(2012) 07 DEL CK 0234

In the Delhi High Court

Case No : O.M.P. 223 of 2006

Hindustan Petroleum Cor. Ltd. APPELLANT

Vs

M/s. Videocon Industries Ltd. and Others RESPONDENT

Date of Decision : 13-07-2012

Acts Referred:

Arbitration (Protocol and Convention) Act, 1937 — Section 7(i)
Arbitration and Conciliation Act, 1996 — Section 2(7), 34, 36, 44, 45
Civil Procedure Code, 1908 (CPC) — Order 21 Rule 2
Contract Act, 1872 — Section 59, 60, 61

Citation : (2012) 3 ARBLR 194

Hon'ble Judges : Vipin Sanghi, J

Bench : Single Bench

Advocate : R. Sasiprabhu and Mr. R. Chandrachud, in O.M.P. 223 and 329/2006 and Mr. A.S. Chandhiok, ASG in O.M.P. 329/2006, for the Appellant; Neeraj Kishan Kaul, with Mr. Anirudh Das, Prashant Kalra and Mr. Rohan Dheman, Advocates in O.M.P. 223 and 329/2006 and Mr. Amit Sibal in O.M.P. 329/2006, for the Respondent

Judgement

Vipin Sanghi, J.—The present petitions have been preferred u/s 48 of the Arbitration and Conciliation Act, 1996 (the Act) by the petitioners, viz. Hindustan Petroleum Corporation Limited (HPCL) and Bongaigaon Refinery & Petrochemicals Limited (BRPL) [in O.M.P. No. 223/2006] and Union of India and the Directorate General of Hydrocarbons (DGH) [in O.M.P. No. 329/2006] to seek a declaration that the partial award dated 31.03.2005 passed by the Arbitral Tribunal consisting of three learned arbitrators, namely, Mr. Justice B.N. Kripal (Retd.), Mr. Justice G.T. Nanavati (Retd.) and Mr. Justice J.K. Mehra (Retd.), is unenforceable against the petitioners. A declaration is also sought that the demand letter dated 22.08.2005, for Rs. 1,24,427,492/- issued by respondent No. 1 is unenforceable against the petitioners. The petitioners also seek stay of the operation of the aforesaid partial award dated 31.03.2005, and of the aforesaid demand letter dated 22.08.2005. The petitioner Nos. 1 and 2 in O.M.P. No. 223/2006 are Public sector Companies, engaged in the business of purchase of crude oil for the purpose of refining and selling the refined petroleum products.

2. Respondent No. 1, i.e. M/s Videocon Industries Ltd. (in both the Petitions- which is also the contesting Respondent), is a company incorporated in India and engaged in business of, amongst others, exploration and exploitation of hydrocarbons.

3. The case of the petitioners is that the Government of India, being the sole owner of natural resources, entered into a Production Sharing Contract (PSC) dated 28.10.1994 with ONGC, Videocon Petroleum Ltd., Command Petroleum (India) Ltd. (now known as Cairn Energy), and Ravva Oil (Singapore) Ltd., collectively referred to as the contractor, for the Ravva Oil field, off the shore of Andhra coast.

4. Under the PSC, the contractor has the right to explore petroleum in the area. The contractor is entitled to recover its cost and specified profits from out of the petroleum produced. According to Article 19.1 of PSC the contractor is obliged to offer its share of production for sale to the Government or its nominee.

5. The petitioner Nos. 1 and 2, in O.M.P. No. 223/2006, have been nominated by the Government of India to purchase the crude oil produced from the Ravva Oil field. The Government has also nominated GAIL to purchase the gas produced from the field.

6. As disputes arose under the Contract, they were referred to arbitration. In the arbitration proceedings, the respondent no.1, Videocon Industries Ltd was the claimant and the UOI and the DGH were the respondents. The arbitral tribunal has made its partial award dated 31.03.2005, at London.

7. The respondent no. 1 vide letter dated 22.08.2005 demanded from UOI and DGH Rs. 1,24,427,492/- on the basis of partial award passed by the tribunal.

8. Consequently, the petitioners have filed this petition for a declaration that the partial award dated 31.03.2005, and the demand made vide letter dated 22.08.2005 is unenforceable against them.

9. Upon issuance of notice, respondent No. 1 entered appearance and raised a preliminary objection regarding the maintainability of the present petition.

