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ABOUT US

WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provide dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

WHITE BLACK LEGAL: THE LAW JOURNAL

Judicial Intervention in International Arbitral Awards

- Harsh Thakur[1]

Abstract

ARBITRATION is a mode of adjudication of disputes between the parties to it by a forum of their choice. It potentially has a great merit. It is not so expensive, faster as it is free from legal technicalities. For the adjudication of commercial disputes, it is considered as the most efficient mode. Since the last few decades and specifically after the liberalisation policy, international trade and commerce are on a tremendous rise. But, for a smooth flow of this trade and commerce a proper and efficient adjudication of disputes relating thereto is very essential. International commercial arbitration provides cheaper and quicker settlement of such disputes. This adjudication to be effective requires a proper recognition and enforcement of awards by domestic courts under national laws but at this stage of the process the judicial intervention has been increased tremendously, thus creating a big huddle in the enforcement of a decided matter.

The author of this paper begins by discussing one of the major problem area of arbitration law in India, i.e. the enforcement of an arbitral award due to judicial interference, along with the difference between a Domestic and International Arbitral award. En route, the author examines the mode of enforcement of arbitral award. The author then analyses that how the problem of judicial intervention at the enforcement stage acts as an obstruction in the enforcement of an arbitral award with the help of few leading case laws in this area.

Keywords:Arbitral Award, Dispute, Judicial Intervention, Enforcement, Recognition

*Harsh Thakur, III year, B.A. LL.B (Hons.), School of Law, Christ. The author can be reached at harsh.harendra@law.christuniversity.in.

I. INTRODUCTION

According to Justice Warren Burger, "*the notion that most people want black-robed judges, well dressed lawyers and fine panelled courtrooms as the setting to resolve their disputes is not correct. People with problems, like people with pains, want relief and they want it as quickly and inexpensively as possible*."

One would relate to the scope and relevance of this statement with ease in the modern legal scenario, in India and globally. The Era of globalisation with all its effects on globalbusinessesmade it necessaryfor the creation of efficient methods of resolution of disputes like arbitration and enforcement of the consequent awards that determine the rights and obligations of the parties. But,in some situations, securing an award or a final decree from the courts may only be a battle half won; this is especially true in the Indian scenario.

There are numerous occasions in which during the proceedings, the counterparty decides not to participate in the said arbitral process and abandons it mid–way.The process for enforcement of arbitral awards in India is primarily governed by Arbitration & Conciliation Act, 1996 ("Act").While the enforcement and execution of an India - seated arbitral award is governed by the provisions of Part I of the Act, enforcement of foreign - seated awards "foreign award" is governed by the provisions of Part II of the Act. Thus, the domestic and foreign awards are enforced in the same manner as any common decree of the Indian Court but there lies a distinction in the enforcement of a domestic and foreign seated award.

Earlier,Foreign Awards (Recognition and Enforcement) Act of 1961 was passed to give effect to the New York Convention. Subsequently, this Act was repealed and the provisions were incorporated in Part II of the Arbitration Act which talks about the enforcement of foreign awards. A few experts were of the view that merging of both the Acts was a mistake and should be rectified with two distinct statutes i.e. one containing domestic arbitration and the other with international commercial arbitration.

The law commission in its 176threport, recommended certain improvements to the Indian Arbitration Act. As a consequence of this, Arbitration and Conciliation (Amendment) Bill of 2003 was introduced in the parliament with an objective to curtail the jurisdiction of the

Indian Court on Arbitrations held outside of India. Section 11 of the said bill addressed the then relevant questions of the creation of an Arbitration bench in every High Court, restriction the grounds of challenging an arbitration award, etc. but this bill never saw the light of day.Atfirst, it was sent to the parliamentary committee but was subsequently withdrawn with the objective of bringing about a more comprehensive bill for some more improvements in Arbitration laws. Whereas, till now a fresh initiative by the government to bring improvements to the Indian Arbitration Act is awaited.

