IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
ORIGINAL SIDE

The Hon'ble **JUSTICE SANJIB BANERJEE**

And

The Hon'ble **JUSTICE SUVRA GHOSH**

APO No. 430 of 2017
In
EC No. 233 of 2016

DEVI RESOURCES LIMITED

-VERSUS-

AMBO EXPORTS LIMITED

For the Appellant: Mr Dhrubo Ghosh, Sr Adv.,
Mr Sarbopriyo Mukherjee, Adv.,
Mr Rahul Karmakar, Adv.,
Ms Debamitra Adhikari, Adv.,
Mr Rohit Banerjee, Adv.,
Ms Anindita Mukherjee, Adv.,
Mr Ayan Ray, Adv.

For the Respondent: Mr Ratnanko Banerji, Sr Adv.,
Ms Urmila Chakraborty, Adv.,
Ms Mudrika Khaitan, Adv.

Hearing concluded on: February 5, 2019.

Date: February 13, 2019.

SANJIB BANERJEE, J. : –

The principal matter in issue in this appeal is how an injunction *in personam* restraining a person from proceeding with a foreign arbitral reference would impact the application for implementation of the foreign award when such award has been rendered at a time that the injunction was in subsistence, but the injunction has subsequently been vacated.

2. The appellant here is a company incorporated and organised under the appropriate laws of Hong Kong and having its principal place of business in Hong Kong. The respondent is a Kolkata-based company.

3. On February 29, 2012, the parties entered into an agreement under which the appellant agreed to buy iron ore fines of indicated specifications from the respondent herein. Clause 14 of the agreement recognised the contract to be governed by English law and any dispute arising out of such agreement to be referred to arbitration in London in accordance with the English statute and the arbitration to be conducted by the London Maritime Arbitrators' Association (LMAA). There may or may not have been subsequent addenda to the original agreement, but nothing turns on such dispute between the parties. The facts narrated are as they appear from the pleadings and the disagreements between the parties on minor matters may not have any bearing in the context of the larger legal issue that has arisen.

4. To continue with the factual narrative, it appears to be the fairly admitted position that the respondent herein was unable to supply the goods to the appellant in terms of the agreement of February 29, 2012 or at any rate, the respondent persuaded the appellant to accept the supply of the goods from another supplier by the name of Muktar Minerals Private Limited of Goa. Supplier Muktar apparently could not arrange the delivery of the goods within the time prescribed by the appellant. Indeed, a vessel commissioned for carrying the goods had to wait for about 70 days at the load-port and the appellant, apparently, had to clear the claims on account of demurrage and dead freight to obtain release of its consignment of cargo.

5. It is the contention of the respondent in a suit filed under Order XXXVII of the Code of Civil Procedure, 1908 in this court, that the disputes between the parties herein as to the claim of the respondent for the price of goods and the claim of the appellant on account of demurrage and the goods not adhering to the contractual specifications were settled in April, 2013 and such settlement is reflected in a letter issued by the appellant to the respondent on April 24, 2013. By such letter, the respondent asserts, the appellant agreed to pay a total amount of US $ 1 million by executing five bills of exchange of value of US $ 200,000 each. According to the respondent's plaint in the summary suit as filed in this court, about US $ 300,000 out of the agreed amount of US $ 1 million has been paid by the appellant to the respondent and the claim in the suit is for the balance amount and based on three of the five bills of exchange in full and another in part.

6. The respondent's summary suit was filed in this court in June, 2014. In January, 2015 the appellant applied under Section 45 of the Arbitration and Conciliation Act, 1996 for the disputes being the subject-matter of the respondent's suit to be referred to arbitration in accordance with the arbitration agreement contained in the original contract between the parties of February 29, 2012.

7. On March 25, 2015, the interlocutory court here directed affidavits to be exchanged in such application filed by the appellant and restrained the parties from taking any step in the suit. In June, 2015 the appellant apparently invoked the arbitration agreement and appointed its arbitrator. The respondent denied the existence of any arbitration agreement between the parties and objected to the arbitral reference by its letter of July 7, 2015. However, by the middle of October, 2015, the appellant filed its statement of claim before the sole arbitrator. The respondent did not pay any heed to the arbitrator directing the respondent in November, 2015 to file its statement of defence and, over the next two months, the respondent sought to question the very basis of the arbitration. The substance of the respondent's challenge to the arbitration reference was that the settlement between the parties herein as embodied in the letter of April 24, 2013 issued by the appellant to the respondent was a stand-alone agreement which was not governed by any arbitration clause.

8. On January 11, 2016 the respondent applied in its summary suit in this court for an injunction restraining the continuation of the foreign arbitration

proceedings by way of an injunction against the LMAA arbitral reference and also seeking an injunction against the appellant herein from proceeding with such arbitration. On January 14, 2016 an interim order was passed on such application of the respondent herein.

9. In the three-page order of January 14, 2016, the court noticed that the appellant herein had applied under Section 45 of the Act of 1996 for reference of the disputes in the suit to arbitration and the contention of the respondent herein that during the pendency of such application under Section 45 of the Act of 1996 the appellant herein was proceeding with its arbitral reference. In particular, the order recorded that the respondent perceived the foreign arbitral reference to be "vexatious, oppressive and abuse of the process" warranting an immediate injunction. The operative part of the order provided as follows:

> "Having considered the rival contentions of the parties, I am prima facie of the view that the defendant having approached this Court by way of an application under Section 45 of the Arbitration and Conciliation Act, 1996, it should not have initiated arbitration proceeding in London until disposal of the said application. This in my opinion amounts to overreaching the Court. In my view, it will be unconscionable and vexatious on the plaintiff if the arbitration proceeding is allowed to continue in London.
>
> "Accordingly, there will be an order of stay of the arbitration proceedings in London till 10th February, 2016 or until further order whichever is earlier. The defendant is restrained from proceeding with the arbitration proceeding in London till 10th February, 2016."

The tenure of the injunction was extended from time to time till it was vacated at the final hearing of the application sometime in August, 2018.

10. For the moment, it may only be noticed that an arbitral award was passed in the LMAA reference on January 21, 2016, without looking into the immediate conduct of the appellant herein after it suffered the anti-suit (more correctly, anti-arbitration) injunction, to the extent that such injunction operated *in personam.* The arbitrator found that the appellant was entitled to a sum of US $ 1,270,127.15 with interest from the respondent herein.

11. In February, 2016 the appellant applied for vacating the anti-arbitration injunction of January 14, 2016 and followed it up, in April, 2016, by a petition for enforcement of the foreign award. Such petition for enforcing the said foreign award of January 21, 2016 was dismissed on August 22, 2017 on the ground that the award was passed in violation of an order of injunction that restrained the appellant herein from proceeding with the arbitral reference. This appeal arises out of such order of August 22, 2017.

