

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
ORIGINAL SIDE
(Commercial Division)

Present:

THE HON'BLE JUSTICE HARISH TANDON
&
THE HON'BLE JUSTICE PRASENJIT BISWAS

APO 8 of 2022
with
AP 267 of 2021

Balasore Alloys Limited
Vs.
Medima LLC

Appearance:

For the Appellant : **Mr. Dhruba Ghosh, Sr. Adv.**
Mr. Rishad Medora, Adv.
Mr. Meghajit Mukherjee, Adv.

For the Respondent : **Mr. S. N. Mookherjee, Sr. Adv.**
Mr. Shounak Mitra, Adv.
Ms. Nandini Khaitan, Adv.
Ms. Shreya Singh, Adv.
Mr. Vishal Sinha, Adv.

Judgment On : **28.04.2023**

Harish Tandon, J.:

The appellant is consistently raising an issue at the different stages of the proceedings which was raised at the time of granting a leave under Clause 12 of

the Letters Patent whether the Clause relating to governing law contained in the agreement shall *ipso facto* exclude the powers of the Court to pass interim reliefs under Section 9 of the Arbitration and Conciliation Act as it is required to be construed as 'an agreement to contrary' appearing in proviso to Section 2 (2) of the Arbitration and Conciliation Act, 1996.

There is no dispute to the fact that the appellant has suffered an award dated 29th March, 2021 for an amount of USD 30,35,249.87 (equivalent to INR 22,08,75,133) passed by the ICC in a proceeding governed by the British Law having a seat/place of arbitration in London, UK. Such being an undisputed fact, a plea was taken when a leave under Clause 12 of the Letters Patent was sought by the respondent that Section 9 of the Arbitration and Conciliation Act contained in Part I has its applicability to a domestic award and not the foreign awards which is governed by Part II thereof. The Single Bench while granting a leave of Clause 12 of the Letters Patent held that an application for interim protection under Section 9 of the Act in respect of London Seated Arbitration is maintainable. The said order was assailed before the Division Bench in AP 267 of 2021 which was disposed of with the categorical finding that the nature of the order does not come within the ambit of Section 37 of the Act and therefore, the aforesaid question cannot be gone into at this stage when the Single Bench decided to hear out the application on the issue relating to grant of interim measures. However, the liberty was given to the appellant if ultimately aggrieved by a subsequent order passed by the Court while granting the interim reliefs to take all grounds including the ground relating to maintainability of the said proceedings.

Pursuant to the aforesaid leave having granted, the point which was decided at the time of granting leave under Clause 12 of the Letters Patent had further been taken with suitable adjustment which suits the appellant in upholding its contention on the maintainability of a proceeding under Section 9 of the said Act.

Mr. Ghosh, the learned senior Advocate appearing for the appellant submits that the foreign awards are not automatically enforceable in the Indian Courts except when the condition for such enforcements provided in Sections 48 and 49 of the said Act are fulfilled. According to Mr. Ghosh, an apparent distinction can be seen from the legislative intent in segregating the domestic award and the foreign award in different parts indicating that they are governed by the provisions contained in the respective parts in order to avoid overlapping of the provisions contained therein. To buttress the aforesaid submission, it is contended that the provisions contained in Part I of the Act, the applicability thereof which is restricted to the domestic award, manifestly intended to treat such award as decree and enforceable before the Court in accordance with the provisions of the Civil Procedure Code. On the other hand, the foreign award has to pass the muster of conditions provided in Section 48 of the said Act which clearly distinct the domestic award from the foreign award and therefore, its enforceability is not automatic. Taking a clue from the aforesaid submission, Mr. Ghosh relies upon the provisions contained in Section 9 of the said Act containing a provision relating to interim measures or passing interim reliefs before or during the arbitral proceedings or any time after making the award but before it is enforced in accordance with the Section 36. Taking aid of the

language employed therein, Mr. Ghosh argued that there is no reference of Section 48 appearing in Part II of the said Act and therefore, it ruled out the applicability of Section 9 of the said Act. According to Mr. Ghosh, the plain meaning of the language employed in the Section has to be construed in order to ascertain the manifest intention of the legislation and no word can be imputed nor added therein. It is thus submitted that the reference to Section 36 in Section 9 of the Act is relatable to a domestic award and not the foreign award for the sound reasons that its enforceability is not automatic but brindled with the conditions provided in Section 48 of the said Act.

