ORIGINAL SIDE

Appeal No. 113 of 1981

Arbitration Petition No. 16 of 1980

For approval

The Hon'ble Mr. Justice M.N. CHANDURKAR

The Hon'ble Mr. Justice D.N. MEHTA

To be referred to the Reporter or Not ? Yes

Whether the Reporters to the Local Papers may be allowed to see the judgement ? Yes

To the Hon'ble Mr. Justice A.V. Nadv (for information

European Grain & Shipping Ltd., .. Appellants

Versus

Bombay Extractions Private Ltd., .. Respondents

And

1. Compagnie Francaise D' Importation Et De Distribution.

2. Messrs Seth Oil Mills Ltdl, .. Interveners.

Mr. F.S. Nariman, Mr. D.R. Kaiwalla, Mr. G.N. Bhatt, Mr. T.V. Subramaniam, Mr. S.J. Wasifdar and Mr. M.P. Bharucha instructed by Messrs. Mulla & Mulla and Crawrie Blunt & Carco for the appellants.

Mr. M.P. Mehta with Mr. J.M. Shah for the respondents.

Mr. C.V. Parde with Mr. D.J. Shroff instructed by Messrs. Little & Co., for intervener No. 1.

Mr. S. Ganesh instructed by Messrs Somer Dadachanji Sethna & Co., for intervener No. 2.

Coram: Chandurkar and Mehta JJ.

4th November 1981.

Oral Judgment (Per Chandurkar J.)

This appeal arises out of an order passed by a learned single Judge rejecting a petition filed by the appellants for enforeign award under the section 6 of the Foreign Awards (Recognition and Inforcement) Act, 1961 (hereinafter referred to as "the 1961 Act").

2. It is not necessary for the purposes of the appeal to refer to the details of the transactions in respect of which a contract in writing was entered into on 16th September 1976 between the appellants and the respondents through the brokers Marshall Produce Brokers Co. Pvt. Ltd., under which the respondents agreed to ship to the appellants 250 metric tonnes of ground nut extractions of the quality specified in the contract at a price of £ 99 per tonne. The delivery was to be made to the petitioners at Bombay in January/February, 1977 at the appellants' option. One of the terms of the contract provided that "this contract is made under the terms and conditions effective at the date of the Grain And Feed Trade Association (GAFTA), Baltic Exchange Chambers, 28 St. Mary Axe, London, Contract No. 119." It was also provided by the

said contract that contract No. 119 was made a part of the contract except so far as it was modified and the modification indicated was that the extension of delivery clause No. 5 was to be deleted. This contract was signed by the respondents at Bombay and by the appellants at London where it was sent by the brokers.

3. GAFTA Contract No. 119 contained an arbitration clause, the material part of which reads as follows:-

> " Any dispute arising out of or under this contract shall be settled by arbitration in London in accordance with the Arbitration Rules of the Grain and Feed Trade Association Ltd. No.125 such Rules forming part of this contract and of which both parties hereto shall be deemed to be cognisant."

GAFTA Contract No. 119 also contains a clause regarding domicile. Under that clause contract No. 119 is by agreement deemed to have been made in England and to be performed there, any correspondence in reference to the offer, the acceptance, the place of appointment or otherwise notwithstanding, and the Courts of England or Arbitrators appointed in England, as the case may be, shall, except for the purpose of enforcing any Award made in pursuance of the clause hereto, have

exclusive jurisdiction over all disputes which may arise under the contract."

4. Admittedly the respondents were not in a position to ship the goods even during the extended period upto April/May 1977 and by letter dated 18th April 1977 the respondents admitted their liability to pay damages but wanted to settle the outstanding contracts as per the original contract period. A dispute having arisen, it had to be referred to arbitration in accordance with the rules of GAFTA. An arbitration was claimed by the appellants who duly appointed its Arbitrator and called upon the respondents to appoint their Arbitrator. The respondents, however, having failed to do so, as contemplated by the rules, GAFTA appointed one Mr. D. Waller as an Arbitrator for the respondents and a notice dated 21st July 1977 was issued by the Arbitrators calling upon the respondents to file a written statement not later than 15th August 1977 and to remain present in the office on 18th August, 1977 for proceeding with the Arbitration. Mr. Waller had also independently written to the respondents on 25th July 1977 intimating to the respondents that he had been appointed by the Grain and Feed Trade Association as an Arbitrator in a dispute with European Cair & Shipping Ltd., in connection with the contract dated 16th September, 1976 and that the meeting with the buyers' Arbitrator was fixed for 18th August, and

it was necessary for the respondents to send him all the evidence, so that he could do his best to protect their interest.

5. The respondents, however, seem to have ignored the arbitration proceedings wholly. The Arbitrators proceeded to decide the dispute and made an award on 8th September, 1977 awarding a sum of £ 12,000/- to the appellants, being the difference in price and the award further directed that the respondents should pay to the appellants the said sum within 14 days from the date of the award along with a sum of US Dollars 4,812/- on account of dead freight due as per contract. Interest at the rate of 8% p.a. from 27th April 1977 to the date of the award was also directed to be paid.