12. There is one more matter of some significance; and that is a subsequent order of August 28, 2018 by which the appellant's application for vacating the injunction issued on January 14, 2016 was allowed, the respondent's application to restrain the appellant to proceed with the arbitral reference was dismissed and the appellant's application for referring the disputes in the respondent's summary suit here to arbitration was also dismissed.

13. In the order impugned of August 22, 2017 the reasons in support thereof are found in the following solitary paragraph:

> "During the pendency of the said application *(the respondent-plaintiff's application for stay of the foreign arbitral reference)* and subsistence of the interim order *(of January 14, 2016)*, the award was published and is now sought to be enforced. There cannot be any doubt that an award passed in violation of an order of injunction which restrains the award-holder from proceeding with the arbitration proceedings in London cannot be enforced in India as it is contrary to the public policy of India as recognized by several decisions of our Court as well as the Hon'ble Supreme Court."

14. In the subsequent order of August 28, 2018, against which neither party has come up in appeal, the interlocutory court observed that the respondent herein had neither denied the execution of the matrix contract of February 29, 2012, which also contained the arbitration agreement, nor questioned the validity of such arbitration agreement; the respondent had only contended that by reason of a subsequent stand-alone agreement embodied in the appellant's letter of April 24, 2013, the arbitration agreement was no longer operative. At the same time, the interlocutory court noticed that in order to preserve the limited success that the appellant herein obtained upon the arbitral award of January 21, 2016 being passed in its favour, the appellant had consistently asserted before the interlocutory court that its claim in the arbitral reference had no nexus with the claim of the respondent herein in the summary suit lodged in this court. The relevant order reasons that since the respondent herein had merely questioned the survival of the arbitral agreement contained in the matrix contract of February 29, 2012 after the so-called settlement as evident from the letter of April 24, 2013 issued by the appellant herein, the commencement of the arbitral reference in London by the appellant herein could neither be said to be vexatious

nor claimed to be oppressive; and, once the execution of the arbitration agreement stood admitted, it was a defence that ought to have been taken in the arbitral reference and the arbitral reference could not have been interfered with by applying for an injunction against the arbitral reference or against the defendant in the suit filed in this court.

15. The appellant laments that it was a cruel quirk of fate that presented the appellant herein with a situation that, on the day that its petition for implementation of the foreign award came up for hearing before the Single Bench, the other applications and petition, which ultimately culminated in the order of August 28, 2018, did not appear simultaneously in the list for all the matters to be taken up together. The appellant contends that in view of the order of August 28, 2018 and the finding rendered therein that the respondent herein could not have sought any restraint on the foreign arbitral reference since its claim in the summary suit here was not founded on the same matrix contract, the appellant's petition for implementation of the foreign award may have succeeded if all the matters were taken up and disposed of together. As to the only reason indicated in the order impugned dated August 22, 2017 in declining to enforce the foreign arbitral award on the ground of the award being obtained by the appellant in the teeth of the order of injunction that was subsisting on the date of the award, the appellant suggests that the vacating of the injunction issued on January 14, 2016 by the order of August 28, 2018 would relate back to the filing of the relevant application. The legal implication of the appellant's submission in such regard is that upon the injunction of January 14, 2016 being

vacated on August 28, 2018, the order of January 14, 2016 should be seen to have been obliterated in the sense that it never existed.

16. The appellant has placed great emphasis on the appellant's conduct after it suffered the injunction *in personam* on January 14, 2016. It says that in response to the arbitrator's notice for furnishing evidence in support of the appellant's claim in the arbitral reference, the appellant did not furnish any new material. This, the appellant says, was in deference to the order of injunction operating against it, though, in the same breath, the appellant suggests that it had not submitted to the jurisdiction of this court as the appellant is not naturally amenable to this jurisdiction as it is a foreign company. The appellant seeks to demonstrate, by referring to a letter it issued to the London arbitrator, that the appellant merely relied on whatever evidence had already been presented before the arbitrator and the appellant took no further steps in the arbitral reference. As to the arbitrator's reaction to the order dated January 14, 2016 insofar as it restrained the arbitral reference, the appellant submits that the arbitrator was not within the appellant's control and it was for the arbitrator to express an opinion on the efficacy of such order by a foreign court which may not have had any jurisdiction over the arbitral proceedings.

17. The respondent points out that even the payment of the arbitrator's fees by the appellant herein, at a time when the order of January 14, 2016 was in force, amounted to a violation of the injunction issued by this court and, since the award may not have been released without the fees being paid, it is evident that

the appellant had breached the order of injunction. The appellant has attempted to somewhat gloss over such aspect by claiming the payment to not be in derogation of the order of injunction, but being a part of its obligation to discharge its debt, particularly when the adjudicating forum itself had indicated that it was not bound by the order of injunction passed by this court and proceeded with the arbitral reference even without the active or any participation on the part of the appellant herein. The appellant is also quick to point out that as a result of the appellant not furnishing evidence in support of its balance claims, in deference to the order of injunction that the appellant perceived to be operating on the appellant, it has been seriously prejudiced by such heads of claim being disallowed and the appellant's cause of action in such regard being extinguished without the appellant having any further right of recourse in such regard.

18. Several judgments have been carried by the appellant in support of its case, most of them for the proposition that an injunction of the nature that was issued on January 14, 2016 should, ordinarily, not be granted; or, at any rate, such an injunction may be issued in the most gross of situations. The appellant maintains that, ordinarily, a court in a particular country would neither have the authority to restrain proceedings or an arbitral reference in another country or even interfere with the right of a party before it to prosecute its action in a foreign land. The appellant accepts that in the rare case such an injunction may issue, but that would be once in a blue moon and not for the mere asking. The appellant reasons that if the grounds for issuance of such an injunction are as

strict as the appellant perceives them to be, when an interim injunction is issued and such injunction is vacated at the final stage of the application, the final order would operate retroactively, as if the injunction had not been issued in the first place at all.

19. The appellant first refers to a judgment reported at (2003) 4 SCC 341 (*Modi Entertainment Network v. W.S.G Cricket Pte. Limited*). It was held in such case that courts in India, like the courts in England, are courts of both law and equity and the principles governing the grant of injunction, which is an equitable relief, will also cover the grant of an anti-suit injunction, which is but a species of injunction. It was also observed in the case that a court in India had the power to issue an anti-suit injunction against a party over whom it had personal jurisdiction; however, having regard to the rule of comity, such power ought to be exercised sparingly since such an injunction, though directed against a person, causes interference in the exercise of jurisdiction by another court. It must also be recorded that even the respondent has placed reliance on this Supreme Court judgment, particularly the discussion with reference to *The Conflict of Laws* by Dicey and Morris (13Ed) and the tests in such regard formulated in other jurisdictions as in Australia and Canada. It needs also to be noticed that the issue involved in the case pertained to a jurisdiction clause and the discussion in the judgment, naturally, revolves around such issue.