According to Mr. Ghosh, it leads to an inescapable conclusion that the moment the foreign award is passed, Section 9 has no manner of applicability. According to him, the proviso inserted to Section 2 (2) of the Act by amending provisions of 2009 has to be construed in the above perspective to mean that the aforesaid provision i.e., Section 9, is only applicable before or during the arbitral proceedings and cannot be extended to a post foreign award situation. Mr. Ghosh is very much vocal in his submission that all the judgments on the above aspect has to be understood in the perspective of the fact that in those cases the foreign award holder filed an application under Section 47 to 49 of the Act and then applied under Section 9 thereof and therefore, the law laid down in the judgments where it is held otherwise cannot be applied to the facts of the instant case for the admitted position that till date the respondent has not taken any steps for enforcement of the foreign award. Mr. Ghosh thus submits that the language used in Section 9 and proviso to Section 2 (2) of the Act is required to be harmonized in such manner that the legislative intent is not frustrated and the

only possible intention which can be gathered in this regard is that the applicability of Section 9 of the Act in relation to a foreign award is restricted to pre or during the arbitral proceeding and not after the award is passed.

Mr. Ghosh have relied upon 246th report of the Law Commission suggesting an amendment to be brought in this regard after noticing the judgment rendered in ***Bharat Aluminium Co. vs. Kaiser Aluminium Technical Services Inc., reported in (2012) 9 SCC 552*** which did not agree with the earlier judgment of the Supreme Court rendered in ***Bhatia International vs. Bulk Trading S.A. & Anr., reported in (2002) 4 SCC 105***, wherein the Law Commission noticed an apparent distinction between Part I and Part II and the applicability of Section 9 of the Act. According to Mr. Ghosh, the seat being the centre of gravity of an arbitral proceeding, even if the foreign parties arbitrate in India by virtue of Section 2(7) of the Act, the award passed therein would be regarded as domestic award. The Law Commission further noticed the ***BALCO (supra)*** judgment and considered to be in a right direction but drastically reduced the judicial intervention in foreign arbitration and therefore, the recommendation was made to bring the suitable amendments in Section 2(2) of the said Act, to avoid any dissipation of the assets by an unscrupulous party. The recommendation was made that a proviso to be inserted subject to the express agreement to the contrary so that the provision of Sections 9, 27, 37 (1) (a) and 37 (3) shall apply to an international commercial arbitration even if the seat of the arbitration is outside India. Mr. Ghosh vociferously submits that while accepting the recommendation of the Law Commission, the legislature have suitably amended the language while incorporating proviso to Section 2 (2) of the Act replacing the

word 'seat' with the 'place' and removing the word 'only' as suggested. Mr. Ghosh further argues that ICC Arbitration Rules contained an exhaustive provision in Article 28 thereof where it is imperative on the parties to notify the secretariat of the arbitral tribunal in the event any orders are passed by the competent judicial authority for interim or conservatory measures which implies that the applicability of the aforesaid proviso is restricted to pre and during the arbitral proceeding and not post award situation.

On the other hand, the respondent arduously submits that the contention of Mr. Ghosh is not fortified by the several decisions of the Supreme Court as well as the High Court and the distinction sought to be made is untenable. Mr. S. N. Mookherjee, the learned senior Advocate appearing for the respondent submits that the Apex Court in ***Bhatia International (supra)*** interpreted two provisions contained in Section 2 appearing in Part I of the said Act which are not restricted to an award where the place of arbitration is in India but have its applicability to an award passed in international commercial arbitration. The aforesaid judgment rendered in Bhatia came up for consideration before a Five-Judge Bench of the Supreme Court in ***BALCO (supra)*** wherein it is held that the language employed in Section 9 of the Act, more particularly, "in accordance with Section 36" necessarily refers to an enforcement of domestic award only as the said Section 36 is relatable to an enforceability of the arbitration taken place in India. Section 9 of the Act is restricted where an arbitration has taken place in India and therefore, the law enunciated in Bhatia International is no longer good law. It is further submitted the matter was referred to a Law Commission in view of the decision rendered in ***BALCO (supra)*** and the Law Commission in its 246th report

