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JURISDICTION OF INDIAN COURTS WITH RESPECT TO POST-AWARD SCHEME IN FOREIGN SEATED ARBITRATION- A CASE STUDY OF MEDIMA LLC V. BALASORE ALLOYS

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1. Background

1.1 Indian judiciary has faced much criticism for their scrutiny of and interference into arbitral Awards, and more so for international arbitral Awards. Since then, Courts have come a long way in creating an arbitration friendly reputation, through various interpretations of the Arbitration and Conciliation Act, 1996 ("**the Act**").

1.2 One such scope of interpretation came up for consideration before the Hon'ble High Court of Calcutta ("**Calcutta High Court**") in *Medima LLC v. Balasore Alloys Ltd. [AP/ 267/ 2021]*.

2. Facts

2.1 In 2018, agreement was entered into between USA based Medima LLC ("**Medima**") and India based Balasore Alloys Ltd. ("**Balasore**"), where the governing law was the laws of United Kingdom and the clause further provided that any disputes will be referred to the International Chamber of Commerce ("**ICC**"), London.

2.2 Dispute arose between the parties and ICC was approached by Medima.

2.3 On 29.03.2021, ICC ruled in favour of Medima and awarded USD 30,35,249.87 to be paid by Balasore.

2.4 Thereafter, Medima approached Calcutta High Court, through a post-award application under Section 9 of the Act, to secure the dues payable by Balasore and to prevent them from liquidating their assets in India, thereby commencing the instant case.

2.5 Balasore, on the other hand, challenged the application on grounds of maintainability.

3. Issues for adjudication

3.1 Whether Section 9 of the Act can be made applicable to a foreign Award where the governing law is British law with the seat of arbitration in London and the rules applicable being those of ICC?

3.2 Whether proviso to Section 2(2) of the Act warrants the arbitration agreement in the instant case to be seen as 'an agreement to the contrary'?

4. Arguments

4.1 Balasore argued:

a. Parties had clearly agreed that substantive, governing and curial law would be the British Laws and the agreement would reflect exclusion of Section 9 of the Act or Indian laws.

b. Exclusion of the word "express" from the 2015 Amendment shows the legislative intent to cover both express and implied exclusion.

c. Section 9 does not provide for any interim relief after an Award has been passed in a foreign arbitration.

4.2 Medima, relying on *Bhatia International vs Bulk Trading SA* [(2002) 4 SCC 105], the 246th Law Commission Report which introduced Section 2(2) of the Act, Statements of Objects and Reasons of the Act and other cases, argued that the instant dispute fell within the ambit of the Proviso which laid out an exception that if there is no 'agreement to the contrary', Section 9 would be applicable to foreign seated arbitrations as well.

5. Decision

5.1 Clause 23 of the Agreement was analyzed by a conjoint reading of Section 2(2) and Section 9 to consider whether it fell within the ambit of "an agreement to the contrary" which would take the agreement between the parties outside the scope of Section 2(2).

5.2 The proviso in question was inserted by the 2015 Amendment to the Act with effect from 23.10.2015. The reason for insertion of the proviso has been discussed in the 246th Report dated 05.08.2014 which led to dropping of the words 'only' and 'express'.

5.3 The Court delved into the very purpose behind the provision, and observed that Section 9 is the most potent remedy available to an award holder as it prevents the Award from becoming redundant. When the award holder, is unable to exercise his rights during enforcement of the Award due to any conflict, then the provision must be constructed and interpreted harmoniously.

5.4 Therefore, it was finally held that the application under Section 9 was maintainable.

6. Cases discussed

6.1 The Court, relying on *PASL Wind Solutions v. GE Power Conversion India* [2021 SCC Online SC 331], analysed proviso to Section 2(2) of the Act and observed that if the assets were located within the territory of India, the provision would be relevant for interim orders in a foreign-seated arbitration.

6.2 In *Big Charter Pvt Ltd v. Ezen Aviation Pty Ltd* [2020 SCC Online Del 1713] *& Raffles Design International v Educomp Professional Education* [2016 SCC Online Del 5521], it was held that in order to claim exception under the category of "an agreement to the contrary", the parties must prove that their prima facie intention was to exclude the operation of Section 9.

