APPELLATE DIVISION
(Civil)

ATM Afzal CJ
Mustafa Kamal J
Latifur Rahman J
Md Abdur Rouf J and
BB Roy Choudhury J
Judgment
May 8th, 1997

Bangladesh Air Service (Pvt) Ltd.....
.....Appellant
vs.
British Airways PLC.....
.....Respondent*

Contract Act (IX of 1872)
Section 28 Exception I

There is nothing in Exception 1 to section 28 of the Contract Act prohibiting the parties to a contract from choosing a foreign forum under the supervision of a foreign court for arbitrating its disputes. Such contract does not offend the main provision of section 28, because the local Courts still retain the jurisdiction to decide the lis between the parties.

The appellant is free to file a suit for damages against the respondent in the local court. The respondent is also free to ask for a stay of the suit, pending arbitration, and it is for the local court having regard to all circumstances, to arrive at a conclusion whether sufficient reasons are made out. .....(24)

Section 28, Exception I

The plea of sovereignty and interest of the country and its citizens, if accepted, will render foreign arbitral jurisdiction absolutely negatory.

We venture to say that such a consequence will itself be opposed to public policy, for no country lives in an island these days. Foreign arbitration clause is an integral part of international trade and commerce today. .....(26)

Cases discussed : MA Chowdhury vs. Mitsui OSK Lines Ltd, 22 DLR (SC) 334; Rabindra N. Maitra vs. Life Insurance Corporation of India, AIR 1964 (Cal) 141, especially upon paragraphs 17, 18, 23 and 25; Mount Albert Borough Council vs. Australasian Temperance etc. Society, (1938) AC 224 (240); Channel Tunnel Group Ltd. vs. Balfour Beatty Ltd., (1993) 1 All ER 664 (682); Tzortzis vs. Monark,(1968) 1 W LR 406 (409); (See Hamlyn and Co. vs. Talisker Distillery (1894) AC. 202, HL and also Compagnie d Armement Maritime SA vs. Compagnie Tunisienne de Navigation SA (1970) 3 All ER 71 HL); Michael Golodetz vs. Serajuddin and Co. AIR 1963 (SC) 1044; Oil and Natural Gas Commission vs. Western Company of North America, AIR 1987 (SC) 674; James Miller and Partners Ltd. vs. Whitworth Street Estates (Manchester) Ltd. (1970) 1 All ER 96; Mahesh Chandra vs. Tara Chand Modi, AIR 1958 All 374; Balkrishna vs. State of Madras, AIR 1961 (SC) 1152; Parakh vs. Mahadeo Maiya, AIR 1959 (SC) 781 (795); Haji Azam vs. Singleton Binda and Co. Ltd., 27 DLR 383; Shiva Jute Bailing vs. Hindley, AIR 1959 (SC) 1387; Yangtzee (London) Ltd. vs. Barlas Bros. (Karachi), 14 DLR (SC) 151; Brij Lal Suri vs. State of UP AIR 1954 Allahabad 393 ref.

Khandker Mahbubuddin Ahmed, Senior Advocate, (Abdul Wadud Khandker, Advocate with him) instructed by Sharifuddin Chaklader, Advocate-on-Record — For the Appellant.

Sigma Huda, Advocate (appeared with leave of the Court), instructed by Md. Aftab Hossain, Advocate-on-Record — For the Respondent.

KS Nabi, Attorney-General, & Rafique-ul-Huq, Senior Advocate — Amici Curiae

Dr Kamal Hossain & Dr M Zahir, Senior Advocates — Interveners.

Judgment

Mustafa Kamal J : What started as a limited question of law in this appeal by leave by the opposite party-appellant from the judgment and order dated 8-2-96 passed by a Division Bench of the High Court Division making the Rule absolute in Civil Revision No.3934 of 1994 concerning whether the Court in England or the Court in Bangladesh has jurisdiction over an arbitration in terms of an Agreement between the appellant and the respodnent, fanned its wings, thanks to the intervention of some other lawyers present in Court, into issues of wider dimensions, namely, how and in what manner the proper law of contract in a given case is to be construed, whether a foreign arbitral award is enforceable in Bangladesh, whether the Agreement is opposed to public policy and so on.

2. Yet, the facts [illegible] the case are simple, but unique in nature. The respondent British Airways PLC of Heathrow Airport, London is a

*Civil Appeal No.30 of 1996.

(From the Judgment and order dated 8-2-96 passed by the High Court Division in Civil Revision No.3934 of 1994.

worldwide Airline company. By an Agreement dated 18-4-1980 signed at Dhaka the appellant Bangladesh Air Services (Pvt) Ltd, a company incorporated in Bangladesh, was appointed as General Sales Agent (GSA) of the respondent initially for the District of Sylhet, later extended to the Districts of Chittagong, Chittagong Hill Tracts, Noakhali and Comilla by a letter of amendment signed and executed between the parties, also at Dhaka, on 31-3-83. Two clauses of the Agreement dated 18-4-80 are the all important clauses interpretation of which is the bone of contention between the parties. The first one, Clause 14, runs as follows :

> "Arbitration—Any difference or dispute concerning the the scope, meaning, construction or effect of this Agreement, or any matter or thing contained therein or related hereto, shall be referred to Arbitration in accordance with, and subject to, the provisions of the Arbitration Act, 1950. The arbitral award shall be final and conclusively binding upon the parties.

3. The second disputed clause, Clause 23, reads as follows :

> "Jurisdiciton:—This Agreement shall be interpreted in all respects in accordance with the Law of England."

