

(1970) 08 DEL CK 0010

In the Delhi High Court

Case No : Suit Appeal No. 122A of 1970

Compagnie De Saint Gobain

APPELLANT

Vs

Fertilizer Corporation of India Ltd.

RESPONDENT

Date of Decision : 28-08-1970

Acts Referred:

Citation : (1970) ILR Delhi 927

Hon'ble Judges : P.N. Khanna, J

Bench : Single Bench

Advocate : G.B. Rai, S.B. Saharya, A.B. Saharia, Ramrakhaini, B.N. Sen, J.B. Dadachandji and C.M.Oberoi, for the Appellant;

Judgement

P.N. Khanna, J.

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

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

(2) Certain disputes having arisen between the parties, the petitioner on 19/06/1964 made an arbitral request to the Court of the International Chamber of Commerce, Paris, for the adjudication of its claim made up of Dollars and

rupees in all amounting to Rs. 1,52,40,401.67. The respondent company contested the petitioner's claim; and filed a counter-claim made up of dollars and rupees amounting in all to Rs. 2,70,18,167.00 or alternatively Rs 1,58,28,803.00, which, however, was disputed by the petitioner.

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

(4) The said Tribunal held its first three sittings in New Delhi and drew its terms of reference (issues in the case) which were agreed to by the parties and approved by the Court of Arbitration in accordance with Article 19 of the Said ICC Rules. Sittings of the Tribunal were then held in Paris for recording evidence for some of the petitioner's witnesses. Further sittings were held from time to time in New Delhi and finally in Mussoorie (India). After the arguments on the counter-claim were concluded, Mr. Sverre Daelhi resigned on 28/11/1967, Rt. Hon^{ble} Lord Devlin of England was appointed in his stead as the Chairman of the Tribunal. On October 11, 1968 Mr. K.K. Shende, a member of the Tribunal, died. A protocol was signed between the parties agreeing that notwithstanding the death of Mr. Shende the arbitration would continue and that the decision recorded by him before his death and sent to the Court of Arbitration would be taken on record. Professor B. Goldman was requested to record his decision also in writing; and Lord Devlin was requested to make the award. Lord Devlin heard arguments of the parties in Delhi from 14th to 25/04/1969. A further protocol was signed by the parties on 25/04/1969, specifically agreeing that Lord Devlin shall have jurisdiction to give his final award, thus constituting him the sole arbitrator.

(5) Lord Devlin submitted his award dated 29/09/1969 to the Court of Arbitration which was communicated from Paris, to the parties by the Secretary General of the said court, by his letter dated 16/10/1969. According to it a sum of Dollars 179,438 and Rs. 56,65,978.00 were awarded in favor of the respondent-corporation against the petitioner. As the award amount was not paid and the petitioners did not have any property in India, the respondent took out execution of the award through the French Court. Certain bank accounts and trade-marks of the petitioner were attached. On the petitioner challenging the said attachment, the French Court ordered it to furnish bank guarantees instead, which were furnished.

(6) Another proceeding was filed by the petitioner in the French Court seeking vacation of the order of execution. While this was pending, the present appeal was filed in this court u/s 33 of the Arbitration Act, praying for an order declaring that the aforesaid award of Lord Devlin had no legal effect or

existence and was not enforceable or in the alternative for the suspension of the award till it was filed and made a rule of the Court under the Arbitration Act, 1940. According to the petitioner's allegations, the present award becomes enforceable under the French law, in accordance with Article V(l)(e) of the "New York Convention of the year 1958 on the Recognition and Enforcement of Foreign Arbitral Awards", by an order of the President of the Civil Court, without an enquiry into the merits of the case, if the award has become binding on the parties or has not been set aside or suspended by a competent authority of the country in which or under the law of which the award was made. The petitioner is apprehended that the respondent would take advantage of the jurisdiction of the French Civil Court in enforcing the award without the same being made a rule of the Court. It was for this reason that the petitioner considered it necessary to move this court under section 33 of the Arbitration Act, 1940, for adjudicating upon the validity and the effect of the said award.