6.3 The Court analysed ICC Rules and United Nations Commission on International Trade Law ("**UNCITRAL**") Model Laws, both of which do not bar parties to apply to any competent adjudicating authority for interim relief. The decision in *Bhatia International v. Bulk Trading S.A* [(2002) 4 SCC 105] was also cited in this context, which had reference to Article 23.2 of the ICC Rules.

6.4 The Court relied on the judgement of the Bombay High Court in *Aircon Beibars FZE v. Heligo Charters Pvt. Ltd* [2017 SCC OnLine Bom 631], in which it was held that just because an agreement provided for a foreign seated arbitration, it did not exclude the operation of Section 9 of the Act. If it were to be excluded, the same should have been expressly mentioned in the agreement.

6.5 Although this decision of the Bombay High Court went for appeal, the appellate Bench upheld the decision and observed that Section 9 read with Section 48 of the Act is an enabling provision, which allows the Courts to pass protective orders in favour of the award holder, and so that the assets of award debtor located in India are not dissipated before the enforcement stage.

7. Conclusion

7.1 The decision of the Calcutta High Court in the instant case gave finality to the question as to whether challenges to a foreign seated arbitral award is maintainable before Indian courts or not.

7.2 In order to limit the possibility of future litigation and for the exclusive operation of a foreign jurisdiction, an arbitration agreement must specifically and expressly stipulate the exclusion of all provisions of the Act.

A copy of the judgment is annexed hereto at **page 3 to 22.**

ORDER SHEET

AP/267/2021

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE
[Commercial Division]

MEDIMA LLC
VS
BALASORE ALLOYS LIMITED

BEFORE:
The Hon'ble JUSTICE MOUSHUMI BHATTACHARYA
Date : 3rd August, 2021.

[Via video conference]

Appearance:
Mr. S. N. Mookherji, Sr. Adv.
Mr. Shaunak Mitra, Adv.
Ms. Nandini Khaitan, Adv.
Ms. Shreya Singh, Adv.
Mr. Vishal Sinha, Adv.
... for the petitioner

Mr. Rishad Medora, Adv.
Mr. Meghajit Mukherjee, Adv.
Ms. Shivangi Thard, Adv.
... for the respondent

The Court :

1. The issue in the present application under section 9 of The Arbitration and Conciliation Act, 1996, is whether the 'Governing Law' clause contained in the agreement, for referring the disputes between the petitioner and the respondent to arbitration before the International Chamber of Commerce, excludes the operation of section 9 of the Act.

2. The applicant-petitioner was the claimant in the arbitration and has emerged as the successful party in the Award dated 29th March, 2021 with an amount of USD 30,35,249.87 (equivalent to INR 22,08,75,133/-) in its favour. The Award is of the ICC passed in proceedings governed by British law with the seat of arbitration in London, UK. The petitioner – award holder – now seeks protective orders to secure the dues payable by the respondent.

3. The adjudication on the point stated above arises from an objection taken on behalf of the award-debtor to the maintainability of the application. Counsel appearing for the parties agree that the issue of maintainability should be decided first.

The case of the respondent - who resists the application under Section 9 of the 1996 Act.

4. The objection to the maintainability, as articulated by Mr. Rishad Medora, learned counsel appearing for the award debtor (the respondent before this court), Balasore Alloys, is that the parties agreed that the substantive law, the curial law and the law governing the arbitration agreement would be English law. Counsel places Clause 23 of the underlying agreement to contend that the said clause would clearly reflect the exclusion of section 9 of the Act, or Indian law for that matter. Counsel submits that this clause, being the arbitration agreement between the parties, falls within the exception carved out in the proviso to section 2(2) of the Act which contemplates that section 9 would apply to arbitrations that take place outside

India subject to its applicability not being excluded by agreement. Counsel relies on the recommendation of the 246th Law Commission Report for addition of the words "*Provided that, subject to an express agreement to the contrary, the provisions of section 9, 27, 37(1)(b) and 37(3) shall also apply to international commercial arbitrations…*". The argument is that the exclusion of the word 'express' from the amendment of 2015 would show that the Legislature intended the proviso to mean both express and implied exclusion. It is submitted that any recourse taken by either of the parties in respect of the award must necessarily be before the courts in England or before the ICC.