10. I have heard learned senior counsels for the parties on the limited aspect of maintainability of this petition. I proceed to decide the issue of maintainability of the present petition u/s 48 of the Act. I may note that the respondents have also challenged the locus stand of the petitioners to maintain a petition u/s 48 of the Act. However, this aspect has not been argued before me by either party and, therefore, is not being dealt with by me in this order. Since I am dealing with a preliminary objection raised by the contesting respondents. I first set out the respondent''s preliminary objection.

Respondent''s submissions:

11. Mr. Kaul, learned senior counsel for respondent no. 1 in OMP No. 223/2006 and Mr. Sibal, learned counsel for the respondent no.1 in OMP No. 329/2006 submit that the award in question is a foreign award and thus it is governed by the Part-II of the Act.

12. It is submitted that in contrast to Section 34 of the Act, Section 48 does not provide for or permit a challenge to a foreign award in Courts in India. A party can only resist the enforcement of a Foreign Award, as and when it is sought to be enforced. The Respondent submits that no Petition u/s 48 can be filed, unless the person who has succeeded in the arbitration seeks enforcement of the Award. It is at that point of time that the successful party may be said to have ''invoked'' an award against the unsuccessful party, and it is that invocation of an Award that gives rise to a cause of action for filing an application u/s 48 of the Act. It is argued that the respondents No. 1 & 2 have not yet invoked the partial award dated 31.03.2005. Consequently, this petition u/s 48 is not maintainable.

13. Before I proceed to further record and discuss the respective submissions of the parties, I consider it appropriate to take note of the relevant provisions of the Act. Section 46 of the Act states:

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

14. The manner in which a party may enforce a foreign award is dealt with in Section 47 of the Act, and the same reads as follows:

47. Evidence. - (1) The party applying for the enforcement of a foreign award shall, at the time of the application, produce before the Court-

(a) the original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made;

(b) the original agreement for arbitration or a duly certified copy thereof; and

(c) such evidence as may be necessary to prove that the award is a foreign award.

(2) If the award or agreement to be produced under sub-section (1) is in a foreign language, the party seeking to enforce the award shall produce a translation into English certified as correct by a diplomatic or consular agent of the country to which that party belongs or certified as correct in such other manner as may be sufficient according to the law in force in India.

15. Section 48 of the Act provides for the conditions for enforcement of foreign award under this Chapter, and the same reads as follows:

48. Conditions for enforcement of foreign awards.-

(1) Enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the Court proof that----

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

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

(c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration. Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be enforced; or

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

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

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

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

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

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

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

16. It is submitted by the respondents that the language of Part II of the Act makes it sufficiently clear that "invocation" under the Act means the filing of a formal enforcement proceeding u/s 47 of the Act. The use of the word ''invocation'' in Section 48(1), as opposed to the use of the word "enforcement",

is rooted in the fact that ''enforcement'' is a relief that only a Court can grant upon ''invocation'' u/s 47 by the party seeking enforcement. Therefore, a party can only "invoke" an Award by filing a Petition u/s 47, while the Court will then decide whether it can be enforced or not, after considering the objections, if any, that may be filed u/s 48 of the Act. This is also why Section 47(1) clearly provides "The party applying for enforcement of a foreign award shall ...."

17. It is submitted that it is the act of a Party formally applying for enforcement, that will give rise to the invocation of the Award. This invocation will then provide an opportunity to the unsuccessful party to request that such enforcement be refused on the grounds set out in Section 48 of the Act. A party cannot request the Court to refrain from enforcing an Award, if no such enforcement has been sought. It is submitted that no petition u/s 48 can be filed as a pre-emptive step. Therefore, the role of the successful party, the unsuccessful party and the Court can be summarized as below:

a. Successful Party: To apply for enforcement u/s 47 of the Act which constitutes invocation of the Award.

b. Unsuccessful Party : To resist enforcement by filing an application u/s 48 of the Act in the Enforcement proceedings.

c. Court: To decide the objections filed and determine whether or not the Award should be enforced.

18. The respondents submit that Section 46 of the Act begins with the words "Any foreign award which would be enforceable under this chapter...". Consequently, the application of Section 46 is limited to circumstances where an Award has been held to be enforceable under Part II of the Act.