6. It appears that the appellants discovered that there was an arithmetical error and at their instance the quantum of damages was reduced from £ 12,000/- to £ 11,750/-. This award along with another award was sent to the respondents by the Arbitrators and the receipt thereof was acknowledged by the respondents by their letter dated 19th September, 1977 written to the appellants. It is important to mention that in this letter, the respondents expressed their anxiety "to finalise the matter amicably and to the utmost satisfaction of both of us" when one of the Directors of the company would visit U.K. in October 1977 and when some other

common friends were also likely to visit U.K., After this letter of 19th September 1977, the amended award was also forwarded to the respondents by GAFTA. Since however, the liability under the award still remained undischarged, the appellants filed a petition under section 6 of the 1961 Act on 24th July 1979.

7. The filing of the award was resisted on behalf of the respondents on various grounds such as that the award was not a foreign award, that at no time were the terms of GAFTA referred to in the contract given to or communicated to the respondents and, therefore, the arbitration agreement in contract No. 119 was not binding on the respondents, that the award was modified without the arbitrators having any power to do so and that in any case, there was inadequate notice of the arbitration proceedings to the respondents. Therefore, according to the respondents, the award should not be enforced in view of the provisions of section 7(1) of the 1961 Act.

8. One of the main contentions raised before the learned single Judge was that the provisions of the 1961 Act could not be availed of by the appellants and the award could, therefore, not be enforced. This contention was advanced on the basis of the decision of a learned single Judge of this Court in Indian Organic Chemicals Ltd. v. Chemtex Fibres Inc. and others, A.I.R. 1978 Bombay 196. In that decision, the learned Judge has taken the view that for application of section 3

of the 1961 Act, an agreement must be commercial not as normally understood but that it must be also established that it is commercial by virtue of a provision of law or an operative legal principle in force in India and that the law in force in section 2 of the 1961 Act did not mean law generally in force in India. Having regard to that decision, which the learned Judge felt compelled to follow, though, according to the learned Judge, left to himself, he would have taken a view different from the one taken in Indian Organic Chemicals Ltd's case, he held that the award could not be filed in this court for reasons given in the judgment in that case. Though this view was sufficient to dispose of the petition, the learned Judge went on to consider the other contentions advanced before him on behalf of the respondents and negatived all of them. The learned single Judge held that the award in question was a foreign award and that under the contract of 16th September 1976 all the terms contained in standard form No. 1 except as specifically excepted or in so far as they are clearly contrary to the terms of the contract must be deemed to be incorporated in the contract including the arbitration clause. He also held that it could not be believed that the respondents were not aware of the standard GAFTA contract form. He negatived the contention of the respondents that there was no power in the Arbitrators to rectify the award by correcting an

arithmetical mistake and, in any case, according to him, if the modification was invalid, the original award will stand and could be filed and decree passed thereon. With regard to the contention that the notice given by the Arbitrators was inadequate, the learned Judge referred to the conduct of the respondents and noticed the fact that the respondents had not applied for time for filing written statement or for postponement of hearing on the ground of inadequate notice or of difficulty in getting foreign exchange. The contention of inadequacy of notice was found by the learned judge to be nothing but an afterthought which could not be entertained. The learned single Judge, however, having regard to the construction of section 5(1) of the 1961 Act, with great reluctance dismissed the petition, As already pointed out, the appellants have now filed this appeal challenging the dismissal of their arbitration petition.

9. The respondents have also filed a cross-objection challenging the adverse findings recorded against them by the learned single Judge.

10. It appears that similar arbitration petitions are pending in this Court at the instance of the appellants and, therefore, when the appeal was taken up for argument, Mr. Ganesh appearing in one of the matters for the respondents therein asked for permission to

intervene and accordingly, permission was granted. He also, therefore, addressed us in addition to the arguments advanced for the respondents by Mr. Kenia.

11. The main and the only ground on which the arbitration petition filed by the appellants has been dismissed by the learned Judge arises out of the construction of section 2 of the 1961 Act, which reads as follows:-

> " In this Act, unless the context otherwise requires, 'foreign award' means an award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960 --
>
> (a) in pursuance of an agreement in writing for arbitration to which the Convention set forth in the Schedule applies, and
>
> (b) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made, may, by notification in the Official Gazette, declare to be territories to which the said Convention applies."

As already pointed out, the words 'legal relationship ... co-nsi'ered as commercial un'er the law in force in India" were construed in the Indian Organic Chemicals

Ltd!s case to mean that there must be some positive legal provision which expressly makes a provision as to what legal relationship should be considered as commercial and in the absence of such legislation, the provisions of section 2 of the 1961 Act could not be invoked. Since the correctness of this decision is in issue, it is necessary to refer to that decision in some detail and the history of the Convention and the legislation dealing with foreign awards.

