THE SUPREME COURT IS NEITHER FINAL NOR INFALLIABLE IN THE LIGHT OF FLIP – FLOPS IN RESPECT OF THREE AREAS UNDER THE ARBITRATION AND CONCILIATION ACT OF 1996

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In the wake of privatization, liberalization and globalization there was a paradigm shift in several areas of policy making by the Government of India. In the expectation there will be large scale investment by foreign companies taking the cue from the United Nations Commission on international law which adopted the model law on international commercial arbitration in 1985 and the recommendation of the General Assembly of the United Nations that all member nations of the U.N. should adopt a uniform law relating to commercial arbitration, Government of India being a member of the United Nations thought it fit to adopt the model law with reference to arbitration. Taking into account the previous legislation on the subject, the Government of India issued an Ordinance 27 of 1996, with regard to the same. The very fact that an ordinance was issued in respect of a matter which is not of such great urgency it is clear that the Government of India was anxious to bring about legislation as early as possible duly incorporating the model law adopted by the UNCITRAL. Normally, an ordinance power under Article 123 of the Constitution of India is exercised by the Government of India in matters of great public importance when the parliament is not in session but in the matter of arbitration and conciliation one cannot say that there was such pressing urgency as to invoke the ordinance making power. But, in making the ordinance the Government of India manifested its intention to bring about legislation relating to arbitration and conciliation based on the UNICTRAL model. The ordinance was replaced by Act 26 of 1996 passed on 18.8.1996. The preamble to the Act 26 of 1996 clearly spells out that the object was the establishment of a unified legal frame work for the fair and efficient settlement of disputes arising in international and commercial disputes and with that object in view the enactment was passed, while making adequate provisions for domestic arbitration which was earlier covered by the Arbitration Act, 1940. In addition to it, as conciliation as an alternative mode of dispute resolution has come into prominence the same was also included in the new enactment. However, in three different aspects relating to the interpretation of the new law, the Supreme Court of India rendered conflicting and different judgments ultimately paving the way for Larger Benches to decide the questions in issue.

The first issue relates to the question whether the order of appointment of an Arbitrator by the Court under Section 11(6) of the Act is an administrative order or judicial order.

The second issue relates to the question whether the Court in appointing an arbitrator has to take into account the conditions mentioned in Section 11(8) about the qualifications of the arbitrator as provided in the agreement between the parties and also the object of securing the appointment of an independent and impartial arbitrator.

The third issue relates to the question as to whether Part-I Chapter-II of the Act applies to international commercial arbitrations.

In the initial stages of the implementation of the law, there were many hiccups and an air of uncertainty prevailed on account of the conflicting judgments of various High Courts and the judgments of the Supreme Court resulting in a great amount of uncertainty and it is needless to mention that

one of the primary and fundamental aspects of law is that the law should be certain and this is not only from the point of view of the litigant but also is of primary importance insofar as the administration of law and justice is concerned.

ISSUE I.

Whether the order under Section 11 of the Act is an administrative order or a judicial order. Section 11 of the Act deals with the question as to when an application is to be made to the Court for the appointment of an arbitrator. It provides that if a party fails to act as per the prescribed procedure or the two appointed arbitrators fail to reach an agreement expected from them or a person which includes an institution fails to perform any function entrusted to him or it under the procedure, the Chief Justice or the person designated by him will have to exercise the power of appointment. For doing so, the Court has to necessarily look into the contract and find out whether there is an arbitration agreement. The question whether a particular clause in the agreement constitutes an arbitration agreement or not certainly depends on the interpretation of the clause. Secondly, the Chief Justice or his nominee will have to decide whether a dispute is there or not and also whether the dispute can be referred to arbitration or not and when a judicial authority is called upon to exercise powers under a statute it is difficult to accept the position such a power is administrative. However, the fact remains that this issue whether it is an administrative power or a judicial power led to different and conflicting decisions.

