Delhi High Court
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Marriott International Inc. & ... vs Ansal Hotels Limited & ... on 5 July, 2000
Equivalent citations: 2000 VIAD Delhi 1003, AIR 2000 Delhi 337
Author: S Mahajan
Bench: D Gupta, S Mahajan
ORDER

S.K. Mahajan, J.

1. By this appeal, the Appellants seek to challenge the order dated March 8, 1999 passed by the learned Single Judge whereby their application under Section 9 of the Arbitration and Conciliation Act, 1996 (in short referred to as "the Act") was dismissed. A preliminary objection to the maintainability of the appeal has been raised by the respondents on the ground that Section 9 falls in Part-I of the Act and Part-I applies only to those arbitrations where the place of arbitration is in India. The contention of the respondents, therefore, is that as the arbitration proceedings were being held before the Kuala Lumpur Regional Centre for Arbitration in Malaysia, Section 9 of the Act will have no applicability and the petition itself was, therefore, not maintainable. It is submitted that in case the petition itself was not maintainable, this appeal will also not lie and is not maintainable.

2. The contention of the Appellants, however, is that the Act provides a comprehensive framework for an arbitration under the Indian law based on the pattern of UNCITRAL model law of international commercial arbitration and the Act would, therefore, apply to all the arbitrations that are connected with India irrespective of the fact whether the place of arbitration is in India or abroad. Before we discuss the respective contentions of the parties, the facts in short relevant to the matter in issue may be enumerated as under:-

3. Appellants who are the Marriott group of companies (hereinafter referred to as "the Marriotts"), on March 8, 1997 entered into a series of related contracts with respondent No. 1 pursuant to which the appellants were appointed to operate the hotel as part of the Marriott chain of hotels world-wide and to provide certain technical, advisory, sales, marketing and pre-opening services to the hotel. There were separate agreements in respect of all these services. Respondent No. 1 allegedly terminated these contracts and is also alleged to have entered into certain agreements with the ITC Hotels Limited and appointing them as the new operator of the hotel and to take over its operation. The ITC Hotels Limited were also issued certain shares to the extent of about 50-51% of the entire share capital of the company. For the view we are taking in this appeal, it is not relevant as to what is the extent of shareholding of the ITC Hotels Limited in respondent No. 1 company. According to the appellant as the purported termination of the agreements by respondent No. 1 was illegal, they proposed to resolve their disputes by negotiations. However, receiving no assurance from the respondents for resolution of such differences by negotiations, the appellants filed a petition under Section 9 of the Act for seeking interim directions. It may not be out of place to mention here that in accordance with the arbitration agreement between the parties, the arbitration proceedings have also been initiated before the Kuala Lumpur Regional Centre for Arbitration in Malaysia.

4. In its reply to the application under Section 9, the respondents mainly raised two objections to the maintainability of the petition, namely, (i) that the petition suffers from a mis-joinder of causes of action inasmuch as each contract entered into between the parties was an independent contract for providing services mentioned therein. The termination of each of the contract was by way of different termination letters. Therefore, each of the causes of action was distinct and one petition for relief on different causes of action was not maintainable; and (ii) under the contract the place of arbitration was Kuala Lumpur, Malaysia and the provisions of Part-I of the Act being applicable only to those arbitrations where the place of arbitration was in India, the application under Section 9 of the Act was not maintainable. On merits the contention of the respondents was that they had reasons to terminate the contracts and contracts from their very nature being terminable, no direction could be given to the respondents for specific performance of those contracts and the

appellants were, therefore, not entitled to any of the interim reliefs sought for in the petition.

5. The learned Single Judge by the impugned judgment dismissed the petition after holding that the appellants had not made out strong prima facie case for the grant of interim relief and the balance of convenience was also not in favour of the appellants and that the grant of interim relief at that stage might cause irreparable injury to the respondents whereas the appellants could always be compensated in terms of money. As the appellants were held not entitled to any relief in the application, the learned Single Judge did not decide the question whether the Part-I of the Act was applicable to arbitration taking place outside India and whether a petition under Section 9 of the Act in such a case was maintainable. Aggrieved by the order of the learned Single Judge, the appellants have preferred this Appeal. As already stated above, a preliminary objection to the maintainability of the appeal has been raised by the respondents mainly on those two grounds on which they had submitted that the petition itself was not maintainable.

6. The Arbitration and Conciliation Act was enacted to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards as also to define the law relating to conciliation and for matters connected therewith or incidental thereto. Prior to the enactment of the Act the United Nations Commission on International Trade Law (UNCITRAL) had adopted the Model Law on International Commercial Arbitration in 1985. The General Assembly of the United Nations recommended that all countries should give due consideration to the said Model Law, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice. As per the preamble to the Act, the said Model Law and rules had made significant contribution to the appointment of an unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations. One of the main objectives of the Act was to minimise the supervisory role of Courts in the arbitral process.

