IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/PETN. UNDER ARBITRATION ACT NO. 131 of 2019
With
R/PETN. UNDER ARBITRATION ACT NO. 134 of 2019

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE BIREN VAISHNAV

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	YES
2	To be referred to the Reporter or not ?	YES
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	NO

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GE POWER CONVERSION INDIA PRIVATE LIMITED
Versus
PASL WIND SOLUTIONS PRIVATE LIMITED

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Appearance:
MR.MIHIR THAKORE, LEARNED SENIOR COUNSEL for DARSHAN M VARANDANI with SHANEEN PARIKH with SHALAKA PATIL with SURYA SAMBYAL with JAIDEEP B. VERMA, ADVOCATES FOR THE PETITIONER(S) NO. 1

MR. TUSHAR HEMANI, LEARNED SENIOR ADVOCATE with MR. DHAVAL SHAH, MR. SHARVIL PATHAK and MS. ADITI SHETH, ADVOCATES for THE RESPONDENT(S) NO. 1

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CORAM:**HONOURABLE MR. JUSTICE BIREN VAISHNAV**

Date : 03/11/2020

COMMON CAV JUDGMENT

1. Arbitration Petition No.131 of 2019 has been filed by the petitioner under Form No. 6 (Application for execution of

decree under Order-XXI, Rule 11 of the Code of Civil Procedure) read with Section 47 of the Arbitration and Conciliation Act, 1996 and read with provisions of Section 2(1)(c), 7 and Section 10(1) of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Court Act, 2015. The prayer of the petitioner reads as under:

> *"(a) That this Hon'ble Court be pleased to enforce and execute the Award dated April 18, 2019 rendered in ICC Case No.22924/FS in which the Sole Arbitrator has awarded to the petitioner the principal sums of INR 2,59,76,330.00 and USD 40,000 together with interest on these amounts computed in accordance with the Indian Interest Act, 1978 under the Arbitration and Conciliation Act, 1996 as a decree of the Court, against the Respondent;*
>
> *(b) That this Hon'ble Court be pleased to order and direct the Judgment Debtor/Respondent to pay the principal sums of INR 2,59,76,330.00 and USD 40,000 together with interest on these amounts computed in accordance Section 3(1) read with Section 2(b) of the Interest Act, 1978 as awarded by the Sole Arbitrator in full and final satisfaction of the Award as computed in Annexure H to the present petition along with the interest computed from September 13, 2019 till the date of realization. The total amount calculated with principle and interest till September 13, 2019 at 8% per annum is INR 2,68,18,959/- and USD 41,298;"*

2. IAAP No.134 of 2019 is between the same parties filed by the petitioner under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter to be referred to as "Arbitration Act').

The prayer in the Arbitration Petition No.134 of 2019 is as under:

> *"The applicant therefore pray that pending the execution of the said Final Award and recovery of the amounts payable by the Respondent to the Applicant, this Hon'ble Court be pleased to:*
>
> *(a) By an Order of this Hon'ble Court direct the Respondent to secure the amount awarded to the Applicant under the said Final Award by depositing an amount of INR INR 25,976,330.00 and USD$ 40,000.00, in this Hon'ble Court or alternatively by furnishing adequate security to the satisfaction of this Hon'ble Court and the Applicants;*
>
> *(b) By an Order of this Hon'ble Court direct the Respondent to disclose on Affidavit, details of all their moveable and immovable properties including those mentioned in paragraph 25 of this Application;*
>
> *(c) By an Order of this Hon'ble Court, restrain the Respondent from alienating, transferring, selling and / or dealing with any of its assets including the moveable and immovable properties mentioned in paragraph 25 of this Application;*
>
> *(d) For ad-interim reliefs in terms of prayer clause (a) to (c) above;*
>
> *(e) For ex-parte ad-interim reliefs in terms of prayer clauses (a) to (c) above;*
>
> *(f) That this Hon'ble Court be pleased to award costs of these proceedings to favour of the Applicant and against the Respondent; and"*

3. Both these applications are in context of a foreign award dated 18.04.2019 passed by the Arbitral Tribunal seated in Zurich, Switzerland.

4. Initially while issuing notice on 25.09.2019, a common oral order was passed by this Court (Coram: Hon'ble Mr. Justice A.J.Desai). The order reads as under:

"COMMON ORAL ORDER

ORDER IN IAAP NO.131 OF 2019

I have heard Mr. Mihir Thakore, learned Senior Counsel assisted by Mr. Darshan M. Varandani for the petitioner. The present petition has been filed for enforcement and execution of the award dated 18.4.2019 passed by the Arbitral Tribunal, Zurich, Switzerland which suggests that the arbitration proceedings commenced on 3.7.2017. I have also gone through the amended provisions of Sections 47 and 48 of the Arbitration Act.

Issue notice to the respondent returnable on 17.10.2019.

ORDER IN IAAP NO.134 OF 2019

I have heard Mr. Mihir Thakore, learned Senior Counsel assisted by Mr. Darshan M. Varandani for the petitioner.

The present petition has been filed under Section 9 of the Arbitration Act for interim relief. Following prayers have been made by the petitioner in the present petition :-

"(a) By an order of this Hon'ble Court direct the respondent to secure the amount awarded to the applicant under the said Final award by depositing an amount of INR 25,976,330.00 and USD$ 40,000.00 in this Hon'ble Court or alternatively by furnishing adequate security to the satisfaction of this Hon'ble Court and the applicants;

(b) By an order of this Hon'ble Court, direct the respondent to disclose on Affidavit, details of all their movable and immoveable properties including those mentioned in paragraph 25 of this application;

(c) By an order and injunction of this Hon'ble Court, restrain the respondent from alienating, transferring, selling and/or dealing with any of its assets including the moveable and immoveable properties mentioned in paragraph 25 of this Application;

(d) For ad-interim reliefs in terms of prayer clause (a) to (c) above;"

Considering the award and dispute between the parties, following order is passed :-

Issue notice to the respondent returnable on 17.10.2019. The respondent shall file reply to prayer clauses (a), (b) and (c) of this application. However, till the returnable date, the respondent is hereby restrained from transferring, alienating, selling or creating any right with regard to two properties, namely, (i) WTG(s) having installed capacity of 2.900 MW installed at Mota Gunda in Gujarat as on May 15, 2018 and (ii) WTG(s) having installed capacity of 2.150 MW installed at Chandrodi in Gujarat as on April 14, 2018.

Direct service is permitted in both the petitions."

5. Since the facts are common in both these petitions, facts from Arbitration Petition No.131 of 2019 shall be referred to.

5.1 The petitioner GE Power Conversion India Private Limited is a company incorporated under the Companies Act, 1956 with the registered office at Chennai. It is an energy infrastructure company that manufactures and sells advanced motor drive and control technologies as well as provides technical support and intervention. The respondent PASL Wind Solutions Private Limited is a company incorporated under the Companies Act, 1956 with registered office at Ahmedabad.

5.2 In the year 2010, the respondent issued three purchase orders to the petitioner for supply of six converters. These purchase orders are part of the paper book and the details are as under:

i. 20 converters of 950 kw (2 were to be supplied initially and 18 were to be ordered later)

ii. 2 converters of 1250 kw

iii. 2 converters of 1800 kw

5.3 It is the case of the petitioner that pursuant to the purchase orders, the petitioner supplied six converters to the respondent i.e. 2 converters each of 950 kw, 1250 kw and 1800 kw specifications. The converters were delivered to the respondent by 02.01.2012. It is a case of the petitioner that

out of the six converters the respondent decided to keep one 950 kw converter in its factory itself as a prototype and the five remaining converters were all commissioned by July 2, 2014. The warranty clause for the converters was identical in all three purchase orders. The warranty period for each converter was 24 months from the date of commissioning or 30 months from the date of dispatch whichever was earlier. The case of the petitioner is that the warranty on the converters therefore expired in June 2014 i.e. 30 months from the date of dispatch in January 2012.

5.4 Certain disputes and differences arose between the parties in respect of the purchase orders. This was regarding the functioning of the converters. The case of the petitioner was that it had already provided a large number of free services repeatedly pertaining to the converters; the warranty of the converters had expired, whereas, according to the respondent, the warranty on the converters was continued. In order to resolve the dispute, the parties entered into a settlement agreement dated 23.12.2014. The relevant clauses of the settlement agreement are as below:

"1.3 GE has supplied various converters against above referred orders as per following details.

Sr.	*M/c. Type*	*Delivery Date as per PO*	*Actual Delivery Date*
1	*900kW*	*15/08/2010*	*1st Panel – Mark "0" – 14/10/2010* *2nd Panel: - 28/05/2011*

2	*1250kW*	*15/08/2010*	*1st Panel – 22/03/2011* *2nd Panel:- 28/05/2011*
3	*1800kW*	*15/02/2011*	*1st Panel:- 04/08/2011* *2nd Panel:- 02/01/2012*

1.4 GE has finally commissioned five converters supplied by them as per following details:

Sr.	*Converter Panel*	*Commissioning Date*
1	*900kW*	*2nd July 2014*
2	*1250kW (TT)*	*2nd July 2014*
3	*1250kW (NTT)*	*2nd July 2014*
4	*1800 kW (TT)*	*2nd July 2014*
5	*1800 kW (NTT)*	*2nd July 2014*

Reading recitals 1.3 and 1.4, it is borne out that it was the case of the petitioner that the delivery date as per the purchase order was 15.08.2020 whereas they were actually delivered on 22.03.2011 whereas the commissioning date was 02.07.2014. Clauses 5.1 to 5.10 of the agreement stated as under:

"5.1 GE would provide 4 (four) nos. of delta module for 1800 kW NTT converter panel at total cost of INR 26,00,000/-. The break up is as under: -First three delta modules @ INR 6,00,000/- per delta and fourth module @ INR 8,00,000/- per delta. GE would ensure that delta modules will be interchangeable with other panels and would be of rating 1 000 AMP 3V3 Model which is suitable for paralleling operation. All delta modules will be factory loaded with all firmware, software etc and no correction at site would be needed. All charges for whole re-commissioning of converter panel shall be borne from AMC.

5.2 GE will extend 14 months warranty attributable to converters for abovementioned converter (1800kW NTT} from the date of re-commissioning of panel after replacement of delta modules. The warranty would be

20 months from the date of supply or 14 months from the date of commissioning. whichever is earlier."

5.3 Any failure in above mentioned panel would be attended within a period of 7 days subject to availability of spares maintained by PASL. List of such spares will be provided to PASL by GE within 10 days.

5.4 Similar pricing and warranty mechanism will be followed in case of remaining 5 converter panels (1 no. 1800kW, 2 nos. 1250kW and 2 no. 900k.W) limited to period of 2 years."

5.5 It is agreed that GE will provide annual maintenance contract to maintain above-mentioned converters at site including preventive at the rate of INR 7,00,000/- per year. PASL will provide local travel and accommodation ex-Ahmedabad. PASL hands over a cheque of INR 7,00,000/- to GE towards AMC and AMC would be effective immediately. As formal PO is needed by GE, it is agreed that PASL would issue a purchase order, terms of which would be bound by this agreement and no additional/ further terms and conditions would be applicable."

5.6 In lieu of supply of outdated delta module in Mark "0" panel, GE will supply new delta module at the cost of INR 5,00.000/- and the old delta modules will be of PASL property. Delta module shall be identical to one supplied in Mark "1" panel (interchangeable). GE undertakes to commission this converter free of cost at site, visit of engineer would be coinciding with visits in AMC.

5.7 GE agrees to provide complete testing procedure (including simple HMI test kit along with HMI & test kit along with HMI backup and procedure in form of documentation etc. PASL can test the DiBE & Delta using the above test kit and PASL Oscilloscope) to test DiBE card and Delta module at cost of INR 4,00,000/- The payment of INR 4,00,000/- will be made within 45 days from the date of supply of complete test procedure and equipment.

5.8 GE undertakes to train at their Chennal plant, two engineers from PASL for a period of 3 days each at total INR 30,000/- to maintain converter panel at PASL.

5.9 PASL on signing of this agreement has handed over two cheques amounting to INR 26,00,000/- and INR 7,00,000/- to GE. GE undertakes to switch on 1800 kW NTT machine within 10 days time from the date of signing of this agreement i.e by 2nd January 2015.

5.10 Both the parties agree that with signing of this agreement, all disputes / difference of opinion stands settle as described in para 2 & 3 and both the parties agrees that as of 23/12/2014 all financial issues stand settled."

5.5 Clause 6 of the settlement agreement contained the dispute resolution clause which reads as under:

"6 <u>Governing law and settlement of dispute</u>

"6.1 Any dispute or difference arising out of or relating to this agreement shall be resolved by the Parties in an amicable way. (A minimum of 60 days shall be used for resolving the dispute in amicable way before same can be referred to arbitration)

6.2 In case no settlement can be reached through negotiations, all disputes, controversies or differences shall be referred to and <u>finally resolved by Arbitration in Zurich, in the English language in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce,</u> which rules are deemed to be incorporated by reference into this clause. The Arbitration Award shall be final and binding on both the Parties.

6.3 The Agreement (together with any documents referred to herein) constitutes the whole agreement between the Parties and it is hereby expressly declare that no variation and / or amendments hereof be effective unless mutually agreed upon and made in writing."

[Emphasis Supplied]

5.6 The case of the petitioner was therefore that the disputes had to be resolved by Arbitration and the seat of Arbitration was Zurich and the arbitration agreement would be governed by Swiss law, Curial law being Swiss law and the arbitration proceedings will be conducted in accordance with the Rules of ICC. The substantive law governing the settlement agreement was Indian law.

5.7 Since the disputes could not be resolved, on 03.07.2017, the respondent issued a request for arbitration and on August, 2018, the parties agreed to the resolution of disputes by the Sole Arbitrator. Upon the request of the parties, the ICC appointed a sole arbitrator Mr. Ian Meakin under the ICC Rules. Mr. Meakin was located in Geneva, Switzerland. The central issue of dispute between the parties was interpretation of clause 5.2 of the Settlement Agreement.

