 3 deals with "Disclosure by the Arbitrator". Clause (a) states: "If facts or circumstances exist that may, in the eyes of the parties give rise to doubts as to the arbitrator's impartiality or independence, the arbitrator shall disclose such facts or circumstance to the parties...prior to accepting his or her appointment or, if thereafter, as soon as he or she learns about them." Part II of the above Guidelines is titled: "Practical Application of the General Standards" and sets out, inter alia, an 'Orange List' which "reflects situations that would fall under General Standard 3 (a), so that the arbitrator has a duty to disclose such situations." Under the heading 'Previous service for one of the parties or other involvement in the case', is Clause 3.1.5 which talks of a situation where "the Arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties or an affiliate of one of the parties." This brooks no exception and is applicable in the present situation where Mr. Oakley acted as the nominated Arbitrator of Respondent No. 1 in a "related issue" concerning the head owners of the vessel and Respondent No. 1.

To summarise the conclusions:

(a) The contention of the Petitioner that in terms of Section [34 \(2\) \(a\) \(ii\)](#) of the Act, there was no valid CP, and therefore no valid arbitration agreement, between the parties is rejected.

(b) The constitution of the arbitral Tribunal with Mr. Alan Oakley, Respondent No. 2, as sole Arbitrator was invalid. The Award rendered by such Tribunal is liable to be set aside under Section [34 \(2\) \(a\) \(v\)](#) of the Act.

(c) The failure by Mr. Alan Oakley to disclose the material fact concerning his having been an Arbitrator on behalf of Respondent No. 1 in the arbitration on a related issue involving it and the head owners gives rise to justifiable doubts as to his independence and impartiality. The impugned Award is opposed to the public policy of India on a collective reading of Sections [12 \(3\)](#), [13 \(5\)](#) and [34 \(2\) \(b\) \(ii\)](#) of the Act and is required to be set aside on this ground.

(d) The grounds mentioned in para 92 above when viewed collectively also give rise to serious doubts as to the validity of the impugned Award.

83. Learned arbitrator ought to have appreciated that it was not a simple claim for money or unpaid under the agency agreement. The respondent was not liable to make any payment to the claimant at the foot of the agency account as the same was liable to be used/adjusted with consent and knowledge of the claimant to set up the ancillary/associated companies for providing ancillary services including to the claimant and thus the matter was of adjustment in accounts and was not case of admission of liability as erroneously held by the learned arbitrator.

84. Mr. D'vitre placed reliance on the judgment of English court of Appeal in case of *Kanoria and others vs. Guinness (2006) 1 LLR 701* in support of the submission that even though in that matter challenged to the award in India had failed, English Court of appeal had refused to enforce foreign award as the aggrieved party was not given due notice of plea of fraud and was unable to represent its case.

85. Mr. D'vitre learned senior counsel has distinguished the judgment of this court in case of *HSBC Vs. Avitel (supra)* and would submit that the said judgment was delivered considering the petition under section 9 and placed reliance on the part of that judgment in support of the submission that even this court has held that in case non arbitrability of the dispute has been made out, the court could refuse enforcement under section 48 as that is a statutorily prescribed ground for refusal of enforcement. Mr. D'vitre learned senior counsel distinguished the judgment of Supreme Court in case of *Dadu Dayalu Jaipur Trust (2008) 11 SCC*

753 relied upon by Mr. Pratap learned senior counsel on the issue of estoppel and invited my attention to paragraph 30 of the judgment of Supreme court in case of ***Hope Plantations Ltd. (1999) 5 SCC 590***. It is submitted that in this case there is no fresh cause of action in so far as jurisdiction of an Indian Court is concerned under Part I of the Act. It is submitted that the principles of res judicata and issue estoppel will apply to the facts of this case as the cause of action relating to part I applicability and jurisdiction and intention of parties regarding applicability of part I being common.

86. Learned senior counsel submits that the finding of the learned arbitrator while rejecting claim for reimbursement of income tax claim, is based on no evidence and perverse. The claimant in this case had not shown that they had paid the tax in England. It was clear from the records of the claimant that in UK the amounts were not reflected in their domestic accounts as erroneously held by the learned arbitrator which finding is plainly contrary to public policy.

87. In rejoinder Mr. Pratap learned senior counsel submits that neither any case is made out for opposing enforcement of the foreign award nor any case is made out under section 34 of the Act. The learned arbitrator has allowed the claim on the basis of admission of liabilities after considering the records and documents. In so far as issue of forgery raised by the respondent is concerned, learned senior counsel submits that though the learned arbitrator was justified in rendering such finding in view of the pleadings filed by the parties, the claimants would not rely upon such finding of forgery for filing any criminal proceedings against the respondent based on such findings rendered by the learned arbitrator.

88. Mr. Pratap learned counsel appearing for the claimant submits that learned arbitrator has powers to regulate procedure and was accordingly right in bifurcating the issue of liability and quantum. No prejudice thus could be caused to the respondent and much less of such nature which would be in conflict with public policy as canvassed by the respondents. Reliance is placed on section 33 and 34 of English Arbitration Act in support of the submission that arbitrator is empowered to decide the procedure suitable to the circumstances of the particular case. The learned arbitrator was right in his decision to decide the issue of liability of first . It is not the case of the respondent that the learned arbitrator had no power to bifurcate the claim. The learned arbitrator has recorded a finding that no prejudice was caused to the respondent on account of bifurcation of issue of liability and quantification.

89. Learned Senior Counsel submits that the allegations made by the respondent against arbitrator are totally frivolous and no such ground in any event available under section 48 of the Act while opposing enforcement of the foreign award. Even otherwise on merits the only allegations made by the respondent was that the learned arbitrator did not disclose that he had appeared as a counsel of the solicitors appearing for the claimant. Merely because the learned arbitrator had passed an order of bifurcation it cannot lead to inference of bias on the part of the learned arbitrator against the respondent. The learned arbitrator had given full opportunities to both the parties which opportunities were not availed of by the respondent who had refused to appear before the learned arbitrator, file any evidence and making it clear that any award made by the arbitrator would be objected in India for its enforcement.

90. The learned senior counsel submits that the jurisdictional award and recusal award has become final and can not be challenged under section 48. Reliance is placed on the judgment of this court in case of **HSBC Vs. Avital (supra)**. Mr. Pratap, learned senior counsel distinguished the judgment relied by Mr. D'vitre learned senior counsel and also other judgments.

### **REASONS AND CONCLUSION**

#### **Whether Arbitration Petition No. 406 of 2013 filed under section 34 of the Arbitration and Conciliation Act, 1996 impugning the foreign award is maintainable :**

91. A perusal of clauses 38 and 39 of the agreement entered into between the parties clearly indicates that parties had agreed that the agreement shall be construed as having been entered into at London and it would be governed by English Law. Parties have also agreed that the agreement shall be governed by and construed in accordance with English Law and any dispute arising out of the agreement shall be referred to arbitration in London. It is not in dispute that seat of the arbitration proceedings was at London in accordance with the agreement arrived at between the parties. On this issue both parties through their learned senior counsel relied upon various judgments of Supreme Court and of this court. Mr.D'vitre, learned senior counsel relied upon following judgments :-

1. Judgment of the Supreme Court in case of **Bhatia International vs. Bulk Trading S.A. And another (2002) 4 SCC 105** and in particular paragraphs 21, 22, 23, 26 and 32.
2. Judgment of Supreme Court in case of **Venture Global Engineering vs. Satyam Computer Services Ltd. and Another (2008) 4 SCC 190** and in particular paragraphs 32, 33, 35 and 37, 38, 41, 44 and 47.

3. Judgment of Supreme Court in case of ***Hope Plantations Ltd. Vs. Taluk Land Board, Peermade and another (1999) 5 SCC 590*** and in particular paragraphs 28 to 31.
4. Judgment of learned Single Judge of this court in case of ***E-City Entertainment (I) Pvt. Limited vs. IMAX Corporation 2013 (6) Bom.C.R. 654*** and in particular paragraphs 21, 22, 25, 26, 29, 30, 33, 35 and 39.
5. Judgment of Supreme Court in case of ***Gorie and Gouri Naidu and another vs. Thandrothu Bodemma and others (1997) 2 SCC 552*** and in particular paragraphs 2 and 4
6. Judgment of Supreme Court in case of ***Bhanu Kumar Jain vs. Archana Kumar and another (2005) 1 SCC 787*** (paragraphs 29 and 32)

92. Mr.Pratap, learned senior counsel appearing on behalf of the claimant on the other hand relied upon the following judgments :-

1. Judgment of Supreme Court in case of ***Videocon Industries Limited vs. Union of India and another (2011) 6 SCC 161*** (paragraphs 31, 32 and 33)
2. Judgment of Supreme Court in case of ***Yograj Infrastructure Limited vs. Ssang Yong Engineering and Construction Company Limited (2011) 9 SCC 735*** and in particular paragraphs 46 to 58
3. Judgment of Division Bench of this court delivered on 6<sup>th</sup> August, 2013 in case of ***Sakuma Exports Limited vs. Louis***

**Dreyfus Commodities and Uisse S.A.** in Appeal no. 337 of 2013 and in particular paragraphs 2, 3, 7 to 14, 17 to 21

4. Unreported judgment of this court in case delivered on 22<sup>nd</sup> January 2014 in case of **HSBC PI Holdings (Mauritius) Limited vs. Avitel Post Studioz Limited** in Arbitration No. 1062 of 2012 (paragraphs 73 to 76)

5. Judgment of Supreme Court in case of **Dadu Dayalu Mahasabha, Jaipur (Trust) vs. Mahant Ram Niwas and another (2008) 11 SCC 753** (paragraphs 36, 38 and 39)

6. Judgment of Court of Appeal in case of Thoday vs. Thoday reported in 1964 2 WLR 371 (relevant paragraphs at page 377 to 380)

93. Both the learned senior counsel also relied upon various paragraphs of the order passed by Anoop V.Mohta J. in the order passed by this court in **Arbitration Petition No. 490 of 2009** filed under section 9 of the Arbitration and Conciliation Act, 1996 by the claimant and the order passed by the Division Bench on 19<sup>th</sup> July 2009 in **Appeal No. 230 of 2010** filed by the respondent in this court on the issue as to whether the orders passed by the learned Single Judge and the Division Bench entertaining petition under section 9 filed by the claimant for seeking interim measures relying upon the judgment of the Supreme Court in case of **Bhatia International (supra)** would consequently permit the respondent to challenge a foreign award under section 34 of the Act in this court itself or such issue is barred by res judicata and/or parties are estopped from contending that Part I of the Act including Section 34 is not applicable. I will deal with the effect of the judgments of learned Single Judge and the Division Bench in the petition filed under section 9 in the later part of the judgment.

94. In case of ***Bhatia International (supra)*** the respondent to that petition had filed an application under section 9 of the Arbitration and Conciliation Act before the District Judge at Indore, Madhya Pradesh. The contract containing arbitration clause provided that the arbitration would be as per rules of International Chamber of Commerce. Parties had agreed that the arbitration be held at Paris, France. In paragraph 21 of the judgment in case of ***Bhatia International (supra)*** has dealt with section 2 (2) (3) (4) (5) of the Act which provides that Part I would apply where the place of arbitration is in India. It is held 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. It is held that parties cannot, by agreement, override or exclude the non-derivable provisions of Part I in such arbitrations. It is held that 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.

95. In paragraph 32 of the said judgment it is held by the Supreme Court 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 the parties are free to deviate only to the extent permitted by the derogative provisions of Part I. It is held that in case of international commercial arbitration 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 provisions in Part I which is contrary to or excluded by that law or rules will not apply. Paragraphs 21, 22, 23, 26 and 32 read thus :-

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.