suggested a suitable amendment to be brought in Section 2 (2) appearing in Part I of the Act, so that the foreign award holder may not be deprived to obtain an interim relief under Section 9 of the Act. Based upon the aforesaid recommendation, the amendments have been carried out by inserting a proviso to Section 2 (2) of the Act which makes the provision contained in Section 9 of the Act applicable even in respect of a foreign award. According to Mr. Mukherjee several judgments have been rendered after incorporation of proviso to Section 2 (2) on the question as to whether the interim relief can be granted by the Indian Courts on a foreign seated award and a consistent view as on the date can be visualized that the Court has upheld the powers of the Indian Courts to pass an interim relief even in this regard. Mr. Mookherjee relies upon a judgment of the Supreme Court in **PASL Wind Solutions Pvt. Ltd. vs. GE Power Conversion India Pvt. Ltd., reported in (2021) SCC Online SC 331**, on the proposition that even if the parties to the contract can choose a forum for arbitration outside India and in this regard, the award so passed can be said to be a foreign award and enforceable under Part II of the said Act. It is submitted that the Apex Court in the said report held that the Courts in India may pass an interim order invoking proviso to Section 2 (2) of the Act even if, in respect of a foreign award. Mr. Mookherjee further relies upon a Single Bench of the Delhi High Court delivered in case of **Raffles Design International India Pvt. Ltd. & Anr. Vs. Educomp Professional Education Ltd. & Ors., reported in (2016) SCC Online Del 5521** wherein a point arose as to whether SIAS Rules, 2016 excludes the applicability of Section 9 of the Act after amendment having brought by inserting a proviso in Section 2 (2) of the Act and it is held that there is no exclusion in this regard and

therefore, Indian Courts have jurisdiction to consider the prayer for interim reliefs independently. According to Mr. Mookherjee, an identical issue arose before the Single Bench of the Bombay High Court in case of ***Aircon Beibars FZE vs. Heligo Charters Pvt. Ltd., reported in (2017) SCC Online Bom 631*** and it has been held that the proviso to Section 2 (2) of the Act subsequently inserted making applicability of Section 9 as a transitory provision pending process contemplated under Section 48 of the said Act. Mr. Mookherjee vociferously submitted that in a subsequent judgment between the aforesaid parties the Division Bench of the Bombay High Court in case of ***Heligo Charters Pvt. Ltd. vs. Aircon Feibars FZE, reported in (2018) SCC Online Bom 1388*** answers the issue raised by Mr. Ghosh in unequivocal term that Section 9 cannot be brindled nor hindered unless the award is put to execution under Section 48 of the said Act. By contending that by virtue of proviso to Section 2 (2) of the Act, Section 9 is made applicable to a foreign award as well but subject to the “agreements to the contrary” which has been interpreted by a Single Bench of the Delhi High Court in ***Big Charter Pvt. Ltd. vs. Ezen Aviation Pty. Ltd. & Ors., reported in (2020) SCC Del 1713*** to mean such agreement which excludes the applicability of the provisions contained in Section 9 and not otherwise. Mr. Mookherjee further submits that while considering the two provisions, the Courts must adopt the Rule of Construction in harmonizing the two apparently inconsistent provisions so that the same would be rendered workable and relies upon a judgment of the Apex Court in case of ***Calcutta Gas Company (Proprietary) Ltd. vs. State of West Bengal & Ors., reported in AIR 1962 SC 1044***. Mr. Mookherjee further submits that there is no fetter on the part of the Court to

interpret the provisions of the statute in such a manner to make it workable than to render it redundant or *otiose* and relied upon the judgment of the Apex Court in case of ***High Court of Gujarat & Anr. Vs. Gujarat Kishan Mazdoor Panchayat & Ors., reported in (2003) 4 SCC 712.*** Mr. Mookherjee arduously submits that if there is a repugnancy in the two provisions, the Court upheld the last word i.e., the subsequent provision and placed relies upon a judgment of the Privy Council in case of ***The King vs. Dominion Engineering Co. Ltd., reported in AIR 1947 PC 94.*** Mr. Mookherjee thus submits that the consistent view expressed by the different High Courts as well as Supreme Court leaves no ambiguity that Section 9 has its applicability in relation to a foreign award and does not depend upon any steps to be taken under Section 48 of the Act. To conclude, Mr. Mookherjee, the learned Sr. Advocate submits that any other interpretation assigned to a proviso to Section 2 (2) of the Act would violate the legislative intent behind incorporation thereof.

The moot question involved in the instant appeal is whether Section 9 of the Arbitration and Conciliation Act is applicable by virtue of proviso to Section 2 (2) of the Arbitration and Conciliation Act in respect of a foreign award even before any steps are taken under Section 48 of the said Act.