5.8 Perusal of the pleadings would indicate that the petitioner had filed a preliminary application challenging the jurisdiction of the arbitrator on the ground that since the two parties were Indian parties, they cannot have a foreign seat of arbitration. That was opposed by the respondent and by a

Procedural Order No. 3 dated 20.02.2018, the preliminary application of the petitioner was rejected and the Tribunal held that the Arbitration Clause in the Settlement Agreement is valid and will proceed to apply the Swiss Act because the seat of Arbitration is Zurich. The order was not challenged either by the petitioner or the respondent.

5.9 After examination of the pleadings and the deposition of witnesses and the written statements filed, for the purposes of final hearing, the petitioner suggested Mumbai as the venue being a convenient location for hearings. The case of the respondent was also that the juridical seat was Zurich and according to the petitioner it was not even disputed that the venue was Mumbai, but the seat of Arbitration was Zurich. The final arguments concluded on July 2018 and 18.04.2019 the Arbitrator after considering detailed submissions, evidences, witness statements, oral arguments passed a detailed and a reasoned award ("foreign award"). The arbitrator rejected the claim of the respondent and granted the petitioner INR 25,976,330.00 & USD 40000.00 in legal costs and expenses with accumulated interest in accordance with the Indian Interest Act, 1978. The foreign award was passed within the time limit prescribed by the ICC. The operative portion of the foreign award reads as under:

"227 ...

A. The seat of the arbitration is Zurich, Switzerland.

...

B. The Claimant's claims for breach of contract, damages and interest thereon are rejected.

C. The Claimant shall pay to the Respondent INR25,976,330.00 and US$40,000.00 in legal costs and expenses with accumulated interest, if any, in accordance with the Indian Interest Act 1978.

D. All other claims of either party, to the extent that they exist, are dismissed."

5.10 Thus, in short the petitions are filed for enforcement of the above award as no payment was paid by the respondent till date. An affidavit in reply has been filed to this arbitration petition and so also a rejoinder has been filed.

6. Heard Mr. Mihir Thakore, learned Senior Advocate with Mr. Darshan Varandani with Mr.Jaideep Verma and Ms. Shanin Parikh, learned advocates for the petitioner and Mr. Tushar Hemani, learned Senior Advocate with Mr. Dhaval Shah, Mr. Sharvil Pathak and Ms. Aditi Sheth, learned advocates for the respondents. Both the learned counsel for the respective parties have also tendered the written submissions which are taken on record.

6.1 Mr. Mihir Thakore, learned Senior Advocate for the petitioner would submit as under:

(a) That the award in question is a foreign award and is therefore enforceable before this Court. Taking the court through Sections 44 to 48 in Part-II of the Arbitration and

Conciliation Act, Mr. Thakore would submit that when the Court is faced with an enforcement petition in context of a foreign award, it is has only to look at whether the conditions of Section 44 have been fulfilled and conditions of Section 47 have been met. Once the Court is satisfied with this, enforcement of the Foreign Award shall automatically follow.

(b) Reading Section 44 of the Arbitration Act, it is clear that Section 44 defines the Foreign Award and means that it is an arbitral award on a difference between persons arising out of a legal relationship to the contractual or not, considered as a commercial dispute in pursuance of an arbitration agreement and the arbitrations conducting in the country which is a signatory with the New York convention. In the facts of the case, he would submit that the settlement agreement between the parties was for replacement of Delta modules in the converters in the wind turbine generators. The agreement has been in writing and clause 6 of which has been reproduced and the Governing law for settlement of disputes and the seat of arbitration was Zurich. It was therefore a foreign award which was sought to be enforced under Section 48 of the Arbitration Act. He would submit that reading Section 47 of the Act, evidence is on record and it is not disputed that it is a foreign award.

(c) That in the facts of the present case in absence of any challenge to the proceedings of the award before the seat Court in Zurich, the award has attained finality. That there is no dispute between the parties that all the conditions of Section 47 of the Act have been complied with. In other

words, according to Mr. Thakore, it is undisputed that the award is a foreign award, enforcement therefore under Section 48 is warranted in view of the award having become final in absence of a challenge at Zurich.

(d) The next limb of Mr. Thakore's argument was that this Court had jurisdiction to enforce the present foreign award. Relying on the explanation to Section 47 of the Arbitration Act which defines ***"Court before which the enforcement petition can be filed",*** Mr. Thakore would submit that in the subject matter of the present proceedings the assets of the respondent against which enforcement is sought to realize the fruits of the award, are located with the jurisdiction of this Court which have been identified in para 55 of the petition and therefore the jurisdiction vests in this Court. He has relied on para 97 of the decision of the Supreme Court in case of ***Bharat Aluminum Company v. Kaiser Aluminum Practical Services Inc.*** reported in ***(2012) 9 SCC 552.*** *(*This judgment will hereinafter will refer to as BALCO).

(e) That the respondent has failed to make out any ground under Section 48 of the Act and therefore the award must be enforced. Mr.Thakore submitted that on reading Section 48 of the Act, it will be evident that the enforcement of a foreign award may be refused at the request of the party against whom it is invoked. If that party furnishes to the Court proofs, as set out in Clauses (a) to (e) of Section 48, he would further submit that Sub-section (2) of Section 48 would indicate that the enforcement of an arbitral award may also be refused if the Court finds that the subject matter of the

difference is not capable of settlement by arbitration under the law of India or the enforcement of the award would be contrary to public policy in India. Relying on Explanation-1, Mr. Thakore would submit that a clarification has been issued that an award is in conflict with the public policy in India only if the making of the award was induced or affected by fraud or corruption or was in violation of Sections 75 or 81 or it is in contravention with the fundamental policy of Indian law, or it is in conflict with the most basic motions of morality or justice. Reading Explanation 2, it further clarifies that the tests as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on merits of the dispute. Mr.Thakore would therefore submit that in order to meet the grounds of Section 48, the respondent has to undergo a test of a pro-enforcement bias. In support of submissions in context of the narrow scope of Section 48 of the Act, Mr.Thakore would extensively rely on the following decisions of the Supreme Court

I. ***Vijay Karia vs. Prysmian Cavi E Sistemi Srl [2020 SCC OnLine Supreme Court 177]***

II. ***Renusagar Power Co. Ltd. vs. General Electric Company [1994 Supp. (1) SCC 644]***

III. ***Shri Lal Mahal Limited v. Progetto Grano SPA [(2014) 2 SCC 443]***

IV. ***Fuerst Bay Lawson Limited v. Jindal Exports Ltd. [(2001) 6 SCC 356].***

(f) From the decision of ***Vijay Karia*** (supra), an extensive reliance is made on several paragraphs of the decision to indicate the submissions that the Court has complete discretion and even if the grounds at times are made out, the Court may still enforce an award under Section 58. He would submit that a perverse interpretation of an agreement cannot be a ground of refusal of a foreign award. The allegation that the Tribunal did not consider critical evidence is also not a ground available under Section 48. Relying on the decision of ***Vijay Karia*** (supra) Mr. Thakore would submit that it is not open for the Court while scrutinizing the Tribunal's analysis of the evidence and hold that the evidence was selective and perverse. Adverting to the challenge on the ground of the most basic notions of justice in accordance with Explanation to Section 48, Mr. Thakore would submit that the foreign award must be read as a whole without nitpicking. Extensive reliance is placed on the expression that the extremely narrow scope under Section 48 is to see that there is only one bite at the cherry in a case where objections are made and therefore it is only when the Court refuses enforcement of an award, does an appeal lie under Section 50 of the Arbitration Act.

(g) Mr. Thakore would also rely on several paragraphs of the decision of ***Renusagar Power Corporation Limited*** (supra), ***Shri Lal Mahal Limited*** (supra) ***and Fuerst Bay Lawson*** (supra). Summarizing his submissions in context of the scope of challenge to the award under Section 48 of the Act, Mr. Thakore would submit that the following principles emerge:

I. Challenge to a foreign award does not entail a review on merits of the award.

II. A foreign award already stands as a decree.

III. Section 48 of the Act does not give an opportunity to have a "second look" at the foreign award, it is not an appeal.

IV. Procedural defects such as taking into consideration inadmissible evidence or ignoring / rejecting the evidence which may be of a binding nature, cannot be a ground to refuse enforcement of a foreign award.

V. Allegation that the Tribunal's analysis of contemporaneous conduct is selective or perverse is not a good ground to refuse enforcement of a foreign award.

VI. Allegations that the Tribunal did not consider critical evidence is not a ground available under Section 48.

VII. Perverse interpretation of an agreement cannot be a ground for refusal of the foreign award.

VIII. Poor reasoning given by a Tribunal by which a material issue or a claim is rejected is also not a ground available. Even if the ground under Section 48 relates to a party's interest alone is made, the Court may still enforce the award.

IX. The foreign award must be read as a whole without nitpicking and if it is addresses the basic issues in substance, the award must be enforced.

(h) Mr. Thakore took the Court also on the question that Section 34 of the Arbitration Act could not apply to foreign seated awards which are covered by Part-II of the Act. Relying on the definitions in Section 2 of the Act in context of the scope, Mr. Thakore would submit seeking support from the decision of BALCO that while Section 2 applies to part-I of the Arbitration Act, Part-II of the Arbitration Act would deal with the enforcement of the foreign award is mutually exclusive of part – I of the Act as is now well settled by the five Judges decision in the case of BALCO. Reliance was place on the decision to support that the foreign award under Part-II of the Act cannot be challenged under Section 34 as is done by the respondents by filing an application under Section 34 before the Competent Civil Court at Ahmedabad. The decisions relied upon by Mr. Thakore in support of his submission that Section 34 of the Arbitration Act does apply to Part-II are as under:

a. ***Bharat Aluminum Company v. Kaiser Aluminum Practical Services Inc.*** reported in ***(2012) 9 SCC 552.***

b. ***IMAX Corporation v. E-City Entertainment (India) Pvt. Ltd.*** reported in ***2017 5 SCC 331***

c. ***DOZCO India Pvt. Ltd. v. BOOSAN Infracore Company Ltd.*** reported in ***2011 (6) SCC 179***

d. ***BGS SOMA v. NHEC*** reported in ***2019 SCC OnLine SC 1585***

(i) Extensively relying on the earlier enactment which was the Foreign Awards (Recognition and Enforcement) Act, 1961 which has now become part of the amended act as Part-II of the Arbitration Act, 1996, Mr. Thakore would submit relying on the definitions in the case in the Act "International Commercial Arbitration 2 (1)(f) and Part-II of the award, that it is open for the two Indian parties to choose a foreign seat of arbitration. In support of his submission, he would rely upon following decisions:

1.d.I. ***Atlas Exports Industries v. Kotak and Company [1999 7 SCC 61]***

1.d.II. ***GMR Energy Ltd. v. Dusan Power Systems India Pvt. Ltd. and others [2017 SCC OnLine (Del) 11625]***

1.d.III. ***Sasan Power Limited v. North American Coal Corporation India Limited. [2015 SCC OnLine MP 7417]***

(j) Lastly Mr.Thakore would submit that an Enforcement Petition and Section 9 petition in a foreign award is maintainable before this High Court. For the aforesaid submission in support, Mr.Thakore would rely on the decision in the case of ***Trammo DMCC v. Nagarjuna Fertilizers and Chemicals [2017 SCC OnLine Bom 8676]*** and ***Ecohidrotechnika LLC v. Blacksea and Azovc Production and Operating and***

Administration of Shipping [(2010) SCC OnLine (Bom) 277].

7. Mr. Tushar Hemani, learned Senior Advocate appearing with Mr. Dhaval Shah has also extensively made arguments and has also supplied written submissions. Pursuant to the arguments of Mr. Thakore that the award is a foreign award, inviting my attention to the scheme of the Arbitration Act, Mr. Hemani would contend that there are only three categories of arbitration viz. (1) domestic arbitration, (2) international commercial arbitration where the place of arbitration is in India, both falling within Part-I of the Arbitration Act and the third is enforcement of foreign arbitral awards. Inviting my attention to the preamble of the Arbitration Act, Mr.Hemani would submit that the Arbitration Act was made to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards. He even relied on the law commission's report to submit that the Act presently treats all the three types of awards, purely domestic award i.e. an award not resulting from an international commercial arbitration, domestic award in an international commercial arbitration and a foreign award as the same. Keeping this in view, Mr. Hemani would submit that the present arbitration in question is not an international commercial arbitration. According to Mr. Hemani, the reason is that the petitioner has claimed interim relief under the provisions of Section 9 read with proviso to Section 2(2) of the Arbitration Act, which is only available to international commercial arbitration. According to Mr. Hemani, the arbitration in question has taken place between

two Indian companies. Inviting the attention to the definition of "international commercial arbitration" as defined in Section 2(1)(f) of the Act, Mr. Hemani would submit that the international commercial arbitration means an arbitration where at least one of the parties i.e. a body corporate has to be incorporated in any country other than India. Admittedly, both the parties to the present arbitration proceedings are body corporates in India. Therefore, since both the companies being incorporated in India, the present arbitration is clearly not an international commercial arbitration. He would rely on the decisions of the Hon'ble Supreme Court to submit that once both companies are incorporated in India, the arbitration cannot be said to be an international commercial arbitration. He would rely on the following decisions:

I. ***TDM Infrastructure (P) Ltd. v. UE Development India (P) Ltd. [(2008) 14 SCC 271]***

II. ***L&T-SCOMI v. MNRDA [(2019) 2 SCC 271]***

7.1 Mr. Hemani would submit that the petitioner has filed an application for interim relief under Section 9 is a tacit admission on the part of the petitioner that Part-I of the arbitration Act applies and such applicability of part-I can only be where the place of arbitration as defined in Section 2(2) and the proviso thereto extends to international commercial arbitration even if the place is outside India. The fact that he has applied under Section 9 would indicate that the award is a domestic award because Section 9 would be applicable only when the place of arbitration is in India and when the proviso is read, it applies to international commercial arbitration only when Part-II is applicable.