Due to this, the Indian courts' continued attitude to not resist the temptation to intervene in arbitrations is harmful. Primarily for a legal system which is plagued by endemic delays, a pro-arbitration stance would reduce the pressure on courts. Arbitration is not merely an attractive and lucrative option for resolution of disputes, it is absolutely essential to maintain the integrity of the Indian legal system so that the trust in it is maintained and India should work to save the citadel of International Commercial Arbitration.

As a country seeking to attract foreign investment, it is crucial that its legal system provides proficient and predictable remedies to foreign investors and people seeking to enter into International transactions in India. When commercial parties enter into transactions, they factor into their bargain, the potential legal costs of enforcing their rights. If a legal system does not hold the promise of speed or certainty, a stigma of certain "risk premium" is added to the cost of the transaction which, if excessive, may make the transaction commercially unviable. Foreign investors have typically preferred arbitration and shied away from Indian courts due to the curse of prolonged delays in litigation system coupled with backlog of cases.

II. DIFFERENCE BETWEEN FOREIGN AWARD AND DOMESTIC AWARD

As per S. 2(7) of the Act, an arbitral award made under Part I of the Act is called a 'domestic award'. An arbitral award shall be deemed to be final and binding upon the parties (and persons claiming under them) to the arbitration. Further, an arbitral award shall be enforced under the Code of Civil Procedure in the same manner as if it were a decree of the court where the time for challenging an award has passed (90 days).[2]

[2]INDIAN ARBITRATION AND CONCILIATION ACT, 1996 § 2

It is important to statethat, before the 2015 Amendment, a challenge to an arbitral award usually meant an automatic stay on the enforcement of the award. However, the Act now specifically states that where an application challenging the award has been filed, the filing of such an application will not by itself render that award unenforceable, unless the Court grants an order of stay of the operation on a separate application made for that purpose.

India being a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York Convention) as well the Geneva Convention on the Execution of Foreign Arbitral Awards, 1927 (Geneva Convention). "Foreign award" means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India (a) in pursuance of an agreement in writing for arbitration to which the New York or the Geneva Convention applies, and (b) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which the said Convention applies.

Broadly the difference between Foreign Award and Domestic Award are twofold in nature;firstly, regarding procedure of the execution of award. In case of domestic award, there is no requirement for separate execution of award. Once an award is made and objections are rejected, the award automatically gets executed and there is no requirement for application of enforcement of an award. A foreign award is required to be enforced. Once the court is satisfied that a foreign award is enforceable the award becomes decree of the court and executable as such.

Another significant difference between the domestic and foreign award is that (unlike domestic awards) foreign awards cannot be set aside. A party seeking to enforce a foreign award has to make an application for the same and the court can either accept it or reject it but the court can never set aside the award.

III. PROBLEMS BEING FACED WHILE ENFORCING AN INTERNATIONAL ARBITRAL AWARD IN INDIA

After the award is passed, one would expect the proceedings to come to an end, and the award being enforceable forthwith. But, in practicality, that is when the real litigation starts. For certain reasons, the legislators chose to make arbitral awards subject to challenge before the trial court, and the most attention seeking part being even awards passed by three retired Supreme Court Chief Justices can be made subject to scrutiny by a single Trial Judge. No

doubt, section 34 has sought to confine its ambit by the use of another interesting terminology such as 'opposed to public policy", etc.

However, in ONGC v. Saw Pipes it was clarified that an arbitral award could be challenged as being 'patently illegal', in instances of the award being opposed to substantive provisions of law or being opposed to the Act or, being opposed to the terms of the contract. After this judgement, the review under section 34 stands louden to testing an award on the touchstone of 'compliance with substantive law, the Act and the terms of the contract to determine whether the award violates public policy. Thereby, the role of the court under the Act is broadened and is now akin to that of an appellate court.

