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ARBITRATION PETITION NO. 33 OF 1980

The Hon'ble Shri Justice M.L.Pendse

European Grain & Shipping Limited .. Petitioners

V/s

Seth Oil Mills Limited .. Respondents

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Shri D.R.Zaiwalla with Shri T.N.Subramanium, Shri S.T.Vajifdar and Shri MP.Bharucha for the petitioners i/b Mulla & Mulla and Craigie Blunt & Caroe
Shri S. Ganesh with Miss U.M.Dalal i/b Romer Dadachanji Sethna & Co. for the Respondents.

CORAM : PENDSE, J.

SATURDAY, JANUARY 29, 1983

ORAL JUDGMENT :

1. This petition has been filed under Sections 5 and 6 of the Foreign Awards (Recognition & Enforcement) Act, 1961, in respect of an award dated May 17, 1977 passed by the arbitrators appointed by the Grain and Feed Trade Association Ltd. directing payment of Rs.2,32,600/- and Rs.1,24,890/- by the respondents to the petitioners.

2. The facts which have given rise to this petition are required to be stated briefly to appreciate the objections raised on behalf of the respondents for filing and enforcement of the award. By an agreement dated March 25, 1976, the respondents Seth Oil Mills Ltd., a company doing business in Bombay and having a factory situate in Amritsar in the State of Punjab, agreed to sell 500 metric tonnes of rice bran extractions at a specified standard. A copy of the agreement is annexed as Exhibit 'A' to the petition, and it inter alia provides that the shipment was to be effected during June/July 1976 at buyers option from port Bedi in State of Gujarat. The agreement provides that the contract is made under the terms and conditions effective on the date of the Grain and Feed Trade Association Ltd. (GAFTA), Baltic Exchange Chambers, 28 St. Mary Axe London EC 3A-8EP Contract No.119, which is made part of the contract. Copy of the said contract No.119 is annexed as Exhibit 'B' to the petition and Clause 25 of that contract inter alia provides that buyers and sellers agreed that for the purpose of proceedings, either legal or by arbitration, the contract shall be deemed to have been made in England, and to be performed there, any correspondence in reference to the offer, the acceptance the place of payment, 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 arbitration clause thereof, have exclusive jurisdiction over all disputes which may arise under the contract. Clause 26 of this contract provides that any dispute arising out of or under this contract shall be settled by arbitration in London in accordance with the Arbitration Rules No.125, of the Grain and Feed Trade Association Limited, and such Rules forming part of this contract and of which both the parties to the contract shall be deemed to be cognisant. A copy of the arbitration Rules is annexed as Exhibit 'C' to the petition.

3. Though under the agreement the respondents did supply the rice bran extractions during June/July 1976, the time was extended by consent of parties till January 23, 1977. The respondents failed to supply the agreed quantity by the extended date and thereupon the petitioners informed the respondents that the claim for damages would be referred to the arbitration. The petitioners nominated their arbitrator as provided under the Arbitration Rules, but the respondents failed to appoint their arbitrator. The arbitration proceedings thereafter proceeded according to the Rules, but the respondents did not attend

before the arbitrators inspite of the notice. The arbitrators ultimately declared their award on May 17, 1977 and the petitioners have filed this petition for filing this award and for the enforcement of the same as contemplated under Sections 5 and 6 of the Foreign Awards (Recognition & Enforcement) Act, 1964. The petitioners have annexed a copy of the affidavit of Charles Howard Deans, a partner in the firm of William A. Croup & Sons, Solicitors at Exhibit 'S' to the petition, to establish that the arbitration proceedings were conducted in accordance with the Arbitration Rules and the arbitration Agreement was valid under the laws of England by which it was governed. In answer to the petition, on behalf of the respondents, an affidavit sworn on September 19, 1980 by Rajendra Bansal, the Principal Officer of the respondents is filed, and several contentions are raised. It is agreed between the parties that in view of the decision dated January 22, 1981 of the learned Single Judge in Arbitration Petition No.16 of 1980 between European Grain & Shipping Ltd. v/s Bombay Extractions Pvt. Ltd. and in view of the decision of the Division Bench of this Court dated November 4, 1981 against the judgment of the learned Single Judge, most of the points raised in answer to the petition are concluded, and it is not necessary to consider the same in the present proceedings.