7.2 Relying on the definition as provided in Section 2(7) of the Act which defines an arbitral award, as made under this part shall be considered as a domestic award, and having invoked Section 9 and enjoyed the interim relief, it is not open for the petitioner now to fall back and say that the award is a foreign award and therefore the petitioner is seeking enforcement under Part-II of the Arbitration Act. The decision relied upon by Mr. Mihir Thakore in case of ***Trammo DMCC v. Nagarjuna Fertilizers and Chemicals*** (supra) is not applicable as in the current situation, admittedly the arbitration is not an international arbitration. The petitioner, according to Mr. Hemani, has failed to justify how it falls under the proviso to Section 2(2) to claim relief under Section 9 without admitting that this is a domestic award.

7.3 Mr. Hemani would further argue that for the reasons above, the award under challenge is a domestic award rendered between two Indian parties under Part-I of the Arbitration Act and therefore IAAP No. 131 and 134 of 2019 are not maintainable before this Court. Relying on the definition of "Court" under Section 2(e) of the Act, Mr. Hemani would contend that since it is established that it is not an international commercial arbitration, what needs to be examined is as to in which of the two remaining categories i.e. a foreign award under Part-II or a purely domestic award under Part-I of the Arbitration Act, does the award in question fall? Relying on Section 47 of the Arbitration Act and Section 44 read with the First Schedule accompanying Part-II i.e. the New York Convention, Mr. Hemani would submit that a plain reading of the provision would indicate that to be a foreign award, the award must be in a territory other than India where the enforcement is sought. The definition of

foreign award under Section 44 begins with the term "unless the context otherwise requires". Hence, the definition of the foreign award is subject to what is required by the context. Relying on the decision in case of ***Vanguard Fire and General Insurance Company Ltd., Madras v. Frazor and Ross*** reported in ***AIR 1960 SC 971***, Mr. Hemani would contend that it is a settled position of interpretation of statutes that the definition clause is subject to the context of the scheme of the Act and its objects. The phrase "unless the context otherwise requires, when read in context of the definition of foreign award, would indicate that an interpretation must be made which the Court would prefer to advance the purpose of the object of the Act. He relied on the decision in the case of ***Allied Motors (P.) Ltd. v. CIT [(1997) 224 ITR 677]***. In the backdrop of this decision, it has to be seen whether the award in question is a foreign award.

7.4 Relying on the law commission's report, which recommended substitution of Section 2(1)(e) of the Arbitration Act, to confer jurisdiction upon High Courts in the case of International Commercial Arbitrations, simultaneous amendments were recommended to Section 47 of the Arbitration Act to confer jurisdiction on the High Court and relying on para 26 of the report, Mr.Hemani would contend that in the context of International Commercial Arbitrations, the object was to ensure that the jurisdiction was exercised by the High Court even if such High Court did not exercise ordinary civil jurisdiction. The intention was that where there was a significant foreign element, High Courts ought to have jurisdiction over issues arising in International Commercial Arbitrations and foreign awards. He would draw

support from the decision in case of ***Vijay Karia*** (supra) where the Court has observed that the appeal procedure in context of foreign award is to ensure that a person belongs to a convention country who has gone through a challenge procedure in the country of his origin and must be able to get such award enforced in India as soon as possible. In the present case admittedly, neither of the parties are parties belonging to the convention country and therefore, the present award cannot be termed as a foreign award in context of the term 'International Commercial Arbitration'.

7.5 Mr. Hemani would submit that even otherwise the only difference between Section 34 for enforcement of a domestic award and a foreign award, is the ground of "patent illegality" which is available in the challenge of domestic awards. Chapter-I of Part-II which deals with New York convention has been drafted to keep in mind the international community and therefore it cannot be the intention of the legislation to allow two Indian parties all the privileges under that part simply by designating a seat abroad but not even carrying out the arbitration there. In the facts of the present case, such a stand of the petitioner would be detrimental to the object of the Arbitration Act inasmuch as there will be a lesser judicial scrutiny though in fact the arbitration was in Mumbai with mere salutary seat at Zurich. Two Indian parties cannot be allowed to gain advantage simply by designating a seat abroad in an arbitration that otherwise has no other foreign element. If the parties are allowed to do so, the purpose of the Arbitration Act will be completely defeated. The mechanism given to the foreign parties for a quick redressal with a deliberate lesser judicial scrutiny to foreign parties will stand defeated if two Indian parties

are allowed to choose a seat abroad.

7.6 The next submission in addition and supplemental thereto was that for these reasons, two Indian parties cannot designate a seat outside India. In support of his submissions, Mr. Hemani relied on the decisions in case of;

I. ***TDM Infrastructure (P) Ltd. v. UE Development India (P.) Ltd. [(2008) 14 SCC 271]***

II. ***M/s.Addhar Mercentile Pvt. Ltd. v. Shri Jagdamba Agrico Exports Pvt. Ltd. [2015 SCC OnLine (Bom) 7752]***

III. ***Sah Petroleums Ltd. [2012 SCC OnLine (Bom) 910]***

7.7 Refuting the decisions cited by the petitioner in the case of ***Atlas Exports Industries*** (supra), Mr.Hemani would submit that the decision would not be applicable so cited by Mr. Thakore as it involved a Hongkong party. Reliance on the decision in case of the Madhya Pradesh High Court in the case of ***Sasan Power Limited*** (supra) was also misconceived because the decision was upturned by the Supreme Court in the case of ***Sasan Power Limited v. North American Coal Corporation (India) (P) Limited. [(2016) 10 SCC 813]*** wherein the question before the Hon'ble Supreme Court was a dispute between three parties with a foreign element.

7.8 Mr. Hemani would submit that Mr. Thakore's reliance in the decision in case of ***GMR Energy Ltd.*** (supra) was also misconceived because it merely relied on the decision of the

Madhya Pradesh High Court in the case of ***Sasan Power Limited*** (supra).

7.9 Mr. Hemani would further submit that under the Indian Contract Act, two Indian parties cannot designate a seat outside India. He drew the attention of the Court to Section 23 of the Indian Contract Act. He would submit that if the object of an agreement defeats the provisions of any law, or is opposed to public policy, such an arbitration agreement with an object to contract out of the full extent of Indian judicial scrutiny by designating a foreign seat will be hit by Section 23 of the Contract Act, because it would defeat the provision of any law viz. the Arbitration Act and the Commercial Courts Act, 2015. By entering into such an arbitration agreement, the petitioner would be exempted from the added scrutiny of patent illegality "as is available under Section 34(2A) to a domestic award".

7.10 Relying on the provisions of Sections 34 and 38 of the Act, Mr. Hemani would submit that under Section 34 of the Arbitration Act, an application may lie for setting aside an arbitral award. An order setting aside or refusing to set aside an arbitral award would be appealable under Section 37(1)(c) of the Arbitration Act, whereas, under Section 48 of the Arbitration Act, which deals with the enforcement of the award, the award cannot be challenged, but its enforcement can be opposed. Under Section 50(1)(b) of the Act, what can only be challenged is an order refusing to enforce the award. The appeal therefore under Section 50 has a very restricted parameter. Therefore, if two Indian parties are permitted to choose a foreign seat and to remove the applicability of Part-I of the

award, it will have a scrutiny at the High Court level only and that too at the time of enforcement. This is at the far disadvantageous position when in case of two Indian parties, an application can be made to set aside the award and an appeal is available if the application is rejected.

7.11 Even Section 10(3) of the Commercial Courts Act is violated inasmuch as, the Section does not give access to High Court to arbitrations other than International Commercial Arbitrations. These ingredients would show that when two Indian companies enter into an agreement choosing a foreign seat, such action is impermissible as it is directly hit by section 23 of the Indian Contract Act, as on both counts it defeats the provisions of law and also being opposed to "public policy". This is because the intention is to keep different forums for purely domestic arbitrations and those with a foreign element. The public policy of India is to give a different forum to a foreign element and to give a foreign party access to High Courts and by contracting out of such a requirement, the agreement is opposed to public policy.

7.12 Mr. Hemani would submit that Section 23 of the Indian Contract Act has not been discussed in any of the decisions on the seat of the arbitration and therefore, it is an open issue. To Mr. Thakore's rejoinder relying on the decisions in the case of ***Shri Lacchumal v. Radheshyam [(1971) 1 SCC 619], Murlidhar Aggarwal v. State of U.P. [(1974) 2 SCC 472]*** and ***Sita Ram Gupta v. Punjab National Bank [(2008) 5 SCC 711],*** Mr. Hemani would submit that these are decisions where rights were in *personem* and none of the decisions lay down that obligations pursuant to *in rem*

statutes can be avoided by contracting out by the same. He would submit that in fact the decision in case of ***Murlidhar Aggarwal*** (supra) and ***Sita Ram Gupta*** (supra) would squarely apply to the facts of the case in the context of two Indian parties being unable to enter into an agreement and contracting out of prohibitions which is opposed to public policy.

7.13 The other main limb of submission of Mr. Hemani was that with regard to the determination of the seat by this Court, Part-II of the Act which deals with "foreign award" and Schedule-I of the First Schedule and the Article Talks of the foreign awards cannot be determined without a determination of the seat where the award is made. Relying on the decision in the case of ***Union of India v. Hardy Exploration [(2019) 13 SCC 472]***, Mr.Hemani would submit that the Court has to first make a determination of what the seat is as per the law and it is free to determine the seat as Mumbai. Mere fact that the arbitrator has decided the seat, would not preclude or prevent this Court from deciding this question despite the contention of the petitioner that the respondent waived his rights. The Court has to go to the root of the matter and first decide whether the seat of arbitration was in fact Mumbai or Zurich. Applying the 'closest connection test' Mr.Hemani would submit that Mumbai was the seat of arbitration. Relying on Clause 6.2 of the Settlement Agreement, Mr. Hemani would submit that the seat was never designated to be Zurich. It merely used the words "in Zurich". Applying "closest connection test", the seat of arbitration was India, inasmuch as the following factors connect the arbitration to India.

(1.d.III.a) Settlement agreement was executed between Indian parties.

(1.d.III.b) Registered office of both the parties is at India.

(1.d.III.c) Agreement was executed in India.

(1.d.III.d) Properties of both the parties in India.

(1.d.III.e) Substantive law is that of India.

(1.d.III.f) Consequently, law governing the arbitration agreement is that of India.

(1.d.III.g) Post agreement the entire transaction takes place in India.

(1.d.III.h) All arbitration proceedings were held in India.

7.14 Relying on the decision in the case of ***Enercon (India) Ltd. v. Enercon G mbh [2014 (5) SCC 1]*** Mr.Hemani would submit that though the venue in case of ***Enercon*** (supra) was decided as London, applying the closest connection test, the seat was determined to be India. He would submit that the case of ***Enercon*** (supra) has been extensively quoted in case of ***BGS SOMA*** (supra). He would therefore submit that once the seat has been designated as Mumbai, the award in question is no longer a foreign award falling under part–II of the Arbitration Act. Since the seat and the enforcement forum are both located in India, it is not a foreign award. Distinguishing factor as highlighted by Shri Thakore that in ***Enercon*** (supra) the choosing of the Indian Arbitration Act was a factor leading for the Court to decide, Mr. Hemani would submit that the majority of the factors as elaborated here in hand would

suggest that all factors still connected to India and in the case of ***Enercon*** (supra) it was just one factor that was weighed with the Court. Mr. Hemani would submit therefore that merely by designating Zurich as a place it does not by default become a seat of arbitration. It was not open for a three Judges bench of an equal strength in case of ***BGS SOMA*** (supra) to hold that the decision in the case of ***Hardy Exploration*** (supra) was incorrect.

7.15 Reliance was placed on the decision in case of ***Mankastu Impex Private Limited*** v. ***Air Visual Limited*** to contend that the seat and the venue cannot be used interchangeably. Mere expression "place" cannot determine that the parties intended that to be the seat. The intention has to be determined from other clauses in the agreement and the parties' conduct. In the case of ***Mankastu*** (supra), the Court held that merely by choosing Hongkong would not lead to a conclusion that it was a seat. It is in this context, Mr.Hemani would submit that merely because arbitration clause used the word 'Zurich' it did not become the seat of the arbitration. By an express direction dated 28.06.2018, the Tribunal determined that the venue shall be Mumbai. The entire arbitral proceedings were conducted and completed in India. The conduct of arbitration was governed by ICC rules. Article 18 (1) of the ICC Rules, allows the Arbitral Tribunal to fix the place of the arbitration. When this is read in context of Section 20 of the Arbitration Act, the undisputed fact is that the venue for the conduct of the arbitral proceedings was ultimately decided as Mumbai. Having decided the venue as Zurich first and then shifting to Mumbai, Mumbai became the "seat of arbitration".

7.16 Mr.Hemani further submitted that the arbitral award is incorrect in holding the seat as 'Zurich'. He draws support from the decision in case of ***BGS SGS SOMA JV v. NHPC [(2020) 4 SCC 234].*** The principles culled out would indicate that the decision squarely makes Mumbai the seat. They are:

(1.d.III.i) The reference to ICC rules is merely for the internal conduct of the arbitration and does not have the effect of changing the seat.

(1.d.III.i.ii) Mumbai is a neutral place where neither of the parties have their companies incorporated (Chennai and Ahmedabad) and no part of the cause of action arises.

(1.d.III.i.iii) Similarly parties have not agreed to exclusive jurisdiction of non Indian courts.

(1.d.III.i.iv) ***BGS SOMA*** (supra) approved ***Enercon*** (supra).

(1.d.III.i.v) The arbitral proceedings as a whole were held in Mumbai.

(1.d.III.i.vi) There are no "significant contrary indicia" that Mumbai was merely a venue and not the seat.

7.17 He would therefore submit that the award rendered is a domestic award inasmuch as in accordance with the provisions of Sections 2(2) of the Arbitration Act, the place of arbitration was India. In Part-I of the Arbitration Act, only 'International Commercial Arbitration' is defined. 'Domestic Arbitration' is not defined. Hence for the purposes of Part-I a pure domestic arbitration is a residual category. Section 2(E) of the Arbitration

Act categorizes arbitrations as arbitration other than International Commercial Arbitration. Since the award in question is neither one rendered in an international commercial arbitration, nor a foreign award, it is a domestic award and therefore, a Part-I award. Merely because there is a foreign element of applicability of ICC rules that alone cannot make it a foreign award.