22. If read in this manner there would be no conflict between Section [1](#) and Section [2\(2\)](#). The words "every arbitration" in sub- section (4) of Section [2](#) and the words "all arbitrations and all proceedings relating thereto" in sub-section (5) of Section [2](#) are wide. Sub-sections (4) and (5) of Section [2](#) are not made subject to sub- section (2) of Section [2](#). It is significant that sub-section (5) is made subject to sub-section (4) but not to sub-section (2). To accept Mr. Sen's submission would necessitate adding words in sub-sections (4) and (5) of Section [2](#), which the Legislature has purposely omitted to add viz. "Subject to provision of sub-section (2)". However read in the manner set out hereinabove there would also be no conflict

between sub-section (2) of Section [2](#) and sub-sections (4) and/or (5) of Section [2](#).

23. That the Legislature did not intend to exclude the applicability of Part I to arbitrations, which take place outside India, is further clear from certain other provisions of the said Act. Sub-section (7) of Section [2](#) reads as follows:

“(7) An arbitral award made under this Part shall be considered as a domestic award.”

As is set out hereinabove the said Act applies to (a) arbitrations held in India between Indians (b) international commercial arbitrations. As set out hereinabove international commercial arbitrations may take place in India or outside India. Outside India an international commercial arbitration may be held in a convention country or in a non-convention country. The said Act however only classifies awards as "domestic awards" or "foreign awards". Mr. Sen admits that provisions of Part II makes it clear that "foreign awards" are only those where the arbitration takes place in a convention country. Awards in arbitration proceedings which take place in a non-convention country are not considered to be "foreign awards" under the said Act. They would thus not be covered by Part II. An award passed in an arbitration which takes place in India would be a "domestic award". There would thus be no need to define an award as a "domestic award" unless the intention was to cover awards which would otherwise not be covered by this definition. Strictly speaking an award passed in an arbitration which takes place in a non-convention country would not be a "domestic awards". Thus the necessity is to define a "domestic award" as including all awards made under Part I. The definition indicates that an award made in an international commercial arbitration held in a non-convention country is also considered to be a "domestic award".

26. Mr. Sen had also submitted that Part II, which deals with enforcement of foreign awards does not contain any provision similar to Section [9](#) or Section [17](#). As indicated earlier Mr. Sen had submitted that this indicated the intention of Legislature not to apply Sections [9](#) and [17](#) to arbitrations, like the present,

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

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.

96. In case of **Venture Global Engineering (supra)** Supreme Court followed its earlier judgment in case of **Bhatia International (supra)**. In that matter, the learned arbitrator made an award who was appointed by London Court of International Arbitration. The successful party filed a petition for enforcement of the award before the United States District Court, Michigan which was objected to by the respondent by raising objections in the said petition before United States District Court. The respondent also filed a separate suit in the City Civil Court at Secunderabad for a declaration and for setting aside the award. A issue of jurisdiction was raised in that petition. In paragraph 33 of the judgment of the Supreme Court in case of **Venture Global Engineering (supra)** after adverting to the judgment of **Bhatia International (supra)** it is held that it would be open to the parties to exclude the application of the provisions of Part I by express or implied agreement, would mean that otherwise the whole of Part I would apply. It is held that to apply section 34 to foreign international award would not be inconsistent with section 48 of the Act or any of the provisions of Part II as a situation may arise. Paragraphs 33, 35 and 37 of the said judgment in case of venture global read thus :-

33. The very fact that the judgment holds that it would be open to the parties to exclude the application of the provisions of Part I by express or implied agreement, would mean that otherwise the whole of Part I would apply. In any event, to apply Section [34](#) to foreign international awards would not be inconsistent with Section [48](#) of the Act, or any other provision of Part II as a situation may arise, where, even in respect of properties situate in India and where an award would be invalid if opposed to the public policy of India, merely because the judgment-debtor resides abroad, the award can be enforced against properties in India through personal compliance of the judgment-debtor and by holding out the threat of contempt as is being sought to be done in the present case. In such an event, the judgment-debtor cannot be deprived of his right

under Section [34](#) to invoke the public policy of India, to set aside the award. As observed earlier, the public policy of India includes - (a) the fundamental policy of India; or (b) the interests of India; or (c) justice or morality; or (d) in addition, if it is patently illegal. This extended definition of public policy can be by-passed by taking the award to a foreign country for enforcement.

35. As rightly pointed out the effort of respondent No.1 was to avoid enforcement of the Award under Section [48](#) of the 1996 Act which would have given the appellant herein the benefit of the Indian Public Policy rule based on the judgment in the **Saw Pipes case (supra)** and for avoiding the jurisdiction of the Courts in India though the award had an intimate and close nexus to India in view of the fact that, (a) the company was situated in India; (b) the transfer of the "ownership interests" shall be made in India under the laws of India as set out above; (c) all the steps necessary have to be taken in India before the ownership interests stood transferred. If, therefore, respondent No.1 was not prepared to enforce the Award in spite of this intimate and close nexus to India and its laws, the appellant herein would certainly not be deprived of the right to challenge the award in Indian Courts.

37. In view of the legal position derived from **Bhatia International** (supra), 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 concerned court 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 Section [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** (supra) the issue relates to filing a petition under Section [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.

97. Supreme Court in case of *Videocon Ltd. (supra)* has interpreted the judgment of Supreme Court in case of *Bhatia International* and has held that the provisions of Part-I of the Arbitration & Conciliation Act would apply to international commercial arbitration held outside India unless the parties by agreement, express or implied, exclude all or any of its provisions. In paragraph 33 of the said order it is held that the parties had agreed that notwithstanding Article 31.1, the arbitration contained in Article 34 shall be governed by laws of England which necessary implies that the parties had agreed to exclude the provisions of Part-I of the Act. Under Article 33.1 of the agreement parties have expressly agreed that the laws applicable to the contract would be the laws of England. The agreement was executed in India. Under Art. 34.1.2 the parties had agreed that the venue of the arbitration unless the parties otherwise agrees shall be Kuala Lumpur Malasia and the agreement shall be governed by the laws of England.

98. The respondent in that case had filed a petition before Delhi High Court under Section 9 for stay of arbitral proceedings and filed another proceedings questioning the award on the issue of exchange rate. The appellant had objected to the maintainability of application under Section 9 on the ground that the Courts in India did not have jurisdiction to entertain challenge to the arbitral award. The learned single Judge of the Delhi High overruled the objection of the respondent and held that it has the jurisdiction to entertain the petition filed under Section 9 of the Act. Considering these facts, Supreme Court held that notwithstanding clause 33 which provided that the contract shall be governed by Indian law, parties

had also agreed that arbitration agreement contained under Article 34 shall be governed by the laws of England which necessarily implied that the parties have excluded the provisions of Part I of the Act and as a corollary to the said conclusion it is held that the Delhi High Court did not have the jurisdiction to entertain the petition filed by the respondents under Section 9 of the Act. It is also held that the mere fact that the appellant had earlier filed similar petition was not sufficient to clothe that High Court with the jurisdiction to entertain the petition filed by the respondents. Paragraph 26 and 33 of the Judgment of Supreme Court in case of **Videocon Industries (supra)** reads thus :

*26. The three Judge Bench recorded its conclusion in the following words : (Bhatia International case :*

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

*33. In the present case also, the parties had agreed that notwithstanding Article 33.1, the arbitration agreement contained in Article 34 shall be governed by laws of England. This necessarily implies that the parties had agreed to exclude the provisions of part I of the Act. As a corollary to the above conclusion, we hold that the Delhi High Court did not have the jurisdiction to entertain the petition filed by the respondents under Section 9 of the Act and the mere fact that the appellant had earlier filed similar petitions was not sufficient to clothe that High Court with the jurisdiction to entertain the petition filed by the respondents.*

99. In case of ***Yograj Infrastructure (supra)*** Supreme Court has held that, in the said matter the parties had agreed that all the disputes, differences shall be referred to arbitration and proceedings shall be in accordance with Singapore International Arbitration Rules and the arbitration shall take place in Singapore. The agreement also provided that the agreement shall be subject to the laws of India. Considering these provisions of the agreement, Supreme Court held that it was no longer available to the appellant to contend that the “proper law” of the agreement would apply to the arbitration proceedings. After advertng to the earlier judgment in case of ***Bhatia International (supra)*** and ***Venture Global (supra)*** it is held that the said judgments would have no application once the parties agreed by virtue of Clause 27.1 of the agreement that the arbitration proceeding would be conducted in Singapore i.e. the seat of arbitration would be in Singapore. Rule 32 of the Singapore Arbitration Centre Rules provided that the law of arbitration would be the International Arbitration Act, 2002, where the seat of arbitration is in Singapore. It is held by the Supreme Court that once the parties had specifically agreed that the arbitration proceedings would be conducted in accordance with the SIAC Rules, the decision in ***Bhatia International*** and the subsequent decisions on the same lines, would no longer apply in that case where the parties had willingly agreed to be governed by the SIAC Rules. Supreme Court also held that in so far as Section 42 of the Act is concerned, the same was applicable at the pre-arbitral stage, when the arbitrator had not been appointed. Once the arbitrator was appointed and the arbitration proceeding were commenced, the SIAC Rules become applicable shutting out the applicability of Section 42 and for that matter Part I of the 1996 Act including the right of appeal under Section 37 thereof. Paragraphs 46 to 59 of the said judgment which are relevant read thus :

46. *In order to appreciate the controversy that has arisen regarding the applicability of the provisions of Part I of the Arbitration and Conciliation Act, 1996, to the proceedings*

*being conducted by the Arbitrator in Singapore in accordance with the SIAC Rules, it would be necessary to look at the arbitration clause contained in the agreement entered into between the parties on 13<sup>th</sup> August, 2006. Clause 27 of the Agreement provides for arbitration and reads as follows:*

*27. Arbitration.*

*27.1 All disputes, differences arising out of or in connection with the Agreement shall be referred to arbitration. The arbitration proceedings shall be conducted in English in Singapore in accordance with the Singapore International Arbitration Centre (SIAC) Rules as in force at the time of signing of this Agreement. The arbitration shall be final and binding.*

*27.2 The arbitration shall take place in Singapore and be conducted in English language.*

*27.3 None of the Party shall be entitled to suspend the performance of the Agreement merely by reason of a dispute and/or a dispute referred to arbitration.*

*48. Clause 28 of the Agreement describes the governing law and provides as follows:*

*This agreement shall be subject to the laws of India. During the period of arbitration, the performance of this agreement shall be carried on without interruption and in accordance with its terms and provisions.*

*49. As will be seen from Clause 27.1, the arbitration proceedings are to be conducted in Singapore in accordance with the SIAC Rules as in force at the time of signing of the agreement. There is, therefore, no ambiguity that the procedural law with regard to the arbitration proceedings, is the SIAC Rules. Clause 27.2 makes it clear that the seat of arbitration would be Singapore.*

*50. What we are, therefore, left with to consider is the question as to what would be the law on the basis whereof the arbitral*

*proceedings were to be decided.*

51. In our view, Clause 28 of the Agreement provides the answer. As indicated hereinabove, Clause 28 indicates that the governing law of the agreement would be the law of India, i.e., the Arbitration and Conciliation Act, 1996. The learned Counsel for the parties have quite correctly spelt out the distinction between the "proper law" of the contract and the "curial law" to determine the law which is to govern the arbitration itself. While the proper law is the law which governs the agreement itself, in the absence of any other stipulation in the arbitration clause as to which law would apply in respect of the arbitral proceedings, it is now well-settled that it is the law governing the contract which would also be the law applicable to the Arbitral Tribunal itself. Clause 27.1 makes it quite clear that the Curial law which regulates the procedure to be adopted in conducting the arbitration would be the SIAC Rules. There is, therefore, no ambiguity that the SIAC Rules would be the Curial law of the arbitration proceedings. It also happens that the parties had agreed to make Singapore the seat of arbitration. Clause 27.1 indicates that the arbitration proceedings are to be conducted in accordance with the SIAC Rules.

