(1999) 11 DEL CK 0011

In the Delhi High Court

Case No : O.M.P. No. 232 of 1997

Olex Focas Pvt. Ltd. and Another APPELLANT

Vs

Skoda export Company Ltd. and Another RESPONDENT

Date of Decision : 05-11-1999

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 2(2)
Civil Procedure Code, 1908 (CPC) — Order 23 Rule 1, Order 23 Rule 2

Citation : (2000) 1 AD 527 : AIR 2000 Delhi 161

Hon'ble Judges : Dalveer Bhandari, J

Bench : Single Bench

Advocate : Mr. Arvind K. Nigam, for the Appellant; Mr. Ravinder Sethi with Mr. Hirroo Advani, Mr. Kailash Vasdev, Ms. Vanita Sahni, Mr. V. N. Kaura and Ms. Pramjit Benipal, for the Respondent

Judgement

Dalveer Bhandari, J.—The contract between the petitioner Olex and respondent No. 1 Skoda export was for the execution of works in India, for and on behalf of the Indian Oil Corporation (for short IOCL). The agreement between Olex and Skoda export, however, provided for disputes to be resolved by reference to ICC arbitration. Olex Focus Pvt. Ltd & Olex Pvt. Ltd. are one and the same, Therefore, they are jointly referred to as the petitioner.

2. The petitioner is an Australian company and respondent No. 1 Skoda export Company Ltd. is a Czech company. Respondent No. 2, Indian Oil Corporation Limited is a Government of India Company and has been imp leaded in the present proceedings only to enable this court to enforce its orders. No relief otherwise is being claimed by the petitioner from respondent No. 2, except for restraining it from making any payment to respondent No.1 arising out of the Contract dated 22.9.1993 with the petitioner in relation to Kandla Bhatinda pipeline.

3. It is mentioned in the agreement that the laws of Switzerland be applicable in the event of any dispute. In November, 1993 the petitioner commenced work on

the Kandla Bhatinda Pipeline and, upon execution of the sub-contract, detailed and exhaustive works were carried out by the petitioner for and on behalf of respondent No. 1. During the course of works, the petitioner learnt that respondents No.1 and 2 entered into an agreement in November, 1995 pursuant to which respondent No. 1 agreed to hand over the work of Kandla Bhatinda Pipeline to respondent No. 2 in four separate phases and to allow respondent No. 2 unrestricted use of the pipeline following the hand over of each phase. For its part, respondent No. 2, amongst other things, granted to respondent No. 1 the commencement of its defect liability period for installed equipment for each phase was handed over to respondent No. 2 Respondent No. 1 did not advise or seek the cooperation of the petitioner before entering into this agreement with respondent No. 2.

4. During the course of the project, certain disputes arose between the petitioner and respondent No. 1 leading to the petitioner filing two separate notices of requests for arbitration against respondent No. 1 on 12.7.1996 with the International Court of Arbitration.

5. It may be pertinent to mention that on 25.7.1996, respondent No. 1 filed two petitions before this Court being AA Nos. 74 and 75 of 1996 in which the petitioner sought an order declaring that the petitioners'' notices for requesting for arbitration were illegal, improper and not maintainable and prayed that the order be passed directing the arbitration proceedings be held in India.

6. On the request of respondent No. 1 on 13.5.1997 this Court dismissed the petition Nos. AA 74 and 75 of 1996 as withdrawn.

7. It is submitted that the petitioner has a strong prima facie case before the arbitral tribunal. It is also submitted by the petitioner that respondent No. 1 is under an obligation to pay to the petitioner for the works done and equipments supplied through invoices. Irreparable harm and injury would be caused to the petitioner in the event, the rights of the petitioner are not protected during the interregnum period.

8. Learned counsel for the petitioner Mr. Arvind Nigam submitted that in the facts and circumstances of this case the petitioner is entitled to the protection by an injunction because in case the injunction is not granted, the petitioner is not likely to recover its legitimate dues. The petitioner has placed on record a report of M/s. Dunn & Bradstreet. This report of October 1998 indicates that respondent No. 1 has networth of about US $ 16 million. The claim of the petitioner alone is US $ 25.4 million which is far in excess of the networth of respondent No. 1. The said report also shows that the turnover of respondent No.1 in 1997 was down by 28% of its turnover of 1996 and the profit for the year 1997 was only US $ 20,000. The petitioner submitted that apart from clear provision of law the petitioner and the respondent always understood that the parties can approach the Court for interim relief during the pendency of the arbitration. In fact, the respondent No. 1 has approached the Courts both in India and in Rome (Italy)

for the interim relief.

