Bombay High Court
Lu. Qin (Hong Kong) Company Ltd vs Conros Steels Pvt. Ltd on 10 May, 2013
Bench: Anoop V.Mohta

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
CHAMBER SUMMONS NO.12 OF 2013

IN
EXECUTION APPLICATION NO.492 OF 2012
IN
AWARD DATED 30TH AUGUST, 2012

Lu. Qin (Hong Kong) Company Ltd.
ig ..... Applicant/
Decree-holder
(Orig. Applicant)

Vs.

Conros Steels Pvt. Ltd. .... Respondents/
(Judgment
debtor).

Mr. Vishwajeet P. Sawant alongwith Mr. Mahendra P. Singh i/by
Tuli & Co. for Applicant in Chamber Summons No.12 of 2013

and Execution Application No.492 of 2012.
Mr. Anoshak Daver i/by Mr. V.M. Chavda for Respondents.

AND

CHAMBER SUMMONS (L) NO.1588 OF 2012
IN
EXECUTION APPLICATION NO.492 OF 2012
IN

AWARD DATED 30TH AUGUST, 2012

Conros Steels Pvt. Ltd.	....	Applicant/ Judgment debtor
Vs.		
Lu. Qin (Hong Kong) Company Ltd.	....	Claimant/ decree-holder/ Respondent.

::: Downloaded on - 09/06/2013 13:28:32 :::

Mr. Anoshak Daver i/by Mr. V.M. Chavda for the Applicant.
Mr. Vishwajeet P. Sawant alongwith Mr. Mahendra P. Singh i/by Tuli & co.
for the Claimant/Respondent.

CORAM : ANOOP V. MOHTA, J.

DATE : 9th May, 2013 &
10th May, 2013

P.C.:-

1 Heard finally by consent in view of the urgency expressed.

The Decree-holder- a foreign entity, was the seller and the Judgment-debtor- an Indian Company was the buyer. The consignment of materials were loaded from the port of China. The port of

discharge was Mumbai-India. The Bankers were from both the countries. The Banking documents were; letters of credit, bill of loading, commercial invoices and shipping advice. There arose dispute. There was no specific agreed governing law of the contract dated 28.04.2010. The suit is filed by the Judgment-debtor in this Court. It will be governed by Indian laws. The matter was referred to the agreed Arbitral Tribunal, outside India. The award is in favour of the seller.

2 The applicant, who is decree-holder has taken out the Chamber Summons for various reliefs/orders, pending the Execution Application in view of Award dated 30th August, 2011 passed by the 3/39 CHS12.2013 Arbitral Tribunal, consists of three Arbitrators (including Chief Arbitrator and two Arbitrators), constituted under the China International Economic and Trade Arbitration Commission (for short "China Trade Commission").

3 The operative part of the Award is as under :

> "(I) The Respondent shall compensate the Applicant's loss of reselling price difference at the amount of USD 1,685.801.58 and its interest loss (calculated at an annual interest rate for bank loans of 6% from October 7, 2010 to the date of actual payment);
>
> (II) The Respondent shall compensate the Applicant's interest loss for the delayed collection of price at the amount of USD 122,543.06;
>
> (III) The Respondent shall compensate the Applicant's interest loss of the deposit USD 918,127.54 paid by the Applicant to Standard Chartered Bank, Hong Kong for its issuance of the Bank Draft to Mumbai Higher Court (calculated at the annual interest rate of 6% from September 16, 2010 to the day when the Bank Draft is returned);
>
> (IV) The Respondent shall compensate the lawyer's fee of USD 41,729.26 paid by the Applicant for dealing with the situation in India caused to the Applicant from the detention of the Applicant's goods because of the Respondent's breach of contract and breach of the arbitration clauses, the Bank Guarantee fee of USD 13,538.86, and the travel accommodation and other expenses at the amount of USD 19,779.43;
>
> (V) the Respondent shall compensate the lawyer's fee of USD 29,823.17 paid by the Applicant dealing with this case;
>
> 4/39 CHS12.2013 (VI) the rest arbitration requests of the Applicant are rejected;
>
> (VII) the arbitration fee of this Case is USD 36,720, the Applicant shall bear 5% i.e. USD 1,836, and the Respondent shall bear 95%, i.e. USD 34,884. The abovementioned arbitration fee has been written off by the advance payment of the arbitration fee at the same amount paid by the Applicant to CIETAC; therefore, the Respondent shall pay the Applicant USD 34,884 for its part of the arbitration fee. The amounts that the Respondent should pay the Applicant stipulated in Items (I),

(II), (III), (IV), (V) and (VII) of the Arbitral Award should be paid up within 30 days after the date when the Arbitral Award is made. If the Respondent delays the payment, an interest shall be calculated at the annual interest rate of 12% (the interest accrual period is from the due date of the actual payment by the Respondent). This Arbitral Award is final and shall enter into force as of the date when it is made."

