

Deepak Mitra Vs. District Judge, Allahabad and Others

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Court : Allahabad

Decided On : Jul-05-1999

Reported in : 1999(4)AWC2721

Judge : O.P. Garg, J.

Acts : [Arbitration and Conciliation Act, 1996](#) - Sections 2, 2(1) , 9, 31, 34, 37 and 42; [Constitution of India](#) - Article 226; [Arbitration Act, 1940](#) - Sections 2, 27(2), 30, 31(4) and 41; [Stamp Act, 1899](#) - Article 12; [Code of Civil Procedure \(CPC\), 1908](#) - Sections 15 - Order 26, Rule 10(2)

Appeal No. : C.M.W.P. No. 16104 of 1999

Appellant : Deepak Mitra

Respondent : District Judge, Allahabad and Others

Advocate for Def. : J. Nagar, S.C.

Advocate for Pet/Ap. : Triloki Nath, Adv.

Judgement :

O.P. Garg, J.

1. The core question involved in the present writ petition is whether in a case in which a dispute between the parties has been referred for decision by an Arbitral

Tribunal appointed by the High Court, interim order which is termed as an 'interim award' passed by it with a view to ascertain the feasibility, viability of the proposal for vertical division of immovable and movable properties and assets of the two private companies equally, after ascertaining the wishes of the shareholders and ultimately holding that the division is not practicably possible, can be made subject-matter of challenge by initiating proceedings under Section 34 of the [Arbitration and Conciliation Act, 1996](#) (hereinafter referred to as 'the Act') before the District Judge, Allahabad, being the principal Civil Court of original jurisdiction in the district. It is in the wake of this controversial question that the petitioner--Deepak Mitra has prayed for a writ of prohibition to prohibit District Judge, Allahabad, from proceeding with the Arbitration Case No. 18 of 1998, Ashok Mitra and others v. Smt. Sucharitra Mitra and others and for a direction in the nature of writ of certiorari to quash the orders dated 19.3.1999 and 9.10.1998 passed by him in the aforesaid proceeding.

2. Shorn of all superfluities, the facts of the case are that late K. M. Mitra and his brother-in-law B. N. Ghosh along with some other persons floated two companies in the year 1953 for the purposes of publishing and printing work respectively--(1) Mitra Prakashan Private Ltd. and (2) Maya Press Private Ltd. which in course of time acquired name and fame. Late K. M. Mitra died leaving behind his widow Smt. Nandrani Mitra, his five sons, namely, Alok Mitra (respondent No. 6) ; Ashok Mitra (respondent No. 2) ; Deepak Mitra (petitioner) ; Parvendra Mitra (whose whereabouts are not known as he has not been heard of for a considerable long time) : Manmohan Mitra (respondent No. 3) and a daughter Ms. Madhurima Mitra (now Smt. Madhurima Ghosh) respondent No. 9. B. N. Ghosh also died leaving behind his widow Smt. Amiya Ghosh respondent No. 11. After the death of K. M. Mitra and B. N. Ghosh, Smt. Nandrani Mitra became the Chairman of the MitraPrakashan Private Limited. So long she was alive, the disputes between her sons did not come to surface. She died on 1.9.1993 and thereafter, a spate of litigation followed and in the litigative zeal of the warring family. Smt. Illa Mitra, respondent No. 7 ; Smt. Sucharita Mitra, respondent No. 4 ; Smt. Deepika Mitra, respondent No. 8 and Smt. Taposi Mitra, respondent No. 5 respectively wives of Alok Mitra, Ashok Mitra, Deepak Mitra and Manmohan Mitra also joined. Ashok Mitra, respondent No. 2 invoked the testamentary jurisdiction of this Court by filing

Case No. 6 of 1996 in which a challenge was made to the alleged will of late Smt. Nandrani Mitra. As an offshoot, a chain of writ petitions came to be filed, besides lodging of Civil Suit Nos. 176 of 1996 ; 272 of 1996 and 233 of 1996. Company Law Board was also approached. In the backdrop of all pervasive litigation between the parties, a good sense and counseling appears to have prevailed and with the whole hearted consent of the parties, an order was passed by a Division Bench of this Court on 27.11.1996 in Writ Petition No. 35721 of 1996, for the resolution of their entire dispute including in relation to Maya Press Private Limited, which was subject-matter of not only the said writ petition but also other disputes pending in different Courts, including grant of an interim relief, which may be desired by one or the other parties, through arbitration of Mr. Justice Amitabh Banerjee, a retired Chief Justice of this Court. Accordingly, writ petition was disposed of with the following observations :

'..... We dispose of this writpetition, accepting the aforementioned proposals and direct the parties, who are before us through their respective learned counsel to appear before Mr. Justice Banerjee, within one week from today and thereafter Mr. Justice Banerjee will proceed in the manner which may be laid down by him. We also put on record that both learned counsel agree that the earlier arrangements which had been arrived at between the parties shall continue and in the event of any dispute in that regard and other connected disputes it will be open for them to move the Arbitrator for passing appropriate orders. It is also agreed that all the expenses of the arbitration will be shared by the companies in equal proportion.

