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IN THE HIGH COURT OF DELHI , August 22, 1970

SUIT NO. 122(A) of 1970

Compagnie de Saint Gobain ... Petitioner

Versus

Fertiliser Corporation of India Ltd. .. Respondents.

PN KHANNA J.

The Petitioner-company Compagnie de Saint Gobain, is a company incorporated under the laws of France with its registered office in Paris. It entered into a contract with Nangal Fertiliser Chemicals Private Limited, the predecessor-in-interest of the present respondent, Fertiliser Corporation of India Limited, which is a Government Company registered under the Companies Act, 1956 having its registered office in New Delhi, for the construction of Nangal Fertiliser Group of Plants. The contract was contained in a letter dated October 10, 1957 issued by the said respondent-company called "letter of instructions", which was followed by some subsequent correspondence between the parties. An Arbitration clause (para 23) in the said letter read as follows:

> "Except as otherwise provided, all disputes and differences between the purchaser (the respondent) and yourselves (the petitioner) shall be settled by amicable arbitration in conformity with regulations of the International Chamber of Commerce. The place of arbitration shall be New Delhi in India."

Certain disputes having arisen between the parties, the petitioner on June 19, 1964 made an arbitral request to the Court of the International Chamber of Commerce, Paris for the adjudication of its claim made up of Dollars and rupees in all amounting to Rs.1,52,80,401.67. The respondent-company contested the petitioner's claim and filed a counter-claim made up of dollars and rupees amounting in all to Rs.2,70,18,167.00 or alternatively Rs.1,38,[illegible] which, however, was disputed by the petitioner.

In accordance with the rules of the International Chamber of Commerce, Paris, herein referred to as ICC Rules' the Court of Arbitration of the said Chamber herein referred to as 'the Court of Arbitration', constituted an arbitral tribunal consisting of Mr. Sverre Daelhi, former Judge of the High Court of Norway, as the Chairman, Professor B. Goldman, nominee of the petitioner-company, and Mr. K.K. Shende, nominee of respondent-company, as the two other members.

The said Tribunal held its first three sittings in New Delhi and drew its terms of reference (issues in the case) which were agreed to by the parties and approved by the Court of Arbitration in accordance with Article 19 of the said ICC Rules. Sittings of the Tribunal were then held in Paris for recording evidence for some of the petitioner's witnesses. Further sittings were held from time to time in New Delhi and finally in Mussorrie (India). After the arrangements on the counter-claim were concluded, Mr. Sverre Daelhi resigned on November 28, 1967, Rt. Hon'ble Lord Devlin of England was appointed in his stead as the Chairman of the Tribunal. On October 11, 1968, Mr. K.K. Shende, a member of the Tribunal, died, a protocol was signed between the parties agreeing that notwithstanding the death of Mr. Shende the arbitration would continue and that the decision recorded by him before his death and sent to the Court of Arbitration would be taken on record. Professor B. Goldman was requested to record his decision also in writing; and Lord Devlin was requested to make the award. Lord Devlin heard arguments of the parties in Delhi from 14th to 25th April, 1969. A further protocol was signed by the parties on April 25, 1969, specifically agreeing to Lord Devlin shall have jurisdiction to give his final award, thus constituting him the sole arbitrator.

Lord Devlin submitted his award dated September 29, 1969 to the Court of Arbitration, which was communicated from Paris, to the parties by the Secretary General of the said Court, by his letter dated October 16, 1969. According to it a sum of Dollars 179-438 and 56,65,978.00 were awarded in favour of the respondent-Corperation against the petitioner. As the award amount was not paid and the petitioners did not have any property in India, the respondent took out execution of the award through the French Court. Certain bank accounts and trade-marks of the petitioner s were attached. On the petitioner challenging the said attachment, the French Court ordered it to furnish bank guarantee instead, which were furnished.