5. The second point urged is that section 9 does not entail grant of interim reliefs post-award in a foreign arbitration. Counsel submits that relief under section 9 can be given before, during or after the arbitration in relation to domestic awards. It is submitted that the proviso to section 2(2) cannot override the express language and effect of section 9. Counsel relies on the basic principles of statutory interpretation to contend that effect must be given to it regardless of the consequences where the language is plain and that the court cannot add to or make up any deficiencies in the legislation. Counsel relies on *Raffles Design International India Private Limited vs. Educomp Professional Education Limited; 2016 SCC OnLine Del 5521* and on *Ashwani Minda vs. U-Shin Ltd.; 2020 SCC OnLine Del 1648*, in support of the proposition that Part I of the Act would be excluded where parties have agreed to do so.

6. Mr. S.N. Mookherjee, learned senior counsel appearing for the petitioner/award-holder, Medima, traces the legislative history of Section 2(2) in which the proviso was introduced by the Amendment Act of 2016. Counsel refers to *Bhatia International vs Bulk Trading S.A.; (2002) 4 SCC 105* which considered the applicability of Part I of the Act in the context of International Commercial Arbitrations which take place outside India. Counsel places the recommendations of the Law Commission in its 246th Report dated 5th August, 2014 which culminated in the introduction of the proviso to section 2(2). Counsel relied on the Statement of Objects and Reasons to the Act of 1996 and cites *PASL Wind Solutions Private Limited vs. GE Power Conversion India Private Limited; 2021 SCC OnLine SC 331*, which held that courts in India may pass interim orders in relation to assets located in India in an arbitration which takes place outside India. Counsel also relies on decisions of the Bombay and Delhi High Courts in *Aircon Beibars FZE vs. Heligo Charters Pvt. Ltd.; 2017 SCC OnLine Bom 631* and *2018 SCC OnLine Bom 1388* and *Big Charter Private Limited vs. Ezen Aviation Pty. Ltd.; 2020 SCC OnLine Del 1713* in support of the aforesaid proposition. Decisions of the Supreme Court are placed to urge that every attempt should be made to harmonize the provisions of the statute in the case of a conflict.

7. I have heard learned counsel and considered the law relevant for deciding the issue which falls for consideration in the present application.

The Issue:-

Whether section 9 of The Arbitration and Conciliation Act, 1996 can be made applicable to a foreign award made under the Rules of the International Chamber of Commerce in arbitration proceedings governed by British Law with the seat of arbitration in London; and

Whether the arbitration agreement in the present case providing for the substantive, curial as well as the law governing the arbitration agreement to be governed by British law can be seen as 'an agreement to the contrary' under the proviso to section 2(2) of the Act.

The Arbitration Agreement

8. Clause 23 of the Agreement dated 31st March, 2018 executed between the parties is set out:

> ***23. Governing Law; Disputes***
> *"This Agreement shall be governed by and construed in accordance with the laws for the United Kingdom. Any claim, controversy or dispute arising out of or in connection with this Agreement or the performance hereof, after thirty day calendar period to enable the parties to resolve such dispute in good faith, shall be submitted to arbitration conducted in the English language in the United Kingdom in accordance with the Rules of Arbitration of the International Chamber of Commerce by 3 (Three) arbitrators appointed in accordance with the said Rules, to be conducted in the English language in London in accordance with British Law. Judgment on the award may be entered and enforced in any court having jurisdiction over the party against whom enforcement is sought."*

9. The provisions of the Act of 1996 which are relevant to the issue, are:-

Section 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."*

Section 9:

> *(1). "A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with Section 36, apply to a court ....."*

Reading the above provisions together, the question is whether the arbitration clause in the present case falls within the exception carved out in the proviso to 2(2) and can be seen as "an agreement to the contrary" which would take the arbitration agreement outside the scope of the proviso to section 2(2) of the Act.