12. The history of the legislation relating to foreign awards dates back to the Protocol on Arbitration Clauses signed at Geneva on 24th September, 1923, to which India was a signatory. Clause 1 of the Protocol read as follows:-

"Each of the Contracting States recognises the validity of an agreement whether relating to existing or future differences between parties subject respectively to the jurisdiction of different Contracting States by which the parties to a contract agree to submit to arbitration all or any differences that may arise in connection with such contract relating to commercial matters or to any other matter capable of settlement by arbitration,

whether or not the arbitration is to take place in a country to whose jurisdiction none of the parties is subject.

Each Contracting State reserves the right to limit the obligation mentioned above to contracts which are considered as commercial under its national law. Any Contracting State which avails itself of this right will notify the Secretary-General of the League of Nations in order that other Contracting States may be informed."

According to this Protocol arrangement, the contracting States recognised the validity of an agreement of arbitration, whether it related to existing or future differences between the parties, who were subjects of the contracting States, and the arbitration agreement could be in respect of differences that may arise in connection with a contract relating to commercial matters or to any other matter capable of settlement by arbitration. However, liberty was given to the contracting State to limit the obligation created under the Protocol only to contracts which were considered as commercial under the national law of the contracting State. The 1923 Convention, therefore, provided for settlement by arbitration of differences arising out of a contract which may relate to commercial or any other matter.

13. The Protocol was followed by a Convention on Execution of Foreign Arbitral Awards to which also India was a party. The Convention laid down that in the territories of any High Contracting Party to which the Convention applies, an arbitral award made in pursuance of an agreement, whether relating to existing or future differences, called a "submission to arbitration", covered by the Geneva Protocol shall be recognised as binding and shall be enforced in accordance with the rules of procedure of the territory where the award is relied upon, provided that the said award has been made in a territory of one of the High Contracting Parties to which the Convention applied and between persons who are subject to the jurisdiction of one of the Contracting Parties. The Convention laid down the conditions which were necessary for recognition or enforcement of a foreign arbitral award. The Convention also laid down circumstances under which the Court could refuse recognition or enforcement of the award. It referred to the documents to be supplied by the party relying upon the award to the Court.

14. This Convention was given effect to by the Arbitration (Protocol & Convention) Act, 1937 (hereinafter referred to as "the 1937 Act"). The 1937 Act inter alia provided that the effect of a foreign award will be that it shall be enforceable in India as if it was an award made in a matter referred to arbitration

in India subject to the provisions of the 1937 Act. Under sub-section (2) of section 4 it was provided that any foreign award which would be enforceable under this Act shall be treated as binding for all purposes on the persons as between whom it was made and may accordingly be relied on by any of those persons by way of defence, set-off or otherwise in any legal proceedings in India and any references in this Act to enforcing a foreign award shall be construed as including references to relying on an award. The procedure and conditions for enforcement of foreign awards was laid down in the Act. Section 7 contained conditions for enforcement of foreign awards and under section 6 it was provided that where the Court is satisfied that the foreign award is enforceable under the Act, the Court shall order the award to be filed and shall proceed to pronounce judgement according to the award and under sub-section (2) of section 6 it was provided that upon the judgement so pronounced, a decree shall follow and no appeal shall lie from such decree except in so far as the decree is in excess of or not in accordance with the award. The procedure for enforcement of the award was that the award had to be filed in Court and an application had to be made, of which notice was to be given to the parties to the arbitration, other than the applicant requiring them to show cause why the award should not be filed. The crucial provision with regard to the foreign award is,

however, in section 2, the material part of which reads as follows:-

> "In this Act 'foreign award' means an award on differences relating to matters considered as commercial under the law in force in India, made after the 28th day of July, 1924 -
>
> (a) in pursuance of an agreement for arbitration to which the protocol set forth in the First Schedule applies, and
>
> (b) ...
>
> (c) ...

Therefore, a foreign award for the purposes of the 1937 Act could be only an award given on differences relating to matters considered as commercial under the law in force in India.

15. In 1958 there was a new Convention called the "New York Convention" on the Recognition and Enforcement of Foreign Arbitral Awards. Clause 1 of Article I of the Convention read as follows:-

> "This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition

and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought."

Under clause 3 of the Convention it is open to any State when signing, retifying or acceding to the Convention that on the basis of reciprocity, it would declare that it would apply the Convention to the recognition and enforcement of awards made only in the territory of another contracting State and then in clause 3 of Article I it was provided as follows:-

"It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration."

The apparent difference between the provisions of the New York Convention and the Geneva Protocol was that while under the Geneva Protocol, differences which may arise in connection with a contract relating to commercial matters or to any other matter capable of settlement by arbitration could be the subject-matter of arbitration, under the New York Convention provision

was made for resorting to arbitration in matters which may not be contractual because the declaration was that the Convention was to be applied to differences arising out of relationships, whether contractual or not. But under both the Geneva Protocol and the New York Convention, the relationship had to be commercial under the national law of the State making the declaration. It needs to be emphasised that so far as both the Geneva Protocol and the New York Convention were concerned, the commercial nature of the contract in the case of Geneva Protocol and the commercial nature of the legal relationship under the New York Convention had both to be determined with reference to the national law of the State making the declaration. The New York Convention further in clause 1 of Article II provided as follows:-

> "Each Contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject-matter capable of settlement by arbitration."

