FA-310-2015

(SASAN POWER LIMITED Vs ***NORTH AMERICAN COAL CORPORATION INDIA PRIVATE LIMITED)***

11-09-2015

HIGH COURT OF MADHYA PRADESH : AT JABALPUR

First Appeal No : 310 of 2015

Sasan Power Limited

- V/s -

North American Coal Corporation India Pvt. Ltd.

Present : **Honâ□□ble Shri Justice Rajendra Menon.**
Honâ□□ble Shri Justice Sushil Kumar Gupta.

Shri V.K. Tankha, Senior Advocate, with Shri Varun K. Chopra, Shri Paras Anand, Shri R. Gupta
and Shri Alok Hoonka, counsel for the appellant.

Shri Anirudh Krishnan and Shri Ankit Agrawal, Counsel for the respondents.

Whether approved for reporting: **Yes / No**.

JUDGMENT

11 /09/2015

Per: Shri Rajendra Menon, J.

In this appeal under Section 96 of the Code of Civil Procedure, challenge is made to a judgment and decree dated 19.3.2015 passed by the learned District Judge, Singrauli, in Regular Civil Suit No.4-A/2014, whereby a Suit filed by the appellant has been dismissed, upholding an objection raised by the respondents under Section 45 of the Arbitration and Conciliation Act, 1996 vide I.A. No.5/2015, said to have been filed under Order VII Rule 11 CPC.

2- It has been held by the learned Court below that parties have entered into an arbitration agreement and as the dispute is covered under Part II of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as â□□the Act of 1996â□□), the bar under Section 45 is attracted and therefore, the suit is not maintainable. However, it is the case of the appellants that the arbitration agreement in question is null, void and inoperative as contemplated under Section 45, of the Act of 1996 and therefore, the suit was maintainable. It was said that two Indian Companies cannot agree for arbitration in a foreign country, according to law of that country. This according to the appellant is violative of Section 23 of the Indian Contract Act and the law laid down by the Supreme Court in the case of **TDM**

Infrastructure (P) Ltd. Vs. UE Development India (P) Limited, (2008)14 SCC 271. Whereas, it is a case of the respondents that as the order passed was under Section 45 of the Act of 1996 and against such an order as no appeal is provided under Section 50, this appeal is not maintainable. It is also submitted that by allowing the objection, learned Court below has only held that the suit in question is barred by law in view of the provisions of Section 45 of the Act of 1996, the agreement in question is not hit by Section 23 of the Contract Act, the law laid down in the case of **TDM Infrastructure** (supra) is not applicable, as a Division Bench of the Supreme Court in the case of **Atlas Exports Industries Vs. Kotak & Company â (1999)7 SCC 61** has laid down the principle to the effect that two Indian companies can enter into an agreement by having the seat of arbitration in a foreign country and in view of the above, the arbitration clause in question is neither null, void and inoperative.

3. Before adverting to consider the rival contentions in support of the aforesaid preposition put forth by learned counsel for the parties, it may be appropriate to take note of certain facts which are relevant for deciding this appeal.

4. The appellant is a Company incorporated and registered under the Indian Companies Act with its registered office at Navi Mumbai, Maharashtra,

India, engaged in the business of developing, financing, designing, constructing, operating, maintaining and owns six independent power generation units i.eâ¦ Ultra Mega Project of a total capacity of 3960 Mega Watt. The dispute in question pertains to Sasan Ultra Mega Power Project located near village Sasan, District Singrauli, Madhya Pradesh. The appellant further claims to be a fully owned subsidiary of Reliance Power Ltd. Respondent is a Company incorporated in India, under the Companies Act of 1956 with registered office in Pune, India, engaged in the business of providing technical consultancy relating to coal mining and related activities and is a subsidiary of North America Coal Corporation (hereinafter referred to as â□□NACC-USâ□□, a Delaware Corporation, carrying on various business activities including mining and marketing of Lignite, bituminous and metallurgical coal as fuel and consultancy service. Its Head Quarter is situated in USA.

5. The Government of India launched an initiative for development of Mega Power Projects for easing the power deficit in the country. This initiative was launched in the year 2005-2006 and accordingly in August 2007, Reliance Power Ltd. was awarded the first Ultra Mega Power Project which is located in village Sasan, District Singrauli, in the State of M.P. and for the purpose of

execution of this project, three captive coal blocks were also allotted to M/s Reliance Power Project. On 20th September 2007, Reliance Power Project executed a Memorandum of understanding with North America Coal Corporation (NACC-US) and based on the aforesaid understanding on 1.1.2009, Sasan Power Ltd., the appellant's Company entered into an association agreement for mine development and operation with NACC-US. On 1.4.2011, NACC-US vide an assignment agreement assigned all its rights, liabilities and obligations under the association agreement of 1.1.2009 to the respondent Company namely, North America Coal Corporation, India (hereinafter referred to as â□□NACC-Indiaâ□□). By this assignment agreement all the rights and obligations under the original Association Agreement dated 1.1.2009 with respect to NACC-US was transferred to NACC-India. In the course of carrying out various activities and work in pursuance to the agreement, disputes started arising between the parties and on 23.7.2014, the respondent Indian Company issued a letter of termination in respect of the associate agreement on 8.8.2014 and also filed a request for arbitration with the International Council for Arbitration (ICC) being Arbitration No.20432/TO and claimed a compensation to the tune of 18,259,301=16 US Dollars along with compound interest. The documents evidencing the association agreement dated 1.1.2009, the assignment agreement dated 1.4.2011, the

termination of association agreement dated 23.7.2014 and the request for arbitration are filed as Annexure A/2, A/3, A/4, A/5 and A/6 respectively. On 20th October 2014, the appellant sent to the ICC its reply to the respondent's request for arbitration without prejudice to their legal right as may be available and on 10.11.2014 filed the suit in question in the District Court at Singrauli being Civil Suit No.4A/2014 and on 11.11.2014, ex-parte injunction was granted against the ICC for proceeding with the arbitration. In the meanwhile, on 2nd December 2014 the respondents informed all concerned that it intends to respect the terms of the ex-parte injunction granted by the Indian Court but simultaneously NACC-US on 12.12.2014 wrote to the ICC intimating that the appellant's letter dated 20th November, 2014, placing on record its objection should be treated as an answer to the request for arbitration and consequentially a second request for arbitration was filed by NACC-US vide its communication dated 12.12.2014. On 22.12.2014 appellant sent their response to this and on 6.1.2015 appellant received a letter from ICC with regard to the second request for arbitration and were granted 30 days period to give their response. It is said that the appellant without prejudice to their rights raised and submitted their objection. On 7.1.2015 in the Civil Suit in question, the injunction was extended by the learned District Judge and in the meanwhile, respondent filed two applications

being I.A.No.5/2015 under Order VII Rule 11 CPC read with Section 45 of the Act of 1996 and I.A.No.4/2015, an application under Order 39 Rule 4 CPC seeking vacation of the ad interim injunction granted. In between the matter came to this Court in a Miscellaneous Appeal at the instance of the respondent challenging the injunction granted and this Court passed an order on 14.1.2015 directing the District Judge to decide the applications filed by the respondent i.e. I.A. No.4/2015 and I.A. No.5/2015 within a period of one month. The proceedings were held and by the impugned order passed on 19.3.2015 as the objection of the respondent has been upheld, this appeal has been filed. In the meanwhile, appellant filed a second suit challenging the action of the NACC-US in requesting for arbitration and simultaneously without prejudice to their right, nominated their arbitrator in the arbitration proceedings pending with ICC.

6. Shri V.K. Tankha, learned Senior Counsel for the appellant, referred to the governing law clauses as appearing in the Association Agreement dated 1.1.2009; the dispute resolution mechanism through Arbitration as provided under Section 12.2; the Terms and Conditions of the Assignment Agreement dated 1.4.2011; and, tried to indicate that once the respondent/Company stepped into the shoes of the US Company, after it had transferred all its rights and obligations under the Association Agreement to the Indian Company, the

Contract in question becomes one between two Indian Companies and in the light of the law laid down in the case of **TDM Infrastructure Private Limited** (supra), the Arbitration through the ICC in United Kingdom, London, that also in accordance to the laws applicable in United Kingdom is not permissible. Learned Senior Counsel placed much emphasis on the ground that two Indian Companies cannot agree to have their dispute resolved outside India in the manner done and, therefore, the arbitration agreement is null, void and inoperative.