20. A judgment reported at (1987) 3 All ER 510 (*SNI Aerospatiale v. Lee Kui Jak*) has been cited by the appellant on the principles to be applied by a court in

deciding whether to restrain foreign proceedings. The Privy Council noticed in such case that the law relating to an injunction restraining a party from commencing or pursuing legal proceedings in a foreign jurisdiction has a long history in England, stretching back to the early nineteenth century. The jurisdiction was always exercised in England when the "ends of justice" required it; but the Privy Council also acknowledged that when the court decides to grant an injunction restraining proceedings in a foreign court "its order is directed not against the foreign court but against the parties so proceeding or threatening to proceed". Such an injunction, it was observed, would only be issued against the party who is amenable to the jurisdiction of the court so that the injunction is effective. Finally, the judgment emphasises that since such an injunction indirectly affects a foreign court, "the jurisdiction is one which must be exercised with caution". The judgment is replete with myriad peculiar situations in which an injunction of such extraordinary nature was issued in cases before the English courts.

21. The illuminating discussion in *Aerospatiale* deals with the famous dictum in *Spiliada Maritime Corp v. Cansulex Limited* [(1986) 3 All ER 843] and the reasons why merely because England was found to be the natural forum for the action, an injunction would invariably be issued to restrain foreign proceedings in respect of such matter. Indeed, the dilemma that such a situation presents is captured in the following passage:

> "… In practice, however, the principle so stated would have the effect that, where the parties are in dispute on the point whether the action

> should proceed in an English or a foreign court, the English court would be prepared, not merely to decline to adjudicate by granting a stay of proceedings on the ground that the English court was forum non conveniens, but, if it concluded that England was the natural forum, to restrain a party from proceeding in the foreign court *on that ground alone.* … in a case where there is simply a difference of view between the English court and the foreign court as to which is the natural forum, the English court can arrogate to itself, by the grant of an injunction, the power to resolve that dispute. … But, … such a conclusion appears to their Lordships to be inconsistent with comity, and, indeed, to disregard the fundamental requirement that an injunction will only be granted where the ends of justice so require."

22. The appellant next refers to a judgment reported at (2017) 14 SCC 722 (*Roger Shashoua v. Mukesh Sharma*). Again, in such case the issue was as to whether courts in India or courts in England had the jurisdiction over the matter, which is not really relevant for the present purpose. The respondent's suit in this court does not face any challenge to jurisdiction since the appellant's petition under Section 45 of the Act of 1996 has been dismissed and the appellant had chosen not to prefer an appeal against the relevant order. The matter is closed. The respondent's suit can continue in this court notwithstanding the appellant having obtained an award in its London reference. The issue here is whether the award passed in the London reference may be enforced against the respondent in this country despite the award being obtained at a time when an injunction operated on the appellant to not take any steps in the arbitral reference; albeit such injunction being vacated long after the foreign arbitral award was rendered.

23. The appellant refers to a Single Bench judgment of the Bombay High Court reported at (2006) 3 Arb LR 510 (*Noy Vallesina Engineering Spa v. Jindal Drugs*

Limited) to canvass that the injunction that the appellant suffered on January 14, 2016 was really an ineffective order and has now to be regarded as a nullity since it has been vacated. In that case a petition was filed by an Italian company under Section 47 of the Act of 1996 for enforcement of a partial foreign arbitral award. The Indian company facing enforcement challenged the partial award under Section 34 of the Act of 1996. Such challenge petition was admitted by the Bombay High Court and records and pleadings were called for. Shortly thereafter, the Indian party applied by way of Section 9 of the Act of 1996, seeking an injunction against the members of the ICC arbitral tribunal so that they could not receive any further submission or pass any further direction or ruling or award in the relevant arbitral reference. An ad interim order was passed, restraining the members of the arbitral tribunal as sought and the order continued till the petition for enforcement of the partial foreign award was decided. The ICC arbitral tribunal took note of the interim order passed by the Bombay High Court, observed that it was not binding on the tribunal and decided to proceed with the arbitral reference. The Italian party made its submission and filed written notes before the tribunal, but the Indian party informed the tribunal that it did not intend to make any submission in view of the subsisting order of injunction. The Indian party's nominee on the ICC arbitral tribunal also indicated that he was unable to continue on the arbitral tribunal in view of the interim order passed by the Bombay High Court. The ICC decided to replace such member on the arbitral tribunal and the arbitral tribunal passed a final award thereafter. Thus, at the time that the final arbitral award was passed

by the ICC arbitral tribunal in Paris, the earlier petition of the Italian party for the implementation of the partial order and the pre-final award petition of the Indian party seeking an injunction on the arbitral tribunal from proceeding with the foreign arbitral reference were pending and an injunction was subsisting in respect of the further conduct of the foreign arbitral reference. The court held, in the Indian party's challenge to the partial foreign award, that such a challenge was not maintainable in this county or under Section 34 of the Act of 1996. The Indian party's petition challenging the further continuation of the arbitral proceedings was also disposed of without any further relief by a common order. An appeal against such order was filed by the Indian party.

24. During the pendency of such appeal, the Italian party applied for enforcement of the partial award and the final award, asserting that no period of limitation had been prescribed in any Indian law for the implementation of a foreign award. The Indian party applied for rejection of the petition for enforcement on the ground of limitation, following which the Italian party applied for condonation of delay, without prejudice to its contention that there was no prescribed period of limitation for such purpose. Though this aspect of the matter is of no relevance in the present contest, but for the completeness of the story it is recorded that the Bombay High Court held that the period of limitation for applying to court for enforcement of a foreign arbitral award was governed by Article 137 of the Schedule to the Limitation Act, 1963 and, upon the court finding the foreign award to be enforceable in India, the execution proceedings for

such purpose could be lodged and carried on within 12 years of the date of the relevant order.

25. The aspect of the judgment which is, however, relevant for the present purpose is the light in which the Bombay High Court saw the order of injunction that restrained the foreign arbitral tribunal from further proceeding with the arbitral reference and the enforceability of the final arbitral award despite the subsistence of such injunction. Two broad reasons were furnished by the Bombay High Court in arriving at the conclusion that the final foreign award was enforceable in India: that the injunction restraining the further arbitral proceedings was passed on a petition under Section 9 of the Act of 1996 which did not empower any court to issue such an injunction under such provision; and, that the injunction was issued against a foreign arbitral tribunal which was not amenable to the jurisdiction of any Indian court and, as such, the order was a nullity. In support of the first limb of reasoning that Section 9 of the Act of 1996 does not conceive of an injunction against the further continuation of a foreign arbitral reference to be included within its fold, the Bombay High Court relied on a judgment of the Supreme Court reported at (2002) 4 SCC 105 (*Bhatia International v. Bulk Trading S.A*), which then held the field. Such Supreme Court judgment took the view that "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." The judgment in *Bhatia International* has since been overruled by a Constitution Bench in a judgment reported at (2012) 9 SCC 552 (*Bharat Aluminium Co. v. Kaiser Aluminium*

Technical Services Inc.) on the ground that *Bhatia International* applied Part-I of the Act of 1996 to an international commercial arbitration where the seat of the arbitration was outside India. In *Kaiser Aluminium* it was categorically held that Part-I of the Act of 1996 would not apply to any international commercial arbitration where the seat of arbitration was outside India.