Another proceedings was filed by the Petitioner in the French Court seeking vacation of the order of execution. Whil this was pending, the present application was filed in this Court under section 33 of the Arbitration Act, praying for an order declaring that the aforesaid award of Lord Devlin had no legal effect or existence and was not enforceable or in the alternative for the suspension of the award till it was filed and made a rule of the Court under the Arbitration Act, 1940. According to the petitioner's allegations, the present award becomes enforcable under the French Law, in connection with Article v(1)(e) of the "New York Convention of the year 1958 on the Recognition and Enforcement of Foreign Arbitral Awards" by an order of the President of the Civil Court, without an enquiry into the merits of the case, if the award has become binding on the parties or has not been set aside or suspended by a competent authority of the country in which or under the law of which the award was made. The petitioners apprehended that the respondent would take advantage of the jurisdiction of the French Civil Court in enforcing the award without the same being made a rule of the Court. It was for this reason that the petitioner considered it necessary to move this Court

under section 33 of the Arbitration Act, 1940, for adjudicatio upon the validity and the effect of the said award.

The award, it has been stated in the petition, is a nullity on the following grounds:

1. That it is made out of time and after the arbitratio became functus officio;
2. That the Award has not been filed in the Court as required by the Arbitration Act, and is, therefor a nullity;
3. That it is not enforceable because the amount due under the award have not been finally determined;
4. That it deals with matters in respect of which there is no arbitration agreement or a reference.

The learned counsel for the petitioner did not elabora ground No.(3) at all and stated at the bar that he would not press, for the present, the fourth ground. He confined his challenge to the award on the first two grounds only.

An objection was raised by Mr. B. Sen, the learned Counsel for the respondent, that the award was not governed by the Indian Law and the Arbitration Act X of 1940 was not applicable. The French Courts, it was further submitted, having already executed the award and dismissed the petitione application, this court should not decide this application in order to avoid a possible conflict of decisions, more especially as under the orders of the Paris Court the respond has already received the amount of its claim granted to it under the award in as much as the Bank guarantee furnished by the petitioner are available to it and can be enforced at its will at any time without resort to any further proceedings in Court. In respect of the first objection, Mr. Sen relied upo Articles 26, 27 and 28 of the ICC Rules, which read as follows:-

"Article 26 - Award to be passed by the Court of Arbitration. Before completing the award, the arbitrator shall submit the same to the court of Arbitration. The court may lay down modifications as to its form and if need be, draw the arbitrator's attention even to points connected with the merits of the case, but with due regard to the arbitrator's liberty of decision. No award shall under any circumstances be issued until approved as to its form by the Court of Arbitration.

Article 27 - Pronouncement of the award.

The arbitral award shall be deemed to be made at the place of arbitration proceedings and on the date of signature by the arbitrator.

Article 28 - Notifying the parties of the award.

1. When the award has been made, the Secretariat shall communicate the Arbitrator's signed text to the parties, provided the arbitration costs have been fully paid to the International Chamber of Commerce by the parties or by one them.

2. XX XX XX XX

According to Mr. Sen, the Court of Arbitration is t final authority, whose approval is a condition precedent t the completion of the award, which is issued by the Secretariate of the Chamber from Paris. The award is actu made thus out of India, although a deeming provision has b made in Article 27 whereby the award is deemed to be made the place of arbitration proceedings. In the present case the place of arbitration proceedings was agreed to be in India in the first instance, New Delhi having been specifi mentioned to be the venue of arbitration proceedings. By mutual consent, the parties agreed subsequently that the proceedings shall take place in New Delhi, Paris and Mussourie (India). It would not, therefore, be said that India is the only place where the arbitration proceedings

took place. The arbitration proceedings also took place in Paris and as the award was in fact made in Paris, the deeming provision in Article 27 would not make any differe: For the Indian Courts, the award, urged Mr. Sen, would rem a foreign award. He relied on M/s. Lachmann Das Sant Lal, Parmeshri Das and another, AIR 1958 Punjab 258, where it w held that the award made and signed at Karachi was a forei award. Mr. Sen also submitted that the scheme of the arbitration Act was entirely different from the scheme contemplated under the ICC Rules and for this proposition relied upon the judgment of the Supreme Court in Societe D Traction et d'Electricite Societe Anonyme V. Kesoram Engineering Company Ltd.(1964) 3 SCR 116, Where commenting on the ICC Rules, it was observed that "the scheme of arbitration contemplated by these Rules is different from the scheme contemplated by ss.3 to 38 of the Arbitration Act". In these circumstances, the learned counsel submitt that application under section 33 of the Arbitration Act was misconceived and untenable. The arguments of Mr. Sen, however, rest on a faulty premise. His contention that th award was made outside India and is not governed by the Indian Arbitration Act has no basis.