7. Learned Senior Counsel further submitted that the application under Order VII Rule 11(d) of the Code of Civil Procedure, was not maintainable, since the provisions of Section 45 of the Act of 1996 was not a bar with regard to maintainability of the suit. It was said that as the relief claimed for by the respondent in I.A. No.5/2015 was to declare the suit filed by them as barred by law, as contemplated under Order VII Rule 11(d) CPC, the learned District Court committed an error in holding that the bar created under section 45 is attracted. Learned Counsel took us through the provisions of Section 45 of the Act of 1996 and argued that the said provision does not operate as a bar to institution of the suit, in a Court which otherwise has jurisdiction over the matter. On the contrary section 45 only contemplates that the Court has power to refer the matter for arbitration in the event conditions stipulated in Section

45 are attracted, he submits that there is no prohibition in filing of a civil suit, merely because there is an arbitration clause and places reliance on a judgment of the Madras High Court in the case of **J. Mary Helan Vs. Lissy Biju, 2012 (4) LW 475 [SCC Online Madras]**, in support of the said contention. Thereafter, it was submitted that section 45 of the Act of 1996 only applies to International Commercial Arbitration Agreement, section 45 as contained in Part II of the Act of 1996, is applicable only where a judicial authority is seized of an action in respect of matter pertaining to a Foreign Award/Agreement under section 44. It is argued that the provisions of Section 44 and 45 are not attracted in the present case, once the US Company assigns all its rights and liabilities to the Indian Company by the Assignment Agreement.

8- It is said that the Assignment Agreement was signed in India between two Indians and NACC US Company, by the said Agreement relinquished all its rights and obligations in favour of the respondent Indian Company; accordingly, the Agreement in question becomes an agreement between two Indian Companies and, therefore, the provisions of Section 45 were not attracted. Learned Senior Counsel further invited our attention to the judgments of the Supreme Court in the case of **Union of India Vs. Kishori Lal Gupta and Brothers, AIR 1959 SC 1362; Young Achievers Vs.**

IMS Learning Resources Private Limited, (2013) 10 SCC 535, to say that an arbitration clause in an Agreement cannot survive if the agreement containing the arbitration clause has been superceded or novated by a later agreement. It was submitted that the arbitration agreement originally contained in section 12 of the Association Agreement stands assigned in favour of the respondent after execution of the Assignment Agreement; accordingly, post assignment, the Arbitration Agreement does not fall in the category of an International Commercial Arbitration as defined under section 2(1)(f) of the Act of 1996 and, therefore, Part II of the Arbitration Act in its entirety and section 45 in particular will not apply in the matter of arbitration between two Indian companies.

9- It was stated that the learned District Judge misconstrued the entire Assignment Agreement and held it to be tri-partite agreement between NACC US; NACC India and the appellant Company, this is unsustainable under law. It is stated that signature of NACC US in the Assignment Agreement was not as a party to the Agreement, but it was only to the effect of excluding or relinquishing its rights and obligations as contained in the Associate Agreement and also for assigning the same to the Indian Company. It was stated that the learned District Judge by holding that the assignment agreement is a tri-partite agreement between two Indian Companies, a US Company and consequently holding

that in view of this, it is an International Commercial Arbitration and section 45 is applicable, has misconstrued itself and has recorded a perverse finding contrary to law. Learned Senior Counsel further argued that section 12 of the Association Agreement is null, void and inoperative as contemplated under section 45 of the Act of 1996, because two Indian Companies cannot arbitrate in a foreign country and cannot subject their contract to be under a Foreign Law. Detailed submissions were made in this regard as asserted from paragraph 46 onwards, in the written arguments, submitted by Shri Vivek Tankha, placing reliance on the case of **TDM Infrastructure Private Limited** (supra) it is said that the two Indian Companies/nationals cannot be permitted and should not be permitted to derogate from Indian Law.

10- In support thereof, learned Senior Counsel also placed reliance on the judgments of the Supreme Court in the case of **Bhatia International Vs. Bulk Trading SA and Another, (2002) 4 SCC 105**; and, **Bharat Aluminium Company Vs. Kaiser Aluminium Technical Services Incorporate, (2012) 9 SCC 552**, to say that two Indian Companies cannot enter into such an agreement. Reliance was also placed on a judgment of the Delhi High Court in the case of **Vikram Bakshi and Another Vs. Mc Donalds India Private Limited and others, 2014 SCC Online Del 7249**; and, the Bombay High Court in the case of **Seven Islands Shipping**

Limited Vs. Sah Petroleums Limited, 2012 (5) MhLJ 822. It was argued that the learned District Judge rejected the contentions in this regard submitted by the appellant, by holding that the judgment rendered in the case of **TDM Infrastructure Private Limited** (supra) by the Supreme Court is by a Single Bench, it is not a binding precedent and placed reliance on the judgment relied upon by the respondents in the case of **Atlas Export Industry** (supra) by saying that it is a judgment by a Division Bench, this approach of the learned Court below is said to be erroneous and unsustainable.

11- Learned Senior Advocate tried to argue that **Atlas Export Industry** (supra) case was decided under the old Act i.eâ¦. the Arbitration Act of 1940, where the principles of law were entirely different and, therefore, by relying upon the case of **Atlas Export Industry** (supra), for rejecting the law laid down and canvassed by the appellant in the case of **TDM Infrastructure Private Limited** (supra) an error apparent on the face of the record and an illegality has been committed by the learned District Judge.

12- By referring to paragraph 63 of the written submissions, learned Senior Counsel tried to indicate as to how the judgment in the case of **Atlas Export Industry** (supra) will not apply. It was tried to be submitted that in the case of **Atlas Export Industry** (supra), the agreement was between two Indian nationals and a foreign company based in Hong Kong and it was

decided on the basis of the principle underlying the Arbitration Act, 1940, which is entirely different from the Act of 1996 and, therefore, the judgment in the case of **Atlas Export Industry** (supra) was not applicable.

13- It was argued by Shri Vivek Tankha, learned Senior Advocate, that the entire dispute resolution clause contained in Section 12 of the Association Agreement should be declared as void, null and inoperative as it cannot be severed from the other parts of the Agreement. It was emphasized that reliance placed by the learned District Judge on the judgments of the Supreme Court in the case of **Enercon (India) Private Limited and others Vs. Enercon GMBH and Another, 2014 (5) SCC 1**; and, **Chloro Control India Private Limited Vs. Severn Trent Water Purification Inc and others, (2013) 1 SCC 641**, to hold that section 45 is applicable is an incorrect and illegal finding and by pointing out how the judgments rendered in the cases of **Enercon (India) Private Limited** (supra) and **Chloro Control India Private Limited** (supra) will not apply in the facts and circumstances of the present case. Detailed submissions were made by referring to the written arguments from paragraph 65 onwards.

14- Finally, it was argued by learned Senior Advocate that the learned Court below found that the appellant by participating in the arbitration proceedings has submitted to the jurisdiction of the arbitral tribunal and by malafidely withholding certain facts about their

participation in the arbitration proceedings and appointment of its arbitrator, has tried to mislead the Court.

15- Learned Counsel took us through various documents and material available on record to say that this finding of suppression of fact or malafide against the appellant are baseless, learned counsel tried to show as to how this finding is unsustainable, is a perverse finding and referred to various facts as pleaded and available on record. It was said that by ignoring these facts, learned District Judge held that the petitioner has not placed correct facts on record.

16- It was argued that the finding recorded by the learned District Judge is wholly perverse, unsustainable and cannot be upheld. Emphasizing that two Indian companies cannot be permitted to have a seat of arbitration outside India and subject themselves to be bound by law of a Foreign Country, in violation to the requirement of section 23 of the Indian Contract Act, and as this is not permissible, the entire order passed by the learned court below is liable to be quashed.