4 The judgment-debtor have filed Suit No.2358 of 2010 in the High Court of Judicature at Bombay (O.O.C.J.) against the decree holder.

The Motion was taken out by the decree-holder under Section 8 of Arbitration and Conciliation Act (for short "Arbitration Act") to refer the matter to the arbitration in accordance with the arbitration agreements between the parties as stipulated in Sale Contract dated 28 th April, 2010 and further that the suit proceeding be terminated. The suit was for a recovery of an amount of Rs.4.19 Crores with interest. The bankers were also party to the suit.

5 The relevant arbitration clause is as under :

5/39 CHS12.2013

"Arbitration-

All disputes in connection with this contract or the execution thereof shall be settled by friendly negotiation. If no settlement can be reached, the case may be submitted for arbitration to the China International Economic and Trade Commission in accordance with the provisional rules of procedures promulgated by the said Arbitration Commission. The arbitration shall take place in Beijing. The decision made by the Arbitration Commission shall be accepted as final and binding upon both parties. The fees for arbitration shall be borne by the losing party."

6 The parties agreed to resolve the disputes by the arbitral tribunal subject to the China Trade Commission Procedure/Rule. The agreed place of arbitration was in Beijing.

This Court, by order dated 11th/14th March, 2011 granted the Motion by observing that "evidently, there are disputes between the plaintiffs and first defendant, which have to be referred to the arbitration". All the rights and contentions of the parties were kept open.

7 The plaintiffs/judgment debtor preferred an Intra-

Court Appeal against the order passed by the Single Judge. The objection was raised to the maintenability of such appeal under 6/39 CHS12.2013 the Arbitration Act. The matter is pending before a larger bench of this Court, for final adjudication on the issue of maintenability of appeal

against the order passed by Single Judge on Section 8 of Arbitration Act.

As per decree-holder, award dated 30 th August, 2011 has attained finality, as it was passed after giving notice to the judgment-debtor. The Arbitral Tribunal by rejecting the issue of jurisdiction so raised by the judgment-debtor, proceeded and passed the award. The award on the date of filing of Execution Application has attained finality. There is nothing placed on record to show that the award is challenged as per procedure of the China Trade Commission at China Cartor and/or as per the law of Arbitration in India.

9 The decree-holder/ claimant, therefore filed an application for enforcement of Award under 36 of the Arbitration Act read with Order 21, Rule 11(2) of the Code of Civil Procedure (for short "CPC") on 11 th April, 2012, which is 7/39 CHS12.2013 further amended and re-verified on 7th November, 2012/ 14th December, 2012. There are various prayers, for the execution of the Award in accordance with law. The main prayers are as per Order 21, Rule 43, 54, 64 of C.P.C. Apart from other prayers in the Chamber Summons (12 of 2013), under Order 21, Rule 41(1)(2) for direction against the Judgment-debtor to provide the details of the immovable, as well as, movable properties, production of documents and details of the assets and the investments, to be disclosed on an affidavit and also prayed for interim protection/ direction in dealing with and/or creating any third party interest and/or transferring the properties, as per Clause (d).

> "d) That pending the final disposal of this Chamber Summons, the Respondent/ Judgment Debtor themselves, their servants and agents be restrained by an order and injunction of this Hon'ble Court in any way dealing with or disposing of or transferring, alienating , encumbering or parting with possession of the debts, cash/ bank balance, bank deposits, stocks/ inventories, investments, loan advances and other such movable (current) assets of the Respondent/ Judgment debtor."

10 The supporting affidavit and the documents 8/39 CHS12.2013 remained uncontroverted as there is no specific reply filed by the judgment-debtor till these dates. The submission is made to treat affidavit-in-support of Chamber Summons (L) No. 1588 of 2012 as their reply.