1. Public Policy of India

The ground of "public policy" has remained a debatable issue under the Indian Arbitration regime. It has also been defined as an unruly horse.[3] "Public Policy" is an inclusive term which may include within its ambit a wide range of activities that can be termed as public policy. In the case of ***MurlidharAgarwal&Anr.v.State of U.P. &Ors.,***[4] the Court stated that public policy does not remain static in any given community. It may vary from generation to generation and even in the same generation. Public policy would be almost useless if it were to remain in fixed moulds for all time.

The Law Commission with the sole purpose to reduce judicial intervention in foreign seated arbitrations in its Report No. 246 recommended the restriction of the scope of "public policy" in both under section 34 and 48.

In so far as the ground regarding the award being in conflict with the public policy of India is concerned, the ambit thereof is quite distinct and different and depends upon the nature of the award i.e. domestic or international. The Supreme Court in RenuSagar[5] while construing the provisions of section 7 of Enforcement and Recognition of the Foreign Award Act which are in parimateria with section 48 of the 1996 Act, held that the Indian courts would be justified in refusing enforcement of a foreign award on the ground that the award is in conflict with the public policy of India, if such enforcement is contrary to

(a) the fundamental policy of Indian law;

(b) Indian interest; and

(c) morality and justice.

[3]Richardson v. Mellish, 2 Bing.229

[4]*MurlidharAgarwal&Anr. v. State of U.P. &Ors.,*1974 (2) SCC 472

[5]RenuSagar Power Company Ltd. v. General Electric Company, (1994) Supp. 1 SCC 6

It was clarified that enforcement of foreign award being governed by the principles of private international law, the doctrine of public policy, as applied in the field of international law alone would be attracted. The court further clarified that a mere infraction of a domestic law per se would not amount to a conflict with the public policy of India. Insofar as domestic awards are concerned, what precisely would be the scope of challenge of an award on the ground of public policy of India remains to be settled as yet.

Surely, an adjudicator of a dispute in India, who is required to apply the laws of India in the process of such adjudication, wouldbe bound by such laws. If an award is demonstrably contraryto the law of the land, it would be in conflict with the public policy of India. But then a further question would arise as to the nature of such law, which could be said to comprehend within itself the public policy of India. Would all the plenary legislations fall in this category? Or, would it be open to the courts to scrutinize whether the law, which is alleged to be infringed, is directory or mandatory? Does every provision of law lay down a public policy? Would the subordinate legislations fall in the category of laws for the purpose? And these questions have to be traced right up to the notifications and orders issued under the statutes.

If there were to be two independent statutes dealing with the domestic and international arbitrations, much of these questions could be dealt with more conveniently than the law in the form as it stands at present. Section 31 of the Act requires the arbitral award to state the reasons upon which it is based unless the parties agree that no reasons are to be given. Section 34, however, does not in turn specify a ground for setting aside an award, which fails to comply with the requirement of stating the reasons upon which it is based. What is the object of requiring every arbitral award to state reasons upon which it is based? Foremost among the objective is to enable the litigating parties to know why the arbitrator has decided the dispute one way or the other. Secondly, in the event of the challenge to the award, the court could satisfy itself that the arbitrator did apply his mind to the relevant facts and law. The court, however, cannot sit in appeal over such decisions, but in the absence of any application of mind, it would be open to the court to hold that the requirement of stating reasons have not been complied with which should be a ground for setting aside such an award.

2. Ground of patent Illegality

The Arbitration and Conciliation Act,1996 did not have any provisions regarding "Patent Illegality" as such it came into existence only after the 2015 Amendment Act. Since it was not defined by the legislature it had it's genesis by the Hon'ble Supreme Court.