7. Under Section 2(f) of the Act, International Commercial Arbitration means an arbitration relating to disputes arising out of the legal relationship, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is an individual who is a national of, or resident in, any country other than India or a company or an association which is incorporated in any country other than India or whose central management and control is exercised in any country other than India. The place of international commercial arbitration may or may not be in India. Section 2(2) of the Act states that part-I of the Act shall apply where the place of arbitration is in India. Section 9 of the Act confers wide powers on the Courts to order interim measures of protection in respect of (i) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement; (ii) securing the amount in dispute in the arbitration; (iii) the detention, preservation or inspection of any property or thing which is the subjectmatter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence; (iv) interim injunction or the appointment of a receiver; and (v) such other interim measure of protection as may appear to the court to be just and convenient. For the purpose of passing such an order for interim measures, the Court has the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it. Section 9 is also in Part-I of the Act.

8. The argument of the respondents, therefore, is that as Part-I, in terms of Section 2(2) of the Act, applies only where the place of arbitration is in India, Section 9 will have no applicability where the arbitration was being held at a place outside India. Part-II of the Act deals with enforcement of certain foreign awards made under the New York and Geneva Conventions. Domestic award has been defined in Section 2 of the Act to mean an arbitral award made under Part-I of the Act. Domestic award will, therefore, include not only an award in an arbitration relating to disputes arising between two individuals who are nationals and residents of India but also includes an award made in an International Commercial Arbitration where the place of arbitration is in India. A foreign award means an arbitral award on differences between persons arising out of

legal relationship whether contractual or not considered as commercial under the law in force in India in pursuance of an agreement in writing to which either the Geneva convention or the New York convention applies and the award is made in the territory of a State other than the State where recognition and enforcement of such awards are sought. A conjoint reading of the above provisions shows that an award made in a territory outside India in an arbitration between two parties one of which is an individual who is a national of or resident in any other country other than India or a company which is incorporated in any country other than India or whose central management and control is exercised in any country other than India will be a foreign award. The short question before us is whether the provisions of Part-I of the Act will, therefore, apply to an international commercial arbitration under the Geneva or New York conventions between persons, whether physical or legal, taking place outside India.

9. It is vehemently argued by Mr. Chidambaram, learned Senior counsel on behalf of the respondents that under Section 2 of the Act, Part-I shall apply only where the place of arbitration is in India and consequently this part will have no applicability to an international commercial arbitration being held under Geneva and New York conventions at a place outside India. The contention is that there is no reason to depart from the plain meaning of Section 2(2) of the Act so as to make part-I applicable even in relation to arbitration proceedings where the place of arbitration is not in India. He, therefore, submits that as the arbitration between the parties before the Court is taking place at Kuala Lumpur Regional Centre for Arbitration, the provisions of Part-I will not apply and consequently Section 9 will have no applicability to the case in hand and the Court has no power to make an order for an interim measure of protection as envisaged by the said Section.

10. Mr. Desai, learned Senior counsel of the appellants, however, contends that Section 2(2) of the Act cannot be read in isolation and it must be read alongwith Section 2(5) of the Act. He submits that under the agreement the parties had agreed that they could go to a Court of law for injunction and it has also been agreed between the parties that the agreement shall be construed under and governed exclusively by the laws of India. It is his contention that under Section 2 of the Act, Part-I shall apply to "all arbitrations" and all proceedings relating thereto and as Section 9 was in Part-I of the Act, there was no reason to exclude its applicability to the arbitrations being held outside India. He, therefore, submits that the appellants had the right to file the application under Section 9 of the Act for an interim protection in an Indian Court. Relevant provisions of the agreement making the Indian laws applicable and empowering a party to seek injunctive relief are as under:

"22.05 Applicable Law and Jurisdiction:

A. This Agreement is executed pursuant to and shall be construed under and governed exclusively by the laws of India.

B. Notwithstanding anything to the contrary herein, either party may seek injunctive relief (including, for purposes of illustration, restraining orders and preliminary injunctions) in any court of competent jurisdiction; either party shall be entitled to make an application to the court requesting that the proceedings be referred to arbitration in accordance with the terms of Section 22.06 without prejudice, however, to interim injunction or enjoining orders granted by such court."

11. It is also the contention of Mr. Desai that under Section 34 of the Malaysian Arbitration Act, Malaysian Courts do not have jurisdiction to pass such an order and it can never be the intention of the legislature to leave a party without any forum for seeking the remedy as provided by Section 9 of the Act. He further submits that even assuming Part-I of the Act does not apply to the facts of the case, the Court has inherent powers to grant injunction so as to advance the cause of justice. In support of his contention that Section 9 of the Act will be applicable even to arbitration being held outside India, he refers to two judgments rendered by Single Judges of this Court and reported as Dominant Offset Private Limited Vs. Adamovske Strojirny A.S., 1997(2) ALR 335 and Olex Focas Private Limited and Another Vs. Skodaexport Company Limited and

Another, 2000 (1) Apex Decisions (Delhi) 527. He also referred to the judgment reported as Channel Tunnel Group Vs. Balfour Beatty Limited (Lord Mustill) 1993 (1) All England Reports 664 in support of his contention that even if Part-1 of the Act does not apply to International Commercial Arbitration where the place of arbitration is outside India, the Court has inherent powers to grant injunction so as to advance the cause of justice.