11 The Chamber Summons (L) No.1588 of 2012 is taken out by the judgment-debtor (applicant) in the same Execution Application and prayed to raise and set aside the attachment as levied in respect of the properties by warrant of attachment (Schedule "A") dated 13th September, 2012 and also prayed for various interim reliefs.

12 The judgment-debtor has filed an affidavit-in-

support of Chamber Summons, thereby objected even to the maintenability of present Execution Application in this Indian Court. By raising various grounds including challenge to the Award, for the first time, on merits of the matter also. The averments are also made about the pendency of the matter before the larger Bench. It is also averred that Award dated 30 th August, 2011, is a "Foreign Award", therefore, it is enforceable 9/39 CHS12.2013 in India, in terms of Sections 44 to 49 of Arbitration Act and the related laws. The averments are also made that the Award is not enforceable

in India as the China is not a reciprocating party to the Convention and as there is no notification issued by the Central Governement in the official gazette under Section 43(3)

(b) of the Arbitration Act declaring China to be a Territory to which New York Convention applies. Therefore, it is also averred and submitted that the Execution Application so filed is contrary to the provisions contained in part II of the Arbitration Act, as it is applicable to enforcement of the "Foreign Award" in India. Therefore, the averments are also made that the warrant of attachment dated 13th September, 2012 and all actions initiated by decree-holder of attaching movable as well as immovable properties is against the law. It is also averred that the attached properties are mortgaged/hypothecated with the banks / financial institutions, who hold first party lien. The prayers are made accordingly and so also the submissions.

13 There is no specific reply filed by the decree-holder

to this Chamber Summons taken out by the judgment-debtor on a footing that the averments, as well as, the documents placed on record in support of Execution Application and their Chamber Summons are sufficient to resist the contentions/averments so made by the judgment debtor in their Chamber Summons.

14 This Court, by order dated 13th August, 2012 permitted the applicant/judgment creditor to proceed with the execution as notice contemplated under Order 21, Rule 22 was not necessary.

15 The matter listed again on 15th April, 2013. None appeared for the respondents. On 22nd April, 2013, the matter was adjourned for service uopn counsel appearing for the respondent-debtor. The court has directed to serve the Chamber Summons again and to file an affidavit of service. The matter was ultimately listed on 3rd May, 2013. The respondent appeared, after hearing both the parties on 8th May, 2013, the matter was closed for order.

16 The matter listed for order/judgment on 8 May

2013. The learned counsel appearing for the judgment-debtor relied upon the Supreme Court Judgment in Videocon v/s Union of India, 1 and Bhatia International Vs. Bulk Trading S.A. 2. The reliance was also placed on Venture Global Engineering Vs. Satyam Computer Services Ltd. 3 by the counsel appearing for the decree-holder.

17 It is clear from the Arbitration Clause itself that the parties have decided to settle their disputes if negotiations fails, through the Arbitration procedure promulgated by the China Trade Commission. It means parties have agreed that the provisional rules of procedure of China Trade Commission will govern their arbitration procedure. They agreed that the arbitration commission's decision shall be final and binding upon both the parties. They specifically agreed that the arbitration shall take place in Beijing. This itself means the 1 A.I.R. Supreme Court 2011, pg. 2040 2 (2002) 4 SCC 105 3 (2008)4 SCC 190 12/39 CHS12.2013 arbitration procedures as applied to the China Trade Commission will govern the arbitration procedures before the Tribunal. It is clear even from the plain reading of arbitration clause that the parties have not specifically and/or impliedly excluded any provisions of Indian laws, including the Arbitration Act. The plaintiffs/respondents themselves filed the suit in India in this Court. The Court as recorded above, thereafter, referred the matter in view of Section 8 of Arbitration Act to the China Trade Commission.

18 Section 28 of Arbitration Act is reproduced as under:

> "28. Rules applicable to substance of dispute- (1) Where the place of arbitration is situate in India,-
>
> (a) in an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;
>
> (b) in international commercial arbitration,-
>
> (i) the arbitral tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of 13/39 CHS12.2013 the dispute;
>
> (ii) any designation by the parties of the law or legal system of a given country shall be construed, unless otherwise expressed, as directly referring to the substantive law of that country and not to its conflict of laws rules;
>
> (iii) failing any designation of the law under clause (a) by the parties, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the

circumstances surrounding the dispute.

(2) The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorised it to do so.