Article V enumerated the circumstances under which recognitionand enforcement of the award may be refused, while the earlier Article IV prescribed the documents which had to be filed by the party for recognition and

enforcement of the award.

16. India declared its accession to the New York Convention on 13th July 1960 in the following words:-

> "In accordance with Article I of the Convention, the Government of India declare that they will apply the Convention to the recognition and enforcement of awards made only in the territory of a State, party to this Convention. They further declare that they will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the Law of India."

By this declaration, therefore, India restricted the applicability of the Convention only to differences arising out of legal relationships which were considered as commercial under the law of India, whether those relationships were contractual or not.

17. In order to give effect to this new Convention, which was adopted on 10th June 1958 and ratified by India on 13th July 1960, the Parliament enacted the 1961 Act. Under section 4 of this Act a foreign award was subject to the provisions of the Act made enforceable in India as if it were an award made in a matter

referred to arbitration in India. The procedure for filing of foreign award in Court was laid down in section 5 and under section 6 the Court was empowered to order the award to be filed and to pronounce judgement according to the award, if it was satisfied that the foreign award was enforceable under the Act. Upon such judgement being pronounced, a decree was to follow and no appeal lay against such a decree except in so far as the decree was in excess of or not in accordance with the award. Section 7 laid down the conditions for enforcement of a foreign award and these were virtually intended to give effect to the provisions of Article V of the New York Convention. The declaration contemplated by clause 3 of Article I of the New York Convention that a contracting State would apply the Convention only to differences arising out of legal relationships, whether contractual or not, which were considered as commercial under the national law of the State making such declaration and the declaration made while declaring India's accession to the New York Convention that "They (Government of India) further declare that they will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the Law of India." were given effect to in the definition of 'foreign award' in section 2, the material part of which reads as follows:-

"In this Act, unless the context otherwise requires, 'foreign award' means an award on differences between persons arising out of legal relationship, whether contractual or not, considered as commercial under the Law in force in India, made on or after the 11th day of October, 1960 -

(a) in pursuance of an agreement in writing for arbitration to which the Convention set forth in the Schedule applies, and

(b) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made, may, by notification in the Official Gazette, declare to be territories to which the said Convention applies."

There is no dispute that United Kingdom is one of the countries which has been notified. The definition of foreign award will show that in order to fall within that definition, the award must satisfy certain requirements. Firstly, it must be an award on differences between persons who have legal relationship with one another, such relationship may be contractual or not, and secondly, the legal relationship must be considered

as commercial under the law in force in India, and thirdly, the award must be made on or after 11th October 1960 and lastly, the award must be in pursuance of an agreement in writing for arbitration to which the New York Convention applies. The definition will show that when it referred to "legal relationship ... considered as commercial under the law in force in India", it was intended to give effect to the declaration in the Convention that the legal relationship must be considered as commercial under the national law of the State making the declaration and in terms of the accession of India to the New York Convention. The declaration was that the legal relationship, whether contractual or not, was to be such as is considered as commercial under the law of India. Therefore, when the Parliament used the words "law in force in India", we cannot lose sight of the fact that the use of those words was intended to give effect to the concept of law of India contained in the declaration of accession and to the concept of national law of the State making a declaration, which is the phraseology used in the New York Convention.

18. Mr. Nariman appearing on behalf of the appellants has contended that when the definition of foreign award uses the phraseology "considered as commercial under the law in force in India", it has merely to be ascertained whether a legal relationship

is regarded by law as commercial or whether a legal relationship is recognised in law as commercial and, according to the learned Counsel, it was not necessary to enact any particular statute, as seems to be contemplated by the decision in Indian Organic Chemicals Ltd.'s case, which would specify or indicate what legal relationships were to be commercial for the purposes of the 1961 Act. In other words, the contention is that if under the general law of the land, a particular relationship was considered as commercial in the normal sense of the term, then that was enough to satisfy the requirement of the definition of foreign award. It was argued that admittedly, the transaction in question between the appellants and the respondents was a trading transaction in which buying and selling was involved and if undoubtedly a trading transaction or a buying and selling transaction is a commercial transaction, then, according to the learned Counsel, the award in question was a 'foregin award' which the appellants were entitled to enforce under the provisions of the 1961 Act.

19. What is argued before us by Mr. Kenia and Mr. S. Ganesh is that when the definition of foreign award' uses the words "considered as commercial under the law in force in India", it contemplates that there is some provision somewhere specifically enacted, which gives some guide lines as to which legal relationships

are to be considered as commercial. Mr. Kenia's argument was that there is no provision in the Act either defining or indicating what legal relationship is considered as commercial, nor can this be found under any other law in force in India. The learned Counsel contended that though the use of the word 'considered' may not be equated with the word 'defining', ultimately while determining the scope of the concept of foreign award, it would become necessary to find whether there is any defnition anywhere to indicate that a particular legal relationship has to be considered as commercial.