52. The immediate question which, therefore, arises is whether in such a case the provisions of Section [2\(2\)](#), which indicates that Part I of the above Act would apply, where the place of arbitration is in India, would be a bar to the invocation of the provisions of Sections [34](#) and [37](#) of the Act, as far as the present arbitral proceedings, which are being conducted in Singapore, are concerned.

53. In Bhatia International (supra), wherein while considering the applicability of Part I of the 1996 Act to arbitral proceedings where the seat of arbitration was in India, this Court was of the view that Part I of the Act did not automatically exclude all foreign arbitral proceedings or awards, unless the parties specifically agreed to exclude the same.

54. As has been pointed out by the learned Single Judge in the order impugned, the decision in the aforesaid case would not have any application to the facts of this case, inasmuch as, the

parties have categorically agreed that the arbitration proceedings, if any, would be governed by the SIAC Rules as the Curial law, which included Rule 32, which categorically provides as follows:

“32. Where the seat of arbitration is Singapore, the law of the arbitration under these Rules shall be the International Arbitration Act (Cap. 143A, 2002 Ed, Statutes of the Republic of Singapore) or its modification or reenactment thereof.

55. Having agreed to the above, it was no longer available to the Appellant to contend that the "proper law" of the agreement would apply to the arbitration proceedings. The decision in Bhatia International v. Bulk Trading S.A. [MANU/SC/0185/2002](#) : (2002) 4 SCC 105, which was applied subsequently in the case of Venture Global Engg. v. Satyam Computer Services Ltd. [MANU/SC/0333/2008](#) : (2008) 4 SCC 190 and Citation Infowares Ltd. v. Equinox Corporation [MANU/SC/0836/2009](#) : (2009) 7 SCC 220, would have no application once the parties agreed by virtue of Clause 27.1 of the Agreement that the arbitration proceedings would be conducted in Singapore, i.e., the seat of arbitration would be in Singapore, in accordance with the Singapore International Arbitration Centre Rules as in force at the time of signing of the Agreement.

56. As noticed hereinabove, Rule 32 of the SIAC Rules provides that the law of arbitration would be the International Arbitration Act, 2002, where the seat of arbitration is in Singapore. Although, it was pointed out on behalf of the Appellant that in Rule 1.1 it had been stated that if any of the SIAC Rules was in conflict with the mandatory provision of the applicable law of the arbitration, from which the parties could not derogate, the said mandatory provision would prevail, such is not the case as far as the present proceedings are concerned.

57. In the instant case, Section [2\(2\)](#) of the 1996 Act, in fact, indicates that Part I would apply only in cases where the seat of arbitration is in India. This Court in Bhatia International (supra), while considering the said provision, held that in

*certain situations the provision of Part I of the aforesaid Act would apply even when the seat of arbitration was not in India.*

*58. In the instant case, once the parties had specifically agreed that the arbitration proceedings would be conducted in accordance with the SIAC Rules, which includes Rule 32, the decision in Bhatia International and the subsequent decisions on the same lines, would no longer apply in the instant case where the parties had willingly agreed to be governed by the SIAC Rules.*

*59. With regard to the effect of Section [42](#) of the Arbitration and Conciliation Act, 1996, the same, in our view was applicable at the pre-arbitral stage, when the Arbitrator had not also been appointed. Once the Arbitrator was appointed and the arbitral proceedings were commenced, the SIAC Rules became applicable shutting out the applicability of Section [42](#) and for that matter Part I of the 1996 Act, including the right of appeal under Section [37](#) thereof.*

100. In my view the judgment in case of **Yograj Infrastructure (supra)** squarely apply to the facts of this case. In this case the parties have agreed that the agreement which was entered into London shall be governed by and construed in accordance with English law and the disputes shall be referred to arbitration in London. The arbitration proceedings were also held at London. In my view, the parties have thus, by agreement, have excluded the applicability of entire Part-I including Sec. 34 of the Arbitration & Conciliation Act 1996.

101. A perusal of judgment of Supreme Court in case of **Bhatia International (supra)** it clearly indicates that in cases of international commercial arbitration held outside India, provisions of Part-I would apply unless the parties by agreement expressly or impliedly excluded all or any of the provisions and in that case, the laws and rules chosen by the parties would prevail. Since in this case,

both the parties had agreed that the main agreement as well as arbitration agreement both would be subject to English laws and seat of the arbitration was London, Part-I is impliedly excluded. This case, in my view, would fall in the exception carved out by the Supreme Court in case of ***Bhatia International*** in view of the agreement between the parties.

102. Division Bench of this Court in case of ***Sakuma Exports Ltd. (supra)*** after adverting to the Judgments of Supreme Court in case of ***Bhatia International (supra)***, ***BALCO (supra)***, ***Sumitomo and NTPC (supra)*** has held that an express agreement excluding the applicability of provisions of Part-I is where the parties to the agreement specifically and categorically provide that some or all provisions of Part-I shall exclude but parties may by implied agreement exclude all or any of its provisions as well. Division Bench has held that the Judgment of Supreme Court in case of ***Sumitomo Heavy Industries Vs. ONGC Ltd. (1998) 1 Supreme Court Cases 305***, has held that the authority for the principle that the law which would apply to the enforcement of the award and for an action questioning the validity of the award would be the law governing the agreement to arbitrate and the performance of that agreement. It is held that the decision of Supreme Court in ***Bhatia International (supra)*** does not affect the validity of these principles which have been enunciated in the Judgment in case of ***NTPC and Sumitomo (Supra)***. After adverting to the Judgment of Supreme Court in case of ***Yograj (supra)*** it is held by the Division Bench that in an application for challenging the validity of an arbitral award under Section 34, the Court would necessarily have to revert to the law governing the arbitration agreement, which would be the law of England in view of the agreement expressly arrived at between the parties. This Court has accordingly held that this Court has no jurisdiction to entertain the petition under Section 34 of the Act challenging an international commercial award of an arbitral

tribunal constituted by Refined Sugar Association of London. Paragraphs 3, 8, 9, 10, 13, 18 to 21 of the judgment of Division Bench read thus :

*3. The Appellant is an Indian Company which carries on the business of import and export of sugar among other commodities. The Respondent is a Swiss Company with whom the Appellant entered into an agreement on 12 January 2010 for the purchase of 2700 metric tons of Brazilian white sugar of a stipulated description. The sugar was to be shipped between 15 January 2010 and 15 February 2010 at the option of the seller, the Respondent. The port of destination was to be Nhava Sheva or Kolkata at 2 (2002) 4 SCC 105 at para 32 page 123 the option of the Appellant. Disputes arose between the parties. The agreement between the parties contained inter alia the following terms and conditions:*

*“Terms and conditions:*

*This Contract is subject to the Rules of The Refined Sugar Association, London as fully as if the same had been expressly inserted herein, whether or not either or both parties to it are Members of the Association.*

*If any provision of this Contract is inconsistent with the Rules, such provision shall prevail.”*

*Parties envisaged that all disputes would be submitted to arbitration. The arbitration agreement was thus:*

*“Arbitration : All disputes arising out of or in conjunction with this Contract shall be referred to The Refined Sugar Association, London for settlement in accordance with the Rules relating to Arbitration. This Contract shall be governed by and construed in accordance with English Law.”*

*A final award was passed by the arbitral tribunal on 31 December 2010 which was sought to be challenged by the Appellant in proceedings under Section 34 of the Act of 1996 before the Learned Single Judge of this Court. An objection was taken to the jurisdiction of this Court to entertain the petition on the ground that the applicability of Part-I of the Act was excluded by the agreement between the parties and consequently even under the law as it then prevailed in Bhatia International, a Petition under Section 34 was not maintainable. The Learned Single Judge has upheld the objection and has come to the conclusion that this Court has no jurisdiction to entertain a challenge to the award under Section 34. The judgment is called in question in appeal.*

8. *Bhatia International* held that: (i) Part-I of the Act of 1996 would apply to arbitration held in India and parties would be free to derogate only to the extent to which this was permissible under the relevant provisions of Part- I; and (ii) In cases of international commercial arbitration held out of India, Part-I would apply unless parties by agreement, express or implied, exclude any of its provisions. The observation in *Bhatia International* is to the following effect :

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

The crucial words upon which the submissions in the appeal turn, are “unless the parties by agreement, express or implied, exclude all or any of its provisions”. These observations of the Supreme Court would indicate that for Part-I not to apply to an international commercial arbitration held out of India, the parties must exclude by their agreement, which may be either express or implied, all or any of its provisions. An express agreement excluding the applicability of the provisions of Part-I is where the parties in their agreement specifically and categorically provide that some or all of the provisions of Part-I shall have no application. But parties, in addition, may by implied agreement exclude all or any of its provisions as well. Something which is implied is obviously something that is not expressly provided to govern in certain events, and it is for the Court to determine whether the parties in the terms of the contract that they have adopted intended to exclude the applicability of Part-I. The submission of the Appellant is that before the Court can draw an inference of an implied exclusion, there must, by the agreement of the parties, be a specific incorporation of a foreign law either in the agreement to arbitrate or in the curial law governing the conduct of the arbitration. It is to this aspect that we now turn.

9. Where parties to an international commercial agreement enter into

*contractual dealings, the foreign element involved in the contract may be regulated by three systems of law. This is indicated in the locus classicus on the subject which is the judgment of the Court of Appeal in the U.K. In Naviera Amazonica Peruana SA vs. Compania International De Seguros Del Peru.<sup>7</sup> The Court of Appeal adverted to three potentially relevant systems of law thus:*

*“A. All contracts which provide for arbitration and contain a foreign element may involve three potentially relevant systems of law. (1) The law governing the substantive contract. (2) The law governing the agreement to arbitrate and the performance of that 7 (1988) 1 Lloyd's Rep 116 CA agreement. (3) The law governing the conduct of the arbitration.*

*In the majority of cases all three will be the same. But (1) will often be different from (2) and (3). And occasionally, but rarely, (2) may also differ from (3).”*

*Mustill and Boyd in their Law and Practice of Commercial Arbitration in England adverted to (i) The proper law of the contract; (ii) The proper law of the arbitration agreement; and (iii) The curial law :*

*“It may be therefore be seen that problems arising out of an arbitration may, at least in theory, call for the application of any one or more of the following laws-*

*-1. The proper law of the contract, i.e. the law governing the contract which creates the substantive rights of the parties, in respect of which the dispute has arisen.*

*-2. The proper law of the arbitration agreement, i.e., the law governing the obligation of the parties to submit the disputes to arbitration, and to honour an award. -3. The curial law, i.e., the law governing the conduct of the individual reference.”*

*10. The principle of party autonomy in an international commercial agreement may lead to the contract incorporating provisions on all these three aspects. The first is the governing law of the contract which defines the substantive rights and obligations of the parties. The second is the law which governs the arbitration agreement. This includes questions as to whether the dispute is arbitrable; the jurisdiction of the arbitral tribunal to make an award and the validity of the award itself. The third aspect is the curial law of arbitration which governs the manner in which the arbitrator would conduct the arbitral proceedings and would extend to procedural matters and the regulation of the conduct of the arbitration. Questions of evidence*

would fall within that description. The curial law governs the conduct of the arbitral 8 Second Edition proceedings until an award is finally made by the arbitral tribunal. Parties to a transnational commercial contract may in the course of negotiation decide upon the applicability of a system of law on all three aspects. It is not necessary that parties must abide by the same system of law on all the three aspects. The governing law of the contract may be the law of a particular jurisdiction. On the other hand, the law governing the arbitration agreement and the curial law governing the conduct of arbitral proceedings may not necessarily be the same as the law governing the substantive obligations of the parties under the contract. Moreover, as between the law governing the arbitration agreement (the proper law governing the arbitration) and the curial law, parties may not necessarily choose the same system of law to apply.