(3) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction".

The parties have decided to follow the procedural rule of the China commercial arbitration. As defined under Clause (f) of Section (1) of Arbitration Act, the decree-holder is a foreign entity /person. It is a International Commercial Arbitration.

19 The question, therefore is in the present facts and circumstances, whether the parties have specifically excluded 14/39 CHS12.2013 and/ or even by implication, in part or in full, Part I and Part II of the Arbitration Act. Part I covers Sections 1 to 43. Part II covers Sections 44 to 60. Part II deals with the aspect of enforcement of certain Foreign Awards covering New York Convention Awards and Geneva Convention Awards. Part 'I' deals with the domestic award and the finality and enforcement of such arbitral award.

20 We are concerned with the enforcement of the award in question. The following Sections are read and referred by the parties.

35. Finality of arbitral awards. -Subject to this Part an arbitral award shall be final and binding on the parties and persons, claiming under them respectively.

36. Enforcement. - Where the time for making an application to set aside the arbitral award under section 34 has expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the court.

44. Definition.- In this Chapter, unless the context otherwise requires, "foreign award" means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, 15/39 CHS12.2013 considered as commercial under the law in force in India, made on or after the 11th day of October, 1960-

(a) In pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies, and

(b) In one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which the said Convention applies.

45. Power of judicial authority to refer parties to arbitration. -Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908) a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

46. When foreign award binding. - Any foreign award which would be, enforceable under this Chapter shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in India and any references in this Chapter to enforcing a foreign award shall be construed as including references to relying on; an award.

16/39 CHS12.2013

48. Conditions for enforcement of foreign awards. - (1) Enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the court proof that-

(a) The parties to the agreement referred to in section 44 were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the 17/39 CHS12.2013 parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

(2) Enforcement of an arbitral award may also be refused if the court finds that-

(a) The subject-matter of the difference is not capable of settlement by arbitration under the law of India; or

(b) The enforcement of the award would be contrary to the public policy of India.

Explanation. -Without prejudice to the generality of clause (b) of this section, it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption.

(3) If an application for the setting aside or suspension of the award has been made to a competent authority referred to in clause (e) of sub-section (1) the court may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

49. Enforcement of foreign awards. -Where the court is satisfied that the foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of that court.

21 It is relevant to note that the decree-holder has filed Arbitration Petition No.1062 of 2011 under Section 9 of the 18/39 CHS12.2013 Arbitration Act against the judgment debtor for an interim protection and/or security in view of the Award passed in their favour. By order dated 22nd December, 2011, the Court has directed judgment debtor not to finalise any transaction for the sale of any of it's immovable property and further directed to file affidavit to disclose all the immovable properties showing their rights, title and interest.

22 By order dated 19th March, 2012, as even the appeal period against the award as contemplated under Section 34 was over, interim order dated 22nd December, 2011, directed to be continued till the enforcement of the award. All the points were kept open. The statement is made that these interim orders with regard to the immovable properties has attained finality. There is no further challenge raised and/or made by the judgment debtor till these dates.

23 The statement is made by the learned counsel appearing for the parties that so far as New York Convention (NYC) as contemplated under Section 44 is concerned, it is 19/39 CHS12.2013 applicable to both the parties i.e. India and China, but the statement is also made that there was no reciprocal provisions notified by the Central Government in the official gazette except a notification dated 19th March, 2012. (date of publication 24th March, 2011), whereby Ministry of Law and Justice, Department of Legal Affairs declared as under :

> "Declares People's Republic of China to be a territory to which the Convention on the Recognition and Enforcement of Foreign Arbitral Awards applies.
>
> S.O. 580(E).-- In exercise of the powers conferred by Clause (b) of Section 44 of the Arbitration and Conciliation Act, 1996 (26 of 1996), the Central Government, being satisfied that reciprocal provision have been made, hereby declares the People's Republic of China (including Hongkong Special Administrative Region and the

> Macao Special Administrative Region of the People's Republic of China) to be a territory to which the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, set forth in the First Schedule to the said Act, applies for the purpose of any award of the nature referred to in that section made on or after the 19 th day of March, 2012".