Para 18 of the letter of instructions specifically provides that "the contract will be governed by the laws of India". The arbitration clause in para 23 of the said letter xxxxxx states that "the venue of all arbitration shall be New Delhi in India". Article 7 of the ICC Rules provides that the court of Arbitration does not by itself settle the disputes.

It appoints and confirms the nomination of arbitrators. Although the court of Arbitration, Paris, has to approve the award nonetheless remains that of the arbitrater, whose liberty of decision is not prejudiced. According to Article 16, the Arbitration proceedings are

governed by the ICC Rules and in the event of no provision in the rules, those of the law of procedure chosen by the parties, or failing such choice, those of the law of the country in which the arbitrator holds the proceedings. Arti 18 provides that the proceedings before the arbitrator shall take place in the country determined by the Court of Arbitr unless the parties shall have agreed in advance upon the pla of arbitration, which in the present case was agreed to be India. According to Article 27, the arbitral award shall be deemed to be made at the place of the arbitration proceeding and on the date of signature by the arbitrator.

It is not disputed that before the nomination of Lord Devlin, as the sole Arbitrator, the arbitration proceed took place in New Delhi and Mussorie. Evidence of some of t petitioner's witnesses was recorded in Paris also but this w done at the request of the respondent, who in their applicat for the purpose, expressly stated that "in the event of the Tribunal itself recording the evidence in Paris, it is to be understood that such an act will not constitute a change of venue of the arbitration proceedings, which is at New Delhi, according to the agreement of the parties". It was on this basis that the Tribunal by its order dated April 14, 1965 observed: "since the parties have now consented to record the evidence of their witnesses by the Tribunal itself in Paris, on the condition that by itself it shall not imply a change of venue of the proceedings, we hereby modify our fi order of recording the evidence in Paris on commission or letter of request and decide to record such evidence by the Tribunal itself. The venue of arbitration, therefore, remained in India. The final arguments in any case were he in India. So far as Lord Devlin who was ultimately agreed to be the sole arbitrator is concerned, he conducted the entire proceedings in India only. The award itself does no appear to have been signed in Paris and must be presumed to

to have been made in India. It was accordingly an Indian Award to which the provisions of the Indian Arbitration Act, 1940 apply.

Section 47 of the Arbitration Act, 1940 reads as follow

"subject to the provisions of the Section 46 and save in so far as is otherwise provided by any law for the time being in force, the provisions of this Act shall apply to all arbitrations and to all proceedings thereunder.

Provided that an arbitration award otherwise obtained may with the consent of all the parties interested be taken into consideration as a compromise or adjustment of a suit by any court before which the suit is pending."

The provisions of section 46 have no relevancy for our present purposes. The Act, therefore, applies to all arbitrations, of whatsoever nature and all proceedings thereunder save as is otherwise provided by the law for the time being in force. Unless, therefore, any law provides otherwise, the Arbitration Act, 1940 will govern the arbitration in this case.

According to Mr. Sen, the award of Lourd Devlin is governed by the Arbitration (Protocol & Convention) Act, 1937 herein called 'the 1937 Act', or by the Foreign Awards (Recognition and Enforcement) Act, 1961, herein called 'the 1961 Act', and that these are the laws which provide otherwise. These two enactments which are more or less analogous in terms were passed by the Indian Legislature to give effect to certain International Protocols and Conventions, framed to meet the widely expressed desire in the commercial circles through the world to accord recognition and protection to arbitration agreements and awards. The first was the Geneva Protocol of Arbitration Clauses (1923) and the International Convention on the execution of the Foreign Arbitral Awards (1927). These were signed at Geneva on behalf of India subject to certain reservations limiting India's obligation under the instrument

to commercial contracts. For the purpose of giving effect to this protocol and for enabling the said Convention to become operative in India the 1937 Act was passed. On June 10, 1958 came the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, at New York, to which India was a party. In order to give effect to the New York Convention the 1961 act was passed. According to the definition of 'foreign award' given in section 2 of the 1961 Act it means an award made on or after 11th day of October, 1960. Accordi to section 10 the aforesaid 1937 Act ceased to have effect in relation to Foreign Awards to which the said 1961 Act applied. The award in the present case having been made on September 29, 1969, the 1961 Act would, if applicable, be the only relevant provision, requiring attention to see if it provides otherwise than as provided in the Arbitration Act,