4. For well over a decade things ran smoothly between the parties and it was only on January 15, 1994 that the appellant was constrained to address a letter to the Manager, Bangladesh of the respondent complaining that the appellant-company was being unjustly and illegally interfered with by the Bangladesh officials of the respondent causing a loss of more than Taka 25 million to the appellant which has given rise to a dispute within the meaning of clause 14 of the GSA Agreement dated 18-4-80 which, if not resolved by the said Manager, would be referred to arbitration. In response, Manager, Bangladesh, of the respondent served a notice of termination of the GSA Agreement on 25-1-94. The appellant informed the respondent's Manager in Bangladesh that the facts stated in the letter dated 15-1-94 and also the unjust and illegal notice of termination have given rise to a dispute which would be referred to arbitration in accordance with clause 14 of the said Agreement. On 3-2-94 the appellant gave formal notice of arbitration appointing Mr TH Khan, Senior Advocate, Supreme Court of Bangladesh as the Arbitrator. After expiry of seven clear days from the receipt of the notice by the respondent, the appellant not having heard anything to the contrary, requested the Arbitrator to enter on the reference. The Arbitrator by a notice dated 15-2-94 asked both the parties to submit their respective statement of facts. On 17-2-94 the appellant received a letter dated 16-2-94 from the Manager, Bangladesh of the respondent, together with photocopy of a letter dated 9-2-94 from the Head Office of the respondent, a copy of which was endorsed to the Arbitrator as well, requesting cancellation of the notice of entering on the reference. On 19-2-94 the appellant filed an application for injunction in the 3rd Court of Subordinate Judge, Dhaka praying for completion of the arbitration proceedings which went upto the High Court Division through the process of appeal and revision resulting in an expiry of the order of *status quo* passed by the trial Court. On 26-4-94 the appellant received a letter from the Arbitrator intimating that in view of the objection raised by the respondent he would not arbitrate in the matter. The appellant immediately proposed by telex the name of Mr Justice Abdul Wadud Chowdhury as the Arbitrator and requested the respondent to concur with the proposal. On 30-4-94 the appellant received a letter from the respondent stating that they did not agree to the appellant's proposal and suggested the appointment of an Arbitrator from a third country preferably based in Singapore, but the appellant did not agree to this proposal and on 2-5-94 the appellant filed an application in the 3rd Court of Subordinate Judge, Dhaka, Arbitration Misc. Case No.368 of 1994, later re-numbered as Arbitration Misc Case No.37 of 1994, under section 8(2) of the Arbitration Act, 1940, corresponding to section 10 (d) of the Arbitration Act, 1950 (England), for appointment of an arbitrator since the parties could not agree to a common appointment. The respondent filed a written objection contending that since clause 14 of the Agreement provided that arbitration shall be in accordance with and subject to the provisions of the Arbitration Act, 1950 and since, further, clause 23 provided that the Agreement shall in all respects be interpreted in accordance with the Law of England, the Courts in Bangladesh have no jurisdiction to appoint an Arbitrator. Upon hearing the parties the trial Court by judment and

order dated 27-11-94 held that the jurisdiction of the local Court was not ousted and appointed Mr. Justice Ruhul Islam as the Arbitrator. The respondent preferred Civil Revision No.3934 of 1994 challenging the legality of the order dated 27-11-94. The learned Judges of the High Court Division by the impugned judgment and order made the Rule absolute holding, *inter alia*, that the Courts in Bangladesh have no jurisdiction over the arbitration in view of the stipulations contained in clauses 14 and 23 of the Agreement.

5. Leave was granted to consider the appellant's submissions, first, that the High Court Division failed to consider the true import of exception 1 to section 28 of the Contract Act by holding erroneously that the said exception validated conferment of exclusive jurisdiction by the parties on English Courts ousting the jurisdiciton of local Courts. Secondly, section 8(2) of the Arbitration Act, 1940 of Bangladesh and section 10(d) of the Arbitration Act, 1950 of England about the appointment of an Arbitrator being in *pari materia* and in view of the principle of law enunciated in the case of *MA Chowdhury vs. Mitsui OSK Lines Ltd, 22 DLR (SC) 334*, the High Court Division wrongly held that only the English Court had jurisdiction over the arbitration or the appointment of an Arbitrator. Thirdly, the law of contract being similar in England and Bangladesh and the relevant provisions of the Arbitration laws of these countries being in *pari materia*, clauses 14 and 23 of the Agreement were wrongly interpreted conferring exclusive jurisdiction to the Courts in England. Fourthly, the Agreement dated 18-4-80 having been executed in Bangladesh and other factors relevant to arbitration, namely, availability of evidence, convenience of parties and expense being also favourable for holding arbitration in Bangladesh, the High Court Division has erred in deciding otherwise. Finally, the High Court Division did not properly consider the submission that a foreign arbitral award is not enforceable in Bangladesh.

Elaborating his submissions Khandker Mahbubuddin Ahmed, learned Counsel for the appellant, submits that there are two parts in clause 14, namely, (i) an agreement between the parties to arbitration; and (ii) such arbitration shall be governed by the Arbitration Act, 1950, i.e., by the Law of Arbitration of England. He submits that so far as the first part of the said clause is concerned, it is covered by exception 1 to section 28 of the Contract Act. But the second part is not so covered, inasmuch as it has the effect of "absolutely restricting" enforcement of a party's right under a contract "by usual legal proceeding in the ordinary tribunal" and, accordingly, void to that extent.

6. To understand the true import of Mr. Ahmed's submission it will be profitable to quote both section 28 and exception 1 thereto of the Contract Act which are as follows :

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

7. Mr Ahmed continues to submit that the appellant is complying with the requirement of clause 14 by agreeing to resolve the dispute through arbitration but as the respondent does neither concur with the appointment of an Arbitrator made by the appellant nor nominate its own Arbitrator, the need to have an appointment made by the Court arose, both under section 10(d) of the Artibtation Act, 1950 of England and under section 8(2) of the Arbitration Act, 1940 of Bangladesh. Restricting the appellant from seeking an appointment under section 8(2) of the Arbitration Act, 1940 is tantamount to ousting the jurisdiction of local Court which is had on account of public policy. He continues to submit that although, apparently, there is a distinction between the case under consideration and the case of *MA Chowdhury vs. Mitsui OSK Lines Ltd, 22 DLR (SC) 334*, if a dissection of clause 14 of the Agreement is made and effect thereof is interpreted in the light of the main provision of section 28, the principle enunciated in the afore-cited case will be better appreciated.

8. To this Ms Sigma Huda, learned Counsel for the respondent appearing with leave of the Court, submits that there is no scope of splitting clause 14 of the Agreement. Clause 14 is not only a composite agreement between the parties to resolve disputes by resorting to arbitration, but is also an agreement to make the arbitration conditional upon and in consonance with the provisions of Arbitration Act, 1950 (of England), which is a procedural law. Clause 14 as a whole is covered by exception 1 to section 28 of the Contract Act. There is no such thing as "first part" or "second part" in clause 14 and a choice of foreign law or foreign tribunal for purposes of arbitration does not bring the agreement within the mischief of the main provisions of section 28. The law allows the parties to make a choice of law, both in repect of the substantive rights and obligations of the parties and in respect of procedure of arbitration, but so long as this freedom of choice does not restrict absolutely a contracting party from enforcing his rights under the contract by taking usual legal proceedings in the ordinary tribunals, the agreement is legal. No part of clause 14 is opposed to public policy. Clause 14, read with clause 23, is decisive on the question that the procedure of arbitration will be regulated only by the English Court and not by the local court.