Even though it is needless, but since it is insisted, we clarify that all the four Directors of the petitioner No. 1 will continue to act as such unless otherwise directed by the Arbitrator.'

Earlier a Writ Petition No. 17757 of 1996 was filed by respondent No. 2 Ashok Mitra which was finally disposed of on 22.5.1996 with an ex parte order and direction that until disposal of the injunction application, status quo with regard to 662 shares of late Smt. Nandrani Mitra in the Mitra Prakashan Limited as on the date of her death shall be maintained. This order was challenged before the Apex Court by Mitra Prakashan Limited through Alok Mitra by filing Special Leave

Petition No. 13143 of 1996. The Hon'ble Supreme Court disposed of the Special Leave Petition by making the following observations :

'In C.M.W.P. No. 35721 of 1996 by order dated November 27, 1996 High Court has referred all the disputes to be resolved by an Arbitrator, Justice Amitabh Banerji, former Chief Justice of Allahabad High Court. In this view of the matter, the dispute in this case also stands referred to and be decided by him. The status quo would continue until the Arbitrator decides the dispute. The S.L.P. is disposed of.'

In view of the above orders passed by this Court as well as the Supreme Court. Mr. Justice Amitabh Banerji, as the sole Arbitrator came in seisin of the entire gamut of the disputes between the parties with regard to the two companies named above. The parties submitted to the arbitral proceedings. During the course of the proceedings, two suggestions, it appears, came to be made by the parties firstly, there was a plea tovertically divide the immovable and movable assets of the two companies equally, or as far as possible equally, including the press building, etc., after ascertaining the value of each item and, the second to hold Annual General Meetings of the shareholders of the two companies to ascertain their wishes in respect of the division of the properties in two units. On 11.4.1998, two separate and distinct orders were passed by the Arbitral Tribunal. One of the orders was in respect of the decision on issue No. 2 which related to the question, as to who are the shareholders of the two companies and what is the extent of their shareholding. By an elaborate order, the extent of the shares was determined and the final position, which emerged about the shareholding of the parties in the two companies, is described in the order. There has been no challenge to this order. The order is pertaining to the suggestions made for the division/partition of the properties of the two companies. For this purpose, by order dated 11.4.1998, the Arbitral Tribunal directed for holding of extraordinary General Meetings of each of the two companies on May 16. 1998 and Maj. General M. N. Rawat, PVSM (retired) was nominated as Chairman of the two meetings. The order dated 11.4.1998 passed by the Arbitral Tribunal for convening the extraordinary General Meetings came to be challenged in Civil Misc. Writ No. 17021 of 1998 filed by Smt. Sucharita Mitra, respondent No. 4. This writ petition along with one more writ

petition was finally disposed of on 15.5.1998 by a Division Bench of this Court with the following observations :

'Both the writ petitions are accordingly disposed of finally with a direction that learned Arbitrator and the Chairman nominated by him may provide the shareholders a concrete proposal of various modes of partition of the assets and properties for consideration in the meeting. It is not disputed that the meeting has already been postponed for 23.5.1998. Such agenda thus shall be supplied to the shareholders well within timeso that they may have sufficient opportunity to consider the same. There will be no order as to costs.'

Pursuant to the order dated 11.4.1998 passed by Arbitrator, the meetings of the shareholders of the two companies were convened by the Chairman Maj. Gen. Rawat and a report dated 23.6.1998 was submitted by him to the Arbitrator intimating that the opinion poll was against the division of the properties of the two companies. An application was moved before the poll by Ashok Mitra and Manmohan Mitra with the prayer that no person be permitted to exercise his voting rights on the strength of the shares devolved upon him/her as successor of late Nandrani Mitra. This application was forwarded with the result of the poll by the Chairman to the Arbitral Tribunal, which passed the following order on July 27, 1998 on the result of the opinion poll as well as the application moved by the above named two brothers :

'Since the shares held by Smt. Nandrani Mitra could only go to her husband's successors, the beneficiaries were the five sons, a daughter and the widow. Further, on the death of the widow, her share would devolve on her five sons and the daughter in equal measure. Consequently, even if these shares are excluded from the total votes cast on the poll, the result would still be the same against the proposal for partition.'