26. The second limb of reasoning in *Noy Vallesina* proceeded on the nature of injunction that was sought and obtained. Since such injunction was sought against members of a foreign arbitral tribunal, two of whom were not in India, it was held that "this Court had no jurisdiction to make the order (*of injunction restraining the foreign arbitral reference)* … and therefore for this reason also the order … is a *nullity*."

27. Neither line of reasoning appeals, as more fully indicated hereinafter.

28. The appellant has next carried a judgment reported at (2012) 4 SCC 307 (*Kanwar Singh Saini v. High Court of Delhi*) for the proposition that if a court exercises a jurisdiction that it does not possess, the resultant order would be a nullity. In that case, a suit was instituted against the appellant in the Supreme Court for a permanent injunction restraining the appellant-defendant from dispossessing the plaintiff from the suit premises. The facts recorded in the Supreme Court judgment reveal that the appellant filed a written statement, admitting the execution of a sale deed in respect of the suit premises and also admitting that he had handed over possession of the suit premises to the plaintiff. The appellant, however, denied the allegation that he had made any

attempt to dispossess the plaintiff from the suit property. In view of such statement of the appellant in the written statement, that he had not threatened to dispossess the plaintiff from the suit premises, the plaintiff asked the court to dispose of the suit by recording the undertaking implied in such statement. The court disposed of the suit by directing the appellant-defendant not to breach the undertaking given by him. Despite such decree, on the plaintiff's perception that the undertaking had been breached by the appellant, the plaintiff applied under Order XXXIX Rule 2-A of the Code. The court assumed jurisdiction and ultimately sentenced the appellant to four months' imprisonment. Such order was challenged in the Supreme Court and it resulted in the judgment cited by the appellant herein. The Supreme Court held that once a decree had been passed, Order XXXIX Rule 2-A of the Code could not be invoked since such provision was only for the enforcement of an interlocutory order passed under Order XXXIX Rules 1 and 2 of the Code. Further, the court held that the relevant decree could have been put into execution in accordance with law and the very assumption of jurisdiction under Order XXXIX Rule 2-A of the Code was illegal.

29. It cannot be said, as will be discussed more fully hereafter, that such principle has any manner of application in the present case.

30. Three further judgments have been referred to on behalf of the appellant in course of its rejoinder. In the first of such judgments, reported at (2014) 14 SCC 574 (*Chatterjee Petrochem Company v. Haldia Petrochemicals Limited*), an issue arose pertaining to the maintainability of the suit instituted by the respondent

before the Supreme Court against a request for arbitration by the appellant. Paragraph 21 of the report sets out the legal questions addressed by the Supreme Court. At paragraph 33 of the report, the Supreme Court held on facts that the arbitration agreement invoked by the appellant was valid and the appellant was entitled to invoke the same. Having answered the principal issue in favour of the appellant, the Supreme Court observed at paragraph 38 of the report that Section 5 of the Act of 1996, even though it was in Part-I of the Act, it "will be applicable to Part-II of the Act as well." At paragraphs 40 and 41 of the report, the Supreme Court noticed the entire gamut of the suit: it was filed for a declaration that the relevant arbitration clause was void and unenforceable and for a consequential permanent injunction restraining the appellant from initiating or proceeding with the arbitral reference. Since it was already held that the arbitration agreement was valid, the suit had to be held to be not maintainable. Instructive as the judgment is, it does not appear that it comes to be aid of the appellant in the present case.

31. A judgment reported at (1974) 2 SCC 121 (*Nawabkhan Abbaskhan v. The State of Gujarat*) has been relied upon on behalf of the appellant as the appellant perceives the judgment to imply that the vacating of an ad interim order would amount to the ad interim order being obliterated altogether as if it never existed. However, the judgment does not clearly say as much. All that the judgment says is that since the initial order was passed by an executive functionary in breach of the principles of natural justice, such executive order had to be regarded as a nullity and steps taken in pursuance thereof would be of no effect. The judgment

is not an authority for the proposition that if a court passes an ad interim order having the jurisdiction so to do, the subsequent vacating of such order would amount to the ad interim order not having been passed at all.

32. Finally, the appellant has relied on a judgment reported at (2014) 2 SCC 433 (*Shri Lal Mahal Limited v. Progetto Grano Spa*) for the observation therein that the concept of "contrary to the public policy of India" in the context of Section 48 of the Act of 1996 is much narrower than how such principle is otherwise understood.

33. The respondent is vehement in its assertion that whether it is opposed to public policy or a downright illegality or opposed to the sense of morality that pervades any fair-minded justice delivery system, it is elementary that an act done in derogation of an order of court would be a nullity, whether or not it visits the party in breach with other consequences as contempt of court or the like. The fundamental ground urged by the respondent is that shorn of the technicalities and the rules of procedure, there is no doubt that a court in this country has the authority to pass an anti-suit or anti-arbitration injunction; and once it is seen that a court did have the authority to pass such an order and it did pass such an order, anything done in violation thereof has to be seen to be void. The respondent contends that it is an entirely different matter that contempt proceedings may also be brought against the person acting in breach of the order where the court may or may not find the alleged contemnor to have deliberately or willfully violated the order. But that would not detract from the efficacy of the

order or the inevitable consequence of the breach. At any rate, the respondent maintains, an arbitral award procured despite the subsistence of an order of injunction on the award-holder from proceeding with the reference cannot be rewarded with the implementation of such award and such an arbitral award has to fail the test under Section 48 of the Act of 1996.

34. The respondent reasons that any contrary view would lead to judicial anarchy and render all interim orders ineffective and subject to the mercy of the parties suffering the same, since all of them can say that they reasonably believed that the orders would finally not be sustained. Such a situation, according to the respondent, would make a mockery of the justice delivery system and render interim orders as a class to be irrelevant, not capable of implementation and not amenable to the contempt jurisdiction. The respondent submits that since the provisions in the Contempt of Courts Act, 1971 and even in Order XXXIX Rule 2-A of the Code make no distinction between final orders and interim orders, if the legitimacy of an interim order remains in suspended animation till a final order is pronounced, the authority to pass interim orders would be rendered futile and the entire system in such regard may be done away with.

35. Several examples have cited on behalf of the respondent to bring home its argument. If, for instance, a person who is in the process of dispossessing another from an immovable property suffers an interim injunction in such regard, he may continue with and complete the act of dispossession

notwithstanding an interim order restraining him from doing so if he asserts that his act would amount to contempt or an illegality only upon a final order being passed. Again, the respondent submits, if a person is restrained by an interim order from carrying on further construction, but he completes the construction without paying any heed to the interim injunction that he may have suffered, it may be open to such person to assert that the legitimacy of his action would depend only on the final order. If, for instance, the final order vacates the interim order, even on the ground of default, the respondent submits that the illegality perpetrated by acting in breach of the interim injunction cannot be addressed or proceeded against if the contention of the appellant in the present case were to be accepted.