The Hon'ble Supreme Court while interpreting the ground of 'Public Policy' introduced first time a sub- ground known as 'Patent Illegality' in ONGC Ltd. v. Saw Pipes Ltd.[6]

It can be understood as, if the award is patently against the statutory provisions of substantive law which is in force in India or is passed without giving an opportunity of hearing to the parties as provided under section 24 or without giving any reason in a case where parties have not agreed that no reasons are to be recorded, it would be against the statutory provisions. In all such cases, the award is required to be set aside on the ground of "Patent Illegality."[7]

In Saw Pipes, the Supreme Court interpreted 'public policy' in light of principles underlying 1996 Act, Indian Contract Act 1872 (India) and Constitutional provisions.[8] The Court found that public policy concerns public good and public interest matters and not the policies of a particular government. [9] After discussing the transitory character of the concept, the Supreme Court added 'patently illegal' to the three other grounds of public policy that were enunciated in Renusagar.[10] This meant that if the award was contrary to a substantive provision of law, the Act or against the terms of the contract, it could be set aside as being 'patently illegal'.

The Arbitration and Conciliation Act,1996attempts to support both domestic and international arbitration as a final, fast and impartial means of dispute settlement. Inclusion of additional grounds in 'public policy' arguments had made arbitration more susceptible to judicial review; this defeated the very objective of arbitration as a dispute settlement procedure.

At present in the The decision of *Shri LalMahal*[11] and other cases on "public policy" has limited the scope of judicial interference of Indian courts regarding enforcement of foreign awards under Section 48 of the Arbitration and Conciliation Act, 1996 and has provided a ray of hope to help India establish as an international commercial arbitration

[6]ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705
[7]*Id.*
[8]*Id.*at 719.
[9] Ibid.
[10]Renusagar Power Co. v. General Electric Co. Ltd., (1999) 1 SCC 644
[11]Shri LalMahal Ltd. v. ProgettoGrano Spa, (2014) 2 SCC 433

destination. However, the Arbitration and Conciliation (Amendment) Act, 2015 which included *'fraud or corruption'* instead of *'interest of India'* has expanded the scope of *'public policy'* under Section 48 of the Act in violation of the judicial decision laid down in *Shri LalMahal case*. Moreover, precedents show that courts have interpreted *'fraud or corruption'* as *'patent illegality'* which was rejected as a ground under *'public policy'* in Section 48 of the Act.

IV. STATUTORY FRAMEWORK REGARDING THE ENFORCEMENT OF INTERNATIONAL AWARDS IN INDIA

(a) Scope of the enforcement of foreign award

Chapter 1 of the Part II of the Arbitration and Conciliation Act,1996 (the **Act**) governs the foreign arbitral awards rendered following the New York Convention and Chapter 2 of the Part II deals with the awards rendered following the Geneva Convention. whereas the Act specifically excludes any award made other than these conventions.

Whereas, foreign awards made in all territories which are Contracting States to the New York Convention are not automatically enforceable in India. The award made under the convention will only be recognised as enforceable in India if the Central Government being satisfied of the award notifies such contracting states of the New York convention in its official gazette.[12]

(b) Enforceability

Part II of the Act does not set out any time after which the foreign award would become automatically enforceable which is unlike domestic arbitral awards. The whole enforcement process of a foreign award can be summed down to two major parts being firstly, under section 48 the Court determines the enforceability of the foreign award by giving a chance to the award debtor the right to challenge the enforcement of the foreign award on the basis of the grounds set out therein.[13] Once the Court is satisfied that the award is enforceable then according to section 49 of the Act, it is executed in the same manner as a decree of the Court.[14] However, the objections can only be raised under section 48 of the Act in a

[12]INDIAN ARBITRATION AND CONCILIATION ACT, § 44(b)
[13]INDIAN ARBITRATION AND CONCILIATION ACT, §49
[14]NoyVallesina Engineering SPA v. Jindal Drugs Ltd, 2006 (3) Arb LR 510 (Bom).

reactionary manner by the party against whom the award has been passed after the creditor seeks enforcement.[15]

The application for enforcement is made under Section 47 and 49 of the Act. Where section 47 deals with the formal requirements necessary for making an application.