9. In the light of the above submissions of the parties it was a relatively easier exercise to resolve the issues on which leave has been granted, but at this stage Mr. Rafique-ul-Huq, learned Counsel, who was present in Court, intervened and submitted that the Law of Arbitration internationally has undergone a sea-change and therefore the matter needs a deeper probe into the issues involved.

10. We asked Mr Rafique-ul-Huq to appear as *amicus curiae* in the matter and make his submissions and Mr Rafique-ul-Huq in an elaborate submission supported the contentions of Khandker Mahbubuddin Ahmed from a different perspective. He submitted that the respondent by submitting to the jurisdiction of the 3rd Court of Subordinate Judge has already admitted the local Court's jurisdiction over the arbitration matter and waived the jurisdiction of English Court. In clause 14 of the GSA Agreement no venue of arbitration has been given. Also in clause 23 the choice of law is restricted to a mere interpretation of the Agreement but no governing law has been indicated in the Agreement so as to give exclusive jurisdiction to English Courts for purposes of arbitration and governance of the Agreement. The proper law of contract, he submits, has not been determined in this Agreement at all. Then to elucidate what is the proper law of contract, how it is to be determined and what happens when there is a conflict of laws, he cited *Halsbury's Laws* of England, 4th Edn., Vol. 8, para 583, page 407; Vol. 2, paras 543 and 546 at pp. 270 and 280 respectively, it's 3rd Edn., Vol.7, para 137, p. 72; Vol. 2, para 36, p. 14. He has also cited some textbooks in this regard, namely *Private International Law by Cheshire & North*, 11th Edn., pp.457-461, *The Conflict of Laws by Morris*, 4th Ed. (1993), pp.131-136, *Law of Arbitration and Conciliation by SK Roy Chowdhury and HK Saharay*, 4th Edn., p.14 and p.27, *Private International Law by Paras Diwan* pp.506-520 and *Cheshire's Private International Law*, 11th Edn., p. 457. He also supports Mr Ahmed in his submission that clause 14 is in two parts. Reference to (English) Arbitation Act, 1950 therein does not exclude the operation of (Bangladesh) Arbitation Act, 1940. Further, even if clause 14 is fully legal and valid, that does not mean that the proper law of contract has been determined in the Agreement. The lack of a reference to a venue for arbitration, the localisation and termination of the agreement, availability of evidence, payment in the currency of the country, convenience of the parties, expenses, etc. are the relevant considerations in deducing by inference the proper law of contract. The question of public policy is a very important factor in determining whether clause 14 should be given effect to by a Bangladesh Court. There is a total lack of reciprocity between UK and Bangladesh in respect of enforcing the decrees of each other's Courts and arbitral awards. Hence on the ground of lack of reciprocity the choice of English law as the procedure of arbitration will be opposed to public policy, he submits. Mr Rafique-ul-Huq has referred to 10 decisions to substantiate his various submissions and those are as follows :

Tzortzis vs. Monark Line A/B, (1968) 1 WLR 406; Compagnie L'Armement [illegible] SA vs. Compagnie Tunisienne d[illegible] (1970) 3 AllE R 71 (HL); James Miller and Partners Ltd. vs. Whitworth Street Estates (Manchester) Ltd (1970)

All ER 796 (HL); Oil and Natural Gas Commission vs. Western Company of North America, AIR 1987 (SC) 674; British India Steam Navigation Co. Ltd., vs. Shanmughvilas Cashew Industries, (1990) 3 SCC 481; ABC Laminart Pvt. Ltd. vs. AP. Agencies, AIR 1989 (SC) 1239; Renusagar Power Col. Ltd. vs. General Electric Col. AIR 1994 (SC) 860; Abu Bakr Siddique vs. MV Aghia Thalassini, 30 DLR (94); VV Aghia Talassini vs. Abu Bakr. Siddique, 32 DLR (AD) 107; Michael Golodetz vs. Serajuddin and Co., AIR 1963 (SC) 1644.

11. We shall avert to some of these decisions as and when deemed necessary.

12. Khandker Mahbubuddin Ahmed, on a second chance available to him, adopted the arguments of Mr Rafique-ul-Huq adding thereto that the High Court Division has not adverted to the appellant's reliance upon the case of *Rabindra N. Maitra vs. Life Insurance Corporation of India, AIR 1964 (Cal) 141, especially upon paragraphs 17, 18, 23 and 25* thereof on the proper law of contract. He, however, submits that the second part of clause 14 is opposed to public policy not because of lack of reciprocity between UK and Bangladesh, as argued by Mr Rafique-ul-Huq, but because the principle of public policy enshrined in section 28 of the Contract Act based on the overriding concept of sovereignty and interest of the country and its citizens is offended.

13. Ms Sigma Huda, on a second chance to reply, submitted a detailed written submission and relied upon various decisions to some of which we shall advert in due course.

14. The hearing was concluded and we reserved the appeal for judgment when a little while later appeared Dr M Zahir and later Dr Kamal Hossain who submitted that they would like to address the Court on enforceability of foreign arbitral awards in Bangladesh, because a likely judgment on this subject is likely to affect some pending cases in which they have been engaged. We then asked Mr KS Nabi, learned Attorney-General, to address us on this point after seeking instruction from the Government. We heard them at some length at a later stage which we shall note at an appropriate stage.

15. We address ourselves first on the question of proper law of contract. This was never an issue at any stage of the proceedings, nor any leave was granted on this point. "The proper law of the contract", observed Lord Wright in *Mount Albert Borough Council vs. Australasian Temperance etc. Society, (1938) AC 224 (240)*, "means that law which the English Court is to apply in determining the obligations under the contract". In *Channel Tunnel Group Ltd. vs. Balfour Beatty Ltd., (1993) 1 All ER 664 (682)*, HL, Lord Mustill defines proper law of contract as that "which regulates the substantive rights and duties of the parties to the contract from which the dispute has arisen". Lord Denning observed in *Tzortzis vs. Monark, (1968) 1 W LR 406 (409)*, "... if there is an express clause in a contract providing what the proper law is to be, that is conclusive in the absence of some public policy to the contrary. But where there is no express clause, it is a matter of inference from the circumstances of the case". There is a third and final way. Failing either of these, ie, by judicial determination of the system of law with which the transaction has the closest and most real connection.