19. It is further submitted that the question of when a Foreign Award is considered to be enforceable under the Act has been addressed in Section 49 of the Act which states that "where the Court is satisfied that the Foreign Award is enforceable under this Chapter, the Award shall deemed to be a decree of that Court".

20. Therefore:

(a) The decision - whether an Award is enforceable or not, is entirely within the Court''s domain;

b) It is only upon such satisfaction being reached by the Court, that a Foreign Award is enforceable;

c) In order to attain such satisfaction, the Foreign Award must go through the process envisaged under "this chapter" i.e. Chapter I of Part II, which includes Sections 44 to 52, at the end of which, the Court must be satisfied that the Award is enforceable.

21. It is argued that where a Foreign Award is enforceable under Chapter I of

Part II of the Act, the same would be deemed to be a decree of the Court and could be relied upon by way of defence, set off or otherwise in any legal proceedings in India.

22. Conversely, if a Foreign Award has not gone through the process envisaged in Sections 47-49, any reliance on such an award would not have any legal sanctity. Therefore, if a party seeks to rely upon a Foreign Award in India, such party must produce the Award in terms of Section 47 by way of a formal application seeking enforcement, which would amount to invoking the Award.

23. If an unsuccessful party wishes to challenge the Award, as opposed to resist its enforcement, a party may do so at the seat of the arbitration, in proceedings equivalent to those u/s 34 of the Act for Domestic Awards.

24. The counsels for the respondent (Videocon Industries Ltd.) place reliance on the following cases to support their contention:

(i) Bulk Trading SA v. Dalmia Cement (Bharat Ltd.), 2006 (1) Arb. L.R. 38 (Del), wherein the Court has observed:-

6..... But in the case of a foreign award as defined in Section 44 of the said Act, there is no provision for moving an application for setting aside a foreign award. On the Contrary, Section 48 provides conditions for enforcement of foreign award. The scheme, therefore, appears to be that while a domestic award made under Part I (See Section 2(7) of the said Act) may be set aside pursuant to an application u/s 34, there is no provision for such an application in respect of a foreign award falling under Part II of the said Act. A party objecting to the enforceability of a foreign award may do so only when an application for enforcing the same is moved by another party. At that stage, the enforcement of the foreign award may be refused by the Court at the request of the party against whom it is invoked on the conditions set out in Section 48 of the said Act.

(Emphasis supplied)

(ii) 966461-->), wherein the Court observed:

19.... Part II in any event provides an opportunity for a party aggrieved by a foreign award to oppose enforcement thereof. It however restricts the circumstances in which such right can be exercised. The scheme of the Act indicates clearly the intent of the legislature to provide a party with a right to challenge a foreign award only in certain circumstances. By necessary implication it excludes the right of a party to challenge a foreign award except in cases where the enforcement thereof is sought.

(Emphasis supplied)

(iii) Jindal Drugs Ltd. v. Noy Vallesina Engineering SpA and others, 2002 (2) Arb L.R. 323 (Bom), wherein the Court observed:

8. Insofar as the challenge to a foreign Award is concerned the scheme of the Act

appears to be that, the remedy that is available to a person against whom that Award has been made is to wait till the person in whose favour the Award is made moves u/s 48 of the Act for enforcement of the award and it is then that such a person can challenge the validity of the Award on the grounds which are mentioned in Section 48 of the Act.

(Emphasis supplied)

(iv) Vikrant Tyres Ltd. and Anr. v. Techno Export Foreign Trade Company Ltd. 2005 Arb. LR 454 (Kar), wherein the Court observed:

41.... However from the scheme of Section 48 it could be said that no application as a pre-emptive step could be filed to resist execution even before any such application for execution of the award is made in that behalf Therefore, the application filed by the Plaintiff u/s 48 is premature and not maintainable.

(Emphasis supplied)

25. Learned senior counsel for respondent no. 1 thus concludes that an enforcement petition is a pre-requisite, in order to give rise to the cause of action for filing of an application u/s 48 of the Act to resist enforcement of a Foreign Award.