36. Apart from such fundamental premise on which the respondent seeks to sustain the order impugned herein, several other grounds have been canvassed, including the grounds available to a party resisting the enforcement of a foreign arbitral award as recognised in Section 48 of the Act of 1996. According to the respondent, clause 14 of the original agreement dated February 29, 2012 (Though the agreement was prepared on February 27, 2012, the respondent signed the same on February 29, 2012.), stipulated that the reference would be to three arbitrators: one each by the parties and the third in accordance with the rules of the London Maritime Arbitrators' Association. The respondent states that the reference could be made to a sole arbitrator only upon one of the parties appointing its arbitrator and sending notice of such appointment in writing to the other party requiring the other party to appoint its own arbitrator within 14

calendar days of that notice and stating that the first party would appoint its arbitrator as sole arbitrator unless the other party appointed its own arbitrator and gave notice that it had done so within the 14 days specified. In other words, according to the respondent, it is only if the notice of appointment of the arbitrator was issued by the appellant to the respondent and the respondent was called upon to appoint its arbitrator within the next 14 days but the respondent did not do so, that the arbitrator nominated by the appellant would become the sole arbitrator.

37. The respondent refers to the letter of appointment apparently issued on behalf of the appellant and demonstrates that such letter was issued directly to the appellant's nominee as arbitrator, without even a copy of such letter of appointment being marked to the respondent. The respondent says that in such a scenario, the respondent was not obliged to make any appointment and the constitution of the arbitral tribunal with the appellant's nominee as the sole arbitrator has to be seen to be not in accordance with the agreement of the parties and, as such, covered by Section 48(1)(d) of the Act of 1996.

38. The respondent also contends that the arbitration agreement between the parties had worked itself out and did not survive to cover the disputes pertaining to the settlement of April 24, 2013. Thus, the respondent submits, that the arbitration agreement was not valid under English law and, as a consequence, the respondent was entitled to resist the enforcement of the resultant award under Section 48(1)(a) of the Act of 1996. The respondent also maintains that the

respondent was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings and the respondent had duly raised such objection under Section 48(1)(b) of the Act of 1996 in the court of the first instance. The respondent says that while it is true that the arbitral award covered only one head of claim that was carried by the appellant herein to the LMAA arbitral reference, but it is also evident that matters pertaining to the settlement agreement of April 24, 2013 had been made the subject-matter of the arbitral reference despite such matters being beyond the scope of the arbitral reference. Thus, it is the contention of the respondent, that even though the order impugned found that the enforcement of the relevant foreign award was barred under Section 48(2)(d) of the Act of 1996, the enforcement of the relevant award was also barred under clauses (a), (b), (c) and (d) of Section 48(1) of the Act of 1996. The respondent maintains that since the court of the first instance found one of the grounds to be good enough, it did not refer to the several other grounds canvassed by the respondent; but if the only ground indicated in the order impugned does not appeal to the appellate court, the other grounds under Section 48(1) of the Act of 1996 urged by the respondent in resisting the enforcement of the relevant foreign award must also be seen.

39. The respondent also seeks to address on the merits of the disputes between the parties and the merits of the claim carried to the arbitral reference by the appellant herein. According to the respondent, the settlement of April 24, 2013 took into account the claim of the appellant on account of alleged demurrage and dead freight. The respondent says that the value of the goods sold

and supplied by the respondent, or at the behest of the respondent, to the appellant was well in excess of US $ 1 million but the finally agreed pay-out by the appellant was pegged at US $ 1 million after negotiations. Such reduced figure was arrived at, according to the respondent, since the payment by the appellant on account of demurrage and dead freight and the claim of the appellant on account of the inferior quality of goods were taken into account in arriving at the final figure of US $ 1 million. It is further asserted by the respondent that the settlement of April 24, 2013 was acted upon and honoured in part by the appellant and payments totaling about US $ 300,000/- were made by the appellant to the respondent in terms thereof. The appellant submits that in such circumstances, the appellant's assertion of the pre-settlement claim of US $ 1.27 million on account of demurrage, dead freight and deficient goods was unconscionable, dishonest and immoral and should shock the conscience of the court. Further, the respondent says that the other reliefs in the arbitral reference may not have been pursued by the appellant here because it suffered the injunction of January 14, 2016; but such other reliefs in the arbitral reference, the respondent points out, were mischievously made to render the summary suit pending in this court irrelevant despite the appellant being aware of such summary suit long prior to the appellant making its claim in the arbitral reference.

40. On the legal issues addressed by the respondent, it has referred to several judgments; the first of them being the one reported at (2008) 1 LLR 1 (*Albon v. Naza Motor Trading Sdn Bhd*). In that case an English gentleman entered into an

agreement with a Malaysian company for the distribution of motor vehicles. The agreement was governed by English law. The English plaintiff commenced proceedings in England for sums allegedly overpaid by him under the agreement. The Malaysian company applied for a stay of the proceedings in England on the ground that the parties had entered into a joint venture agreement that was governed by Malaysian law and provided for arbitration in Malaysia. The English plaintiff asserted that his signature on the arbitration clause was a forgery. From an injunction restraining the Malaysian company from pursing its arbitral reference in Malaysia, the Malaysian company filed an appeal. The appellate court perceived that it was properly arguable that the joint venture agreement and the arbitration clause contained therein may have been brought into existence to defeat the English proceedings that had started earlier. On such reasoning, the appellate court left the order impugned undisturbed.

41. A judgment reported at (1990) 3 SCC 669 (*Krishna Kumar Khemka v. Grindlays Bank P.L.C.*) has been placed by the respondent for the recognition therein that the creation of a new tenancy during the subsistence of an injunction was illegal and liable to be cancelled.

42. The respondent has also relied on a judgment reported at (1997) 3 SCC 443 (*Tayabbhai M. Bagasarwalla v. Hind Rubber Industries Private Limited*) for the proposition that even if a court subsequently discovered that it had no jurisdiction to entertain a suit in the first place, an interim order of injunction passed in such suit could not be disregarded or violated and had to be obeyed till

it was set at naught. The case deals with the authority under Section 9A of the Code conferred on courts in Maharashtra. In the State of Maharashtra Section 9A has been inserted after Section 9 in the Code of 1908. Section 9A(1) mandates that any objection as to jurisdiction of the court has to be decided as a preliminary issue. However, Section 9A(2) authorises even such court, whose jurisdiction has been objected to, to pass an interim relief pending a decision on the preliminary issue as to the maintainability of the suit. The respondent has referred in passing to the famous judgment reported at AIR 1969 SC 823 (*Official Trustee, West Bengal v. Sachindra Nath Chatterjee*) which recognises that a void order may be challenged in collateral proceedings to suggest that both the judgments in *Tayabbhai* and in *Sachindra Nath Chatterjee* instruct that only if the court lacks jurisdiction over the subject-matter before it, would such objection as to jurisdiction go to the root of the matter and make the exercise of the jurisdiction, and any consequential order, a nullity.