13. *Sumitomo* is, therefore, authority for the principle that the law which would apply to the enforcement of the award and for an action questioning the validity of the award would be the law governing the agreement to arbitrate and the performance of that agreement. *NTPC*, as noted above, affirms the principle that choice of a proper law of contract implies, in the absence of an unmistakable intention to the contrary, the choice of the same law as the proper or governing law of the arbitration agreement. The decision in *Bhatia International* does not affect the validity of these principles which have been enunciated in the judgment in *NTPC* and in *Sumitomo*. In fact, the Supreme Court in *Bhatia International* was not dealing with either of the two issues, namely, (i) whether the choice of the governing law of the arbitration agreement, would follow from the choice of the proper law of contract. or (ii) which law would apply to the challenge of an arbitral award, whether the law governing the arbitration agreement or the curial law relating to the conduct of the arbitration. The issue before the Supreme Court in *Bhatia International* was whether or not Part-I would apply to a foreign seated international commercial arbitration. *Bhatia International* hence, did not affect or overrule the fundamental premise of the two decisions in *NTPC* and *Sumitomo* referred to above. These principles postulate that parties to an international commercial arbitration in making a choice as regards the substantive law governing the arbitration agreement and the curial law governing the conduct of the arbitration, may do so either expressly or by

*implication. If an express choice is made by the parties, that is a matter which is self evident. But even in the absence of an express choice by the parties in regard to the substantive law governing the arbitration agreement or curial law, when the proper law of contract has been specifically chosen that law would, in the absence of an unmistakable intention to the contrary govern the arbitration agreement. The law which governs an action for setting aside or questioning the validity of an award in an international commercial arbitration would be the law governing the agreement to arbitrate and the performance of that agreement. Bhatia International has not overturned these principles.*

*18. In Videocon Industries Ltd. vs. Union of India,<sup>21</sup> the issue <sup>20</sup>At para 7 page 425 21AIR 2011 SC 2040 related to the applicability of the provisions of Section 9 of the Act of 1996 to a case involving an international commercial agreement where (i) The proper law of the contract was Indian law; (ii) The seat of the arbitration was Kuala Lumpur, Malaysia; and (iii) The arbitration agreement was to be governed by English law. The Supreme Court held that a change of the venue would not result in a change of the seat of arbitration and referred to the decision in Dozco (supra). The Supreme Court affirmed the view in a judgment of a Learned Single Judge of the Gujarat High Court in Hardly Oil and Gas Limited vs. Hindustan Oil Exploration Company Limited.<sup>22</sup> Hardly Oil involved a case where the substantive law governing the contract was Indian law; the law governing the arbitration agreement was to be English law and the seat of the arbitration was London with the rules of the London Court of International Arbitration governing the arbitration. The Gujarat High Court held in those facts that there was a specific provision that the law governing the arbitration would be English law and hence, Part-I would stand excluded. The Bench of two learned Judges of the Supreme Court affirmed the correctness of the view of the learned Single Judge of the Gujarat High Court. In the case at hand, it was held that parties had agreed that the arbitration agreement shall be governed by the law of England which necessarily implied that they had agreed to exclude the provisions of Part-I.*

*19. Finally, we may refer to a decision of two learned Judges of the Supreme Court in Yograj Infrastructure Limited vs. Ssang Yong Engineering and Construction Company Limited,<sup>23</sup> where the*

substantive law governing the arbitration agreement was Indian law while the seat of the arbitration was Singapore, with the arbitration being governed by the Law of Singapore (the reference to SIAC rules in the original order was later corrected in a clarificatory order of the Supreme Court in *Yograj Infrastructure Limited vs. Ssang Yong Engineering and Construction Company Limited.*)<sup>24</sup> The Supreme Court held as follows:

“As indicated hereinabove, Clause 28 indicates that the governing law of the agreement would be the law of India i.e. the Arbitration and Conciliation Act, 1996. The learned counsel for the parties have quite correctly spelt out the distinction between the “proper law” of the contract and the “curial law” to determine the law which is to govern the arbitration itself. While the proper law is the law which governs the agreement itself, in the absence of any other stipulation in the arbitration clause as to which law would apply in respect of the arbitral proceedings, it is now well settled that it is the law governing the contract which would also be the law applicable to the arbitral tribunal itself. Clause 27.1 makes it quite clear that the curial law which regulates the procedure to be adopted in conducting the arbitration would be the SIAC Rules. There is, therefore, no ambiguity that the SIAC Rules would be the curial law of the arbitration proceedings. It also happens that the parties had agreed to make Singapore the seat of arbitration. Clause 27.1 indicates that the arbitration proceedings are to be conducted in accordance with the SIAC Rules.”

20. In the present case, the parties have specifically made their contract subject to the rules of the Refined Sugar Association, London. Leaving no ambiguity of interpretation the contract mandates that the rules of the Refined Sugar Association, London are incorporated “as fully as if the same has been expressly inserted” in the contract. The governing law of the contract is English law. All disputes arising out or in conjunction with the contract were to be referred to the Refined Sugar Association for settlement in accordance with the rules relating to arbitration of the Association. The law in the U.K. is, therefore, the substantive law of the contract. The seat of the arbitration is in the U.K. Parties have made it clear that the rules of the Refined Sugar Association would govern the resolution of their disputes. Rule 8 of the Rules of the Refined Sugar Association (on which there is no dispute between the parties during the course of the hearing of the

appeal) provides as follows:

*“8. For the purpose of all proceedings in arbitration, the contract shall be deemed to have been made in England, any correspondence in reference to the offer, the acceptance, the place of payment or otherwise, notwithstanding, and England shall be regarded as the place of performance. Disputes shall be settled according to the law of England wherever the domicile, residence or place of business of the parties to the contract may be or become. The seat of the Arbitration shall be England and all proceedings shall take place in England. It shall not be necessary for the award to state expressly the seat of the arbitration.”* The terms of the purchase contract as well as Rule 8 of the Rules of the Refined Sugar Association would make it clear that disputes shall be settled in accordance with the law of England wherever the domicile, residence or place of business of parties to the contract may be or become. Moreover, for the purposes of all proceedings in arbitration, the contract shall be deemed to have been made in England and England shall be regarded as the place of performance. The seat of the arbitration shall be England and all proceedings shall take place in England. On the basis of these provisions, it has been submitted that parties have, by the terms of their agreement, impliedly excluded the provisions of Part-I. We find merit in the submission. It is clear from the terms and conditions which have been accepted by the parties in the purchase contract, read with Rule 8 that parties have accepted English law as the governing law of the contract; that the seat of the arbitration would be London; that disputes shall be settled according to the law of England which would include the resolution of disputes and that all proceedings shall take place in England. Alternatively, even if it were to be held that parties have not provided for the curial law governing the arbitration, the decision in *Bhatia International* does not prohibit the exclusion of the application of Part-I on account of the proper law of the contract being a foreign law. Where the proper law governing the contract is expressly chosen by the parties, which they have done in the present case by selecting English law as the proper law of the contract, that law must, in the absence of an unmistakable intention to the contrary, govern the arbitration agreement. The arbitration agreement, though it is collateral or ancillary to the main contract is nevertheless a part of the contract. In an application for challenging the validity of an arbitral award under Section 34, the Court would necessarily have to revert to the law governing the arbitration

*agreement, which, in our considered view, would be the law of England.*

*21. In this view of the matter and for the reasons that we have indicated, we have come to the conclusion that this Court has no jurisdiction to entertain the petition under Section 34 of the Arbitration and Conciliation Act, 1996, challenging an international commercial award of an arbitral tribunal constituted by the Refined Sugar Association, London. The judgment of the Learned Single Judge does not suffer from any error. The appeal is accordingly dismissed. There shall be no order as to costs.*

103. In my view the judgment of Division Bench of this Court in case of ***Sakuma Exports Ltd. (supra)*** which is rendered after considering the judgments of Supreme Court in various judgments referred to aforesaid is squarely applicable to the facts of this Case. It is not in dispute that the arbitration was held at London and the main agreement as well as arbitration agreement was subject to laws of England. In my view, the parties by implied agreement have excluded applicability of entire Part-I of Act including Section 34. In my view, arbitration petition filed by the respondent under Section 34 for impugning the foreign award is thus not maintainable in this Court.

104. This Court in its judgment delivered on 22/01/2014 in case of ***HSBC PI Holdings (Mauritius) Ltd Vs. Avitel Post Studioz Ltd.***, after considering the judgment of Supreme Court in case of ***Bhatia International, Sumitomo Heavy Industries, NTPC and Bharat Aluminium (supra)*** has held that in so far as applicability of the law of governing based on arbitration is concerned, the seat of arbitration would determine the governing law of arbitration agreement. Since, in this case, the parties have agreed that the law of arbitration agreement would be law of England and seat of arbitration was London, this Court, in my view, has no

territorial jurisdiction to entertain the petition under Section 34 for impugning such foreign award. Paragraphs 73 to 76 of the judgment of this Court which are relevant for the purpose of deciding this petition and apply to the facts of this case read thus :

73. *It is not in dispute that petitioner had invoked arbitration agreement which was forming part of the agreement entered into between the parties. On perusal of clause 15 of the agreement, it is clear that it was not intended by the parties that the Indian law would apply to the main agreement as well as to the arbitration agreement. Admittedly arbitration proceedings were held at Singapore in accordance with Singapore International Arbitration Rules. Respondents have participated in the said proceedings before the Arbitral Tribunal. It is also not in dispute that the parties had agreed that the seat of arbitration shall be at Singapore. In my view, agreement to arbitrate at Singapore has a closer and real connection with the place where the parties had chosen to arbitrate. Arbitration agreement would be thus governed by the law of Singapore and not Indian law. In my view principles of law laid down by the Supreme Court in case of **Sumitomo Heavy Industries Ltd. (supra)** and in case of **National Thermal Power Corporation (supra)**, shall be squarely applicable to the facts of this case. Judgment of the Supreme Court in case of **Bharat Aluminium (supra)**, has been interpreted by the Division Bench of this court in case of **Konkola Copper Mines (PLC) (supra)** in which it is held by the Division Bench of this court that the entire judgment of the Supreme Court in case of **Bharat Aluminium (supra)**, would not apply with prospective effect. It is held that in so far as applicability of the law of governing based on arbitration is concerned, the seat of the arbitration agreement would determine the governing law of arbitration agreement. In this case also the express choice of the parties was that seat of the arbitration would be at Singapore and thus in my view, the seat of the arbitration would govern by law of agreement i.e. law of Singapore and not Indian law in this case. I am respectfully bound by the judgment of the Supreme Court in case of **Sumitomo Heavy Industries Ltd. (supra)**, in case of **National Thermal Power Corporation (supra)** and judgment of the Division Bench of this court in case of **Konkola Copper Mines (PLC) (supra)** which in my view squarely apply to the facts of this case.*

74. In my view judgment of Supreme Court in case of **National Thermal Power Corporation (supra)** is of no assistance to the respondents but assist the case of the petitioner. In view of the aforesaid reasons, I am of the view that there is no merits of the submission of the learned senior counsel for the respondents that clause 16.4 of the agreement does not oust Indian law. In my view issue of arbitrability has to be decided under the law of arbitration agreement which is law of Singapore in this case and thus whether dispute raised by the petitioner was arbitrable or not would have been decided as per law of Singapore and not as per Indian Law. In my view, since there is no dispute that allegations of fraud, forgery and fabrication etc. can be decided under the laws of Singapore by the learned tribunal, there is no merit in the submission of Mr.Rohatgi, learned senior counsel that such issue has to be decided only as per Indian law.