9. It is alleged by the petitioner that the Court has prima facie found that the monies are due and payable by Skoda export to Olex Group of Companies and a reference has been made to the judgments delivered by the Arbitral Tribunal. The Australian Court has also found that the conduct of Skoda export in invoking the Bank Guarantees of Olex was unconscionable. In these circumstances, the petitioner has filed this petition in this Court with the prayer that respondent No. 2, their agents, employees, etc., be restrained from taking any steps to release any payments to respondent No. 1 to the extent the amount which is payable by respondent No. 2 to respondent No. 1.

10. The petitioner submitted that this Court has the power to grant interim relief. The learned counsel for the petitioner has referred to Article 8.5 of the ICC rules which reads as under :

"Before the file is transmitted to the arbitrator, and in exceptional circumstances even thereafter, the parties shall be at liberty to apply to any competent judicial authority for interim or conservatory measures, and they shall not by so doing be held to infringe the agreement to arbitrate or to affect the relevant powers reserved to the arbitrator."

11. The new 1998 ICC Rules specifically provide for the grant of interim order and conservatory measures by both the arbitrators (s) in the proceeding and "in appropriate circumstances" by any competent judicial authority and also state that :

"The application of a party to a judicial authority for such measures or for the implementation of any such measures ordered by an Arbitral Tribunal shall not be deemed to be an infringement or a waiver of the arbitration agreement and shall not affect the relevant powers reserved to be Arbitral Tribunal."

12. It is, thus clear that the ICC Rules contemplate circumstances, and have done so over a decade, whenever an application is required to be made to an authority other than the relevant Arbitral Tribunal to protect or to preserve the assets or goods and that this is consistent with the parallel Arbitral proceedings.

13. It is also mentioned by the petitioner that after the commencement of arbitration proceedings by the petitioner, respondent No. 1 had itself filed and application to the Civil Court in Rome in early 1997 seeking an injunction to attach the balance SCAD equipment held by Nuevo Pignone. The parties were duties clear that the civil court could be approached before or during the arbitration proceedings.

14. The learned counsel for the petitioner submitted that efficacious orders can be passed only by the Court which has jurisdiction over, the property in question or the funds. In the instant case the funds are presently in the hands of respondent No. 2 and the Arbitral Tribunal would accordingly be powerless to grant any effective relief to protect the property or funds until the disposal of the

arbitration proceedings. Only this Court can grant relief in this respect.

15. Mr. Nigam also submitted that under the Arbitration and Conciliation Act, 1996, the Court has been invested with the powers to grant the interim injunction/relief. He submitted that Section 2(2) of the Arbitration and Conciliation Act, 1996 does not restrict the court powers and jurisdiction to grant interim orders. It is mentioned in the Act that part 1 consists of Sections 1 to 43 of the Act shall apply to place of arbitration in India. This does not exclude the arbitration where venue of arbitration is outside India. Mr. Nigam further submitted that the intention of the legislature becomes abundantly clear from the other Clauses of this section, i.e., Sections 2(3) , 2(4), 2(5). The relevant clauses of the section are reproduced hereinbelow for the sake of convenience :

"2(2) This part shall apply where the place of arbitration is in India.

2(3) This part shall not affect any other law for the time being in force by virtue of which certain disputes may not be submitted to arbitration.

2(4) This part except sub-section (1) of Section 40, Sections 41 and 43 shall apply to every arbitration under any other enactment for the time being in force, as if the arbitration agreement as if that other enactment were an arbitration/ agreement, except insofar as the provisions of this part are inconsistent with that other enactment or with any rules made thereunder.

2(5) Subject the provisions of sub-section (4), and save insofar as is otherwise provided by any law for the time being in force or in any agreement in force between India and any other country or countries, this pare shall apply to all arbitrations and to all proceedings relating thereto."

16. Section 2(5) clearly mentions that this part shall apply to all the arbitrations and proceedings relating thereto, Therefore, on close scrutiny and analysis of Section 2(5), the attention behind enacting the legislation becomes abundantly clear. According to Mr. Nigam, application of the section was not intended to be restricted for the arbitrations which are held in India. According to Mr. Nigam, by Section 2(4), it is clear that this part except sub-section (1) of Section 40, Sections 41 and 43 shall apply to every arbitration under any other enactment for the time being in force. Mr. Nigam also submitted that the Chief Justice of India and the Chief Justice of the High Courts have been vested with the power to appoint an arbitrator u/s 11, particularly when venue of the arbitration is outside India. If the interpretation as given by the respondent is accepted, then the Chief Justice of India and Chief Justices of the High Courts shall have no power to appoint an arbitrator because Section 11 is also within part I of Act.