7.18 Alternatively Mr.Hemani would submit that even if the award in question is a foreign award, the enforcement should be refused on the touchstone of the provisions of Section 48. In support of his submissions, he would raise the following grounds:

7.18.1 According to Mr.Hemani the main bone of contention between the parties was the interpretation of Clause 5.2 of the settlement agreement. In the arbitration, the petitioners sought to change the emphasis to change the term "converters" to "delta modules" which argument was accepted by the arbitrator. The clause therefore of the warranty read was for "delta modules" and not for "converters". The case of the respondent was that the claim as per warranty was indeed applicable to converters. Delving into the business transaction, Mr.Hemani would submit that the respondent is in the business of wind turbine generation and along with the petitioner, it designed converter panels. Converters are needed to ensure that the output voltage remains suitable to be fed into the grid. The most expensive and the active component of such a converter is delta-module. It is controlled by a computer. Hence, any damage to the delta-module would render the converter useless and would cause huge losses of power. He would highlight the action of the arbitrator of changing the wording

of the agreement being not permissible in light of the various clauses in the settlement agreement. He would submit therefore that the entire settlement agreement revolved around converter panel.

7.18.2 Mr. Hemani would submit that despite such strong indications, the arbitrator held that the scope of warranty under clause 5.2 was to repair or replace faulty delta modules. Even taking into consideration the limited scrutiny available, the award was bad.

7.19 He would further submit that the award does not make commercial sense in such a way that it would shock the conscious of the Court. Mr.Hemani would submit that after 5 months of hearing and 9 months of deliberations, the Arbitrator delivered the award which was completely inconceivable. The sole issue was whether the settled amendment agreement gave a warranty on delta-modules or converter panels. By holding that the warranty was on delta-modules, the Arbitrator has effectively converted the entire settlement agreement into any other purchase order entered into between the parties. The Arbitrator by his findings has obliterated the very basis of entering into a settlement agreement. Such findings, in Mr.Hemani's submissions, would shock the conscience of the Court.

7.20 Mr.Hemani would further submit that it is not at all permissible for the arbitrator to rewrite the terms of the settlement agreement. By changing the most essential term of the settlement agreement, the arbitrator has breached the most basic notions of justice and the fundamental policy of Indian law. By changing the

contract, the Arbitrator has defeated the very purpose for which the respondent entered into the settlement agreement.

7.21 By making an award that unilaterally changed the terms of the contract, the Arbitrator is asking the respondent to perform a bargain which was not entered into with the petitioner. A bigger burden is being placed on the respondent because the respondent may not have a greed to settle at this price without the warranty extension on the components causing the most problems. Such an award is contrary to the public policy of India i.e. the fundamental policy of Indian law and the most basic notions of justice.

7.22 In context of the submission of Mr.Thakore that there is no discretion of the Court in refusing to enforce the award, by relying on the decision in the case of ***Vijay Karia*** (supra) Mr.Hemani would submit that the award violates the fundamental policy of Indian law or is in conflict with the most basic notions of morality of justice would warrant that the enforcement is refused. Since these are the very grounds made out by the respondent herein, the award cannot be enforced.

7.23 The award of the Tribunal, which rewrote the terms of the agreement and which shocks the conscience of the Court and which was against the fundamental principles of justice, are awards which cannot be enforced and has been so held by the Courts in various decisions which Mr. Thakore also has relied on. In determining the breach of public policy concept, as is held in the case of ***Associate Builders***, the merits also have to be looked into.

7.24 To the decision relied upon by Mr.Thakore in the case of

Sangyong to overcome the respondent's decision of ***Sangyong*** (supra), Mr.Hemani would submit that it is evident from the decisions in the case of ***L&G Trading v. Adani Energy Ltd.*** reported in [***(2018) SCC OnLine (Guj) 301***] that in what context, a foreign award can be refused to be enforced. The award in the present context when seen in view of the findings arrived at is an award which shocks the conscience of the Court and therefore even within the limited jurisdiction of Section 48, the same is against public policy falling within Explanation 2 of Section 48(2) of the Act.

7.25 In context of the alternative submission, even if the award in question is an enforceable award, in context of the amendments of the Arbitration Act, when the legislature did not intend two domestic parties to receive access to High Courts even if the award is a foreign award, the petition should have been filed in the lower Court and even according to the provisions of the Commercial Courts Act, High Court is not the appropriate forum as has been extensively argued above. Mr.Hemani would therefore submit that the petition for enforcement of the award deserves to be dismissed.

8. Mr.Mihir Thakore learned Senior Advocate in rejoinder to Mr.Hemani's submissions would submit as under:

a. The submission of Mr.Hemani that the present foreign award is not an award out of an International Commercial Arbitration and that therefore the foreign award is a domestic award is contested by Mr.Mihir Thakore learned Senior Advocate. To Mr.Hemani's

submission that this is not a foreign award in context of the definition of Section 2(1)(f) of the Act which defines an International Commercial Arbitration and to submit that in order to be an International Commercial Arbitration, one of the parties should be a person in a country other than India and by relying on the decision in the case of ***L&T-SCOMI*** (supra), the contention of Mr.Hemani was that since both the parties are incorporated in India and as none of the conditions of Section 2(1)(f) of the Act are satisfied, it is not an International Commercial Arbitration and therefore a domestic arbitration, Mr.Thakore would submit that such a submission is wholly an incorrect understanding of the law and do not apply at all in the context of considering the enforcement of a foreign award. The fact that the present arbitration is not an International Commercial Arbitration has no bearing on the fact that the award made in Zurich outside India falls in part-II of the Act and is a foreign award. He would submit that the principle of nationality has no bearing in determining whether an award is a foreign award. Relying on the decision in the case of ***Sasan Power Limited*** (supra) of the Madhya Pradesh High Court, specifically para 58 thereof, Mr.Thakore would submit that on the analysis of the scheme of the Arbitration Act, there is a distinction between International Commercial Arbitration and a foreign award. The distinction is between an International Commercial Arbitration and an arbitration which is not an

International Commercial Arbitration. The same is based on the nationality of the parties and the distinction is only relevant for the purpose of following the appointment procedure as contemplated under Section 11 of the Arbitration Act. The concept of nationality of parties is not relevant as far as Part-II of the Arbitration Act is concerned.

b. So far as the reliance placed on the decision in case of ***TDM*** (supra), Mr. Mihir Thakore would submit that the case of **TDM** (supra) will not be applicable and would not be relevant for the purposes of the proposition. Mr.Thakore would in rejoinder submit that he would distinguish this decision when he would come to the question of Mr. Hemani's submission on the point that two Indian parties cannot enter into an arbitration agreement to have a foreign seat of arbitration. What Mr.Thakore therefore would submit is that Part-I of the Act comprises of Sections 2 to 43 of the Act. Section 2(1)(f) and Section 2(2) of the arbitration agreement are covered under Part-I of the Act. When Section 2 is read, it categorically begins with the word "in this part" therefore even if the definition of International Commercial Arbitration under Section 2(1)(f) is considered it only applies to Part-I of the proceedings, meaning thereby, the seat of arbitration is in India. Once the seat is designated in India, Indian Courts will have supervisory jurisdiction over the arbitration proceedings. Mr.Thakore would submit that Part-I of

the Act deals with conduct of arbitration proceedings including challenge and enforcement of a domestic award. On the other hand, part-II of the Act only deals with the enforcement of foreign awards. The supervisory jurisdiction over the foreign award including a challenge to it lies with the Courts of the seat of arbitration. Relying extensively on the decision in the case of **BALCO** (supra), Mr.Thakore would submit that it is categorically held that Part-I and Part-II are mutually exclusive and Section 2(2) of the Act only applies when read with Section 2(7) of the Act where the arbitral award is a domestic award. Section 44 defines a foreign award and the only condition is that the arbitration agreement between the parties must be in writing. Schedule-I of the Act which is the convention of the recognition and enforcement of foreign arbitral awards, when read with Article 1, suggests that enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons whether physical or legal. It shall also apply to arbitral awards not considered domestic awards. According to Mr.Thakore, the principle that emerges from Section 44 of the Act and with the interpretation of Article 1 of New York convention is that the nationality, domicile or residence of the parties is irrelevant to determine whether the award is a foreign award. Seat of arbitration is legal not a physical or geographical

concept and hearings, deliberations and signature of the award and other parts of the arbitral process may take place elsewhere. In Mr.Thakore's submission, therefore that on account of Section 2(1)(f) of the Act in that context the award has to be a domestic award is an argument which cannot be considered because nationality is not an issue when considering the context of the award being a foreign award.

c. In the context of submission of Mr.Hemani where Part-II and the definition of Section 44 begins with the sentence 'unless the context otherwise requires', Mr.Thakore would submit that the words 'unless the context otherwise requires' is also to be appreciated in context of the preceding words 'in this chapter'. He would therefore submit that the entire argument of the restricted meaning sought to be given relying on the phrase 'unless the context otherwise requires' on behalf of the respondents, is misconceived.

d. Coming to the submission of Mr. Hemani in context of the ground that two Indian parties cannot designate a seat outside India and the reliance placed on the decisions of Mr.Hemani, Mr. Thakore in rejoinder would submit that the submission of Mr.Hemani has to be seen in context of two facets. Firstly, to his submission that two Indian parties cannot have a foreign seated arbitration and also that such an arbitration agreement would be in violation of Section

23 and Section 28 of the Contract Act, Mr.Thakore would submit that there are several judgments of the Supreme Court which have held that there is no bar on Indian parties choosing a foreign seat and that it is not contrary to Sections 23 and 28 of the Contract Act. Mr. Thakore would submit that there is nothing in law to prevent parties that is two Indian parties from having a foreign seated arbitration. He would rely on the decision in the case of ***Atlas Exports Industries v. Kotak and Company [1999 7 SCC 61]***. He would submit that though this judgment is in context of the Arbitration Act of 1940 and the Foreign Awards (Recognition and Enforcement) Act, 1961, Part-II being identical to the foreign enforcement Act, having considered the decision, the ***Atlas Exports Industries*** (supra) holds that where the agreement was essentially between three parties, the dispute essentially was between two Indian parties, they agreed for a London seated award. Relying on the clause of the arbitration agreement in that, Mr.Thakore would submit that there is nothing under the Act which prevents the parties from entering into a contract to have a foreign seated arbitration. Mr.Thakore would submit that while considering the argument in context of Sections 23 and 28, the Supreme Court had held that the two parties Atlas Exports Industries and Kotak between whom the dispute had arose were both Indian parties, and the contract which had the effect of compelling them to resort to arbitration by a foreign arbitrator excluding

the remedy, cannot be said to be opposed to public policy. He would submit that the Supreme Court held that the case was an exception-I to Section 28 of the Contract Act. He would therefore submit that the judgment would categorically answer the submission of Mr.Hemani that (i) two Indian parties cannot enter into a contract and; (ii) such a contract is opposed to Sections 23 and 28 of the Contract Act.

e. Reliance was also placed on the decision in the case of ***Sasan Power Limited*** (supra), extensively paragraphs were read out from the judgment to support the case that the question of permitting two Indian companies or parties to arbitrate out of India is permissible as held by the decision in the case of ***Atlas Exports Industries*** (supra). He also relied on the decision in the case of Delhi High Court in ***GMR Energy Ltd. v. Dusan Power Systems India Pvt. Ltd. and others [2017 SCC OnLine (Del) 11625]***. Distinguishing the decisions in the case of ***TDM Infrastructure (P) Ltd.*** (supra), Mr.Thakore would submit that in the case of ***TDM Infrastructure (P) Ltd.*** (supra) which was argued in support by Mr. Hemani holding that two Indian parties cannot choose a foreign seat, the same is not relevant. The matter in issue in the judgment of ***TDM Infrastructure (P) Ltd.*** (supra) was not the question whether two Indian parties can choose a foreign seat. The case in the ***TDM Infrastructure (P) Ltd.*** (supra) was pertaining to a

petition filed under Section 11 of the Arbitration Act and the Supreme Court on the argument that though the company was incorporated and registered in India, its Board members and its shareholders were Malaysians and therefore the arbitration was an International Commercial Arbitration seated in India. Relying on para 2 of the judgment which contained the arbitration clause, in the context of the judgment, the Supreme Court in para 19 held that determination of nationality of parties plays a crucial role in the appointment of an Arbitrator. A company incorporated in India can only have an Indian nationality. Interpreting Section 28 of the Act which states that for the arbitration seated in India between Indian parties, the dispute shall be decided as per the Indian law, it was in the context of that Section 28 that the Supreme Court held that the parties cannot be permitted to derogate from the Indian law. The context was in question with when the seat of arbitration in India, then the substantive law of arbitration is the Indian Arbitration Act. In the decision of ***TDM Infrastructure (P) Ltd.*** (supra), the Supreme Court held that when the seat of arbitration is in India between two Indian parties, the parties cannot derogate from the substantive law i.e. the Companies Act on the ground that it is a foreign company because the control is vested in Malaysia. Relying on para 36 of the decision, Mr.Thakore would submit that the Supreme Court categorically made clear any findings or observations made was only for the purposes of

determining the jurisdiction of the Court as envisaged under Section 11. He would therefore submit that this judgment would have no binding force in the context of the law in reference to the arguments juxtaposed in Sections 23 and 28 of the Indian Contract Act.

f. In context of the decision relied upon by Mr.Hemani in case of ***M/s.Addhar Mercentile Pvt. Ltd.*** (supra), Mr.Thakore would submit that the said decision would not be of any assistance to the respondents because the decision of ***M/s.Addhar Mercentile Pvt. Ltd.*** (supra) was again not dealing with the proposition whether two Indian parties can choose a foreign seat. ***M/s.Addhar Mercentile Pvt. Ltd.*** (supra) was again a decision in context of Section 11 of the Arbitration Act and the clause of the arbitration provided that the arbitration could be in India or Singapore. It was in this context that the Bombay High Court found that if Singapore was chosen, English law will have to be applied and it was in this context that the Court held that if the seat of the arbitration was Singapore, it was the English law that will apply and if the Arbitration Act was to be made applicable, the parties cannot be made to derogate from Indian law.