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Turning to the New York Convention, given in the Schedule to the 1961 Act, it is plain that it applies accord to its Article 1, to such arbitral awards only, which are no made in the territory of a State, where the recognition and enforcement, of such awards are sought. In the present case the award having been made in India, its recognition and enforcement were sought not in India, but in France. The Convention under the Indian law would be applicable only if the award was not made in India and its recognition and enforcement were sought here. This not being the case, the New York Convention in those Schedule into the 1961 Act has application to this award in India. The New York Convention may be applicable to this very award in France, as for the purpose of courts in France, it, having been made inIndia, is a foreign award. This position was accepted by the Paris Court, as appears from Annexure 'A' filed by the respondent along with its sub-rejoinder, which is a translation of the order of the First Vice-President of the French Court, on the petitioner's application for cancellation of the

attachment of its Bank accounts. It is mentioned in the said court order that the award was made in India and that the parties were in agreement on the applicability of the New York Convention of June 10, 1958. The award was thus recognised in Paris, to be an award made in India and thus a foreign award. The 1961 Act under the circumstances, has no application. There being no other law in force, which provides otherwise, the Arbitration Act 1940 remains applicable to the award of Lord Devlin. The 1961 Act, even if it was applicable, contains no provisions for declaring the effect validity or the existence of an Award. Even Article v(1)(e) of the Convention given in the Schedule to the 1961 Act provides that the award has to be set aside or superseded, if so required by a competent authority of the country, in which or under the law of which, that was made. The matters for which there is no provision in the 1961 Act or the Convention, have thus to be dealt with by the ordinary law of the land under the law of which the award was made. The provisions of Section of the Arbitration Act, therefore, are not ousted under any circumstances.

In Kamani's case (1964) (5SCR 116), relied upon by Mr. Sen, the Supreme Court had no occasion to go into the question of the applicability of the 1937 Act, as it was not disputed that the proposed arbitration under the Rules of the International Chamber of Commerce was governed by the Protocol on Arbitration Clauses agreed to at Geneva on September 24, 1923; and the Protocol in the First Schedule given in the 1937 Act, passed to give effect to the same, was applicable. Regarding the applicability of the Arbitration Act, 1940, it was observed by the Supreme Court in that case that section 47 of the Arbitration act made the provisions of the Arbitration Act applicable to all arbitrations and to all proceedings subject, however, to the provisions of section 46 and so far as was otherwise provided in law for

the time being in force. Under this section, therefore, the Court was of the view that "the legislature has clearly made the provisions of the Arbitration (Protocol & Convention) Act, 1937 applicable to consequential arbitration, under the Arbitration Act, 1940, when the conditions prescribed for the application of that Act are attracted, even if the scheme of arbitration recognised thereby is inconsistent with Section 3 to 38 of the Arbitration Act, 1940". It was only by virtue of the applicability of the Arbitration Act, 1940 itself that the 1937 Act was held to apply to the proceedings under the ICC Rules, which was admitted to be otherwise applicable in the circumstances of that case.

In M/s. Lachman Das Sant Lal's case (AIR 1958 Punjab 258) also relied upon by Mr. Sen, a Bench of the Punjab High Court consisting of Bishan Narain J. and A.N. Grover J. (as he then was), was of the view that it was open to the parties "to agree that any dispute arising between them shall be submitted to arbitration at any place and in any particular country in any part of the world". As arbitration proceedings in that case took place in Karachi in pursuance of the arbitration agreement, the award was made and signed at Karachi, it was held that the said award. Accordingly to the ratio of that decision, it is the intention of the parties, which determined the place or the country where the proceedings are to take place and consequently the award is to be made. The Supreme Court applying Indian Law in M/s. Dhanrajmal Gobindram V. M/s. Shamji Kalidas & Co. (1961) 3 SCR 1020, observed: Whether the proper law is the lex loci contractus or lex loci solutionis is a matter of presumption; but there are accepted rules for determining which of them is applicable. Where the parties have expressed themselves, the intention so expressed overrides any presumptic Where there is no expressed intention, then the rule to apply

is to infar the intention from the terms and nature of the contract and from the general circumstances of the case. In the present case, two such circumstances are decisive. The first is that the parties have agreed that in case of dispute the Bombay High Court would have jurisdiction..... If Courts of a particular country are chosen, it is expected, unless the by either expressed intention or evidence, that they would app in their own law to the case..... The second circumstance is that the arbitration clause in agreements, it has been said on more than one occasion that they lead to an inference that the parties have adopted the law of the country in which arbitrati is to be made." In the case before me, the parties had expres agreed, in para 18 of the letter of instructions, as stated above, that "the contract will be governed by the law of India The proceedings took place in India. It is, therefore, a clear case governed by the Indian Laws. The Arbitration Act is not excluded by the 1961 Act, or by any other law. The objection of Mr. Sen, therefore, has no merit. It is an Indian award governed by the Arbitration Act, 1940 and the present application under section 33 of the Act is maintainabl