Before we proceed to decide the aforesaid question it would be profitable and relevant to quote the provisions contained in Section 2(2) and 9 of the Act which runs thus:

“(2) This Part shall apply where the place of arbitration is in India:

Provided that subject to an agreement to the contrary, the provisions of sections 9, 27 and clause (a) of sub-section (1) and sub-section (3) of section 37 shall also apply to international commercial arbitration, even if the place of arbitration is outside India, and an arbitral award made or to be made in such place is enforceable and recognized under the provisions of Part II of this Act.

* * * * *

9. Interim measures, etc., by Court.- *[(1)] 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 purposes 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 authorizing for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorizing 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.

(2) Where, before the commencement of the arbitral proceedings, a Court passes an order for any interim measure of protection under sub-section (1), the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the Court may determine.

(3) Once the arbitral tribunal has been constituted, the Court shall not entertain an application under sub-section (1), unless the Court finds that circumstances exist which may not render the remedy provided under section 17 efficacious.”

The brief genesis to an amendment having brought in Section 2(2) of the Act is required to be recapitulated before we proceed to decide the points as indicated above. In ***Bhatia International (supra)***, an application under Section 9 of the Act was taken out in relation to international commercial arbitration seeking for an interim relief wherein a plea was taken that Part I which contained in Section 9 would not apply to an arbitration where the place of arbitration is outside India. The Apex Court while considering the unamended provisions contained in Section 2 (2) of the Act held that language employed therein does not suggest that Part I shall not apply to an arbitration taken place outside the

country. It was held that since no negative word has been used in the provision contained in Part I thereof, it cannot be implied that its applicability has been excluded in relation to an international commercial arbitration in the following:

“21. Now let us look at sub-sections (2), (3), (4) and (5) of Section 2. Sub-section (2) of Section 2 provides that Part I would apply where the place of arbitration is in India. To be immediately noted, that it is not providing that Part I shall not apply where the place of arbitration is not in India. It is also not providing that Part I will ‘only’ apply where the place of arbitration is in India (emphasis supplied). Thus the legislature has not provided that Part I is not to apply to arbitrations which take place outside India. The use of the language is significant and important. The legislature is emphasizing that the provisions of Part I would apply to arbitrations which take place in India, but not providing that the provisions of Part I will not apply to arbitrations which take place out of India. The wording of sub-section (2) of Section 2 suggests that the intention of the legislature was to make provisions of Part I compulsorily applicable to an arbitration, including an international commercial arbitration, which takes place in India. Parties cannot, by agreement, override or exclude the non-derogable provisions of Part I in such arbitrations. By omitting to provide that Part I will not apply to international commercial arbitrations which take place outside India the effect would be that part I would also apply to International commercial arbitrations held out of India. But by not specifically providing that the provisions of Part I apply to international commercial arbitrations held out of India, the intention of the legislature appears to be to ally (sic allow) parties to provide by agreement that Part I or any provisions therein will

not apply. Thus in respect of arbitrations which take place outside India even the non-derogable provisions of Part I can be excluded. Such an agreement may be express or implied.”

Ultimately, it is held:

“35. Lastly, it must be stated that the said Act does not appear to be a well-drafted legislation. Therefore the High Courts of Orissa, Bombay, Madras, Delhi and Calcutta cannot be faulted for interpreting it in the manner indicated above. However, in our view a proper and conjoint reading of all the provisions indicates that Part I is to apply also to international commercial arbitrations which take place out of India, unless the parties by agreement, express or implied, exclude it or any of its provisions. Such an interpretation does not lead to any conflict between any of the provisions of the said Act. On this interpretation there are no lacunae in the said Act. This interpretation also does not leave a party remediless. Thus such an interpretation has to be preferred to one adopted by the High Courts of Orissa, Bombay, Madras, Delhi and Calcutta. It will therefore have to be held that the contrary view taken by these High Courts is not good law.”

The Constitution Bench in ***Bharat Aluminium Company (supra)*** did not accept the proposition of law laid down in ***Bhatia International (supra)***. An argument was advanced that Section 9 appearing in Part I is a standalone provisions unhindered by the limitations of Section 2(2) of the Act as it does not impinge upon the arbitral process which would still be continued outside the country but its applicability to an interim relief necessitated by emergent situation

with avowed object to preservation of assets and/or dissipation of the assets. The Constitution Bench did not accept the aforesaid contention on harmonizing the language employed in Section 2 (2) and Section 9 of the Act and held that the applicability of Section 9 is restricted to an arbitral proceeding held in the country. The Apex Court further highlighted that though Section 9 can be resorted to before or during the arbitral proceeding but the further contemplation that before it is enforced in accordance with Section 36 gives clear manifestation of its applicability to a domestic award or an arbitral proceeding held within the country in the following:

“157. Schematically, Section 9 is placed in Part I of the Arbitration Act, 1996. Therefore, it cannot be granted a special status. We have already held earlier that Part I of the Arbitration Act, 1996 does not apply to arbitrations held outside India. We may also notice that Part II of the Arbitration Act, 1996, on the other hand, does not contain a provision similar to Section 9. Thus, on a logical and schematic construction of the Arbitration Act, 1996, the Indian courts do not have the power to grant interim measures when the seat of arbitration outside India. A bare perusal of Section 9 would clearly show that it relates to interim measures 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. Section 36 necessarily refers to enforcement of domestic awards only. Therefore, the arbitral proceedings prior to the award contemplated under Section 36 can only relate to arbitrations which take place in India. We, therefore, do not agree with the observations made in Bhatia International in para 28 that ‘The words ‘in accordance with Section 36’ can only go

with the words ‘after the making of the arbitral award’.” It is clear that the words “in accordance with Section 36” can have no reference to an application made “before” or “during the arbitral proceedings”. The text of Section 9 does not support such an interpretation. The relevant part of the provisions is as under :

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

A bare look at the aforesaid provision would indicate that there is no breakup of the sentence in between the two commas at the beginning and end of the sentence. Therefore, the sentence cannot be broken into three parts as it is done in para 28 of Bhatia International. The arbitral proceedings mentioned in the aforesaid provision cannot relate to arbitration which takes place outside India.

158. Therefore, we have no hesitation in declaring that the provision contained in Section 9 is limited in its application to arbitrations which take place in India. Extending the applicability of Section 9 to arbitrations which take place outside India would be to do violence to the policy of the territoriality declared in Section 2 (2) of the Arbitration Act, 1996.

195. With utmost respect, we are unable to agree with the conclusions recorded in the judgments of this Court in Bhatia International and Venture Global Engg. In our opinion, the provision contained in Section 2(2) of the Arbitration Act, 1996 is not in conflict with any of the provisions either in Part I or in Part II of the Arbitration Act, 1996. In a foreign-seated international commercial arbitration, no application for interim relief

would be maintainable under Section 9 or any other provision, as applicability of Part I of the Arbitration Act, 1996 is limited to all arbitrations which take place in India. Similarly, no suit for interim injunction simplicitor would be maintainable in India, on the basis of an international commercial arbitration with a seat outside India.”

The Constitution Bench was not quite oblivious of the fact that **Bhatia International (supra)** judgment has been operating in a field for a quite long time and various actions and/or decisions have taken place thereupon clearly indicated that the judgment rendered in **BALCO (supra)** would apply prospectively i.e., from the date of rendering the judgment and would be applicable to all arbitration agreements executed thereafter in these words:

“197. The judgment in Bhatia International was rendered by this Court on 13-3-2002. Since then, the aforesaid judgment has been followed by all the High Courts as well as by this Court on numerous occasions. In fact, the judgment in Venture Global Engg. has been rendered on 10-1-2008 in terms of the ratio of the decision in Bhatia International. Thus, in order to do complete justice, we hear by order, that the law now declared by this Court shall apply prospectively, to all the arbitration agreements executed hereafter.”

Because of the aforesaid judgments rendered in **Bhatia and BALCO**, the Law Commission in its 246th report though found that the decision in **BALCO** is in right direction and shall put a reasonable restriction on judicial interventions in relation to a foreign arbitration yet there are two problematic areas which needs to

be addressed which was reflected in Para 41 of the said report reproduced as under:

“41. While the decision in BALCO is a step in the right direction and would drastically reduce judicial intervention in foreign arbitrations, the Commission feels that there are still a few areas that are likely to be problematic.

(i) Where the assets of a party located in India, and there is a likelihood that that party will dissipate its assets in the near future, the other party will lack an efficacious remedy if the seat of the arbitration is abroad. The latter party will have two possible remedies, but neither will be efficacious. First, the latter party can obtain an interim order from a foreign Court or the arbitral tribunal itself and file a civil suit to enforce the right created by the interim order. The interim order would not be enforceable directly by filing an execution petition as it would not qualify as a “judgment” or “decree” for the purposes of sections 13 and 44A of the Code of Civil Procedure (which provide a mechanism for enforcing foreign judgments). Secondly, in the event that the former party does not adhere to the terms of the foreign Order, the latter party can initiate proceedings for contempt in the foreign Court and enforce the judgment of the foreign Court under Sections 13 and 44A of the Code of Civil Procedure. Neither of these remedies is likely to provide a practical remedy to the party seeking to enforce the interim relief obtained by it.