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

(1) That it is made out of time and after the arbitration became functus officio;

(2) That the award has not been filed in the Court as required by the Arbitration Act, and is, therefore, a nullity;

(3) That it is not enforceable because the amounts due under the Award have not been finally determined;

(4) That it deals with matters in respect of which there is no arbitration agreement or reference.

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

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

"ARTICLE 26 Award to be passed by the Court of Arbitration. Before completing the award, the arbitrator shall submit the same to the Court of Arbitration. The Court may lay down modifications as to its form and if need be, draw the arbitrator's attention even to points connected with the merits of the case but

with due regard to the arbitrator's liberty of decision. No award shall under any circumstances be issued until approved as to its form by the court of Arbitration.

(10) Article 27 pronouncement of the award. The arbitral award shall be deemed to be made at the place of arbitration proceedings and on the date of signature by the arbitrator.

(11) Article 28 : Notifying the parties of the award.

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

2. XX Xx Xx XX

(12) According to Mr. Sen, the Court of Arbitration is the final authority, whose approval is a condition precedent to the completion of the award, which is issued by the Secretariat of the Chamber from Paris. The award is actually made thus out of India, although a deeming provision has been made in Article 27 whereby the award is deemed to be made at the place of arbitration proceedings. In the present case, the place of arbitration proceedings was agreed to be in India in the first instance, New Delhi having been specifically mentioned to be the venue of arbitration proceedings. By mutual consent, the parties agreed subsequently that the proceedings shall take place in New Delhi, Paris and Mussoorie (India). It could not, therefore, be said that India is the only place where the arbitration proceedings took place. The arbitration proceedings also took place in Paris and as the award was in fact made in Paris, the deeming provision in Article 27 would not make any difference. For the Indian Courts, the award urged Mr. Sen, would remain a foreign award. He relied on *Lochman Das Sat Lal and Another Vs. Parmeshri Dass and Another*, where it was held that the award made and signed at Karachi was a foreign award. Mr. Sen also submitted that the scheme of the Arbitration Act was entirely different from the scheme contemplated under the ICC Rules and for the proposition he relied upon the judgment of the Supreme Court in *Societe De Traction Et D'electricite Societe Anonyme Vs. Kamani Engineering Company Ltd.*, where commenting on the ICC Rules, it was observed that "the scheme of arbitration contemplated by these Rules is different from the scheme contemplated by ss. 3 to 38 of the Arbitration Act". In these circumstances, the learned counsel submitted that application u/s 33 of the Arbitration Act was misconceived and untenable. The arguments of Mr. Sen, however, rest on a faulty premise. His contention that the award was made outside India and is not governed by the Indian Arbitration Act has no basis.

(13) Para 18 of the letter of instructions specifically provides that "the contract will be governed by the law of India". The arbitration clause in para 23 of the said letter states that "the venue of all arbitration shall be New Delhi in India". Article 7 of the ICC Rules provides that the Court of Arbitration does not by itself

settle disputes. It appoints and confirms the nomination of arbitrators. Although the Court of Arbitration, Paris, has to approve the form of the award before it is completed, the award nonetheless remains that of the arbitrator, whose liberty of decision is not prejudiced. According to Article 16, the arbitration proceedings are governed by the Icc Rules and in the event of no provision in the rules, those of the law of procedure chosen by the parties, or failing such choice, those of the law of the country in which the arbitrator holds the proceedings. Article 18 provides that the proceedings before the arbitrator shall take place in the country determined by the Court of Arbitration unless the parties shall have agreed in advance upon the place of arbitration, which in the present case was agreed to be India. According to Article 27, the arbitral award shall be deemed to be made at the place of the arbitration proceedings, and on the date of signature by the arbitrator.