The other objection of Mr. Sen that the Courts in Paris being seized of the matter, the courts in India should not entertain the present application, is equally devoid of force. The court in Paris, being the court of a country, the laws of which do not apply to this award, will not determine the existence, validity or effect of this award. They on the other hand, will recognise and enforce the award under the New York Convention, unless the petitioner can establish that the award is not binding on the parties, or has been set aside or suspended by a competent court in India;

agreed, vide sub-clause (c) of clause (1) of Article V of the New York Convention. The courts in India alone are competent to decide the application under section 33 of the Arbitration Act filed on behalf of the petitioner-company; and the questi of a conflict of the decision in India with that in Paris doe not arise.

Another objection was raised by Mr. Sen that this court has no jurisdiction to entertain this application even if an application under section 33 of the Arbitration Act, 1940 is competent. According to him, all questions relating to the validity effect or existance of an award or an arbitra tion agreement between the parties to the agreement, have to be decided under section 31(2) of the Arbitration Act, 1940, by the court in which the award may be filed and by no other court. According to section 31(1) of the said Act, an award can be filed in any court having jurisdiction in the matter t which the reference relates. According to section 2(c) of th Act, 'Court' means a Civil Court having jurisdiction to decid the Questions forming the subject matter of the reference, if the same had been the subject matter of a suit. The learned Counsel submitted that the matter in controversy between the parties relates to a turn-key job for the construction of Nan Fertilizer Group of Plants, at Nangal, which is beyond the Union Territory of Delhi. The subject matter of the dispute, according to him is not within the jurisdiction of the court. From the language of section 2(c) and Section 31(1) of the Arbitration Act, the jurisdiction according to the learned counsel, has been made dependant not upon the residence or place of business of the parties; but on the subject-matter of the reference. Under the circumstances, the learned coun submitted, this court has no jurisdiction to entertain the present petition. He relied on Inder Chand Jain V. Pooran Chand Bansi Dhar AIR 1959 Punjab 614, where the head-note

reads as follows:-

> "In order to determine the question whether the court before which applications under Sections 32 and 33 are filed has jurisdiction to entertain them, it must be ascertained what the questions are, which form the subject matter of the reference to arbitration and then supposing these questions had arisen in a suit, which is the court which would have jurisdiction to entertain the suit, whether in fact any part of the cause of action in the suit, which the opposite party might have instituted arising out of the subject matter of reference arose within the jurisdiction of the court before which the application are filed."

Mr. Sen submitted that the Question of residence or place of business of the respondent mentioned in sub-sections (a) o (b) of section 20 of the Code of Civil Procedure, has no relevance for the present purposes. It is the cause of action arising in whole or in part referred to sub-clause (c) of that section, which would be the determining factor. As no part of the cause of action has arisen in Delhi in the present case, there is no matter to which the reference relat over which this Court has jurisdiction.

It may, however, be observed that section 120 of the Code of Civil Procedure specifically excludes the applicabili of section 20 of the High Court in the exercise of its origin civil jurisdiction. In other words, the scope of the jurisdi ction of the High Court on its original side is dependent mer on the cause of action in the case. The jurisdiction appears be much wider. Sub-section (2) of section 5 of the Delhi Hig Court Act, 1966 lays down that notwithstanding anything contained in any law for the time being inforce, the High Cou