This means on the date of the agreement between the parties, the date of award, the reciprocal provisions as 20/39 CHS12.2013 contemplated in Clause "B" of Section 44 of Arbitration clause, was not in existence, but on the date of filing of the Execution Petition on 11th April, 2012, in view of notification dated 19 th March, 2012 / 24th March, 2012 Peoples Republic of China has been declared to be a territory, to which the Convention on the Recognition of Enforcement of Foreign Arbitral Award applies.

24 Section 44(A) of C.P.C. as relevant is reproduced as under:

> " 44A.Execution of decrees passed by Courts in reciprocating territory.-
>
> (1) Where a certified copy of a decree of any of the superior Courts of {***} any reciprocating territory has been filed in a District Court, the decree may be executed in [India] as if it had been passed by the District Court.
>
> (2) Together with the certified copy of the decree shall be filed a certificate from such superior Court stating the extent, if any, to which the decree has satisfied or adjusted and such certificate shall, for the purposes of proceedings under this section, be conclusive proof of the extent of such satisfaction or adjustment. (3) The provisions of section 47 shall as from the filing of the certified copy of the decree apply to the proceedings of a District Court executing a decree under this section and the District Court shall refuse execution of any such decree, if it is shown to the satisfaction of the Court that the decree falls within 21/39 CHS12.2013 any of the exceptions specified in clauses (a) to (f) of section 13.
>
> [Explanation 1.- "Reciprocation territory " means any country or territory outside India which the Central Government may, by notification in the Official Gazette, declare to be a reciprocating territory for the purposes of this section ; and "superior Courts", with reference to any such territory, means such Courts as may be specified in the said notification.

Explanation 2.- "Decree" with reference to a superior Court means any decree or judgment of such Court under which a sum of money is payable, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty, bur shall in no case include an arbitration award, even if such an award is enforceable as a decree or judgment.]] 25 The definition of Foreign judgment and Foreign Court as per C.P.C.:-

> "Definitions.- In this Act, unless there is anything repugnant in the subject or context,-
>
> [(5) "foreign Court" means a Court situate outside India and rot established or continued by the authority of the Central Government:] (6) " foreign judgment " means the judgment of a foreign Court".

26 The contention, therefore, was made by the learned counsel appearing for the decree-holder that in view of clear 22/39 CHS12.2013 provisions on the date of passing of award apart from the date from the agreement between the parties, the award in question though it is a "Foreign Award" but in view of undisputed position on record and in view of specific notification about the reciprocity, which was on/or after 19 th March, 2012, Part II of Arbitration Act is not applicable. The Award so passed cannot be treated as a Foreign Decree / foreign judgment as contemplated under Section 44(A) of C.P.C. or Section 44 of the Arbitration Act. The formalities as contemplated in C.P.C. are not necessary, as sought to be contended by the learned counsel appearing for the judgment debtor.

27 The agreement to govern their disputes settled by China Trade Commission was for procedure to be followed by the Arbitral Tribunal while deciding the dispute between the parties. There was no specific agreement of exclusion of any provisions of India Law and/or any agreement governing law.

The place/seat of arbitration in no way takes away the rights of the parties and cannot be the foundation to decide the 23/39 CHS12.2013 applicable laws. There was no agreement, except the procedural rules as recorded above, which was specifically excluded to decide the disputes. The judgment-debtor filed the suit for recovery in this Court as cause of action arose in this Court's jurisdiction.

The decree-holder, therefore invoked the provsions of Indian Laws (C.P.C.) by treating the same award as domestic award, which is executable in India as per Part I of Arbitration Act, including Sections 35 and 36 read with C.P.C. Therefore, the Law of Execution in India will govern the present execution action and all proceedings arising out of the same.

29 The Supreme Court in Bhatia International (Supra) has dealt with the aspect of applicability of Part I and Part II of Arbitration Act, in national or international commercial arbitration, held outside India. The aspect of domestic award as contemplated under Section 2(7) of Arbitration Act and Foreign Award have been elaborated in following words :-

> " 23. That the Legislature did not intend to exclude the applicability of Part I to arbitrations, which take place 24/39 CHS12.2013 outside India, is further clear from certain other provisions of the said Act. Sub-section (7) of Section 2 reads as follows:

"2(7) An arbitral award made under this Part shall be considered as a domestic award."

As is set out hereinabove the said Act applies to

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

24. Section 5 provides that a judicial authority shall not intervene except where so provided in Part I. Section 8 25/39 CHS12.2013 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.