(14) It is not disputed that before the nomination of Lord Devlin, as the sole arbitrator, the arbitration proceedings took place in New Delhi and Mussourie. Evidence of some of the petitioner's witnesses was recorded in Paris also; but this was done at the request of the respondent who in their application, for the purpose, expressly stated that "in the event of the Tribunal itself recording the evidence in Paris, it is to be understood that such an act will not constitute a change of venue of the arbitration proceedings, which is at New Delhi, according to the Tribunal by its order dated 14/04/1965 observed: "Since the parties have now consented to record the evidence of their witnesses by the Tribunal itself in Paris, on the condition that by itself it shall not imply a change of venue of the proceedings, we hereby modify our first order of recording the evidence in Paris on commission or letter of request and decide to record such evidence by the Tribunal itself". The venue of arbitration, Therefore, remained in India. The final arguments in any case were heard in India. So far as Lord Devlin, who was ultimately agreed to be the sole arbitrator, is concerned, he conducted the entire proceedings in India only. The award itself does not appear to have been signed in Paris and must be presumed to have been made in India. It was accordingly an Indian award to which the provisions of the Indian Arbitration Act, 1940 apply.

(15) Section 47 of the Arbitration Act, 1940 reads as follows:

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

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

(17) The provisions of section 46 have no relevancy for our present purposes. The Act, Therefore, applies to all arbitrations, of whatsoever nature and all proceedings there under save as is otherwise provided by the law for the time being in force. Unless, Therefore, any law provides otherwise, the Arbitration Act,

1940 will govern the arbitration in this case.

(18) According to Mr. Sen, the award of Lord Devlin is governed by the Arbitration (Protocol & Convention) Act, 1937, herein called "the 1937 Act," or by the Foreign Awards (Recognition & Enforcement) Act, 1961, herein called the 1961 Act", and that these are the laws which provide otherwise. These two enactments which are more or less analogous in terms were passed by the Indian Legislature to give effect to certain International Protocols and Conventions, framed to meet the widely expressed desire in the commercial circles throughout the world to accord recognition and protection to arbitration agreements and awards. The first was the Geneva Protocol of Arbitration Clauses (1923) and the International Convention on the Execution of the Foreign Arbitral Awards (1937). These were signed at Geneva on behalf of India subject to certain reservations limiting India's obligation under the instruments to commercial contracts. For the purpose of giving effect to this protocol and for enabling the said Convention to become operative in India the 1937 Act was passed. On 10/06/1958, came the Convention on the Recognition & Enforcement of Foreign Arbitral Award, at New York, to which India was a party. In order to give effect to the New York Convention the 1961 Act was passed. According to the definition of "foreign award" given, in section 2 of the 1961 Act it means an award made on or after 1. 1th day of October, 1967. According to section 10 the aforesaid 1937 Act ceased, to have effect in relation to Foreign Awards to which the said 1961 Act applied. The award in the present case having been made on 29/09/1969 the 1961 Act would, if applicable, be the only relevant provision, requiring attention to see if it provides otherwise than as provided in the arbitration Act, 1940.

(19) Turning to the New York Convention, given in the Schedule to the 1961 Act, it is plain that it applies according to its Article I, to such arbitral awards, only, which are not made in the territory of a State, where the recognition and enforcement of such awards are sought. In the present case, the award, having been made in India, its recognition and enforcement were sought not in India, but in France. The Convention under the Indian law would be applicable only if the award was not made in India and its recognition, and enforcement were sought here. This not being the case, the New York Convention in the Schedule to the 1961 Act has no application, to this award in India. The New York Convention may be applicable to this very award in France, as for the purpose of Courts in France, it having been made in India, is a foreign award. This petition was accepted by the Paris Court, as appears from annexure "A" filed by the respondent along with its sub-rejoinder, which is a translation of the order of the First Vice-President of the French Court, on the petitioner's application for cancellation of the attachment of its Bank accounts. It is mentioned in the said court order that the award was made in India and that the parties were in agreement on the applicability of the New York Convention of 10/06/1958. The award was thus recognised in Paris, to be an award made in India and thus a foreign award.

(20) The 1961 Act under the circumstances, has no application. There being no

other law in force, which provides otherwise, the Arbitration Act 1940 remains applicable to the award of Lord Devlin. The 1961 Act, even if it was applicable, contains no provisions for declaring the effect, validity or the existence of an award. Even Article V(i)(e) of the Convention given in the Schedule to the 1961 Act provides that the award has to be set aside or superseded, if so required, by a competent authority of the country, in which or under the law of which, that was made. The matters for which there is no provision in the 1961 Act or the Convention, have thus to be dealt with by the ordinary law of the land under the law of which the award was made. The provisions of section 33 of the Arbitration Act. Therefore, are not ousted under any circumstance.