43. The respondent has also placed strong reliance on the principle that orders of injunction issued by civil courts must not only be adhered to, but its enforcement is a duty of the court. From the judgment reported at (1996) 4 SCC 622 (*Delhi Development Authority v. Skipper Construction Co. (P) Limited*), the respondent has referred to paragraphs 18 to 20 of the report where the Supreme Court has referred to judgments of the Madras High Court and this court in addition to judgments of the English courts to hold that "where an act is done in violation of an order of stay or injunction, it is the duty of the court, as a policy, to set the wrong right and not allow the perpetuation of the wrongdoing."

44. Before the principal legal question which has arisen here is addressed, some of the contentions of the respondent in assailing the award or seeking to resist the enforcement thereof in this country, other than on the ground that the award was obtained in derogation of a subsisting injunction, need to be assessed. It is possible that since the court of the first instance found that the arbitral award sought to be enforced was opposed to public policy on the ground that the award was passed or was obtained in derogation of a subsisting order of injunction of this court, the court may not have addressed the other grounds that may have been urged by the respondent to resist the enforcement of the relevant foreign arbitral award. After all, the court of the first instance may have felt that there was no merit in flogging a dead horse.

45. Notwithstanding no cross-objection having been filed on behalf of the respondent, the other grounds of resistance to the enforcement of the foreign arbitral award set up by the respondent under clauses (a) to (d) of Section 48(1) of the Act of 1996 are taken up for consideration. However, such grounds do not appear to be worthy, nor do they appear to have been canvassed at the appropriate stage or even before the court of the first instance. For one, if ten grounds are cited by a party to resist an order and only one of the grounds is found to be good enough, the court would ordinarily record that the other grounds urged have not been gone into since even on the one ground considered, the order sought was liable to be refused. The order impugned in this case does not refer to any additional ground having been canvassed by the respondent herein. The respondent seeks to make out that such additional grounds as to its

challenge under clauses (a) to (d) of Section 48(1) of the Act of 1996 were indicated in its affidavit-in-opposition to the petition filed by the appellant herein to enforce the foreign arbitral award. A reading of the relevant affidavit does not reveal that any ground other than the ground that the arbitral award was passed in violation of the order of injunction was taken therein. It is true that while dealing with the averments in the appellant's petition specifically denying the grounds under Section 48(1)(a), (b), (c) and (d) of the Act, the respondent has controverted the averments; but only bald denials have been issued without indicating how the arbitration agreement was not valid or how no proper notice of the appointment of the arbitrator was given to the respondent or which matters were beyond the scope of submission to arbitration but had been included by the appellant in the arbitral reference or how the composition of the arbitral tribunal may not have been in accordance with the agreement between the parties. It cannot be lost sight of that Section 48(1) of the Act of 1996 puts the burden of furnishing proof on the party seeking to resist the enforcement of a foreign award and in the context of the expression "only if that party furnishes to the Court proof", the onus that had to be discharged by the party seeking to resist the enforcement of a foreign award was not met by the bald denials in the respondent's affidavit in the court of the first instance.

46. More importantly, the grounds of prejudice that have been cited in course of the present appeal were matters that ought to have been carried by the respondent to the arbitral reference or by way of a challenge to the arbitral award in England. After all, the existence of the arbitration agreement is not in dispute

and it is only the unilateral assertion of the respondent that the arbitration agreement had worked itself out and did not govern the settlement agreement of April 24, 2013. It must be remembered that grounds which can be urged by a party before an arbitrator but are not urged and grounds which ought to have been taken in challenging an arbitral award in the appropriate jurisdiction cannot be looked into if the party seeking to assail the arbitral award has not availed of its opportunity before the appropriate forum. Qualitatively, the tests are different as Section 48 of the Act of 1996 itself instructs: the purpose of such provision is not to consider the deficiencies in the award, but only to assess the desirability of its enforcement. The duty of a court receiving a petition for enforcement of a foreign arbitral award is to broadly see if there was an apparent arbitration agreement under which arbitrable disputes were submitted in the reference, that a fair procedure was adopted in course of the reference and the award-debtor had a reasonable opportunity to present its case and, finally, that the matters in issue have received the consideration of the arbitral tribunal. Thus, it is, in a sense, the decision-making process that is looked into and not the decision itself and unless the relevant award sought to be enforced appears to be irrational and unreasonable to the meanest mind, the court will allow its enforcement.

47. The respondent has referred to the correspondence exchanged between the parties and, in a sense, the respondent has attempted to enter upon the merits of the disputes between the parties as covered by the arbitral reference. Apart from the fact that this court in exercise of its limited authority under Section 48 of the

Act of 1996 could not have looked into such grounds, there is no sense of injustice that the court perceives in the matter. In other words, far from the appellant's conduct shocking the conscience of the court, it does not appear that the award, to the extent that it was limited to the appellant's claim on account of demurrage and dead freight and the like, can be said to have prejudiced the respondent in any manner. The respondent's suit still remains in this court. The respondent's claim is founded on bills of exchange and it is for the respondent to chart its own course and invoke such jurisdiction as may be open to the respondent for it to obtain the remedy that it seeks.

48. Section 48 of the Act of 1996 is not a safety-net that catches every unworthy foreign arbitral award or every act of perceived illegality or injustice or wrongful prejudice. Section 48 of the Act of 1996 has to be seen in its context. Most countries which are signatories to the New York Convention have arbitration statutes on similar lines as the Indian Act of 1996. At any rate, the parts of such statutes in New York Convention countries that deal with the enforcement of New York Convention awards passed beyond the shores or boundaries of the country in which the enforcing court is situate, have similar provisions as in Chapter-I of Part-II of the Indian Act of 1996. Part-II of the Act is intituled "Enforcement of Certain Foreign Awards" and Chapter-I thereunder deals with New York Convention Awards. The underlying philosophy of Chapter-I under Part-II of the Act of 1996 is designed to be the same in all New York Convention countries and such provisions are similar in such countries which adhere to the international norm. International law requires not only

international conventions to be respected but also the sovereignty of the signatory nations to any convention to be acknowledged and not undermined. Thus, certain broad parameters have been set out in Section 48 of the Act of 1996 and such parameters are not a substitute for a possible objection that could have been taken before the foreign arbitral tribunal or in course of the challenge procedure in the country of the seat of the arbitration. A very look at the broad grounds for resisting the enforcement of an arbitral award as contained in Section 48 of the Act would indicate such grounds to be of incapacity of the party resisting its enforcement, of the invalidity of the arbitration agreement, of the violation of the principles of nature justice in the conduct of the arbitral reference, of the subject-matter of the arbitration not being arbitrable or beyond the scope of submission to arbitration, of the composition of the arbitral tribunal being contrary to the agreement between the parties or illegal according to the law of the country where the seat of arbitration was indicated or of the award not being binding or having been set aside or suspended in accordance with the law of the country of the seat of the arbitration.