It is this order which is the bone of contention and has been challenged by Ashok Mitra and Manmohan Mitra Vespondent Nos. 2 and 3, by filing an Arbitration Case No. 18 of 1998 under Section 34 of the Act, before the District Judge, Allahabad, on the grounds that the said order has been passed in utter disregard of various orders passed by this Court as well as the Apex Court ; it demonstrates total non-

application of mind and is not informed by reason ; it is laconic and perfunctory and has been passed with a pre-meditated and prejudiced mind. Learned District Judge, while admitting the case under Section 34 of the Act by order dated 9.10.1998 issued notices to the opposite parties and passed an interim order to the following effect :

'I have gone through the various orders passed by the Hon'ble High Court and the Supreme Court regarding the shares of late Smt. Nandrani Mitra. I, therefore, direct that the declaration of the result on the basis of the voting in the extraordinary meeting of 10.10.98 shall remain stayed. (Till 17.10.98 for which notices were issued)'

This interim order has been extended time and again primarily for the reason that the case was not ripe for hearing on account of non-service on all the opposite parties. The last order has been passed on 19.3.1999 by which the case was fixed for hearing by learned District Judge on 22.4.1999.

3. In the present petition under Article 226 of the [Constitution of India](#), the petitioner has challenged the maintainability of the application under Section 34 of the Act (Case No. 18 of 1998) before learned District Judge, Allahabad, on the grounds that the impugned order dated 27.7.1998 passed by the Arbitral Tribunal could not be made the subject-matter of challenge as the said order cannot be termed as an 'award' and that since the order dated 11.4.1998 about the devolution of the shares of Smt. Nandrani Mitra had become final, it could not be reopened and challenged before the District Judge who has illegally assumed the jurisdiction not vested in him by passing the interim order dated 9.10.1998, which came to be extended from time to time in a proceeding which is not entertainable. On behalf of respondent Nos. 2 to 5, a counter-affidavit has been filed by Manmohan Mitra-respondent No. 3, to which a rejoinder-affidavit has been brought on record by the petitioner.

4. Heard Sri Triloki Nath, learned counsel for the petitioner, Sri J. Nagar, for contesting respondent Nos. 2 to 5 and Sri K. M. Sinha, for the respondent Nos. 10 and 11 at considerable length. S/Sri J. Nagar and K. M. Sinha urged that the order dated 27.7.1998 passed by the Arbitral Tribunal is in the nature of an 'interim

award' and, therefore, the said order could be challenged in proceedings under Section 34 of the Act before the District Judges Allahabad, which is the principal civil court of original jurisdiction. It was also urged that under Section 9(ii)(d) of the Act, the District Judge has the power to pass interim orders independent of the proceedings under Section 34 of the Act. All these submissions have been repelled by Sri Triloki Nath. Reiterating the grounds of challenge taken in the writ petition, it was maintained by him that, if at all, the order dated 27.7.1998 is deemed to be an interim award, it could be challenged before this Court as the reference of the dispute between the parties to the Arbitral Tribunal was made by this Court. The controversy between the parties, therefore, primarily centres round the two basic points firstly, whether the order dated 27.7.1998 passed by the sole Arbitrator falls within the ambit of the definition of the expression 'award' as given in Section 2(c) of the Act, and, secondly, if the order aforesaid is under the law an 'interim award', is the District Judge a proper court to entertain an application under Section 34 of the Act and has the power under Section 9(ii)(d) of the Act to pass an interim order? As a matter of fact, the parties would swim or sink with the answer to the first point. If the answer to it is in the negative, then obviously no application under Section 34 is maintainable either before the District Judge or before this Court, for one simple reason, that the provisions of Section 34 of the Act come into play only if an arbitral award, which undoubtedly includes an interim award, has been made.

5. Chapter VII of the Act makes a provision for recourse against the arbitral award. In this chapter there is a long Section 34 which deals with an application for setting aside the arbitral award. This provision in the new Act corresponds in some measure to Section 30 of the repealed Arbitration Act of 1940 (hereinafter referred to as 'the repealed Act'). Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with the subsections (2) and (3). Sub-section (3) provides for the period of limitation while sub-section (2) specifies the various grounds, which are required to be proved by the party making an application for setting aside the award. The provisions of Section 34 are comprehensive enough with regard to the various grounds available for setting aside the award. The main postulate for making an application under this Section is that the Arbitral Tribunal must have made an award. The