Petitioner''s submissions:

26. On the other hand, the learned ASG submits that Part II of the Act deals with ''Enforcement of Certain Foreign Awards''. He submits that Section 46 is in two parts. The first part provides that any foreign award which would be enforceable under this chapter shall be treated as binding and can be relied by way of defence, set off or otherwise in any legal proceedings in India and the second part provides that enforcing a foreign award shall be construed as including reference to relying on an award. In other words ''relying on an award'' also amounts to ''enforcement of a foreign award''.

27. He submits that it is possible that an award is enforced without the intervention of a Court. In such cases also it would amount to enforcing the Award, notwithstanding the fact that no application is filed in the Indian Court.

28. It is argued that Section 48 of the Arbitration and Conciliation Act, 1996 states that: "Enforcement of an foreign award may be refused, at the request of the party against whom it is invoked.....". In view of Section 46 of the Act ''Enforcement of a foreign award'' as used in Section 48 would also mean ''relying on the award'' in any manner. Section 48 provides that the Court may refuse to enforce a foreign award at the request of a party against whom the award is ''invoked'', and not against whom the award is ''enforced''. An award can be invoked against a party without recourse to any judicial proceedings, viz. by making the award as a basis and demanding the amount payable by the unsuccessful party, or by adjusting the money belonging to the unsuccessful party already in the hands of the successful party, towards the liability under the

award. Sections 59, 60 and 61 of the Contract Act also recognize that a person can appropriate the amount held by him and belonging to another, owed by the latter to the former, towards the debt. Order XXI Rule 2 of the CPC also recognizes the discharge of debt by appropriation or adjustment of amount already lying with the decree holder.

29. Therefore, to read section 48 in a manner to say that enforcement can be refused only at the request of the party against whom enforcement/execution proceedings have been initiated in a Court, would be to add/supply words to the said provision.

30. Meaning of "invoke" is "appeal to as an authority or in support of an argument" (Oxford Tenth Ed.) and "enforce" means "compel compliance with (a law, rule or obligation); cause to happen by necessity or force".

31. Thus the use of the word ''invoke'' in section 48 in contradistinction to "enforce" shows that the Legislature did not intend the initiation of an enforcement/execution proceeding as a condition precedent for raising the issue of non-enforceability of a foreign award by the unsuccessful party.

32. Further, the term "enforcement of award" has been held not to mean merely execution of that award as a decree, but it also includes using that award as defence in legal proceedings for claiming set off on the basis of that award, etc. Execution of the foreign award as decree is only one facet of enforcement. Thus, enforcement of a foreign award is a wider term than execution of the award.

33. Reliance is placed on Pratabmull Rameshwar Vs. K.C. Sethia (1944), Ltd., , wherein it was held as under:-

23. The learned Standing Counsel, on behalf of the respondent, has argued that this main contention of the appellant that the agreement and the awards are against the public policy of India is misconceived. He submits that the words of Section 7 (i) of the Arbitration (Protocol and Convention) Act, 1937, are against this contention. He argued that the expression, "enforcement thereof'', in that section means execution of these awards. It is said that the awards in this case only direct the appellant to pay a certain sum of money as damages. As such, on the face of it, it cannot be said that the awards are against any public policy. The difficulty of accepting this argument is the narrow meaning it attributes to the word, "enforcement". Enforcement is not merely the technical part of execution. Enforcement includes the whole process of getting an award as well as its execution. We are, therefore, not prepared to limit the word, "enforcement", in Section 7(i) of the Act to the mere technical part of its execution.

(Emphasis supplied)

34. Thus, if a foreign award is sought to be relied upon to raise a demand, it can be said that it is being enforced. In any event, the award stands invoked in such a situation.

35. Reliance is also placed on Centrotrade Minerals and Metals Inc. Vs. Hindustan Copper Ltd., wherein a single Judge of Calcutta High Court has observed as under:-

9. From the provisions contained in Section 47, 48 and 49 of the Act it is clear that both the parties can approach the appropriates forum with their respective prayers, i.e. the person in whose favour a foreign award goes can definitely apply before the competent Court for enforcement and execution of the award, and at the same time the person against whom the foreign award has gone can approach the Court for setting aside such an award....