4. On behalf of the respondents, Shri Ganesh, learned counsel, has raised four contentions in answer to the request of the petitioner to file and enforce the foreign award. The first contention urged by Shri Ganesh is that this Court has no jurisdiction under Section 5 of the Act to entertain the petition. Section 5(1) reads as under :

> "5(1) : Any person interested in a foreign award may apply to any court having jurisdiction over the subject matter of the award that the award be filed in Court."

It was urged that the subject matter of the award is the agreement between the parties to supply rice bran extractions and the parties have agreed by clause 25 of Exhibit 'B' that for the purpose of proceedings either legal or arbitration, laws of England shall apply and the contract will be deemed to have been made in England. The submission is that any claim in respect of the contract could have been filed only in an English Court and as Clause 25 requires the parties to file the claim in English Court, it is not open for this Court to exercise the jurisdiction by permitting filing of the award in this Court. It is not possible to accept this submission for more than one reason. In the first instance, it is required to be made clear that the petitioners

claim that the contract was entered into at Bombay and the respondents' office is situate in Bombay. The petitioners in paragraph 22 of the petition has made specific averments to this effect. In answer to this, in the affidavit-in-reply the respondents denied that the contract was entered into at Bombay, but did not challange that they have got their office situate at Bombay. It is obvious that in the ordinary course it was open for either of the parties to file any action in respect of the contract in Bombay Court. It is true that clause 25 of Exhibit 'B' provides that the contract shall be deemed to have been made in England and the Courts at England have exclusive jurisdiction over all disputes which may arise under the contract, but it cannot be overlooked that clause 25 itself specifically provides that this exclusive jurisdiction over all the disputes would be subject to an exception and that is for the purpose of enforcement of any award made in pursuance of the arbitration clause. It is therefore, obvious that the parties have agreed that for enforcement of the award passed under the arbitration clause, the jurisdiction can be exercised by any Court which could have exercised the jurisdiction over the subject matter of the award. The subject matter of the award being a contract and this Court could exercise jurisdiction for enforcement of the

award passed in pursuance of the agreement between the parties. The parties have clearly agreed that for the purpose of enforcement of the award, the English Court would not be the exclusive court and as such it is open for the petitioners to claim that the award could be filed and enforced by this Court as provided by under Sections 5 and 6 of the Act. The first submission of Shri Ganesh that this Court has no jurisdiction under Section 5(1) of the Act deserves to be repelled.

5. The second ground of challenge is that this Court should not enforce the foreign award because the enforcement of the award will be contrary to the public policy as provided under Section 7(1)(b)(ii) of the Act. It is necessary to state at the outset that Section 7 prescribes that the foreign award cannot be enforced if the Court dealing with the case is satisfied that the enforcement of the award will be contrary to public policy, and it never lays down that the Court can consider whether the award itself is contrary to the public policy. To appreciate the contention of Shri Ganesh on this aspect, it is required to state certain facts. As mentioned hereinabove, the time was extended upto January 23, 1977 for completion of the contract. Shri Ganesh submits that the

agreement provides that the shipment was to be effected from Port Bedi in the State of Gujarat, and the rice bran extractions, as specified in the agreement, was manufactured by the respondents in their factory at Amritsar in the State of Punjab. Shri Ganesh submits that before the time for completion of the contract expired on January 18, 1977, the respondents received a letter dated January 12, 1977 addressed by the District Animal Husbandry Officer, Amritsar, intimating that all the sale/export permits issued by his office are cancelled. Shri Ganesh submits that as the export permits were cancelled by the Punjab State Government, it was not possible for the respondents to complete the contract of exporting the rice bran extractions. The learned counsel placed reliance upon clause 18 of Exhibit 'B', which reads as under :

> "18. PROHIBITION- In case of prohibition of export, blockade or hostilities or in case of any executive or legislative act done by or on behalf of the government of the country of origin or of the territory where the port or ports of shipment named herein is/are situate, restricting export, whether partially or otherwise, any such restriction shall be deemed by both parties to apply to this contract and

to the extent of such total or partial restriction to prevent fulfilment whether by shipment or by any other means whatsoever and to that extent this contract or any unfilfilled portion thereof shall be cancelled, Sellers shall advice Buyers without delay with the reasons therefor and, if required, Sellers must produce proof to justify the cancellation."

