BHATIA INTERNATIONAL

v.

BULK TRADING S.A. AND ANR.

MARCH 13, 2002

[G.B. PATTANAIK. S.N. PHUKAN AND S.N. VARIAVA, JJ.]

Arbitration and Conciliation Act, 1996: Part-I and Part-II Sections 2, 5, 9, 17, 48, 49, 57 and 58.

International Chambers of Commerce Rules—Article 23.

Arbitration—Jurisdiction of Courts in India—Exercise of—Held, may not be ousted unless explicitly expressed by the statutory provisions or by inferential conclusion.

Provisions of Part-I—Applicability to arbitration proceedings and International Commercial Arbitration in India.

Deviation from provisions—Extent of—Parties can deviate from the provisions to the extent permitted as per Part-I of the Act—For International Commercial Arbitration parties by an agreement may exclude all or any provisions of the Act.

Application for interim measure—Maintainability of—Such Application can be submitted to Courts in India irrespective of place of arbitration but before expiry of time of execution of the Award.

Interim Award—Interim Order—Distinction between—Though Arbitral Tribunal could pass an interim award under Part-II of the Act, yet an interim order passed by it would not be enforceable in India.

Legislative Intent—Provisions of Part-I is compulsorily applicable to arbitration including an International Commercial Arbitration in India—Parties by an agreement can declare that Part-I or any of its provisions will not apply to arbitration—UNCITRAL Model Laws Article 1(2).

Interpretation of Statutes:

Statutory provisions—Possibility of more than one interpretation—Court

A *to choose that interpretation which represents the true intention of the Legislature—In the unforeseen situations which emerge after enactment of statute, Court could expound but should not try to legislate.*

Appellant entered into a contract with 1st Respondent. Arbitration clause in the Contract provided for arbitration as per rules of the International B **Chambers of Commerce (ICC). 1st Respondent requested for arbitration. Parties agreed for the same and ICC appointed a sole arbitrator. In the meanwhile, 1st Respondent filed an application before the Distt. Judge in India and prayed for an order of injunction restraining the opposite parties from alienating, transferring, creating third party right, disposing of, dealing with** C **and/or selling their business assets and properties. Appellant raised plea of maintainability of such application on the ground that Part-I of Arbitration and Conciliation Act would not apply where place of arbitration is not in India. On dismissal of the application, Appellant filed a Writ Petition which was also dismissed by the High Court. Hence the present appeal.**

D **It was contended for the appellant that Part-I of the Act only applies to arbitrations where place of arbitration is in India; and that Legislature did not want Part-I to apply to arbitrations which take place outside India; and that Part-II of the Act applies to foreign awards; and that 'every arbitration' in Section 2(2) and 'all arbitration' in Section 2(5) of the Act must necessarily refer only to arbitrations which take place in India; and that if Part-I applies** E **to all arbitrations then Section 2(2) would become redundant and/or otiose; and that the Legislature purposely omitted to make any provision for interim measures either by the Court or by Arbitral Tribunal; and that a number of High Courts have held Part-I of the Act would not apply to arbitrations which take place outside India.**

F **It was contended for the Respondents that a conjoint reading of the provisions shows that Part-I applies to all arbitrations unless the parties by their agreement excludes its provisions, Part-I would also apply to all International Commercial Arbitrations including those which take place outside India.**

G **Dismissing the appeal, the Court**

HELD: 1.1. The wording of sub-section (2) of Section 2 of the Arbitration and Conciliation Act suggests that the intention of the Legislature was to make provisions of Part-I compulsorily applicable to an arbitration, H **including an international commercial arbitration, which takes place in India.**

Parties cannot, by agreement, override or exclude the non-derogable provisions of Part-I in such arbitrations. [423-G] A

1.2. By omitting to provide that Part-I will not apply to international commercial arbitrations which take place outside India the effect would be that Part-I would also apply to international commercial arbitrations held outside India. 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 allow 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-derogable provisions of Part-I can be excluded. Such an agreement may be express or implied. [424-A-B] B C

National Thermal Power Corporation v. *Singer Company and Ors.*, [1992] 3 SCC 551, relied on.