g. Mr.Thakore also distinguished the decision in the case of ***Sah Petroleums Ltd.***(supra) relied upon by Mr.Hemani and submitted that it too does not deal with the context of permission of two Indian parties to enter

into an agreement for a foreign seated arbitration. ***Sah Petroleums Ltd.*** (supra) has been held to be *per-incuriam* as it does not deal with the decision of ***Atlas Exports Industries*** (supra).

h. Mr.Thakore would further submit that the legislature never intended that two Indian parties cannot have a foreign seated arbitration. By referring to the preamble of the Act, when Mr.Hemani submitted that the Arbitration Act deals with law relating to Domestic Arbitration, International Commercial Arbitration and enforcement of formal award of foreign awards, it is wrong to argue that it contemplates only two forms of arbitration. Reliance by Mr. Hemani on the paragraphs of the Law Commission's report in the submission of Mr.Thakore are also fallacious and made with an intention to confuse between the International Commercial Arbitration and Foreign Award. Mr. Thakore would submit that these two are entirely different concepts. One is premised on nationality of parties and the other on the situs where the award is made. Mr.Thakore would submit that even the law commission's report distinguishes these facts by setting out the three separate fields that the Arbitration Act considers viz. (i) Domestic Arbitration (ii) Award arising out of International Commercial Arbitration (iii) Enforcement of Foreign Arbitral Awards. Reiterating and denying the arguments of Mr.Hemani in the provision of Section 44 to hold that the Section begins

with the proviso "unless the context otherwise required" Mr.Thakore would submit that the intent of the legislature can be determined. Mr.Thakore submitted that the submission of Mr.Hemani that since both the parties are incorporated in India and therefore since none of the conditions under Section 2(1)(f) have been met out it should be a domestic arbitration, is misconceived. The above according to Mr.Thakore the argument is based on a wholly incorrect understanding of law and does not apply in context of the enforcement of the foreign award. In context of the submission that by entering into an agreement which would defeat the provisions of any law, Mr.Thakore would submit that in fact, it is not so. He would submit that the respondent has failed to show any law which expressly prohibits two Indian parties from choosing a foreign seat. An arbitration agreement is an agreement by mutual consent and the parties can contract out of the law provided the said law impacts a private right. When a law pertains to purely private rights between the parties such as the Arbitration Act, it cannot control a contract. Arbitration in any event applies to disputes that determine the rights of parties *in personam* and therefore does not apply disputes which are *in rem*. Decision relied upon was in the case of **Booz Allen & *Hamilton Inc. v. SBI Home Finance Limited [(2011) 5 SCC 532].*** That such an agreement is not with a view to defeat the provisions of any law, Mr.Thakore would place reliance on the decision in the case of ***Lachoo***

Mal v. Radhey Shyam [(1971) 1 SCC 619.] Relying on the decision of ***Lachoo Mal*** (supra) where the issue before the Supreme Court was whether Section 1A of the UP (Temporary Control of Rent and Eviction Act] was merely in the nature of an exemption in favour of landlords with regard to the buildings constructed after January 1951, in context of Section 23 the Hon'ble Supreme Court held that the general principle is that everyone has a right to waive and to agree to waive the advantage of a law or a rule made solely for the benefit or the protection of an individual in his private capacity. In juxtaposition he relied on the case of ***Murlidhar Aggarwal v. The State of Uttar Pradesh 1974 2 SCC 472*** and in the case of ***Sita Ram Gupta v. Punjab National Bank [(2008) 5 SCC 711]*** which held the contracting out as against public policy and defeat the provisions of law because the rights *in rem* were involved which is not the case in the present instance where the settlement of disputes by arbitration is purely a personal right.

i. On the question of law and on facts, where Mr. Hemani argued that Mumbai should be taken to be the seat of arbitration in view of the 'closest connection test' as argued by Mr.Hemani and particularly in view of the interpretation of the clause “in Zurich” Mr.Thakore would submit that relying on clause 6.2 of the agreement, Mr.Thakore would submit that when clause

6.2 of the agreement is read, it said that all disputes, controversies or differences shall be referred to and finally resolved by arbitration in Zurich. He would submit that the wordings of Clause 6.2 of the settlement agreement would show that the arbitration was seated at Zurich. It was the curial law of Switzerland that applied and the arbitration was in accordance with the ICC rules. First arguing on the question of waiver on behalf of the respondent, Mr.Thakore would argue that in fact it was the petitioner who had filed a preliminary application challenging the jurisdiction of the arbitration on the ground that two Indian parties cannot have a foreign seat arbitration. In that application, the respondents herein had opposed the said application and argued specifically submitting that the seat of arbitration is Zurich. The procedural order was held in favour of the present respondent holding that the seat was Zurich. The conduct of the respondent therefore now to say that the seat of arbitration was not Zurich but Mumbai cannot be so taken and the respondents are estopped from taking such contention. Mr.Thakore has relied extensively on the reply filed by the respondent herein in the preliminary application of the petitioner. He would submit that therefore a party like the respondent cannot be allowed to approbate and reprobate at its convenience. A party having a choice between two courses is to be treated to have elected from which it cannot resile.

j. Mr.Thakore would submit that Mumbai was merely a convenient venue whereas Zurich remained the seat of arbitration. He would invite the attention on emails from time to time to submit as such and also to the transcripts of the proceedings where the arbitrator continued to remind the petitioners and the parties that they were subject to Swiss law as far as arbitration proceedings are concerned. He would submit that there is no ambiguity between seat versus venue and therefore the precedents relied upon by the applicant are not applicable. Reliance by Mr.Thakore was placed on the decision in the case of **BALCO** (supra) in context of the term "place of arbitration". Paras 100 and 110 were relied in support of his submission that the seat in fact was Zurich.

k. Mr.Thakore would submit that the respondents seeking to rely on the decision in the case of ***Hardy Exploration*** (supra) was misconceived. So also the reliance by the respondent in the case of ***Mankastu Impex Private Limited*** (supra) also was misconceived. Mr.Thakore would submit that the reliance on the decision in case of ***Hardy Exploration*** (supra) is ill-founded based on the arbitration clause in the case of ***Hardy Exploration*** (supra). The word in the arbitration clause in ***Hardy Exploration*** (supra) was "venue" and it was in that context that the Court held that unless the parties otherwise agree. In contrast, there was a clear

stipulation in clause 6.2 of the present arbitration agreement that the dispute will finally be resolved by arbitration in Zurich. In ***Hardy Exploration*** (supra) there was a clear observation of the Supreme Court that the place of arbitration was to be agreed upon between the parties whereas it was not so in the present case. Mr.Thakore would further submit that the Supreme Court in ***BGS SOMA*** (supra) found ***Hardy Exploration*** (supra) to be *per incuriam* as it did not consider the judgment of **BALCO** (supra). Mr.Thakore relied on para 91 of the decision in the case of ***BGS SOMA*** (supra). Even the decision in case of ***Mankastu*** (supra), according to Mr.Thakore would not help the respondents because the Supreme Court categorically refused to opine on the correctness of the ***BGS SOMA*** (supra).

1. Mr.Thakore would otherwise submit that in fact ***Mankastu*** (supra) helps and aids the petitioner's submission that Zurich is the seat of arbitration. The arbitration clause in case of ***Mankastu*** (supra) read that the dispute, controversy, difference arising out of or relating to the dispute shall be referred to and finally resolved by arbitration administered in Hongkong. The cause of arbitration in ***Mankastu*** (supra) therefore was similarly worded to the clause 6.2 of the settlement agreement in the present case which had the words 'in Zurich'. It was in this context that ***Mankastu*** (supra) also held that this was a clear suggestion that the seat of

arbitration was Hongkong and the same analogy would therefore apply in the facts of the present case.

m. Dealing with the "close connection test" as argued by Mr.Hemani by relying on the decision in the case of ***Enercon*** (supra), Mr.Thakore would submit that such an argument would be misconceived for the following reasons:

(i) According to Mr.Thakore the closest connection test becomes applicable only when the arbitration clause in question is ambiguous. In the case of ***Enercon*** (supra) the clause stipulated that the venue of arbitration proceedings shall be London and it said that the provisions of the Indian Arbitration and Conciliation Act shall apply. The clause therefore not only provided that London was the venue but also stipulated that the Indian Arbitration and Conciliation Act would apply therefore expressly stipulating the supervision of the Indian Courts on the arbitration proceedings. This was not the case in context of the settlement agreement between the parties governing the present arbitration.

(ii) In comparing Article 18(1) with Section 20 of the Arbitration Act and drawing support thereof in his submissions that seat of arbitration was Mumbai, Mr.Thakore tried to dislodge the argument that when Section 2.2 defining Place of Arbitration which is in

identical terms to the definition in Article 1 is read with Section 20 of the Act, the argument is completely fallacious because Section 20 finds its place in part -I of the Arbitration award and is inapplicable to the present case. Relying on para 98 of the decision in case of BALCO (supra), Mr.Thakore would submit that the fixation of the most convenient venue is taken care in Section 20 and Section 20 has to be read in context of Section 2(2) which places a threshold limitation on the applicability of part-I and does not support the extraterritorial applicability of part-I and applies only to purely domestic awards. He therefore submits that the interpretation canvassed by Mr.Hemani with respect to Article 18(1) with 20 would not apply. Mr.Thakore would submit that the submission of Mr.Hemani that Mumbai is the seat of arbitration is clearly an afterthought. Having filed an application under Section 34 for setting aside the award in the Small Causes Court in Gujarat, it is not open for him now to contend that the seat of Arbitration was Mumbai.

n. On the question of the scope of Section 48(2) and the objections raised by the respondent and that therefore, the award cannot be enforced, Mr.Thakore would submit that reliance by Mr.Hemani on the case of ***Associate Builders*** (supra), ***Sangyong*** (supra) and ***Asian L&G*** is misconceived. Mr.Thakore would submit that the reliance on the case of ***Associate Builders*** was of no relevance because the challenge before the

Supreme Court was in the context of a domestic award under Section 34 and not under Section 48. ***Associate Builders*** (supra) was prior to the amendment of 2015 where the grounds of challenge under Section 34 were far more expansive. In case of ***Sangyong*** (supra), Mr.Thakore would submit that the Supreme Court held that Explanation 2 to Section 34 and Explanation 2 to Section 42 was added and in the case of ***Sangyong*** (supra) the Supreme Court categorically held that ***Associate Builders*** (supra) was not applicable. The decision in the case of ***Sangyong*** (supra), according to Mr.Thakore also provides no assistance because it dealt with an award under Section 34. Even that decision holds that the argument based on "most basic motions of justice can be attracted only in exceptional circumstances". The circumstances shown by the respondent to elicit that it shocks the conscience are not met to satisfy such parameters on which the enforcement of the award can be refused. In the case of ***Sangyong*** (supra) what the majority award held was that it created a new contract by applying a unilateral circular without bringing it to the notice or without altering the contract. It was in these circumstances that the Supreme Court interfered. What was done in the present case was a simple interpretation of the agreement, particularly Clause 5.2 thereof, which cannot be said to be one which shocks the conscience or against the basic motions of morality.

o. Mr.Thakore would submit that even the case of Gujarat High Court in ***Asian L&G*** (supra) was not applicable because there was no agreement between the parties in that case and on facts therefore the said decision was not applicable. Reiterating, Mr.Thakore would submit that the objections on merits are also not maintainable in view of Explanation 2 to Section 48(2)(b). These objections are (a) a last ditch attempt raised on merits to a sale of foreign award. These objections are not maintainable and do not merit consideration.

p. Mr.Thakore would submit that by quoting recitals in the settlement agreement, the respondent tried to argue that the converters were not tested before supplying them to the respondents. Such submissions are plarily wrong. Reading the purchase orders, it is clear that 24 months warranty was provided from the date of commissioning or 30 months from the date of dispatch whichever is earlier. The warranty on converters expired in June 2014 before the settlement agreement which was an undisputed position. There was no rewriting of the settlement agreement by replacing the words "converters" with "delta modules". The submission of the respondent that it would not make commercial sense as the supplied "delta modules" came with an in-built warranty of 12 months is also misconceived and flawed. This was because according to Mr.Thakore the petitioner had already provided a number of services

through personnel, man hours and troubleshooting beyond what was required in the purchase orders. To the argument of the respondents that "delta modules" came with an inbuilt warranty and that could have been purchased from the market and therefore there was no benefit from the settlement agreement, Mr.Thakore would argue that even before this settlement agreement was entered into, it was very clear that the warranty on converters was long over in June 2014. This is evident from recital 3.4 of the settlement agreement. Reading the award, Mr.Thakore would submit that such a contention has been rightly refused in para 165 of the foreign award.

q. On the question of whether the pricing mechanism which would appeal to the commercial sense, Mr.Thakore would submit that from the bare reading of clause 5.2 it was evident that there was some ambiguity with the words as "warranty attributable to converters for above mentioned converter" does not make any sense. The arbitrator therefore rightly placed emphasis on the word "attributable". Mr.Thakore would submit that section 34 petition filed by the respondents would not be maintainable in view of the fact that the seat of the award was Zurich and it was a foreign award and the same has been extensively discussed and upheld in the decision in the case of **BALCO** (supra). Reliance was placed on the decision in the case of ***IMAX***

Corporation (supra) also to submit that when an arbitration agreement has a seat outside India and the rules of ICC apply, all the awards are foreign awards, Mr.Thakore reiterated the decisions.

r. With regard to the objection of maintainability of Section 9 petition filed by petitioner, Mr.Thakore would submit that the petition under Section 9 would be maintainable in view of the decision in the case of ***Trammo DMCC*** (supra). For all these reasons, Mr.Thakore would submit that the present petition is maintainable and the arbitral award of 18.04.2019 ought to be enforced and the petition be allowed.

9. Having considered the extensive oral arguments and written submissions tendered by the respective parties to decide the issues in context, the following essential questions raised need to be answered.

(I) Is the Award in question a Foreign Award?

(II) Whether the award in question, if a foreign award, is enforceable in India?

(a) Whether conditions of enforceability are fulfilled?

(b) Whether the award can be said to be against the public policy of India?