20. Mr. S.Ganesh appearing for the intervener has further argued that a legal relationship is different from the antecedent transaction which gives rise to that legal relationship and if the argument of the learned Counsel for the appellants is accepted that no special enactment or provision is necessary, which specifically defines or indicates what legal relationships can be considered as commercial, the Court will not be giving effect to the words "under the law for the time being in force". Our attention has been invited to the definition of "Indian Law" in section 3(29) of the General Clauses Act and to the definition of "existing law" in Article 366 (10) of the Constitution of India. Clause (10) of Article 366 of the Constitution

of India defines "existing law" as meaning any law, Ordinance, bye-law, rule or regulation passed or made before the commencement of this Constitution by any Legislature, authority or person having power to make such a law, Ordinance, order, bye-law, rule or regulation. Now, the argument before us appears to be that the words "considered as commercial under the law in force in India" would mean that the law must be one within section 3(29) of the General Clauses Act and it must clearly and unequivocally regard a particular legal relationship as a commercial one and that this the said Act must do for the purposes of the 1961 Act alone. It was argued that there was nothing in the sale of Goods Act which regards a relationship between a buyer and seller as commercial; that it only regulates the rights of buyers and sellers.

21. We are unable to see the relevance of the definition of "existing law" made in Article 366 (10) of the Constitution of India which is intended to give the meaning of those words which have been used in the Constitution at different places. It refers to law made before the commencement of the Constitution. The 1961 Act is a post-Constitution Act and though it is possible to appreciate the argument that there has to be some provision which must specifically indicate what legal relationship should be considered as commercial, when the definition of foreign award

used the words "legal relationship.... considered as commercial under the law in force in India", any reference to existing law in Article 366(10) of the Constitution appears to be inapposite. Now, so far as the definition of "Indian Law" is concerned also, it is difficult to appreciate how that definition is of any assistance to the respondents. A "law in force in India" contemplated by the definition of foreign award could be Indian law under section 3 (29) of the General Clauses Act because the definition itself states that the words mean any Act, Ordinance, regulation which had the force of law. The reference to Indian law in section 3(29) of the General Clauses Act has however, really nothing to do with the contention which is now sought to be raised on the requirement of the definition of foreign award.

22. Now, for the purposes of this case, it is not necessary to go into the width of the meaning of the word 'commerce' because admittedly, a trading activity like buying and selling, which is involved in the instant case, will be covered by commerce. 'Commercial' will mean pertaining to commerce, on which there can hardly be any dispute. In Black's Law Dictionary, 'commercial' is defined as "relates to or is connected with trade and traffic or commerce in general" and it is stated that 'commercial' is a "generic

term for most all aspects of buying and selling".

23. There is also no dispute that between the appellants and the respondents in this case there is a legal relationship which is contractual. We are, therefore, not concerned with any legal relationship which is not contractual, though we may point out that Mr.Nariman had invited our attention to certain passages from Mulla's Contract Act and Mulla's Sale of Goods Act which deal with the concept of a quasi contract and what was argued was that when the definition uses the words "legal relationship, whether contractual or not", reference was intended to be made to a relationship which could be brought about by the concept of a quasi contract as contemplated by the principle embodied in section 70 of the Contract Act. In Mulla's Contract Act, 9th edition, page 497, quoting the decision in Craven-Ellis v. Canons, Limited, (1936) 2 K.B. 403, it is observed that "the rendering of services under a void agreement is a typical situation leading to a quasi-contractual remedy". In that decision Greer L.J. has put the proposition thus at page 412:

> "In my judgement, the obligation to pay reasonable remuneration for the work done when there is no binding contract between the parties is imposed by a rule of law, and not by an inference of fact

arising from the acceptance of services or goods. It is one of the cases referred to in books on contracts as obligations arising quasi ex contractu, of which a well known instance is a claim based on money had and received."

24. Now, when the definition of foreign award refers to "legal relationship ... considered as commercial under the law in force in India" we cannot overlook the fact that the 1961 Act was intended to give effect to the New York Convention. The New York Convention made reference to the national law and the declaration of accession to the New York Convention by India made reference to the law of India. Now, the words "national law" or "the law of India" no doubt will take in a particular statute, but these words are of such wide import that they will envelope the entire body of laws which are effective or operative in India. Indeed when the statute uses the words "law in force in India", such use of words could never have contemplated a reference to any particular law and while it may in a given case in the context refer to a law on that particular subject, generally such words are used when reference is made to the general body of laws operative in India. We have repeatedly asked the learned Counsel for the intervener and the respondents

of provision they contemplated when they argued that there has to be a law which deals with contractual legal relationships and declares them to be commercial. We were, however, unable to elicit any satisfactory answer. With several kinds of transactions which may be considered as commercial on the facts of each case, it is obvious that when the Parliament referred to the legal relationship considered as commercial under the law in force in India, it had in mind the general body of laws with reference to which the nature of the transaction would be considered. The definition clearly did not contemplate any special enactment dealing with a commercial transaction as such only for the purposes of the 1961 Act. While it may be true that a legal relationship may not be equated with the antecedent transaction which creates that legal relationship, it is difficult for us to appreciate how for the purposes of ascertaining the nature of relationship we can exclude from consideration the nature of the transaction from which the relationship flows or out of which the relationship is created. If the transaction between the parties is one which part takes of commerce or which is in the nature of commerce, then inevitably the relationship between the parties to the contact or parties to the transaction will be clearly a commercial relationship. The nature of the relationship will depend on the nature of the transaction and whether the nature of the transaction is commercial or not will have to be determined with reference generally to the law in force in the country inclusive of what the learned