(c) Appeal

If the Court refuses to enforce a foreign award under Section 48 of the Act. The Award holder has a right under Section 50 of the Act to file an appeal.[16] Whereas no such remedy is available under the Act for award Debtor to file an appeal. However, Calcutta High Court has held that the award debtor is permitted to file a Letters Patent Appeal under the High Court Rules against the enforcement of the award.[17] This decision was based on the Court's observation that Part II of the Act is not a self – contained code, and thus the provisions of the Court rules which provide for such appeal operate to override Section 50.[18]

(d) Jurisdiction

According to the explanation of Section 47 of the Act, High Court has original jurisdiction to decide the questions forming the subject matter of the arbitral award if thesame had been the subject matter of the suit, and in rest of the cases the High Court has the jurisdiction to hear appeals from the decrees of its subordinate courts.

The Hon'ble Supreme Court has held that in case the subject- matter is money, then the execution petition must be filed before a Court within whose jurisdiction the money is held.[19]Accordingly, the application for enforcement of a foreign award may be filed before a Court in whose jurisdiction the award debtor has its office or is carrying on its business,[20]or where the assets of the award debtor are present.[21]

(e) Time Period

The Act does not provide for any period of limitation for filing an application for enforcement of a foreign award. However, the High Court of Bombay held that since the enforcement of foreign awards required that an application is to be made before a civil court,

[15] Hindustan Petroleum v. Videocon Industries Limited, 2012 (3) Arb LR 194
[16]ArunDevUpadhyaya v. Integrated Sales Services Limited, (2016) 9 SCC 524
[17] LMJ International v. SEA Stream Navigation Ltd, 2007 SCC Cal. 252
[18]*Id.* at 254.
[19] Brace Transport Corporation v. Orient Middle East Lines Ltd., AIR 1994 SC 175
[20] Tropic Shipping Co Ltd, London, UK v. Kothari Global Ltd., Mumbai 2001 SCC BOM 889
[21] Videocon Power Limited v. Tamil Nadu Electricity Board, 2004 SCC Mad 807

the provisions of the limitation Act would be applicable.[22]also, it was held that since foreign award goes through two distinct stages i.e. determination and execution , different provisions of the Limitation Act would apply to each stage. The Madras High Court on the other hand, has taken a contrary view on this, it held that since the foreign award is to be enforced in a combined proceeding involving enforcement and execution, only Article 136 of the Limitation Act would be applicable, setting out the time period of twelve years from the date on which the foreign award was rendered.[23]

V. LANDMARK CASES

(a) Renusagar Power Electric co. case

This case dealt with enforcement of an ICC award. Since, this case took place before 1996, it was decided under the Arbitration Act of1961.

The Supreme Court in this case held that the term "public policy" as mentioned in Section 7(1)(b)(ii) of the Arbitration Act,1961 meant the public policy as utilized by the Indian courts. Indian Court recognizes that “Public Policy refers to the matter which involves public good and interest”. What is injurious and obnoxious to public and what is in public interest and public good has varied from time to time. The Indian Supreme Court held that the expression "public policy” should be construed narrowly and therefore, in order to invoke exception of public policy, the award should be more than just violation of laws. If the criteria above are satisfied, it can be construed that the award given by the international arbitral tribunal would not be enforceable in India as enforcement of award is not possible if it is contrary to -

1) The interests of India or

2) Justice or morality or

3) Fundamental Policy of India

(b) Saw Pipes case

[22]NoyVallesina Engineering SPA v. Jindal Drugs Ltd., 2006 SCC Bom 545
[23]CompaniaNaviera v. Bharat Refineries Ltd., AIR 2007Mad 251

In ONGC v. Saw Pipes Ltd.,[24] reiterated several principles of construction of contract and referring to the contractual provisions which were the subject-matter of the arbitral award, the court held that "*in the facts of the case, it cannot be disputed that if contractual term, as it is, is to be taken into consideration, the award is, on the face of it, erroneous and in violation of the terms of the contract and thereby it violates Section 28(3) of the Act*". Culling out the ratio from the decisions rendered under the 1940 Act, the Court held:

"It is true that if the Arbitral Tribunal has committed mere error of fact or law in reaching its conclusion on the disputed question submitted to it for adjudication then the court would have no jurisdiction to interfere with the award. But this would depend upon reference made to the arbitrator:

> *(a) if there is a general reference for deciding the contractual dispute between the parties and if the award is based on erroneous legal proposition, the court could interfere;*
> *(b) it is also settled law that in a case of reasonedaward, the court can set aside the same if it is, on the face of it, erroneous on the proposition of law or its application;*
> *(c) if a specific question of law is submitted to the arbitrator, erroneous decision in point of law does not make the award bad, so as to permit its being set aside, unless the court is satisfied that the arbitrator had proceeded illegally."*

The decision in Saw Pipes, was rendered by a bench of two judges but has far reachingimportance.

Construing the phrase "public policy of India" appearing in section 34(2)(b)(ii), the court held that in a case where the validity of the award is challenged on the ground of being opposed to "public policy of India", a wider meaning ought to be given to the said phrase so that to set aside "patently illegal awards". The court distinguished the earlier decision in RenuSagarcase[25] on the ground that in the said case the phrase "public policy of India" appearing in section 7(l)(b)(ii) of the Foreign Awards (Recognition and Enforcement) Act, 1961 was construed which necessarily related to enforcement of foreign award after it became final.[26]Though the court accedes that "it is for the Parliament to provide for limited or wider jurisdiction of the court in case where award is challenged", it still holds that, in its view, a wider meaning is required to be given to the phrase "public policy of India" so as to "prevent frustration of legislation and justice". Stating the reasons in support of its view the

[24]ONGC v. Saw Pipes Ltd.,(1999) 4 SCC 214
[25]Renusagar Power Co. v. General Electric Co. Ltd., (1999) 1 SCC 644
[26]Central Inland Water Transport Ltd v.Brojo Nath Ganguly, (1986) 3 SCC 217

court held that "giving limited jurisdiction to the court for having finality to the award and resolving the dispute by speedier method would be much more frustrated by permitting patently illegal award to operate. Patently illegal award is required to be set at naught, otherwise it would promote injustice".

This decision had been the subject matter of public debate and criticism in various fora. The Law Commission of India also suggested an amendment to the Act by adding of explanation II to section 34 of the Act:[27]

Thus 'items' permitted by RenuSagar case are restricted to-

(i) Fundamental Policy of India

(ii) Interest of India

(iii) Justice or morality

These alone are included in the meaning of the worlds 'public policy', apart from what is contained in the Explanation [S.34(2)(b)(ii)] This aspect in proposed to be clarified by an Explanation.

(c) Bhatia International and its aftermath

The decision in Bhatia International v. Bulk Trading S.A.[28] was directly not concerned with enforcement of arbitral award, certain principles laid down therein with regard to application of the provisions contained in part I of the Act in respect of arbitration proceedings that are held in Paris in accordance with the Rules of the International Chamber of Commerce (ICC), have far reaching consequences. In Bhatia International, the major issue was whether an application filed under section 9 of the Act in the court of Additional District Judge, Indore by the foreign party against the appellant praying for interim injunction restraining the appellant from alienating transferring and/or creating third party rights, disposing of, dealing with and/or selling their business assets and properties, was maintainable. The Court held that the application was maintainable, which view was affirmed by the high court. The Supreme Court, reaffirming the decision of the high court, held that an application for interim measure can be made to the courts of India, whether or not the arbitration takes place in India or abroad. The court went on to hold 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

[27] 4. Law Commission of India, 176th Report on The Arbitration and Conciliation (Amendment) Bill,2001

[28] (2002) 4 SCC 1

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".