It was urged by the learned counsel that in view of the executive act done by the Government of State of Punjab, the respondents were prevented from fulfilling the part of the contract and the respondents immediately informed the petitioners their inability to do so. Reliance is placed on a letter dated January 25, 1977, copy of which is annexed as Exhibit 'A' to the petition, to claim that the petitioners were informed of the ban and the inability of the respondents to complete the contract. Shri Ganesh submits that taking into consideration these facts, it is obvious that the arbitrators had passed an award which could not be sustained in law, and therefore, its enforcement is contrary to the public policy. It is not possible to accept this line of argument. In the first instance it was open for the respondents to raise this contention before the arbitrator. The contention of the respondent as to whether they were prevented from fulfilling

the contract because of an executive act of the Government of Punjab was open for consideration before the arbitrator. The mere fact that the respondents did not choose to appear before the arbitrator is not sufficient to enable them to claim that this Court should exercise the appellate jurisdiction over the award passed by the arbitrator and ascertain whether passing of the award was contrary to the law, and the failure of the respondents to fulfil the contract was for reasons mentioned in clause 18 of Exhibit 'B'. Shri Ganesh made a valiant attempt to claim that though Section 7(1)(b)(ii) of the Act provides that the enforcement of the award should not be contrary to the public policy, still it is open for this Court to consider whether passing of the award itself was contrary to public policy. It is not possible to accept this submission. It is possible that in a given case where the contract between the parties is totally illegal from its inception and inspite of it an award is passed, then the Court may very well refuse to enforce such an award as being contrary to public policy. But the mere fact that it was possible for the respondents to raise certain contentions before the arbitrator for non-fulfilment of the contract, is no ground to hold that enforcement of the award is contrary to public policy. Mr.Zaiwala, in this connection submitted that the shipment was to be effected from Port Bedi in State of Gujrat and nothing prevented the respondents from securing the rice bran extractions from open market and completing shipment. Clause 18, says Mr.Zaiwala, is attracted provided there is prohibition of export at the port of shipment. The submission is correct and deserves acceptance.

6. Shri Ganesh then submitted that the arbitrators, while passing the award, have given no reasons whatsoever and that itself is ground sufficient to hold that the enforcement of the award will be contrary to public policy. It was urged that under Rule 8 of the Arbitration Rules, copy of which is annexed as Exhibit 'C' to the Petition, enables the party to file an appeal before the Board of Appeal to be elected in accordance with the Rules and as the appeal is provided it was necessary for the arbitrator to state in detail the reasons which prompted them to pass the award. There is no merit whatsoever in this contention. The Rules do not require the arbitrators to give any reasons and merely because the appeal is provided it does not require the arbitrators to set out the reasons. In any event, it is difficult to imagine how these grounds would suffice to claim that the enforcement of the award would be contrary to the public policy. Shri Ganesh cited the decision of the Punjab High Court reported in A.I.R. 1974 Punjab & Haryana 36 (Ganga Ram and others v. Risal Singh), but in my judgment, this decision has no relevance whatsoever to the point involved in this petition. The last leg of the submission on this point is that the award does not reflect any material to support the basis of the damages awarded in favour of the petitioner. In my

judgment, this ground also cannot be entertained for the reasons mentioned hereinabove. It is impossible to hold that enforcement of the award would be contrary to public policy.

7. Shri Ganesh then urged that proper notice as contemplated under Section 7(1)(a)(ii) of the Act was not served upon the respondents and therefore the foreign award should not be enforced. Section 7 inter alia provides that the foreign award may not be enforced if the party against whom it is sought to be enforced proves to the Court that the party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise present his case. Shri Ganesh rests his submission by claiming that notice dated April 5, 1977 served on the respondents, a copy of which is annexed as Exhibit 'H' colly., does not set out the details of the claim made by the petitioners. The notice was issued by the Grain and Feed Trade Association Ltd. by registered post to the respondents and it inter alia states that on consideration of an application from the petitioner for the appointment of arbitrators connecting with the disputes arising out of the contract the respondents should appoint their arbitrator. Shri Ganesh submits that the notice does not set out the claim, but Shri Zaiwala, learned counsel appearing in support of the petition, submits that prior to this notice, on