17. The Arbitration and Conciliation Act, 1996 is based on the United Nations Commissions on International Trade law (UNCITRAL) adopted in 1985, the Model Law on International Commercial Arbitration. The General Assembly of the United Nations are recommended that all countries give due consideration to the said Model Law, in view of the desirability of uniformity of the law of arbitral

procedures and the specific needs of international commercial arbitration practice. The UNCITRAL also adopted in 1980 a set of Conciliation Rules. The General Assembly of the United Nations has recommended the use of these Rules in cases where the disputes arise in the context of international commercial transactions and the parties seek amicable settlement of there disputes by recourse to conciliation. In the Statement of objections and Reasons it is mentioned that an important feature of the said UNCITRAL Model Law and Rules is that they have harmonised concepts on arbitration and conciliation of different legal systems of the world and thus contain provisions which are designed for universal application. The UNCITRAL Model Law and Rules are intended to deal with International Commercial Arbitration and Conciliation, they could, with appropriate modifications, serve as a model for legislation on Domestic Arbitration and Conciliation. The present Act of 1996 is an Act to consolidate and amend the law relating to Domestic Arbitration, International Commercial Arbitration and enforcement of Foreign Arbitral Awards as also to define the law relating to conciliation and for matters connected herewith or incidental thereto.

18. Section ''9'' of the arbitration is a replica of Section ''9'' of the UNCITRAL Model Law on International Commercial Arbitration. Article ''9'' of UNCITRAL Model Law on International Commercial Arbitration reads as under :

"It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant the protection."

19. The intention of the legislators in enacting or incorporating Section ''9'' is clear and explicit, that the party before arbitral proceedings or at any time after making of the award but before enforcement can apply to the Court for interim relief u/s ''9'' which reads as under :

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

(i) for the appointment of a guardian for a minor or a person of unsound mind for the purpose of arbitral proceedings: or

(ii) for an interim measure of protection in respect of any of the following matters, namely :-

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

(b) securing the amount in dispute in the arbitration :

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

(d) interim injunction or the appointment of a receiver :

(e) such other interim measure of protection as may appear to the court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it."

20. Mr. Nigam placed reliance on the judgment of this Court, i.e. Dominant Offset Private Limited Vs. Adamoske Strojirny A.S. ;1997 (2) Arb LR 335 where the learned Single Judge of the Court while dealing with somewhat similar facts and circumstances has categorically come to the conclusion that conjoint reading of the different clauses of Section 2 includes an International Commercial Arbitration:

"A conjoint reading of all the aforementioned provisions clearly indicate ta International hat sub-section (2) of Section 2 is an inclusive definition and that it does not exclude the applicability of part I to those arbitrations which are not being held in India. The aforesaid interpretation gets support from the provisions of subsection (5) of Section 2 which provides that Part I shall apply to all arbitrations and to all proceedings relating thereto which would also, in my considered opinion, include an international commercial arbitration."

21. Mr. Nigam submitted that in view of the authoritative pronouncement, which according to him is the correct interpretation of law, part ''I'' also applies to those arbitrations, where the venue of arbitration is outside India.

22. Mr. Nigam submitted that in any event, the Court has inherent powers to grant interim relief under the Arbitration Act.

23. The Supreme Court in the judgment 1996 I AD 1002 (SC) observed as under :

"Admittedly, the appellant is in possession of the property, In view of his apprehension that there is a threat to his possessions, his only remedy would be whether he will be entitled to the declaration sought for. When the seeks to protect his possession, if he is otherwise entitled according to law, necessarily the Court has to consider whether protection is to be given to him pending the suit. Merely, because there is no dispute as regards the corporeal right to the property, it does not necessarily follow that he is not entitled to avail of the remedy under Order 39, Rules 1 and 2 CPC. Even otherwise also, it is settled law that u/s 151 CPC, the court has got inherent power to protect the rights of the parties pending the suit. Under these circumstances, the view expressed by the High Court that application itself is not maintainable is clearly illegal and erroneous. The application under Order 39, Rules 1 and 2 is maintainable."