Judge, who decided the Indian Organic Chemicals Ltd.'s case referred to as an operative legal principle in force in India. The mere use of the word 'under' preceding the words "law in force in India" would not, in our view, necessarily mean that you have to find a statutory provision or a provision of law which specifically deals with the subject of particular legal relationship being commercial in nature.

5th November 1981

24. It is no doubt true that the use of the word 'under' in a given case may require a reference to a particular provision of law, but the meaning of the word 'under' also is "according to". (See Black's Law Dictionary.) If the word 'under' is construed in the sense of meaning "according to the law of India" or "according to the law in force in India" or in the sense of a legal relationship being regarded as commercial by the law in force in India, such a construction cannot mean, as was contended, that the court is not giving a meaning to all the words used in section 2 or that any part of that section is being ignored. It is not, therefore, necessary to refer to the two decisions of the Supreme Court on which reliance was placed by Mr. Ganesh in Aswini Kumar v. Arbinda Bose, A.I.R. 1952 S.C. 369, in which the Supreme Court has held that it is not a sound principle of construction to brush aside words in a statute as being inapposite if they can have appropriate application in circumstances conceivably within the

contemplation of the statute, and the decision in Shiv Bahadur Singh v. State of Vindhya Pradesh, A.I.R. 1953 S.C.394, in which the Supreme Court pointed out that it is incumbent on the Court to avoid a construction, if reasonably permissible on the language, which would render a part of a statute devoid of any meaning or application.

25. Mr. Nariman has brought to our notice two decisions of the United States District Court in which the same phraseology used in the New York Convention and in the American statute giving effect to that Convention was construed. We have been supplied with a photostat extract from the Federal Supplement, Volume 356, containing the judgement in the case of The Island Territory of Curacao v. Solitron Devices, Inc. given by the United States District Court on 14th February 1973. The dispute in that case was between the Government of Curacao and Solitron Devices Inc., which was a manufacturer in the United States, and one of the contentions was that the award given by the Arbitrators in Curacao did not arise out of "legal relationship"... which is considered as commercial including a transaction, contract or agreement described in section 2 of the relevant statute and thus did not fall under the Convention. The dispute had arisen out of an agreement between Curacao and the Solitron Devices Inc. under

which Curacao had agreed to construct factory buildings in Curacao at the expense of Curacao and in those factories, Solitron Devices Inc. had agreed to put its electronic manufacturing industry into operation within 12 months of the delivery of the larger building and the manufacturing industries were such as to provide employment for at least 3000 persons born in the Netherlands Antilles. The objection to the award raised on behalf of Solitron Co. was negatived in the following words:-

> "(6) Solitron objects (Memo, pp. 10, 11) that the award did not arise out of a 'legal relationship .. which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title ....' (9 U.S.C. § 202) and thus did not fall under the Convention (9 U.S.C. § 202). The reference to Section 2 in to 'any maritime transaction or a contract evidencing a transaction involving commerce'.
>
> The Convention, which is enforced by Chapter 2 of Title 9 of the Code, was adopted in 1958 by the United Nations Conference on International Commercial Arbitration. It was provided that each 'Contracting State' (and both the United States and the

Netherlands became such) could declare that it would apply the Convention only to awards arising from 'legal relationships.... which are considered as commercial ....' The United States so declared and 9 U.S.C. § 202 so provides.

Research has developed nothing to show what the purpose of the 'commercial' limitation was. We may logically speculate that it was to exclude matrimonial and other domestic relations awards, political awards, and the like.

Judged by any test, however, the contract of January 12, 1968 seems clearly to be 'commercial'. It has been said in this connection (Quigley, Convention on Foreign Arbitral Awards, 58 A.B.A.J. 821, 823 (1972)): " In the case of the United States reservation it seems clear that the full scope of 'commerce' and 'foreign commerce', as those terms have been broadly interpreted, is available for arbitral agreements and awards."

The United States Court thus pointed out that the agreement between the parties was clearly commercial and that the word 'commercial' was put in order to

exclude matrimonial and other domestic relations awards, political awards and the like. The other decision is also of the United States District Court, South District of New York and the extract is taken out of the Year Book of Commercial Arbitration, Volume 5, 1980, page 271. The dispute in that case was between two Corporations, one from Chile and the other from New York, and the Arbitration award was made in Chile. It was held that a dispute arose out of a classic commercial relationship involving purchase and sale of goods by two Corporations and, therefore, the arbitration agreement was within the meaning of the New York Convention. We quote the extract below:-

> "After having referred to Art. II, para 1, of the New York Convention, and having observed that the 'United States has limited the scope of Art. II, para 1, by adopting the reservation that the Convention applies only to arbitration agreements 'arising out of legal relationships ... which are considered as commercial' ... Art. I, para 3', the Court concluded that the submission agreement provided for arbitration of the dispute as to the quality and condition of goods purchased. Since the dispute arose out of a <u>classic commercial relationship</u> - one involving the purchase and sale of goods by two

corporations - the submission agreement was an arbitration agreement within the meaning of the Convention." (Underlining ours.)