February 16, 1977 a letter was addressed to the respondents pointing out that the claim for default calculated at the rate of Sterling 50/- per ton towards damages and the further claim towards freight is made before the arbitrator. The correspondence between the parties leaves no manner of doubt that the respondents were fully conscious of the claim made by the petitioners. In any event, the respondents were given proper notice of the appointment of the arbitrators and of the arbitration proceedings and the challenge to the enforcement of the award on the ground of breach of Section 7(1)(a)(ii) of the Act is without any substance. Shri Ganesh made a faint attempt to urge that Rule 2(c) of the Arbitration Rules requires that when one party has appointed ~~mmhis~~ arbitrator, ~~despatched~~ notice in writing of such appointment is to be given to the other party, and that Rule is not strictly complied with. It is not in dispute that on February 16, 1977 a notice of appointment of the arbitrator was served by the brokers of the petitioners on the respondents. The only ground of challenge is that as the notice was not served by the petitioners themselves but by the broker, the Rule is not complied with. The submission is without any substance and cannot be entertained. The rule requires service as merely directory and it is ~~mmm~~ futile to urge that the notice served by the brokers of the petitioners is not

sufficient. These are the only contentions urged by Shri Ganesh to claim that the foreign award should not be filed in this Court and should not be enforced. In my judgment, there is no merit whatsoever in the challenge urged on behalf of the respondents, and the petitioners are entitled to the relief sought in the petition.

8. Accordingly, the petition succeeds and it is ordered that the award of the arbitrators dated May 17, 1977 be filed in this Court and it is furthere ordered that the petitioners are entitled to a decree in terms of the award for the sum of £12,375.00 Pounds Sterling and the United States Dollars $ 12,250.00 and interest on the sum of £.12,375.00 at the rate of 10% per annum and on the sum of $ 12,250.00 at the rate of 8% per annum from February 1977 to the date of the award i.e. May 17, 1977. There will be also a decree against the respondents and in favour of the petitioners for costs of the arbitration proceedings fixed by the arbitrators at £ 120.00 ~~as costs of the arbitration proceedings.~~

The respondents shall also pay the costs of the petition.

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Monday, February 14, 1983, and

TUESDAY, FEBRUARY 15, 1983.

Shri D.R.Zaiwalla with Shri T.N.Subramanium
Shri S.T.Vajifdar and Shri M.P.Bharucha
for the petitioners.

Shri S. Ganesh with Miss U.M.Dalal
for the respondents.

9. The counsel had sought time to argue the question as to whether this Court has power to grant interest to the petitioners in respect of the sums found due ~~fmmm~~ by the arbitrators. The matter was argued at length to-day. The Arbitrator has awarded certain sums of money in favour of the petitioners by award dated May 17, 1977. The petitioners filed petition under Section 5 (2) of the Foreign Awards (Recognition & Enforcement) Act, 1961 on May 6, 1980. The question which now requires determination is whether the petitioners are entitled to any amount of interest on the sums found due by the arbitrator from (i) the date of the award till the date of filing of the petition, and (ii) from the date of filing of the petition till the date of realisation.

10. Shri Zaiwalla submitted that though there is no provision under the Foreign Awards Act to grant interest, Section 11 of the Act enables the High Court to make rules consistent with the Act as to the filing of the Foreign Awards and all proceedings consequent thereon or incidental

thereto and for generally, all proceedings in Court u der the Act. Shri Zaiwalla submits that in accordance with the power conferred under Section 11 of the Act, this Court has framed Rule 803 under Chapter XLIII of the Rules and Forms of the High Court of Judicature at Bombay on the Original Side. Rule 803 reads as under :

> "In cases not provided for in the rules contained in this chapter, the provisions of the Code of Civil Procedure, 1908, and the rules of the Court in suits and matters on the Original Side of the Court shall, with any necessary modifications, apply to all proceedings before the Court and to all appeals under the Act. In case of inconsistency between the provisions of the Code of Civil Procedure and the rules of the Court referred to herein, the said rules of the Court shall prevail."

It was urged that in view of this Rule, the provisions of the Code of Civil Procedure would apply to the proceedings adopted under Section 5 of the Foreign Awards Act, and therefore, this Court has got power to award interest under Section 34 of the Code of Civil Procedure, in respect of the period commencing from the date of filing of the petition till realisation of the claim. Shri Zaiwalla then submits that in respect of the

period commencing from the date of the award till the date of the filing of the petition, the petitioners are entitled to claim interest under the provisions of Section 3(1)(b) of the Interest Act, 1978. Shri Ganesh appearing for the respondents on the other hand submitted that there is no provision in the Foreign Awards Act to grant interest on awards as one contained under Section 29 of the Arbitration Act, 1940. The learned counsel also argued that the provisions of the Interest Act, 1978 would not entitle this Court to grant interest to the petitioners for the period commencing from the date of the award till the filing of the petition. Shri Ganesh disputed the submission of Shri Saiwalda that Section 34 of the Code of Civil Procedure would apply and urged that this Court while passing the judgment in terms of the award under the Foreign Awards Act has no power to grant interest. Strong reliance was placed on the decision of the single Judge of this Court reported in A.I.R. 1967 Bom. 347 (S.N.Srikantia & Co. v. Union of India & Anr.) in support of the submission. In view of the rival submissions, the question which requires determination is whether the provisions of the Interest Act are attracted to entitle the petitioners to claim interest till the date of filing of the petition and whether Section 34 of the Code of

Civil Procedure entitles this Court to grant interest to the petitioners on the amount found due for the period commencing from filing of the petition till realisation.