16. Now, a contract may contain more than one selection of law in respect of various contractual components, say, one for mutual rights and obligations, another for arbitration and its procedure, the 'curial law' of the arbitration as it is often called. The position is summarised in *Halsbury's Laws of England,4th Edn., Vol. 8, para 592, p. 414* under the heading "Scope of the proper law", as follows:

> "592. Splitting of the contract. Whilst most contractual issues are governed by the proper law, the parties can agree that different contractual issues may be governed by different laws." *(See Hamlyn and Co. vs. Talisker Distillery (1894) AC. 202, HL* and also *Compagnie d' Armement Maritime SA vs. Compagnie Tunisienne de Navigation SA (1970) 3 AllER 71 HL).*

17. Hence in given contract the law and procedure of the arbitration may be different from the proper law of the contract. Some cases have been cited at the Bar showing that parties belonging to two different countries entered into agreements providing for arbitration of their disputes in one of the two countries according to the Rules

of Arbitration prevalent in the country where arbitration is to take place. In the case of *Michael Golodetz vs. Serajuddin and Co. AIR 1963 (SC) 1044*, an Indian Firm and an American Company entered into an agreement for supply of manganese providing for arbitration of their disputes in New York according to American Arbitration Association Rules. In the case of *Oil and Natural Gas Commission vs. Western Company of North America, AIR 1987 (SC) 674*, the appellant ONGC of India and the respondent American Company entered into a drilling contract. The arbitration proceedings to resolve disputes between the parties were to be governed by the Indian Arbitration Act, 1940. London was the agreed venue for hearing of arbitration matter as per the arbitration clause.

18. In the present case clause 14 refers to arbitration "in accordance with, and subject to, the provisions of the Arbitration Act, 1950". So there is already a law of arbitration embodied in the contract. We have nothing to do with the proper law of contract because we are not determining the rights and obligations of the parties under the contract. If the reference to Arbitration Act, 1950 is held invalid by us then we shall be obliged to decide, applying the tests indicated above, what is the proper law of contract (including arbitration) in this case. The question of determination of proper law of contract including arbitration arises only when a bi-national contract is silent about it or is equivocal in expression. Thus in *Compagnie d' Armement Maritime SA vs. Compagnie Tunisienne d' Navigation SA (1970) 3 All ER 71(HL)*, a contract for carriage of crude oil at Tunisian ports entered into between a French company and a Tunisian company provided in a printed clause that the contract should be governed' by the laws of the flag of the county carrying the goods.' A dispute arose and proceeded to arbitration which according to the contract was to take place in England. The arbitrators stated a case in the form of a question of law whether the law applicable was French or English law. The House of Lords finally decided that French law was the proper law of contract. The proper law of contract was thus decided on a case stated by the arbitrators. Again, in *James Miller and Partners Ltd. vs. Whitworth Street Estates (Manchester) Ltd. (1970) 1 All ER 96*, the House of Lords decided that the arbitration was subject to Scots law, confirming the decision of the Scottish arbitrator who issued the final award refusing to state a case for the decision of the English High Court. In *Tzortzis vs. Monark Line A/B, (1968) 1 WLR 406*, the arbitrators stated an interim award in the form of a special case for the decision of the English High Court and the Court of Appeal upheld the decision of the High Court that the proper law of the contract was English law. In the case of *Rabindra N Maitra vs. Life Insurance Corporation of India, AIR 1964 (Cal) 141*, which Khandker Mahbubuddin Ahmed complained, the High Court Division overlooked, a suit was filed by the assignee of the insured to realise insurance claim in Calcutta High Court and the proper law of contract was decided in the suit itself.

19. Hence, the present appeal is not an occasion for us to decide what is the proper law of contract in this case for we are not deciding the rights and obligations of the parties under the contract and we have in clause 14 of the Agreement a stipulation about the law of arbitration. We shall therefore confine ourselves to the submissions made on clauses 14 and 23.

20. Reading clause 14 as a whole, we find it hard to sustain the submission of Khandker Mahbubuddin Ahmed that it is capable of dividing itself into two parts. We find clause 14 to be a composite whole, a self-contained indivisible covenant, having a meaning and content in its totality. Clause 14 is an arbitration clause, stipulating not only that the parties shall submit all their disputes to arbitration, but also that the arbitration shall be "in accordance with, and subject to, the provisions of the Arbitration Act, 1950".

21. The words "in accordance with" and "subject to", as Ms. Sigma Huda rightly submits, are not without any significance.

22. *Black's Law Dictionary (Abridged 5th Edn.)* defines "accordance" as "agreement, harmony, concord, conformity. *"Stroud's Judicial Dictionary*, 4th Edn, Vol. 3, gives 8 illustratiouns of the use of the words "in accordance with" one of which means "in substantial compliance with". *Biswas* on *Encyclopaedic Law Dictionary*, 2nd Edn., quotes *Mahesh Chandra vs. Tara Chand Modi, AIR 1958 All 374*, to say, "The words "in accordance" mean in

conformity or 'as provided for". So does *Mitra in Legal and Commercial Dictionary*, 4th Edn. In *Words and Phrases, West Publishing Co., Permanent Edn.* Vol. 20A, 'in accordance with' is used as an equivalent of 'not repugnant to', 'not in conflict with' or ' not inconsistent with',

23. In *Black's Law Dictionary*, 5th Edition, "subject to" means ' liable, subordinate, subservient, inferior, obedient to, governed or affected by, provided that, provided, answerable for'. Biswas and Mitra (aforequoted) quote ***Balkrishna vs. State of Madras, AIR 1961 (SC) 1152***, to say, "The words "subject to' have reference to effectuating the intention of the law and the correct meaning is 'conditional upon". So does *Prem's Judicial Dictionary*, Vol. (iv), quoting another unreported Indian Supreme Court case. *Words and Phrases (aforequoted), Vol.* 40, describes "subject to" as meaning 'conditional upon' or 'depending on', or 'subordinate to' or 'inferior to'.