(III) Whether an application under Section 9 in the context of the agreement in question is maintainable before this Court?

10. Before proceeding with the determination of questions which arise for consideration of this Court, the understanding of the scheme of the Act, 1996 would be essential. The Preamble of The Arbitration and Conciliation Act, 1996, reads as follows:

> "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 therewith or incidental thereto."

10.1 It is clear from the preamble that the Act, 1996, seeks to prescribe the law relating to

- Domestic Arbitration
- International Commercial Arbitration, and,
- Enforcement of foreign arbitral awards
- Define the law relating to conciliation and for matters connected therewith or incidental thereto

10.2 Whereas Law relating to Domestic arbitration and International Commercial arbitration is stipulated under what is identified as Part I of the Act, Enforcement of foreign arbitral awards falls under Part II of the Act. Law relating to conciliation and for matters connected therewith or incidental thereto falls under Part III. The Scope and application of Part I of the Act, is defined under Section 2(2) of the Act which reads as under:

> *2(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 (b)] 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 recognised under the provisions of Part II of this Act.]

Part II pertains to enforcement of foreign awards. It provides for Chapter I applicable to New York Convention Awards (awards arising out of agreements to which the New York Convention applies) and Chapter II applicable to Geneva Convention Awards (awards arising out of agreements to which the Geneva Convention applies).

11. The Supreme Court in **BALCO (supra)** in the context of applicability of the Act, 1996 has held as under:

"67. ..., that Parliament by limiting the applicability of Part I to arbitrations which take place in India has expressed a legislative declaration. It has clearly given recognition to the territorial principle. Necessarily therefore, it has enacted that Part I of the Arbitration Act, 1996 applies to arbitrations having their place/seat in India.

...

70. Whilst interpreting the provisions of the Arbitration Act*, 1996, it is necessary to remember that we are dealing with the Act which seeks to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards. The aforesaid Act also seeks to define the law relating to conciliation and for matters connected therewith or incidental thereto. It is thus obvious that the* Arbitration Act*, 1996 seeks to repeal and replace the three pre-existing Acts, i.e.,* The Arbitration Act*, 1940; The Arbitration (Protocol and Convention) Act, 1937 and the Foreign Awards (Recognition and* Enforcement) Act*, 1961.* Section 85 *repeals all the three Acts. Earlier the 1937 Act catered to the arbitrations under the Geneva Convention. After the 1958 New York Convention*

was ratified by India, the 1961 Act was passed. The domestic law of arbitration had remained static since 1940. Therefore, the Arbitration Act*, 1996 consolidates the law on domestic arbitrations by incorporating the provisions to expressly deal with the domestic as well as international commercial arbitration; by taking into account the 1985 UNCITRAL Model Laws. It is not confined to the New York Convention, which is concerned only with enforcement of certain foreign awards. It is also necessary to appreciate that the* Arbitration Act*, 1996 seeks to remove the anomalies that existed in the* Arbitration Act*, 1940 by introducing provisions based on the UNCITRAL Model Laws, which deals with international commercial arbitrations and also extends it to commercial domestic arbitrations. UNCITRAL Model Law has unequivocally accepted the territorial principle. Similarly, the* Arbitration Act*, 1996 has also adopted the territorial principle, thereby limiting the applicability of Part I to arbitrations, which take place in India."*

11.1 The Supreme Court in ***BALCO (supra)*** goes on to hold that *:*

"89. … From the aforesaid, the intention of the Parliament is clear that there shall be no overlapping between Part I and Part II of the Arbitration Act, 1996. The two parts are mutually exclusive of each other."

12. In other words, the scheme highlights, if anything, a clear distinction between Part I and Part II as being applicable in completely different fields and with no overlapping provisions. It is in the above conspectus of the provisions of the Act, 1996, that the questions arising for determination in the controversy at hand shall be determined.

Is the Award in question a Foreign Award

13. The pursuit to determine the nomenclature of the award would warrant this Court to consider Section 2(1)(e), 2(2)(7), 28

and 31 of Part I, and pertinently, Section 44 of Part II of the Act. Primarily, these sections appearing under mutually exclusive parts (i.e. Part I and Part II) of the Act, define the types of award recognized by the Act. These relevant provisions are enumerated herein below:

> "**2(1)(e): "Court" means—**
>
> in the case of an arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes;
>
> (*ii*) in the case of international commercial arbitration, the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, and in other cases, a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court;]
>
> **2(7)** An arbitral award made under this Part shall be considered as a domestic award.

28. Rules applicable to substance of dispute.—

(1) Where the place of arbitration is situate in India,—

> (a) in an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;
>
> (b) in international commercial arbitration,—

(i) the arbitral tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute;

(ii) any designation by the parties of the law or legal system of a given country shall be construed, unless otherwise expressed, as directly referring to the substantive law of that country and not to its conflict of laws rules;

(iii) failing any designation of the law under clause (a) by the parties, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute.

(2) The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorised it to do so.

(3) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

31. Form and contents of arbitral award.—

(1) An arbitral award shall be made in writing and shall be signed by the members of the arbitral tribunal.

(2) For the purposes of sub-section (1), in arbitral proceedings with more than one arbitrator, the signatures of the majority of all the members of the arbitral tribunal shall be sufficient so long as the reason for any omitted signature is stated.

(3) The arbitral award shall state the reasons upon which it is based, unless—

(a) the parties have agreed that no reasons are to be given, or

(b) the award is an arbitral award on agreed terms under section 30.

(4) The arbitral award shall state its date and the place of arbitration as determined in accordance with section 20 and the award shall be deemed to have been made at that place.

(5) After the arbitral award is made, a signed copy shall be delivered to each party.

(6) The arbitral tribunal may, at any time during the arbitral proceedings, make an interim arbitral award on any matter with respect to which it may make a final arbitral award.

(7) (a) Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.

(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of eighteen per centum per annum from the date of the award to the date of payment.

(8) Unless otherwise agreed by the parties,—

(a) the costs of an arbitration shall be fixed by the arbitral tribunal;

(b) the arbitral tribunal shall specify—

(i) the party entitled to costs,

(ii) the party who shall pay the costs,

(iii) the amount of costs or method of determining that amount, and

(iv) the manner in which the costs shall be paid. Explanation.—For the purpose of clause (a), "costs" means reasonable costs relating to—

(i) the fees and expenses of the arbitrators and witnesses,

(ii) legal fees and expenses,

(iii) any administration fees of the institution supervising the arbitration, and

(iv) any other expenses incurred in connection with the arbitral proceedings and the arbitral award."

13.1 Consideration of sections 2(1)(e), 2 (2), 2(7), 28 and 31 of Part I, will not arise for the present purpose particularly for determining whether an award is a foreign award because foreign award stands defined under Section 44 of the Act falling under Part II. This Court would be supported, in its such finding, by the position of law postulated in ***BALCO (supra)*** where it is held as under:

> *"89. That Part I and Part II are exclusive of each other is evident also from the definitions section in Part I and Part II. Definitions contained in Section 2(i)(a) to (h) are limited to Part I. The opening line which provides "In this part, unless the context otherwise requires……", makes this perfectly clear. Similarly, Section 44 gives the definition of a foreign award for the purposes of Part II (Enforcement of Certain Foreign Awards); Chapter I (New York Convention Awards). Further, Section 53 gives the interpretation of a foreign award for the purposes of Part II (Enforcement of Certain Foreign Awards); Chapter II (Geneva Convention Awards)…"*

13.2 Section 44 defines a foreign award to be an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India made after 11th October, 1960 in pursuance of an agreement in writing for arbitration to which Convention set forth in the First Schedule (the New York Convention) applies, and, in one of such territories as the Central Government declares to be territories to which such convention (the New York Convention) applies. Thus, upon appreciation of the above definition as provided in Section 44, the following ingredients of a foreign award can be culled out

- It must be an arbitral award
- The award must be deduced upon an adjudication of a dispute between parties
- Such dispute must be owing to and/or arise from a legal relationship between the parties
- Such legal relationship, may or may not be contractual, however must borne out to be commercial in nature

- Must be pursuant to an agreement in writing to which the New York Convention applies
- Must be made in a territory recognized by the Central Government as a territory to which the New York Convention applies.

13.3 The parties in the course of their pursuit before this Court, would not dispute that

- The award is an arbitral award,
- The award results from an adjudication of a dispute between the parties arising out of a legal relationship which is commercial in nature.

13.4 What thus remains disputed between the parties are the territorial ingredients of Section 44 i.e. applicability of New York Convention to the agreement and the Venue/seat of the award where the award can be said to have been made. In furtherance of such dispute the parties would differ on their respective understanding of the 'seat' of the arbitration. Whilst the judgement creditor represented by Mr. Thakore would contend that the 'seat' of the Arbitration, as can be appreciated from clause 6.2 of the agreement in question would be 'Zurich', a territory declared by the Central Government to which the New York Convention applies, Mr. Hemani per contra would contend that through application of the 'closest connection test' and by 'inferring the intention of the parties' as is a recognized medium to identify a 'seat' of arbitration in ***Mankastu*** (supra), such 'seat' in the present context would be Mumbai. It is therefore to the above extent, that this Court is obligated to render a determination so as to ascertain the 'seat' of

the arbitration. Such determination would confirm that the two ingredients of Section 44 with respect to which the parties dispute, i.e. the agreement while confirming to the New York Convention is made in a territory recognized by the Central Government to which the said convention applies, stand settled in order to enable this Court to conclude on whether the award placed before it is a 'foreign award'.

13.5 Though it is the case of Mr. Hemani that the award, to the extent that it involves Indian parties and lacking foreign element, must be declared as a domestic award, however this Court, does not acknowledge, consideration of such facets of the award to be determinative for declaring the same a foreign award. The foundation to arrive at such a conclusion for this Court is as follows:

(a) the definition as available under Section 44 can be held to be the sole repository for determining an award to be a foreign award

(b) Section 44 of the Act lays down exhaustively the essential ingredients for determination of an award to be a foreign award,

(c) Neither inferences nor intentions to presume any other ingredients than those provided under section 44 should be regarded as permissible for determining an award as a foreign award.

13.6 However, and despite this Court's resolve as above, even while testing the argument of Mr. Hemani exfacie, this Court

concludes that nationality of the parties has no relevance for considering the applicability of Part II, of the Act of 1996. Applicability of Part II is determined solely based on what is the seat of arbitration, whether it is in a country which is signatory to the New York Convention. If this requirement is fulfilled, Part II will apply. Thus, this Court while over ruling the contentions of nationality of the parties and the domestic elements involved in the award, as being irrelevant for the purpose of determining the nomenclature of the award, proceeds to the vital determination i.e. the seat of the arbitration, which in the understanding of the Court shall be clinching to determine whether the award is a foreign award enabling this Court to answer the first question raised for consideration in the dispute at hand.

13.7 This Court shall be guided by ***BALCO*** *(supra)* and ***BGS SOMA*** *(supra) in its* quest for determining the seat of arbitration. Through ***BALCO*** *(supra)* the Hon'ble Apex Court held that ***the seat of arbitration is centrifugal to the determination of jurisdiction*** since the Act, 1996, borrows the territorial principal recognized under the UNICTRAL Model. In that context the Hon'ble Apex Court has held:

> "116. The legal position that emerges from a conspectus of all the decisions, seems to be, **that the choice of another country as the seat of arbitration inevitably imports an acceptance that the law of that country relating to the conduct and supervision of arbitrations will apply to the proceedings**."

13.8 The Apex Court as recently as in 2020 through ***BGS SOMA*** *(supra)* while recognizing the primacy of 'seat' of arbitration, in the context of conduct and supervision of arbitrations, consolidated and elucidated the principal of determination of a 'seat' and ***held that where there is an express designation of venue and no designation of any alternative place as seat combined with a supernational body of rules governing arbitration and no other significant contrary indicia, the inexorable conclusion is that the stated venue is a juridical seat of arbitration proceedings***.

14. It is in the precincts of the above settled law, that the arguments of the parties deserve to be appreciated. Mr. Thakore argues that the expression and intention of the parties to the Arbitration was always to the effect that seat of the arbitration would be Zurich. It is Mr. Thakore's submission that a dispute with respect to the seat of arbitration being Zurich, was raised before the arbitral tribunal, but was rested by it while holding that the seat of arbitration is infact and law Zurich and hence the curial law applicable shall be the Swiss law. He would enforce his such submission by stating that such finding of the arbitral tribunal has remained unchallenged. It is his case that even when the proceedings of the arbitration were held in Mumbai for convenience of the parties, it was never a dispute that the seat of arbitration shall remain to be Zurich despite the venue of proceedings being Mumbai.

14.1 Such submissions of Mr. Thakore are sought to be refuted by Mr. Hemani who while relying upon ***Mankastu*** (supra) would submit that the 'closest connection test' and 'intent of the parties'

when inferred shall yield that the seat of the arbitration was never agreed upon to be Zurich but it was Mumbai. To buttress his such submission on facts he would rely upon elements such as settlement agreement was executed between Indian parties, registered office of both the parties is at India, agreement was executed in India, properties of both the parties in India, substantive law is that of India, consequently, law governing the arbitration agreement is that of India, post agreement the entire transaction takes place in India, and, all arbitration proceedings were held in India. The implication through such reliance is the belief he presents to lay the foundation of the case he puts up against the submissions of Mr. Thakore.

14.2 Bound by the diktat of the settled law (as enunciated above), this Court would first turn to what has been the express designation of the seat of arbitration in the agreement which is reproduced as under:

> "*6. Governing Law and Settlement of Dispute*
>
> *6.2 …**finally resolved by Arbitration in Zurich**, in the English language in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce…*"

14.3 As clear as the plain reading of the above clause would reveal, the express designation of seat of arbitration, which even if it were to be inferred from clause 6.2, is that the seat/venue of arbitration shall be Zurich. This, in addition to the fact that there is no other significant indicia to the contrary. Bearing such designation in mind while being bound by the preposition of law laid down in ***BGS Soma (supra)***, the inexonerable conclusion is

that the juridical seat of the arbitration is Zurich. With such conclusion being founded in settled law, there shall be no requirement for further elongating the inquiry into the determination of the seat of arbitration. However only so as to ensure Mr. Hemani's submissions are not rendered unappreciated, the following aspects deserve to be exploited to determine the express intentions of the parties to the arbitration with respect to its seat being Zurich.