11. Reliance is placed on the provisions of Section 3(1)(b) of the Interest Act to claim interest for the period prior to the filing of the petition. Section 3(1) (a) and (b) reads as under :

> "(1) In any proceedings for the recovery of any debt or damages or in any proceedings in which a claim for interest in respect of any debt or damages already paid is made, the court may, if it thinks fit, allow interest to the person entitled making such claim, as the case may be, at a rate not exceeding the current rate of interest, for the whole or part of the following period, that is to say,-
> (a) if the proceedings relate to a debt payable by virtue of a written instrument at a certain time, then, from the date when the debt is payable to the date of institution of the proceedings;
> (b) if the proceedings do not relate to any such debt, then, from the date mentioned in this regard in a written notice given by the person entitled or the person making the claim to the person liable that interest will be claimed, to the date of institution of the proceedings:

Provided that where the amount of the debt or damages has been repaid before the institution of the proceedings, interest shall not be allowed under this section for the period after such repayment."

It is required to be stated that Interest Act, 1978 received the assent of the President and published in the Gazette on March 31, 1978 and by Section 6 of this Act the provisions of the Interest Act, 1839 were repealed. The Interest Act, 1839 consisted of one Section only and it read as under :

"1. Power of Court to allow interest- It is, therefore, hereby enacted that, upon all debts or sums certain payable at a certain time or otherwise, the Court before which such debts or sums may be recovered may, if it shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time; or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment; provided that interest shall be payable in all cases in which it is now payable by law."

The Interest Act, 1978 shows departure from the earlier Act in many respects. Section 2(a) defines "Court" which includes a tribunal and an arbitrator. Section 2(c) defines "debt" which means any liability for an ascertained sum of money and includes a debt payable in kind, but does not include a judgment debt. Section 3(1) is also substantially different from the earlier Section. Section 3(1) refers to the powers of the Court to allow interest in any proceedings for the recovery of any debt. Section 3(1)(b) enables the Court to award interest from the date mentioned in a written notice given by the person making the claim to the person liable to pay the interest. Shri Zaiwalla relied upon the notice dated August 2, 1977, copy of which is annexed as Exhibit 'Y' to the petition to submit that the claim was made by the petitioners on the respondents, and therefore, this Court has power to allow interest from that date, that is August 2, 1977, till the date of filing of the petition.

February 15, 1982

12. In my judgment, the submission of Shri Zaiwalla is correct and deserves acceptance. Section 3(1)(b) of the Interest Act, 1978 confers powers upon the Court to award interest from the date mentioned in the written notice given by

the petitioners to the respondents till the institution of the proceedings. In the present case, the notice has been given on August 2, 1977 while the petition under Section 5 of the Foreign Awards Act was filed on May 6, 1980 and under the provisions of the Interest Act, the petitioners would be entitled to claim interest for the said period.

13. Shri Ganesh submits that the learned Single Judge of this Court in the decision reported in A.I.R. 1967 Bom. 347 (supra) has taken a view that it shall not be permissible for the Court to award interest on the principle sum adjudged by an award for any period prior to the date of the passing of the decree. As strong reliance is placed on the decision of the learned Single Judge, it is necessary to set out the controversy which arose before the Single Judge. Anaward was passed for a sum of Rs.1,17,212.75 by the empire against the defendant Union of India. The award was filed in Court and neither parties filed any petition for either setting aside or remitting the award. The plaintiffs S.N.Srikantia & Co. took out Notice of Motion for a decree in terms of the award and in addition to the principle sum adjudged claimed interest from the date of the award till the date of the decree and further from the date of the decree till payment. The claim for interest from the date of the award till realisation was resisted on the ground that the powers conferred