expression 'Arbitral Award' has been defined in Section 2(1)(c) to include an 'interim award'. Sri J. N. Nagar, learned counsel for the contesting respondents urged that the impugned order dated 27.7.1998 comes within the sweep of an interim award and, therefore, it could be made the subject-matter of challenge under Section 34 by making an application before the appropriate Court. The moot point for consideration as said above, therefore, is as to what is the implication of the expression 'interim award'. Learned counsel for the parties placed reliance on the various paragraphs of 'Russell on Arbitration. 21st Ed. 1977' to fortify their contentions. A reference was made to marginal paragraph 6.075 under Head 3 dealing with 'Substantive Requirements of Award' at page 277. In the said paragraph, it has been incorporated that to be valid, an award must comprise a decision by the Tribunal on the matters referred with which it deals. An award must also be final, in the sense of being a complete decision without leaving matters to be dealt with subsequently or by a third party, and it must be certain, and that the Courts are inclined to uphold the validity of an award and there is a presumption in favour of it being a final and sufficiently certain decision on the matters in dispute, in marginal paragraph 6.081 at page 280 of the said book, it has been mentioned that an award must be final in the sense that, in relation to the issues or claims with which it deals, it is a complete decision on the matters requiring determination. The Tribunal's duty is to make a complete and final decision by its award, and it is a breach of that duty to leave any part of the decision to be determined subsequently or by another. Sri Triloki Nath further placed reliance on the decision of a Division Bench of this Court in *Ganga Dhar v. Indar Singh* : AIR1938 All195 , wherein it has been held that an award is void if given piecemeal. It was observed that an award should be entire and complete and unless there is an agreement between the parties which authorizes the Arbitral Tribunal to make several awards, it is not competent for the Arbitral Tribunal to give an award piecemeal. If the award is made in part at one day and in part at another the whole award is void. In the said case, the decision in *Ganesh Narain Singh v. Malida Koer*, (1911) 13 CLJ 399, was also relied upon in which it was ruled that it is well-settled that an Arbitral Tribunal must be careful to see that its award is a final decision on all matters requiring its determination. The obligation so to decide depends upon the question whether the submission requires that all or only some of the matter in dispute are

to be determined by it. The position, of course is different where the Arbitral Tribunal is empowered to make one or more awards at its discretion. The decision in the case of Ganga Dhar (supra) was rendered even before the commencement of the Repealed Act. In which under Section 27(2). a provision was made that an interim award is also an award. The other decision relied upon by Sri Triloki Nath is Gaddam China Kondaiah v. Gaddam Pedda Kondaiah : AIR 1974 AP238 . in which the expression 'award' used in Article 12 of the Stamp Act came to be interpreted in terms of Section 2(b) of the repealed Act. Another decision referred to on behalf of the petitioner is M/s. Deluxe Silk Trader v. M/s. Satyanarayan Mahedrakumark and others : AIR1979 Bom149 .

6. I have thoroughly scrutinized the observations made in the aforesaid decisions as well as various paragraphs contained in the book--Russell on Arbitration, and find that the reference to them is uncalled for and otiose as the law after the enforcement of the Act has undergone a sea change. Now it is permissible to make an interim award. Section 31 of the Act deals with the form and contents of 'arbitral award'. in subsection (6), it is provided that the Arbitral Tribunal may at any lime, during the arbitral proceedings, make an interim arbitral award on any matter with respect to which it may make a final arbitral award. This providing for making of interim award is not controlled by or dependent upon any agreement between the parties. The matter is left at the discretion of the Arbitral Tribunal and it is now open to it to make an Interim award on any matter on which it may make a final arbitral award. In Mew of the definition given under Section 2(1)(c) of the Act, an interim arbitral award is also an award and has, therefore, to be made in the same way as an award after hearing the parties, and on consideration of the evidence adduced. in Anand Prakash and another v. Assistant Registrar. Cooperative Societies : AIR1968 All22 , it was made clear that by an interim award, the Arbitrator has to decide some of the issues or some of the claims. He may determine the issue of liability by leaving the question of the amount or damage to be dealt with later. In order to be an interim award. Arbitral Tribunal must determine some part of the disputes referred to it. A reference may be made to the case of Uttam Singh Duggal and Co. Pvt. Ltd. v. Hindustan Steel Ltd. : AIR 1982 MP206 , in which it was observed that before an order of the arbitrators may be held to be an interim award, it must decide a part of the claim or an issue of

liability. What the arbitrators did in that case was to decide a preliminary issue relating to their jurisdiction. As the order of the arbitrators does not decide the claim or even any part of the claim or any issue of liability, it cannot be held to be an interim award. To elucidate the point, a concrete example may be cited. In a dispute relating to right of easement with respect to discharge of water, an Arbitral Tribunal may make an interim award and direct that the water shall not be discharged or shall be discharged in a particular manner till the rights of the parties are finally determined by the award. Similarly, in a dispute about the partition of property, an Arbitral Tribunal may allot a particular property to a party by an interim award and adjust the value thereof in its final award. Interim award is virtually intended to be in the nature of a preliminary decree. An interim arbitral award, therefore, would be as much liable to be set aside as the final arbitral award and the provisions of Section 34 of the Act may be invoked for the purpose. This inescapable conclusion has been drawn on the basis of the definition of arbitral award contained in Section 2(1)(c). Sri J. Nagar, learned counsel for the contesting respondents appeared to be of the view that an award, and for that matter, an interim award means a judicial decision and that a decision is nothing but a determination arrived at after consideration of the facts and, in legal context, law. In support of his contention, reliance was placed on the meaning of the expressions 'award' and the 'decision', as given in 'Legal Thesaurus by William C. Burlon'. Deluxe Edition ; 'The Universal Dictionary of the English Language' compiled by Henry Cecil Wyld, and Black's Law Dictionary Sixth Edition. Every judicial decision or order during the course of arbitration proceedings cannot be treated as an interim award.