75. The next submission of Mr.Rohatgi, on this issue was that if any award is passed by the arbitral tribunal, the same would have to be brought in India for enforcement and would be subjected to the Indian legal process and as per Indian law, since allegations of fraud, fabrication and forgery cannot be decided by arbitrator, such award would not be enforceable in India under Indian law.

76. It is not in dispute that the arbitral tribunal which has held hearing at Singapore and has applied laws of Singapore has rendered a jurisdictional award in this matter. The arbitral tribunal has considered the objections raised by the respondents herein that the arbitral tribunal did not have jurisdiction to decide the allegations to forgery, fraud and fabrication and has rendered the jurisdictional award holding that under law of Singapore, the arbitral tribunal has jurisdiction to decide such allegations. Admittedly the respondents have not challenged the said jurisdictional award in any proceedings at Singapore under the laws of Singapore. Question that arises is whether such jurisdictional award can be relied upon in this proceedings by the petitioner in view of the respondents not having challenged the said jurisdictional award rejecting the plea of jurisdiction raised by the respondents, without filing an application for enforcement of the said award. Question also arises is that whether present petition filed under section 9 of the Arbitration and Conciliation Act, 1996 is an application for enforcement of the

*jurisdictional award, interim award or is simplicitor for interim measures against the respondents independently. Submission of the respondents is that if as per law of India, if final relief cannot be enforced in India in view of the subject matter of the difference being not capable of settlement by arbitration under the law of India or if enforcement of the award would be contrary to public policy of India, interim measures in that situation can not be granted by this court under section 9 of the Act.*

105. In my view, the law of arbitration agreement, which in this case, is law of England, would apply to the application for impugning the foreign arbitral award. The Arbitration Act 1996 (English Arbitration) would apply also since the seat of arbitration was in England at Wales and Northern Ireland which provides for a remedy to impugn an arbitral award, which the respondent has failed to avail of. This petition is thus not maintainable in this Court and deserves to be rejected.

106. This Court shall now decide the effect of the order passed by this Court in the arbitration application filed under Section 9 by the claimant and also the effect of the order passed by the appeal court in the appeal filed by the respondent in view of the submissions made by the respondent that in view of such petition filed in this Court, Part-I of the Act including Section 34 for impugning the foreign arbitral award would apply.

107. In so far as judgment of learned single Judge of this Court in case of ***E City entertainment (I) Pvt. Ltd. vs. Imax Corporation (supra)*** is concerned, the parties had agreed that the agreements shall be governed and construed by the laws of Singapore and the parties attorn to the jurisdiction of the Courts of Singapore. Disputes shall be settled by arbitration pursuant to the ICC Rules of arbitration. The seat of arbitration was in England. The agreement was executed

at Mumbai. The contract was to be performed in India. This Court held that the venue itself is not the decisive factor to exclude Part-I of the Arbitration Act. The learned single Judge of this Court in the said judgment has not considered the judgments of Supreme Court in case of *Yograj Infrastructure (supra)* and the judgment of Division Bench in case of *Sakuma Exports Ltd.* interpreting various judgments including judgment of *Yograj (supra)*. In my view, in view of the judgments of Supreme Court in case of *Yograj (supra)* and in view of judgment of Division Bench of this Court in case of *Sakuma Exports Ltd.(supra)* judgment of the learned Single Judge taking a different view without referring to and without following those judgments thus would not be binding on this Court and is of no assistance to the respondent. Even otherwise the said judgment is clearly distinguishable in the facts of this case.

108. In so far as reliance placed by the learned senior counsel for the respondent in case of *Kanoria and others vs. Guinness* reported in *(2006) 1 Llyod's Law Reports 701* in support of the submission that though petition under section 34 challenging a foreign award in India had failed, English Court of Appeal had refused to enforce foreign award on the ground that aggrieved party who was not given due notice of plea of fraud and was unable to represent its case is concerned, a perusal of the judgment indicates that the Court of Appeal had rendered a finding that the aggrieved party who was unable to represent its case and had refused to enforce the foreign award. In my view the facts of that case as well as the provisions considered by the Court of Appeal were totally different and the said judgment is distinguishable with the facts of this case.

109. In so far as judgment of Division Bench of this court relied upon by Mr.D'vitre learned senior counsel in case of *Jindal Drugs Limited vs. Noy*

**Vallesina Engineering SpA, and others** delivered on 28<sup>th</sup> April, 2008 in Appeal No. 519 of 2002 is concerned, the said judgment is delivered prior to the judgment of the Supreme Court in case of **Sumitomo Heavy Industries Ltd. (supra)**, **Yograj Infrastructure Limited (supra)**, **Bharat Aluminium Company Ltd. (supra)** and judgment of this court delivered by division bench in case of **Sakuma Exports Limited (supra)**. This court will have to consider the later judgment taking a different view in the matter and that also by the supreme court. The judgment of division bench of this court in case of **Jindal Drugs Limited (supra)** is of no assistance to the respondent.

110. Learned counsel appearing for parties invited my attention to various paragraphs of the order passed by the learned single Judge and also the Division Bench in support of their respective plea and also relied upon various judgments on the issue of *res judicata* and *estoppel*.

111. It is not in dispute that arbitration petition no. 490 of 2009 was filed by the claimant under section 9 for interim measures of protection pending international commercial arbitration that was to take place at London. In paragraph 44 of the said petition it was stated by the claimant that the claimant as entitled to approach this court under section 9 of the Act for appropriate interim measures of protection pending arbitration between the parties in view of the law declared by the Supreme Court in the case of **Bhatia International Limited (supra)**. Perusal of the order passed by the learned Single Judge in Petition filed under section 9 by the claimant does not indicate that the learned Single Judge has decided the issue of maintainability of the said petition or that Part I of the Arbitration and Conciliation Act was applicable to the said petition. Division Bench of this court in the appeal arising out of the said order and judgment dated 9<sup>th</sup> September, 2009

has held that the respondent has not raised an objection to the jurisdiction of the court to entertain the petition under section 9. In the affidavit filed by the respondent herein in its affidavit dated 7<sup>th</sup> December, 2013 in Arbitration Petition No. 406 of 2013 it is admitted that when the claimant applied for interim relief under section 9 of part I of the Act, the respondent herein did not dispute their right.

112. In my view thus the issue as to whether part I was applicable to the petition filed under section 9 was never tried and or decided by the learned Single Judge or by Division Bench as the same was not raised by the respondent in the said proceedings. Be that as it may, a perusal of the entire order passed by the learned Single Judge, it is clear that there was no detailed analysis or full examination and adjudication. There is no identify of cause of action in the petition filed under section 9 and a petition filed under section 34 of the Act. Petition under section 9 is for interim measures which was filed before commencement of arbitration proceedings and or during the ongoing arbitration proceedings whereas petition under section 34 is filed for impugning the arbitral award. In my view cause of action estoppel arises only if the cause of action in the later proceeding is identical to that in the earlier petition between the same parties and involves the same subject matter. Both these necessary ingredients for applicability of cause of action estoppel are absent in this case.

113. In so far as submission of the parties regarding issue estoppel is concerned, in my view, issue estoppel would arise only when a particular issue forming a necessary ingredients in a cause of action has been litigated and decided and in the subsequent proceedings between the same parties involving a different cause of action to which such issue is relevant, no parties can apply for reopening the said

issue. I am of the view that since the issue of applicability of Part I was not raised in the petition filed under section 9, the said issue was not litigated or adjudicated upon. The English court of appeal in case of ***Thoday Vs. Thoday (1964) 2 WLR 377*** has held that in a case where the cause of action of the plea in defence in the second action is precisely the same as has been raised in the previous case and where that has been the subject of a full examination and adjudication in the previous case the parties seeking to re-litigate the matter will normally be held to be estopped. Since in this case, the respondent themselves have admitted that the said issue was not raised, there was no question of there being full examination or adjudication on the issue of non applicability of part I. In my view, the issue estoppel urged by the respondent does not arise in the facts of this case.

114. In case of ***Hope Plantations Limited (supra)***, the Supreme Court has held that the parties may not be bound by the determination made earlier if in the meanwhile, the law has changed or has been interpreted differently by higher forum. Judgments of Supreme Court have subsequently in case of ***Yograj Infrastructure Limited (supra)***, ***Videocon Industries Limited*** and Division Bench of this court after adverting to subsequent judgments of Supreme Court interpreting the judgments in case of ***Videocon Industries (supra)***, ***Yograj Infrastructure (supra)*** and ***Balco (supra)*** has held that parties by either express agreement or by implied agreement may exclude the provisions of part I including section 34. In this case it is not in dispute that parties had agreed that the main agreement and the arbitration agreement would be subject to English Law and the venue of arbitration would be at London. Mr. Pratap learned senior counsel appearing for the claimant in my view is right in his submission that the order passed by this court in application under section 9 of the Arbitration & Conciliation Act, filed by the claimant would be neither in the nature of issue estoppel nor cause of action

estoppel. The issue of estoppel and res judicata as construed by the Supreme Court in *Hope Plantation (supra)* in my view would apply to the facts of this case . I am respectfully bound by the said judgment.

115. In case of *Bhanukumar Jain Versus Archana Kumar (2005) 1 SCC 787* the Supreme Court has held that a cause of action estoppel arises wherein two different proceedings identical issues are raised in which event the later proceedings between the same parties shall be dealt with similarly as was done in the previous proceedings. Paragraph 29 to 32 of the said judgment which are relevant read thus :

29. There is a distinction between 'issue estoppel' and 'res judicata' [See *Thoday v. Thoday*.

30. Res judicata debars a court from exercising its jurisdiction to determine the lis if it has attained finality between the parties whereas the doctrine issue estoppel is invoked against the party. If such an issue is decided against him, he would be estopped from raising the same in the latter proceeding. The doctrine of res-judicata creates a different kind of estoppel viz Estopper By Accord.

31. In a case of this nature, however, the doctrine of 'issue estoppel' as also 'cause of action estoppel' may arise. In *Thoday (supra)* Lord Diplock held :

"..."cause of action estoppel" is that which prevents a party to an action from asserting or denying, as against the other party, the existence of a particular cause of action, the non-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties. If the cause of action was determined to exist, i.e., judgment was given on it, it is said to be merged in the judgment....If it was determined not to exist, the unsuccessful plaintiff can no longer assert that it does; he is estopped per rem judicatam."

32. The said dicta was followed in *Barber v. Staffordshire*

Country Council. A cause of action estoppel arises where in two different proceedings identical issues are raised, in which event, the latter proceedings between the same parties shall be dealt with similarly as was done in the previous proceedings. In such an event the bar is absolute in relation to all points decided save and except allegation of fraud and collusion. [See C. (a minor) v. Hackney London Borough Council.]

116. In my view, the cause of action in application under section 9 and under section 34 are different and thus the issue estoppel or cause of action estoppel would not apply in this situation.