12. In Dominant Offset Private Limited Vs. Adamovske Strojirny A.S. (Supra), the Court was concerned with the appointment of an arbitrator. In that case, the parties had entered into an agreement for providing technical know-how for the manufacturing of automatic offset press and the respondent had agreed to supply the petitioner with the technical, documentation, know-how, etc. for the manufacture, assembly, use and sale of the product. The disputes arose between the parties and a petition under Section 11 of the Act was, therefore, filed for appointment of an arbitrator. An objection to the maintainability of the petition was taken and the Court framed the following issues :-

1. Whether there was any agreement valid and subsisting between the parties?

2. Whether the Court has jurisdiction to try and decide the present petition?

3. Whether disputes raised in the petition to be referred for arbitration in terms of the arbitration clause?

13. One of the points raised in that case was that as Part-I of the Act does not apply to international commercial arbitrations where the place of arbitration was not in India, the Court had no jurisdiction to entertain a petition under Section 11 of the Act. The Court while dealing with this argument of the respondent in that case held as under :-

"The aforesaid argument of the learned counsel appears to be attractive at the first glance of the provisions. However, on a closer look of the provisions of the Act relief upon by the counsel for the parties, the said impression does not appear to be correct. Reasons for the same are not far to seek. On a reference to the proviso to sub-section (2) of Section 1, it is crystal clear that Part I shall apply to a case of international commercial arbitration in the case of State of Jammu & Kashimr, Again, when one refers to sub-Section (5) of Section 2 which states that subject to the provisions of sub-section (4) and save in so far as it otherwise provided by any law for the time being in force, this part (meaning thereby part I) shall apply to all arbitrations and to all proceedings relating thereto. Sub-section (12)(a) of Section 11 also provides that when the matter referred in sub-section (4), (5), (6), (7), (8) and (10) arise in an international commercial arbitration, the reference to `Chief Justice' would be construed as a reference to `the Chief Justice of India'. A conjoint reading of all the aforementioned provisions clearly indicate that sub-section (2) of Section 2 is an inclusive definition and that it does not exclude the applicability of Part I to those arbitrations which are not being held in India. The aforesaid interpretation gets support from the provisions of sub-section (5) of Section 2 which provides that Part I shall apply to all arbitrations and to all proceedings relating thereto which would also, in my considered opinion, include an international commercial arbitration."

14. The aforesaid judgment in Dominant Offset Private Limited Vs. Adamovske Strojirny A.S. (Supra) was followed in Olex Focas Private Limited and Another Vs. Skodaexport Company Limited and Another (Supra). The learned Single Judge while agreeing with the reasoning given in Dominant Offset Private Limited Vs. Adamovske Strojirny A. S. (Supra), held as under:-

"60. I have considered the rival contentions advanced by the learned counsel for the parties. I have also considered the cases which have cited at the bar. A careful reading and scrutiny of the provisions of 1996 Act leads to the clear conclusion that sub-Section (2) of Section 2 is an inclusive definition and it does not exclude the applicability of Part I to this arbitration which is not being held in India. The other clauses of Section 2 clarify the position beyond any doubt that this court in an appropriate case can grant interim relief or interim injunction.

61. A close reading of relevant provisions of the Act of 1996 leads to the conclusion that the Courts have been vested with the jurisdiction and powers to grant interim relief. The powers of the Court are also essential in order to strengthen and establish the efficacy and effectiveness of the arbitration proceedings.

62. The arbitrators perhaps cannot pass orders regarding the properties which are not within the domain of their jurisdiction and if the Courts are also divested of those powers, then in some cases it can lead to grave injustice. Arbitration proceedings take some time and even after an award is given, some time is required for enforcing the award. There is always a time lag between pronouncement of the award and its enforcement. If during that interregnum period, the property/ funds in question are not saved, preserved for protected, then in some cases the award itself may become only a paper award or a decree. This can of course never be the intention of the legislature. While interpreting the provisions of the act the intention of the framers of the legislation has to be carefully gathered.

63. In the recent judgment of the Supreme Court in Sundram Finance case (supra) their Lordships of the Supreme Court have approved of the Channel Tunnel case (supra). In this case the House of Lords' granted injunction, where admittedly the venue of arbitration was outside the territory of the United Kingdom. Since this judgment has been approved by the Supreme Court therefore, it can be reasonably assumed that their Lordships of the Supreme Court did not prescribe to the view that the Indian Courts ought not to have jurisdiction where the venue of arbitration is outside India.

64. Article 8.5 of the ICC Rules is consistent with the provisions of 1996 Act. Under Article 8.5 there is a provision for interim and conservatory measures from an appropriate judicial authority.

65. On consideration of aforesaid submission and relevant provisions of the Act and the case law, I am clearly of the opinion that according to the provisions of 1996 Act the Courts are vested with the jurisdiction and power to grant interim relief in appropriate cases. The Court's power to grant interim relief even strengthen the arbitration proceedings, otherwise in some cases the award may in fact be reduced to only a paper award.

66. I am of the considered view that accordingly to the provisions of the 1996 Act, this Court is clearly vested with the jurisdiction and powers of granting interim relief in appropriate cases. I am in respectful agreement with the reasoning given by M.K. Sharma, J. while interpreting the provisions of the 1996 Act in the case of Dominant Offset Private Ltd. Vs. Adamovake Strojirny A. S. (supra).