(a) The Petitioner herein had filed a preliminary application challenging the jurisdiction of the arbitration. The Respondent herein had opposed the said application and argued and specifically submitted that the seat of arbitration is Zurich, Switzerland by way of a reply dated January 15, 2018. Petitioner's preliminary application before the Arbitrator was dismissed by way of Procedural Order No. 3 dated February 20, 2018 which held that:

> "*[f]or the reasons set out above, the Tribunal* ***therefore finds that the arbitration clause in the Settlement Agreement is valid and will proceed to apply the Swiss Act because the seat of the arbitration is Zurich, Switzerland***."

This Procedural Order No. 3 was not challenged by either the Petitioner or the Respondent and therefore, it attained finality.

(b) In this regard, the email dated June 22, 2018 addressed by the petitioner to the Arbitrator, if viewed, it is clear that the petitioner had requested that the venue of the arbitration proceedings be held in Mumbai. However, the respondent

opposed this submission by way of its email of June 22, 2018 and wanted the venue of arbitration to continue to be Zurich, Switzerland. However, after some deliberations and hearings, by his email order dated June 28, 2018 the Arbitrator ruled, "***The venue of the hearing shall be Mumbai, India. The seat of the arbitration of course remains Zurich, Switzerland.***"

(c) Further, from the hearing transcripts, extracts of which are reproduced below, as pointed out by Mr. Mihir Thakore, learned Senior Counsel, the fact that the seat of arbitration remained Zurich is very evidently clear:

(i) **Transcript of the hearing held on July 16, 2018 –**

"*Ladies and gentlemen, welcome to Mumbai.* ***In fact, we are in Zurich. The seat of the arbitration is Zurich, so the Swiss Private International Law statute applies with regards to procedural law. But pursuant to the ICC Rules, we are, for convenience purposes, sitting in Mumbai India.***" [Emphasis applied]

(ii) **Transcript of the hearing held on July 16, 2018 –**

"*Although we are sitting,* ***as I said at the beginning of the hearing, physically in Mumbai, India, we are actually, in reality, legally we are sitting in Zurich Switzerland. As an arbitrator in a Swiss arbitrator, I am duty bound to point out to you that it is a criminal offence in Switzerland to give false testimony pursuant to the Swiss Criminal Code***"

(iii) **Transcript of the hearing held on July 18, 2018 –**

"***We are physically sitting in Mumbai, but in fact the seat of this arbitration is Zurich Switzerland***"

(iv) **Transcript of the hearing held on July 19, 2018 –**

"***Thank you for coming to testify. We are currently sitting physically in Mumbai, but this arbitration is actually taking place in Zurich Switzerland because that's the seat of the arbitration.***"

(d) The operative portion of the foreign award reads as under:

"227 …

The seat of the arbitration is Zurich, Switzerland…."

14.4 With appreciation of the above evidences on record, there would hardly arise a doubt in the mind of this Court that notwithstanding the expression of the seat as arises in clause 6.2 of the arbitration agreement, even the intention of the parties, if it were to be so culled out, was irrefutably to designate the seat of arbitration as Zurich. A reading of ***Mankastu*** (supra) as relied upon by Mr. Hemani not only strengthens this Court's resolve of the seat of arbitration in the present case being Zurich but also leads this Court to hold that such reliance was only to the detriment of Mr. Hemani since ***Mankastu*** (supra) rather affirms the position of law settled by ***BGS Soma*** (supra). Moreover in ***Mankastu*** (supra) an inquiry into the intent of the parties very similar to the one done above in the instant case lead to the Hon'ble Apex Court concurring with the view taken by it in ***BGS Soma*** (supra).

15. In light of the above, this Court deduces and declares that the inexonerable conclusion is that the juridical seat of the arbitration is Zurich. With such finding this Court deems it trite to hold that

the award, in as much as it is made in Zurich- a territory declared by the Central Government to be one to which the New York Convention applies and since for the other ingredients prescribed in Section 44 of the Act, there is no dispute *interse* the parties, is a Foreign Award.

16. Having arrived at the conclusion as aforesaid, I proceed to answer the next question for consideration i.e.

II. **Is the foreign award in question enforceable in India**

16.1 For the purposes of determining the above question, this Court would be guided by the prescriptions of the Hon'ble Apex Court made in ***Fuerst Day Lawson Ltd. (supra)***. It is held therein that there are 2 stages in enforcement of foreign award, **Stage 1**, *where the Court would make an inquiry into enforceability of the Award*, and, **Stage 2** *where the Court holds that the Award is enforceable*. In furtherance of the above mandate of the Hon'ble Apex Court, enforceability of the Award may have to be inquired into. For the purposes of such inquiry, a consideration of Section 47 of the Act, may be necessary and hence the same is reproduced as under:

> **"47. Evidence.—**
>
> (1) The party applying for the enforcement of a foreign award shall, at the time of the application, produce before the court—
>
> (a) the original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made;

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

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

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

Explanation.—In this section and all the following sections of this Chapter, "Court" means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction over the subject-matter of the award if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes.

16.2 It is not the case of either parties that all requirements postulated in Section 47 (1) and (2) are not fulfilled. Resultantly, it would be essential to consider further whether this Court will have jurisdiction to decide upon the application seeking enforcement of the award in question. Explanation to Section 47 defines 'Court' before which the Enforcement Petition can be filed. Court is defined to mean, "***the High Court having original jurisdiction to decide the questions forming the subject-matter of the arbitral award if the same had been the subject-matter of a suit on its original civil jurisdiction and in other cases, in the High Court having jurisdiction to hear appeals from decrees of courts subordinate to such High Court.***"

16.3 The subject-matter of the present proceedings is the assets of the respondent against which enforcement is sought to realize the fruits of the Foreign Award in favour of the Petitioner. This Court has the jurisdiction to hear the present petitions as the assets of the Respondent are located in this Court's jurisdiction and some of these assets have also been identified at paragraph 55 of the Enforcement Petition. The Supreme Court in **BALCO** *(supra)* has held:

> "*97....Section 47 which is in* ***Part II of the Arbitration Act, 1996 dealing with enforcement of certain foreign awards has defined the term "court" as a court having jurisdiction over the subject-matter of the award. This has a clear reference to a court within whose jurisdiction the asset/person is located, against which/whom the enforcement of the international arbitral award is sought****.*"

16.4 In light of the above, this Court holds that the conditions of enforceability are fulfilled in the present case, and hence answers II (a) in the affirmative.

17. Proceeding further towards deciding the question as to whether the award is enforceable, Section 48 of the Act may have to be considered, and therefore the same is reproduced :

> **"48. Conditions for enforcement of foreign awards.—**
>
> (1) Enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the court proof that—

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

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

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

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

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

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

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

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

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

17.1 The Supreme Court in ***Shri Lal Mahal Ltd.(supra)*** held that the scope of Section 7(1)(b)(ii) of the Foreign Awards Act as held in ***Renusagar (supra)*** must apply equally to the ambit and scope of Section 48(2)(b) of the Act. The Supreme Court further noted as under:

> "*45. Moreover, Section 48 of the 1996 Act does not give an opportunity to have a "second look" at the foreign award in the award enforcement stage. The scope of inquiry under Section 48 does not permit review of the foreign award on merits. Procedural defects (like taking into consideration inadmissible evidence or ignoring/rejecting the evidence which may be of binding nature) in the course of foreign arbitration do not lead necessarily to excuse an award from enforcement on the ground of public policy*."

17.2 The Supreme Court in ***Vijay Karia (supra)*** has explained the narrow scope of Section 48. The Supreme Court emphasized that only the narrow grounds under Section 48 are available and held as under:

> ***"Thus far, it is clear that enforcement of a foreign award may under Section 48 of the Arbitration Act be refused only if the party resisting*** enforcement furnishes to the Court proof that any of the stated grounds has been made out to resist enforcement. The said grounds are watertight – no ground outside Section 48 can be looked at. Also, the expression used in Section 48 is "may". Shri Viswanathan has argued that "may" would vest a discretion in a Court enforcing a foreign award to enforce such award despite the fact that one or more grounds may have been made out to resist enforcement. For this purpose, he relied upon Sections 45 to 47, which contain the word "shall" in contradistinction to the word "may". He also relied upon Article V of the New York Convention which also uses the word "may**."**

17.3 The Court went a step further and held that even if some of the grounds under Section 48 of the Act are made out, the Court at its discretion may still enforce the foreign award. The Court noted that:

> "*56 On the other hand, where the grounds taken to resist enforcement can be said to be linked to party interest alone, for example, that a party has been unable to present its case before the arbitrator, and which ground is capable of waiver or abandonment, or, the ground being made out, no prejudice has been caused to the party on such ground being made out, a Court may well enforce a foreign award, even if such ground is made out.*"

17.4 The Apex Court further on the issue that perverse interpretation of an agreement cannot be a ground for refusal of a foreign award held that:

> "*106. … As has been held, referring to some of the judgments quoted hereinabove, in particular Shri Lal Mahal (supra), the interpretation of an agreement by an arbitrator being perverse is not a ground that can be made out under any of the grounds contained in Section 48(1)(b). Without therefore getting into whether the tribunal's interpretation is balanced, correct or even plausible, this ground is rejected.*"

17.5 The Supreme Court further held that an allegation that the tribunal did not consider critical evidence is not a ground available under Section 48 and that any scrutiny of the tribunal's analysis of contemporaneous evidence was selective and perverse is also not available under Section 48:

> "*108. … In any case, if at all, this ground goes to alleged perversity of the award, which as has been held by us hereinabove, is outside the ken of Section 48.*"

> "*110. …that the tribunal's analysis of contemporaneous conduct is selective and perverse. Without going into any further details in this ground, this argument must be rejected out of hand, as not falling within the parameters of Section 48.*"

17.6 The Supreme Court while determining the standard of what amounts to "most basic notions of justice" [Section 48(2), Explanation 1(iii)] held that:

> "*86. …It must always be remembered that poor reasoning, by which a material issue or claim is rejected, can never fall in this class of cases…*

> *... The important point to be considered is that the foreign award must be read as a whole, fairly, and without nit-picking. If read as a whole, the said award has addressed the basic issues raised by the parties and has, in substance, decided the claims and counter-claims of the parties, enforcement must follow.*"

18. A consideration of the above postulates, leads this Court to understand that no ground other than that provided for under Section 48 is available to resist enforcement of a foreign award. With that light on the position of law, the only argument admissible for resisting the enforcement of the foreign award which is raised by Mr. Hemani, learned advocate for the respondent is the public policy defense where it has been contended that to the extent the arbitration agreement involves two Indian parties who have acceded to designating their seat of arbitration to be outside India, such agreement would be inconsistent with Section 28 of the Indian Contract Act and therefore hit by Section 23 of the Act, rendering the contract to be illegal, hence against the public policy of India. Such ground being available to Mr. Hemani under Section 48 (2)(b) of the Act, its relevance shall have to be explored.

18.1 As to Section 48 (2)(b), it may be noted that Explanation 2 thereof mandates that "***For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.***" Bearing this stipulation of law in mind, the argument canvassed by Mr. Hemani shall have to be considered.

18.2 The contention of Mr. Hemani is that by designating the seat of Arbitration outside India, the disability provided under Section

28(a) would be incurred owing to complete exclusion of jurisdiction of Indian Courts for availing legal recourses while vesting such jurisdiction in a foreign court. To such extent, Mr. Hemani would submit that the consideration of the contract/agreement would be forbidden by law and hence cause currency of Section 23 of the Indian Contract Act which would render the arbitration agreement void and moreover against the public policy of India. For the purposes of appreciating the said contention of Mr. Hemani, Sections 28 and 23 of the Indian Contract Act, are reproduced hereunder in that order

> **"Section 28.**
>
> ***Every agreement,—***
>
> ***(a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights****; or*
>
> *(b) which extinguishes the rights of any party thereto, or discharges any party thereto, from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights,*
>
> ***is void to the extent.***
>
> *Exception 1.—**Saving of contract to refer to arbitration dispute that may arise**.—This section shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.*"
>
> ***"Section 23***

What considerations and objects are lawful, and what not.

The consideration or object of an agreement is lawful, unless—

it is forbidden by law ; or is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent ; or involves or implies, injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void."

18.3 To bolster his above submission, Mr. Hemani would rely upon ***TDM Infrastructure (P) Ltd.*** *(supra)* to enforce applicability of Section 28 of the Arbitration Act, 1996 in the context of the present case. In the backdrop of the above contentions of Mr. Hemani, it shall be fruitful to refer to the prescriptions of the Hon'ble Apex Court in ***Renusagar*** *(supra)* as followed by the Delhi High Court in ***Glencore*** *(supra)* in regard of public policy defence. It has been held in the said decisions, that there ought to be narrow construction of the public policy defence. Also, it is further held that the defence of public policy should be construed narrowly and that the expression 'public policy' covers the field not covered by the words 'and the law of India' which follow the said expression. Thus, contravention of law alone will not attract bar of public policy and something more than contravention of law is required. It was also held that *"The scope and ambit of the expression 'public policy of India' must necessarily be construed narrowly to mean the fundamental policy of India, and, as clarified by the Explaination to Section 48 (2), conflict with the public policy must involve the*

element of fraud or corruption". The defense of Mr. Hemani clearly fails the above standard laid by the Hon'ble Apex Court in ***Renusagar*** *(supra)* followed by the Delhi High Court in ***Glencore*** *(supra).*

18.4 Moreover, even while considering the public policy defense raised by Mr. Hemani, on merits, this Court remains unimpressed since what escapes from the canvas of Mr. Hemani while raising such defense and which is crucial for determining incurrence of the disability under Section 28 is its Explanation 1 which clearly lays down that the disability provided for under Section 28 would exclude from its ambit a reference to arbitration.