How the proviso to section 2(2) came to be part of the 1996 Act

10. Section 2(2) as it stood before the Amendment Act of 2016:

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

There was no proviso (underlined for emphasis). This means that section 2(2) only contained the assertion that Part I of the Act would apply to domestic arbitrations and nothing more. Insertion of the proviso by the amendment of 2016 with effect from 23.10.2015

brought about a quantum shift in the effect of section 2(2) in respect of the following:

a) international commercial arbitrations,

b) international commercial arbitrations including those outside India, and

c) arbitral awards which are being made or are in the process of being made in a place outside India which are capable of being enforced and recognised under Part II of the Act.

11. The Law Commission in its 246th Report dated 5th August, 2014, recommended the introduction of a proviso to section 2(2) to address certain specific problematic areas. The Law Commission noticed several practical difficulties which could be faced by a successful party in a foreign-seated arbitration in the matter of obtaining temporary relief against the award-debtor where the assets of the award-debtor are located in India. The possible remedies of obtaining an interim order from a foreign court or filing a civil suit for enforcing that interim order in India were found to be unworkable. The Commission was of the view that the award-holder would be placed at a distinct disadvantage in the event the award-debtor dissipated its assets and rendered the award wholly infructuous. The recommendatory Note reads as-

> *"This proviso ensures that the Indian Court can exercise jurisdiction with respect to these provisions even where the seat of the arbitration is outside India."*

12. The insertion of the proviso to 2(2) found place in the Amendment Bill of 2015 which culminated in the Amendment Act of 2016 - and the proviso as it stands today. The words '*only*' and '*express*' as recommended by the Law Commission, were dropped.

A. Decisions of the Supreme Court which had a bearing on the 246th Report of the Law Commission: -

- *Bhatia International vs Bulk Trading S.A. (2002) 4 SCC 105:-*

  The Supreme Court considered the applicability of Part I of the Act to international commercial arbitrations which take place outside India and held that the absence of the word '*only*' from 2(2) – as it then existed- would not debar application of Part I to international commercial arbitrations held outside India unless the parties agreed to exclude such applicability. The option to contract out of the application of Part I was not available to parties in respect of domestic arbitrations under Part I of the Act.

- *Bharat Aluminium Company vs Kaiser Aluminium Technical Services Inc. (2012) 9 SCC 552:*

  A 5-Judge Bench of the Supreme Court overruled *Bhatia* and held that section 9 could not be made applicable to arbitrations which take place outside India but declared that the law laid down in *BALCO* would apply prospectively to arbitration agreements executed before 6th September, 2012, being the date when the judgment in *BALCO* was delivered – paragraph 197 of the Report.

[The Law Commission referred to the anomalous situations which may arise from paragraph 197 of *BALCO* where courts could grant interim orders in respect of foreign-seated arbitrations despite *BALCO* holding otherwise].

B. Other enactments supporting intervention by the Indian Courts in foreign-seated arbitrations

i) The Statement of Objects and Reasons of The Arbitration and Conciliation (Amendment) Bill, 2015, recognised that the Act was based on the UNCITRAL Model Law on International Commercial Arbitration, as adopted in 1985 by the United Nations Commission on International Trade Law and applied to both international as well as domestic arbitrations for facilitating alternative dispute mechanisms. The Statement in clause 6 specifically provides :-

" 6. .....

(i) to amend the definition of "Court" to provide that in the case of international commercial arbitrations, the Court should be the High Court;

(ii) to ensure that an Indian Court can exercise jurisdiction to grant interim measures, etc., even where the seat of arbitration is outside India.

....."

ii) The Notes on Clauses to the Amendment Bill in respect of section 2 provides that:-

> *" …A proviso below sub-section (2) is inserted to provide that some of the provisions of Part I of the Act shall also apply to International Commercial Arbitration, even if the place of arbitration is outside India."*

iii) Article 17 J –of the UNCITRAL Model Law on International Commercial Arbitrations – with amendments as adopted in 2006- states that:-

> *"Article 17 J. Court-ordered interim measures*
>
> *A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in the territory of this State, as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration."*

iv) Article 28.2 of the Arbitration Rules of the International Chamber Of Commerce (ICC) – in force from 1 March 2017 states that:

> *"Article 28: Conservatory and Interim Measures*
>
> *1) …….*
>
> *2) Before the file is transmitted to the arbitral tribunal, and in appropriate circumstances even thereafter, the parties may apply to any competent judicial authority for interim or conservatory measures. The application of a party to a judicial authority for such measures or for the implementation of any such measures ordered by an arbitral tribunal shall not be deemed to be an*

infringement or a waiver of the arbitration agreement and shall not affect the relevant powers reserved to the arbitral tribunal. Any such application and any measures taken by the judicial authority must be notified without delay to the Secretariat. The Secretariat shall inform the arbitral tribunal thereof".