17- Refuting the aforesaid contentions, Shri Anirudh Krishnan, learned counsel appearing for the respondent raised a preliminary objection at the very outset to say that as the suit filed by the appellant has been dismissed in view of the legal bar created by Section 45 of the Act of 1996, the appellant cannot file this appeal as an order passed allowing an objection under Section 45 is not

appealable under Section 50 of the Act of 1996. He argued that even though the application was purported to be filed by the respondent under Order VII Rule 11 CPC but the main relief claimed by them was to dismiss the suit in view of the bar created under Section 45 and the relief under Order VII Rule 11 was only consequential to the main relief claimed under Section 45. He further argued that even if it is assumed that the suit is dismissed under Order VII Rule 11 CPC and the same is appealable before this Court, the only issue involved in this appeal is as to whether referral of the matter under Section 45 amounts to the bar under law for the purpose of invoking the provisions of Order VII Rule 11 CPC. He submitted and emphasized that the main issue before this Court is as to whether or not the order passed under Section 45 is proper, in accordance with law.

18- He took us through the scheme of the Act of 1996 and emphasized that classification of arbitration under the said Act having an element of international arbitration are based on two factors, **one** is the nationality of the parties; and, **second** is the seat of arbitration. If an arbitration, international in nature is based on nationality of the parties, then it falls under the provisions of Section 2(1)(F) of the Act of 1996. There again the arbitration i.e. international commercial arbitration can be classified into two distinct categories : one where one of the parties atleast is a foreign party

and second where all the parties are Indian but still based on certain factors like seat of arbitration, the arbitration may fall in the category of an international commercial arbitration. He has produced a detailed chart before us in support of his contention.

19- He argued that when a dispute falls within the category of part II of the Act, of 1996 the scheme of the Act contemplates minimal interference by the Court and as the requirement of law contemplated under Section 45 for reference of the matter for arbitration in accordance to the arbitration clause is made out in this case, the learned court below has not committed any error in dismissing the suit. He submitted that in the present case as agreed to between the parties, the seat of arbitration is in a foreign country and therefore, the provisions of part-II will apply and if the learned District Judge exercised his jurisdiction under such circumstances, by invoking the bar created under Section 45, no error has been committed and when the matter is referred to the arbitration, the question of procedure to be followed and various other objections raised can always be dealt with by Arbitral Tribunal itself and in support of his contention, he invited our attention to various judgments which we will refer to at a later stage. He emphasized that the appellant is relying mainly on the judgment rendered by the Supreme Court in the case of **TDM Infrastructure** (supra) in support of their contentions. He took us through the provisions of Act of

1996, the Act of 1940, compared both and indicated that infact, there is no difference between the enactments. He argued that the provisions of both the Acts i.eâ¦. Act of 1996 and 1940, are infact similar in nature, there is no difference in the substance of both the Acts. The judgment relied upon by him in support of the aforesaid contention was a judgment of the Supreme Court in the case of **Fuerst Day Lawson Ltd. v. Jindal Exports Ltd., (2011) 8 SCC 333**, he took us through the provisions of Section 2(1)(f) of the Act and various other provisions and tried to indicate that there is not much of a difference between both the Acts and therefore, the judgment rendered in the case of **Atlas Export Industries** (supra) will apply. He emphasized that in the case of **TDM Infrastructure** (supra), the Court was dealing with the question of appointing an Arbitrator in a proceeding under Section 11(6) of the Act of 1996 and while doing so, in view of the specific provisions of Section 28(1) had decided the matter by relying on the provisions of Section 28 which applies when the seat of arbitration is India. Learned Counsel argued that in the present case provisions of Section 28(1) are not applicable, as agreed to between the parties the seat of arbitration is not India. It is said that in the case of **TDM Infrastructure** (supra) itself, Hon'ble Supreme Court has added a note of caution by saying that *finding/ observations made therein were only for the purpose of determining the jurisdiction of the Supreme Court in a*

proceeding under Section 11 and not for any other purpose. Shri Anirudh Krishnan further argued that in the case of **TDM Infrastructure** (supra), the matter was decided by a learned Single Bench of the Supreme Court whereas, the case of **Atlas Export Industries** (supra) was decided by a Division Bench and therefore, as per the law of precedent, the judgment of the Larger Bench will prevail over a judgment of a Smaller Bench, by referring to a judgment of Supreme Court in the case of **R. Antulay Vs. R.S. Nayak â□□ (1988)2 SCC 602**, it was emphasized that the judgment in the case of **Atlas Export Industries** (supra) will apply and in applying the same for rejecting the contentions of the appellant, the learned District Judge has not committed any error. He further argued that when the proceedings are held before the Chief Justice or his designate, while deciding an application under Section 11 of the Act of 1996, the order passed in such a proceeding and the proceeding in such cases are not held before a 'Court'. Even though the order passed in such a case is subject to judicial review under Article 226 and 227 of the Constitution but the proceedings are not before a Court and once the order passed in a proceeding under Section 11 is not by a Court, it will not have the effect of law, laid down by the Supreme Court as envisaged under Article 141 of the Constitution. To say that an order passed by a authority exercising jurisdiction under Section 11 is not by a Court, Shri Anirudh Krishnan places reliance on a

judgment of the Supreme Court in the case of **State of West Bengal & Ors. Vs. Associated Contractors Civil Appeal No.6691/2005** decided on 10.9.2014 and para 16 thereof. Accordingly, the main contentions advanced by Shri Anirudh Krishnan was that in the light of law laid down in the case of **Atlas Export Industries** (supra) and by applying the principles laid down in the aforesaid case read along with the provisions of Section 28 of the Contract Act, there is no bar in the matter of two Indian Companies entering into a contract whereby they agree for having the seat of arbitration in a foreign country. He thereafter took us through the provisions of Order VII Rule 11 and various other judgments with regard to the principles for rejecting a plaint in exercise of powers under Order VII Rule 11 and argued that even on the admitted facts of this case, the learned Court below has correctly exercised its jurisdiction under Order VII Rule 11 CPC. He referred to various paragraphs of the plaint and tried to demonstrate before us that on these admitted facts itself, the suit could be dismissed by invoking the powers under Order VII Rule 11 CPC. He also referred to the principles of severability of an agreement, refers to various judgments on the said question and emphasized that the so called offending parts of the arbitration agreement i.e. with regard to applicability of the laws of United Kingdom or Seat of Arbitration can be severed and when once the parties have agreed to have their dispute resolved by

arbitration, the intentions of the parties to resolve their dispute through arbitration is established, the offending clause could be severed, the matter can be take up in arbitration with regard to applicability of procedural law and other objectionable clause and the same can be decided by the arbitrator. He argued that there is no prohibition in law in view of law laid down in the case of **Atlas Export Industries** (supra) which prevents two Indian Companies agreeing to have the seat of arbitration in a foreign country. He argued that there is no conflict between the judgment in the case of **Atlas Export Industries** (supra) and **TDM Infrastructure** (supra), the legal principles in the case of **TDM Infrastructure** (supra) is based on reading of Section 28(1) and Section 11 whereas, **Atlas Export Industries** (supra) is based on the principles under-laying the contract law applicable in India. He also referred to a judgment in the case of **Bharat Aluminum Company Vs. Kaiser Aluminum Technical Services - (2012)9 SCC 552 [BALCO]** relied upon by Shri Vivek Tankha, learned Senior Counsel, para 118 and 123 of the aforesaid judgment and emphasized that the entire para of the said judgment i.e. para 118 should be read in its totality. He referred to the observations appearing in the last portion of para 118 with reference to Section 28 to canvass his contention.

20- That apart, Shri A. Krishnan, learned counsel for the respondent, at the very outset had admitted that the

findings recorded by the learned District Judge to say that the Assignment Agreement is a tri-partite agreement is not correct and the objection in this regard raised by Shri V.K. Tankha, learned Senior Advocate, may be accepted, he agrees that the same is a Bi parte agreement.

21- Learned counsel contends that the Assignment Agreement is not a tri-partite agreement, but it is an agreement between two Indian Companies, who have accepted the original arbitration clause as contained in Section 12.1 of the Association Agreement dated 1.1.2009, accordingly the entire arbitration clause as contained in the Association Agreement becomes a Arbitration Agreement now between two Indian Companies and that being so, learned counsel argues that it is a bi-party agreement between two Indian Companies agreeing to resolve all their disputes though arbitration as contemplated under section 12.1 of the said Agreement with the seat of the Arbitration in London.

22- That being so, learned counsel submits that the contention of Shri V.K. Tankha, learned Senior Advocate, that the agreement is not a tri-partite agreement even if accepted, will not make any consequential difference on the final outcome with regard to the finding recorded by the learned District Judge pertaining to the bar created under section 45, of the Act.