15. The learned Judge while holding that Section 9 of the Act will apply even to arbitrations being held outside India, has also relied upon the judgment of the Supreme Court in Sundaram Finance Vs. NEPC India Limited, and has held that since that Supreme Court has approved the Channel Tunnel Case, it can reasonably be assumed that the Supreme Court did not prescribe to the view that the Indian Courts ought not to have jurisdiction where the venue of arbitration was outside India. With due respect to the learned Judge, we do not find any such approval of the Channel Tunnel case by the Supreme Court. The Supreme Court in Sundaram Finance case has approved only the following observations in Channel Tunnel's case:-

"In my view, this power (of making interim orders) can be exercised before there has been any request for arbitration or the appointment of arbitrators, provided that the applicant intends to take the dispute to arbitration in due course".

16. Supreme Court in that case was dealing with the question as to whether power under Section 9 of the Act could be exercised by the Court even at a stage when there was no request made by the party for appointment of an arbitrator and it was in that context that the aforesaid observations in Channel Tunnel case was approved by the Court. The Supreme Court in that case was not concerned with the question of the powers of the Court to pass interim orders in arbitration being held outside India. In our view, therefore, appellants cannot take any assistance from the judgment of the Supreme Court in Sundaram Finance case.

It is contended by Mr. Desai that Section 2(2) has to be read alongwith Section 2(5) of the Act. Section 2(5) of the Act reads as under :-

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

17. In our view sub-section (5) of Section 2 has to be read alongwith subsections (2) and (4) of Section 2 of the Act. Sub-section (4) of Section 2 of the Act reads as under:-

"This Part except sub-section (1) of sections 40, 41 and 43 shall apply to every arbitration under any other enactment for the time being in force, as if the arbitration were pursuant to an arbitration agreement and as if that other enactment were an arbitration agreement, except in so far as the provisions of this Part are inconsistent with that other enactment or with any rules made thereunder."

18. The expression 'every arbitration under any other enactment' in subsection (4) and 'all arbitrations' in sub-section (5) do not mean that Part-I of the Act will apply even to arbitrations taking place outside India. Arbitrations are not held only under an agreement between the parties but there can be many other types of arbitrations, namely, arbitrations under certain statutes like the Indian Telegraph Act etc. and under the rules and bye laws of certain associations such as associations of merchants, stock-exchanges and different chambers of commerce etc. The applicability of part-I of the Act to "all arbitrations" means that this part will apply to all such arbitrations being held not only under an agreement between the parties but also under the provisions of rules and bye-laws of such associations of merchants, stock-exchanges, chambers of commerce etc. as also to statutory arbitrations but only when the place of arbitration is in India. In our view, the expression "every arbitration" and "all arbitrations" in subsections 4 and 5 of Section 2 cannot be stretched to mean an arbitration being held outside India. In case the interpretation sought to be given to sub-section (5) of the Act by Mr. Desai is accepted, in our view, the provisions contained in sub-section (2) of the Section 2 of the Act will become redundant. In our opinion, therefore, the only way in which sub-sections (2) and (5) of Section 2 of the Act can be harmoniously read together is that Part-I of the Act shall apply to all arbitrations being held either under an agreement between the parties or under the rules and bye-laws of certain associations of merchants, stock-exchanges, chambers of commerce or under a statute where the place of arbitration in India. Part-I, therefore, shall apply to all arbitrations where the place of arbitration is in India. In our view there is no other way in which such sub-sections (5) and (2) of Section 2 of the Act can be interpreted.

19. The present Act was enacted to consolidate and amend the law relating to domestic and international commercial arbitrations and for matters connected therewith or incidental thereto the Act. The introduction to the Act shows that it is based on the Model Law on International Commercial Arbitration adopted in 1985. According to Article 1(2) of UNCITRAL Model Law, the provisions of the Model Law except Articles 8,9,35 and 36 apply only if the place of arbitration was in the territory of the State. It means that Articles 8,9,35 and 36 of the UNCITRAL Model Law would have applied even to arbitrations taking place outside the territory of the State. Under Article 9 of the UNCITRAL Model Law, a party could request a Court for an interim measure of protection before or during the arbitration proceedings.

20. Article 9 of the UNCITRAL Model Law is similar to Section 9 of the Indian Act. In case, Article 1(2) of the UNCITRAL Model Law had been added in the Indian Act without any modification, there would have been no difficulty in applying the provisions of Section 9 of the Act to arbitrations taking place outside India. While Articles 8, 35 and 36 have been added in the Indian Act as Sections 44 , 48 and 49 in Part-II of the Act, Article 9 has been omitted from Part-II. The legislature has therefore consciously avoided to add Article 9 of the UNCITRAL Model Law in Part II of the Act. It clearly means that the provisions as contained in Article 9 of the UNCITRAL Model Law and consequently the provisions of Section 9 of the Act will not apply to arbitrations being held under the Geneva and New York Convention outside India. The legislature having

consciously departed from the UNCITRAL Model Law in making the provisions of Article 9 not applicable to the foreign awards, it is not permissible for this Court to interpret the provisions of Section 9 in a manner so as to make them applicable to the arbitration proceedings being held at a place outside India.