of Delhi shall also have in respect of the said Territories (Territories for the time being included in the Union Territory of Delhi), Ordinary original civil jurisdiction in every suit the value of which exceeds Rs. 50,000/-. This would mean that the Delhi High Court would have jurisdiction in the matter to which the reference relates, if it has some nexus with the said territories. The residence or place of business in the Union territory of Delhi of the respondent or defendant in a case dealing with the matter to which the reference relates, coupled with the fact that the entire correspondence dealing with such matter took place with the Delhi Office alone, would be a sufficient nexus of such kind to give jurisdiction to this Court. The jurisdiction is not because of the residence or of the location of the place of business of the respondent, but because of the subject matter of the reference which has a nexus or connection or the locati of the place of business of the respondent and because of the entire material correspondence having taken place with the Delhi Office, but, this question need not detain our attentior any further, as Mr. Pai at the end of his arguments, filed contract documents, which show that the original tender submitted by the petitioner was accepted by the respondent by its letter dated October 10, 1957, in Delhi. The petitioner, however, was requested to intimate its acceptance of the terms and conditions set out therein. The petitioner in reply, whil conveying its acceptance suggested a revision of certain terms in same foot-notes and asked for its acceptance by the respondent. There appears to have followed some correspondenc intended to clarify certain terms of the contract. The last letter was dated June 3, 1958, written by the respondent from New Delhi, whereby it conveyed its agreement to the revised te of the foot-note which had been submitted to it by the petitioner. This letter was thus the final acceptance in New Delhi of the terms of the contract. The contract, therefc

was concluded at New Delhi. A part of the subject matter of the reference natured and, therefore, a part of the cause of action arose in New Delhi. There does exist sufficient nexus, under the circumstances, between the subject matter to which the reference relates and the Union Territory of Delhi. This court therefore, has jurisdiction to entertain the present application and the objection of Mr. Sen is not tenable.

Dealing with his contention that the award was a nullity, Mr. Pai submitted that the arbitrator had become functus officio when he made his award dated September 29, 1969. The time limit under Article 23 of the ICC Rules within which the award could be made, was 60 days from the date on which he signed the statement defining his terms of reference. The arbitrator could be deemed to have done this latest by April 25, 1969, while he made his award on September 29, 1969, along after the said sixty days had expired. Extension granted by the court of arbitration relied upon by Mr. Sen, are of no consequence, submitted Mr. Pai, in view of sub-section (2) of Section 28 of the Arbitration Act, which reads as follows:-

> "Any provision in an arbitration agreement whereby the arbitrators or umpire may, except with the consent of all the parties to the agreement, enlarge the time for making the award, shall be void and of no effect."

According to him, the court of arbitration and the arbitrator are parts of the same arbitration scheme, and the order of the court of arbitration enlarging the time for making the award c be taken as the order of the arbitrator; but this being withou the consent of the parties was void and of no effect in view of Section 28(2) of the Arbitration Act. Even if the Court of Arbitration was taken to be independent of and separate fro

the arbitrator, the enlargement of time, which is the function of the court under Section 28(2) of the Arbitration Act, cannot be granted by a person acquiring authority for such purpose by agreement of the parties as that would be hit by section 28 of the Contract Act, being an agreement in restraint of legal proceedings. It is, however, not necessary to enter into this discussion as under section 28(1), "the Court may, if it thinks fit, whether the time for making the award has expired or not and whether the award has been made or not, enlarge from time to time, the time for making the award." The Court, it will be seen has suo motu power to move in the matter. An applicati was, however, made at the end of arguments on behalf of the respondent, praying for suitable extension of time for makin the award was made. It is not disputed that time can be extended even after the award has been made. Subba Rao J. of the Supreme Court speaking for himself and B.P. Sinha C.J. and Madholkar J. in the case of Hari Shankar Lal V. Shambhu Nath, AIR 1962 SC 78, observed: "section 28 of the Act enabl the court to extend the time for making of the award; extens of time may be given even after the award has been factually made. So till the time is extended an award cannot be made, though, when extended, the award factually made may be treat as an award made within the time so extended. To put it differently, if time was not extended by court, the document described as an award would be treated as non est."

Mr. Pai submitted that the discretion of the court should not be exercised in favour of enlarging the time as prayed in this case, as that would be unfair to the petitione His request to the arbitrator to file the award in court was not acceded to. He, therefore, had no opportunity to file objections to it. The award being out of time is not est as was held by the Supreme Court in Hari Shanker Lal's

case (AIR 1962 SC 79). The petitioner in the bonafide belief that the award is a nullity took no further steps to have the award filed in court to enable it to file objections under section 30, Arbitration Act. Now, the time for the petitioner to make an application in court under section 14 of the Arbitration Act, has expired, and if the time is enlarged by the court, the petitioner may be faced with diffidculty in filing objections and may be highly prejudiced. The enlargements of time is a matter of discretion which should not be exercised in the respondent's favour in view of the above circumstances submitted Mr. Pai.