24. Having regard to the meanings assigned to the words 'in accordance with' and 'subject to', we have no manner of doubt whatsoever that in so far as arbitral procedure is concerned the parties have consciously made the arbitration to be in consonance with and conditional upon the observance of the provisions of the (English) Arbitration Act, 1950, which is a "law of procedure" (as held in ***James Miller vs. Whitworth, (1970) 1 All ER 796 HL***), and as correctly submitted by Ms Sigma Huda. There is nothing in Exception 1 to section 28 of the Contract Act prohibiting the parties to a contract from choosing a foreign forum under the supervision of a foreign court for arbitrating its disputes. Such contract does not offend the main provision of section 28, because the local Courts still retain the jurisdiction to decide the *lis* between the parties. The appellant is free to file a suit for damages against the respondent in the local court. The respondent is also free to ask for a stay of the suit, pending arbitration, and it is for the local court having regard to all circumstances, to arrive at a conclusion whether sufficient reasons are made out (by the plaintiff) for refusing to grant a stay. ***(Michael vs. Serajuddin, AIR 1963 (SC) 1044*** and also ***MA Chowdhury vs. Messrs. Mitsui OSK Lines, Ltd., 22 DLR (SC) 334.*** The High Court Division has discussed a number of cases on stay of suit under section 34 of the Arbitration Act, 1940 and we need not dwell further on that, the issue in this appeal not being whether or not to grant an order of stay.

25. While the parties are free to include in their contract a foreign arbitral jurisdiction clause, we notice that no case has been made out by the appellant from the very beginning that such a clause is not binding on them. On the contrary, they accept the procedural law of the Arbitration Act, 1950, but by a process of analogical reasoning they contend that the English Law of arbitration is *in pari materia* with the Bangladesh counterpart. Therefore the Bangladesh Court will administer the corresponding English procedural law, a strange logic indeed. It is true that Bangladesh Courts often follow the English law when there is no municipal law on the subject, as in the field of Marine Insurance, but in the (English) Arbitration Act, 1950, the procedural law includes the forum for administration of the procedure and it is poor defence to say that clause 14 has not settled the venue of arbitration. If the arbitration "is in accordance with, and subject to, the provisions of the Arbitration Act, 1950", the parties do not have to travel far to look out for the venue beyond the Arbitration Act, 1950 itself.

26. As to the objection raised by Khandker Mahbubuddin Ahmed that reference to (English) Arbitration Act, 1950 is opposed to public policy on the ground of conflict with the main provision of section 28 itself based on the concept of sovereignty and interest of the country and its citizens, we would like to quote *Halsbury's Laws of England, 4th Edn., Vol. 2, Para 501, p 255*, as follows :

> "501. Definition and classification. An arbitration is the reference of a dispute or difference between not less than two parties for determination, after hearing both sides in a judicial manner, by a person or persons other than a court of competent jurisdiction."

Section 28 makes void to that extent every agreement by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract by the usual legal proceedings in ordinary tribunals, but Exception 1 to section 28 provides that it shall not render illegal a contract by which any dispute referred to arbitration, that is, for determination by a person or persons other than a court of competent jurisdiction.

Exception 1 itself relaxes the rigours of section 28. The plea of sovereignty and interest of the country and its citizens, if accepted, will render foreign arbitral jurisdiction absolutely nugatory. We venture to say that such a consequence will itself be opposed to public policy, for no country lives in an island these days. Foreign arbitration clause is an integral part of international trade and commerce today.

27. Mr Rafique-ul Huq's contention that there is no reciprocity between UK and Bangladesh in the enforcement of decrees and arbitral awards and therefore clause 14 is opposed to public policy extends the purview of public policy to an unchartered territory and we shall quote Subba Rao, J in *Gherulal Parakh vs. Mahadeo Maiya, AIR 1959 (SC) 781 (795)* which is a complete answer to Mr. Huq's submission :

> "The doctrine of public policy may be summarised thus: Public policy or the policy of the law is an illusive concept; it has been described as "untrustworthy guide", "variable quality", "uncertain one" "unruly horse", etc.; the primary duty of a Court of Law is to enforce a promise which the parties have made and to uphold the sanctity of contracts which form the basis of society, but in certain cases, the Court may relieve them of their duty on a rule founded on what is called the public policy; for want of better words Lord Atkin describes that something done contrary to public policy is a harmful thing, but the doctrine is extended not only to harmful cases but also to harmful tendencies; this doctrine of public policy is only a branch of common law, and, just like any other branch of common law, it is governed by precedents; the principles have been crystallised under different heads and though it is permissible for Courts to expound and apply them to different situations, it should only be invoked in clear and incontestable cases of harm to the public; though the heads are not closed and though theroretically it may be permissible to evolve a new head under exceptional circumstances of a changing world, it is advisable in the interest of stability of society not to make any attempt to discover new heads in these days."

28. As for the submission that by submitting to the jurisdiction of the learned Subordinate Judge, the respondent has waived compliance with the (English) Arbitration Act, 1950, Ms. Sigma Huda has rightly argued that the respondent by filing a written objection objected to the assumption of jurisdiction by a Bangladesh Court and therefore the question of waiver does not arise.

29. Now, there remains Khandker Mahbubuddin Ahmed's reliance upon paragraphs 37, 38, 39, 51 and 52 of the judgment in the case of *M A Chowdhury vs. Mitsui OSK Lines Ltd., 22 DLR (SC) 334.* The point involved in this decision was whether a clause in a bill of lading providing that any dispute arising thereunder shall be "governed" by a foreign law and any such dispute shall be "decided by" a foreign court could lawfully oust the jurisdiction of the Courts in the then Pakistan. Upon a masterly analysis of all available case-laws of the period Hamoodur Rahman, CJ in an illuminating judgment replied to the question in the negative and the paragraphs relied upon by Mr Ahmed are of no assistance to the appellant. Rather paragraph 57 of the report on which Ms. Sigma Huda relies, supports the case of the respondent that a foreign arbitral jurisdiction clause is permissible under our law and we quote paragraph 57 as follows :

> "57. Having said this, however, I am of the opinion that in order to preserve the sanctity of contracts I ought also to hold, as was done in the earlier cases in Great Britain that such foreign jurisdiction clauses, even when they purport to give jurisdiction to a Court in a foreign country, are really in the nature of arbitration clauses which come within the exceptions to section 28 of the Contract Act and, therefore, should be dealt with in the same manner as other arbitration clauses. In the case of an arbitration it has to be remembered that the jurisdiction of the Courts is not altogether ousted, for, the Courts merely stay their hands to allow the parties to resort to the form of adjudication to which they have previously agreed. By only staying the actions before them the Courts still retain to themselves the jurisdiction to resume the case if the arbitration, for any reason, fails or the parties find it impossible to comply with the form of adjudication to which they had agreed. This was

also the view taken in the case of Malik Ali Akbar, which I approve."