That being the case, it is a distinct possibility that a foreign party would obtain an arbitral award in its favour only to realize that the entity

against which it has to enforce the award has been stripped of its assets and has been converted into a shell company.

(ii) While the decision in BALCO was made prospective to ensure that hotly negotiated bargains are not overturned overnight, it results in a situation where Courts, despite knowing that the decision in Bhatia is no longer good law, are forced to apply it whenever they are faced with a case arising from an arbitration executed pre-BALCO.”

The Law Commission thus made following recommendations:

“(vi) In sub-section (2), add the word “only” after the words “shall apply” and delete the word “place” and insert the word “seat” in its place.

[NOTE: This amendment ensures that an Indian Court can only exercise jurisdiction under Part I where the seat of the arbitration is in India. To this extent, it over-rules Bhatia International v. Bulk Trading S.A. and Anr. (2002) 4 SCC 105, and re-enforces the “seat centricity” principle of Bharat Aluminium Company and Ors. etc. v. Kaiser Aluminium Technical Service, Inc. and Ors. etc., (2012) 9 SCC 552]

Also insert the following proviso “Provided that, subject to an express agreement to the contrary, the provisions of Sections 9, 27, 37 (1) (a) and 37 (3) shall also apply to international commercial arbitration even if the seat of arbitration is outside India, if an award made, or that which might be made, in such place would be enforceable and recognized under Part II of this Act.”

[NOTE: this proviso ensures that an Indian Court can exercise jurisdiction with respect to these provisions even where the seat of the arbitration is outside India.]”

On the basis of 246th report of the Law Commission and the recommendations contained therein the Arbitration and Conciliation (Amendment) Bill, 2015 was introduced by a Parliament seeking to amend the parent Act. we are basically concerned with the recommendation made in relation to Section 2 (2) of the Act where a proviso was recommended to be inserted making the provisions contained in Sections 9, 27 and Clause (a) of sub-Section (1) and sub-Section 3 of Section 37 of the Act applicable to international commercial arbitration, even if the place of the arbitration is outside India subject to an agreement to the contrary. It appears that the recommendation of the Law Commission was not accepted *in toto* as we find that the exclusion was intended subject to an express agreement to the contrary and thus, the word “express” has been excluded. What could be seen therefrom that though ***BALCO (supra)*** held that Part I which contained Section 9 has no manner of applicability to an international commercial arbitration but taking into account the various factors, such recommendation was made so that the position of law as held in Bhatia may be restored to some extent, subject to certain limitations. The Bill was subsequently passed and by virtue of an amendment Act, the aforesaid proviso was inserted rendering the applicability of Section 9 appearing in Part I to apply to an international commercial arbitration as well. After such amendments have been brought and becomes an integral part of the statute, the Apex Court in ***PASL Wind Solutions Pvt. Ltd. (supra)*** was considering the question whether the companies incorporated in India entered into

an agreement choosing a forum for arbitration outside India and an award so made, can be regarded as a foreign award and enforceable under Part II of the said Act. While embarking the journey on the peripheral of the said questions, an argument was advanced that the proviso to Section 2 (2) of the Act, is, in effect a bridge connecting Part I and Part II which was not accepted. However, it has been held that the said proviso concerning the international commercial arbitration as defined in Section 2 (1) (f) of the Act is different. It is further held that the definition of international commercial arbitration defined in the aforesaid Section makes it abundantly clear that it is a partycentric but the proviso to section 2 (2) is a placecentric and therefore, cannot be reconciled in this regard. It is apposite to quote the relevant excerpts therefrom which runs thus:

“41. While the decision in BALCO is a step in the right direction and would drastically reduce judicial intervention in foreign arbitrations, the Commission feels that there are still a few areas that are likely to be problematic.

(i) Where the assets of a party located in India, and there is a likelihood that that party will dissipate its assets in the near future, the other party will lack an efficacious remedy if the seat of the arbitration is abroad. The latter party will have two possible remedies, but neither will be efficacious. First, the latter party can obtain an interim order from a foreign Court or the arbitral tribunal itself and file a civil suit to enforce the right created by the interim order. The interim order would not be enforceable directly by filing an execution petition as it would not qualify as a “judgment” or “decree” for the purposes of sections 13 and 44A of the Code of Civil Procedure (which provide a mechanism for enforcing foreign

judgments). Secondly, in the event that the former party does not adhere to the terms of the foreign Order, the latter party can initiate proceedings for contempt in the foreign Court and enforce the judgment of the foreign Court under Sections 13 and 44A of the Code of Civil Procedure. Neither of these remedies is likely to provide a practical remedy to the party seeking to enforce the interim relief obtained by it.