The first of the cases in which the issue came up in the Supreme Court of India was in *Sundaram Finance Ltd. vs. NEPC India Ltd.*[1]. The Court while considering whether a petition under Article 136 of the Constitution lies against an order passed by the Chief Justice or his nominee took the view that it is an administrative order. However, elaborate reasons had not been set out as to why the Court considered it to be an administrative order. Subsequently in the same year two learned Judges of the Supreme Court Justice *S.B. Majmudar* and Justice *D.P. Mohapatra* in *Ador Samia Private Ltd. vs. Peekay Holdings Ltd*[2], and others held that it is an administrative order. They simply followed *Sundaram Finance Ltd.'s* case (supra) and there is no discussion as to why it was considered to be an administrative order. Subsequently the matter again came up before the Supreme Court in *Datar Switchgear Gas Ltd. v. Tata Finances Ltd.*[3], two learned Judges of the Supreme Court held that it would be a judicial order. Once again, matter came up in *Konkan Rly. Corporation Ltd. and others vs. Mehul Construction Co.*[4], three learned Judges Justice *G.B. Patnaik*, Justice *Dorai Swamy Raju* and Justice *S.N. Variva* held that it is an administrative order. They observed that the purpose of the order being speedy disposal of commercial disputes such orders should not be subject to judicial review and they affirmed the decision in *Sundaram Finance's* case (supra) and *Ador Samia's* case (supra) and they also considered the question where when contentious issues are raised whether the party has any remedy and in such cases they said if the Chief Justice exercising power under Section 11(6) could not decide the issue still the aggrieved party can move the High Court seeking *mandamus* compelling the party to approach the Court. The Court again went into the reason behind the adoption of the UNCITRAL model and observed the same has to be kept in mind while interpreting any provision in the Act and the Court observed that the authority has to ensure that, without any delay, the arbitral tribunal should be set in motion and contentious issue can be decided by the arbitral tribunal itself. Therefore, the Court

1. 1999 (2) SCC 479
2. 1999 (8) SCC 572
3. 2000 (8) SCC 151
4. 2000 (7) SCC 201

ultimately held that the order is only an administrative order but not a judicial order.

The decision in *Konkan Railway's* case (supra), rendered by three Judges was decided on 21.8.2000. In the same year, on the 19th of August, 2000, again involving Konkan Railway, this time with *Konkan Rly. Corporation Ltd and another v. Rani Construction Pvt. Ltd.*[5], two learned judges Justice *Jagannadha Rao* and Justice *K.G. Balakrishnan*, as he then was, expressed the view that the three bench decision in *Konkan Rly vs. Mehul Construction* (supra), requires reconsideration. They addressed themselves to the question of speedy disposal which found favour with the three Judges Bench judgment and observed that preliminary issues such as whether there is an arbitration agreement or not, whether there was a dispute or not, whether a dispute is an excepted matter or not - are all matters, that require judicial adjudication and therefore, the same cannot be treated as an administrative order. However, since two learned Judges could not over rule the decision of three Judges they referred the matter to a Larger Bench and they made a very pertinent observation that if the object of the legislation in conferring the power on the Chief Justice under Section 11 was to ensure speedy appointment of an arbitrator, even if it is an administrative order, it could be challenged in a writ petition before the High Court then certainly far from achieving the object of quick disposal it would entail further delay thus defeating or frustrating the object of speedy disposal. The Court also observed that the initial challenge is before a Single Judge and the said order can be challenged before a Division Bench and finally before the Supreme Court under Article 136 and these would entail further delay. Then again the matter came up before a Constitution Bench of the Supreme Court in *Konkan Rly. Corporation v. Rani Construction* (supra). This judgment was delivered on 30.1.2002 and the constitution bench accepted the view that the appointment is not a judicial order and the Chief Justice is not a tribunal and therefore no appeal under Article 136 of the Constitution of India is maintainable and concluded that the order has to be treated as an administrative order. They also referred to the fact that under Section 5 of the Act the judicial interference should be minimal and therefore, took the view that the three bench decision in *Konkan Railways v. Mehul* (supra), was rightly decided and Justice *Barucha* the learned Chief Justice who delivered the judgment on behalf of the constitution bench observed that two learned Judges who were bound by three Judge Bench should not have adopted the course of referring the matter to a Larger Bench and stated that the said practice was deprecated earlier. However, subsequent judgment of the seven-judges decision shows that the doubt expressed by Justice *Jagannadha Rao* and Justice *K.G. Balakrishnan* was right. This again obliges one to consider that if precedential primacy is followed and if two learned Judges had not expressed their view to seek reference to Larger Bench; it is not known when the decision of the three Judges Bench would have been corrected. In other words, judicial comity or binding nature of precedents would some time if put in a straight jacket would lead to a situation that we find in this particular instance. Later the constitution bench in *Rani Construction's* case (supra), was over ruled by a seven Judges decision in *S.B.P. and Co. v. Patel Engineering Ltd. and another*[6], which turned the tables and over ruled the Constitution Bench in Konkan Railway and took the view that the order passed by the Chief Justice or his nominee is a judicial order. The Bench which consisted of the learned Chief Justice *R.C. Lahoti*, Justice *B.N. Agarwal*, Justice *Arun Kumar*, Justice *G.P. Mathur*, Justice *A.K. Mathur*, Justice *P.K. Balasubramanyan* and Justice *C.K. Thakker* with Justice *Thakker* dissenting, held that it is a