30. With regard to clause 23 of the Agreement, we do not think that this clause has to be read jointly with clause 14 to reinforce the respondent's claim for an arbitration under the (English) Arbitraion Act, 1950. Clause 14 can stand on its own to bring the arbitration within the said Act. It has to be read with clause 23 only when the proper law of the contract will come up for determination ie when the law governing the rights and obligations of the parties will have to be settled, if it needs any settlement at all.

31. Hence we do not find substance in the first four grounds on which leave has been granted.

32. The appellant argued before the High Court Division that a foreign arbitral award is not enforceable in Bangladesh and the High Court Division, following the decision of a Division Bench in the case of *Haji Azam vs. Singleton Binda and Co. Ltd., 27 DLR 583.* and noticing Explanation 3(b) to section 44A of the Code of Civil Procedure upheld the contention of the appellant but observed that in case of success in getting an award, the appellant may pursue their remedy under section 26 of the Arbitration Act, 1950 and may pray for costs for having to file proceedings in a foreign country.

33. Leave was granted to consider the appellant's submission that the High Court Division did not properly consider the appellant's submission in this regard.

34. Neither in his oral nor in his two written submissions Khandker Mahbubuddin Ahmed argued this point.

35. A little background needs to be given before we note the respective submissions of the learned intervening Counsels.

36. Because there was no obligation under international customary law to enforce foreign arbitral awards and because of the increasing demands of international commerce in the early twentieth century, the Geneva Protocol on Arbitration Clauses was signed by mainly European States in 1923. Undivided India was also a State signatory to the Protocol. Later, most European States as also undivided India, became signatories to the Geneva Convention of the Execution of Foreign Arbitral Awards in 1927. To give effect to the Protocol and for enabling the said Convention to become operative in India, the Arbitration (Protocol and Convention) Act, 1937 (Act VI of 1937) was passed in India on the 4th March, 1937. Under section 1(3) of the said Act, the different provisions of the said Act except section 1 were to come into effect from different dates by notification in the Official Gazette. The said Act had only 10 sections. Section 3 came into effect on 30-11-37 vide Gazette of India, 1937, Pt 1, P 1945 and sections 2 and 4-10 on 23-1-38, vide ibid, 1938, pt. 1, p 25. The Act defined "foreign award", made it enforceable in India as if it were a local award and laid down the procedure and conditions for enforcement. The Protocol and the Convention were made the First and Second Schedules to the Act.

37. After the partition of India, Indian and Pakistan Supreme Courts took opposite views with regard to the continued application of the said Act in their respective territories. In *Shiva Jute Bailing vs. Hindley, AIR 1959 (SC) 1357,* the Indian Supreme Court took the view that the pre-independence reciprocal arrangements would be deemed to be valid in post-independence India. But the Pakistan Supreme Court took the view on 6-6-61 in *Yangtzee (London) Ltd. vs. Barlas Bros. (Karachi), 14 DLR (SC) 151,* that in the absence of any fresh notification by the Central Government of Pakistan an award of the Court of Arbitration, London is not a foreign award and is not enforceable in Pakistan. The Central Government of Pakistan thereafter promulgated on 6-6-62 the Foreign Awards and Maintenance Orders Enforcement (Amendment) Ordinance, 1962 (Ordinance LIII of 1962) removing doubt and declaring that the notification issued by the Central Government of India before 15-8-47 declaring any power to be a party to the Convention or any territory to be the territory to which the Convention applies, shall be deemed to be a notification issued by the Central Government of Pakistan.

38. After the liberation of Bangladesh, in the case of *Haji Azam vs. Singleton Binda and Co. Ltd., 27 DLR 583,* a Division Bench of the High Court Division held on 23-4-75 that both the Protocol and the Convention to which Bangladesh

was not a signatory were not internationally binding upon Bangladesh and that Ordinance LIII of 1962 "may have been an expression of the will of the State of Pakistan indicating its acceptance of the said notification (issued by the Central Government of India) as one on its own behalf, but that cannot be regarded as sufficient acceptance on behalf of the People's Republic of Bangladesh without similar legislative enactment by the appropriate law-making authority of the State of Bangladesh."

39. Both Dr M Zahir and Dr Kamal Hossain submit that in the Bangladesh Code (Vol. XI), published in 1988, Act VI of 1937 containing the amendment made by Ordinance No. LIII of 1962, has been published as an existing law, indicating thereby that the Government of Bangladesh takes the view that Bangladesh continues to be bound by the Protocol and the Convention.

40. In the meantime, some other developments have taken place in the field of international recognition and enforcement of foreign arbitral awards. On the 10th June, 1958 a Convention on the Recognition and Enforcement of Foreign Arbitral Awards held in New York was adopted by the United Nations Conference on the International Commercial Arbitration. India was a signatory to the New York Convention. On 30-11-61 India passed the Foreign Awards(Recognition and Enforcement) Act, 1961 (Act 45 of 1961) to give effect to the Convention. Act VI of 1937 was repealed by section 10 thereof, as clause (2) of Article VII of 1958 New York Convention provided that the Geneva Protocol of 1923 and the Geneva Convention of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent they become bound, by this Convention. England has passed a new Arbitration Law, Arbitration Act, 1996, incorporating the latest developments made in New York Convention (1958) and repealing Part I of the Arbitration Act, 1950.

41. Bangladesh acceded on 6 July, 1992 to the New York Convention (1958), but no domestic legislation has been enacted as has been done by India in 1961 and by England in 1996.

42. Dr M Zahir contends that *Haji Azam's case, 27 DLR 583*, has not been rightly decided and that a foreign arbitral award can be enforced in Bangladesh both under Act VI of 1937 and New York Convention (1958). Both Dr Kamal Hossain and Ms. Sigma Huda refer to Laws Continuance Enforcement Order, 1971, Bangladesh (Adaptation of Existing Bangladesh Laws) Order, 1972 (President's Order No. 48 of 1972) and Dr Kamal Hossain additionally refers to Article 25 of the Constitution and submits that Act VI of 1937 is still an existing law of the country. Dr. Kamal Hossain in a written submission submits that even though no domestic legislation has been passed to provide for enforcement of foreign arbitral awards, following accession to New York Convention, Courts while interpreting foreign arbitral awards should favour an interpretation which upholds their validity and/or enforceability, either under the 1937 Act, or under section 44A of the Code of Civil Procedure (when a judgment has been obtained abroad on the basis of an award), or through a suit based on a foreign judgment based on an arbitration award.