That being the case, it is a distinct possibility that a foreign party would obtain an arbitral award in its favour only to realize that the entity against which it has to enforce the award has been stripped of its assets and has been converted into a shell company.

(ii) While the decision in BALCO was made prospective to ensure that hotly negotiated bargains are not overturned overnight, it results in a situation where Courts, despite knowing that the decision in Bhatia is no longer good law, are forced to apply it whenever they are faced with a case arising from an arbitration executed pre-BALCO.”

42. The above issues have been addressed by way of proposed Amendments to sections 2(2), 2 (2A), 20, 28 and 31.”

Ultimately, the Apex court did not accept the contention that the provisions contained in Section 9 of the Act has no manner of applicability to a foreign award in these words:

“113. Mr. Dewan, by way of cross objection, has challenged the finding of the Gujarat High Court by the impugned judgment that the section 9 application that was made by the respondent was not maintainable by reason of the expression “international commercial arbitration” appearing in the proviso to section 2 (2) having the meaning would be ascribed by

section 2(1)(f) of the Arbitration Act. We have already held in paragraph 14 above that this view of the law is incorrect. Consequently, this part of the judgment is set aside, it being held that the application made by the respondent under section 9 would be maintainable.”

It takes us to another judgment of the Single Bench of the Delhi High Court in case of ***Raffles Design International India Pvt. Ltd. & Anr. (supra)*** wherein an identical question was raised over the maintainability of Section 9 of the Act in relation to a foreign award in conjunction with proviso inserted to Section 2(2) of the said Act. It was contended therein that the place/seat of the arbitration was at Singapore and the proceeding is regulated and conducted under SISE Rules. It therefore, excludes the recourse under Section 9 of the Act. It is held:

“100. The SIAC Rules are clearly in conformity with the UNCITRAL Model Law and permit the parties to approach the Court for interim relief. As pointed out earlier, UNCITRAL Model Law expressly provides for courts to grant interim orders in aid to proceedings held outside the State. And, the proviso to Section 2(2) of the Act also enables a party to have recourse to Section 9 of the act notwithstanding that the seat of arbitration is outside India. Thus the inescapable conclusion is that since the parties had agreed that the arbitration be conducted as per SIAC Rules, they had impliedly agreed that it would not be incompatible for them to approach the courts for interim relief. This would also include the Courts other than Singapore. It is relevant to mention that IAA is based on UNCITRAL Model Law and SIAC Rules are also complimentary to IAA/UNCITRAL Model Law.

101. In the circumstances, the contention that the parties by agreeing that the proper law applicable to arbitration would be the law in Singapore have excluded the applicability of Section 9 of the Act cannot be accepted.

102. The only question that now remains to be considered is whether the petitioner can approach this Court for an interim relief considering that it has already approached the Arbitral Tribunal in Singapore and thereafter, also obtained a judgment in terms of the interim order from the Singapore High Court.

103. It is relevant to mention that Article 17H of the UNCITRAL Model Law contains express provisions for enforcement of interim measures. However, the Act does not contain any provision pari materia to Article 17H for enforcement of interim orders granted by an Arbitral Tribunal outside the India. Section 17 of the Act is clearly not applicable in respect of arbitral proceedings held outside India.

104. In the circumstances, the emergency award passed by the Arbitral Tribunal cannot be enforced under the Act and the only method for enforcing the same would be for the petitioner to file a suit.

105. However, in my view, a party seeking interim measures cannot be precluded from doing so only for the reason that it had obtained a similar order from an arbitral tribunal. Needless to state that the question whether the interim orders should be granted under Section 9 of the Act or not would have to be considered by the Courts independent of the orders passed by the arbitral tribunal. Recourse to Section 9 of the Act is not available for the purpose of enforcing the orders of the arbitral tribunal; but that does

not mean that the Court cannot independently apply its mind and grant interim relief in cases where it is warranted.”