24. In Mohd. Ikram Hussain Vs. State of U.P. and Others, their Lordships of the

Supreme Court observed that :

"All procedure is always open to a Court which is not expressly prohibited."

25. In Manohar Lal Chopra Vs. Rai Bahadur Rao Raja Seth Hiralal, , while interpreting Section 151 of the Code of Civil Procedure, their Lordships of the Supreme Court laid down :

"Section 151 itself says that nothing in the Code shall be deemed to limit or otherwise affect the inherent power of the Court to make orders necessary for the ends of justice. In the face of such a clear statement, it is not possible to hold that the provisions of the Code control the inherent power by limiting it or otherwise affecting it. The inherent power has not been conferred upon the Court, it is a power inherent in the Court by virtue of its duty to do justice between the parties before it. Further, when the Code itself recognizes the existence of the inherent power of the Court, there is no question of implying any powers outside the limits of the Code.

26. In Munshi Ram Vs. Banwari Lal, the Supreme Court held as under :

"The power to record such an agreement and the make it a part of the decree, whether by including it in the operative portion or in the schedule to the decree, in our opinion, will follow from the application of the CPC by Section 41 of the Arbitration Act and also Section 141 of the Code."

27. Mr. Nigam placed strong reliance on the celebrated case of Channel Tunnel Group Ltd. & Other Vs. Balfour Beatty Construction Ltd. & Others : (1993) 1 All ER 664. The House of Lords had clearly observed that the courts have power to grant interim injunction in arbitration matters and the domestic courts have the jurisdiction even where the venue of the arbitration is outside, The relevant paras are reproduced as under :

"(1) The Court had power pursuant to its inherent jurisdiction to grant a stay of an action brought before it in breach of an agreed method of resolving disputes by some other method. Furthermore, a stay of the appellants action ought to be ranted because the parties were large commercial enterprises negotiating at arm''s length in the light of long experience of construction contracts which had clearly decided that the two-stage procedure, the despite its potential weaknesses, had balance of practical advantage over the alternative of bringing proceedings in the national courts and because, having agreed to take their com plaints to experts and if necessary arbitrators, they should be required to their chosen tribunal to settle their commercial differences."

"Where the Court made an order staying an action pending a foreign arbitration it had no power u/s 12(6) of the 1950 Act to grant an interim injunction since mone of the powers conferred on the court by that Act applied to arbitrations conducted abroad under a law other than English Law. Accordingly, the chosen curial law of the arbitration being Belgian law the court had no power u/s 12(6) to grant an interim injunction requiring the respondents to continue work on the cooling system pending the decision of the penal or the arbitrators.

(3) The court had power to grant an interlocutory injunction u/s 37 of the Supreme Court Act, 1981 in support of a cause of action which the parties had agreed should be the subject of a foreign arbitration, notwithstanding that proceedings in England had been stayed u/s 1 of the 1975 Act so that the agreed method of adjudication should take place, since the cause of action remained potentially justiciable before the English Court despite the stay. Accordingly, although the commencement of the action was a breach of the arbitration agreement, so that the respondents were not properly before the court, the court had power u/s 37 of the 1981 Act to grant an interlocutory injunction to prevent the respondents stopping work on the cooling system. However, as a matter of discretion the injunction sought by the appellants would not be granted because the injunction sought was the same relief which would be claimed from the panel and the arbitrators and Therefore if the court were to grant the injunction it would largely pre-empt the decision of the panel and arbitrators."

28. It is submitted that the Channel Tunnel (supra) Judgment has been approved in the recent celebrated judgment of the Supreme Court, M/s. Sundaram Finance Ltd. Vs. M/s. NEPC India Ltd., .

29. Mr. Nigam also submitted that the ouster of jurisdiction has to be strictly construed by the civil courts. In Richpal Singh and Others Vs. Dalip, the Supreme Court observed as under :

"Where there is an express bar of the jurisdiction of the Court, an examination the scheme of the particular Act of find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court.

Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in civil courts are prescribed by the said statute or not."