1.3. Article 1(2) of UNCITRAL Model Laws uses the word "only" to emphasize that the provisions of that Law are to apply if the place of arbitration is in the territory of that State. Significantly in Section 2(2) the word "only" has been omitted. The omission of this word changes the whole complexion of the sentence. The omission of the word "only" in Section 2(2) indicates that this sub-section is only an inclusive and clarificatory provision. [426-H; 427-A] D

1.4. 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 provisions, in Part-I, which is contrary to or excluded by that law or rules will not apply. Article 23 of the ICC Rules permits parties to apply to a competent judicial authority for interim and conservatory measures. Therefore, in such cases an application can be made under Section 9 of the said Act. [429-C-D; 430-B] E F G

2.1. Ordinarily the jurisdiction of a Court may not be ousted unless the very statutory provision explicitly indicates or even by inferential conclusion the Court arrives that such a conclusion is the only conclusion. [420-D-E]

Corrocraft Ltd. v. *Pan American, Airways,* (1968) 3 WLR 714 AIR (1975) H

A SC 1951; *Johnson* v. *Moreton,* (1978) 3 All ER 37 and *Stock* v. *Frank Jones (Tipton) Ltd.,* (1978) 1 All. ER 948 and *Shanon Realities Ltd.* v. *Sant Michael,* (1924) A.C. page 185, referred to.

2.2. "International commercial arbitration" as defined in the Act makes no distinction between international commercial arbitrations which take place B in India or international commercial arbitrations which take place outside India. Courts in India would have jurisdiction even in respect of an international commercial arbitration. An ouster of jurisdiction cannot be implied but has to be express. [423-B-D-E]

C 3. It must be borne in mind that the very object of the Arbitration and Conciliation Act of 1996, was to establish a uniform legal framework for the fair and efficient settlement of disputes arising in International Commercial Arbitration. The conventional way of interpreting a statute is to seek the intention of its makers. If a statutory provision is open to more than one interpretation then the Court has to choose that interpretation which D represents the true intention of the Legislature. It is impossible even for the most imaginative legislature to forestall exhaustive situations and circumstances that may be called for. It is in such a situation the Court's duty to expound arises with a caution that the Court should not try to legislate. [420-B-C-D]

E 4. There is a difference between an "interim award" and an "interim order". Undoubtedly, the arbitral tribunal could pass an interim award. But an interim order or direction passed by the arbitral tribunal would not be enforceable in India. Thus even in respect of arbitrations covered by Part-II a party would be precluded from getting any interim relief. [428-G-H]

F 5. The Arbitration and Conciliation Act is one consolidated and integrated Act. General provisions applicable to all arbitrations will not be repeated in all chapters or parts. It must immediately be clarified that the arbitration not having take place in India, all or some of the provisions of Part-I may also get excluded by an express or implied agreement of parties. G 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. [426-B-E]

6. A proper and conjoint reading of all the provisions indicates that Part- H I is to apply to international commercial arbitrations which take place out of

India, unless the parties, by agreement or implied exclude it or any of its provisions. Such an interpretation has to be preferred to the one adopted by the High Courts of Orissa, Bombay, Madras, Delhi and Calcutta. Therefore, the contrary view taken by these High Courts is not good law. [430-D-E]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6527 of 2001.

From the Judgment and Order dated 10.10.2000 of the Madhya Pradesh High Court in W.P. No. 453 of 2000.

B. Sen, Sushil Kr. Jain, U. Chouksey, Ms. Ruchi Kohli, Ms. Anjali Doshi and L.P. Singh for the Appellant.

C.A. Sundaram, Ms. Farishty D. Sethena, V. Krishnan, Tripurari Ray, Vishwajit Singh and Ms. S. Aiyar for the Respondent No. 1 Ex-parte for Respondent No. 2.

The Judgment of the Court was delivered by

S. N. VARIAVA, J. 1.This Appeal is against a Judgment dated 10th October, 2000 passed by the Madhya Pradesh High Court.

2. Briefly stated the facts are as follows:

The Appellant entered into a contract with the 1st Respondent on 9th May, 1997. This contract contained an arbitration clause which provided that arbitration was to be as per the rules of the International Chamber of Commerce (for short ICC). On 23rd October, 1997 the 1st Respondent filed a request for arbitration with ICC. Parties agreed that the arbitration be held in Paris, France. ICC has appointed a sole arbitrator

3. 1st Respondent filed an application under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter called the said Act) before the IIIrd Additional District Judge, Indore, M.P. against the Appellant and the 2nd Respondent. One of the interim reliefs sought was an order of injunction restraining these parties from alienating, transferring and/or creating third party right, disposing of, dealing with and/or selling their business assets and properties. The Appellant raised the plea of maintainability of such an application. The Appellant contended that Part I of the said Act would not apply to arbitrations where the place of arbitration is not in India. This application was dismissed by the IIIrd Additional District Judge on 1st

A February, 2000. It was held that the Court at Indore had jurisdiction and the application was maintainable. The Appellant filed a Writ Petition before the High Court of Madhya Pradesh, Indore Bench. The said Writ Petition has been dismissed by the impugned Judgment dated 10th October, 2000.