C. Decisions which support intervention of courts in India for interim relief in respect of a foreign award

- In *PASL Wind Solutions vs GE Power Conversion India 2021 SCC OnLine SC 331;* the question before the Supreme Court was whether two Indian companies can choose a forum outside India for arbitration and whether an award made at such forum to which the New York Convention applies, can be said to be a 'foreign award' under Part II of the Act and be enforceable as such. The Supreme Court construed the proviso to section 2(2) to be relevant for interim orders in a foreign-seated arbitration where the assets are located in India.

- *Aircon Beibars FZE v. Heligo Charters Pvt. Ltd. 2017 SCC OnLine Bom 631* and *Heligo Charters Pvt. Ltd. v Aircon Feibars FZE 2018 SCC OnLine Bom 1388*, Single and Division Bench decisions of the Bombay High Court, respectively, where the order of the First Court was upheld by the Division Bench by holding that section 9 cannot be excluded in the absence of a specific agreement to the contrary and further that the respondent Aircon Beibars cannot be denied interim protection regardless of whether the award was put to execution or not. The Single Bench decision noted that the contract in that case was to be governed in accordance with

Singapore law and be referred to arbitration in Singapore under the SIAC Rules.

- *Big Charter Pvt. Ltd. vs Ezen Aviation Pty. Ltd; 2020 Scc Online Del 1713,* also involved a Singapore-seated arbitration under the SIAC Rules and the agreement was to be governed in accordance with the laws of Singapore. A Single Bench of the Delhi High Court recognised the need to obtain interim relief under section 9 against dissipation of assets located in India.

- In *Raffles Design International v Educomp Professional Education 2016 SCC Online Del 5521;* the Delhi High Court held that Rule 26.3 of the SIAC Rules was in conformity with the UNCITRAL Model Law and permitted the parties to approach the court for interim relief and the court to grant such relief.

D. <u>The other view :</u>

- *Ashwani Minda vs. U-Shin Ltd.; 2020 SCC OnLine Del 1648;*

  The governing law of the Agreement in this case was to be the laws of Singapore and the dispute was to be resolved by arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre (SIAC) Rules. The Court construed the Arbitration Agreement as an expression of the intention of the parties to exclude the applicability of Part I of the Act.

  This decision can however be factually distinguished from the present case since the application under Section 9 was filed after

the same interim reliefs were rejected by an Emergency Arbitrator under the Japan Commercial Arbitration Association (JCAA) Rules. In the appeal from this decision reported in *Ashwani Minda vs. U-Shin Ltd.; 2020 SCC OnLine Del 721*, the conduct of the appellant, Ashwani Minda in electing to invoke the JCAA process and filing a Section 9 application after having failed to obtain interim relief in the former proceeding was taken note of. The Division Bench further observed that the question of exclusion of applicability of Part I would be decided in an appropriate case.

'*Agreement to the contrary'* under the proviso to section 2(2) of the Act:

13. The caveat to the application of section 9 to international commercial arbitrations with a place outside India and an arbitral award made in such place is '*an agreement to the contrary*'. This means that the contracting parties must evince and articulate an intention not to subject the arbitration agreement to the application of section 9 of the Act. The application of section 9 to an arbitration agreement and an award which is under Part II of the Act is a fallout of the Supreme Court decision in *Bhatia* which was prospectively overruled in *BALCO* only to be reinstated by the recommendations of the Law Commission in August 2014 thereafter culminating in the insertion of the proviso to 2(2) with effect from 23rd October, 2015.