117. Supreme Court in case of **Gorie Gouri Naidu (supra)** has in the facts of that case held that the finding rendered by one court in the proceedings between the same parties declaring the deed of gift invalid, in the suit between the same parties, in which the same document was relied upon, even if erroneous, inter party judgment binds the party if the court of competent jurisdiction has decided the lis. In my view even if this court has erroneously entertained the petition under section 9 filed by the claimant, on the basis of judgment of Supreme Court in case of **Bhatia International (supra)** in spite of the implied agreement between the parties that the main agreement as well as arbitral agreement would be governed by the English Law and the seat of arbitration would be in London, in my view this court would not be a competent court having jurisdiction to decide the petition under section 34 merely because application under section 9 was entertained by this court in view of the parties having not raised any issue of jurisdiction and or the same not having been adjudicated upon. In my view section 42 of the arbitration and conciliation Act in this situation would not be applicable to the facts of this case. Judgment of Supreme Court in case of **Videocon Industries Ltd. (supra)** is squarely applicable to the facts of this case. In my view, judgment of Supreme

Court in case of ***Dadu Dayalu Mahasabha Jaipur (Trust) (supra)*** is applicable to the facts in this case. Judgment of the Supreme Court in case of ***Bhatia International (supra)*** has been interpreted differently in subsequent judgment referred to aforesaid.

118. I am not inclined to accept the submission of the Mr.D'vitre learned senior counsel that the claimant had invited this court to adjudicate on and determine the question of applicability of Part I to the present arbitration proceedings. In my view there is no merit in the submission of Mr.D'vitre that there was no implied agreement between the parties that Part I of the Act would not be excluded to the proceedings. The agreement entered into between the parties and more particularly Clauses 38 and 39 of the agreement dated 1st August, 2005 makes it clear that Part I of the Arbitration Act was excluded.

119. In so far as submission of Mr.D'vitre, learned senior counsel that principles and policy reflected in provisions of order 47 rule 1 sub rule 2 of the Code of Civil Procedure shall be attracted to the facts of this case is concerned, in my view since both the proceedings and the subject matter of the proceedings are different, provisions like order 47 rule 1 sub rule 2 as canvassed by the learned senior counsel would in my view cannot be attracted to this case. In my view , Mr. Pratap, learned senior counsel is right in his submission that in view of the parties having agreed that the main agreement, arbitration agreement would be governed by English law and the curial law also being English law, question of applicability of Part I did not arise. It is not the case of the resplendent herein that the petition for seeking enforcement of foreign award filed by the claimant is not maintainable under Part II of the Act. This court in case of ***M/s.Louis Drefus Commodities PTE Ltd. Vs. Govind Rubber Ltd.*** in the judgment delivered on 4<sup>th</sup> February 2013

in Arbitration Petition No. 174 of 2012 has held that foreign award is enforceable under Part II and is binding for all purposes on the parties under section 46 of the Arbitration and Conciliation Act, 1996. It is not in dispute that the awards rendered by the learned arbitrator is foreign award.

120. In my view this court has to apply the law applicable to the parties at the time of filing petition under section 34 as interpreted by the Supreme Court and this court as to whether in the fact of this case Part I of the Act would be attracted or Part II. In my view parties cannot confer jurisdiction on the court even by consent if it does not have jurisdiction to entertain a petition. Even if this court has erroneously assumed jurisdiction under a statute, it does not preclude this court from declining jurisdiction in another set of proceedings between the same parties if there are several subsequent judgments of this court and of Supreme Court clarifying the legal position in regard to the jurisdiction of the court under the statute. There is no estoppel against law.

### **INCAPACITY OF RESPONDENT**

121. In so far as objection of the respondent about alleged incapacity of the respondent relying upon section 48 (1) (a) of the act is concerned, in my view a perusal of the pleadings on record does not indicate that the respondent has either pleaded and/or raised such objections before the learned arbitrator. In my view, the incapacity of a party under section 48(1) (a) can be related to the incapacity to enter into an arbitration agreement which in this case is not attracted at all. There is thus no merit in this objection of the respondent.

### **122. WHETHER RESPONDENT WAS UNABLE TO PRESENT ITS CASE**

The learned senior counsel appearing for parties invited my attention to the

correspondence exchanged between the parties and also the minutes of the arbitration proceedings and also the ruling rendered by the learned arbitrator. It is case of the claimant that both the parties had already completed standard discovery on 18<sup>th</sup> May 2012 of the documents they placed to rely upon in support of their claim and defence in counter claim. The claimant had made a request for additional disclosure in respect of the counter claim for damages made by the respondent as well as the claim of the claimant based on constructive trust. A perusal of the record indicates that the respondent went on extending time for giving inspection and for disclosure of the documents on one or the other grounds and was not even able to prepare a list of such documents even after taking substantial extension of time. The learned arbitrator had already fixed the date of hearing on 7<sup>th</sup> January 2013. In these circumstances the claimant decided to drop their request for discovery in respect of the counter claim of the respondent.

123. In so far as claim relating to the constructive trust of the claimant is concerned, the claimant made a request to the learned arbitrator to bifurcate the issue of liability and quantum on the ground that the question of quantification would arise only if it was established as a question of fact that the claimant had not consented to use their funds by the respondent. In my view it was for the claimant who had sought disclosure of documents to decide whether to press for such discovery or not to prove its claim or to seek discovery of such documents which may be required to oppose the counter claims of the respondent. In my view since there was substantial delay on the part of the respondent in completing the procedure of discovery on one or the other ground, claimant was justified in giving up the discovery of documents or to seek bifurcation of hearing regarding determination of liability and quantification to avoid any further delay in the matter. In my view, no prejudice would have been caused to the respondent due to

the claimant giving up their request for discovery of the documents.

124. In so far as counter claim is concerned, the documents in respect of which discovery was sought by the claimant, respondent themselves could have produced such documents at the subsequent stage. In my view the learned arbitrator was thus justified in bifurcating the issue for liability and quantification. The learned arbitrator was fully empower to regulate the procedure of conducting arbitration proceedings and in passing a procedural order on 7<sup>th</sup> November 2012 to the effect that the hearing on 7<sup>th</sup> January 2013 would proceed on issue of liability only. In my view the learned arbitrator has rightly held that he would proceed with issue of liability in respect of both the claims and the counter claim and the hearing would deal with the preliminary issue of liability which was to be decided on the pleadings as exchanged between the parties. In my view the respondent could have participated at the hearing and could make submission on the issue of liability after which the learned arbitrator could have fixed a further hearing on the issue of quantum that would have arisen. The respondent also could have produced the witness statements and documents which were relevant according to the respondent through their witnesses at the hearing on the issue of liability.

125. A perusal of record indicates that the delay was on the part of the respondent to make disclosure of documents on one or the other ground. The respondent by their letter dated 27<sup>th</sup> November 2012 took a deliberate and conscious decision not to participate any further in the arbitration making their stand clear that they would not file any witness statements, will not attend the hearing and would challenge any attempt to enforce the arbitral award in India. Even in that letter dated 27<sup>th</sup> November 2012 , it was not their case that they were unable to present their case. The respondent was fully conscious of the fact that they had remedy under Indian

law to oppose enforcement if the claimant attempted to enforce such award in India and that the respondent would not be entitled to apply to set aside the award in India which procedure was completely different from opposing enforcement.

126. A perusal of the recored indicates that the claimant ultimately did not pursue its claim for constructive trust and thus the issue about discovery of document in regard to such claim was redundant and/or of no consequence. A perusal of record indicates that claimant was insisting for hearing in the month of October 2012 whereas it was suggestion of the respondent for hearing in January 2013 which suggestion of respondent was accepted by the learned arbitrator. In my view the respondent was thus not at all affected by the application of the claimant to give up and/or not insisting for disclosure of documents or for seeking bifurcation of the issue of liability with quantification and in view of the decision of the learned arbitrator accepting such request of the claimant. The learned arbitrator had rendered a finding of fact on this issue in the impugned award while rejecting the application for adjournment which finding of fact in my view cannot be set aside by this court while hearing the objections regarding enforcement of the foreign award. In my view no case is made out by the respondent that they were unable to present their case under section 48(1) (b).

**WHETHER THE LEARNED ARBITRATOR WAS BIASED IN ANY MANNER WHATSOEVER AND THE AWARD IS IN CONFLICT WITH PUBLIC POLICY UNDE SECTION 48(ii) (b)**

127. The question that now arises for consideration is whether the learned arbitrator was biased, prejudiced or has failed to disclose his alleged interest. Question also arises as to whether in view of the finding of forgery rendered by the

learned arbitrator, such finding would demonstrate any bias on the part of the learned arbitrator against the respondent.

128. The learned senior counsel appearing for both the parties on this issue invited my attention to the objection raised by the respondent in this regard and also the correspondence exchanged with the learned arbitrator and also the minutes of meeting of the learned arbitrator. It was the case of the respondent that the learned arbitrator had not disclosed the fact that he had appeared as counsel instructed by the solicitors of the claimant in few matters between different parties in February 2011. From the correspondence exchanged and the minutes of meeting it appears that M/s Thomas Cooper were the former solicitors of the claimant. M/s Square Sanders were the solicitors of the claimants in the arbitration proceedings. The learned arbitrator was engaged by both the solicitors as counsel only once and was in any event was not appointed as arbitrator by any of the solicitors or by claimant in any matter. The learned arbitrator was never appointed even in any connected matter of any of these parties. There is no bar under English Act or IBA guidelines to act as arbitrator on such grounds. The learned arbitrator has made this position clear in the minutes of meeting.

129. The record also indicates that the learned arbitrator had given sufficient opportunity to challenge his appointment before English High Court under Section 24 of the English Arbitration Act. However, the respondent did not challenge his appointment in spite of such opportunity. The learned arbitrator had also made it clear that if both parties agree, he would resign. The learned arbitrator had pointed out that there were 131 partners of the solicitors of claimant M/s Square Sanders and thus it was not possible for the learned arbitrator or anybody else to keep the track who had briefed and in which matter. Under Sec. 68 of English

Arbitration Act, such partial award of the learned arbitrator could be challenged which the respondent has not availed of such right within 28 days other otherwise. In my view no objection about recusal award can be raised in the petition for enforcement of final award. In my view jurisdictional award and recusal award could be challenged by the respondent under relevant provisions under English law, respondent not having challenged those awards before appropriate court, those awards have become final and conclusion of those issues and the respondent is barred by principles of estoppel in re-agitating the same issue in this proceedings.

130. Mr Pratap learned senior counsel placed reliance on the judgment of this Court in case of ***Oil and Natural Gas Commission Vs. Offshore Enterprises Inc.***, in Appeal No. 808/92 decided on 12/11/1993. Paragraph 41, 44, 48, 50 and 51 of the said judgment which are relevant for deciding this petition read thus :

*41. An award may be set aside if an arbitrator or umpire has misconducted himself on the proceedings. An arbitrator or umpire misconducts himself when he is guilty of personal misconduct. It will be misconducting the proceedings when there is a defect in the procedure followed in conduct of the arbitration proceedings and also when there is a defect in the award. A broad allegation of misconduct without any particulars is not enough. The particulars of alleged misconduct has to be explicit. An the instant case, the Respondents had appointed Shri K. H. Bhabha as their arbitrator. The Appellants had initially appointed Shri S. B. Kabra as their arbitrator. In the Petition filed by the Respondents to remove Shri S. B. Kabra as an arbitrator since he was interested in the Appellants, with consent of the Appellants, Shri S. B. Kabra was removed as an arbitrator and the vacancy so caused was filled in by appointment of Shri N. P. Dutta as co-arbitrator alongwith Shri K. H. Bhabha. Both Messrs K. H. Bhabha and N. P. Dutta were duly appointed as arbitrators in the arbitration reference and entered upon the reference. Shri K. H. Bhabha is an eminent Senior Advocate of repute at the Bar of this court. Shri N. P. Dutta, besides being Vice-Admiral, was Chairman and Managing Director of Mazgaon Docks Ltd., and also a Judge-Advocate in Court Martial. Both Shri K. H. Bhabha and Shri N. P. Dutta are persons of integrity and have been enjoying high reputation in their respective*

fields.