21. Taking support from the judgment in Dominant Offset Private Limited Vs. Adamovske Strojirny A.S. (Supra), Mr. Desai submits that proviso to sub-Section 2 of Section 1 of the Act makes it clear that Part-I shall apply to a case of international commercial arbitration in the case of Jammu and Kashmir and, therefore, the provisions of part-I will also apply in the case of an international commercial arbitration relating to the State of Jammu and Kashmir. From this he seeks to draw an inference that as Part-I has been made applicable to an international commercial arbitration, there is no reason not to make applicable the provisions of Section 9 of the Act to an international commercial arbitration being held outside India. The interpretation sought to be given to Section 1(2) of the Act by Mr. Desai is, in our view, not supported by the provisions of the Act. Section 1(2) of the Act makes it clear that it extends to the whole of India. Jammu and Kashmir being a Part of India, the Act will also apply to the State of Jammu and Kashmir. However, in terms of the proviso to subSection 2 of Section 1 of the Act, parts I, III and IV shall extend to the State of Jammu and Kashmir only insofar as they relate to international commercial arbitration. An international commercial arbitration, as earlier mentioned, can take place in India or outside India. In case, an international commercial arbitration takes place in India, there is no difficulty in applying the provisions of Part-I of the Act to such an arbitration. It is only an international commercial arbitration being held outside India that the provisions of Part-I of the Act will not be applicable. The applicability of parts I, III and IV to the State of Jammu and Kashmir only in relation to an international commercial arbitration means that an arbitration which is not an international commercial arbitration will not be governed by the provisions of Parts 1, 3 and 4. It shows that the domestic arbitration in the State of Jammu and Kashmir will be governed by the laws which may be exclusively applicable to that State. In our view, therefore, there is nothing in Section 1(2) of the Act which may compel us to depart from the plain meaning of Section 2(2) of the Act so as to make Part-I applicable to an international commercial arbitration being held outside India.

22. In a case reported as Kitechnology N.V. and Another Vs. Unicor GmbH Plastmaschinen and Another, , learned Single Judge of this Court has held that where none of the parties to the agreement was an Indian and the agreement was to be covered by German law which provided arbitration to be held at Frankfurt, Section 9 of the Act will have no applicability and the Court will have no jurisdiction to pass an interim order in that matter. A learned Single Judge of the Calcutta High Court in a case reported as East Coast Shipping Limited Vs. M. J. Scrap Private Limited, 1997(1) CHN 444, has held that in the case of an arbitration taking place outside India, Part-I of the Act will have no applicability. Similarly a Division Bench of the Calcutta High Court in Keventor Agro Limited Vs. Seagram Company Limited, A.P.O.Nos. 490/97, 499/97 and C.S. No.592/97 decided on January 27, 1998 has held that provisions of Part-I were by nature of Section 2(2) of the Act made applicable only to domestic arbitrations and consequently no order can be passed under Section 9 of the Act in a case where the place of arbitration was outside India. While dealing with this question, the Court held as under :-

"In our view, the question must be answered in the negative. The Court's power to pass an interim order in connection with special acts must be derived from that statute itself. In the decision of the Supreme Court in Morgan Sterling Mutual Fund Vs. Kartik Das : the Supreme Court negatived the power of the

consumer protection forum to grant interim relief on the ground that it was not provided for in the statute. There is no provision in Part II Chapter I or any other portion of the 1996 Act applicable to foreign arbitrations under the New York Convention, which gives the Court such a power.

When the Parliament thought it necessary to provide for the power of Court to issue interim relief it has so provided. In connection with arbitrations under Part I of the 1996 Act which deals with domestic arbitration the power to grant interim relief is provided for in Sections 9 and 17 of the Act. Sections 9 and 17 read as follows:-

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

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

(2) for an Interim measure of protection in respect of any of the following matters, namely;

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

b) securing the amount in dispute in the arbitration.

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

d) Interim injunction of the appointment of a receiver.

e) such other interim measure of protection as may appear to the Court to be just and convenient.

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

17. Interim measures ordered by arbitral tribunal.

(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order a party to take any interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute.

(2) The arbitral tribunal may require a party to provide appropriate security in connection with a measure ordered under subsection (1)."

The provisions of Part I are by virtue of Section 2(2) explicitly made applicable to domestic arbitration only. There are no corresponding provisions in Part II.

This exclusion was thus deliberate in keeping with one of the main objectives of the 1996 Act viz. "to minimize the supervisory of the Courts in the arbitral proceedings" (Vide Clause ____ of the Statement of Objects and Reasons of the 1995 B(11).

Keventer has relied upon Article 8(5) of the Arbitration Rules of the International Chamber of Commerce (1CC) to submit that the Court had the power to pass interim orders. 1 Article 8(5) of the ICC Rules of Arbitration provides:

"Article 8: Effect of the agreement to arbitrate

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5. Before the file is transmitted to the arbitrator and in exceptional circumstances even thereafter the parties shall be at liberty to apply to any competent judicial authority for interim or conservatory measures and they

shall not by so doing be held to infringe the agreement to arbitrate or to affect the relevant powers reserved to the arbitrator.