36. Reliance is placed on Shin-Etsu Chemical Co. Ltd. Vs. Aksh Optifibre Ltd. and Another, , wherein the Supreme Court held as under:

55. I may also deal with the contention urged on behalf of the appellant that only a prima facie finding is required to be given on a combined reading of Sections 45, 48 and 50 from which it can be culled out that a party who has suffered an award can always challenge the same u/s 48 on the ground that the arbitration agreement is null and void. This read in conjunction with the right of appeal given u/s 50 and the power of the arbitrator to rule on his own jurisdiction clearly shows the intent of the legislature to avoid delay which would be inevitable if it has to be a final decision and it would defeat the object of soon placing all material before the Arbitral Tribunal. I am afraid that this cannot be accepted as the real purpose of Section 48 is to ensure that at some stage Whether pre-award, post-award or both, a judicial authority must decide the, validity, operation, capability of performance of the arbitration agreement....

(Emphasis supplied)

37. Reliance is also placed on Venture Global Engineering Vs. Satyam Computers, 2007 (3) RAJ. 128 (AP), wherein it was held that :

A conjoint reading of section 36 and 34 reveal that Section 36 deals with the enforcement of the Arbitral Award and Section 34 provides for the recourse for challenging the arbitral award. Whereas Section 48 of the Act, 1996 is a comprehensive provision, dealing with a foreign award, like the present one, which can be invoked for enforcement of the arbitral award or be subjected to challenge by the aggrieved party.

(Emphasis supplied)

38. Further, it is submitted that even if an award is challenged by a party outside India and the challenge is rejected, even in that case u/s 48 of the Act, a second chance is available to a party to again challenge the said award u/s 48 of the Act.

39. It is submitted that in a situation where the amount under the foreign award is appropriated or adjusted without intervention of the Indian Court, if it is held that a petition u/s 48 is not maintainable by the unsuccessful party before the successful party moves the Court u/s 47, then in that case the remedy provided

under the Indian Law u/s 48 would be rendered redundant. A suit for recovery of money in the case of ''appropriation'' of amount under the Award, without going through the procedure of Section 47 and 48, would also not be maintainable since same would be barred by Section 5 of the Arbitration and Conciliation Act. Therefore, in such a case the petitioner/award debtor would be left remediless, and therefore an independent petition u/s 48 should be permitted to be maintained. In the present case a demand letter dated 22.08.2005 was addressed to Govt. of India with copy to HPCL and others. The demand letter dated 22.08.2005 was based on the partial award dated 31.03.2005 and as per that award a payment of Rs. 124,427,492/- was demanded from the Govt. It was further stated in the letter as under:

we further request you to instruct your Nominees, including GAIL, to apply the average of the SBI TT Buy Rate and SBI TT Sell Rate for converting the US Dollar amount into INR equivalent amounts while making payments to the Company with immediate effect. The current practice of GOI Nominees of making payments by applying the SBI TT Buying Rate is not only incorrect and undesirable but also contrary to the Arbitral Award dated 31.03.2005.

40. Thus, the Respondent No. 1 is seeking to enforce the Award against the petitioner. Since, by demand letter dated 22.08.2005 the award was sought to be enforced (invoked), and the remedy is provided in section 48 of the Arbitration Act, 1996 therefore, the only remedy available to the petitioners is to file an application u/s 48.

Discussion:

41. Part II of the Act is titled "Enforcement of Certain Foreign Awards". Chapter I (Section 44 to 52) of Part II deals with "New York Convention awards". Section 44 defines "foreign award", under Chapter I of Part II of the Act, as an arbitral award made in pursuance of an arbitration agreement as provided for in clause (a) of Section 44, and in such territory as provided for in clause (b) of Section 44. Section 45 provides for the "Power of judicial authority to refer parties to arbitration" in respect of an arbitration agreement referred to in Section 44. Section 46 to Section 49 deal with Enforcement of the foreign awards under Chapter I of Part II of the Act.