49. Section 48(2) of the Act embodies the grounds that have to be left open to every sovereign State despite such sovereign State being a party to the New York Convention. Again, such grounds go to the root of the matter in the sense that the arbitration must have been in respect of disputes which would not be arbitrable under the laws of this country or the enforcement of the award would be opposed to public policy where public policy has to be construed rather

strictly and confined to the fundamental policy of Indian law or the interest of India or justice or morality.

50. It bears repetition that the grounds available under Section 48 of the Act of 1996 to resist the enforcement of a foreign arbitral award are not the grounds that ought to be raised in course of the arbitral reference or grounds that could have been raised if the arbitral award had been challenged in the appropriate country. The grounds in Section 48 of the Act of 1996 are the really fundamental grounds that no fair or responsible judicial system would dare to overlook. As much as a court would protect a party from injustice, the court has also to remember the international commitment of India to enforce a New York Convention Award.

51. Though no appeal has been preferred by the respondent against the order ultimately rejecting the respondent's application for the anti-arbitration injunction and it also does not appear that any special leave petition has been carried to the Supreme Court from such order, the respondent has made some murmurs to the effect that the conduct of the appellant in instituting the arbitral reference was so vexatious and mala fide that the award obtained should be found to be in conflict with the most basic notions of morality and justice. The respondent insinuates that the arbitral reference was initiated as a counter-blast to the institution of the suit in this court and to virtually render such suit meaningless. Such argument is exceptionable. There is at least one pre-suit letter addressed by the appellant to the respondent claiming the amount ultimately

claimed in the arbitral reference on account of demurrage, dead freight and deficient goods. It cannot be accepted, in the circumstances, that the entire purpose of the arbitral reference was to non-suit the respondent or render such suit pending in this court irrelevant.

52. It is now that the only issue of importance in this appeal needs to be concentrated upon: whether an arbitral award obtained by the award-holder, despite a subsisting order of injunction restraining him to proceed with the arbitral reference, will stand in the way of the enforcement of such foreign arbitral award despite the interim injunction being ultimately vacated. The ancillary issue is what would be the impact of the subsequent vacating of the anti-arbitration injunction when the petition for enforcement of the foreign arbitral award had already been rejected on the ground of it being in derogation of a subsisting injunction.

53. While it is impossible to imagine every possible ground that can be urged by a party to arrest the initiation or the continuation of a foreign arbitral reference even by inviting an injunction *in personam,* there can be certain broad categories in which such grounds may be placed. There could be classes of cases challenging the jurisdiction of the foreign arbitral tribunal on the ground of the very existence of the arbitration agreement or the efficacy of the arbitration agreement or the survival of the arbitration agreement or the jurisdiction of the arbitral tribunal. Likewise, an anti-arbitration injunction may be sought on the ground of the incapacity of the party seeking the injunction or grounds of

overwhelming inconvenience to such party. Another class of reasons invoked to seek an anti-arbitration injunction could be the egregious fraud committed by the party seeking to initiate or pursue the arbitral reference or of the arbitral reference being patently vexatious or unbearably oppressive. In every case, it is the duty of the court to exercise extreme caution and circumspection before issuing an anti-suit or anti-arbitration injunction and, as high authorities instruct, the injunction should be *in personam* and issued against a party amenable to the jurisdiction of the court issuing the injunction and not issued against a foreign court or a foreign arbitral tribunal.

54. Just as the legal trinity of justice, equity and good conscience casts a duty on a court to see that a party before it is not unfairly prejudiced, the principles of comity, the respect for the sovereignty of a friendly nation and the need for self-restraint should guide a court to issue an injunction of such nature only in the most extreme and gross situations and not for the mere asking. A court must be alive to the fact that even an injunction *in personam* in such a situation interferes with the functioning of a sovereign or a private forum which may not be subject to the writ of that court. At the same time, despite placing such an onerous burden on a court assessing the propriety of such an injunction, the authority of such a court, unless it is of very limited jurisdiction, cannot be doubted, particularly if it is a High Court in this country exercising its original civil jurisdiction. That is not to suggest that a Civil Judge (Junior Division) may lack the authority, it is only that such an injunction may rarely be sought at that level.

55. The very purpose of law is to right a perceived wrong. In course of a court righting such wrong, at times, something more than adjudicating the immediate *lis* is also called for. It would be futile for a court to proceed steadfastly towards a decree in a civil suit if, in the mean time, the subject-matter of the decree is wasted or destroyed. In doing justice in accordance with law, the court will also try and preserve the subject-matter of the *lis* so that the beneficiary of the final verdict can enjoy the fruits thereof. It is the general authority of a sovereign forum as a court - as opposed to a private forum or a forum of limited jurisdiction as a tribunal – that it enjoys certain powers which are incidental to the court's obligation to do justice. Such power inheres in a court by virtue of the court being the face of the sovereign while dispensing justice. Thus, despite no law providing for an anti-suit or an anti-arbitration injunction, the general equitable jurisdiction of granting an injunction encompasses the authority to grant an anti-suit or anti-arbitration injunction or even an anti-anti-suit injunction. But such an injunction is issued only in the most extreme of cases where the refusal of the injunction may result in palpable and gross injustice in the meanest sense.

56. The ordinary rule is that an injunction that interferes with the proceedings before another forum, albeit such injunction being couched in terms that make it operate *in personam*, is without jurisdiction. If such an injunction is issued by way of an interim measure, subject to further consideration, it will no doubt remain effective during its currency; but if it is vacated at the final stage or set aside in appeal or revision by an immediate superior forum or even higher, it will date back to the institution of the petition and once vacated or set aside it will

stand obliterated in the sense that it was never passed. In the context of the strictness with which such an injunction has to be viewed, it has to be an exception to the general rule where the general rule is that notwithstanding an order of injunction being subsequently vacated or set aside – whether at the same level or higher – acts done in derogation of the injunction during its subsistence would be regarded as void acts.

57. In other words, when an anti-suit or anti-arbitration injunction is issued by way of an ad interim or interim order without the relevant application being decided finally, its efficacy would never be established till the order has reached finality. And, if foreign proceedings (whether before a court or in course of an arbitration) are continued during the subsistence of an anti-suit or anti-arbitration injunction, the legality of the outcome of such foreign proceedings will depend on the final outcome of the application on which the injunction was issued, whether at the same level or in appeal or revision or the like. There is good reason for such an exception to be made. It is possible that a tentative view is taken at the initial stage to pass an anti-suit or anti-arbitration injunction *in personam*, but the party suffering the injunction has no choice in not proceeding with the foreign action lest its cause of action gets extinguished on the ground of non-prosecution and when the foreign forum – private or sovereign – may not feel bound by an injunction issued by a foreign court to restrain a party before it to prosecute the action or defend it.