Any such application and any measures taken by the judicial authority must be notified without delay to the Secretariat or the Court of Arbitration. The Secretariat shall inform the arbitrator thereof."

The clause does not in terms confer any power on a Court to give interim relief. It merely gives liberty to the parties to approach a "competent" judicial authority for such relief without jeopardising their rights to have their disputes settled by arbitration. Besides the ICC Rules have no statutory force. At the highest they may be incorporated by reference in an arbitration agreement as one of its terms and jurisdiction of the Court cannot be conferred by consent. A passage from Bennion on Statutory Interpretation (1984 Edn.) page 51 may be quoted in this context:

"Parties cannot by their agreement confer upon a Court any jurisdiction which under the Acts establishing the Court it does not possess. (Heyting Vs. Dupont (1963) IWLR 1992: Aylmer, ex p Bischoffshelm (1887) 20 QBD 258: London Corpn. Vs. Coz. (1867) LR 2 HL 239). If it were not so, private persons would have the power to compel a judge to act merely because they wished it which is absurd."

23. We are in full agreement with the view expressed by the Division Bench of the Calcutta High Court in the above case and are of the opinion that the Court has no power to issue an interim order in a matter where the arbitration is held under the New York or Geneva conventions at a place outside India.

24. It is then the contention of Mr. Desai that even assuming the provisions of part-I of the Act do not apply, the Court still has the inherent powers to pass an order of injunction so as to advance the cause of justice. It is his submission that a party cannot be left to fend for itself without any remedy to prevent the mischief which is likely to be caused by the opposite party. For this he has relied upon the aforesaid judgment in Channel Tunnel Case.

25. In Channel Tunnel case, the facts were that the appellants were the concessionaires under a concession granted by the English and French governments for the construction and operation of the Channel tunnel between England and France. They entered into a contract with the respondents for the design and construction of the tunnel. The contract was governed by the principles common to both English and French law and in the absence of such common principles by general principles of international trade law, provided that any dispute between the parties should first be referred to a panel of experts for settlement and then be finally settled by arbitration in Brussels under the rules of the International Chamber of Commerce. The appellants were entitled under the contract to issue a variation order for, and the respondents were obliged to carry out if so ordered, 'additional work of any kind necessary for the completion of the Works'. When the contract was signed it was envisaged that although a cooling system would eventually be required it was not necessary for the opening of the tunnel and therefore provision was made in the lump sum works merely for the design and not the supply of such a system. It later transpired that a cooling system would be needed for the opening of the tunnel and in 1988 the appellants issued a variation order for the provision of such a system. The parties were unable to reach agreement as to the price for the construction of the cooling system and the respondents, therefore, wrote to the appellants threatening to suspend work on the cooling system unless the appellants agreed and paid the respondents proposed price for the construction of the cooling system. The appellants did not agree to the respondents demand and instead commenced an action in the High Court for an interim injunction restraining the respondents from suspending work on the cooling system. The respondents applied for a stay of the proceedings under Section 1 of the Arbitration Act, 1975 on the basis that the proceedings were in respect of a dispute which the parties had agreed, under the contract, to refer to arbitration.The Judge refused to stay on the ground the neither party was in a position to embark on arbitration since no reference had been made to the panel of experts and such a reference was a necessary preliminary to an arbitration. The Judge further held that he had jurisdiction under Section 12(6)(h) of the Arbitration Act, 1950 to grant an interim mandatory injunction against the respondents pending the arbitration and was

prepared to do so, but he made no order because the respondents gave an undertaking that they would not suspend work on the cooling system without giving the appellants 14 days' notice. The respondents appealed to the Court of Appeal, which allowed their appeal and stayed appellants' action under Section 1(1) of the 1975 Act on the grounds that it was not necessary that all preliminary steps ought to have been taken to enable an 'arbitration to proceed before the court's jurisdiction to stay under Section I could be invoked. The court further held that there was no power to grant an injunction under Section 12(6)(h) of the 1950 Act where the arbitration was to take place abroad. The appellants appealed to the House of Lords against the stay granted under Section 1(1) of the 1975 Act.

26. While dealing with the appeal, the Court held as under:-

1. "The Court had power pursuant to its inherent jurisdiction to grant a stay of an action brought before it in breach of an agreed method of resolving disputes by some other method. Furthermore, a stay of the appellants' action ought to be granted because the parties were large commercial enterprises negotiating at arm's length in the light of long experience of construction contracts who had clearly decided that the two-stage procedure, despite its potential weaknesses, had a balance of practical advantage over the alternative of bringing proceedings in the national courts and because, having agreed to take their complaints to experts and if necessary arbitrators, they should be required in the interests of the orderly regulation of international commerce to have resort to their chosen tribunal to settle their commercial differences. Moreover, since it could not be said on the evidence before the court that the appellants' claim was so unanswerable that there was nothing to arbitrate, there was a dispute between the parties with regard to the subject matter of the action and therefore no reasons to withhold a stay (see p. 667 hj, p. 668 b, p670 d e, p 677 efh, p678 c to f and p 68 i e to g, post).