7. It is an indubitable fact that no final award has been made in the present case by the Arbitral Tribunal. The difficulty, however, is in accepting the submission that the order dated 27.7.1998 of the Arbitral Tribunal is an interim award. Therefore, it is necessary to consider whether the order dated 27.7.1998 passed during the pendency of the arbitral proceeding, which has been assailed by filing an application under Section 34 of the Act, is capable of being treated 'an interim arbitral award'. The entire gamut of the dispute between the parties has been referred for decision by the Arbitral Tribunal under the orders of this Court dated 27.11.1996. The Apex Court has affirmed the said order in Special Leave

Petition No.13143 of 1996. Various suggestions came to be made by the parties before the Arbitral Tribunal. It, in its wisdom, thought it proper to convene the extraordinary General Meetings of the shareholders of the two companies to ascertain their wishes about the proposal of division /partition of the properties. At the time of the convention of the meetings, Ashok Mitra and Manmohan Mitra, respondent Nos. 2 and 3 had made a prayer that no person be permitted to exercise his voting rights on the strength of the shares devolved upon him or her as successor of late Smt. Nandrani Mitra on 11.4.1998. Therefore, by the impugned order dated 27.7.1998, the Arbitral Tribunal had simply declared the result of the opinion poll, i.e., majority of the shareholders was against the partition or division of the properties of the two companies and consequently, the suggestion for division of the properties, which came from the side of one or the other party, was ignored. The order dated 27.7.1998, therefore, does not decide any matter except that it recorded the fact that the exploratory mission with regard to the division of the properties of the two companies had failed. The Arbitral Tribunal has simply recorded a finding of fact that the majority of the shareholders does not want division of the properties. By no stretch of imagination, the said order can be termed to be an interim award as it does not decide the rights of the parties or determine their liability. In principle, an award or for that matter, an interim award is a final determination of a particular issue or claim in the arbitration. A distinction has always to be kept in view with regard to the orders and directions which address the procedural mechanism to be adopted in the arbitration proceedings. There is a sharp contrast in the various procedural steps taken in aid of reaching final conclusion on the particular issues, on the one hand, and the final determination of a particular issue or matter, on the other. Final or interim arbitral award presupposes the determination of a substantive right of the parties. It has to be contrasted with interim orders or directions. The tone and tenor of the order dated 27.7.1998, makes it clear that no interim award has yet come to be made by the Arbitral Tribunal, and, therefore, the said order could not be challenged by means of an application under Section 34 of the Act. The necessary implication of this conclusion is that the District Judge exceeded in his jurisdiction to entertain an application which otherwise is not legally maintainable.

8. An alternative submission was made by Sri Triloki Nath, learned counsel for the petitioner that even if, for the sake of argument, it be taken that the impugned order was an 'interim arbitral award', in that event also the District Judge, Allahabad was not the competent court to entertain the application under Section 34 of the Act. According to him, an application under Section 34 of the Act could be made only before the Court which referred the dispute for decision by the Arbitral Tribunal. Emphatic reliance has been placed on the provision of Section 42 of the Act. In substance, the submission on behalf of the petitioner is that since the dispute between the parties had been referred by this Court for decision by the Arbitral Tribunal, an application under Section 34 of the Act could be filed only before this Court and in no other Court. Sri Triloki Nath appears to have founded his submission on the strength of the decisions reported in Shukrullah and another v. Mt. Rahmat Bibi and others AIR 1947 (34) All 304 ; Kumbha Mawji v. Dominion of India (now the Union of India). : [1953]4SCR878 . Union of India v. Surjeet Singh Atwal : [1970]1SCR351 , M/s. Guru Nanak Foundation v. M/s. Rattan Singh and Sons, : [1982]1SCR842 . Rajendra Prasad and another v. Smt. Suraj Mukhi Singh and others.1984 AWC 1015 (LB) and Siroj export Company Ltd. v. Indian Oil Corporation Ltd. . This fact cannot be lost sight of that the new Act has brought about a great transformation and a kind of revolution in the field of law of 'arbitration. Many a concept as also a mass of case laws have suddenly become obsolete and, therefore, undue reliance thereon is unjustified.