43. Mr KS Nabi, learned Attorney-General, submits that Act VI of 1937 stands now at standstill and without a fresh notification by the Government of Bangladesh, the Act cannot be operative. There exists no legal mechanism for enforcement of a foreign award in Bangladesh. *Haji Azam's case, 27 DLR 583*, has been correctly decided. He will, however, instruct the Government to make immediate legislation to provide for a legal mechanism for enforcement of arbitral awards of those countries which are or will be signatories to New York Convention (1958).

44. Khandker Mahbubuddin Ahmed did not make any submission in reply.

45. We are not deciding in this appeal whether *Haji Azam's case, 27 DLR 583*, has been correctly decided or not or whether legal mechanisms exist for enforcement of a foreign arbitral award. We leave it for decision in an appropriate case, if and when occasion arises.

46. As we find that the High Court Division has not fallen into any error in interpreting Exception 1 to section 28 of the Contract Act on any account, which is the burden of the appellant's submission, we are not inclined to interfere with the impugned judgment.

The appeal is dismissed. No costs.

Latifur Rahman J : Agreeing with my brother Mustafa Kamal, J. I want to write a few lines as the real issue involved in the appeal is indeed short and simple.

49. The material question for consideration in this appeal is, whether the Court in England or the Court of Bangladesh has jurisdiction over the arbitration in view of the agreement between the parties that the arbitration will be in accordance with, and subject to, the provision of Arbitration Act, 1950 (England).

50. It is not at all necessary to narrate the facts of the case in detail. Suffice to say, Bangladesh Air Services (Pvt) Ltd.-appellant was appointed General Sales Agent of the respondent, British Airways PLC for some Districts of Bangladesh. The passenger General Sales Agency agreement was entered into between the parties on 18-4-80. In the Agreement clause (14) speaks of arbitration which runs as follows :

"Any difference or dispute concerning the scope, meaning, construction or effect of this Agreement, or any matter or thing contained herein or related hereto, shall be referred to Arbitration in accordance with, and subject to, the provisions, of the Arbitration Act, 1950. The arbitral award shall be final and conclusively binding upon the parties."

51. Clause (23) of the said Agreement speaks of the jurisdiction which reads as follows :

"This Agreement shall be interpreted in all respects in accordance with the Law of England."

52. By a notice of the Manager of the respondent the General Sales Agency agreement was terminated on 25-1-94. In view of the dispute relating to the termination of the agency, the appellant on 3-2-94 gave a formal notice of arbitration. Ultimately, the respondent having not agreed to the proposal of the appellant in appointing an arbitrator, the appellant on 2-5-94 filed an application before the learned Subordinate Judge, Dhaka to appoint an Arbitrator. The parties failed to agree to appoint an Arbitrator as the respondent raised objection contending that in accordance with clauses 14 and 23 of the said agreement the Arbitration shall be in accordance with, and subject to, the provisions of the Arbitration Act, 1950 (England) and the agreement in all respects be interpreted in accordance with the law of England and the court in Bangladesh has no jurisdiction to appoint an Arbitration.

53. The trial Court held that the jurisdiction of the local court was not ousted in appointing an Arbitrator. The learned Judges of the High Court Division in revision held that the court of Bangladesh has no jurisdiction over the arbitration in view of the stipulations contained in clauses 14 and 23 of the General Sales Agency Agreement.

54. In view of clauses 14 and 23 of the Agreement the question arises whether the arbitration proceeding will be conducted in accordance with the provisions of the Arbitration Act, 1950 (England) or the arbitration can proceed in accordance with the Arbitration Act, 1940 of Bangladesh and whether exception I of section 28 of the Contract Act validates conferring exclusive jurisdiction to arbitrate in accordance with the English Arbitration Act.

55. Some other incidental questions have also been raised as to the enforceability of Foreign Award in Bangladesh, availability of evidence, convenience of parties and expense being also favourable for holding arbitration in favour of the appellant in Bangladesh as the agency contract has been entered into in Bangladesh.

56. The parties to the present litigation have entered into an agreement voluntarily and of their own accord to select the Arbitration Act, 1950 (England) to refer any difference or dispute concerning the scope, meaning, construction or effect of this agreement. It is needless to say that it is a commercial contract between the parties and the arbitration is a statutory mode of settlement and the parties may agree as to the jurisdiction to which all or any dispute arising out of the contract shall be subject. The appellant itself was a party to the agreement under which the matter has got to be referred to an Arbitrator and it does not appear to me either just or proper that the appellant should be allowed to avoid the contract which he willingly executed. In *Cheshire and North's Private International Law (12th Edition) 205 it* has been

observed that the arbitration agreement being made as a result of a bargain between the parties, the integrity of the bargain has to be maintained and this is unassailable and the party which is seeking to prevent the bargain to come into force shall be now estopped from denying the contract and the bargain. It has been held in the case of *Brij Lal Suri vs. State of UP AIR 1954 Allahqbad 393* as follows :

> "Now it is well known that where the parties have chosen under an agreement to refer their disputes to arbitration, Courts will insist that they should have recourse to arbitration before pursuing any other remedy".

In this regard, I may also refer to a passage from *Cheshire and North's Private International Law (11th Edition, 495)*, while discussing about the interpretation of contracts the authors say: "There is, speaking generally, no reason in principle why the parties should not be free to select the governing law. The express choice of law made by parties alleviates need for interpretation. In the absence of an express choice, the question of the proper law of contract would arise, the parties to a contract should be bound by the jurisdiction clause to which they were agreed unless there is some strong reason to the contrary". The parties having chosen the law, the question of deciding the proper law of contract does not arise. The parties to a contract should be bound by the jurisdiction clause to which they have agreed unless there is some strong reason to the contrary.