2. Where the court made an order staying an action pending a foreign arbitration it had no power under s 12(6) of the 1950 Act to grant an interim injunction since none of the powers conferred on the court by the Act applied to arbitrations conducted abroad under a law other than English law. Accordingly, the chosen curial law of the arbitration being Belgian law the court had no power under s 12(6) to grant an interim injunction requiring the respondents to continue work on the cooling system pending the decision of the panel or the arbitrators (see p 667 hj), p 668b, p 670g, p683 a b f to h and p 684 d e, post).

3. The court had power to grant an interlocutory injunction under s 37 of the Supreme Court Act 1981 in support of a cause of action which the parties had agreed should be the subject of a foreign arbitration, notwithstanding that proceedings in England had been stayed under s I of the 1975 Act so that the agreed method of adjudication should take place, since the cause of action remained potentially justiciable before the English court despite the stay. Accordingly, although the commencement of the action was a breach of the arbitration agreement, so that the respondents were not properly before the Court, the court had power under s 37 of the 1981 Act to grant an interlocutory injunction to prevent the respondents stopping work on the cooling system. However, as a matter of discretion the injunction sought by the appellants would not be granted because the injunction sought was the same relief which would be claimed from the panel and the arbitrators and therefore if the court were to grant the injunction it would largely pre-empt the decision of the panel and arbitrators. The appeal would therefore be dismissed and the appellants' action stayed (see p 667 h j, p 668 b, p 669 d to j, p 670 h, p 687 c d, p 689 f and p 690 e g to p 691 a g, post); Siskina (cargo owners) Vs. Distos Cia Naviera SA, The Siskina [1997] 3 All ER 803 distinguished; Bremer Vulkan Schiffbau Und Maschinenfabrik Vs. South Indian Shipping Corp Ltd. [1981] 1 All ER 289 considered.

27. In Channel Tunnel case, the Court observed that the Court had power to grant an interlocutory injunction under Section 37 of the Supreme Court Act, 1981 notwithstanding that the proceedings in it have been stayed under Section 1 of 1975 Act so that the agreed method of adjudication should take place, however, as a matter of discretion, the Court still refused to grant injunction because the injunction sought was the same which could be claimed from the panel and the arbitrators and if the Court was to grant injunction it would have largely preempted the decision of the panel and the arbitrators. The Court, therefore, refused to exercise

discretion even under Section 37 of the Supreme Court Act to grant interim relief.

28. Under Section 12(6)(h) of the English Act, the High Court had the powers to make orders in respect of interim injunctions or the appointment of a receiver as it has for the purpose of and in relation to the matter in High Court. Section 12(6)(h) of the Act reads as under:-

"The High Court shall have, for the purpose of and in relation to a reference, the same power of making orders in respect of ...(h) interim injunctions or the appointment of a receiver; as it has for the purpose of and in relation to an action or matter in the High Court...".

29. The Court, therefore, was concerned whether the provisions of Section 12(6)(h) of the 1950 Act did have any application to an arbitration agreement of the type contained in Clause 67 of the contract between the parties. The contention of the respondent was that this clause had no applicability to a foreign arbitration as the same was outside the scope of the 1950 Act. The Court of Appeal accepted that contention. The House of Lords while dealing with the appeal, therefore, observed that if the respondents were going on that point, it would be necessary to consider whether the discretion created by Section 12(6)(h) should be exercised in a special way in relation to arbitrations conducted abroad. The Court while deciding this point held as under:-

"It is by now firmly established that more than one national system of law may bear upon an international arbitration. Thus, there is the proper law which regulates the substantive rights and duties of the parties to the contract from which the dispute has arisen. Exceptionally, this may differ from the national law governing the interpretation of the agreement to submit the dispute to arbitration. Less exceptionally it may also differ from the national law which the parties have expressly or by implication selected to govern the relationship between themselves and the arbitrator in the conduct of the arbitration: the curial law' of the arbitration, as it is often called. The construction contract provides an example. The proper substantive law of this contract is the law, if such it can be called, chosen in cl 68. But the curial law must I believe be the law of Belgium. Certainly there may sometimes be an express choice of a curial law which is not the law of the place where the arbitration is to be held: but in absence of an explicit choice of this kind, or at lease some very strong pointer in the agreement to show that such a choice was intended, the inference that the parties when contracting to arbitrate in a particular place consented to having the arbitral process governed by the law of that place is irresistible.

In all these instances one or more national laws may be relevant because they are expressly or impliedly chosen by the parties to govern the various aspects of their relationships. As such, they govern the arbitral process from within. But national laws may also apply ab extra, when the jurisdiction of the national court is invoked independently of any prior consent by the parties. An obvious case exists where the claimant, in face of an arbitration agreement, brings an action before a national court which must apply its own local law to decide whether the action should be stayed, or otherwise interfered with. Equally obvious is the case of the national court which becomes involved when the successful party applies to it for enforcement of the arbitrator's award. But a national court may also be invited, as in the present case, to play a secondary role, not in the direct enforcement of the contract to arbitrate, but in the taking of measures to make the work of the chosen tribunal more effective. Here, the matter is before the court solely because the court happens to have under its own procedural rules the power to assert a personal jurisdiction over the parties, and to enforce protective measures against them. Any court satisfying this requirement will serve the purpose, whether or not it has any prior connection with the arbitral agreement or the arbitration process. In the present case, the English court has been drawn into this dispute only because it happens to have territorial jurisdiction over the respondents, and the means to enforce its order against them. The French court would have served just as well, and if the present application had been made in Paris we should have found the French Court considering the same questions as have been canvassed on this appeal, but from a different perspective.