5. 2000 (8) SCC 159

6. 2005 (8) SCC 618

judicial order. Thus the pendulum swung again and ultimately the seven Judge Bench decision with a majority of six Judges holding that it is a judicial order and not an administrative order over ruled the constitution bench decision reported in *Konkan Railway vs. Rani Construction* (supra). Thus, the air of uncertainty that prevailed upon the question as to whether it is a judicial order or an administrative order was settled and the controversy was laid to rest hopefully once for all and it is only hoped that an earlier precedent covered by the constitution bench will not again raise its head compelling a much Larger Bench of the Court being constituted to consider *S.B.P. and Co. v. Patel Engineering Ltd.* (supra) was rightly decided and the issue should be given a quiet repose and the controversy should be set at rest and uncertainty which led to a lot of cleavage of judicial opinion at the High Court's level and at the level of Supreme Court as many as five judgments including a three Judge Bench, a five Judge Bench only shows how uniformity and certainty of law is a desideratum that has to be kept in mind. Thus, for nine long years from 1996 till 26.10.2005 when the seven bench judgment was delivered there was lot of uncertainty about the question whether the order appointing an arbitrator is a judicial order or an administrative order and one is tempted to say whether the object of initiating the process of adopting an UNCITRAL model by way of an ordinance put the clock back by the Supreme Court in deciding one of the initial aspects relating to the constitution of an arbitral tribunal.

ISSUE 2.

The next issue relates to the uncertainty as to whether the Court can appoint an independent arbitrator without taking into consideration the qualifications of the arbitrator mentioned in the arbitration agreement between the parties, having due regard to the provisions of Section 11(8) of the Act.

Under Section 11(6) of the Arbitration and Conciliation Act where an appointment procedure is agreed upon by the parties relating to the appointment of the arbitrator, if a party fails to act as required or the parties or the two appointed arbitrators fail to reach an agreement expected of them under the procedure or a person including the institution fails to perform any function entrusted to him or it under that procedure then the party may request the Chief Justice or any person or institution designated by him to take the necessary measures to appoint an arbitrator unless the agreement on the appointment procedure provides other means of securing the appointment.

This right accrues as provided under Section 11(5) in the case of an appointment of a sole arbitrator if the parties fail to agree to the appointment within 30 days from the date of request by one party to the other. The Supreme Court in a decision reported in the case of *Datar Switchgears Ltd. v. Tata Finance Ltd.* (supra), held that if the appointment is not made within 30 days the right to appoint is not lost but however they said that such appointment beyond 30 days must be made before the other party moves an application under Section 11 and once the other party moves the Court, then the right to appoint an arbitrator will be forfeited. The Supreme Court referred to the views of the Bombay, Delhi, Andhra Pradesh and other High Courts but however the Court ruled that before the appointment was made if the application under Section 11(6) is not filed the nomination would be valid and concluded that there is no failure to appoint an arbitrator. However, the issue as to who could be appointed as an arbitrator did not arise for consideration. Yet again, the three learned Judges in the case of *Punj Lloyd Ltd. vs. Petronet MHB Ltd.*[7], ruled that as the party failed to appoint an arbitrator within thirty days and after the expiry of 30 days