42. The first part of Section 46 provides for the effect of a foreign award which would be enforceable under chapter I- by stating that the same shall be binding for all purposes on the persons as between whom it was made. The Second part of Section 46 provides for the manner in which such a foreign award may be relied upon. It states that the same may be relied upon by persons by way of defence, set off or otherwise in any legal proceedings. The later part of Section 46 provides for the manner in which, references to enforcing an award under Chapter I, are to be construed or, in other words, are to be read or interpreted. It states that the same shall be construed as including references to relying on an award. This means that when an award is relied upon by way of defence, set

off or otherwise in any legal proceedings, it shall be construed as enforcing the award under this chapter. Therefore, in case an award-debtor initiates certain legal proceedings against the award-holder, and the award-holder relies upon the award by way of defence, set off or otherwise (before pro-actively getting it enforced before the Court in execution proceedings), the award-holder would be obliged to comply with the requirements of Section 47 (which prescribes the "evidence" to be produced by the award-holder) without which the Court would not entertain the defence based on the foreign award. If the award-holder produces the evidence to enforce the award, i.e. to permit it to be treated as a valid defence, set-off etc., it shall be open to the plaintiff/award-debtor to oppose the enforcement by furnishing the proof in terms of Section 48 of the Act. Therefore, to save multiple proceedings and to promote the objective of the Act,- which is to provide an alternate expeditious and efficacious remedy to the parties and limit the intervention of the Courts in matters of arbitration, the legislature in its wisdom has expanded the scope of the expression "enforcement" of an award under this chapter as not only meaning the making of a formal application for execution by the award-holder, but also to include reliance by the parties by way of defence, set off or otherwise in any legal proceedings.

43. In the light of the above, the argument of the petitioner founded upon Section 5 of the Act appears to be misplaced. Even otherwise, Section 5 falls in Part I and Section 5, in terms, applies in respect of matters governed by Part I. Enforcement of foreign awards, on the other hand, falls in Part II. Therefore, Section 5 would not come in the way of an award-debtor to initiate legal action or proceedings in respect of the subject matter forming part of a foreign award. However, such an action/proceedings may at the behest of the opposite party be short circuited, if launched before the making of an arbitral award - by resort to Section 45. If a foreign award has already been rendered, the opposite party would be entitled to enforce the award, inter alia, by relying upon the same by way of a defence, set off or otherwise, by following the procedure prescribed u/s 47 of the Act. Such enforcement may then be opposed by the plaintiff/award debtor by producing evidence u/s 48 of the Act.

44. Chapter I of Part II the Act deals, firstly, with the definition of "foreign awards"; secondly, with the power of the judicial authority to refer the parties to arbitration, and; thirdly, with the enforcement of foreign awards.

45. A comparative analysis of the provisions of Part I and Part II of the Act reveals that request for refusal of enforcement of an award as provided for in Section 48, cannot be equated to, and is different from, an independent remedy for seeking recourse against an award (as provided for in Section 34). Firstly, Chapter VII of Part I of the Act (wherein Section 34 falls), bears the heading "Recourse against Arbitral Award". There is no corresponding Chapter provided for in Part II of the Act. There is no recourse against a foreign award in an Indian Court under Part II of the Act. Secondly, Chapter VIII of Part I of the Act relates to "Finality and Enforcement of Arbitral Awards". Part II of the Act (dealing with

foreign awards) deals with "Enforcement of Certain Foreign Awards". So, it could be said that Chapter VIII of Part I and Part II of the Act are corresponding/ analogous to each other; but it cannot be said that Chapter VII of Part I of the Act (dealing with recourse against arbitral award) is analogous to Part II. Thirdly, in Section 36 (in Chapter VIII of Part I of the Act), there is a reference to an application for recourse against arbitral award u/s 34. However, there is no reference to such an application in Section 49 (provided for in Part II of the Act), which deals with enforcement.

46. Pertinently, Section 34 prescribes a mandatory period of limitation to challenge the domestic award. However, there is no limitation prescribed for moving an application u/s 48. This also shows that, whereas, a proceeding u/s 34 is required to be launched - to assail the award within the statutory period of limitation - else it cannot be assailed, a proceeding u/s 48 can only be initiated once its enforcement (as widely understood in Section 46) is sought. Whereas Section 34 proceedings are proactive proceedings, Section 48 proceedings are only responsive in nature. Whereas Section 34 proceeding are like a sword-to challenge the award to have it set aside, Section 48 proceeding are only like a shield against a foreign award. This means that even if a proceeding u/s 48 of the Act, i.e. to resist the enforcement of a foreign award succeeds, it does not amount to the setting aside of the foreign award. It only means that the enforcement of the foreign award may not take place within the Indian territory, through the process of an Indian Court. Since Part II does not provide for "recourse against a foreign award" i.e. to seek the setting aside of a foreign award, to read the right to assail the foreign award into the Act, would be to go against the express words of the Act and against the principles of statutory interpretation.