It was urged on behalf of the respondent that the award was made within the time allowed by the court of arbitration in accordance with ICC Rules, agreed upon by the parties, as governing the arbitration. The Award was, thus, made in time as extended in accordance with the agreement of the parties, it was at their specific request that the arbitrator after conclusion of the argument proceeded to make the award. The petitioner had all along been participating in the arbitration proceedings which started in 1964 or 1965; and never questioned the arbitrator's power to proceed, although the enlargement of time had not been granted by the Court of Arbitration. The dates for proceeding in the case were being fixed from time to time, the parties had expressed their keenness to see the arbitration though. The petitioner thus took a chance of a decision favourable to it. And now when the award has gone against it, its objection to the enlargement of time are wholly unjustified. Its non-filing of an application under section 14, Arbitration Act earlier, for filing of the award in court has no relevance for the present purposes. The petitioner itself know as stated in para 19 of the petition, that under the French Law the award made

enforceable by order of the court without enquiring in the merits of the case, if the award has become binding and has not been set aside by a competent authority of the country in which or under the law of which the award was made. It is the petitioner's case that the award was made in India under the Indian Law. It was, therefore, for the petitioner to take timely steps to have the award declared a nullity, if it thought it was so, more specifically as it was aware that they could be enlarged by the court even after the award had been made. The petitioner not having moved the court under Section 14, earlier cannot plead its own neglect, for invoking the exercise of court's discretion against the grant of time. The petitioner has now filed an independent application under Section 14, Arbitration Act, in respect of which nothing is said in this judgment, will have any effect; nor should it be taken as an expression of opinion affecting that application. The said application shall be tried on its own merits, and the petitioner will be granted appropriate relief, if fund entitled to any. But, that has no relevance for the purpose of extending or not extending time for making the award.

Mr. Pai submitted that time should not be enlarged in this case also because the petitioner has very serious objections to the award on merits. But it was for the arbitrator to decide the merits of the case; and in case the court can go into the award under Section 30 of the Arbitrati Act after its being filed in court, the petitioner will have an opportunity to urge its objections, after its application under section 14 is granted and the award is allowed to be filed in court. Without the award being before the court, not can be said about the petitioner's objections on the merits.

The learned counsel have cited a number of judgments for and against the grant of the prayer for enlargement of time; but all of them are based on the fact of each individual case. There can be no doubt that the enlargement of time for making the award is entirely within the discretion of the court. In Kanhaiyalal Dugar V. Ashkaran Kishanlal, AIR 1957 Cal. 658, it was observed that the court's power under section 28 to extend time are entirely discretionary and are not limited. The court can enlarge time for making the award even after the award has been made and even after the time has expired. It was also held that out of the persuasive consideration before the court would be, "that after all the time, expenses and trouble in going into arbitration and actually having the award, regarding which there is no meritorious objection, it is proper to enlarge the time and make the award, the fruit of so much time, labour and expense, effective and not to frustrate it by refusing time." Looking to all the facts and circumstances stated above, I am satisfied that it is a fit case where time for making the award would be extended. I, therefore, enlarge the time until 29/9/1969, the date on which the award was made in this case. The award was, therefore, made within the time allowed by law; and is not invalid on the ground of being made beyond time.

Coming to the merits of the case, Mr. G.B. Pai, the learned Counsel for the petitioner-company, submitted that an award, which has not been made a rule of the court and has not become a decree of the court, is a nullity and as such has no existence in law and remains a dead letter. The learned Counsel cited a number of decisions of various courts, viz. Ram Sahai V. Babu Lal AIR 1965 Allahabad 217, Seo Narain Lal Prabhu Chand AIR 1958 Patna 262 (FB), Sait Pamandas Sounaram T.S. Naikyam Pillai, AIR 1960 AP 59 (FB), O. Mohamed Yusuf Lebbe Saheb Vs. S. Hajee Mohammed Hussain Rother, AIR 1964 Madras 1 and Sardool Singh V. Hari Singh AIR 1968 Punjab & Haryana 204

in all these cases it was held that no party can be prejudiced by the mere existence of an award, which does not become operative and enforceable until it has been filed in court and the court adjudicating upon its validity passes a judgment and a decree in accordance therewith.