25. The beginning part of Section 28 reads as follows: "28. Rules applicable to substance of dispute.- (1) where the place of arbitration is situate in India,-

xxx xxx xxx xxx xxx xxx"

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 where the place of arbitration is out of India.

26/39 CHS12.2013

26. Thus Sections 44 in (Chapter I) and Section 53 (in Chapter II) define foreign awards, as being awards covered by arbitrations under the New York Convention and the Geneva Convention respectively.

Part II then contains provisions for enforcement of "foreign awards" which necessarily would be different. For that reason special provisions for enforcement of foreign awards are made in Part II. To the extent that Part II provides a separate definition of an arbitral award and separate provisions for enforcement of foreign awards, the provisions in Part I dealing with these aspects will not apply to such foreign awards. It must immediately be clarified that the arbitration not having taken place in India, all or some of the provisions of Part I may also get excluded by an express or implied agreement of parties. But if not so excluded the provisions of Part I will also apply to "foreign awards". The opening words of Sections 45 and 54, which are in Part II, read "notwithstanding anything contained in Part I". Such a non-obstante clause had to be put in because the provisions of Part I apply to Part II.."

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

(emphasis added)

27/39 CHS12.2013

30 The Apex Court following same in Venture Global

Engineering (Supra), in paragraph 33 observed as under:

> "33. The very fact that the judgment holds that it would be open to the parties to exclude the application of the provisions of Part I by express or implied agreement, would mean that otherwise the whole of part I would apply. In any event, to apply Section 34 to foreign international awards would not be inconsistent with Section 48

> of the Act, or any other provisions of Part II as a situation may arise, where even in respect of properties situate in India and where an award would be invalid if opposed to the public policy of India, merely because the judgment-debtor resides abroad, the award can be enforced against properties in India through personal compliance of the judgment-debtor and by holding out the threat of contempt as is being sought to be done in the present case. In such an event, the judgment-debtor cannot be deprived of his right under Section 34 to invoke the public policy of India, to set aside the award. As observed earlier, the public policy of India includes - (a) the fundamental policy of India; or (b) the interests of India; or (c) justice or morality; or (d) in addition, if it is patently illegal. This extended definition of public policy can be bypassed by taking the award to a foreign country for enforcement."

31 In Videocon Industries Limited (Supra), the Supreme Court after referring to the Bhatia International 28/39 CHS12.2013 (Supra), Venture (supra) has reiterated the position in following words:-

> "19 In the present case also, the parties had agreed that notwithstanding Article 33.1, the arbitration agreement contained in Article 34 shall be governed by laws of England. This necessarily implies that the parties had agreed to exclude the provisions of Part I of the Act. As a corollary to the above conclusion, we hold that the Delhi High Court did not have the jurisdiction to entertain the petition filed by the respondents under Section 9 of the Act and the mere fact that the appellant had earlier filed similar petitions was not sufficient to clothe that High Court with the jurisdiction to entertain the petition filed by the respondents.

32 I have also in J.S. Ocean Liners Inc. Vs. S.K.

Shipping (Singapore) Pte Ltd. 4 while dealing with the exclusive agreement with regard to Part "I" held that the parties having agreed to exclude the provisions of Part I of the Arbitration Act, any proceedings based upon the provisions, which falls within Part "I" of the Act , cannot be invoked. They will be governed by their agreed clauses and the respective court's jurisdiction.

Paragraph Nos. 14 and 15 read as under:-

"14 The Apex Court in (Venture Global Engineering v. Satyam Computer Services Ltd. & 4 2010(2) Bom. C.R. 52 29/39 CHS12.2013 Anr), 2008 DGLS (soft) 36: (2008) 4 S.C.C. 190, while dealing with the challengeable aspect of foreign award under Section 34 of the Act in India, has also reiterated that provisions of Part I could be applicable to International Commerce Arbitration held out of India, "unless any or all such provisions have been excluded by agreement between the parties, expressly or by implication".

"15 igTherefore, in view of the present facts and circumstances, as the parties have consented and agreed that the Court at London have the jurisdiction and further that the English Act would govern the arbitration proceedings and in fact the parties have acted accordingly throughout, in my view,

this amounts to permitted commercial agreement whereby the parties have agreed to be governed by the English law. It also means that the parties have agreed and consented to the exclusion of provisions of Part I of the Act which is permissible under the law. The Apex Court in (Rajasthan State Electricity Board Vs. Universal Petrol Chemicals Ltd.) 2009 DGLS (soft) 14 : (2009) 3 S.C.C. 107, specifically recognised and accepted such agreement of having exclusive jurisdiction to a particular Court and the law. The Apex Court has also recognised in (Indian Oil Corporation Limited Vs. Raja Transport (P) Ltd.) (2009) 8 S.C.C. 520, that such arbitration agreement between the parties need to be accepted."