9. Sri J. Nagar, learned counsel for the contesting respondents pointed out that an application under Section 34 of the Act has to be made before the Court which expression was defined in Section 2(1)(e) of the Act, 'to mean 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. The matter came to be considered by this Court in a recent decision dated 20.8.1998 in Civil Misc. Arbitration Case No. 11 of 1998, M/s. I. I. S. C. Engineers Put. Ltd. v. M/s. Triveni Structures Ltd. and another, in which it was held that it is principal civil court of original jurisdiction which is entitled to entertain an application under Section 9 of

the Act and that the High Court of Allahabad does, not stand invested with the original jurisdiction in the matter relating to civil suits which are always instituted as provided under Section 15 of the Code of Civil Procedure in the Court of lowest grade competent to try it and that it exercises original jurisdiction pertaining to matters conferred by special Acts, such as Companies Act. Indian Divorce Act or the Indian Succession Act. An application moved under Section 9 of the Act was held to be not maintainable before High Court and was directed to be filed before the principal civil court of original jurisdiction, i.e., District Judge, Allahabad. There is no doubt about the fact that the expression 'Court' wherever used in the Act is to mean the Court as defined in Section 2(1)(e) of the Act. It is only the principal civil Court of original jurisdiction in the district which has now the authority to act under the provisions of the Act. It will be only such kind of the Court as would have jurisdiction to decide the question forming subject-matter of the arbitration if the same had been the subject-matter of the suit which would fall within the definition of 'Court' given in the Act. Needless to say, the principal civil court of original jurisdiction must also have territorial jurisdiction where the dispute involves immovable properties.

10. The reliance on the provisions of Section 42 of the Act is obviously misplaced. This Section confines jurisdiction to a particular Court out of many which may have jurisdiction in the matter. Section 31(4) of the Repealed Act not only conferred exclusive jurisdiction on the Court to which an application was made in any reference but simultaneously ousted the jurisdiction of any other Court, which may as well have the jurisdiction in this behalf. Provisions of Section 42 require that a single Court should deal with the arbitration proceedings at different stages. The phrase 'no other Court' in Section 42 contemplates a situation where two or more Courts have jurisdiction in respect of an application and when the application is made in any one of such Courts, first in order of time, then that court has exclusive jurisdiction and all other Courts will be divested of their jurisdiction in the matter. The necessity for clothing a single Court with effective and exclusive jurisdiction, and to bring about the avoidance of conflict and scramble is the underlying idea of Section 42 as well as Section 31(4) of the Repealed Act as was held in *Kumbh Mawji's case* (supra). The submission made by Sri Triloki Nath does not go too far and has been stated simply to be rejected. It is true that all the disputes between

the parties were referred for resolution by the Arbitral Tribunal by this Court in a pending writ petition. No proceedings are now pending before this Court. Aftermaking reference, this Court has become functus officio in the matter and the proper court to entertain the application under Section 34 of the Act is the principal civil court of original jurisdiction, i.e., District Judge, Allahabad.

11. The scope and the object of the provisions of Section 9 of the Act has also been canvassed. Sri J. Nagar, learned counsel for the contesting respondents urged that even if it is held and determined by this Court that no application under Section 34 of the Act could be entertained since no award has come into being, an application for interim relief is, nevertheless, maintainable before the District Judge under Section 9 of the Act. The subtle point raised by Sri Nagar requires scanning of the new provisions with regard to interim measures, etc., contained in Section 9 of the Act vis-a-vis the provisions of Section 41(b) of the Repealed Act which dealt with the identical subject Section 41(b) of the Repealed Act provided that the Court shall have for the purpose of, and in relation to, arbitration proceedings, the same power of making orders in respect of any matters set out in the Second Schedule as it has for the purpose of, and in relation to, in proceedings before Court. The Second Schedule to the Repealed Act specified various interim measures in respect of which Court had the power to pass orders. However, the view taken under the previous law was that the Court could not grant any interim relief under the aforesaid repealed provision without arbitration proceedings pending in the Court. Under Section 42(b) of the Repealed Act, the Court had powers to grant interim relief 'for the purpose of and in relation to arbitration proceedings'. This expression was interpreted to mean that the Court could grant interim relief only if the arbitration proceedings were pending either before the arbitrator or before the Court or at least a suit was pending in the Court. Interim relief could not have been granted by the Court if neither arbitration proceeding nor the suit was pending. The matter came to be considered by the Apex Court in the case of Sant Ram and Company v. Raman in Iron Foundry : AIR 1997 SC2557 , Holding that the earlier decision in Union of India v. Raman in Iron foundry : [1974]3SCR556 , was overruled by a three-Judge Bench case in Kamaluddin Ansari and Company v. Union of India : [1983]3SCR607 , it was laid down that pendency of proceedings in Court in relation to arbitration proceedings was a precondition for the exercise of

power by the Court to grant interim relief under Section 41(b) of the repealed Act. In that case, arbitration without the Intervention of the Court was in fact pending, but no arbitration proceedings were pending in the Court. It was in the context of this fact that it was held that without arbitration proceedings pending in the Court, the Court could not grant any interim relief. On the strength of the decisions in Kamaluddin Ansari and Company's case (supra) and Sant Ram and Company (supra), Sri Triloki Nath, learned counsel for the petitioner, urged that the provisions of Section 9 of the Act cannot be invoked unless the Court, i.e., the District Judge was seized of arbitration proceedings or some pending suit. In substance, the submission of the learned counsel for the petitioner was that Independent of the provisions of Section 34 of the Act, no application under Section 9 for interim measures is entertainable by the Court. This submission stands negatived in view of the new provisions contained in Section 9, the relevant portion of which is extracted as below :

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

(i) ...