44. *The Appellants have also made allegations against Mr. M. O. Chinoy, the learned Counsel appearing for the Respondents before the Arbitrations in the arbitration proceedings which allegations cast aspersions on Mr. Chinoy without their being the slightest material on record to support the same. Mr. Chinoy did start his professional career as junior of the said Shri K. H. Bhabha. After about 10 years, Mr. Chinoy left the Chambers of Shri K. H. Bhabha. In the year 1980, Mr. Chinoy was designated as Senior Advocate of this court. In his individual capacity, Mr. Chinoy became an eminent senior member of the Bar of this court and Solicitors and Advocates practising in this court started briefing him as a Counsel of repute. It is scandalous to say that the services of Mr. Chinoy were highly patronised by the said Shri K. H. Bhabha in this practice at Bar. There is no bar for a Counsel designated as Senior Advocate to accept second brief in a matter alongwith a Counsel senior to him who is also designated as Senior Advocate. There is no basis for the allegation of the Appellants that Mr. Chinoy got preferential treatment from Shri K. H. Bhabha in the conduct of the arbitration proceedings. It is correct that Shri K. H. Bhabha was briefed to appear on behalf of M/s. Bachubhai Munim and Co., Solicitors and Advocates before Pendse J. on 19th November, 1987 in a Notice of Motion. It is also correct that Mr. Chinoy was briefed in the said matter as a second Counsel. However, the notice of Motion at the hearing whereof both Shri K. Ht Bhabha and Mr. Chinoy were briefed had no nexus or relation with the arbitration proceedings bending before the Arbitrators. Members of the Bar while acting, as arbitrators cannot be suspected of partiality towards a party in reference merely because advocate arbitrators are often briefed in other litigations by the firm of solicitors/advocates who represent one of the parties in the reference or merely because one of the Counsel appearing for a party in the reference was at one time associated with such advocate arbitrators or arbitrator as junior. As rightly observed by the Learned Single Judge, the high traditions of the Bar must not be ignored.*

48. *There are yet other circumstances which establish that the allegations of bias and partiality made by the Appellants against Shri K. H. Bhabha are false, baseless and devoid of any merit. In none of the judicial proceedings filed for extension of time for the Arbitrators to make the award, the Appellants have made any allegation of bias and/or partiality*

against Shri K. H. Bhabha. The Appellants did not show their inclination not to proceed with the arbitration reference then pending before the Arbitrators on the ground that Shri K. H. Bhabha was allegedly biased against them or partial towards the Respondents. On the contrary, the Appellants have got the time to make the award extended from time to time with consent. Time to make the award was extended by Pendse J. on 2nd March, 1984, by Pratap J. (as he then was) on 10th April, 1984 and again by Pendse J. 21st December, 1984. Even after the Appellants filing their Written Submissions before the Arbitrators on 28th February, 1988 wherein for the first time the Appellants made allegations against Shri K. H. Bhabha that he was biased against the Appellants and partial towards the Respondents Chamber Summons No. 1176 of 1988 was taken out by the Respondents for extension of time for the Arbitrators to make the award. In reply to the said Chamber Summons, the Appellants did file the affidavit affirmed on the 12th December, 1988 but no allegations of bias or partiality were made therein against Shri K. H. Bhabha. On 12th December, 1988, time to make the award was extended by Suresh J. (as he then was).

50. Even after impugned judgment of Dhanuka J. the Appellants took out a Chamber Summons No. 632 of 1992 for extension of time to make the award in the said 'stability reference.' At the hearing of the said Chamber Summons, the learned Counsel for the Appellants stated that the Appellants were willing to pursue the pending 'stability reference' before the very same arbitrators viz., Shri K. H. Bhabha and Shri N. P. Dutta without prejudice to all their contentions in this appeal. On being directed by the Learned Judge to their stand on affidavit, the Appellants have filed affidavit of Pramod Seth, the Deputy General Manager of the Appellants in the proceedings of the said Chamber Summons stating that the Appellants do not have any grievance against the said Arbitrators viz., Shri K. H. Bhabha and Shri N. P. Dutta and have no allegations of bias or or lack of integrity against them as far as stability reference is concerned and that the Appellants are willing to pursue the said pending 'stability reference' before the same arbitrators. The Appellants and Respondents are parties to the said stability reference. The dispute pertains to stability of the same Drillship which has been subject matter of the said Contract. The allegations of the Appellants in the said Written Submissions filed by the Appellants before the Arbitrators on 28th February, 1988 have been that Shri K. H. Bhabha Was biased against the Appellants and partial

towards the Respondents. Had there been any substance in the said allegations, the Appellants would not have stated in the said affidavit of Pramod Seth affirmed on 6th September, 1993 that the Appellants have no grievance against the Arbitrators and have no allegations of bias or lack of integrity against the Arbitrators as far as 'stability reference' is concerned. The Appellants are approbating and reprobating with ulterior motive to suit their convenience. In the facts of the case, there is no merit whatsoever in the allegations of the Appellants that Shri K. H. Bhabha acted with bias against the appellants or with partiality towards the Respondents or that he was not interested in bringing out true facts or that he acted as a Senior Counsel for the Respondents then an independent arbitrator. Equally there is no merit in the allegations of the Appellants that Shri K. H. Bhabha treated counter-claims of the Appellants in strange manner or that he approached in the arbitration proceedings with pre-conceived view that the Respondents were always rights. It is also not correct that said Shri K. H. Bhabha misconducted himself or the proceedings before the Arbitrators by granting claims of the Respondents not covered by the said arbitrators agreement or otherwise or that he and Mr. Chinoy inordinately prolonged the conduct of the arbitration proceedings before the Arbitrators.

51. The allegations of personal bias, partiality and misconduct made against Shri K. H. Bhabha are baseless and made without any sense of responsibility. Shri K. H. Bhabha is a Senior Counsel who is briefed by several the firm of M/s. Ambubhai & Diwani prior to its bifurcation had briefed Shri K. H. Bhabha as Counsel to argue cases in the courts Of law. In the personal matters of Shri K. H. Bhabha, they have acted as solicitors for him. Similarly Shri K. H. Bhabha has been briefed by M/s. Bachubhai. Munim & Co., solicitors for the respondents in several matters. In the facts of the case, it is impossible to infer that Shri K. H. Bhabha was committed to oblige the respondents because the said Mr. Chinoy, one of the erstwhile juniors of Shri K. H. Bhabha was appearing for the respondents in the said arbitration proceedings. Allegations are also made against Shri K. H. Bhabha in respect of the fees received by him as an arbitrator. The mode of payment of fees to the Arbitrators was decided as per desire expressed by the officers of the appellants that it was practice of the appellants to pay the fees of the arbitrator appointed by them. The fees of each of the arbitrators were fixed by mutual consent of the parties at Rs. 600/- per hour. None of the allegations made by the appellants against Shri K. H. Bhabha has been proved or substantiated.

131. A perusal of the record indicates that the learned arbitrator was Queen's counsel appearing in number of matters and was a reputed counsel which fact is not disputed by either party. He was nowhere connected with any of the parties and had not appeared for any of parties in any matter. Learned arbitrator was not engaged as arbitrator by any of the parties or by their respective solicitors in any matter related to the matter in hand. The learned arbitrator had made this position clear. The learned arbitrator had given opportunity to the respondent to challenge his appointment before appropriate court of law but the respondent did not avail of such opportunity. The Division Bench of this Court has held that members of the bar while acting as arbitrators cannot be suspected of partiality towards the party in a reference merely because the advocate arbitrators are often briefed in other litigations by the firm of solicitors/advocates to represent one of the parties in the reference.

132. In my view, unless a party making allegations, demonstrates that the learned arbitrator had interest in the subject matter of the dispute in which he was acting as arbitrator or was related to any of the parties in any manner whosoever, no bias can be attributed against such arbitrator on the ground of he having been engaged by solicitors of one of the party and that also in some unconnected matter once or twice. In my view, the allegation of bias made against the arbitrator who was a reputed counsel are without responsibility and without merit. In my view there is no provision for objecting to an enforcement of foreign award on the ground as such alleged bias. The respondent thus cannot be permitted to urge such ground. Be that as it may, in my view, no case is made out that the learned arbitrator was biased against the respondent and or the apprehension of the respondent about alleged bias is justified. On the contrary, record indicates that the learned arbitrator had given full opportunity to both the parties to represent their case and

does not shown any bias attitude against the respondent or the claimant. There is thus no merit in the submission of the respondent.

133. In so far as the judgment of Delhi High Court in case of ***Shaktibhog Foods Ltd. Vs. Kola Shipping Ltd. And Anr.*** relied upon by Mr D'vitre learned senior counsel for the respondent is concerned, a perusal of the said judgment indicates that the learned arbitrator in that matter had acted as arbitrator on behalf of the respondent in a related dispute between the head owners and the respondent No.1 which the learned arbitrator had failed to disclose at the time of his acceptance of appointment as arbitrator. The rules applicable to parties mandated for an arbitrator to disclose his interest which would have given rise to doubts as to the impartiality or independence of the learned arbitrator prior to accept his or her appointment. Considering the provisions applicable to parties and the facts of that case, Delhi High Court held that the failure by the learned arbitrator to disclose the material fact concerning his having been an arbitrator on behalf of the respondent in the arbitration on a related issue involving it and the head owners gave rise to justifiable doubts as to his independence and impartiality and thus award was opposed to public policy of India on collective reading of Sec.12(3), 13(5), and 34 (2) (b) (ii) of the Act and requires to be set aside. The facts of this case in my view are totally different. Neither the learned arbitrator was appointed as an arbitrator in any of the other matters of the same parties or much less any related matter. The provisions applicable to the parties which mandated such disclosure is absent in part II of the Arbitration and Conciliation 1996. The Judgment of Delhi High Court in case of ***Shaktibhog (supra)*** is thus distinguishable with the facts of this case.

134. The next issue urged by Mr D'vitre learned senior counsel that in view of the finding of forgery rendered by learned arbitrator against the respondent and the

learned arbitrator refusing to postpone the arbitration hearing beyond 07/01/2013, though there was gross delay on the part of the claimant in filing statement of claim and in view of discovery sought by claimant in respect of voluminous documents, the allegations of bias made by the respondent against the arbitrator stands proved. It is not in dispute that the claimant had disputed the 2007 agreement referred to and relied upon by the respondent in its pleading. The respondent did not lead any evidence to prove the existence of 2007 agreement inspite of opportunity rendered by the learned arbitrator. In the termination notice issued by the claimant, claimant had terminated the 2005 agreement. In one of the letter addressed by the claimant in response to the letter addressed by the respondent, claimant had categorically denied that claimant had entered into any agency agreement dated 01/07/2007 and had asserted that no such agreement existed. The claimant had called upon the respondent to provide a copy of the alleged agreement dated 01/07/2007. Neither there was any response from the respondent nor any copy furnished.