58. The handicapped party or the party on which the anti-suit or anti-arbitration injunction operates must obviously bring such injunction to the notice of the foreign forum *in seisin* of the action; but if such foreign forum expresses a view that such injunction does not oblige the foreign forum to act in accordance therewith or if such foreign forum does not honour the order of injunction by adjourning the proceedings before it, the party suffering the injunction may have no choice but to act in derogation of the injunction, if only in pursuance of its rights which may otherwise be lost – whether in prosecuting an action or defending it.

59. It follows, therefore, that when a foreign decree or a foreign arbitral award is sought to be enforced and the only or primary ground to resist the same is that the decree or award was obtained by a party in derogation of an order of an injunction *in personam* against such party being in place by a court of the country where the enforcement is sought, the court *in seisin* of the petition for enforcement will take upon the adjudication of such ground if the injunction has attained finality. If the injunction is only an interim order or an appeal from the final order of injunction is pending, the court *in seisin* of the petition for enforcement should afford reasonable time for the matter pertaining to the injunction to be finally decided; and even if the court refuses to enforce the award on such ground when it perceives an unworthy appeal to have been carried from the order of injunction, if the injunction is ultimately vacated, the order rejecting the enforcement on the ground that it was in violation of a subsisting injunction would have to stand reversed to the extent such order is

founded on the ground that the foreign award was obtained by the award-holder in violation of a subsisting injunction against it.

60. There is sometimes an affinity in judicial orders to throw the baby out with the bath-water. While it is possible in a particular situation to say that the facts do not warrant the high order that is sought, the very authority of the court to pass the order cannot be eroded because an unworthy cause is espoused before it. Though *Bhatia International* is no longer good law after the Constitution Bench judgment in *Kaiser Aluminium*, in *Noy Vallesina* a passage from *Bhatia International* on the scope of Section 9 of the Act of 1996 was relied upon to hold that an anti-arbitration injunction could not be passed on a petition under such provision. In *Kaiser Aluminium*, the Constitution Bench held that *Bhatia International* was not good law because it permitted Section 9 of the 1996 Act to be invoked in respect of a foreign commercial arbitration which did not have a seat in India as Section 9 was contained in Part–I of the Act of 1996 and nothing in Part-I applies to a foreign arbitral reference with its seat not in India. Indeed, the Constitution Bench's undoing of *Bhatia International* has itself been undone by the 2016 Amendment to the Act of 1996 with retrospective effect from October 23, 2015. A proviso to Section 2(2) of the Act of 1996 has expressly extended Section 9 thereof to an international commercial arbitration even if the seat of such international commercial arbitration is outside India, though the parties to the arbitration agreement may contract to the contrary.

61. A suit may lie merely to restrain the initiation or continuation of an arbitral reference on any of the grounds as indicated above. And the interlocutory orders that may be passed in such a suit would have to meet the strict test as in any anti-suit or anti-arbitration injunction. But it can scarcely be said that such a suit would not lie. Even in *Chatterjee Petrochem Company*, the Supreme Court first held that the arbitration agreement survived and, in the light of such finding, held the suit not to be maintainable. The dismissal of the suit on such ground is akin to the dismissal of a suit on the ground that the events subsequent to the institution of the suit had overtaken the reliefs claimed as the reliefs could no longer be granted.

62. Similarly, in course of a suit on a contract for substantive reliefs, an application may be made seeking an anti-suit or anti-arbitration injunction on any of the grounds noticed hereinabove; and it cannot be said that since no final relief in the suit covers an anti-suit or anti- arbitration injunction, no application for such purpose can be entertained at all. It is possible that a contract is governed by a jurisdiction clause which confers exclusive jurisdiction on courts in this country to entertain an action in respect of any dispute pertaining to the matrix contract governed by the jurisdiction clause. In such a scenario when such a suit is instituted in a particular court in India and the defendant seeks to institute or pursue proceedings in a foreign court in derogation of the jurisdiction clause, the relevant Indian court where the suit has been filed surely has the authority to restrain the defendant *in personam* from instituting or proceeding with the foreign action in violation of the jurisdiction clause.

63. Thus, it cannot be said that this court, while *in seisin* of the respondent's suit, did not have the authority to issue an anti-suit or an anti-arbitration injunction against the appellant herein. It is only that once such interim injunction has been vacated or set aside, it would imply that the injunction had never been passed. The consequence of an injunction is so devastating in such circumstances that such an exception has to be carved out.

64. Equally, merely because an injunction is sought against a foreign court or a foreign forum and not *in personam* against a party amenable to the court *in seisin* of the prayer for such injunction, it would not make the prayer for injunction infructuous if the applicant meets the high test otherwise required. The court may mould the relief and issue an injunction *in personam*. There is a line in some of the judgments, including in *Noy Vallesina*, that an anti-suit and anti-arbitration injunction may issue *in personam* only against a party amenable to the jurisdiction of the court issuing the injunction. Such amenability need not be seen or tested at the time of issuance of the injunction, but may also be seen from a different perspective. If such an injunction is sought against a foreign party by a party amenable to the jurisdiction of the court, the amenability of the foreign party to the jurisdiction of such court may also be seen in the context of the foreign party coming on a later date to enforce the foreign decree or foreign award in this country.

65. It must also be recorded that there was substantial correspondence exchanged between the London arbitrator and the respondent or advocates

representing the respondent. Several objections were taken in course of the letters addressed on behalf of the respondent to the arbitrator, primarily as to the scope of the arbitration agreement and whether it covered the claim that was made by the appellant in the reference. But none of the letters alluded to the illegal or erroneous constitution or composition of the arbitral tribunal in the faintest manner.

66. Accordingly, since the respondent's injunction restraining the appellant from proceeding the foreign arbitral reference has been vacated and the appellant's application for vacating such injunction has been allowed, such order – which has now attained finality since no appeal against the same has been preferred – will date back to the time of the institution of the respondent's application for injunction and the legal implication would be that the order of January 14, 2016 was never passed. In the light of such legal implication, the only ground for declining to enforce the foreign arbitral award of January 21, 2016 would no longer be relevant. Since none of the other grounds as sought to be canvassed by the respondent in course of the present appeal appear to have been taken before the court of the first instance and since such grounds, even if taken, had to be disregarded since the respondent did not challenge the arbitral award in the appropriate jurisdiction, the order impugned dated August 22, 2017 is set aside and the decks are cleared for the enforcement of the arbitral award dated January 21, 2016 by the appellant in accordance with law.

67. The appeal succeeds. APO 430 of 2017 is allowed as above. EC 233 of 2016 is restored to the board of the executing court for such matter to be taken up and dealt with in accordance with law.

68. There will be no order as to costs.

69. Urgent certified website copies of this judgment, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

(Sanjib Banerjee, J.)

I agree.

(Suvra Ghosh, J.)