23- Accordingly, it is submitted by Shri Krishnan that

even if the Assignment Agreement is construed to be a bi-party agreement, it is an agreement between two Indian Companies, agreeing to have their seat of arbitration in a Foreign Country and as this is permissible in law, there is no reason for interference into the matter.

24- Referring to a judgment of the Supreme Court in the case of **Chatterjee Petroleum Company & Others Vs. Haldia Petro Chemicals Ltd. & Ors. - 2013 ARBLR 456 (SC)**, it is argued that once the parties have agreed for arbitration and when the arbitration Act has been enacted for the purpose of amicable resolution of a dispute through arbitration, the Court should give effect to the arbitration agreement and the adversarial system of litigation should not be resorted to. Learned counsel argued that the Court must adopt a pro arbitration attitude and ensure that the arbitration is proceeded with, without any delay. Referring to the scope of interference in a proceeding under section 45 and the principle laid down in **Chloro Control India Private Limited** (supra), learned counsel for the respondent argued that in a proceeding under section 45, the Court must only decide the validity of the arbitration clause and based on the intention to arbitrate, if any, expressed by the parties, effect should be given to the arbitration agreement. It is only when the arbitration clause becomes unworkable that permission to prosecute the matter by the common law procedure should be resorted

to. By emphasizing that if severability of an arbitration clause is possible then the offending part of the arbitration clause may be severed. The question of dispute and interpretation process should be left to the arbitrator. In support of the aforesaid contention, learned counsel placed reliance on a judgment of the Supreme Court in the case of **Shin Satellite Public Company Limited Vs. Jain Studios Limited, (2006) 2 SCC 628**. It was argued that intention of the parties when is for resorting to the remedy of arbitration, arbitration should be resorted to and all other issues can be determined and decided by the arbitral tribunal.

25- Learned counsel for the respondent referred to the procedure for arbitration contemplated under the ICC Rules, filed at page 498 â Part II, of the Paper Book and indicated that in the statutory procedure prescribed therein, specific procedures are laid down for resolution of such a dispute by the arbitrators itself. Referring to a Handbook of ICC Arbitration and the provisions of Article 18.1 thereof, learned counsel emphasized that this Clause contemplates that if the parties have not agreed for a place of arbitration, the Tribunal can take a decision in the matter. Learned counsel also referred to certain judgments of the Foreign Courts laying down the aforesaid principle and the powers of the Arbitrator to say that all questions with regard to jurisdiction of the arbitrator, the dispute with regard to place of arbitration can be settled by the arbitrators themselves and they

have the jurisdiction to do so.

26- The judgment relied upon are **Star Shipping Vs. China Foreign Trade Corporation, LLR 1993 Vol 4, 445**; a decision of the US District Court, New York, in the case of **National Network of Accountants Investment Advisors, Inc and another Vs. James R. Gray** â order filed at page 513 of the Paper Book â Part I, and emphasized that once the arbitrators are conferred with the power to decide the dispute pertaining to the seat of arbitration and the procedure to be followed at this stage, it is not necessary for this Court to go into such a question.

27- Finally, learned counsel for the respondent submitted that in the admitted facts and circumstances of this case, it was not necessary to frame separate issues and put the parties to trial by recording of evidence and inquiry, as on the basis of the admitted position itself the Court can exercise its discretion and decide the question of maintainability even under Order VII Rule 11 and in support of the aforesaid contention learned counsel placed reliance on various judgments to say that the appeal be dismissed.

28- In support of their rival contentions various judgments were relied upon by the parties. The cases relied upon on behalf of the appellant are:-

1. **Union of India Vs. Kishori Lal Gupta** (supra).
2. **Young Achievers Vs. IMS Learning Resources Private Limited** (supra) â to say that once an

agreement is superceded or novated, the arbitration clause cannot survive.

3. **TDM Infrastructure** (supra); **Bhatia International** (supra); **Bharat Aluminium Company** (supra) to say that two Indian Companies cannot enter into an agreement for settlement of their dispute in a foreign country as per the law of that country. This is hit by public policy.
4. The judgment of the Delhi High Court in the case of **Vikram Bakshi and another** (supra).
5. **Seven Islands Shipping Limited** (supra), wherein the judgment of the Supreme Court in the case of TDM Infrastructure was followed.
6. Judgment of the Supreme Court in the case of **Kunhayammed and others Vs. State of Kerala and another, (2000) 6 SCC 359**, to say that a judgment rendered even by a Single Bench of the Supreme Court is binding under Article 141 of the Constitution.
7. **Waverly Jute Mills Company Limited and another Vs. Raymon and Company (India) Private Limited, AIR 1963 SC 90**, to say that mere participation or appearance of the party in an arbitration cannot cure the defects in the jurisdiction. For the same proposition to say that acquiesce does not confer jurisdiction. **UP Rajkiya Nirman Nigam Vs. Indore Private Limited and others, 1996 (2) SCC 667**, so also judgments of

the Bombay High Court in the case of **Hotel Corporation Vs. Motwani (P) Ltd.**, 1999 (1) Maharashtra Law Journal 88; **Atul R. Shah Vs. V. Vrijlal Lalloobhai And Co. - 1999 (1) Maharastra Law Journal 629**; and,

8. finally a judgment of the Madras High Court in the case of **J. Mary Helan** (supra) in support of his contention that merely because the objection is raised under section 45, the provision of Order VII Rule 11 CPC are not attracted.

29- Similarly, on behalf of the respondents, the following judgments were relied upon :-

1. **Fuerst Day Lawson Limited Vs. Jindal Exports Limited**, (2011) 8 SCC 33, to state that the appeal was not maintainable.
2. **Enercon** (supra) and **Shin Satellite** (supra) in support of the contention relating to intention to arbitration/severability.
3. Foreign Judgments in the cases of - **Star Shipping** (supra) and **National Network of Accountants Inv Advisors** (supra), in support of his contention relating to jurisdiction of the Arbitral Tribunal to decide all objections.
4. **Atlas Export Industries** (supra), **TDM Infrastructure** (supra) and **Bharat Aluminium Company** (supra) in support of his contention

whether Two Indian Companies can have seat of arbitration outside India.

5. **Chloro Controls India Private Limited** (supra) in support of his contention relating to the test under section 45.
6. **Enercon (India) Limited and others** (supra) in support of his contention relating to international arbitration.

> Learned counsel for the respondents had also relied upon certain judgments of the Supreme Court in the case of **Shree Subhlaxmi Fabrics (P) Limited Vs. Chand Mal Baradia and others, (2005) 10 SCC 704**.

30- We have heard learned counsel for the parties at length and have gone through the material available on record and the elaborate written arguments submitted by the parties.

31- Before adverting to consider the rival contentions, we may take note of the agreements entered into between the parties and various relevant provisions as contained in the Arbitration and Conciliation Act, 1996.

32- The agreements which are relevant and which require consideration are the Association Agreement dated 1.1.2009; the First Amendment to the same brought about on 30.9.2009; and, the Assignment and Assumption Agreement dated 1.4.2011. In the Association Agreement dated 1.1.2009, in detail various

aspects of the work to be performed are indicated. The said agreement consists of 15 Articles and 4 Annexures. Article 1 pertains to definition and thereafter the various Articles relate to consulting and advisory service; implementation of the services, fines, royalty payments, mode of termination of the Agreement; consequences of Force Majeure and various aspects of the matter.