4. On behalf of the Appellants, Mr. Sen submits that Part I of the said
B Act only applies to arbitrations where the place of arbitration is in India. He submits that if the place of arbitration is not in India then Part II of the said Act would apply. He relies on sub-section (2) Section 2 of the said Act which provides that Part I shall apply where the place of arbitration is in India. He submits that sub-section (2) of Section 2 makes it clear that the provisions of
C Part I do not apply where the place of arbitration is not in India. Mr. Sen points out that the said Act is based on UNCITRAL Model Law on International Commercial Arbitration. He points out that Article 1(2) of UNCITRAL Model Law provides that the law, except Articles 8, 9, 35 and 36 of the Model Law, would apply only if the Arbitration takes place in the territory of the State. Mr. Sen submits that Article 9 of the UNCITRAL
D Model Law permits a party to request a Court for interim measure even if the arbitration is not in the territory of the State. He submits that whilst framing the said Act the Legislature has purposely not adopted Article 1(2) of the UNCITRAL Model Law. He submits that this clearly shows the intention of the Legislature that they did not want Part I to apply to arbitrations which
E take place outside India.

5. Mr. Sen points out that Section 2(f) of the said Act defines an "international commercial arbitration". Mr. Sen submits that an international commercial arbitration could take place either in India or outside India.He submits that if the international commercial arbitration takes place out of
F India then Part I of the said Act would not apply. He submits that Part II of the said Act applies to foreign awards.

6. Mr. Sen fairly draws the attention of this Court to sub-sections (3), (4) and (5) of Section 2, which read as follows:

G "2(3) This Part shall not affect any other law for the time being in force by virtue of which certain disputes may not be submitted to arbitration.

(4) This Part except sub-section (1) of section 40, sections 41 and 43 shall apply to every arbitration under any other enactment for the
H time being in force, as if the arbitration were pursuant to an arbitration

agreement and as if that other enactment were an arbitration agreement except in so far as the provisions of this Part are inconsistent with that other enactment or with any rules made thereunder. A

(5) Subject to the provisions of sub-section (4), and save in so far as is otherwise provided by any law for the time being in force or in any agreement in force between India and any other country or countries, this Part shall apply to all arbitrations and to all proceedings relating thereto." B

Mr. Sen submits that sub-sections (3), (4) and (5) of Section 2 would necessarily only apply to arbitration which take place in India. He submits that, therefore, even though the sub-section (4) of Section 2 uses the words "every arbitration" and sub-section (5) of Section 2 uses the words "all arbitrations and to all proceedings relating thereto", they must necessarily refer only to arbitrations which take place in India. He submits that otherwise there would be a conflict between sub section (2) on one hand and sub sections (4) and/or (5) on the other. Mr. Sen submits that if it is held that Part I applies to all arbitrations i.e. even to arbitrations whose place of arbitration is not in India, then Sub section (2) of Section 2 would become redundant and/or otiose. C D

7. Mr. Sen submits that in this matter arbitration is being held in Paris i.e. out of India. He submits that to such arbitrations Part I does not apply. He submits that Sections 9 and 17 fall in Part I. He submits that Sections 9 and 17would not apply and cannot be used in cases where the place of arbitration is not in India. E

8. Mr. Sen submits out that Part II deals with enforcement of foreign awards and makes elaborate provisions in respect thereof. He points out that in Part II there is no provision similar to Sections 9 and 17. He submits that the Legislature, whilst providing for foreign awards, has purposely omitted to make any provision for interim measures either by the Court or by arbitral tribunal. He submits that the reason for this is obvious. He submits that in cases, where arbitrations take place outside India they would be governed by the rules of the country or the body under whose jurisdiction they are being conducted. He submits that under the ICC Rules of Arbitration Article 23 provides for interim measures. Mr. Sen submits that the remedy, if any, is to apply for interim relief under Article 23. F G