30. In Smt. Bismillah Vs. Janeshwar Prasad and Others, the Supreme Court observed as under :

"It is settled law that the exclusion of the jurisdiction of the civil court is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied. The provisions of a law which seek to oust the jurisdiction of civil court need to be strictly of civil court need to be strictly construed. Section 331 of the Act has been the subject of series of pronouncements of the High Court as to the circumstances and the nature of the suits in which its exclusionary effect operates. Distinction was sought to be drawn between the class of cases where the binding effect of a deed had to be got rid of by an appropriate adjudication on the one hand and the class of cases in which a transaction could be said to be void in law where what the law holds to be void, there is nothing to cancel or set aside on the other. In the former case, it was held, a suit was cognisable by the civil court while in the latter. It was not, it being open to the statutory authority to take note of the legal incidents of what was non est."

31. In Dhulabhai and Others Vs. The State of Madhya Pradesh and Another, the Supreme Court observed that :

"(1) Where the statute gives a finality to the orders of the special tribunals the civil court''s jurisdiction must be held to be excluded if there is adequate remedy to do what the civil courts would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular. Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedures.

(2) Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court.

Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in civil courts are prescribed by the said statute or not.

(3) Challenge to the provision of the particular Act as ultra virus cannot be brought before Tribunals constituted under that Act. Even the High Court cannot go into that question on a revision or reference from the decision of the Tribunals.

(4) When a provision is already declared unconstitutional or the constitutionality of any provision is to be challenged, a suit is open. A writ of certiorari may include a direction for refund if the claim is clearly within the time prescribed by the Limitation Act but it is not a compulsory remedy to replace a suit.

(5) Where the particular Act contains to machinery for refund of tax collected in excess of constitutional limits of illegally collected a suit lies. The questions of the correctness of the assessment apart from its constitutionality are for the decision of the authorities and a civil suit does not lie if the orders of the authorities are declared to be final or there is an express prohibition in the particular Act. In either case the scheme of the particular Act must be examined because it is a relevant enquiry.

(7) An exclusion of the jurisdiction of the civil court is not readily to be inferred unless the conditions above set down apply."

32. In State of Tamil Nadu Vs. Ramalinga Samigal Madam, , Supreme Court held as under :

"Having regard to the principle stated by this Court while enunciating the first proposition in Dhulabhai case it is clear that even where the statute has given finality to the orders of the special tribunal the Civil Court''s jurisdiction can be regarded as having been excluded if there is adequate remedy to do what the Civil Court would normally do in a suit. In other words, even where finality is accorded to the orders passed by the special tribunal one will have to see whether such special tribunal has powers to grant reliefs which Civil Court would normally grant in a suit and if the answer is in the negative it would be difficult to imply or infer exclusion of Civil Court''s jurisdiction."

33. Mr. Nigam also placed reliance on the Supreme Court Judgment reported as ABC Laminarts Private Ltd & Another Vs. A.P. Agencies, Salem (AIR 1989 SC 1279). Their Lordships of the Supreme Court observed that when the legislature want to exclude the jurisdiction they use the words "exclusive", "alone" and "only" and the like and when no such words have been used, then it can be assumed that under provision of the 1996 Act the Courts have jurisdiction to grant interim relief.

34. It is also mentioned that the petitioner only seeks the remedy to protect its claims. The relief as granted by this Court does not in any manner restrain the Arbitral tribunal resolving the disputes between respondent No. 1 and respondent No. 2 from deciding as to which party owes the other party how much money? The arbitral tribunal in resolving the dispute between respondent No. 1 and respondent No. 2 may come to a conclusion that monies are payable by respondent No. 2 to respondent No. 1; it is only in this eventuality that the order of this Court dated 19.12.1997 would have any meaning. It is mentioned that the order of this Court does not preclude a decision on merits by the Arbitral Tribunal at all.

35. Mr. Nigam submitted that provisions for granting interim relief strengthen the arbitration proceedings. Mr. Nigam also submitted that the Courts have to be invested with the powers to grant interim relief where the properties are situated, otherwise in some cases the entire arbitration proceedings shall be rendered nugatory as arbitrators may not be able to pass orders if the properties are not located within the domain of their jurisdiction. Unless the power are vested in the Courts, where the properties are situated, in some cases the award may remain only paper awards because before the award is enforced the properties may be frittered away.

36. Mr. Ravinder Sethi and Mr. Advani, learned counsel appearing for respondent No. 1 submitted that the petitioner is an Australian company and respondent No. 1 is a company situated in the Czech Republic and Swiss laws are made applicable. They further submitted that Courts in India should not grant any interim relief. The petitioner, if aggrieved, can take recourse to Swiss laws which

have been made applicable in the instant case.