33- However, Article 12 deals with the governing law and a dispute resolution mechanism. Section 12.1 and 12.2 (a), which are relevant, read as under:

> â□□**Section 12.1 - <u>Governing Law</u>**. This Agreement shall be governed by, and construed and interpreted in accordance with, the laws of the United Kingdom without regard to its conflicts of law principles.
>
> **Section 12.2 - <u>Dispute Resolution Arbitration</u>**.
>
> **(a)** Any and all claims, disputes, questions or controversies involving Reliance on the one hand and NAC on the other hand arising out of or in connection with this Agreement (collectively, â□□Disputesâ□□) which cannot be finally resolved by such parties within 60 (sixty) days of arising by amicable negotiation shall be resolved by final and binding arbitration to be administered by the International Chamber of Commerce (the

â□□ICCâ□□) in accordance with its commercial arbitration rules then in effect (the â□□Rulesâ□□). The place of arbitration shall be London, England. Each party shall appoint one (1) arbitrator and the two (2) arbitrators so appointed shall together select and appoint a third arbitrator. If either Reliance, on the one hand, or NAC, on the other hand, fail to appoint their respective arbitrator within 30 (thirty) days after receipt by respondent(s) of the demand for arbitration or if the two (2) party-appointed arbitrators are unable to appoint the chairperson of the arbitral tribunal within thirty (30) days of the appointment of the second arbitrator, then the ICC shall appoint such arbitrator or the chairperson, as the case may be, in accordance with the listing, ranking and striking provisions of the Rules. Save and except the provision under Section 9, the provisions of the Part 1 of (Indian) Arbitration and Conciliation Act, 1996, as amended (the â□□Arbitration Actâ□□) shall not apply to the arbitration. The arbitrators shall not award punitive, exemplary, multiple or consequential damages. In connection with the arbitration proceedings, the parties hereby agree to cooperate in good faith with each other and

the arbitral tribunal and to use their respective best efforts to respond promptly to any reasonable discovery demand made by such party and the arbitral tribunal.â□□

Sub-clause (d) of this Article deals with payments to be made by the parties for the purpose of Arbitration.

â□□ **(d)** Each party shall bear its own arbitration expenses, and Reliance on the one hand, and NAC, on the other hand, shall pay one-half of the ICCâ□□s and the chairpersonâ□□s fees and expenses, unless the arbitrators determine that it would be equitable if all or a portion of the prevailing partyâ□□s expenses should be borne by the other party. Unless the Award provides for non-monetary remedies, any such Award shall be made and shall be promptly payable in (i) US Dollars if payable to NAC or (ii) Rupees if paid to Reliance net of any tax or other deduction. The Award shall include interest from the date of any breach or other violation of this Agreement and the rate of interest shall be specified by the arbitral tribunal and shall be calculated from the date of any such breach or other violation to the date when the Award is paid in full.â□□

34- Section 15(2) deals with a severability clause and the same reads as under:

> â**Section 15.2 <u>Severability</u>**. If any provision of this Agreement or the application of any such provision to any Person or circumstance is held invalid, illegal or unenforceable in any respect by a Court of competent jurisdiction, the remainder of the provisions of this Agreement (or the application of such provision in other jurisdictions or to Persons or circumstances other than those to which it was held invalid, illegal or unenforceable) will in no way be affected, impaired or invalidated, and to the extent permitted by Applicable Laws, any such provision will be restricted in applicability or reformed to the minimum extent required for such to be enforceable. This provision will be interpreted and enforced to give effect to the original written intent of the parties prior to the determination of such invalidity or unenforceabilityâ

Section 15.6 contemplates a successor assignment, which reads as under:

> â**Section 15.6 <u>Successor and Assigns</u>**. <u>This Agreement may be assigned by NAC to any Affiliate of NAC; with the previous written</u>

consent of Reliance, which consent shall not be unreasonably withheld. Without the written consent of NAC, which consent shall not be unreasonably withheld, Reliance shall not assign its right under this Agreement or cause its obligations under this Agreement to be assumed by any other Person. No assignment or other transfer shall release the assignor from its obligations or liabilities hereunder. Any assignment in violation of the foregoing shall be null and void ab initio. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their successors and permitted assignsâ□□

35- Thereafter, the first amendment agreement is dated 30.9.2009 and it amends certain provisions of section 15.6, particularly with regard to the payment terms and conditions.

36- The Assignment and Assumption Agreement is dated 1.4.2011, it contemplates that the North American Coal Corporation has incorporated NAC India and desires to transfer all its rights and obligations under the Association Agreement to NAC India, which desire is accepted and thereafter the Agreement, i.eâ□¦. The Assignment and Assumption Agreement reads as under:

â□□**ASSIGNMENT AND ASSUMPTION**.

1. NAC hereby transfers and assigns all of NACâ□□s rights and obligations under the Agreement to NACC India. NAC hereby acknowledges that, as provided in Section 15.6 of the Agreement, NACâ□□s transfer and assignment of all of NACâ□□s rights and obligations under the Agreement to NACC India does not release NAC, as assignor, from its obligations or liabilities under the Agreement.
2. NACC India hereby accepts the transfer and assignment of all of NACâ□□s rights and hereby all of NACâ□□s obligations under the Agreement, and hereby agrees to perform such obligations in accordance with the terms of the Agreement.â□□

Thereafter, some amendments to the provisions of section 5.3, 5.6 pertaining to payments are incorporated in the Assumption Agreement and finally in Clause 6, it is said that except for the aforesaid amendments, the Agreement shall remain in effect as written â□□ namely the original Association Agreement and it reads as under :-

> â□□6. Except as amended by this Amendment, the Agreement shall remain in effect as written.â□□

37- If we go through the objects and reasons of the Bill for bringing into force the Act of 1996, it would be seen that one of the main objects of the enactment was to minimize the supervisory role of Courts in the arbitral

process. An international commercial arbitration is defined in section 2(1)(f) to mean an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where atleast one of the parties are as indicated in sub-clauses (i) to (iv) thereto. Further it is indicated in section 2(2) that Part I of the Act of 1996 shall apply where the place of arbitration is in India. Section 28, of the Act of 1996, contained in Chapter VI pertaining to making of arbitral award and termination of proceedings, deals with Rules applicable to substance of dispute. Section 28 is divided into two parts namely â sub sections (1) and (2), where the office of Arbitration is situated in India, the provision of sub-section (1) of Section 28 would apply.

38- Part II of the Act of 1996, deals with enforcement of certain foreign awards and a âforeign awardâ is defined in section 44 to mean an arbitral award on difference between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960.

39- Section 45, of the Act of 1996, in Part II, which is crucial for deciding this appeal, reads as under:-

> â**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.â□□

40- Finally, section 50 deals with appeallable orders and it indicates that an appeal under section 50 shall lie only against orders refusing to refer parties to arbitration under section 45, and under sub-section (2), a provision of second appeal to the Supreme Court is provided.

41- In the backdrop of the aforesaid, this Court is required to consider as to what is the nature of the agreement entered into between the parties, whether it can be termed as an agreement pertaining to a international commercial arbitration subject to jurisdiction of this Court or the Courts in India or it would be an arbitration covered under the provisions of Part II of the Act, meaning thereby that Section 45 would apply and, therefore, the suit was not maintainable.

42- If the scope of applicability of Part I of the Act of 1996, as contemplated under sub-section (2) of Section 2 is taken note of, it clearly stipulates that this Part, namely, Part I of the Act, shall apply where the place of

arbitration is in India. Similarly, if this provision is read alongwith section 28(1), it would be clear that where the place of arbitration is situated in India, the procedure contemplated in Part I would apply. However, the appellantâ□□s have tried to indicate that as the agreement in question does not meet the requirement of the ingredients laid down in section 2(1)(f), to come within the purview of an international commercial arbitration, the provisions of Part I will apply.

43- In the case of **Bharat Aluminium Company** (supra), the Constitution Bench of Supreme Court dealt with conflicting views rendered in the two judgments â□□ namely, **Bhatia International** (supra) relied upon by Shri V.K. Tankha, learned Senior Advocate; and **Venture Global Engineering Vs. Satyam Computer Services Limited and another, (2008) 4 SCC 190**, and after taking note of the provisions of sub-section (2) of Section 2, in paragraph 62, posed a question as to whether the provisions of section 2(2) bars the application of Part I to arbitration which takes place outside India. It took note of the judgments in the case of **Bhatia International** (supra) and **Venture Global Engineering** (supra) and found that in both the cases the Courts have held that Part I would also apply to all arbitration held outside India until the parties by an agreement â□□ express or implied, excluded all or any of the provisions.

44- The Honâ□□ble Supreme Court expressed, that with utmost respect and humility they are unable to agree

with the aforesaid view and after detailed discussions, it has been held that a plain reading of section 2(2) reflects that Part I is limited in its application to arbitration which takes place in India.