upon the Court under Section 29 of the Arbitration Act provides for grant of interest from the date of the decree onwards and Section 29 is silent as regards the interest to be awarded for any period prior to the passing of the decree. Reliance was placed on behalf of the Plaintiff on the provisions of the Interest Act, 1839, and the learned Judge turned down the plea on the ground that the provisions of Section 1 of the Act was not attracted as the actual debt was adjudicated upon not by the civil Court but by domestic forum. that is the arbitrator or the umpire. The learned Single Judge held that the Court not having adjudicated upon the actual debt payable by the defendant to the plaintiffs, it would not be possible for the court to award interest to the plaintiffs under the Interest Act. Shri Ganesh submits that though the learned Single Judge was dealing with the powers of the Court to award interest in respect of the award passed under the Arbitration Act, still the ratio laid down would apply to an award passed under the Foreign Awards Act. It is not possible to accept this submission for more than one reason. In the first instance the provisions of the Foreign Awards Act are absolutely silent about the powers of the Court to grant interest. In other words, the powers of the Court are not circumscribed by the

statutory provisions like Section 29 contained in the Arbitration Act. Secondly, the provisions of Interest Act, 1978 did not come up for consideration before the Single Judge. As mentioned hereinabove, the Interest Act of 1839 was repealed and the Interest Act, 1978 shows departure from the original Act on substantial points. The definition of the Court is not restricted to the civil Court but incompasses in its sweep a tribunal and even an arbitrator. It clearly shows that even an arbitrator can exercise the powers conferred under Section 3(1)(b) of the Act and therefore it is difficult to appreciate why such a power cannot be exercised by a civil court before whom proceedings for the recovery of the debt are pending. The definition of 'debt' given under the Interest Act, 1978 makes it clear that debt would cover any liability for the ascertained sum of money, and an award passed by the arbitrators fixing liability to ascertain sum can well be described as a debt. In my judgment, the decision of the learned Single Judge in S.N.Srikantia & Co.'s case would have no application after the Interest Act, 1978 came into operation. In my judgment, the expression "in any proceedings for the recovery of any debt" are not restricted only to the cases where the Court is required to adjudicate upon the debt payable by one party to the other. The

expression is wide enough to cover cases where the proceedings are instituted for a decree in terms of the award. The mere fact that in such proceedings the Court is not required to adjudicate the debt would not take away such proceedings from the ambit of Section 3(1) of the Interest Act. In my judgment, the petitioners in the present case are entitled to claim interest for the period commencing from the date of giving of notice till the date of filing of the petition.

14. Shri Zaiwalla then submits that the petitioners are also entitled to claim interest from the date of the filing of the petition, that is May 6, 1980 till the date of realisation, and in support of the claim the learned counsel relied upon the provisions of Section 34 of the Code of Civil Procedure. Section 34 reads as under :

> "34. (1) Where and in so far as a decree is for the payment of money, the Court may, in the decree, order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged, from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate not exceeding six per cent per annum as the Court deems reasonable on such

principal sum, from the date of the decree to the date of payment, or to such earlier date as the Court thinks fit :

Provided that where the liability in relation to the sum so adjudged had arisen out of a commercial transaction, the rate of such further interest may exceed six per cent per annum, but shall not exceed the contractual rate of interest or where there is no contractual rate, the rate at which moneys are lent or advanced by nationalised banks in relation to commercial transactions.

Explanation I.- In this sub-section, "nationalised bank" means a corresponding new bank as defined in the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970.

Explanation II.- For the purposes of this section, a transaction is a commercial transaction, if it is connected with the industry, trade or business of the party incurring the liability.

(2) Where such a decree is silent with respect to the payment of further interest on such principal sum from the date of the decree to the date of payment or other earlier date, the Court shall be deemed to have refused such interest, and a separate suit therefor shall not lie."

The provisions of the Section can be well divided into three parts - (1) interest accrued prior to the institution of the proceedings; (2) interest on the principal sum from the date of the suit to the date of the decree; and (3) further interest from the date of the decree to the date of payment. Shri Zaiwalla submits that interest after the date of the suit is a matter of substantive law and Section 34 has no application to the payment of interest for the period prior to the institution of the suit, but it applies to the second and the third heads. Shri Zaiwalla very fairly stated that the power to grant interest under Section 34 is discretionary and the Court may in a proper case decline to grant interest. The question which really falls for determination is whether the provisions of Section 34 of the Act can be attracted to the proceedings instituted under Section 5(2) of the Foreign Awards Act. Shri Zaiwalla relied upon Rule 803 of the Original Side Rules framed by this Court in respect of proceedings under the Foreign Awards (Regulation and Enforcement) Act, 1961. The Rule undoubtedly makes the provision of the Code of Civil Procedure, 1908 applicable to the proceedings provided the Rules contained in Chapter XXXII are not inconsistent with the provisions of the Code. The Rules framed by this Court makes no reference to the powers of the Court to grant interest, and therefore,