33 In the present case, as noted above, there is no specific exclusive and/or agreement between the parties except 30/39 CHS12.2013 the procedural rule as noted above, agreed to decide their disputes. The parties are always free to decide the rules to be followed and/or procedure to be adopted to adjudicate their disputes before the nominated Arbitral Tribunal. Both parties are bound by the same, so also the Arbitral Tribunal. The adoption of China Commission/ procedure/rules itself cannot be read and/or means that the parties have agreed to exclude the provisions of Part "I" of Arbitration Act as arbitration held outside India. Therefore, in view of specific agreement between the parties, I am inclined to observe that there is no such agreement even by implication to exclude the provisions of Part "I" of the Arbitration Act of India governing laws of the contract.

34 The submission that on the date of filing of the present Execution Application, in April, 2012, by which the notification under Clause "B" of Section 44 was declared in the government gazette, thereby the Republic of China has been recognized to be territory, to which the Convention on the recognition of enforcement of Arbitral Awards applies, debars 31/39 CHS12.2013 the decree-holder to put this execution by treating the award as domestic award. I am inclined to observe in the present case that in view of agreement date and the award date, apart from clear provision mentioned in the Notification which is applicable on and after 19th March, 2012, the award in question need to be governed by the provisions of laws prior to 19 th March, 2012.

Therefore, there was no question of any formalities or requirement as contemplated under Section 44 of Part II of Arbitration Act and as well as Section 44(A) of C.P.C. The award in question, in my view, cannot be treated as Foreign Award, which required to be executed only by following the procedure of Part II of Arbitration Act.

35 The constitution Bench of Supreme Court on 6 September 2012, in Bharat Aluminium Company Vs. Kaiser Aluminium Technical Services Inc. 5 while dealing with the correctness of the Judgments of Bhatia International (supra), Videocon(Supra) and Venture Global engineering (supra) declared that, as those Judgments have been in the field since 5 (2012) 9 SCC 552 32/39 CHS12.2013 long, will govern the agreements between the parties as made prior to the date of this judgment. The judgment so declared will be applicable prospectively. Therefore, all earlier transactions/ litigations will be governed by the laws and regulation, which have been in existence prior to the date of the judgment. In the present case, in view of clear notification, the disputes arising out of agreements and awards so passed, based upon the same situation. The agreement, prior to 19th March, 2012, would be governed by the then prevailing law by treating Republic of China as non reciprocal territory/country. The present case, therefore, also will govern by the decisions of Supreme Court in

Bhatia International (supra), Videocon(Supra) and Venture Global engineering (supra).

36 By section 85 of Arbitration Act, 1996, the Foreign Awards (Recognition and Enforcement) Act, 1961 stood repealed and so also the Arbitration Act, 1937. The provisions of those Acts are not applicable to the present facts and circumstances of the case, as cause of action also arose after 33/39 CHS12.2013 1/1/1996. There is no such case pleaded even by the parties.

The Arbitration Act though has a foundation of UNCITRAL model, but in view of specific provisions, will be governed by the Indian Arbitration Act only, unless agreed otherwise by the parties. Part II, which deals with the foreign award and its enforcement, therefore, needs to be considered in this background. In the present case, admittedly pursuant to the agreement between the parties, arbitration held outside India based upon the procedural rule of China Trade Commission.

The important element to enforce the award in question is that it was not made in the reciprocal territory, though, the agreement was in writing and it was arising out of commercial relationship. It is relevant to note that even Article I(a) of the NYC Provides that to seek enforcement of an award rendered outside India as a foreign award, in accordance with Sections 48 and 49 of the Arbitration Act, it is necessary that the award must be rendered in a reciprocated country and not otherwise.