45- Thereafter, various observations are made and in paragraph 89 in the case of **Bharat Aluminium Company** (supra), it has been held by the Supreme Court that Part I and Part II are exclusive of each other as is evident from the definition section of both the parts. It is held that the definition of international commercial arbitration contained in section 2(1)(a) to (b) is limited to Part I and section 44 gives the definition of â□□foreign awardâ□□ for the purpose of Part II. Thereafter, in paragraph 92, the Supreme Court agrees with certain submissions made by a learned Senior Counsel and holds that Part I only applies where the seat of arbitration is in India, irrespective of the kind of arbitration. It is held that section 2(7) does not indicate that Part I is applicable to arbitration held outside India.

46- Finally, in paragraph 118, the crucial part heavily relied upon by Shri V.K. Tankha, learned Senior Advocate, reference is made to section 28, and it is held as under:

> â□□**118**. It was submitted by the learned counsel for the appellants that Section 28 is another indication of the intention of Parliament that Part I of the Arbitration Act, 1996 was not confined to arbitrations which

take place in India. We are unable to accept the submissions made by the learned counsel for the parties. As the heading of Section 28 indicates, its only purpose is to identify the rules that would be applicable to â□□substance of disputeâ□□. In other words, it deals with the applicable conflict of law rules. This section makes a distinction between purely domestic arbitrations and international commercial arbitrations, with a seat in India. Section 28(1)(a) makes it clear that in an arbitration under Part I to which section 2(1)(f) does not apply, there is no choice but for the Tribunal to decide â□□the disputeâ□□ by applying the Indian â□□substantive law applicable to the contractâ□□. This is clearly to ensure that two or more Indian parties do not circumvent the substantive Indian law, by resorting to arbitrations. The provision would have an overriding effect over any other contrary provision in such contract. On the other hand, where an arbitration under Part I is an international commercial arbitration within Section 2(1)(f), the parties would be free to agree to any other â□□substantive lawâ□□ and if not so agreed, the â□□substantive lawâ□□ applicable would be as determined by the Tribunal. The section merely shows that the

> legislature has segregated the domestic and international arbitration. Therefore, to suit India, conflict of law rules have been suitably modified, where the arbitration is in India. This will not apply where the seat is outside India. In that event, the conflict of law rules of the country in which the arbitration takes place would have to be applied. Therefore, in our opinion, the emphasis placed on the express â□□where the place of arbitration is situated in Indiaâ□□, by the learned Senior Counsel for the appellants, is not indicative of the fact that the intention of Parliament was to give an extra-territorial operation to Part I of the Arbitration Act, 1996.â□□ (***Emphasis supplied***)

Hon'ble Supreme Court holds that section 28 makes a clear distinction between purely domestic arbitration and international arbitration with a seat in India, and it is indicated that section 28(1)(a) makes it clear that in an arbitration under Part I to which section 2(1)(f) does not apply, there is no choice but for the Tribunal to decide the dispute by applying the Indian substantive law applicable to the Contract. It is this part of the judgment which was heavily relied upon by Shri V.K. Tankha, learned Senior Advocate further refers to the next sentence which says that two or more Indian parties cannot circumvent the substantive Indian Law by

resorting to arbitration. By placing much emphasis on this part, learned Senior Advocate tried to indicate that the order of the learned District Judge is unsustainable.

47- However, if we further read the findings recorded by the Supreme Court in the same paragraph 118, as reproduced hereinabove, it is held by the Supreme Court that when the seat is outside India, the conflict of law rule of the country in which the arbitration takes place would have to be applied, and thereafter it is held that the expression â□□whether the place of arbitration is situated in Indiaâ□□ does not indicate the intention of the Parliament to give extra territorial operation to Part I, of the Arbitration Act of 1996. In paragraph 123 also, the matter has been considered in the backdrop of the provisions contemplated under section 28, this also makes us to come to the inevitable conclusion that the provisions of Part I will not apply where the seat of arbitration is outside India.

48- On consideration of the law laid down in the case of **TDM Infrastructure** (supra), we find, that the proceeding before the Honâ□□ble Supreme Court was with regard to appointing an arbitrator under section 11(6) and after taking note of the definition of International Commercial Arbitration as provided in section 2(1)(f), the procedure for appointment of arbitrator and the provision of section 28, it was held that Part I of the Act of 1996 deals with domestic arbitration and Part II deals with â□□foreign awardâ□□,

and by specifically taking note of the provisions of section 28, has held that companies incorporated in India and when both the parties have Indian nationality, then such arbitration cannot be said to be an international commercial arbitration. However, after having said so, in paragraph 23 reference is made to section 28, the intention of the legislature, to hold that two Indian nationals should not be permitted to derogate Indian Law.

49- Finally, in para 23 the following observations are made by the Supreme Court in the aforesaid case:-

> â□□**23.** Section 28 of the 1996 Act is imperative in character in view of Section 2(6) thereof, which excluded the same from those provisions which parties derogate from (if so provided by the Act). The intention of the legislature appears to be clear that Indian nationals should not be permitted to derogate from Indian Law. This is part of the public policy of the country.
>
> 36. It is, however, made clear that any findings/ observations made hereinbefore were only for the purpose of determining the jurisdiction of this Court as envisaged under Section 11 of the 1996 Act and not for any other purpose.â□□
>
> *(Emphasis Supplied)*

50- If we analyse this judgment, we find, that apart from being one rendered in a proceeding held under section 11(6), is based on the consideration made with reference to section 28(1), as is evident from paragraph 23 relied upon by Shri V.K. Tankha and thereafter in paragraph 36, a caution is indicated with regard to applicability of this judgment. Whereas in the case of Atlas Exports (supra), we find that in Atlas Exports, in paragraphs 10 and 11, the following principles have been laid down :-

> â□□**10**. It was however contended by the learned counsel for the appellant that the award should have been held to be unenforceable in as much as the very contract between the parties relating to arbitration was opposed to public policy under Section 23 read with Section 28 of the Contract Act. It was submitted that Atlas and Kotak, the parties between whom the dispute arose, are both Indian parties and the contract which had the effect of compelling them to resort to arbitration by foreign arbitrators and thereby impliedly excluding the remedy available to them under the ordinary law of India should be held to be opposed to public policy. Under section 23 of the Indian Contract Act the consideration or object or an agreement is unlawful if it is opposed to public policy. Section 28 and Exception 1 to it, (which only is

relevant for the purpose of this case) are extracted and reproduced hereunder:

> â□□**28**. Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.
>
> **Exception 1** â□□ This section shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.â□□

11. The case at hand is clearly covered by Exception 1 to Section 28. Right of the parties to have recourse to legal action is not excluded by the agreement. The parties are only required to have their dispute/s adjudicated by having the same referred to arbitration. Merely because the arbitrators are situated in a foreign country cannot by itself be enough to nullify the arbitration agreement

> when the parties have with their eyes open willingly entered into the agreement. Moreover, in the case at hand the parties have willing initiated the arbitration proceedings on the disputes having arisen between them. They have appointed arbitrators, participated in arbitration proceedings and suffered an award. The plea raised before us was not raised either before or during the arbitration proceedings, nor before the learned Single Judge of the High Court in the objections filed before him, nor in the letters patent appeal filed before the Division Bench. Such a plea is not available to be raised by the appellant Atlas before this Court for the first time.â□□

(***Emphasis supplied***)

51- In this case i.e. **Atlas Exports** (supra), Sections 23 and 28 of the Contract Act are considered and it is held that when a dispute arises where both the parties are Indian, and if the contract has the effect of compelling them to resort to arbitration by foreign arbitrators and thereby impliedly excluding the remedy available to them under the ordinary law of India, the same is not opposed to public policy. Section 28 exception (1) of the Contract Act is taken note of and it is held that merely because the arbitrators are situated in a foreign country that by itself cannot be enough to nullify the arbitration agreement,

when the parties have with their eyes open, willingly entered into an agreement. If this observation made by the Supreme Court is taken note of, we find that merely because two Indian companies have entered into an arbitration agreement to be held in a foreign country by agreed arbitrators, that by itself is not enough to nullify the arbitration agreement.

52- Shri V.K. Tankha, learned Senior Advocate, tried to indicate that **Atlas Exports** (supra) case was rendered in a proceeding held under the Arbitration Act, 1940 which is entirely different from the Act of 1996 and, therefore, the said judgment will not apply in the present case. Instead, the judgment in the case of TDM Infrastructure (supra) would be applicable.