9. Mr. Sen submits that a plain reading of Section 9 also makes it clear H

A that it would not apply to arbitrations which take place outside India. He submits that Section 9 provides that an application for interim measure must be made before the award is enforced in accordance with Section 36. Mr. Sen submits that Section 36 deals with enforcement of domestic awards only. Mr. Sen submits that provisions for enforcement of foreign awards are contained in Sections 48, 49, 57 and 58. He submits that it is very significant that B Section 9 does not talk of enforcement of the award in accordance with Sections 48, 49, 57 and 58. Mr. Sen submits that this also makes it clear that the provisions of Part I of the said Act do not apply to arbitrations which do not take place in India.

C 10. Mr. Sen also relies on Section 5 of the said Act and submits that the underlying principle is that a judicial authority should not interfere except as provided in said act. He submits that the rational behind this is that there should be minimum interference by Courts.

11. Mr. Sen submits that the Court in Indore could not have entertained D the application under Section 9 as Part I did not apply to arbitrations which take place outside India. He submits that the Court in Indore and the High Court were wrong in rejecting the application of the Appellant and in holding that the Court had jurisdiction.

E 12. Mr. Sen states that on this aspect there is no authority of this Court. He points out that a number of High Courts including the High Courts at Orissa, Bombay, Madras, Delhi and Calcutta have held that Part I of the said Act would not apply to arbitrations which take place outside India. He points out that earlier, two single Judges of the Delhi High Court had held that Part I applies to arbitrations which take place outside India. He points F out that now a Division Bench of the Delhi High Court has held that Part I does not apply to arbitrations which take place outside India. He submits that therefore now the only High Court which has held, that Part I applies to arbitrations which take place outside India, is the Madhya Pradesh High Court, which has so held by the impugned Judgment. Mr. Sen took us through the authority of the Division Bench of the Delhi High Court in the case of G *Marriott International Inc.* v. *Ansal Hotels Ltd.*, reported in AIR [2000] Delhi 377. He also took us through an unreported Judgment of a Division Bench of the Calcutta High Court dated 27th January, 1998 in the case of *Keventea Agro Ltd.* v. *Agram Company Ltd.*, These authorities adopt, more or less, the same reasoning as has been canvassed by Mr. Sen. The Delhi H High Court further notices that this reasoning may lead to a situation where

a party may be left remedy-less and, therefore, would work hardship on a party. The Delhi High Court however observed as follows :

> "We may agree with the learned counsel for the appellant that it may, in some cases, lead to hardship to a party, however, when the language of the statute is plain and unambiguous and admits of only one meaning. The question of construction of statute arises, for the Act speaks for itself even if the result is strange or surprising, unreasonable or unjust or oppression as it is not for the Courts to extend the scope of the statute beyond the contemplation of the legislature. It is entirely for the legislature to look into this question.

13. On the other hand Mr. Sundaram for the Respondents has taken us through the various provisions of the said Act. He has ably submitted that a conjoint reading of the provisions shows that Part I is to apply to all arbitrations. He submits that unless the parties by their agreement excludes its provisions Part I would also apply to all international commercial arbitrations including those that take place out of India.

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

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

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

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

(d) leave a party remediless inasmuch as in international commercial

A arbitrations which take place out of India the party would not be able to apply for interim relief in India even though the properties and assets are in India. Thus a party may not be able to get any interim relief at all.