7. 2006 (2) SCC 638

an application was made under Section 11(6) for the appointment of an arbitrator and even by that date the other party did not appoint the arbitrator the Court said that the functional director who was the named arbitrator could be moved. The judgment was challenged under Article 226 and the High Court confirmed the order and the Supreme Court set aside the order but however, remanded the matter to the Chief Justice to consider the appointment of an arbitrator in accordance with Section 11(6) of the Act, but however, did not refer to Section 11(8) and therefore, the issue as to whether any person other than the person named by designation in the agreement to be appointed did not arise for consideration. Yet again, in the case of *B.S.N.L. v. Motorola India Pvt., Ltd.*[8], the Court followed *Datar Switchgear's* case (supra) and also *Punj Lloyd's* case (supra), the Supreme Court observed that as BSNL failed to appoint an arbitrator BSNL forfeited the right to appoint an arbitrator. However, in a large number of cases wherein the other party failed to appoint an arbitrator and forfeited the right to appoint an arbitrator the High Courts have uniformly been appointing retired Judges of the High Court or Supreme Court as arbitrators without considering the provisions of Section 11(8) which says that the Chief Justice or his designate should keep in mind the conditions relating to the appointment of an arbitrator as provided in the arbitration clause and also to secure the appointment of an independent arbitrator.

In a batch of SLPs the matter came up before the Supreme Court and in the case of *Northern Railway Administration, Ministry of Railway, New Delhi vs. Patel Engineering Company Ltd*[9]., where several High Courts have appointed retired Judges, the Supreme Court considered the effect of Section 11(8) and observed that while appointing the arbitrator the Chief Justice or his designate should take into account the conditions prescribed in the arbitration agreement in regard to the qualification of the arbitrator and a large number of matters were remitted to the High Court to consider the appointment of an arbitrator having regard to the conditions of Section 11(8) of the Act with reference to the qualifications of the arbitrator.

In the said judgment of *Northern Railway Administration vs. Patel Engineering Company Ltd.'s* case (supra), three learned Judges Justice *Arijit Pasayat*, Justice *P. Sathasivam* and Justice *Aftab Alam* had considered as to what are the matters to be considered in making an appointment under Section 11(6) of the Arbitration & Conciliation Act and 11(6) does not spell out what are the criteria to be taken into account to appoint a arbitrator and Section 11(8) clearly says that the Chief Justice or the person or institution designated by him for appointing the arbitrator shall have due regard (a) to any qualifications required of the arbitrator by the agreement of the parties; (b) and other considerations as are likely to secure the appointment of an independent and impartial arbitrator. Unfortunately, this requirement does not appear to have been taken into account and the three bench decision considered the importance of the words "necessary measures" occurring in 11(6) and "due regard" in Section 11(8) concluded that though it is not mandatory that the Chief Justice or his nominee should only appoint the named arbitrator or arbitrators still the words "due regard" occurring in 11(8) must be given effect to and after quoting *in extenso* the provisions of 11(6) and 11(8) the Court felt that in making the appointment qualifications of the arbitrators prescribed in the agreement have to be taken into account. As many as 18 special leave applications were decided by this bench by its judgment dated 18.8.2008 and subsequently the matter again came up in the case of *BSNL and another vs. Dhanurdhar Champatiray*[10] and the