says Shri Zaiwala, provisions of Section 34 of the Code are clearly attracted. Shri Ganesh on the other hand submits that the mere fact that the proceedings under Section 5(2) of the Foreign Awards Act are numbered as suits is not sufficient to conclude that the provisions of the Code of Civil Procedure would apply in all matters. Shri Ganesh further submitted that Rule 789 appearing in Chapter XLI of the Original Side Rules framed by this Court is para materia same as Rule 805 and if provisions of Section 34 of the Code are attracted in respect of foreign awards, then there is no reason why they could not be attracted in respect of the proceedings taken for enforcement of the award passed under the Arbitration Act. Shri Ganesh urges that the learned Single Judge in S.N.Srikantia & Co.'s case did not hold that the civil court can exercise the powers under Section 34 of the Code and award interest. It is not possible to accept the submission of Shri Ganesh. The claim of the petitioners for grant of interest under Section 34 of the Code is not based on the ground that the proceedings are numbered as suit under Section 5(2) of the Foreign Awards Act. The claim is based on the ground that the provisions of the Code of Civil Procedure are applicable to the proceedings for the enforcement of the foreign award and that would

include the power of the Court to award interest as well as costs. The question whether the provisions of Section 34 of the Code are attracted or otherwise was not agitated before the learned Single Judge in the case of S.S.Srikantia & Co., and therefore, it is not open for Shri Ganesh to urge that the learned Single Judge had come to the conclusion that Section 34 would not enable the civil court to award interest in a proceedings adopted to enforce the award passed under the Arbitration Act. In my judgment, apart from the specific Rule 80% which provides for application of provisions of the Code, there is another good reason to hold that the Court can exercise the powers under Section 34 of the Code. It is necessary to note that the grant of interest under Section 34 of the Code subsequent to the institution of the proceedings is not a matter of lease between the parties, but is a discretionary power conferred upon the Court to foist the liability on a defaulting party. The fact that the proceedings remained pending in this Court for a considerable period would work to the benefit of the defendant against whom an award has been passed of an ascertained liability. The defendant has enjoyed the advantage of the sums wrongfully denied and the plaintiff cannot be deprived of right to interest on the ground that Section 34 of the Code has no application. In my judgment, both in law

and in equity, the petitioners are entitled to claim interest for the period commencing from the date of filing of the petition till realisation.

15. Accordingly, the petitioners would be entitled to the interest on the sum of £ 12,375.00 Pounds Sterling at the rate of 10% per annum from August 2, 1977 and on the sum of ₹ 12,250.00 at the rate of 8% per annum from August 2, 1977 till realisation.

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DECISIONS OF INDIAN COURTS ON QUESTIONS OF INTERNATIONAL LAW

EUROPEAN GRAIN & SHIPPING LTD. V. BOMBAY EXTRACTIONS PVT. LTD.

The expression "Law in force in India" within the meaning of Sec. 2 of Foreign Awards (Recognition and Enforcement) Act, 1961, read with clause 3 of Article 1 of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.

CHANDURKAR, J.**

This appeal arises out of an order passed by a learned single Judge rejecting a petition filed by the appellants for enforcement of a foreign award u/s. 6 of the Foreign Awards (Recognition and Enforcement) Act. 1961 (hereinafter referred to as "the 1961 Act").

2. It is not necesssary for the purpose of the appeal to refer to the details of the transactions in respect of which a contract in writing was entered into on 16th Sept. 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 tons 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 Jan./Feb. 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 cl. No. 5 was to be deleted. This contract was signed 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

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*All India Reporter, 1983 Bombay, 36.
**For himself and Mehta, J.

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 up to 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 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 Aug. 1977 for proceeding with the arbitration. Mr. Waller had also independently written to the respondents on 26th 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 Grain & Shipping Ltd. in connection with the contract dated 16th Sept. 1976 and that the meeting with the buyers' Arbitrator was fixed for 18th Aug. 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 Arbitration proceeded to decide the dispute and made an award on 8th Sept. 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 per cent 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 Sept. 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 Oct. 1977 and when some other common friends were also likely to visit U.K. After this letter of 19th Sept. 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 u/s. 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 S. 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., AIR 1978 Bom 106. In that decision, the learned Judge has taken the view that for application of S. 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 Sec. 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 (AIR 1978 Bom 106), 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 Sept. 1976 all the terms contained in standard form No. 119 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 respondent 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 Judge, however, having regard to the construction of Sec. 6 (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 S. 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 notifications in the Official Gazzette, declare to be territories to which the said Convention applies."