37. Mr. Ravinder Sethi and Mr. Advani also submitted that the petitioner is not entitled to any injunction or interim relief. The petitioner without serving a copy of the petition and injunction application to respondent No. 1 got the injunction from the Court. The petitioner only served respondent No. 2, Indian Oil Corporation. In this view of the matter, the petitioner because of its conduct is not entitled to any interim relief and the interim order granted is liable to be vacated. Mr. Advani submitted that respondent No. 1 is a solvent party and just because of the reduction in profits in one or two financial years should not lead to the conclusion that the respondent No. 1 shall not be in a position to pay the petitioner in, case the award goes in its favour.

38. Mr. Sethi and Mr. Advani further submitted that there is no merit in the submission that if injunction is not continued during the interregnum period, then the award would be rendered only a paper award because the petitioner will not be able to realise any amount from respondent No. 1.

39. Mr. Sethi and Mr. Advani also submitted that arbitration proceedings cannot go on until the proceedings in this Court are adjudicated. Learned counsel for respondent No. 1 relied on the Judgment of J. B. Goel. J. of this Court in Punj Lloyd Ltd. Vs. Skoda export Co. Ltd. & Ors. (OMP No. 92/96 decided on 19.5.1998) to strengthen their submission that there is no provision for the grant of any interim relief according to the scheme of the Act.

40. In reply it is submitted by respondent No. 1 that the dispute between the petitioner and the respondents are pending adjudication before the International Chambers of Commerce on a unilateral reference made by the petitioner in terms of the contract. The claim respondent against the petitioner is also pending adjudication before the Arbitral Tribunal of the ICC. It is submitted that no interim injunction can be granted by this Court till such time as there is no such adjudication or settlement of the claims of the parties.

41. It is mentioned in the reply that a pre-emptory order pending the disposal of a claim should be granted only if it is established on record by sufficient evidence that the defendant (respondent in the instant case) with the intention to defeat the decree of the plaintiffs/petitioner may dispose of its assets/properties or leave the country (India) or initiate any such actions as may give a reasonable apprehension that the plaintiff (petitioner herein) will be prejudiced if the pre-emptory orders are not granted.

42. Respondent No. 1 has mentioned in the reply that the award to be made by the Arbitral Tribunal will be executed as per the applicable laws i.e. the United Nations Conventions of the Recognition & Enforcement of Foreign Tribunal Awards (the New York Convention). Under the said convention, the award would be enforced as per the orders of the Courts in Switzerland which are seized of the matter. The award would be enforced against the assets of the petitioner in Australia and against the assets of the answering respondent in the Czech

Republic depending on the findings of the Tribunal. For the said reason it is submitted that the Courts in India are interdicted from exercising jurisdiction in the matter and for the further reason that both - the petitioner and respondent No. 1 are both companies and registered outside India.

43. It is submitted that there is no cause for the exercise of jurisdiction by this Court under the Arbitration and Conciliation Act, 1996 for otherwise. The jurisdiction for adjudication of all disputes between the parties hereto by tacit agreement is vested in a specified Tribunal which has the authority to decide all disputes between the parties and to enforce the award made by it. Thus the Tribunal is seized of the matter and is in process of hearing the said reference.

44. The agreement entered into between the parties envisages that all disputes between the parties shall be resolved in accordance with teh procedures prescribed by the I.C.C. in accordance with the Swiss Laws. The parties have elected to preclude the jurisdiction of all other forums. Accordingly, even this Court does not Therefore, have the jurisdiction to entertain this petition. The petitioner is estopped by conduct from invoking the jurisdiction of this Court.

45. It is mentioned that the petitioner and respondent No. 1 are the foreign companies who are registered in their respective countries of origin, having assets outside the territorial boundaries of India and outside the jurisdiction of this Court. The petitioner who has elected to seek redressal of their disputes/ claims outside the jurisdiction of this Court are entitled to seek all reliefs- interim or otherwise from the jurisdiction which they have invoked. The said tribunal has jurisdiction to entertain any prayer for interim relief - which the petitioner has not invoked.

46. The petitioner has invoked a special jurisdiction for deciding its claim, i.e., the I.C.C. The said claims are pending adjudication. The claims are essentially by way of damages. They are to be decided in accordance with the applicable laws - i.e., the rules of the ICC and the New York Convention and the Swiss Laws. The Arbitral Tribunal which is seized of the matter is yet to decide the disputes. The exercise of jurisdiction of any other court/tribunal should be made only if there is an adjudicatory order passed by the tribunal seized of the matter. The claims and counter claims have already been filed. There is no adjudicatory order of the Arbitral Tribunal. It is submitted that this Court does not have the jurisdiction to entertain this petition and in any event this Court should not entertain the present application as being an attempt to defeat the jurisdiction of a competent Tribunal. The tribunal cannot precluded from exercising its jurisdiction.