8. 2009 (2) SCC 337

9. 2008 (10) SCC 240

10. 2010 (1) SCC 673

Supreme Court following *Patel Engineering's* case (supra), remanded five cases in respect of which special leave petitions were filed before them holding that the High Court is bound to take into consideration the requirements of Section 11(8) and remanded all the matters to the High Court to consider the requirements of Section 11(8) in appointing the arbitrator. Therefore, if the Court in *Datar Switchgears Ltd. vs. Tata Corporation Ltd.* (supra), while speaking of the appointment of the arbitrator had stated that the requirements mentioned in Section 11(8) should be taken into consideration though the issue as to what consideration should be taken into account when appointing an arbitrator would have avoided any loose ends. Normally, it is said that the highest Court will not decide a matter unless it is directly put an issue. However, in a situation where they were interpreting 11(6) and deciding on the issue of the Court to appoint an arbitrator, it cannot be said that by mentioning that in making such appointment, the requirement of the qualifications of the arbitrator mentioned in the agreement could be taken into account cannot be said to be a matter that had not come up for decision and would have settled the issue as to who is to be appointed as arbitrator because many High Courts started appointing retired High Court Judges or Judges of the Supreme Court totally ignoring the words in 11(8) that in making the appointment "due regard" must be had to the qualifications of the arbitrator to be appointed mentioned in the agreement. From the number of cases that were remanded by the order covered by *Patel Engineering Company Ltd.'s* case (supra) and *Dhanurdhar Champatiray's* case (supra) (as many as 20 matters were remitted back to the High Court indicates the uncertainty of the position). Though only 20 matters came up by way of SLP to the Court, and the Court had to decide the issue but still there must have been innumerable other cases where such appointments would have been made which certainly would not be valid if tested on the touchtone of the requirements mentioned in Section 11(8). Strictly though it may not be a flip flop in the true sense of the word, this issue also shows that the important requirement of securing the appointment of an arbitrator keeping in mind the requirements of Section 11(8) was almost given a go bye and in several such cases appointments were made without taking into account the requirements of 11(8) and it only came out as a result of two conflicting views expressed in two judgments *Ace Pipeline Contracts Private Limited v. Bharat Petroleum Corporation Limited*[11] and *Union of India (UOI) v. Bharat Battery Manufacturing Co. (P) Ltd.*[12] and the matter had to be resolved by a Larger Bench.

All this could have been avoided as mentioned above if the Court in the earlier cases had simply directed the High Court to take into account the qualifications of the arbitrator mentioned in the arbitration agreement and once again it would show that it took twelve long years for the Court to decide finally as to how the Court has to proceed in appointing the arbitrator if an application is filed under Section 11(6) of the Act.

ISSUE 3:

The third issue relates to the question whether Part-I of the Arbitration and Conciliation Act applies to international arbitrations. This again was embroiled in conflicting opinions and it was only in 2012 by a judgment which was delivered on 6.9.2012 that the issue was resolved and *Bhatia International v. Bulk Trading S.A. and another*[13] which judgment was rendered on 13.3.2002 was over turned after it held the field for ten years.

In *Bhatia International's* case (supra), the Supreme Court observed that there is nothing in Chapter II of the Arbitration and

11. (2007) 5 SCC 304
12. 2007 (7) SCC 684
13. 2002 (4) SCC 105

Conciliation Act which would exclude the operation of Part-I of the Arbitration and Conciliation Act in respect of arbitrations held outside India. One of the issues that came up for consideration was whether in respect of an international arbitration where the seat of the arbitration is outside India whether any interim orders could be passed under Section 9 of the Arbitration and Conciliation Act and the Supreme Court said that if an international arbitration where the proceedings are held in India that is the seat of the arbitration in India Part-I in its entirety would apply subject to the condition that the parties are free to deviate to the extent permitted by the provisions of Part-I. It was also held that even in the case of international arbitrations where the arbitration proceedings are held outside India Part-I would apply unless the parties by express or implied agreement exclude all or any other provisions and three Judges in Para 21 of the judgment mentioned that since the Act did not mention that Part-I would not apply to arbitration held outside India necessarily it has to be concluded that Part-I would apply to international arbitrations even if the seat of the arbitration is outside India. The said view was followed in *Venture Global Engineering v. Satyam Computer Services Ltd. and another*[14], a decision rendered on 10th January, 2008. The Supreme Court chose to follow the Bench decision in *Bhatia International v. Bulk Trading Company, S.A.'s* case (supra), From the facts in (2008) 4 SCC 190, we find that an award passed by the sole arbitrator directing the transfer of shares to Satyam Computers was sought to be enforced by filing an application in the U.S. District Court, Eastern District Court of Michigan State and Venture Global Engineering appeared before the Court and contended that the enforcement of the award by which transfer of shares was made as being in violation of the Foreign Exchange Management Act in force in India the Court had no jurisdiction and while that was the position Venture Global Engineering filed a suit before the Chief Judge, City Civil Court, Secunderabad for a declaration to set aside the award and also for a permanent injunction restraining the transfer of shares under the award and the District Court passed an interim *ex-parte* order and against the same an appeal was filed by Satyam Computers before the High Court and the High Court directed the suspension of the order and against the same a SLP was filed before the Supreme Court and Bhatia International Case was clarified and applied. However, a Constitution Bench of Supreme Court of India in a judgment *Bharat Aluminium Co. and others vs. Kaiser Aluminium Technical Service, Inc. and others*[15] delivered on 6.9.2012 considered the issue at great length and after referring to several judgments rendered by Indian Courts and also Courts in other jurisdictions elaborately considered the issue relating to seat or place of arbitration and ultimately held that Section 2(7) of the Arbitration and Conciliation Act which speaks of a domestic award held that the seat or place of arbitration has an impact in respect of an award passed and held that even if two foreign parties have an arbitration in India Part-I would apply but the Court concluded that where the arbitration is held outside India then Part-I has no application and enforcement of the award would be governed by the different considerations. The Court clearly held that where the seat of arbitration is outside India the Indian Courts have no jurisdiction in an international commercial arbitration to pass any interim order even if parties have made a provision that the arbitration would be governed by the Arbitration and Conciliation Act, 1996. Thus, the Constitution Bench (five-Judge Bench) overruled both *Bhatia International's* case (supra) and also *Venture Global Engineering's* case (supra). As mentioned earlier, this judgment was rendered on 6.9.2012 and once again we find that from 2002 to 2012 for ten long years the