15. It is thus necessary to see whether the language of the said Act is so plain and unambiguous as to admit of only the interpretation suggested by B Mr. Sen. It must be borne in mind that the very object of the Arbitration and Conciliation Act of 1996, was to establish a uniform legal framework for the fair and efficient settlement of disputes arising in international commercial arbitration. The conventional way of interpreting a statute is to seek the intention of its makers. If a statutory provision is open to more than one C interpretation then the Court has to choose that interpretation which represents the true intention of the legislature. This task often is not an easy one and several difficulties arise on account of variety of reasons, but at the same, it must be borne in mind that it is impossible even for the most imaginative legislature to forestall exhaustively situations and circumstances that may emerge after enacting a statute where its application may be called for. It is D in such a situation the Courts' duty to expound arises with a caution that the Court should not try to legislate. While examining a particular provision of a statute to find out whether the jurisdiction of a Court is ousted or not, the principle of universal application is that ordinarily the jurisdiction may not be ousted unless the very statutory provision explicitly indicates or even by E inferential conclusion the Court arrives at the same when such a conclusion is the only conclusion. Notwithstanding the conventional principle that the duty of judges is to expound and not to legislate. The Courts have taken the view that the judicial art of interpretation and appraisal is imbued with creativity and realism and since interpretation always implied a degree of discretion and choice, the Court would adopt particularly in areas such as, F constitutional adjudication dealing with social and defuse rights. Courts are therefore, held as "finishers, refiners, and polishers of legislatures which gives them in a state requiring varying degrees of further processing". (see *Corrocraft Ltd.* v. *Pan American Airways,* (1968) 3 WLR 714 at page 732, AIR (1975) SC 1951 at page 1957. If a language used is capable of bearing G more than one construction, in selecting the true meaning, regard must be had to the consequences, resulting from adopting the alternative constructions. A construction that results in hardship, serious inconvenience, injustice, absurdity or anomaly or which leads to inconsistency or uncertainty and friction in the system which the statute purports to regulate has to be rejected and preference should be given to that construction which avoids such results. H (see *Johnson* v. *Moreton,* (1978) 3 All. ER 37 and *Stock* v. *Frank Jones*

(Tipton) Ltd. (1978) 1 All. ER 948). In selecting out of different interpretations the Court will adopt that which is just reasonable and sensible rather than that which is none of those things, as it may be presumed that the legislature should have used the word in that interpretation which least offends our sense of justice. In *Shanon Realites Ltd.* v. *Sant Michael,* (1924) A.C. page 185 at page 192-193 Lord Shaw stated, "where words of a statute are clear, they must, of course, be followed, but in their Lordships opinion where alternative constructions are equally open that alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to be regulating and that alternative is to be rejected which will introduce uncertainty, friction or confusion into the working of the system." This principle was accepted by Subba Rao, J. while construing Section 193 of the Sea Customs Act and in coming to the conclusion that the Chief of Customs Authority was not an officer of custom. (AIR 1961 SC 1549).

16. A reading of the provisions shows that the said Act applies to arbitrations which are held in India between Indian nationals and to international commercial arbitrations whether held in India or out of India. Section 2(f) defines an international commercial arbitration. The definition makes no distinction between international commercial arbitrations held in India or outside India. An international commercial arbitration may be held in a country which is a signatory to either the New York Convention or the Geneva Convention (hereinafter called the convention country). An international commercial arbitration may be held in a non-convention country. The said Act nowhere provides that its provisions are not to apply to international commercial arbitrations which take place in a non-convention country. Admittedly Part II only applies to arbitrations which take place in a convention country. Mr. Sen fairly admitted that Part II would not apply to an international commercial arbitration which takes place in a non-convention country. He also fairly admitted that there would be countries which are not signatories either to the New York Convention or to the Geneva Convention. It is not possible to accept submission that the said Act makes no provision for international commercial arbitrations which take place in a non-convention country.

17. Section 1 of the said Act reads as follows:

"*1. Short title, extent and commencement.*- (1) This Act may be called the Arbitration and Conciliation Act, 1996.

A (2) It extends to the whole of India:

Provided that Parts I, III and IV shall extend to the State of Jammu and Kashmir only in so far as they relate to international commercial arbitration or, as the case may be, international commercial conciliation."

B

The words "this Act" means the entire Act. This shows that the entire Act, including Part I, applies to the whole of India. The fact that all Parts apply to whole of India is clear from the proviso which provides that Parts I, III and IV will apply to the State of Jammu and Kashmir only so far as international commercial arbitrations/conciliations are concerned. Significantly C the proviso does not state that Part I would apply to Jammu and Kashmir only if the place of the international commercial arbitration is in Jammu and Kashmir. Thus if sub-section (2) of Section 2 is read in the manner suggested by Mr. Sen there would be a conflict between Section 1 and Section 2(2). There would also be an anomaly inasmuch as even if an international D commercial arbitration takes place outside India, Part I would continue to apply in Jammu and Kashmir, but it would not apply to the rest of India. The Legislature could not have so intended.