34/39 CHS12.2013

37 The plain reading of Section 44 and the NYC

Articles, it is clear that for want of reciprocity, the convention and all it's provisions shall not be extended and/or made applicable to the alleged foreign award. The reservation/exception of reciprocity and/or its mandate, in the present facts and circumstances, make the position clear that the award though rendered in a foreign country, based upon the China Trade Commission procedure, is not enforceable as a foreign award, as contemplated under Part II of the Arbitration Act.

38 The parties cannot be rendered remediless. In the present case, as noted, and in view of the clear declaration/ decision given by the Supreme Court of India, considering the Arbitration Act, such award is executable/ enforceable in India, as contemplated under Part I of the Arbitration Act. The procedure of actual enforcement/execution is nowhere contemplated and/or provided in Chapter II of the Arbitration Act and/or in any of the convention and/or the international 35/39 CHS12.2013 treaties, the party- decree-holder, national and/or international entity has no choice but to invoke the provisions of C.P.C., as contemplated under Sections 35 and 36 of the Arbitration Act.

39 In Arbitration Act, there are three provisions for enforcement of arbitral award. Section 36 contemplates an enforcement of domestic award or the foreign award if not covered by Part II of the Arbitration Act. Section 49 deals with the enforcement of foreign award and so also Section 58,

based upon the respective conventions.

40 In Bangladesh Air Service (Pvt.) Ltd. vs. British Airways PLC 6, the Appellate Division Bench, refused to enforce a foreign award in a country, which had acceded to the convention but had not passed implementing legislation by observing that "I can only say that Sections 12, 13 and 44(A) of C.P.C. do not apply in foreign award in Bangladesh". The point is that it is internationally recognised that such convention and the related proceedings for enforcement of arbitral award 6 (1998) 23 Year Book Commercial Arbitration (Bangladesh 36/39 CHS12.2013 and or alleged foreign award, is not permissible unless award is made in a territory and/or country, on which the NYC applies on reciprocity basis. In India, therefore, the said reciprocity clause/ provisions/ Notification by the Central Government is mandatory and therefore, in view of the admitted position prior to the date of agreement between the parties and the arbitral award in question, the provisions of Part II, as sought to be contended, are not applicable and therefore the arbitral award is executable/ enforceable in India as contemplated in Part I of the Arbitration Act.

41 In view of above, the preliminary objections so raised by the learned counsel appearing for the judgment-

debtor that this Court has no jurisdiction is untenable. The application for enforcement of Award dated 30th August 2011 under Section 36 of Arbitration Act read with provisions of C.P.C. is maintainable in India. Rule 801 (Chapter XLIII) of the Bombay High Court (Original Side) Rules, which prescribed the procedure for enforcement of foreign award, is also not 37/39 CHS12.2013 applicable to the arbitral award in question.

42 As recorded above, this court has already directed that the execution to proceed in accordance with law by order dated 13th August, 2012 itself. The interim protection with regard to the immovable property is concerned, has been in force since long.

43 Now considering the continuation of the order so passed and the fact that the Arbitral Award has attained finality and considering the averments so made by the decree-holder, which remained uncontroverted, except the issue of jurisdiction so raised and decided, the attachment order so passed by this Court on 30th September, 2012, will continue till the disposal of the execution proceedings.

44 The Chamber Summons (L) No. 1588 of 2012 as filed, therefore, is dismissed. However, all points are kept open for final decision of execution proceeding, which to be continued in accordance with law.

38/39 CHS12.2013

45 So far as Chamber Summons No. 12 of 2013 is

concerned, for the reason recorded above and there is no contravention or contra material placed on record and as admittedly the award has attained finality, I am inclined to grant prayer clause (c).

46 The judgment-debtor to comply prayer clause (c) within six weeks.

47 So far as prayer clause (d) is concerned, I am inclined to observe that in view of interim order/ protection already granted by this Court referring to immovable property, that has been continued till this date, i.e. till the enforcement of the award and further as Chamber Summons taken out by the judgment debtor to release and or vacate the warrant of attachment is rejected., I am not inclined to prayer clause (d) without details of movable as well as immovable properties.

However, liberty is granted to the decree-holder to pray for appropriate orders by providing details.

48 It is made clear that the Execution Application so filed to proceed in accordance with law.

49 Stand over by eight weeks.

50 The learned counsel appearing for the judgment-debtor submitted to stay the effect and operation of this order.

Considering the reason so provided, I am inclined to grant stay for six weeks. However, the interim order already passed, shall continue till further order.

(ANOOP V. MOHTA, J.)