14. 2008 (4) SCC 190

15. 2012 (9) SCC 552

issue whether Part-I would apply to international commercial arbitration when the seat of arbitration is outside India remained unresolved and the uncertainty was allowed to continue for ten long years virtually setting at naught the object of hurriedly enacting the 1996 Act adopting UNICTRAL model which was preceded by an ordinance and far from encouraging the inflow of capital from foreign companies to India the judgment of *Bhatia International's* case (supra) and *Venture Global Engineering's* case (supra), virtually became counter productive because even if the arbitration is held outside India the Supreme Court said that Indian Courts can pass interim orders. The Supreme Court once again resorted to the doctrine of prospective overruling and held that the judgment will only the operate prospectively because several High Courts as also the Supreme Court followed the said judgments and the Court did not want to upset the large number of cases decided on the basis of *Bhatia's* case (supra).

The learned Judge who spoke for the Bench in *Bhatia International's* case (supra), chose to accept what he called the able arguments of Mr. *Sundaram* in preference to the attractive arguments of Mr. *B. Sen* and in one stroke of the pen chose to overrule the judgments of Orissa, Bombay, Madras, Delhi and Kolkatta High Courts and in a paternalistic manner or in a patronizing way said that "the Act does not appear to be well drafted and the High Courts of Bombay, Delhi, Kolkatta, Madras and Orissa cannot be faulted for interpreting the law in the manner indicated above". But, however, in *Bharat Aluminium vs. Kaiser* (supra), the *Bhatia International* (supra), was overruled, the correctness of the decisions of High Courts mentioned above was accepted. Without meaning any disrespect one is tempted to quote *Oliver Cromwell's* appeal to synod of the Church of Scotland "I BEESEECH YOU, IN THE BOWELS OF CHRIST, THINK IT IS POSSIBLE THAT YOU MAY BE MISTAKEN". The supreme wisdom of the *Cromwellian* aphorism should not be lost sight of by the highest Court of the land.

In the words of *Alexander M Bickel*, in his book the *"Least Dangerous Branch"*[16] referring to the US Supreme Court which description was taken from *Alexander Hamilton's* 78th Federalist Papers, the Court takes on an ultimate dimension *dum ex cathedra loquitor* (Page 204). The same could be said of the judgments of the Supreme Court of India because it is the highest Court of the land and the law declared by it is binding on all Courts in India.