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

(a) ...

(b) ...

(c) ...

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

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

The limitation of pendency of arbitration proceeding in Court before Court could grant interim relief does not now exist considering the language of Section 9 in which the words 'for the purpose of, and in relation to, arbitration proceeding' are missing. The Court may now on an application made by a party grant relief 'before, or during arbitral proceedings or at any time after making of the arbitral award but before its enforcement.' The decisions relied upon by Sri Triloki Nath with reference to the provisions contained in the Repealed Act are not applicable to the provisions contained in Section 9 of the new Act as they are not part materia with the earlier provision contained in Section 41(b) of the Repealed Act. As a matter of fact, the controversy raised by the learned counsel for the parties is not free from difficulty. I would, however, prefer to grasp the nettle stings rather than evade the issue. In a recent decision, Delhi High Court in *Ashok Chawla v. Ramesh Gupta*, 1996 (37) DRJ decided on 24.5.1996, appears to have taken the view that a petition under Section 9 is not entertainable except in the course of proceedings for substantive relief under the Act. This view may not be wholly correct as the letter and spirit of Section 9, which is to be contrasted with the repealed provision, indicate that it is a self-contained provision contemplating that a party may make an independent and substantive application under this provision. It does not appear necessary that the party should have made an application for substantive relief in relation to arbitration matters and in such proceedings only should have made an application for interim relief under Section 9 of the Act. The source of power of the Court to make orders by way of interim measures is only in, Section 9 and there is no independent power de hors that provision. I am conscious of the fact that the case law on the point is exiguous which may, however, grow only with the passage of time but the interpretation that the Court may make interim measures independent of any substantive proceedings appears to be consistent with the change brought about by the new law.

12. Power under Section 9, however, is not unbridled. It is subject to certain limitations and restrictions, such as, firstly, it can be exercised by the Court to the same extent and in the same manner as it could for the purpose of in relation to any proceeding before it and, secondly, the exercise of the power to make interim arrangements should not militate against any power which might be vested in an Arbitral Tribunal. The interim measures which a Court may be requested by a

party to take are detailed in sub-clauses (a) to (e) of clause (ii) of Section 9. Similar measures were given in paragraphs 1 to 4 of the Second Schedule of the Repealed Act. The improvement now made is that an omnibus provision in the shape of sub-clause (e) has now been added providing that an application may be made to the Court for such other interim measures of protection as may appear to the Court to be just and convenient. The interim measures of protection which would also include interim injunction are not to be passed for the mere asking. There are well-settled and well-defined principles and norms governing the grant of temporary injunctions. Without dilating the matter any further as it is so commonly known to all and sundry as to under what circumstances interim orders of injunction are granted, suffice it to say that the power conferred under Section 9 of the Act is to be exercised by the Court only in sparing circumstances. A party to the arbitration proceeding cannot be allowed to challenge normal and routine orders passed by an Arbitral Tribunal. In *P. K. Thresia v. State of Kerala* : AIR 1979 Ker 212, where a contractor was dissatisfied with the report of the Commissioner, who was appointed to ascertain the quantum of work by taking measurement, it was held that the Court could not invoke provisions of Order XXVI, Rule 10 (2). Code of Civil Procedure to ask the Court to examine the Commissioner and could not also seek injunction for restraining the Government from proceeding with the work. It was for the Arbitrator to evaluate the Commissioners' report and to determine the quantum of work and the Court could not be indirectly asked to determine the quantum of work done. In *J&K; State Forest Corporation v. Abdul Karim Wali*, : [1989] 2 SCR 380, a company sought arbitration only in respect of the interest on the amount due to it from the Union of India under two contracts owing to delay in payment of amount due. The dispute relating to the interest was referred to the arbitration. It was held that the Court could not direct Union of India by mandatory injunction to pay the amounts due under the contracts to the company. Such a relief would be outside the purview of the arbitration proceedings and would not be for the purpose of or in relation to arbitration proceeding. These are the instances which would indicate that Section 9 is not intended to confer on the Court a blanket power to pass any interim measures of protection during the pendency of the arbitration proceeding.