14. The 1996 Act asserts party autonomy at all levels. A party's control over the proceedings is evident from plain affirmation- "*The*

parties are free to determine.." or *"..agree"* (sections 10, 11, 13, 20, 22)- to creating exceptions in the form of "*Unless otherwise agreed by the parties*" (sections 21, 24, 25, 26, 29, 31, 33). It is clear however that the parties must articulate an intention to do – or not to do- that which follows in the particular provision. A good example would be section 31(3)(a) where the obvious requirement of an award containing reasons can only be circumvented if the parties agree otherwise. The important aspect is that none of these provisions contain words such as '*express'* or "*only*" etc. to lend weight to the plain meaning of the provision.

15. The argument that the deletion of the word '*express*' in relation to '*agreement to the contrary*', as recommended by the Law Commission to the proviso to 2(2) would indicate that an implied agreement is included in the proviso has to be seen through the same prism as the other sections of the Act which contemplate an agreement by the parties. In other words, dropping the word *'express'* in the final cut means little; the structure of the proviso as it exists today is that there must be a clear, unequivocal and unambiguous articulation by the parties to exclude the application of section 9 from the arbitration which is to take place outside India. Simply put, there must be something more to an arbitration agreement governed by a foreign law and with a foreign seat; the agreement must indicate in clear and express terms that the parties intend to exclude the operation of section 9 from the purview of the said arbitration agreement (underlined for emphasis). Hence, an arbitration agreement

which merely chooses the law governing the underlying agreement, the arbitration and the conduct thereof without anything more cannot be seen as excluding the application of Section 9 by implication and closing the gates to Section 9 or the scope of the proviso to 2(2) of the Act.

16. The import of the proviso to section 2(2) can be better understood if each part thereof is placed in the larger framework of the Act. Sub-section (2) of 2 makes Part I of the Act applicable where the "*place"* of arbitration is in India. The exception to this brought in by the proviso repeats the word "*place of arbitration"* in the proviso. The word "*place"* finds mention in Section 20 of the Act which gives free-reign to the parties to agree on the place where the arbitration shall be conducted and in Sections 28 and 31 of the Act which further roots the arbitration to a place and the laws of that place while Section 31 confers a place-identity to the arbitral award. The term "*seat"* on the other hand, despite being the more popular choice, does not find mention in respect of foreign arbitrations. The proposal of the Law Commission in its 246th Report to amend several sections of the Act to replace "*place"* with *"seat"* was not given effect to. The Supreme Court in *BALCO* referred to "*place"* as being equivalent to the juridical seat of arbitration which was referred to by the Supreme Court in *Indus Mobile Distribution Pvt. Ltd. vs. Datawind Innovations Pvt. Ltd.; (2017) 7 SCC 678*. In this decision, the Supreme Court referred to the inter-changeability of "*place"* and "*seat"* with reference to Section 2(2)

of the Act. *BGS SGS Soma JV vs. NHPC Limited; (2020) 4 SCC 234* may also be referred to in this context.

17. Second, the exception contained in the proviso to applicability of Part I has been used with reference to "*International Commercial Arbitration"* which has been defined in Section 2(1)(f). The definition consists of disjunctive conditions, namely arbitrations relating to disputes arising out of legal relationships where at least one of the parties is an individual who is a habitual resident of a foreign country, a body corporate which is incorporated outside India, an association whose central control is exercised in a country outside India or the Government of a foreign country. In *PASL Wind Solutions Pvt. Ltd. vs. GE Power Conversion India Pvt. Ltd; (2021) SCC Online SC 331,* the Supreme Court held that the expression "*International Commercial Arbitration"* under Section 2(1)(f) was *party-centric* whereas the same expression used in the proviso to Section 2(2) was *place-centric*. The Supreme Court thus held that the expression *International Commercial Arbitration* as used in the proviso to Section 2(2) refers to a foreign-seated arbitration to which Part II of the Act applies and not in the sense defined in Section 2(1)(f). The undeniable reference to a foreign-seated arbitration and the resulting award would further be evident from the reference to "*.....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 expression *International Commercial Arbitration* used in the proviso would therefore necessarily mean a foreign-seated arbitration which forms the substratum of Part II of the 1996 Act. The

conclusion from the above is that the proviso to 2(2) would cover arbitration agreements regardless of whether '*seat*' is used or '*International Commercial Arbitration*' is not used. (underlined for emphasis).