18. Section 2(a) defines "arbitration" as meaning any arbitration whether or not administered by a permanent arbitral institution. Thus, this definition E recognises that the arbitration could be under a body like the Indian Chambers of Commerce or the International Chamber of Commerce. Arbitrations under International Chamber of Commerce would be held, in most cases, out of India. Section 2 (c) provides that the term "arbitral award" would include an interim award.

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19. Section 2(f) of the said Act defines an international commercial arbitration. It reads as follows:

"2(f) "international commercial arbitration" means an arbitration relating to disputes arising out of legal relationships, whether G contractual or not, considered as commercial under the law in force in India and where at least one of the parties is -

(i) an individual who is a national of, or habitually resident in, any country other than India; or

(ii) a body corporate which is incorporated in any country other than H India; or

(iii) a company or an association or a body of individuals whose central management and control is exercised in any country other than India; or

(iv) the Government of a foreign country."

As stated above the definition of "international commercial arbitration" makes no distinction between international commercial arbitrations which take place in India or international commercial arbitrations which take place outside India.

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

> 2(e) "Court" means the principle Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes."

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

21. Now let us look at sub-sections (2), (3), (4) and (5) of Section 2. Sub-section (2) of Section (2) provides that Part I would apply where the place of arbitration is in India. To be immediately noted that it is not providing that Part I shall not apply where the place of arbitration is not in India. It is also not providing that Part I will "*only*" apply where the place of arbitration is in India (emphasis supplied). Thus the Legislature has not provided that Part I is not to apply to arbitrations which take place outside India. The use of the language is significant and important. The Legislature is emphasising that the provisions of Part I would apply to arbitrations which take place in India, but not providing that the provisions of Part I will not apply to arbitrations which take place out of India. The wording of sub-section (2) of Section 2 suggests that the intention of the Legislature was to make provisions of Part I compulsorily applicable to an arbitration, including an international commercial arbitration, which takes place in India. Parties cannot, by

A agreement, override or exclude the non-derogable 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 B Legislature appears to be to allow parties to provide by agreement that Part I or any provision therein will not applow. Thus in respect of arbitrations which take place outside India even the non-derogable provisions of Part I can be excluded. Such an agreement may be express or implied.

C 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 D 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.

E 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 F 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 G 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 H 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". A B

24. Section 5 provides that a judicial authority shall not intervene except where so provided in Part I. Section 8 of the said Act permits a judicial authority before whom an action is brought in a matter to refer parties to arbitration. If the matters were to be taken before a judicial authority in India it would be a Court as defined in Section 2(e). Thus if Part I was to only apply to arbitrations which take place in India the term "Court" would have been used in Sections 5 and 8 of the said Act. The Legislature was aware that, in international commercial arbitrations, a matter may be taken before a judicial authority outside India. As Part I was also to apply to international commercial arbitrations held outside India the term "judicial authority" has been used in Sections 5 and 8. C D

25.The beginning part of Section 28 reads as follows: E

> "28. Rules applicable to substance of dispute.- (1) where the place of arbitration is situate in India,-
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> xxx xxx xxx
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> xxx xxx xxx

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Section 28 is in Part I. If Part I was not to apply to an arbitration which takes place outside India there would be no necessity to specify that the rules are to apply "where the place of arbitration is situate in India". It has been held in the case of National Thermal Power Corporation vs. Singer Company and others reported in (1992) 3 SCC 551 that in international commercial arbitrations parties are at liberty to choose, expressly or by necessary implication, the law and the procedure to be made applicable. The procedure or the rules governing such arbitration may be of the country where the arbitration is being held or the body under whose aegis the arbitration is being held. All bodies which conduct arbitrations and all countries have rules and laws governing arbitrations. Thus Section 28 does not provide for rules G H

where the place of arbitration is out of India.

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.

27. Mr. Sen had also relied upon Article 1(2) of the UNCITRAL Model Law and had submitted that India has purposely not adopted this Article. He had submitted that the fact that India had not provided (like in the UNCITRAL Model Law) that Section 9 would apply to arbitral proceedings which take place out of India indicated the intention of the Legislature not to apply Section 9 to such arbitrations. We are unable to accept this submission. Article 1(2) of UNCITRAL Model Law reads as follows :

> (2) The provisions of this Law, except articles 8, 9, 35 and 36, apply *only* if the place of arbitration is in the territory of this State." (emphasis supplied)

Thus Article 1(2) of UNCITRAL Model Laws uses the word "only" to

emphasize that the provisions of that Law are to apply if the place of arbitration is in the territory of that State. Significantly in Section 2(2) the word "only" has been omitted. The omission of this word changes the whole complexion of the sentence. The omission of the word "only" in Section 2(2) indicates that this sub-section is only an inclusive and clarificatory provision. As stated above it is not providing that provisions of Part I do not apply to arbitration which take place outside India. Thus there was no necessity of separately providing that Section 9 would apply.