18.5 Furthermore, it is a well settled principle that by agreement the parties cannot confer jurisdiction where none exists on a Court to which CPC applies, but this principle does not apply when parties agree to submit to exclusive jurisdiction of a foreign court. Thus, it is clear that parties to a contract may agree to have their disputes resolved by a foreign court termed as a 'neutral court' or a 'court of choice' creating exclusive or non-exclusive jurisdiction in it. Together with the above position of law, and the explanation in Section 28 excluding a reference of arbitration from the ambit of Section 28(a), what is also discernible is that the Act, 1996, does not *per se* prohibit two Indian parties from designating a foreign court and vesting in it exclusive jurisdiction to supervise its arbitration proceedings and therefore even with the parties designating the seat of arbitration at Zurich do not infract any Indian law much less it being forbidden by any Indian laws. Thus, the public policy defense of Mr. Hemani not only fails the standard

laid down in *Renusagar (supra)* and *Glencore (supra)* but also does not stand on the footing of it being forbidden by or violating either the Indian Contract Act or the Arbitration Act, the same deserves to be over-ruled.

18.6 Reliance upon ***TDM Infrastructure (P) Ltd.*** *(supra)* also may not render any assistance to further the defense of Mr. Hemani. Whilst this Court agrees with the retort of Mr. Thakore to the reliance upon ***TDM Infrastructure (P) Ltd.*** *(supra)* that the same is not applicable in the facts of the present case, what also binds this Court's attention is the excerpt of ***BALCO*** *(supra)* with respect to Section 28 of the Act, 1996 which was central to the discussion in ***TDM Infrastructure (P) Ltd.*** *(supra).* The said excerpt from ***BALCO*** *(supra)* is reproduced hereunder*:*

> "123. It was submitted by the learned counsel for the appellants that Section 28 is another indication of the intention of the Parliament that Part I of the Arbitration Act, 1996 was not confined to arbitrations which take place in India. We are unable to accept the submissions made by the learned counsel for the parties. As the heading of the Section 28 indicates, its only purpose is to identify the rules that would be applicable to "substance of dispute". In other words, it deals with the applicable conflict of law rules. This section makes a distinction between purely domestic arbitrations and international commercial arbitrations, with a seat in India. Section 28(1)(a) makes it clear that in an arbitration under Part I to which Section 2(1)(f) does not apply, there is no choice but for the Tribunal to decide "the dispute" by applying the Indian "substantive law applicable to the contract". This is clearly to ensure that two or more Indian parties do not circumvent the substantive Indian law, by resorting to arbitrations. The provision would have an

> overriding effect over any other contrary provision in such contract. On the other hand, where an arbitration under Part I is an international commercial arbitration within Section 2(1)(f), the parties would be free to agree to any other "substantive law" and if not so agreed, the "substantive law" applicable would be as determined by the Tribunal. The section merely shows that the legislature has segregated the domestic and international arbitration. Therefore, to suit India, conflict of law rules have been suitably modified, where the arbitration is in India. This will not apply where the seat is outside India. In that event, the conflict of laws rules of the country in which the arbitration takes place would have to be applied. Therefore, in our opinion, the emphasis placed on the expression "where the place of arbitration is situated in India", by the learned senior counsel for the appellants, is not indicative of the fact that the intention of Parliament was to give an extra-territorial operation to Part I of the Arbitration Act, 1996."

18.7 Viewed from neither visage, be it the merit of public policy defence in the context of Section 28 and 23 of the Contract Act or applicability of ***TDM Infrastructure (P) Ltd.*** *(supra)* can this Court find favour with the resistance to enforcement of the foreign award in question on the count of Section 48(2)(b) of the Act. In the light of the above discussion, this Court holds that the foreign award in question is not against the policy of India, hence, enforceable in India and accordingly the question to II (b) is answered in the affirmative.

19. Having arrived at the above conclusion, this Court would proceed to the last question i.e.

Whether an application under Section 9 in the context of the agreement in question is maintainable before this Court?

19.1 The Petitioner herein, filed the Enforcement Petition along with petition under Section 9 of the Act bearing no. IAAP No. 134 of 2019 ("**Section 9 Petition**") before this Court in order to seek an injunction from disposal of assets of the Respondent in order to secure the Foreign Award and so that it is not left as a paper decree upon enforcement. It is the Petitioner's case as represented by Mr. Thakore, that the use of the phrase "*international commercial arbitration*" in the proviso to Section 2(2) of the Act appears to be a misnomer. This is also because the definition of "international commercial arbitration" under Section 2(1)(f) applies ONLY to arbitrations seated IN INDIA. Therefore, it is submitted that the words "international commercial arbitration" in Section 2(2) have been broadly used to signify all arbitrations seated outside India. There is therefore "complete incongruity" in the phraseology and this is also the case with Section 10 of the Commercial Courts Act. The Petitioner is not alone in thinking so. The unworkability of Section 2 was also recognised in the case of ***Trammo DMCC v. Nagarjuna Fertilizers and Chemicals Limited*** **2017 SCC OnLine Bom 8676** ***(Trammo)***. The Court was interpreting Section 2(1)(e)(ii) of the Act, which also uses the words international commercial arbitration and recognized this "complete incongruity". The Court held:

> "22.... The legislature would not envisage a situation that a party can invoke jurisdiction of the Court to enforce a monetary award under Section 47 and 49 of the Act, however, for any relief of the nature Section 9

interalia contemplates the jurisdiction of the same Court would not be available. This would create a complete incongruity in giving effect to the provisions of Section 9 in a situation as in the present case and defeat the legislative intent."

"24. Another significant aspect which cannot be overlooked is that Section 2(1)(e)(ii) is not made applicable to foreign awards falling in Part II of the Act. It is thus clear that when neither the arbitration nor the award in question would fall under Section 2(1)(e)(ii) of the Act there cannot be any applicability of the said provision. Thus necessarily recourse would be required to be taken to the definition of "Court" as contained in the "Explanation" to Section 47 falling in Part II of the Act, so as to hold that it is this provision which becomes relevant to confer jurisdiction on this court to entertain the Section 9 petition, pending the enforceability of the foreign award in question. Such legal fiction of applicability of Part II of the Act qua the definition of "Court" under the Explanation to Section 47 is a fall out of the 2015 Amendment Act. In my opinion, considering the legislative scheme as brought about by the 2015 Amendment Act, it is not possible, in the circumstances, to resort to any other interpretation. A party in enforcing a foreign award and seeking recourse to Section 9 of the Act, cannot be left without an effective remedy, in a situation akin to the facts in the present case. This interpretation in my opinion suffices and fulfills the legislative intent in making Section 9 interalia available in enforcement of foreign awards."

19.2 Mr. Thakore submitted that the Bombay High Court in ***Trammo*** *(supra)* noted that a party in enforcing a foreign award and seeking recourse to Section 9 of the Act, cannot be left without an

effective remedy and therefore, the proviso under Section 2(2) must be reconciled with intent of the legislature to protect the foreign award holders. Thus, as the decision in ***Trammo*** *(supra)* holds, the correct provision to apply jurisdiction to a Section 9 petition filed in aid of a foreign award is the explanation to Section 47 and not any definitions in Part I including Section 2.

19.3 Mr. Thakore drew attention to, the legislative intent which he perceived was of allowing Section 9 petitions in aid of foreign seated arbitrations (regardless of the nationality of the parties) which is how the 2015 Amendments to the Act came about which introduced the proviso to 2(2) to overcome ***BALCO's*** embargo on any Part I proceedings in Part II foreign awards. This was done to aid foreign award holders in protecting their assets that may be in India through Section 9 proceedings even if Section 9 was in Part I. The 246th Law Commission report recognizes this and had accordingly recommended that Section 9 should apply even to arbitrations seated outside India. The Law Commission Report specifically notes the same as below:

> *"[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.]"*

19.4 It is then submitted by Mr. Thakore that the only criteria for applicability of Section 9 to a foreign award identified by the Law Commission is that the seat of arbitration should be outside India and nationality of the parties has no role to play in it. It is submitted that the intent of the legislature was to provide relief

under Section 9 of the Act to any party holding a foreign award. It is submitted by Mr. Thakore that the Law Commission in paragraph 41 of the 246th Law Commission Report noted that a party holding a foreign award should be protected during the enforcement of a foreign award. The Law Commission noted as follows:

> "*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.*
>
> *Where the assets of a party are 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. …*

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

19.5 Mr. Thakore would further submit that the Courts in India since 2015, have passed orders under Section 9 of the Act to protect the foreign award holder pending enforcement of foreign award under Part II of the Act. In a recent judgment of the Supreme Court passed on August 19, 2020 in ***Avitel Post Studioz Limited v. HSBC PI Holdings (Mauritius) Limited*** **Civil Appeal No. 5145 and 5158 of 2016** ***(Avitel Post)***, the Court dismissed an SLP against a Section 9 order granted by the Bombay High Court protecting the foreign award holder. The Court directed that an amount of USD 60 million be deposited in the Court pursuant to the Section 9 petition pending the enforcement of the foreign award.

19.6 Per contra, Mr. Hemani, has submitted that by filing the Section 9 Petition, the Petitioner has admitted to the application of Part-I of the Act, making the present Foreign Award a domestic Award. It was submitted that the proviso to Section 2(2) of the Act recognizes relief under Section 9 of the Act even to arbitrations that are not seated in India and that are governed by Part II. Proviso 2(2) of the Act reads as below:

> "*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 recognised under the provisions of Part II of this Act.".

19.7 The Respondent represented by Mr. Hemani argued that the proviso to Section 2(2) applied only to international commercial arbitrations outside India which as per the definition of an international commercial arbitration in Section 2(1)(f) required at least one foreign party which did not exist in the present case. The Respondent argued that the Petitioner having filed the Section 9 petition coupled with the fact that all the arbitration proceedings were conducted in Mumbai, changed the nature of the Foreign Award to a domestic award.

19.8 Appreciating the submissions of both sides, this Court holds as under:

(a) The plain language of provisio to Section 2 (2) reads to imply that *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 recognised under the provisions of Part II of this Act.*** Interpreting the above provision *ejusdem generis* it would arise that Section 9 *interalia* shall 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 recognised under the provisions of Part II of this Act.*** The words "…***even if the***

place of arbitration is outside India, and an arbitral award made or to be made in such place is enforceable and recognised under the provisions of Part II of this Act" qualifies **international commercial arbitration** and particularly **when such international commercial arbitration bears an arbitral award made or to be made in such place is enforceable and recognised under the provisions of Part II of this Act**. While so interpreting this Court finds favour and is inclined to accept the submission of Mr. Hemani who submits that the proviso to Section 2(2) applies only to International Commercial Arbitration. The submission of Mr. Thakore that the term 'international commercial arbitration' appearing to be a misnomer and it be read with a wider connotation bearing in mind the intent of the legislature does not impress the Court in as much as it would be inconsistent with the principals of statutory interpretation.

(b) Moreover, it is a settled principle of law that the court cannot read anything into a statutory provision which is plain and unambiguous. A statute is an edict of the legislature. The language employed in the statute is the determinative factor of legislative intent. The first and primary rule of construction is that the intention of the legislation must be found in the words used by the legislature itself. The question is not what may be supposed and has been intended but what has been said. Statutes should be construed not as theorems of Euclid. Reliance upon ***Trammo*** (supra) and ***Avitel Post*** *(supra)* to the extent that it is intended to read more than what

the language of the provisio to Section 2(2) implies is insignificant for the self-same reason.

(c) Apart from the above fact, Mr. Thakore fails to establish resemblance of facts of ***Trammo*** with the present case more particularly since ***Trammo*** involved adjudication in the context of an International Commercial Arbitration whereas the uniqueness of this case is the involvement of Indian parties having designated a foreign seated arbitration which arbitration however is not an International Commercial Arbitration. The above distinction becomes significant because ***Trammo*** and particularly the ratio laid down therein relied upon by Mr Thakore was unique to the facts under consideration in ***Trammo***. The following excerpt from ***Trammo*** would be relevant:

> *"24. Another significant aspect which cannot be overlooked is that Section 2(1)(e)(ii) is not made applicable to foreign awards falling in Part II of the Act. It is thus clear that when neither the arbitration nor the award in question would fall under Section 2(1)(e)(ii) of the Act there cannot be any applicability of the said provision. Thus necessarily recourse would be required to be taken to the definition of "Court" as contained in the "Explanation" to Section 47 falling in Part II of the Act, so as to hold that it is this provision which becomes relevant to confer jurisdiction on this court to entertain the Section 9 petition, pending the enforceability of the foreign award in question. Such legal fiction of applicability of Part II of the Act qua the definition of "Court" under the Explanation to Section 47 is a fall out of the 2015 Amendment Act. In my opinion, considering the legislative scheme as*

brought about by the 2015 Amendment Act, it is not possible, in the circumstances, to resort to any other interpretation. ***A party in enforcing a foreign award and seeking recourse to Section 9 of the Act, cannot be left without an effective remedy, in a situation akin to the facts in the present case.*** *This interpretation in my opinion suffices and fulfills the legislative intent in making Section 9 interalia available in enforcement of foreign awards.*"

(d) Notwithstanding the above and the fact that the decision in the case of ***Trammo*** (supra) cannot be binding upon this Court, it shall be needless to be reminded of the settled position of law which stipulates that ratios of judgments are to be viewed in the context of the facts of each case and such position would caution this Court and make it circumspect from being swayed by the decision rendered in the case of ***Trammo*** *(supra).*

19.9 As a result of the above discussion, it is held that application under Section 9 is not maintainable before this Court and accordingly the answer to the said question is in the negative.

20. Considering the aforesaid as well as taking into consideration the ratio laid down by the Hon'ble Apex Court as well as judgments of the other High Courts, all contentions raised by the respondents in Arbitration Petition No. 131 of 2019 deserve to be negatived. In facts of the aforesaid case therefore, this Court finds that the award in question has become final as per the Curial law and this Court is satisfied that the award in question is enforceable and it is

hereby held that the award shall be deemed to be decree of this Court.

21. In view of the above discussion, Arbitration Petition No. 131 of 2019 is allowed to the aforesaid extent and Arbitration Petition No. 134 of 2019 is dismissed. No costs.

(BIREN VAISHNAV, J)

ANKIT SHAH