18. The other point of objection taken by the award-debtor pertains to non-availability of the remedy under Section 9 in a post-award scenario in relation to a foreign award which is enforceable under Part II of the Act.

Is this argument legally tenable?

For the above, the respondent relies on the language of Section 9, the relevant part of which is set out below:

> *"9. Interim Measures, etc, by Court.- (1) A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with Section 36, apply to a court ....."*

19. The language *".....and an arbitral award made or to be made....."* in section 2(2) read with the proviso makes it clear that Section 9 would apply in a post-award scenario subject to the other conditions of the proviso being satisfied. Second, the perceived gap between Section 9 so far as it mentions enforcement under Section 36 and the enforceability – recognition under Part II would defeat the very purpose of introduction of the proviso to Section 2(2) if allowed to magnify into a conflict. There is every chance that an award-holder of an arbitration which took place outside India would be rendered

remediless if prompt and effective interim measures are not granted to the award-holder in the interregnum in relation to the assets of the award-debtor which are located in India. In other words, if suitable interim measures are not granted to a foreign award-holder and the award is made to pass the tests for enforcement under Part II, the award-holder may be denuded of its rights. The Act, together with the amendments, intends to facilitate quick resolution of disputes through alternative means. Hence, asking an award-holder to wait until the award is recognised and enforced is antithetical to the very objective of the Act. The Law Commission in its 246th Report noticed the aforesaid as also the lack of an efficacious remedy in furtherance of the award.

20. It may hence be said, and with good reason, that section 9 read with the proviso to Section 2(2) would require a purposive construction which would be in line with the intention of the framers for bringing in the proviso by the Amendment Act of 2016. The objective of the amendment was to make the proviso workable, not stultify it by reason of a conflict with Section 9.

21. This court therefore finds substance in the contention that every attempt should be made to harmonise the provisions of a statute wherever there appears to be a conflict. In *J.K. Cotton Spinning and Weaving Mills Co. Ltd. vs. State of Uttar Pradesh; AIR 1961 SC 1170*, a 3-Judge Bench of the Supreme Court spoke for the Rule of harmonious construction and the presumption that every part of the statute should be given effect to and that no clause should be reduced

to a dead letter. In *High Court of Gujarat vs. Gujarat Kishan Mazdoor Panchayat; (2003) 4 SCC 712,* the Supreme Court explained that while the court is not entitled to re-write the statute itself, it is not debarred from "*ironing out the creases*". Reference may also be made to *The King vs. Dominion Engineering; AIR 1947 PC 94* which held that in the event of a conflict, the later provision would prevail since it expresses the last intention of a legislature. The last intention of the legislature in the present case would be the proviso to Section 2(2) for ascertaining the true scope and meaning of Section 9 and the power of the court to make interim measures in a foreign seated arbitration post-award.

22. The Arbitration in the present case is to be conducted in accordance with the Rules of Arbitration of the International Chamber of Commerce. Article 28.2 of the ICC Arbitration Rules, 2017 permits the parties to apply to a competent judicial authority for interim measures. It is relevant to state that the Supreme Court in *Bhatia* referred to Article 23.2 of the ICC Rules which were then in force and held that Section 9 would be applicable to International Commercial Arbitrations which take place outside India. Article 17 J of the UNCITRAL Model Law also green-flags the right to approach courts outside the territory of the State. Significantly, the arbitration agreement in the present case permits enforcement of the award in any court having jurisdiction over the party against whom enforcement is sought.

23. Based on the above discussion, this court is of the view that the present application for interim protection under Section 9 of the Act, in respect of the Award of the London-seated arbitration, is maintainable and the petitioner Medima is hence entitled to seek interim measures against Balasore, the respondent award-debtor.

24. Upon hearing learned counsel on behalf of the petitioner, the leave under Clause 12 of the Letters Patent, 1865, is granted.

25. Matter to appear on 11th August, 2021.

(MOUSHUMI BHATTACHARYA, J.)

RS