57. In the present case, the intention of the parties to the contract, the governing law of contract has been expressed in clear words giving *their* express intentions,

58. In the case of *Malik Ali Akbar vs. Metro Goldwyn Mayer India Ltd*, reported in *PLD 1952 (Lahore) 149*, the correct rule in interpreting such contract, Justice SA Rahman, J. has observed as follows :

> "The correct rule in such cases seems to be that a clause of this character in a contract providing for determination of all disputes arising between the parties to the contract, by a foreign tribunal, must be construed as a submission clause for arbitration purposes."

59. It will be profitable if I quote a portion of paragraph 57 of the reported decision of *MA Chowdhury vs. Mitsui OSK Lines Ltd. and others, 22 DLR (SC) 334*, wherein celebrated Judge, Hamoodur Rahman, CJ observed as follows :

> "Having said this, however, I am of the opininon that in order to preserve the sanctity of contracts I ought also to hold, as was done in the earlier cases in Great Britain, that such foreign jurisdiction clauses, even when they purport to give jurisdiction to a Court in a foreign country, are really in the nature of arbitration clauses which come within the exceptions to section 28 of the Contract Act and, therefore, should be dealt with in the same manner as other arbitration clauses. In the case of an arbitration it has to be remembered that the jurisdiction of the Courts is not altogether ousted, for, the Courts merely stay their hands to allow the parties to resort to the form of adjudication to which they have previously agreed."

60. Since leave was granted primarily on the question of exception I to section 28 of the Contract Act, I feel it necessary to quote the section along with Exception 1.

> "28. Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunls, or which limits the time within which he may thus enforce his rights, is void to that extent.
>
> *Exception 1*—This section shall not render illegal a contract by which two or more persons agree that any dispute which may arise between them in respect of any subjects or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred".

61. Section 28 of the Contract Act deals with making those contracts void which restricts the right of a contracting party [illegible] legal actions in the ordinary tribunals [illegible] process of law. Exception (1) to section 28 of the Contract Act, however, enacts a saving clause in favour of the

contracts to refer to arbitration any dispute that may arise between the parties. Hence arbitration clause is protected by exception (1) to section 28 of the Contract Act.

62. Mr Khandker Mahbubuddin Ahmed, learned Advocate appearing for the appellant, submits that Clause 14 of the Contract contains two parts, the first part, agreement between the parties to resolve the dispute by resort to arbitration and second part, such aribitration shall be governed by the English Arbitration Act, 1950. According to the learned Advocate, the first part is covered by Exception I to section 28 of the Contract Act, but the second part has the effect of absolutely restricting enforcement of a party's right under a contract by usual legal proceedings in ordinary tribunal and hence the second part is only void.

63. Section 28 of the Contract Act makes void only those agreements which absolutely restrict a party to a contract from enforcing the rights under that contract in ordinary tribunals. But this section has no application when a party agrees not to restrict his right of enforcing his rights in the ordinary tribunals but only agrees to a selection of one of those ordinary tribunals in which ordinarily a suit would be tried.

64. It is well settled that none by previous agreement can confer jurisdiction to a court, when the court has none, nor can one divest a court of jurisdiction when it possesses jurisdiction under the ordinary law. After reading clause 14 I do not find that it is an attempt to oust the jurisdiction of any court, but it is only an agreement to submit to the jurisdiction of an Arbitrator. It is merely a submission clause for that limited purpose and Exception I of section 28 of the Contract Act in fact allows such a contract and the same is not at all illegal.

65. Mr Khandker Mahbubuddin Ahmed could not show that the agreement in any manner ousted the jurisdiction of any court and the contract is void. Further, it would be extremely inconvenient and impractical if a part of the dispute between the parties were to be litigated in court and another part were to be decided by an arbitrator. Hence I do not find any force in the argument of the learned Advocate for the appellant.

66. In our leave order we also noted the submission of the learned Advocate for the appellant as to the enforceability of a foreign award as that was also argued and touched by the learned Judges of the High Court Division.

67. Strictly speking, in this case this point is of no primary importance because no award has yet been made and to speak frankly, none of the parties has even submitted to the jurisdiction of the Arbitrator. It is only after the award is made and it is made a rule of the court by virtue of the judgment and decree in terms of the award then the question of enforceability comes in. In the facts of this case and the issues involved, the question of enforceability of a foreign award is not very material now. It is incidental and academic as yet and dependent on very many considerations which may arise in future.

68. In this case, Mr. Rafiqul Huq, learned Advocate, was requested by us as a friend of the court to assist a little. Thereafter hearing was concluded and the appeal was kept reserved for judgment. In the meanwhile, Dr Zahir and Dr Kamal Hossain voluntarily sought to appear in the case though they were not engaged by either of the parties. They wanted to make submission on the enforceability of foreign award in Bangladesh, probably because they had some interest in some pending or future matter.

69. We allowed the learned Advocates who were not appointed by the parties to argue on this point a length. I still feel that we should not have allowed the learned Advocates to intervene and to make their submissions on this point on the question of enforcement of foreign award in this case as that is too premature.

70. With regard to the enforceability of a foreign award the learned Advocate who appeared before us with the leave of the court pointed out the New York convention on the Recognition and Enforcement of Foreign Arbital Awards, 1958 ("the New York Convention), and the Arbitration (Protocol and Convention) Act, 1937 ("the 1937 Act"). They also laid much emphasis that Bangladesh is a signatory to the New York Convention (1958), *in July*, [illegible] Foreign Award is enforceable in Bangladesh. This argument being not very relevant for disposal of this case may

be kept reserved for future, if brought before the court in an appropriate case. I can only say that sections 12, 13 and 44(A) of the Code of Civil Procedure do not apply in foreign award in Bangladesh. In India, I find that the foreign awards are enforced by following the separate procedure provided under the Foreign Award Recognition and Enforcement Act, 1961. Thus, there is no difficulty in India in enforcement of foreign award.

71. With regard to the question of hardships, I can only say that the point before us is a legal one, and it has to be decided without reference to extraneous considerations like hardship, availability of the witnesses, expense and the like. In the facts and circumstances of the case the alleged hardship or inconvenience of the appellant as argued by the learned Advocate of the appellant was *not a sufficient consideration to allow the appellant to resile from the contract which is lawful.* As the parties have agreed to arbitration under English Law of Arbitration they must be held to stick to their agreement.

An elaborate argument was made on the question of public policy from the Bar. Section 23 of the Contract Act, of course, deals with considerations and objects what are lawful and what are not. Many decisions were also cited from the Bar on this question of public policy but those are unnecessary for the primary point in issue in the appeal.

Ed.

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