53- We cannot accept the aforesaid proposition. Shri Anirudh Krishnan, learned counsel, had taken us through the provisions of both the Act of 1940 and the Act of 1996, and thereafter he had referred to the judgment of the Supreme Court in the case of **Fuerst Day Lawson Limited** (supra), where after a detailed comparison of various sections of both the Acts, from paragraphs 65 onwards, Honâ□□ble Supreme Court discussed the provisions of both Acts, and finally has observed that there is not much of a difference between them. If the aforesaid judgment in the case of **Fuerst Day Lawson Limited** (supra) is considered, the same holds that both, the Act of 1980 and 1996 are identical and the Honâ□□ble Court has also indicated the similarity in both

the Acts. That being so, we see no reason as to why the principle laid down of **Atlas Exports** (supra), which is by a Larger Bench i.eâ¦. Division Bench, should not be applied particularly in the light of the law of precedent as laid down in the case of **A.R. Antulay** (supra). The contention of Shri V.K. Tankha, learned Senior Advocate, that the learned District Judge relied upon the judgment in the case of **Atlas Exports** (supra) and refused to rely upon the case of **TDM Infrastructure** (supra) only because it is by a Single Bench is not convincing or acceptable, as the Division Bench Judgment in the case of **Atlas Exports** (supra) is a binding precedent and once it is held in the aforesaid case that two Indian companies can agree to arbitrate in a foreign country and the same is not hit by public policy, we see no error in the order passed by the learned District Judge.

54- That apart, we also find that in the case of **TDM Infrastructure** (supra), a note of caution is indicated in paragraph 36, which was added by a corrigendum subsequent to pronouncement of judgment, this clearly indicates the principle laid down by the Supreme Court was only for determining the jurisdiction under section 11 and nothing more. We need not go into the questions any further now, as we find that the judgment in the case of **Atlas Exports** (supra) is a binding precedent.

55- Various other contentions were also advanced by Shri Anirudh Krishnan, learned counsel, to say that the judgment in the case of **TDM Infrastructure** (supra) is

not by a Court and, therefore, the provision of Article 141 of the Constitution will not apply. Once we have held that the principle of law laid down by the Supreme Court in the case of **Atlas Exports** (supra) is binding on us and is applicable to the present dispute, we need not go into all these questions.

56- On going through the scheme of the Arbitration and Conciliation Act, 1996, we find that based on the seat of arbitration so also the nationality of parties, an arbitration is classified to be an â□□International Arbitrationâ□□, and the governing law is also determined on the basis of the seat of arbitration. Therefore, it is clear that based on the seat of arbitration, the question of permitting two Indian companies/parties to arbitrate out of India is permissible. In the case of **Atlas Exports** (supra) itself, the principle has been settled that two Indians can agree to have a seat of arbitration outside India. Now, if two Indian Companies agree to have their seat of arbitration in a foreign country, the question would be as to whether the provisions of Part I or Part II would apply. Section 44, of the Act of 1996, contemplates a foreign award to be one pertaining to difference between persons arising out of legal relationship, whether contractual or not, which is in pursuance to an agreement in writing for arbitration, to which the convention set forth in the first schedule applies.

57- In the First Schedule to the Act of 1996, convention on the recognition and enforcement of foreign award

popularly known as New York Convention has been laid down and admittedly in this case the parties have agreed to have an arbitration with its seat outside India i.eâ¦. London. If that be the position then the provisions of section 45 would be attracted until and unless it is established that the agreement is null and void, inoperative or incapable of being performed. If we analyse the scheme of the Arbitration and Conciliation Act, 1996, we find that there is a distinction between â□□International Commercial Arbitrationâ□□ and a â□□Foreign Awardâ□□. It is the case of the appellant that in a dispute between two Indian Parties, which is a domestic arbitration, Part II and Section 45 of the Act of 1996 will not apply. However, when we consider the distinction between â□□International Commercial Arbitrationâ□□ and â□□Foreign Awardâ□□, we find that there is a difference between an International Commercial Arbitration and an Arbitration which is not an International Commercial Arbitration. The same is based on the nationality of the parties and this distinction is only relevant for the purpose of following the appointment procedure as contemplated under section 11. As far as nationality of the parties are concerned, the same has no applicability for considering the applicability of Part II, of the Act of 1996. Applicability of Part II is determined solely based on what is the seat of arbitration, whether it is in a country which is signatory to the New York Convention. If this

requirement is fulfilled, Part II will apply and in the present case as this requirement is fulfilled, we have no hesitation in holding that the dispute in question is covered by Part II of the Act of 1996.

58- The appellant wants this Court to hold that even though the arbitration agreement may be covered under the provisions of Section 44, but because two parties namely â Two companies, which are Indian Companies, are prevented from entering into the contract, in derogation to Indian Law, the agreement becomes null and void. But, once the law laid down in the case of **Atlas Exports** (supra) is applied and when the same permits two Indian Companies to arbitrate their dispute in a foreign country, this contention of the appellant cannot be accepted. The agreement cannot be termed as null and void or incapable only because the parties chose to arbitrate their dispute in a foreign country.

59- Having held that the provisions of section 45 are attracted and the agreement is not hit by the null and void clause as contemplated under section 45, then a jurisdictional authority which is seized of the matter under law is obliged to refer the parties for arbitration and that is precisely what has been done by the learned Court below.

60- During the course of hearing Shri V.K. Tankha, learned Senior Counsel had relied upon the judgment of the Madras High Court, in the case of **J. Mary Helan**

(supra), to say that section 45 cannot be used to reject a plaint under Order VII Rule 11 of the CPC. In this case, the respondentsâ objection was to the maintainability of the suit in view of the bar contained under section 45. If section 45 is found to be applicable then the Court below had no option, but to refer the matter for arbitration and if this power is exercised, it is infact rejection of the suit on account of the bar created under section 45, and merely because in the application it was also indicated that it is under Order VII Rule 11(d), we cannot loose sight of the fact that once section 45 is attracted, the suit was not maintainable and by ignoring this aspect of the matter we cannot say that the suit could not be dismissed. This issue can be analysed in a different manner, as canvassed on behalf of the respondents at the time of hearing, it is a well settled principle of law that a bar of law can be an implied bar also. If we read section 9 and Order VII Rule 11 CPC together, we find that section 9 provides that a Civil Courtâs jurisdiction is presumed to be in existence unless expressly or impliedly barred meaning thereby that even if a bar is provided, either expressly or impliedly, the only option available is rejection of the plaint and now in this case when the implied bar as contained in section 45 is attracted, the suit has to be dismissed. In this regard, the Madras High Court itself has laid down the principle in the case of **Adam & Coal Resources Private Limited** (supra).

61- That apart, if an order is passed under section 45 and a suit is dismissed because of the bar created under section 45, then the appeal itself would be hit by the provision of section 50, of the Act. The Supreme Court while interpreting the provisions of section 45, in the case of **Chloro Control India Private Limited** (supra), has clearly laid down the principle of *Kompetenz-Kompetenz* and the test set out for determining the competence of a Court, under section 45, the Court is only to decide the validity of the arbitration clause and for the purpose of determining the validity of the arbitration clause, the crucial test as laid down in the case of **Enercon (India) Limited** (supra) is the intention of the parties to arbitrate.

62- The intention of the parties to arbitrate has been emphasized by the Supreme Court in the case of **Enercon (India) Limited** (supra) and if it is found that the intention of the parties was to resolve their dispute through arbitration, then it is the bounden duty of the Court to give effect to the intention of the parties.

63- In the present case, if the test laid down with regard to the provisions of section 45; the intention of the parties; and, the principle of least intervention not only crystallized in the case of **Enercon (India) Limited** (supra), but also in the case of **Chatterjee Petroleum Company** (supra), is taken note of, it would be seen that once the parties have agreed to resolve their dispute by arbitration and when the learned Court below has only

referred the parties for arbitration, this Court should not interfere into the matter until and unless the agreement is itself found to be null or void or inoperative.