Rejecting the contention of the appellant that an award made in an arbitral proceeding held in a non-convention country could not be enforced in India, the court observed that a party could not be "left completely remediless".

The court concluded, "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 mean parties are free to deviate only to the extent permitted by provisions of Part I. In cases of international commercial arbitrations out of India provisions of Part I would apply unless the parties express or implied, exclude all or any of its provisions. In laws or rules chosen by the parties would prevail. Any provision, which is contrary to or excluded by that law or rules will not apply".

These observations in Bhatia International have led to views expressed by different high courts as regards the available against an award rendered abroad following the Rules of International of Arbitration of the International Chamber of Commerce.

A division Bench of the Calcutta High Court in White Industries Australia Ltd v. Coal India Ltd.[29] held that an award published and rendered in accordance with ICC Rules in Paris (though the proceedings were held, for the convenience of the parties, in London) could be challenged in a proceeding initiated in a court in India under section 34 of the Act since the contract between the parties stipulated that the "agreement shall be subject to and governed by the laws in force in India except that the Indian Arbitration Act of 1940 shall not apply". A division bench speaking through A K Patnaik CJ of Chhattisgarh High Court in Bharat Aluminium Company Limited v. Kaiser Aluminium Technical Services, Inc.,[30] however, took a contrary view.

(d) Venture Global Engineering v. Satyam Computer Services

Recently, a two-judge bench of the Supreme Court,[31] reiterating its decision in Bhatia International held that an award made in England through a arbitral process conducted by the London Court of International Arbitration, though a foreign award, part I of 1996 Act would

[29]White Industries Australia Ltd v. Coal India Ltd., (7004Ì 2 CLJ 197.
[30]Bharat Aluminium Company Limited v. Kaiser Aluminium Technical Services, Inc.,AIR (2005) Chhat 21.
[31]*Id.*

be applicable to such award and hence the courts in India would have jurisdiction both under section 9 and section 34 of the Act and entertain a challenge to its validity. It is of some significance that both in Bhatia International as well as in Venture Global Engineering case, the provisions under the Arbitration Act invoking the provisions contained in part-I thereof had been initiated by foreign parties against the Indian parties, though the proceedings of the arbitration were held abroad and the culmination of which undoubtedly were foreign awards.

The factual background of the case was thus: Venture Engineering (VGE), a company incorporated in USA had entered joint venture with Satyam Computer Services (Satyam) to constitute Indian company - Satyam Venture Engineering Company Limited. The two companies had equal shares i.e. 50-50 in the joint venture They had also entered into shareholder's agreement, which provided that "the shareholders shall at all times act in accordance Company Act and other applicable Act/Rules being enforced in time". In February 2005, disputes arose between the parties, referred to sole arbitration of Paul Hannon, appointed by the London Court of International Arbitration and the award made in England, directed to transfer its 50% shares in SVES to Satyam. Satyam filed a petition before the US District Court, Eastern District Court of Michigan recognition and enforcement of the award, which was contested by Venture filed a civil suit in the court of the First Additional Chief judge, City Civil Court, Secunderabad, seeking a declaration for setting award and for a permanent injunction on the transfer of shares award. The city civil court, though initially, granted an order of injunction, at the intervention of Satyam, finally rejected the plaint.

An appeal by Venture before the High Court of Andhra Pradesh, was also unsuccessful. Venture, therefore, approached the Supreme Court.Relying upon the decision in Bhatia International,[32] contending inter alia that in terms of the declaration of law by Supreme Court, part I of the Act would also apply to foreign awards and hence the courts in India had jurisdiction to entertain a challenge to the validity of the award and that in view or the over-riding provision contained in the shareholder's agreement, Satyam cannot approach the US courts for enforcement of the award.

On behalf of Satyam, it was contended that since the award was made in England and thus was a foreign award, no suit or other proceedings can lie against such award in view of section 44 of the Act and that an application for setting an award under section 34 of the Act could not lie in any event. A two-judge bench, which heard the case, felt that Bhatia

[32] *Supra* note 9 at 54.