The distinction between the internal and external application of national arbitration laws is important. In my opinion, when deciding whether a statutory or other power is capable of being exercised by the English court

in relation to cl 67, and if it is so capable whether it should in fact be exercised, the court should bear constantly in mind that English law, like French law, is a stranger to this Relgion arbitration, and that the respondents are not before the English court by choice. In such a situation the court should be very cautious in its approach both to the existence and to the exercise of supervisory and supportive measures, lest it cut across the grain of the chosen curial law.

It seems to me absolutely plain for two reasons that Parliament cannot have intended these provisions to apply to a foreign arbitration. The first reason is that the chosen mechanism was to make these provisions into implied terms of the arbitration agreement, and such terms could not sensibly be incorporated into an agreement governed by a foreign domestic arbitration law to whose provisions they might well be antithetical: see, for example, the provisions concerning the administration of oaths, discovery and orders for costs.

Secondly, S 2 of the 1889 Act, unlike S 12 of the 1950 Act, was concerned exclusively with the internal conduct of the arbitration, and not at all with any external powers of the Court. I can see no reason why Parliament should have had the least concern to regulate the conduct of an arbitration carried on abroad pursuant to a foreign arbitral law. Furthermore, it was expressly stipulated in S 28 that the 1889 Act should not extend to Scotland or Ireland. It is absurd to suppose that Parliament should have intended that the same French arbitration should at the same time be subject to implied terms under English law but not under the law of Scotland. I do not believe that in such a situation either law was intended to apply.

30. The Court, therefore, held that in those circumstances none of the terms of the 1950 Act apply to foreign arbitrations and that since those include Section 12(6), the power conferred by Section 12(6)(h) to grant an interim injunction was not available to the Court in respect of foreign arbitrations, such as the present. It is, therefore, clear that even the House of Lords in Channel Tunnel's case have clearly held that in relation to a foreign arbitrations, the provisions of the Act would not apply and no interim directions can be given under the Act in relation to such an arbitration.

31. We are not impressed with the arguments of Mr. Desai that in case the provisions of the Act did not apply, the Court has inherent powers under Section 151 of the Code of Civil Procedure to pass an interim order so as to advance the cause of justice. In case this Court, in view of Section arb 2(2) of the Act, does not have jurisdiction to pass an interim order contemplated by Section 9 of the Act, in our view, the Court cannot exercise inherent powers and thereby confer upon itself a jurisdiction not conferred by law. To exercise any inherent power, the Court must have jurisdiction over the proceedings before it. Power under Section 151 of the Code can be exercised only when the matter is properly before the Court. In case, there is inherent lack of jurisdiction in the Court, the Court cannot exercise inherent powers so as to confer jurisdiction upon itself.

32. It is not denied that parties had agreed to have their disputes referred to the arbitration of the Kuala Lumpur Regional Centre for Arbitration (KRCA) in accordance with the rules of the said Centre. Under Rule 1 of the KRCA rules the disputes shall be settled in accordance with the UNCITRAL Arbitration Rules subject to modification set forth in KRCA Rules. The UNCITRAL Arbitration Rules have, therefore, been made a part of the KRCA Rules. Article 26 of the UNCITRAL Arbitration Rules read as under:-

"(1) At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.

(2) Such interim measures may be established in the form of an interim award. The arbitral tribunal shall be entitled to require security for the costs of such measures.

(3) A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement."

33. It is, therefore, clear that even though a party may not be able to move the Indian Court for interim measures, it is not left remedy less in as much as it can approach the arbitral tribunal for passing appropriate orders to take interim measure as it may deem necessary in respect of the subject matter of the dispute. The tribunal may pass such interim measure in the form of an interim award. This interim award, in our view, can be enforced as an arbitral award. Though we can not go into the question as to why the legislature has made a departure from the UNCITRAL Model Laws by not incorporating a provision like Article 9 in Part-II of the Act but we feel the reason for departure may be that the party in such a case could approach the arbitral tribunal for passing appropriate orders to take interim measures as it may deem necessary in the facts and circumstances of each case.

34. Even assuming for the sake of argument that the party is left remedy less and it cannot approach the Court for taking interim measures, in our view that cannot be a ground to make Section 9 applicable to arbitrations taking place outside India. We may agree with the learned counsel for the appellant that it may, in some cases, lead to hardship to a party, however, when the language of the statute is plain and unambiguous and admits of only one meaning, no question of construction of statute arises, for the Act speaks for itself even if the result is strange or surprising, unreasonable or unjust or oppressive as it is not for the Courts to extend the scope of the Statute beyond the contemplation of the legislature. It is entirely for the legislature to look into this question.

For the aforesaid reasons, we are of the opinion that the petition under Section 9 of the Act was not maintainable and the Court has no jurisdiction to entertain such a petition for grant of interim measures in relation to an arbitration being held outside India. We, therefore, see no merits in this appeal and the same is, accordingly, dismissed leaving the parties to bear their own costs.