The Single Bench of Bombay High Court in ***Aircon Beibars FZE (supra)*** was again considering the identical question as to the applicability of Section 9 of the Act to a foreign award before a party takes recourse under Section 48 of the Act. The Court after considering the recommendation of the Law Commission in its 246th report and the amendment having been carried out held that Section 9 can still be pressed in action before contemplation under Section 48 of the said Act as a said Section is a transitory provision pending contemplation of such process in the following:

“10. I do not believe this to be a correct reading of the proviso. If this was so, then between the time of passing a foreign award and until an order is made on it under Section 48, the only remaining asset in India might well be dissipated if not protected by order under Section 9. What the proviso seeks to do by amendment is to make available a remedy or recourse under Section 9 as a transitory provision pending the process contemplated by Section 48. This is obviously intended to ensure that a court can step in to protect an asset from being diverted or dissipated, and to ensure that the holder of a foreign award has, if he is able to get his foreign award pronounced enforceable, an asset against which he can proceed. If the foreign award does not result in an order of enforceability, then of course a protective order under Section 9 cannot continue. But equally, it cannot have been the statutory intent to the amendment that should the holder of a foreign award obtain an order pronouncing it enforceable and recognizing it, he finds in his hands nothing but paper, since, for want of a

protective order under Section 9, or something like it, the only available asset has been lost. This might actually happen more often than one imagines: it is entirely conceivable that in anticipation of losing a Section 48 litigation, a party that has suffered an award might take rapid steps to dissipate and distribute assets to frustrate the execution of a foreign award. That, it seems to me, is precisely what the proviso to Section 2 sought to avoid.”

However, it is contended by Mr. Ghosh that the judgment delivered by the Division Bench of the Bombay High Court indicates that a petition under Sections 47 and 49 of the Act was filed by the parties seeking enforcement of the foreign award dated 25th January, 2017 and thereafter, in effect the steps were taken for the enforcement of the foreign award and thereafter an application under Section 9 was taken out. The language employed in Section 9 of the Act has to be construed in this regard. The aforesaid contention of Mr. Ghosh cannot be accepted simply on the basis of a fact recorded in the first paragraph of the judgment rendered by the Division Bench of the Bombay High Court in the aforesaid matter on a score that a plea was taken before the Single Bench that unless the steps have taken under Section 48 of the said Act, Section 9 cannot be made applicable and therefore, it can be reasonably inferred that at the time of when the judgment of the Single Bench was delivered, there was no proceeding for enforcement of the foreign award and therefore, we cannot accept the contention of Mr. Ghosh in this regard.

It is apparent from the language employed therein that there is no restrictions imposed on the applicability of proviso to Section 2 (2) of the Act

except to the extent that the exclusion is on the basis of an agreement by and between the parties. The applicability of Section 9 to a foreign award is put in place with such restrictions which is required to be seen to exist in the instant case. Though the Law Commission recommended the word “express” before the word “contract” but in its legislative wisdom, Legislature consciously avoided the said word so that the said provision can be applied to a foreign award and achieve the purpose for which such amendment was sought. The agreement to the contrary has to be understood in the perspective of applicability of Section 9 of the Act and not in relation to any other aspect. Any other interpretation, in our opinion would do violence to the incorporation of the proviso to Section 2 (2) of the Act. The Court should not adopt an approach to interpret the provision of the statute to render the provision *otiose* and/or redundant. The cannon of interpretation should be activated in such manner to harmonize the provisions in case of any conflict and adopt such interpretation which would make both the provisions to operate in a respective sphere. The judgments have been cited by the respondent in this regard to which we do not find any quarrel to the proposition and therefore, do not intend to deal with it separately.

There is another aspect which cannot be loss sight of that the recommendation of the Law Commission was based upon the conflicting judgments rendered by the Supreme Court in case of **Bhatia** and **BALCO**, even the Constitution Bench in **BALCO**, the provision contained in Part I shall not apply to a foreign award yet on the ground on reality, the recommendation was made that if the provision relating to interim measures is not provided to a successful litigant, there is every possibility of the assets being dissipated or dealt with rendering the

award on mere paper. The object and the purpose underlying the incorporation of the said proviso are laudable and therefore, any restrictive interpretation would frustrate the very purpose. There is no logic to the contention of the appellant that the language used in section 9 has to be given a restrictive meaning that it would apply to a foreign award only in pre or during the arbitral proceeding. The expressions “before it is enforced under Section 36” has to be harmoniously construed taking into consideration the object for incorporation of the proviso to Section 2 (2) of the Act and should not be given a restrictive meaning.

We, therefore, do not find any grounds for interference with the impugned order.

The appeal is thus dismissed.

No order as to costs.

Urgent Photostat certified copies of this judgment, if applied for, be made available to the parties subject to compliance with requisite formalities.

I agree.

(Harish Tandon, J.)

(Prasenjit Biswas, J.)