47. A careful perusal of Section 48 itself would reveal that an application to assail a foreign award i.e. to seek setting aside or suspension of the foreign award, is independent of the said provision. Section 48 (1)(e) provides that enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if the party furnishes proof that - "the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or the under the law of which, that award was made". Further, Section 48(3) states that if an application for the setting aside or suspension of the award has been made to a competent authority referred to in clause (e) of sub-section (1), the Court may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security. Therefore, Section 48 in itself contemplates the initiation of independent proceedings for assailing the foreign award before the competent Court/authority of the country where the award was made, or under the law of which, the award was made. A proceeding u/s 48 of the Act cannot be converted into one to assail the foreign award, i.e. to seek the setting aside of the foreign award.

48. The decision of the Supreme Court in Shin-Etsu Chemical Co. Ltd. (Supra), relied upon by the petitioners, dealt with an entirely different issue. The question for consideration before the Court was of the nature of adjudication that is contemplated by Section 45 when the question about the arbitration agreement being "null and void, inoperative or incapable of being performed" is raised before a judicial authority. It was in this context that Y.K. Sabharwal, J. (in his dissenting view), took note of, and rejected the contention of the appellant in Para 55 of his Judgment, as aforementioned, and observed that a Judicial authority u/s 48 must decide the validity, operation, capability of performance of the arbitration agreement. The Supreme Court in this case was not considering the issue arising before me. The issue before the Supreme Court was not whether a petition u/s 48 of the Act could be filed even when no enforcement proceedings, as understood in Section 46 of the Act, had been initiated by one of the parties to the foreign award. I find it difficult to comprehend as to how the said observation renders support to the petitioner''s case.

49. The decision in Ventura Global Engineering (supra) has no application in the facts of this case. That was a case where enforcement proceedings had already been initiated in a foreign court prior to the filing of a Civil Suit in the Indian Court. The Andhra Pradesh High Court held that since the plaintiff had already invoked the remedy of challenging the enforcement of the award in the foreign court, the civil suit was not maintainable. In any event, this judgment has been set aside by the Supreme Court, though on a different consideration, in the decision reported as Venture Global Engineering Vs. Satyam Computer Services Ltd. and Another,

50. The decision in Pratabmull Rameshwar (supra) also has no relevance. In this case, the expression enforcement as used in Section 7(i) of the Arbitration (Protocol and Convention) Act, 1937 was interpreted by the Calcutta High Court in a wider sense to include the process of getting an award as well as its execution. The present case concerns the Act which has a different legislative scheme altogether. Moreover, I find myself in respectful disagreement with the view of the Calcutta High Court that "enforcement" would include the whole process of getting the award. There is no question of the process of getting an award being considered as a process of "enforcement". "Enforcement" is of an award. It is not the enforcement of legal rights that was being discussed in Section 7(i) of the Arbitration (Protocol and Convention) Act, 1937. Unless the award comes into being, I fail to understand where is the question of its enforcement. The said decision of the Calcutta High Court, therefore, is of no avail to the petitioner.

51. The decision in Centrotrade Minerals and Metals (supra) of the Calcutta High Court, with respect, does not lay down the correct legal proposition in my view in so far as it holds "at the same time the person against whom the foreign award has gone could approach the Court for setting aside such an award". I see no reason to disagree with the view taken by a co-ordinate Bench of this Court in

Bulk Trading SA (supra), the Bombay High Court in Jindal Drugs Ltd.(supra), and by the Karnataka High Court in Vikrant Tyres Ltd. (supra) in so far as they holds that an independent proceeding u/s 48 of the Act cannot be maintained, unless the foreign award is sought to be enforced in legal proceedings.

52. The submission based on a distinction sought to be drawn between the expressions "enforced" and "invoked", in my view, tantamounts to a resort to hairsplitting. Invocation of the award, in the context of the Act only means the act of seeking its enforcement - as defined in the wider sense in the Act.

53. For all the aforesaid reasons, I hold that the present petitions are not maintainable at this stage, since the respondent, Videocon Industries Ltd., has not initiated any enforcement proceedings in respect of the foreign award.

54. The petitions are accordingly dismissed as not maintainable, while allowing the preliminary objection of the respondents. Parties are left to bear their respective costs.