13. The interim directions can be issued under Section 9 only for the purpose of arbitration proceeding and with a view to protect the interest of the parties which otherwise cannot be protected or safeguarded by the Arbitral Tribunal. The power contemplated under Section 9 is not intended to frustrate the arbitration proceeding. Power to pass orders with respect to interim measures, as said above, cannot be exercised by a Court if it would prejudice the powers vested in the arbitrator and renders him incapable to resolve the dispute between the parties. In the instant case, as has been clarified above, the impugned order dated 27.7.1998 does not affect or impinge upon, in any manner, the rights of any one of the parties, it is an order which records the fact that on opinion poll shareholders are against the division of the properties of the two companies. In respect of the said order, no interim measure of protection is required to be made by the Court. It is an innocuous order and does not resolve the dispute either way. If a long rope is given to the parties to approach the Court under Section 9 of the Act, in that event proceedings before the Arbitral Tribunal will be throttled and it would become difficult for the Arbitral Tribunal to proceed further in the matter. Therefore, to allow the jurisdiction under Section 9 to be invoked for interim directions, one has to be cautious and circumspect. If the application of the nature, as has been filed in the present case before the District Judge, is allowed to be entertained, it will open up the flood-gates of litigation and the Court will be mulcted with many number of applications of this nature leaving the arbitrator helpless. If such type of applications are permitted to be filed, the very purpose of the Act will itself be frustrated and rendered nugatory. In my view, even if the application purported to have been made under Section 34 of the Act before the Court is treated to be an Independent application under Section 9 of the Act, it would, for the above reasons, be untenable. The intendment of the new Act is to minimise the scope for intervention of Courts in arbitration matters. The Arbitral Tribunal has been given a free hand to deal with the disputes between the parties and to arrive at its resolution. A finality has been attached to an arbitral award under Section 35 of the Act and the law has turned a full circle as an award by itself has become enforceable as a decree of a Court. The award is not open to challenge on the ground that the arbitrator has reached a wrong conclusion or has failed to appreciate the facts. On the other hand, under Section 34 or under Section 9 of

the Act, when a Court is called upon to decide the objection raised by a party against an arbitral award or to make interim measures of protection, the jurisdiction of the Court is limited as expressly indicated in the said provisions. It has no jurisdiction to sit in appeal and examine the correctness of the award on merits with reference to materials produced before the Arbitral Tribunal or to issue an order of injunction, which may result in obstructing the proceedings before the Arbitral Tribunal. The Court cannot sit in appeal over the views of the Arbitrator by re-examining and reassessing the materials, in exercise of its power under Section 34 of the Act and similarly under the garb of interim measures of protection it cannot put impediments in the progress of the arbitral proceeding.

14. From the above analysis of the facts in hand and the law on the point, the following conclusions emerge :

(i) Though the District Judge being the principal civil court of original jurisdiction at Allahabad has the power and competence to entertain an application for setting aside an arbitral award on the grounds specified under Section 34 of the Act, he had no jurisdiction to entertain the application in the present case as the order dated, 27.7.1998 passed by the Arbitral Tribunal cannot be treated to be an 'interim arbitral award' within the meaning of Section 2(1)(c). No application under Section 34 lies, unless an arbitral award, which includes an Interim award, has been made.

(ii) Even otherwise, impugned order dated 27.7.1998 could not be made subject-matter of challenge in the independent proceedings under Section 9 of the Act to seek interim measures of protection including interim injunction as such a course is devoid of any merit and substance. On the other hand, the Court would be loathe to put the stumbling block in the way of the Arbitral Tribunal to proceed with the case.

15. In view of the above conclusions, the question is whether a writ of prohibition should issue in this case to prohibit the District Judge from proceeding with the Arbitration Case No. 18 of 1998. A writ of prohibition commands the Court or a Tribunal to whom it is issued to refrain from doing something which it is about to do. It prevents a Court from assuming or threatening to assume Jurisdiction which it

does not possess. Thus, writ of prohibition lies both for excess of jurisdiction and absence of jurisdiction. A Division Bench of this Court in the case of *Khageshwar v. Hoshram and others* : AIR 1966 All 191, has held that in no circumstance can an order without jurisdiction be allowed to be passed as nothing is to be gained by it. The submission of the learned counsel for the contesting respondents that the petitioner could take recourse to the alternative remedy of filing an appeal under Section 37 of the Act is wholly untenable in the circumstances of the case. It has been determined that the District Judge has no jurisdiction to proceed with the case under Section 34 of the Act as no arbitral award, or for that matter, an interim award has come into being. It would be a futile exercise to pursue the matter in a venture which is wholly without jurisdiction. Therefore, it would be in the fitness of things to prohibit the District Judge to pass Interim orders and proceed with the case. In the case of *Bengal Immunity Company Ltd. v. State of Bihar* : [1955] 2 SCR 603, the Apex Court observed that existence of alternative remedy may be more relevant in the context of a writ of certiorari but where an inferior Court or Tribunal is shown to have usurped jurisdiction which does not belong to it, the consideration of alternative remedy is irrelevant and the writ of prohibition has to be issued as of right.

16. In the conspectus of the above facts, the writ petition is well merited and has to succeed. It is allowed and a writ of prohibition shall issue to prohibit the District Judge Allahabad to proceed with Arbitration Case No. 18 of 1998 under Section 34 of the Act. The interim orders dated 9.10.1998 and all subsequent orders including the order dated 19.3.1999 shall stand quashed. The Arbitral Tribunal shall proceed with the case unaffected, in any manner, by the orders passed by the learned District Judge in the aforesaid arbitration case.