As already pointed out the words "legal relationship . . . . . considered as commercial under the law in force in India" were construed in the Indian Organic Chemicals Ltd.'s case (AIR 1978 Bom 106) 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 Sec. 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 Conventions 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 Sept. 1923, to which India was a signatory. Cl. 1 of the protocol reads 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 subject 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 so 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 the 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 conditions which were necessary for recognition or enforcement of a foreign arbitral award. The Convention also laid down circumstances under which the Court could refuser ecognition 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 Sec. 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. Sec. 7 contained conditions for enforcement of foreign awards and u/s. 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 judgment according to the award and under sub-sec. (2) of Sec. 6 it was provided that upon the judgment 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 enforce-

ment 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 application requiring them to show cause why the award should not be filed. The crucial provision with regard to the foreign award is, however, in Sec. 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 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. Cl. 1 of Article I of the Convention reads 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 cl. 3 of the Convention it is open to any State when signing, ratifying 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 cl. 3 of Art. 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 only 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 cl. 1 of Art. 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."

Art. V enumerated the circumstances under which recognition and enforcement of the award may be refused, while the earlier Art. 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 Art. 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 Sec. 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 Sec. 5 and u/s. 6 the Court was empowered to order the award to be filed and to pronounce judgment according to the award, if it was satisfied that the foreign award was enforceable under the Act. Upon such judgment 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 Art. V of the New York Convention. The declaration contemplated by cl. 3 of Art. 1 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 Sec. 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 Oct. 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 (AIR 1978 Bom 106) 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 'foreign 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 guidelines 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 definition 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 Sec. 3 (29) of the General Clauses Act and to the definition of "existing law" in Article 366 (10) of the Constitution of India. Cl. (10) of Art. 366 of the Constitution 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 Sec. 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 relevancy of the definition of "existing law" made in Art. 366 (10) of the Constitution 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 Art. 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 u/s. 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 Sec. 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 almost 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 wtih the concept of a quasi-contract and what was argued was that when the definition used 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 Sec. 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 judgment 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 as to what kind of provision they contemplated which 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 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 partakes of commerce or which is in the nature of commerce, then inevitably the relationship between the parties to the contract 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 (AIR 1978 Bom 106) 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.

24A. 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 S. 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, AIR 1952 SC 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, AIR 1953 SC 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, Vol. 365, containing the judgment in the case of the Island Territory of Curacao v. Solitron Devices, Inc. given by the United States District Court on 14th. Feb. 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. [s.] 202) and thus did not fall under the Convention (9 U.S.C. [s.] 202) The reference to Sec. 2 is 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. [s.] 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 'commerical'. 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, Vol. 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 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 1, 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 *classic commercial relationship*—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 Para 3 of Art. I of the New York Convention refers to "legal relationships . . . . Which are considered as commercial under the national law of the State making such declaration". 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 on the Recognition and Enforcement of Foreign Arbitral Awards will be attracted.

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 are the basis of the provisions defining 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 others, causes relating to the construction of mercantile documents, export or amongst import of 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 commercial 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 S. 2 provides that notwithstanding anything contained in the Indian Evidence Act. 1872, statement 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. How 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 judgment 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 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 para 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 of different States."

The proposition laid down by the learned Judge cannot be disputed. However, when the learned Judge proceeded to construe the provision in S. 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 para 42:—

"The expression occurring in S. 2 is 'legal relationships, whether contractual or not, considered as commercial *under the law in force in India*' (emphasis supplied). It, therefore, follows that not only should the relationship 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 trans-

lated 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 para 43, in which 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 u/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.) Now, an operative legal principle in force in India would also be a 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 S. 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, (1964) 66 Bom LR 758: (AIR 1965 Bom 114). 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 judgment 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 S. 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 dt. 27th Oct, 1977 was without authority. It is difficult for us to see how the respondents can make any grievance with regard to this modification whereby their liability has been reduced. The original award of the arbitrators required the respondents to pay the damages of £ 12,000/-. According to the appellants, the actual amount should have come to £ 11,750/- and they, therefore, wrote to the

arbitrators on 27th Oct. 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 field 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 the arbitrators dated 9th Nov. 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 per cent p.a. from 27th April 1977 to 9th Nov. 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.

Appeal allowed.