47. It is also mentioned in the reply that this Court while dealing with a similar claim against this respondent has declined to grant any similar interim or other relief to another sub contractor of the respondent i.e., Punj Lloyds Ltd. Vs. Skoda export Ltd. decided in AA No. 92 of 1996 by the order dated 19.5.1998.

48. The claim for injunction against respondent No. 2 is not based on any cogent material. It is based on bald allegations and apprehensions which are not

supported by material on record.

49. Respondent No. 1 has not acted in any manner to defeat the claims of the petitioner either in India or abroad.

50. It is mentioned in the reply that the petitioner has not supplied the allied supervisory equipments to SCADA. In terms of the contract and the documents which form part of the contract, the petitioner is at the most entitled to interest and/or damages in case of any breach in the Contract. The petitioner being in the breach of its obligations under the Contract are not entitled to any reliefs in equity and/or otherwise. The petitioner has caused serious prejudice to respondent No. 1 and members of the Consortium by non-supply of the equipment. It is relevant to state that in a tripartite meeting held in Rome between the petitioner, Indian Oil, Novue Pigeon and Skoda export, the petitioner had confirmed that the equipment was ready and would be dispatched to the Indian Oil with due expedition. The petitioner after holding out the said promise has resoled form that promise.

51. It is also mentioned in the preliminary objection that this petition is bad for non-joinder of the necessary parties. It is alleged that the petitioner has deliberately not joined all members of the Consortium as parties to these proceedings being fully aware that any injunction obtained from this Court will adversely affect the rights of the other members of the Consortium. It is mentioned that the petitioner who has in earlier proceedings objected to the invocation of the jurisdiction of the Court cannot now itself invoke the jurisdiction of this Court. The petitioner cannot be permitted to approbate and reprobate.

52. It is mentioned that in order to fulfill the obligations cast upon the respondent in terms of the agreements between the petitioner and the respondent the respondent is required to perform its tasks in several countries of the world. The cable to be laid is manufactured in Australia, the SCADA equipment is manufactured in Italy and the pipeline is being laid in India. It is thus entirely appropriate that the ICC Rules agreed to be applied for resolution of dispute be maintained. The petitioner and respondent No. 1 are both bodies corporate incorporated in countries other than India. Each of the countries, namely, Australia, Czech Republic, India and Switzerland are parties to the United Nations Conventions of the Recognition of relevant Arbitration Agreements and Arbitral Awards and the Enforcement of Foreign Awards.

53. Respondent No. 1 submitted that the contention of the petitioner that ICC Award rendered in Switzerland in pursuance to Swiss Law would be a "paper award unenforceable and of no value" is entirely misconceived. It is submitted that the Ordinance of 1996 provides for enforceability of the same and there is nothing inconsistent in this behalf. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards has been in force in India since 1960, in Australia since 1975 and is also enforceable in the Czech Republic.

54. In this context respondent No. 1 submitted that more than the 90% of ICC

Awards are enforced; and that Switzerland Along with France are the most common Seats of Arbitration. In its issue of the ICC Bulletin (Mal. 1997 p. 7) it is mentioned that in 1995, out of 427 new requests for arbitration filed with the ICC, India was the seat of arbitration in 3 cases (pursuant to the parties'' agreement); Switzerland in 91 cases (88 pursuant to parties agreement and 3 determined by the ICC Court) and France in 111 cases (80 pursuant to the parties agreement and 31 determined by the ICC Court).

55. Even otherwise in the absence of any assets of the petitioner in India and/or in Switzerland it is unlikely that respondent No. 1 would seek to enforce the Award in India or in Switzerland, Accordingly the absence of assets of the petitioner in Switzerland is totally irrelevant.

56. Article 5 of the Formal Contract Agreement being a valid and binding arbitration clause in terms of Section 45 of the Ordinance 1996, the Court shall and is expected to refer the parties to arbitration and facilitate enforcement of the principal, provisions agreed between the contracting parties.

57. It is mentioned that because of the interim injunction by this Court, the Tribunal is precluded from passing any orders on the restitution of the sums encased by the Indian Oil under the bank Guarantees, and Indian Oil is not obliged to pay any sums to the Consortium led by Skoda exports.