64- After analyzing the matter as detailed herein above, we find that in this case even though initially the association agreement was entered into between the petitioner-Company and NACC US on 1st January 2009 but by virtue of the assignment agreement NACC US assigned all its rights, obligations and liabilities to the Indian subsidiary i.e. NACC-India, thereafter certain dispute have arisen between the two Indian Companies, when the claims and vouchers issued by the respondents was not honored by the appellant. As a result vide Annexure A/5 dated 23rd July, 2014, the respondent terminated the association agreement. In the association agreement under Section 12(1) a detailed arbitration procedure is contemplated for resolution of the dispute. As per the agreement entered into in the said clause, the seat of the Arbitration is London and the arbitration is to be undertaken as per the law applicable at the place of arbitration. Even though Shri Tankha, learned Senior Counsel tried to indicate that in view of the law laid down in the case of **Kishori Lal** (supra) and **Young Achievers** (supra) when an agreement is novated or assigned, the arbitration clause goes, we are unable to accept the said contention. The novation agreement only permits the Indian Company to step into the shoes of

American Company but all other terms and conditions contained in the Association Agreement of 1st of January, 2009 continued to be existing between the parties and the appellant and respondents agreed to carry out the work as per original Association Agreement dated 1st January 2009. It was said that the entire section 12(2) of the Association Agreement goes and there cannot be an arbitration in accordance to the aforesaid provision. It was said that section 12 of the Association Agreement also stands novated on execution of the Assignment Agreement. It was argued that post assignment, the arbitration agreement does not fall within the definition of International Commercial Arbitration. This argument cannot be accepted in the Assignment Agreement it is indicated that NAC (i.e. the US Company) has incorporated NACC India and desires to transfer and assign all of NACâ□□s rights and obligations under the Association Agreement to NACC India, which desire is accepted and as Reliance is also willing to such consent and assignment entered into, i.e. the Assignment and Assumption Agreement, and it goes to indicate that NAC transfers and assigns all its rights and obligations under the Agreement to NACC India and as provided under Section 15(6) of the Association Agreement i.eâ□¦ the provision for Succession and Assignment, transfers and assigns all of its rights and obligations to NACC India; and, thereafter NACC India accepts the transfer and assignment and assumes all NACâ□□s obligations and in

Clause 2, the following stipulations are contained in the assignment agreement:

> â□□2. NACC India hereby accepts the transfer and assignment of all of NACâ□□s rights and hereby assumes all of NACâ□□s obligations under the Agreement, and hereby agrees to perform such obligations in accordance with the terms of the Agreement.â□□

65- Thereafter, in Clause 3, consent to assignment and assumption is given by Reliance and thereafter, amendment to the Association Agreement is made by deleting section 5.3 of the Association Agreement and substituting it with Clause 4. Clause 5.6 of the Association Agreement is deleted and certain amendments are made to the payment terms and conditions and separate payments.

66- Apart from the aforesaid change to the Association Agreement, under Clause 6 of the Assignment Agreement, it is clearly stipulated that except as amended, the Agreement shall remain in effect as written, meaning thereby that all the provisions of the Association Agreement which was entered into on 1.7.2009 remains in effect as it was originally written, except certain amendments as are incorporated in Clause 4 and 5, of the Assignment Agreement.

67- If that be so, it has to be assumed that under law the entire dispute resolution system stands accepted and adopted by the parties even by the Assignment Agreement and, therefore, the contention that the entire Association Agreement gets novated or superceded is not correct. Infact and in law, the Association Agreement continues to remain in force with certain amendments as stipulated in clause 4 and 5 and the material modification that NACC India replaces NACC US in the said agreement. Except for this change, there is no other change in the Agreement.

68- That apart, the Association Agreement is nothing but an agreement which now meets the requirement of Section 43 of the Indian Contract Act and if we analyze the same in the backdrop of the principles laid down by the Delhi High Court in the case of **Delhi Airport Metro** (supra), we find that in the said case somewhat identical and similar situation was existing, the learned Court had taken note of Section 43 of the Indian Contract Act and found that it is legally permissible when two or more persons can make a joint promise and in the absence of any express agreement to the contrary, agreement can be compelled by any of the joint promisor to perform the said promise. That being so, the arbitration agreement can be given effect to in the light of the aforesaid principle of law itself. That apart, when parties have agreed for arbitration and when it is the intention of the

parties to resolve their dispute by Arbitration, in the light of law laid down in the case of **Enercon (India) Ltd** (supra), this Court is duty bound to give effect to the intention of the parties and it is not in the interest of law or in the interest of justice to permit the parties to take any steps which may have the effect of nullifying the arbitration agreement. In the case of **Enercon India Ltd** (supra) in para 77 and 79, the learned Supreme Court has laid down the following principle :-

> â□□77. A bare perusal of this clause makes it abundantly clear that the parties have irrevocably agreed that clause 18 of the proposed IPLA shall apply to settle any dispute or claim that arises out of or in connection with this Memorandum of Understanding and negotiations relating to IPLA. It must also be noticed here that the relationship between the parties formally commenced on 12th January, 1994 when the parties entered into the first SHA and TKHA. Even under that SHA, Article XVI inter alia provided for resolution of disputes by arbitration. The TKHA also contained an identically worded arbitration clause, under Article XIX. This intention to arbitrate has continued without waiver. In the face of this, the question of the concluded contract becomes irrelevant, for the purposes of making the reference to the Arbitral

Tribunal. It must be clarified that the doubt raised by the Appellant is that there is no concluded IPLA, i.e. the substantive contract. But this can have no effect on the existence of a binding Arbitration Agreement in view of Clause 3. The parties have irrevocably agreed to resolve all the disputes through Arbitration. Parties can not be permitted to avoid arbitration, without satisfying the Court that it would be just and in the interest of all the parties not to proceed with arbitration. Furthermore in arbitration proceedings, courts are required to aid and support the arbitral process, and not to bring it to a grinding halt. If we were to accept the submissions of Mr. Nariman, we would be playing havoc with the progress of the arbitral process. This would be of no benefit to any of the parties involved in these unnecessarily complicated and convoluted proceedings.

xxx xxx xxx xxx

79. Further, the arbitration agreement contained in clause 18.1 to 18.3 of IPLA is very widely worded and would include all the disputes, controversies or differences concerning the legal relationship between the parties. It would include the disputes arising in respect of the IPLA with regard to its

validity, interpretation, construction, performance, enforcement or its alleged breach. Whilst interpreting the arbitration agreement and/or the arbitration clause, the court must be conscious of the overarching policy of least intervention by courts or judicial authorities in matters covered by the Indian Arbitration Act, 1996. In view of the aforesaid, it is not possible for us to accept the submission of Mr. Nariman that the arbitration agreement will perish as the IPLA has not been finalised. This is also because the arbitration clause (agreement) is independent of the underlying contract, i.e. the IPLA containing the arbitration clause. Section 16 provides that the Arbitration clause forming part of a contract shall be treated as an agreement independent of such a contract. â□□

(***Emphasis supplied***)

69- The aforesaid principle clearly indicates that when parties have agreed to resolve all their disputes by arbitration, they cannot be permitted to avoid arbitration. When arbitration is the process agreed to by the parties for resolution of their dispute, this Court under law is required to aid and support the arbitral proceedings and not to cause any hindrance in it.

70- Keeping in view the principles laid down in the case

of **Enercon India Ltd.** (supra) also, we are unable to accept the contentions of the appellants. That apart, when we go through the law laid down in the case of **Shin Electronics** (supra), we find that in that case it has been laid down by the Supreme Court that the Arbitral Tribunal is empowered to adjudicate all disputes with regard to its own jurisdiction.

71- Finally, we may observe that once it is found by us that parties by mutual agreement have decided to resolve their dispute by arbitration and when they, on their own, chose to have the seat of arbitration in a foreign country, then in view of the provisions of Section 2(2) of the Act of 1996, Part I of the Act, will not apply in a case where the place of arbitration is not India and if Part I does not apply and if the agreement in question fulfills the requirement of Section 44 then Part II will apply and when Part II applies and it is found that agreement is not null or void or inoperative, the bar created under Section 45 would come into play and if bar created under Section 45 comes into play then it is a case where the Court below had no option but to refer the parties for arbitration as the bar under Section 45 would also apply and the suit itself was not maintainable.

72- Accordingly, in the facts and circumstances, we find no error in the order passed by the learned District Judge, warranting reconsideration.

73- Appeal is therefore, dismissed. No order on costs.

(RAJENDRA MENON)
JUDGE

(SUSHIL KUMAR GUPTA)
JUDGE