135. The learned arbitrator rendered a finding that with or without the 2007 agreement, the 2005 agreement still continued in effect as a binding contract until its termination in November 2008. After considering the evidence on record, the learned arbitrator rendered a finding that he was compelled to the conclusion that there was a forgery. In my view since the existence of 2007 agreement was disputed by the claimant, since the date of commencement of dispute, the onus was on the respondent to prove the existence of the said agreement which the respondent failed to prove. The learned arbitrator considered the pleadings, documents and the evidence led by the claimant and rendered such finding. The learned arbitrator was not bound to frame issue on each and every statement asserted and denied by the other party. This Court while hearing the objection to

the enforcement of a foreign award cannot set aside the findings of fact or to consider the new evidence on record.

136. In so far as submission of the learned senior counsel for the respondent that by retaining the jurisdiction by the learned arbitrator with himself in respect of indemnity claim which would show the future bias of the learned arbitrator is concerned, a perusal of record indicates that the learned arbitrator did not reject the claim outright in view of the respondent not having produced any proof of demand in respect of tax issued by any authority in India for last more than six years post the termination of the agreement but granted liberty to the respondent to approach the learned arbitrator if and when the demand was raised by the income tax authorities. In my view successive reference is permissible under the arbitration agreement arrived at between the parties. Merely because the learned arbitrator had granted liberty to the respondent to approach the learned arbitrator if and when the demand is raised by the income tax authorities in future would not indicate any bias on the part of the learned arbitrator but on the contrary would assist the respondent who would not have to go through the entire process all over again. Be that as it may, the apprehension of bias of the respondent in respect of claim which is not only speculative in nature but is totally premature without any merits and is thus rejected. This court has already rejected allegation of bias made against the learned arbitrator during the proceedings conducted as without merit.

137. Be that as it may, the respondent has made a statement through learned senior counsel that respondent would not rely upon such finding of forgery in any other matter including the criminal proceedings, which statement is accepted by this Court, thus no prejudice would be caused to the respondent. In my view no bias can be attributed against the learned arbitrator merely based on such finding of

forgery rendered by the learned arbitrator, even if it is construed as erroneous or without jurisdiction.

138. In my view there is no merit in the submission of the learned senior counsel for the respondent that in view of the learned arbitrator refusing to grant the adjournment to the respondent and in view of the decision to bifurcate the issue of liability with quantification or having rendered the finding of forgery, any bias can be attributed against the learned arbitrator.

139. In so far as submission of the learned senior counsel appearing for respondent that the finding of the learned arbitrator based on the notarial certificate is perverse is concerned, a perusal of the record indicates that the learned arbitrator has considered various notarial certificates and has rendered such finding on the issue of forgery which finding in my view is based on the appreciation of evidence and no interference is warranted with such finding of fact while considering the objection in respect of enforcement of foreign award under section 48 of the act. The submission of the learned senior counsel is without any merits and is rejected.

140. A perusal of the award indicates that the learned arbitrator has allowed the claim of the claimant out of several claims only in the sum of US\$2080640.40 as principal amount and US\$680000 under Section 49 of the English Arbitration Act 1996 towards interest. The learned arbitrator also awarded cost of the said reference. The learned arbitrator has rendered a finding that the respondent was continuing to send statements of account and remitible surplus and remitting the same stated to be due albeit with some delays as against the contractual time table. They also filed annual audited statutory accounts stated as of 31<sup>st</sup> March of each year. The respondent had admitted their liability and had requested for time to

make payment. Based on the admission of liability, by the respondent of the amount payable to the claimant and based on the other material available on record, the learned arbitrator has allowed only such claim. The finding of forgery rendered by the learned arbitrator thus in any event did not have any bearing on the claim awarded by the learned arbitrator.

141. In so far as counterclaim made by the respondent is concerned, the learned arbitrator after considering the entire material on record rendered a finding that there was no actionable misrepresentation by the claimant and the respondent have no sustainable cross claim whatever the details of their alleged quantum of mass recent documents might shown. The finding is also rendered that position of the respondent was not materially changed by reliance on the alleged misrepresentation of the claimant that it would suffer substantial injustice if called upon to pay the sums due to the claimant or it would be inequitable and unconscionable for the claimant to recover those sums. The claimant did not make any admission of any independent liability to pay the respondent otherwise than agreed in the 2004 agreement and 2005 agreement. In my view, this court cannot re-appreciate the findings of fact rendered by the learned arbitrator while considering the objections to the enforcement of a foreign award. Such recourse is not permissible under Section 48 of the Act.

142. The Supreme Court in case of *Shri Lal Mahal (Ltd) Vs. Progoto Grano Spa* delivered on 03/07/2013 in Civil Appeal 5089/2013 reported in JT 2013 (11) SC 84 has held that enforcement of a foreign award would be refused under Section 48(2)(b) only if such enforcement would be contrary to (1) fundamental policy of Indian Law (2) the interest of India or (3) Justice or morality. It is held that the wider meaning given to the expression “public policy of India” occurring in

Section 34(2)(b)(ii) in case of **Saw Pipes** is not applicable where objection is raised to the enforcement of foreign award under Section 48(2)(b). Section 48 of the Act does not give an opportunity to have a second look at the foreign award in the award enforcement stage. The scope of inquiry under Section 48 does not permit review of foreign award on merits. Procedural defects like taking into consideration inadmissible evidence or ignoring/rejecting the evidence which may be in binding nature in the course of foreign arbitration do not lead necessarily to execute award for enforcement on the ground of public policy. The Court does not exercise appellate jurisdiction over the foreign award not does it inquire as to whether while rendering foreign award some error has been committed. Paragraphs 26, 27, 28, 43 to 46 of the said judgment read thus :

26. *We are not persuaded to accept the submission of Mr. Rohinton F. Nariman that the expression “public policy of India” in Section 48(2)(b) is an expression of wider import than the “public policy” in Section 7(1)(b)(ii) of the Foreign Awards Act. We have no hesitation in holding that Renuagar<sup>3</sup> must apply for the purposes of Section 48(2)(b) of the 1996 Act. Insofar as the proceeding for setting aside an award under Section 34 is concerned, the principles laid down in Saw Pipes<sup>1</sup> would govern the scope of such proceedings.*

27. *We accordingly hold that enforcement of foreign award would be refused under Section 48(2)(b) only if such enforcement would be contrary to (i) fundamental policy of Indian law; or (2) the interests of India; or (3) justice or morality. The wider meaning given to the expression “public policy of India” occurring in Section 34(2)(b)(ii) in Saw Pipes<sup>1</sup> is not applicable where objection is raised to the enforcement of the foreign award under Section 48(2)(b).*

28. *It is true that in Phulchand Exports , a two-Judge Bench of this Court speaking through one of us (R.M. Lodha, J.) accepted the submission made on behalf of the appellant therein that the meaning given to the expression “public policy of India” in Section 34 in Saw Pipes<sup>1</sup> must be applied to the same expression occurring in Section 48(2)(b) of the 1996 Act. However, in what we have discussed above it must be held that the statement in paragraph 16 of the Report that the expression “public policy of India used in Section 48(2)(b) has to be given a wider meaning and the award could be set aside, if it is patently illegal” does not lay down correct law and is overruled.*

3. *Moreover, Section 48 of the 1996 Act does not give an opportunity to have a “second look” at the foreign award in the award - enforcement stage. The scope of inquiry under Section 48 does not permit review of the foreign award on merits. Procedural defects (like taking into consideration inadmissible evidence or ignoring/rejecting the evidence which may be of binding nature) in the course of*

*foreign arbitration do not lead necessarily to excuse an award from enforcement on the ground of public policy.*

*44. In what we have discussed above, even if it be assumed that the Board of Appeal erred in relying upon the report obtained by buyers from Crepin which was inconsistent with the terms on which the parties had contracted in the contract dated 12.05.1994 and wrongly rejected the report of the contractual agency, in our view, such errors would not bar the enforceability of the appeal awards passed by the Board of Appeal.*

*45. While considering the enforceability of foreign awards, the court does not exercise appellate jurisdiction over the foreign award nor does it enquire as to whether, while rendering foreign award, some error has been committed. Under Section 48(2)(b) the enforcement of a foreign award can be refused only if such enforcement is found to be contrary to (1) fundamental policy of Indian law; or (2) the interests of India; or (3) justice or morality. The objections raised by the appellant do not fall in any of these categories and, therefore, the foreign awards cannot be held to be contrary to public policy of India as contemplated under Section 48(2)(b).*

*46. The contention of the learned senior counsel for the appellant that the Board of Appeal dealt with the questions not referred to it and which were never in dispute and, therefore, these awards cannot be enforced being contrary to Section 48(1)(c) is devoid of any substance and is noted to be rejected.*

143. In my view there is thus no merit in the submission of Mr D' vitre learned senior counsel that the learned arbitrator ought to have considered the documents referred to relied upon by parties in application under Section 9 while rendering the finding of forgery and in particular the statement made by Mr Dissanayake. In my view this Court cannot make such inquiry and enter into the arena of merits while scrutinizing the application for enforcement of award or cannot consider such evidence at this stage. Respondent not having appeared before learned arbitrator deliberately cannot be permitted to urge such grounds on re-appreciation of evidence by the learned arbitrator. Scope of Section 48 of the Act is very limited. Various submission made the learned senior counsel for the respondent on merits of the matter and challenging the findings of fact rendered by the learned arbitrator cannot be gone into by this Court in this proceedings. I am respectfully bound by the judgment of the Supreme Court in case of **Shri Lal Mahal (Supra)**.

144. The next submission of Mr D'vitre learned senior counsel that though the claimant had withdrawn more than 90% of their claim before the learned arbitrator, the learned arbitrator has allowed substantial amount of claim towards costs which could have been considered only to the extent of claim ultimately pressed by the claimant and in proportion of the principal claim allowed by the arbitrator. It is not in dispute that the learned arbitrator was not required to be paid his fees on the basis of claim made by the parties but was required to be paid on the basis of the meetings held the learned arbitrator. Learned arbitrator has not charged fees on the basis of claims made by the claimant. The arbitrator was justified and was empowered to award such costs. In my view, in any event there is no such ground available under Section 48 of the Act for awarding the costs by the learned arbitrator. Be that as it may, the award of costs by the learned arbitrator is absolutely reasonable and no interference is warranted.

145. In my view the respondent has not furnished any proof before this court as to why enforcement of the foreign award may be refused. In my view the said foreign award is enforceable under Part II and is binding for all purposes on the parties under section 46 of the Arbitration and Conciliation Act, 1996. I am therefore of the view that the foreign award is already stamped as decree and the claimant holding such foreign award has become entitled for enforcement of the award having taking effective steps for execution of the award. In my view, the petition for enforcement of the foreign award is in accordance with and in compliance with section 47 of the Arbitration and Conciliation Act, 1996. As this court has taken a view that the said foreign award is enforceable, the claimant can proceed to take further effective steps for execution of the same. In the circumstances the claimant is directed to put the award in execution in accordance with the rules of this court. I therefore, pass the following order :-

- (a) Arbitration Petition No. 259 of 2013 is made absolute in terms of prayers (a) to (f) and (h). Affidavit of disclosure in terms of prayer (h) shall be filed within six weeks from today.
- (b) Arbitration Petition no. 406 of 2013 is dismissed as not maintainable in this court.
- (c) No order as to costs.

**[R.D. DHANUKA, J.]**

On oral application of Mr.Rambhadran, learned counsel appearing for the respondent in Arbitration Petition No. 259 of 2013 and for the petitioner in Arbitration Petition No.406 of 2013, operation and execution of this order is stayed for the period of eight weeks from today. It is made clear that ad-interim order dated 22<sup>nd</sup> February, 2013 granted by this court would continue in the meanwhile.

**[R.D. DHANUKA, J.]**