58. It is mentioned that the petitioner has obtained ex parte interim order without giving any prior notice to respondent No. 1 but by serving a copy in advance of the application only to respondent No. 2, the Indian Oil Corporation. The Indian Oil Corporation on the basis of the ex parte orders passed by this court in the present petition has been taking pleas before a separate and independent arbitral tribunal (constituted to arbitrate on the disputes under the arbitration clause in the principal contract between Skoda export and Indian Oil) that the said Tribunal cannot pass any orders on the restitution of any sums to the Consortium led by Skoda exports till the present injunction remains in force. It is submitted that the present injunction/stay order is being used in other forums to cause serious prejudice to this respondent No. 1.

59. The counsel for respondent No. 1 has strongly relied on the judgment of this Court on Kitechnology NV & Another Vs. Unicor GmbH Rahn Plastmaschinen & Another; reported in 1999 (2) AD (DELHI) 537 =1999 (1) Arb. LR 452. In this judgment, J. B. Goel, J. has taken the view that u/s 9 of the Arbitration and Conciliation Act, 1996 where both parties are foreign groups and both parties are governed by German Law place of arbitration is not in India, then provisions of part I of the Act are not applicable.

60. I have considered the rival contentions advanced by the learned counsel for the parties. I have also considered the cases which have cited at the bar. A careful reading and scrutiny of the provisions of 1996 Act leads to the clear conclusion that sub-section (2) of Section 2 is an inclusive definition and it does not exclude the applicability of Part I to this arbitration which is not being held in

India. The other clauses of Section 2 clarify the position beyond any doubt that this court in an appropriate case can grant interim relief or interim injunction.

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

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

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

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

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

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

67. The question which now arises for consideration is whether the petitioner is

entitled to get the relief on the strength of the facts and circumstances of this case? In my view, though the Court is vested with the powers to grant interim relief, but the Court''s discretion must be exercised sparingly and only in appropriate cases. The Courts should be extremely cautious in granting interim relief in cases of this nature. The Court''s discretion ought to be exercised in those exceptional cases when there is adequate material on record, leading to a definite conclusion that the respondent is likely to render the entire arbitration proceedings infructuous, by frittering away the properties or funds either before or during the pendency of arbitration proceedings or even during the interregnum period from the date of award and its execution. In those cases, the Courts would be justified in granting interim relief.

68. In the instant case respondent No. 1 is a solvent company and it has not defaulted in honouring its financial commitments and obligations. In Punj Lloyds Ltd. Vs. Skoda export Ltd. (decided in A.A. No. 92/96 on 19.5.1998) this court declined to grant ''injunction against the respondent company in almost a similar claim on the ground that the assets of the respondent company are worth US $1700 million.

69. In the instant case respondent No. 1 complained that the petitioner has obtained an injunction without serving a copy of the petition and injunction application on respondent No. 1. The petitioner only served respondent No. 2, Indian Oil Corporation. The interests of the petitioner and respondent No. 2 are identical as far as relief in this petition is concerned. This aspect of the matter should be kept in view while deciding the petitioner''s application for interim relief.

70. The petitioner has invoked the arbitration clause. The respective claims of the parties are pending adjudication. Arbitral tribunal is seized of the matter and is yet to decide the disputes in accordance with Swiss Laws. The claim for injunction against respondent No. 2 is not based on any cogent material. The apprehensions of the petitioner are not supported by adequate material on record. The petitioner has not been able to successfully establish that respondent No. 1 is trying to defeat the claims of the petitioner. The petitioner''s apprehension that an ICC award rendered in Switzerland would be a paper award, unenforceable and of no value is misconceived. The Ordinance of 1996 provides for enforceability of the same. The New York Convention of Recognition and Enforcement of Foreign Arbitral Awards has been in force in India since 1960, in Australia since 1975 and is also enforceable in Czech Republic. The experience reveals that majority of the ICC awards are enforced.

71. On consideration of the totality of facts and circumstances, the petitioner has not made out a strong case for the grant of interim relief. The balance of convenience is not in favor of the petitioner. No irreparable injury is likely to be caused to the petitioner in case the injunction granted by this Court is vacated. Accordingly, the ex-parte ad interim injunction granted by this Court on December 19,1997 is hereby vacated.

72. This O.M.P. is accordingly disposed of. In the facts and circumstances of this case, the parties are directed to bear their own costs.