We have already pointed out above that paragraph 3 of Article I of the New York Convention refers to "legal relationships ... which are considered as commercial under the national law of the State making such declarations." The United States District Court has thus understood the declaration to mean that if under the general law a relationship can be considered as commercial, the Convention of the Recognition and Enforcement of Foreign Arbitral Awards will be attached.

26. Mr. Nariman has relied upon the Rules of the Bombay, Calcutta, Delhi and Madras High Courts which refer to commercial causes or suits in support of his argument that those Rules contemplate that transactions which are generally understood under the law and not any particular law as commercial causes. The Rules are more or less identical and we may merely refer to the Rules of this High Court on the Original Side where under Rule 228 commercial causes are defined as follows :-

"Commercial causes include causes arising out of the ordinary transactions of merchants,

bankers and traders whether of a simple or complicated nature and amongst others, causes relating to the construction of mercantile documents, export or import or merchandise, affreightment, carriage of goods by land, insurance, banking and mercantile agency and mercantile usages. Suits relating to infringement of trade marks, patents and designs and passing of actions shall be treated as commercial causes.

Suits relating to purchase and sales between merchants or traders on the one hand and manufacturers on the other hand in respect of goods which are normally purchased and sold by the manufacturers in the ordinary course of their business as manufacturers shall also be treated as commercials causes."

Reference was also made to the Commercial Documents Evidence Act, 1939. This Act has a schedule which enumerates a large number of documents and section 2 provides that notwithstanding anything contained in the Indian Evidence Act, 1872, statements of facts in issue or of relevant facts made in any document included in the Schedule as to matters usually stated in such document shall be themselves relevant facts within the

meaning of that Act. Now, obviously the Rules and the Act relied upon proceed on the footing that the causes or the documents referred to therein arise out of commercial transactions. They may give some indication as to what are commercial transactions, but when the causes or the documents are referred to as commercial in the context of the transactions, that is only for the purposes of those Rules or Acts, but those definitions will not be of any assistance for the purposes of construction of the definition of "foreign award" in the 1961 Act. It has, however, to be noted that even in the Rules and the Act concerned, the definition is based only on the general concept of commerce under the general law of the land.

27. Now, coming to the decision of Mrudul J., which Mody J. has followed in the judgement which is the subject-matter of the appeal, it is impossible to find any infirmity with that part of the judgment of the learned Judge which describes what generally commercial relationship means. After making a reference to the 1937 Act and the 1961 Act and pointing out that the provisions of these Acts were calculated and designed to subserve the cause of facilitating international trade or promotion thereof, the learned Judge observed as follows in paragraph 39: -

> "An expression occurring in such statutes, therefore, must receive, consistent with its literal and grammatical sense, a liberal construction. I, therefore, take the view that the concept of commercial relationship in S. 2 of the 1961 Act takes within its ambit all relationships which arise out of or are ancillary and incidental to the business dealings between citizens of two States. The concept takes within its fold all legal relationships pertaining to the international trade in all its forms between the citizens sense of different States."

The proposition laid down by the learned Judge cannot be disputed. However, when the learned Judge proceeded to contrue the provision in section 2 of the 1961 Act, he emphasised the use of the words "under the law in force in India" and then observed as follows in paragraph 42:-

> "The expression occurring in S.2 is legal relationships, whether contractual or not, considered as commercial <u>under the law in force in India"</u> (emphasis supplied). It, therefore, follows that

not only should the relaticnship be commercial but such a relationship should be 'considered as commercial under the law in force in India'. The use of the word 'under' in my opinion, is deliberate and predicates coverage. It posits a cloak enveloping an act. In legal parlance the word 'under' connotes 'by virtue of'. It is sometimes also translated as 'pursuant to'. The expression 'under the law', therefore, must mean 'by virtue of a law for the time being in force'. In other words, before provisions of S. 3 can be invoked, the agreement must be an agreement embodying a relationship considered commercial under a provision of law. In my opinion, in order to invoke the provisions of S. 3 it is not enough to establish that an agreement is commercial- It must also be established that it is commercial by virtue of a provision of law or an operative legal principle in force in India."

Later in paragraph 43, when a specific argument was raised before the learned Judge that it is not necessary to identify the provisions under which a relationship is considered commercial and that it was enough to show that the relationship is commercial as normally

understood in legal parlance, the learned Judge rejected those contentions in the following words:

> " I am unable to appreciate the contentions. The question is not as to the import of the word 'commercial'. The question is what effect should be given to the expression 'considered commercial under the law in force in India.' There is no running away from the fact that the commercial relationship under S. 2 must be a relationship considered commercial under the provisions of a law in force in India. The interpretation sought to be given by the learned counsel, if accepted, will render the words 'under the law in force in India' otiose. Such an interpretation will have to be eschewed."