It is not necessary to go into the merits of the aforesaid decisions, as this question was considered by the Supreme Court in M/s. Uttam Singh Duggal V. Union of India CA 162 of 1962 authoritatively decided on 11th October, 1962. It was held that "after an award has been pronounced, the rights and liabilities of the parties in respect of the said claims can be determined only on the basis of the said award. After an award is pronounced, no action can be started on the original claim which had been the subject matter of the refere The court approvingly quoted from the observation of Mookerjee of the Calcutta High Court in the case of Bhaisbari Saha Banik Vs. Behary Lal Basak, ILR 33 Cal. 881, at 888, as follows:- "The award is in fact, a final adjudication of a court of the parties own choice, and until impeached upon sufficient ground in an appropriate proceedings, an award, which is on the face of it regular, is conclusive upon the merits of the controversy submitted, unlesspossibly the parties have intended that the award shall not be final and conclusive.....in reality, an award possesses, all the elements of vitality even though it has not been formally enforced and it may be relied upon in a litigation between the parties relating to the same subject matter". This view was approved and affirmed by the Supreme Court in Satish Kumar V. Surinder Kumar & Others, AIR 1970 SC 833. It was held that an award has some legal force and is not a mere waste paper. Further if the award is final and binding on the parties, it can hardly be said that it is a waste paper, unless it is made a rule of the Court. Mr. Justic

Hegde, in a separate judgment, agreeing with the majority, observed, that "the award does create rights in that property, but those rights cannot be enforced until the award is made a decree of the court." The award under consideration, thus creates rights and is final and, therefore, binding; although in case it is sought to be enforced in India, some further steps may be required to be taken for that purpose.

Mr. Pai submitted that the award in the present case was not final as it was signed and completed by Lord Devlin before submitting it to the court of Arbitration. According to Article 26 of the ICC Rules, the award is requiredto be approved by the Court of Arbitration before it can be completed by the arbitrator. This according to the learned counsel appears not to have been done. But, the award was admittedly communicated to the parties by the Secretariate of the International Chamber of Commerce, in accordance with Article 28 of the ICC Rules. The formalities required under Article 26 being matters of domestic procedure must be presum to have been fully complied with. The objection of the learn Counsel, therefore, has no force. Mr. Pai also referred to Article 29 of the ICC Rules and submitted that the arbitral award is a stated to be final; but nothing about its binding nature. This article being a specific provision in the contr between the parties, indicates, according to him, an intentio of the parties different from para 7 of the first Schedule of the Arbitration Act, which would have made the award not only final but binding also. But Section 3 of the Arbitration Act applies to the provisions set out in the first Schedule to every arbitration agreement, unless a different intention is expressed. Nothing having been said about its binding nature the award would become binding under the provision to that effect in clause 7 of the first Schedule. Further, sub-claus (2) Article 29 says that the parties undertake to carry out

the award without delay, showing thereby the unmistakable intention of the parties to remain bound by the award. If the award is final it implies that the award is binding on the parties and the contentions of Mr. Pai to the contrary has no basis. Objection of the learned counsel, therefore, has no force.

Mr. Pai also regarded to Article 29 of the ICC Rules and submitted that the arbitral award is stated to be final; but nothing is stated about its binding nature. This article being a specific provision in the contract between the parties, indicates, according to him, an intention of the parties differ from para 7 of the first Schedule of the Arbitration Act, which would have made the award not only final but binding also. But Section 3 of the Arbitration Act applies the provisions set out in the first schedule different intention is expressed. Nothing having been said about its binding nature, the award would become binding under the provision to that effect in clause 7 of the first Schedule. Further, sub-clause (2) of Art 29 says that the parties undertake to carry out the award with delay, showing thereby the unmistakable intention of the parti to remain bound by the award. If the award is final it impli that the award is binding on the parties; and the contentions of Mr. Pai to the contrary has no basis.

In the result, the award dated 29th September 1969 to Lord Devlin is declared to be final and binding on the parties; although further steps may be required to be taken to make it a decree of the court, if it is sought to be enforced in India. In the circumstances of this case there will be no order as to costs. This will also dispose of O.M.P. 98 of 1970 filed by the Respondent for enlarging time for making the Award.

JUDGE

August 28, 1970.