In one sweeping sentence, the learned Judge who spoke for the Bench in *Bhatia International's* case (supra), overruled the judgments of the various High Courts and expressed sympathy for them stating that the act is not well drafted. Of the several judgments overruled by the Court, mostly unreported, one judgment reported in *Marriott International Inc. and others vs. Ansal Hotels Limited and another*[17] merits mention. A Division Bench of the Delhi High Court sets out elaborate reasons why it considered that Section 9 has no application where the seat of arbitration is outside India. In that particular case, the arbitration was conducted in Kuala Lumpur as per the Kuala Lumpur Regional Centre for Arbitration Rules. Incidentally, the Delhi High Court referred to in Para 23 of its judgment at page 385 to an earlier decision of the Delhi High Court reported in *Kitechnology NV and another vs. Unicor GmbH Rahn Plastmaschinen and another*[18] where none of the parties were Indians and the arbitration agreement provided that the arbitration must be in Frankfurt, Germany. The matter was governed by the German law which provided that the arbitration was to be in Frankfurt, Germany. The judges also referred to the decision in the *East Coast Shipping*

16. Alexander M. Bickel – 'The Least Dangerous Branch' at Page 204
17. AIR 2000 Delhi 337
18. 1998 (47) Delhi RJ 397

Limited vs. M.J. Scrap Private Limited[19] and *Keventor Agro Limited vs. Seagram Company Limited*[20] two unreported judgments of the Calcutta High Court and from the judgment it appears that the Calcutta High Court made a reference to Section 2(2) of the Arbitration and Conciliation Act and observed that it can only apply to domestic arbitrations. It is to be stated that as several High Courts had taken a different view, the Supreme Court should have made some reference to the judgments of various High Courts. In fact, a growing tendency of not referring to the judgments of various High Courts when the Supreme Court takes a different view is being found in some judgments of the Supreme Court; and in a case like this, where Supreme Court's view in *Bhatia* is overturned by a Larger Bench, there is all the more reason why in *Bhatia*, some detailed consideration of the judgments of the various High Courts taking a contrary view, which ultimately was accepted by a Larger Bench of the Supreme Court, ought to have been made. Judgments of High Courts also deserve a lot of respect and more often than not, they are confirmed by the Supreme Court.

The three areas pointed out in this article will clearly show how the Supreme Court of India has rendered conflicting judgments spread over a period ranging from 10 to 12 years and it is extremely intriguing as to how such different views could be expressed by different benches and certainty of law being the loadstar to guide the path of justice and stare decisis being a hallowed principle which also leads to certainty will be seriously jeopardized by such frequent changes in the legal position. In that sense, one is tempted to say quoting Justice *Robert Jackson* of the US Supreme Court *Brown v. Allen*[21] that the Court is *"not final but it is infallible but infallible only because it is final"*. That the Supreme Court of India is not infallible is demonstrated by the large number of Courts' decisions which were overruled. It cannot be said it is either final, because as things stand, any of its judgment could still be overruled. One cannot wish away the brooding omnipresence of a reversal of the decisions at a future point of time. Be that as it may, the Supreme Court should evolve a method of constituting Larger Benches so that at least in the areas covered by new legislations, judgments do not run the risk of being overturned. In fact, the constitution-makers had the foresight to think of a 'Constitution Bench' even when making the constitution obviously because they must have realized that Larger Benches will effectuate and ensure the certainty of law as the risk of frequent reversal of judgments would be avoided by providing under Article 145(3) of the Constitution that five-Judges Bench shall decide issues of substantial questions of law relating to the interpretation of the constitution. The Court has extended the said principle of constituting Larger Benches to resolve conflicts and to lay down the law to other branches of law. In fact, we find that in the first 15 years of the Supreme Court, there were a large number of "constitution benches", a practice which has gone into disuse because of the docket explosion, constitution of Larger Benches would be difficult because of the huge number of cases entertained by the Supreme Court but however, for the enhancement of institutional respect and reputation of the highest Court and the need for certainty of law, frequent over-turning of decisions has to be avoided and in that sense, devising an institutional mechanism of constituting Larger Benches is the crying need of the hour. Unfortunately, unlike the US Supreme Court, the Supreme Court of India does not sit 'enbanc' because of a large number of cases that the Supreme Court entertains. For the sake of certainty of law, it is hoped that the Supreme Court of India would aim to be final and endeavor to be infallible.

19. 1997 (1) CHN 444
20. A.P.O. Nos.490/97, 499/97 and C.S. No.592/97 (decided on January 27, 1998)
21. 344 U.S. 443 (1953)