With great respect to the learned Judge, not only are we unable to agree with the view taken by him, but it appears to us that the observations made by the learned Judge that the relationship must be 'considered as commercial under the provisions of a law (emphasis supplied) in force in India' seem to run counter to what the learned Judge himself observed in the earlier paragraph when he took the view that the legal relationship must be commercial 'by virtue of a provision of

law or an operative legal principle in force in India." (Emphasis supplied). How, an operative legal principle in force in India would also be principle flowing from any law already in force. In any case, it is not possible for us to accept the construction that the words "law in force in India" were intended to mean a particular law specifically enacted for the purposes of the provisions of the 1961 Act.

28. One of the arguments advanced by Mr. Kenia was that the enactment of such a law was necessary in order to avoid any controversy with regard to the construction of the words in section 2 or a contrary view being taken as in the case of Kamani Engineering Corporation Ltd. v. Society De Traction Et D'Electricite Societe Anonyme, 66 Bom. L.R. 758. In that case, the learned Judge was dealing with the contract with a collaboration agreement for the sale of the know-how or technical assistance and the question was whether such a contract created legal relationship considered as commercial under the law in force in India and the learned Judge took the view that the contract was of a professional character and did not involve any business or commerce at all. No other facts about the contract are available from the judgement and the contract was held to be not a commercial contract because it was more like a retainer or contract that is made between a solicitor, a counsel and an

advocate on the one hand and a client on the other. We are not called upon in this case to go into the correctness of the view of the learned single Judge, but it is difficult for us to accept the argument that in order to avoid any controversy about the determination of the question as to whether a particular legal relationship is commercial or not, it was necessary to make a statutory provision enumerating such legal relationship.

29. We have no doubt that the contract in the instant case, which was for the sale and purchase of a commodity, was clearly a contract which brought about legal relationship which was commercial in nature under the Indian law.

30. The respondents have filed cross-objections which have been argued by the learned Counsel for the respondents. One of the arguments was that no copies of the GAFTA Contract No.119 having been given to the respondents, the agreement for arbitration could not be fastened upon them. It is difficult for us to accept the contention. The contract, which is admittedly signed by the respondents, clearly makes a reference to the GAFTA Contract No.119. Not only that, the parties have agreed to delete a particular clause from the GAFTA agreement. When the respondents have signed this agreement and have specifically agreed that one of the parts of the GAFTA agreement must be deleted, it

is difficult to accept the statement that they were not aware of the terms of the GAFTA agreement. Whether they were in possession of the GAFTA agreement or not is hardly relevant for the determination of the question as to whether the original agreement was binding and once the original agreement was binding, the terms of the GAFTA agreement, which were incorporated, would automatically bind the respondents.

31. It was then contended that under the terms of the GAFTA agreement, artificially a provision was made with regard to domicile and according to that term, the arbitration agreement must be "deemed to have been made in England by the buyers and sellers and to have been performed there and any correspondence with reference to the offer, the acceptance, the place of appointment or otherwise notwithstanding, the Courts of England or Arbitrators appointed in England, as the case may be, shall, except for the purpose of enforcing any award made in pursuance of the clause hereof, have exclusive jurisdiction over all disputes which may arise under this contract". The argument was that in view of this clause relating to domicile, the award ceased to be a foreign award. The argument must be rejected in view of the definition of foreign award in section 2 of the Act which is a complete answer to this contention and we need not elaborate on this any further.

32. It was also argued before us that the

modification of the award made by the Arbitrators at the instance of the appellants by their letter dated 27th October 1977 was without authority. It is difficult for us to see how the respondents can make any grievance with regard to this modification whereby thier liability has been reduced. The original award of the Arbitrators required the respondents to pay the damages of £ 12,000/-. According to the applicants, the actual amount should have come to £ 11,750/- and they, therefore, wrote to the Arbitrators on 27th October 1977 and accordingly, the award was rectified and the liability was reduced by £ 250/- against which the respondents cannot make any grievance.

33. In the view which we have taken, the appeal filed by the appellants must be allowed and the cross-objections filed by the respondents must be rejected. Accordingly, the appeal is allowed, cross-objections are rejected and the order of the trial Court is set aside. It is ordered that the award of Arbitrators dated 9th November 1977 be filed and it is held that the appellants-plaintiffs are entitled to a decree in terms of the Award for £ 11,750/- on account of damages and U.S. Dollars 4,812.50 on account of dead freight and they are also entitled to interest at 8% p.a. from 27th April 1977 to 9th November 1977, The appellants will be entitled to the costs of this appeal as well as the petition in the trial Court from the respondents. .

There will be no order as to costs of the cross-objections.

34. Leave to appeal to Supreme Court asked for by the respondents is rejected.

35. The decree will not be executed for a period of six weeks from today.