28. Now let us consider Section 9. It reads as follows:

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

(i) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or

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

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

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

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the court to be just and convenient,

and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it."

Thus under Section 9 a party could apply to the court (a) before, (b)

during arbitral proceedings or (c) after the making of the arbitral award but before it is enforced in accordance with Section 36. The words "in accordance with Section 36" can only go with the words "after the making of the arbitral award". It is clear that the words "in accordance with Section 36" can have no reference to an application made "before" or "during the arbitral proceedings". Thus it is clear that an application for interim measure can be made to Courts in India, whether or not the arbitration takes place in India, before or during arbitral proceedings. Once an Award is passed, then that award itself can be executed. Sections 49 and 58 provide that awards covered by Part II are deemed to be a decree of the Court. Thus "foreign awards" which are enforceable in India are deemed to be decrees. A domestic award has to be enforced under the provisions of Civil Procedure Code. All that Section 36 provides is that an enforcement of a domestic award is to take place after the time to make an application to set aside the award has expired or such an application has been refused. Section 9 does suggest that once an award is made an application for interim measure can only be made if the award is a "domestic award" as defined in Section 2(7) of the said Act. Thus where the Legislature wanted to restrict the applicability of Section 9 it has done so specifically.

29. We see no substance in the submission that there would be unnecessary interference by courts in arbitral proceedings. Section 5 provides that no judicial authority shall intervene except where so provided. Section 9 does not permit any or all applications. It only permits applications for interim measures mentioned in clauses (i) and (ii) thereof. Thus there cannot be applications under Section 9 for stay of arbitral proceedings or to challenge the existence or validity of arbitration agreements or the jurisdiction of the arbitral tribunal. All such challenges would have to be made before the arbitral tribunal under the said Act.

30. Mr. Sen had also submitted that the term "arbitral award" includes an interim award. He had submitted that it would be open for the arbitral tribunal to pass interim awards and those interim awards could be enforced in India under Part II. However, there is a difference between an "interim award" and an "interim order". Undoubtedly, the arbitral tribunal could pass an interim award. But an interim order or directions passed by the arbitral tribunal would not be enforceable in India. Thus even in respect of arbitrations covered by Part II a party would be precluded from getting any interim relief.

In any event, on Mr. Sen's interpretation, an award passed in arbitral proceedings held in a non-convention country could not be enforced. Thus such a party would be left completely remediless. A

31. If a party cannot secure, before or during the pendency of the arbitral proceedings, an interim order in respects of items provided in Section 9(i) & (ii) the result may be that the arbitration proceedings may themselves get frustrated e.g. by non appointment of a guardian for a minor or person of unsound mind or the subject matter of the arbitration agreement not being preserved. This could never have been the intention of the Legislature. B

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. C D

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

"*Conservatory and Interim Measures*

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

2. Before the file is transmitted to the Arbitral Tribunal, and in appropriate circumstances even thereafter, the parties may apply to any competent judicial authority for interim or conservatory measures. H

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

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

C 35. Lastly it must be stated that the said Act does not appear to be a well drafted legislation. Therefore the High Courts of Orissa, Bombay, Madras, Delhi and Calcutta cannot be faulted for interpreting it in the manner indicated above. However, in our view a proper and conjoint reading of all the provisions indicates that Part I is to apply also to international commercial arbitrations D which take place out of India, unless the parties by agreement, express or implied exclude it or any of its provisions. Such an interpretation does not lead to any conflict between any of the provisions of the said Act. On this interpretation there is no lacunae in the said Act. This interpretation also does not leave a party remedyless. Thus such an interpretation has to be preferred to the one adopted by the High Courts of Orissa, Bombay, Madras, Delhi and E Calcutta. It will therefore have to be held that the contrary view taken by these High Courts is not good law.

36. In this view of the matter we see no reason to interfere with the impugned judgment. The Appeal stands dismissed. There will be no Order as to costs throughout. F

S.K.S. Appeal dismissed.