International decided the principal issue namely that since the parties did not, by agreement exclude the provision of part-I of the Act from being made applicable to arbitration proceedings in England, the provisions of part-I would apply even to foreign award and hence the courts in India can entertain a challenge to the validity of such an award. Accepting the contentions of Venture, the court held:[33]

That the provisions of Part I of the Act would apply to all arbitrations including international commercial arbitrations and to all proceedings relating thereto. We further hold that where such arbitration is held in India, the provisions of Part-1 would compulsorily apply and parties are free to deviate to the extent permitted by the provisions of Part-I. It is also clear that even in the case 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. We are also of the view that such an interpretation does not lead to any conflict between any of the provisions of the Act and there is no lacuna as such.

The reason, which persuaded the court that a challenge to foreign award can lay in India, was the fact that an award, which is otherwise opposed to public policy of India and thus not enforceable even under the New York Convention, can be enforced, by a party by seeking its enforcement of such an award in another country. It is in view of such apprehension, the court observed:[34]

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 its 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's patently illegal.

This extended definition of public policy can be by-passed by taking the award to a foreign country for enforcement.

[33] Venture Global Engineering v. Satyam Computers Services, 2008(1) SCALE 214.
[34] Id. at 225

The cases of Bhatia International & Venture only proved the proverbial truth that 'bad cases make bad laws'. Another interesting feature is that in both cases, it was the foreign party who sought to invoke the jurisdiction of the Indian courts in respect of arbitration proceedings held abroad and awards made there.

VI. CONCLUSION

The Parliament has enacted the Arbitration and Conciliation Act with anobjective to provide speedy remedy and to achieve this objective, section 5 of the Act imposes a complete bar on the intervention of the courts in matters where there exists an arbitration clause. The arbitration laws in India is very much at its crossroads. Today, arbitration is poised to effect great changes to the ways in which dispute resolution is conducted. It brings with it the solemnity and finality of the judicial process and along with the procedural flexibilities of alternate dispute resolution methods. However, there is an equally pressing need to recognize that much more can and should be done in order to improve the conduct of arbitral proceedings in India but most importantly, we feel that there is a need to bring a change in perceptions. As our nation moves towards increasing litigiousness, alternative methods of dispute resolution might just provide the key to resolving the problems of overburdened caseloads, long pendency of cases and an all too frequent case of justice being delayed. For long, the problem plaguing the effective implementation of ADR methods has been their perception as being subordinate to the court process- a perception shared and fostered by lawyers and people alike. It is imperative, that this be changed and this can only be achieved if there is active engagement from all the stakeholders in this process. Certainly, there are some disputes inherently unsuited for alternative channels but there are so many more which fit perfectly within the vision envisaged for a system of rendering justice that runs concurrent to the Courts. It is necessary for the Courts themselves to mandate recourse to ADR methods in inter alia international commercial disputes, employment disputes, matrimonial cases, compoundable criminal offences, to name just a few. Saw Pipe case's expanded judicial review especially unsuitable in the Indian context where courts are overwhelmed with backlog. In such scenario to permit a challenge on merits would considerably delay the enforcement proceedings. A majority of parties opting for arbitrations do so to avoid court delays and legal niceties. An unfortunate side effect of this decision is that it has become a ground for parties to shift the venue of arbitration outside India. The Supreme Court's decision (Venture Global Engineering case) flies in the face of modern commercial practice. At the end of the day, what should take precedence is the prevailing of justice, in substance more than in form. As our country grows and flowers, taking wing on issues unimagined

before, it is time also for our dispute resolution systems, the undisputed backbone of our nation, to follow suit. At the end of the day arbitration would see the day light of reality and true success when people would start accepting the arbitral award and its finality as that of a judgment by the Supreme Court not because it is justice always but because it is final always, having no further appeal.