(21) In *Societe De Traction Et D'electricite Societe Anonyme Vs. Kamani Engineering Company Ltd.*, , relied upon by Mr. Sen the Supreme Court had no occasion to go into the question of the applicability of the 1937 Act, as it was not disputed that the proposed arbitration under the Rules of the International Chamber of Commerce was governed by the Protocol on Arbitration Clauses agreed to at Geneva on 24/09/1923; and the Protocol in the First Schedule given in the 1937 Act, passed to give effect to the same, was applicable. Regarding the applicability of the Arbitration Act, 1940, it was observed by the Supreme Court in that case that section 47 of the Arbitration Act made the provisions of the Arbitration Act applicable to all arbitrations and to all proceedings subject, however, to the provisions of section 46 and so far as was otherwise provided in law for the time being in force. Under this section, Therefore, the court was of the view that "the legislature has clearly made the provisions of the Arbitration (Protocol & Convention) Act, 1937 applicable to consensual arbitration, under the Arbitration Act, 1940, when the conditions prescribed for the application of that Act are attracted, even if the scheme of Arbitration recognised thereby is inconsistent with sections 3 to 38 of the Arbitration Act, 1940". It was only by virtue of the applicability of the Arbitration Act, 1940 itself that the 1937 Act was held to apply to the proceedings under the ICC Rules, which was admitted to be otherwise applicable in the circumstances of that case.

(22) In *Lochman Das Sat Lal and Another Vs. Parmeshri Dass and Another*, , also relied upon by Mr. Sen, a Bench of the Punjab High Court consisting of Bishan Narain J. and A.N. Grover J. (as he then was), was of the view that it was open to the parties "to agree that any dispute arising between them shall be submitted to arbitration at any place and in any particular country in any part of the world". As arbitration proceedings in that case took place in Karachi in pursuance of the arbitration agreement, the award was made and signed at Karachi, it was held that the said award was a foreign award. According to the ratio of that decision, it is the intention of the parties, which determined the place or the country where the proceedings are to take place and consequently the award is to be made. The Supreme Court applying Indian law in *M/s Dhanrajmal Gobindram v. M/s Shamji Kalidas & Co.* (1961) 3 Scr 1020, observed : "Whether the proper law is the *lex loci contractus* or *lex loci solutionis* is a matter of presumption; but there are accepted rules for determining which of them is applicable. Where the parties

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

(23) The other objection of Mr. Sen that the courts in Paris being seized of the matter, the courts in India should not entertain the present application, is equally devoid of force. The Court in Paris, being the court of a country, the laws of which do not apply to this award, will not determine the existence, validity or effect of this award. They on the other hand, will recognise and enforce the award under the New York Convention, unless the petitioner can establish that the award is not binding on the parties, or has been set aside or suspended by a competent court in India : vide sub-clause (c) of clause (1) of article V of the New York Convention. The courts in India alone are competent to decide the application u/s 33 of the Arbitration Act filed on behalf of the petitioner-company ; and the question of a conflict of the decision in India with that in Paris does not arise.

(24) Another objection was raised by Mr. Sen that this court has no jurisdiction to entertain this application even if an application u/s 33 of the Arbitration Act, 1940 is competent. According to him, all questions relating to the validity effect or existence of an award or an arbitration agreement between the parties to the agreement, have to be decided u/s 31(2) of the Arbitration Act, 1940, by the court in which the award may be filed and by no other court. According to section 31(1) of the said Act, an award can be filed in any court having jurisdiction in the matter to which the reference relates. According to section 2(c) of the Act, "Court" means a civil court having jurisdiction to decide the questions forming the subject matter of the reference, if the same had been the subject matter of a suit. The learned counsel submitted that the matter in controversy between the parties relates to a turnkey job for the construction of Nangal Fertilizer Group of Plants, at Nangal, which is beyond the Union Territory of Delhi. The subject matter of the dispute, according to him, is not within the jurisdiction of this court. From the language of section 2(c) and section 31(1) of the Arbitration Act, the jurisdiction

according to the learned counsel, has been made dependent not upon the residence or place of business of the parties ; but on the subject-matter of the reference. Under the circumstances, the learned counsel submitted, this court has no jurisdiction to entertain the present petition. He relied on *Inder Chand Jain Vs. Pooran Chand Bansilal Dhar*, where the head-note reads as follows:

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

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

(26) It may, however, be observed that section 120 of the CPC specifically excludes the applicability of section 20 of the High Court in the exercise of its original civil jurisdiction. In other words, the scope of the jurisdiction of the High Court on its original side is not dependent merely on the cause of action in the case. The jurisdiction appears to be much wider. Sub-section (2) of section 5 of the Delhi High Court Act, 1966 lays down that notwithstanding anything contained in any law for the time being in force, the High Court of Delhi shall also have in respect of the said Territories (Territories for the time being included in the Union Territory of Delhi), ordinary original civil jurisdiction in every suit the value of which exceeds Rs. 50,000.00. This would mean that the Delhi High Court would have jurisdiction in the matter to which the reference relates, if it has some nexus with the said territories. The residence or place of business in the Union Territory of Delhi of the respondent or defendant in a case dealing with the matter to which the reference relates, coupled with the fact that the entire correspondence dealing with such matter took place with the Delhi office alone, would be a sufficient nexus of such kind to give jurisdiction to this court. The jurisdiction is not because of the residence or of the location of the place of business of the respondent but because of the subject matter of the reference which has a nexus or connection with the territory concerned through such residence or the location of the place of business of the respondent and because of the entire material correspondence having taken place with the Delhi office. But, this question need not detain our attention any further, as Mr. Pai at the end of his arguments, filed contract documents, which show that the original tender submitted by the

petitioner was accepted by the respondent by its letter dated 10/10/1957, in Delhi. The petitioner, however, was requested to intimate its acceptance of the terms and conditions set out therein. The petitioner in reply, while conveying its acceptance suggested a revision of certain terms in some foot-notes and asked for its acceptance by the respondent. There appears to have followed some correspondence intended to clarify certain terms of the contract. The last letter was dated 3/06/1958, written by the respondent from New Delhi, whereby it conveyed its agreement to the revised text of the foot-note which had been submitted to it by the petitioner. This letter was thus the final acceptance in New Delhi of the terms of the contract. The contract, therefore, was concluded at New Delhi. A part of the subject matter of the reference matured and, therefore, a part of the cause of action arose in New Delhi. There does exist sufficient nexus, under the circumstances, between the subject matter to which the reference relates and the Union Territory of Delhi. This court, therefore, has jurisdiction to entertain the present application and the objection of Mr. Sen is not tenable.

(27) Dealing with his contention that the award was a nullity, Mr. Pai submitted that the arbitrator had become functus officio when he made his award dated 29/09/1969. The time limit under Article 23 of the I.C.C. Rules within which the award could be made, was 60 days from the date on which he signed the statement defining his terms of reference. The arbitrator could be deemed to have done this latest by 25/04/1969, while he made his award on 29/09/1969, along after the said sixty days had expired. Extensions granted by the court of Arbitration relied upon by Mr. Sen, are of no consequence, submitted Mr. Pai, in view of sub-section (2) of section 28 of the Arbitration Act, which reads as follows:

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

(28) According to him, the court of arbitration and the arbitrator are parts of the same arbitration scheme; and the order of the court of arbitration enlarging the time for making the award can be taken as the order of the arbitrator; but this being without the consent of the parties was void and of no effect in view of section 28(2) of the Arbitration Act. Even if the Court of Arbitration was taken to be independent of and separate from the arbitrator, the enlargement of time, which is the function of the court u/s 28(2) of the Arbitration Act, cannot be granted by a person acquiring authority for such purpose by agreement of the parties as that would be hit by section 28 of the Contract Act, being an agreement in restraint of legal proceedings. It is, however, not necessary to enter into this discussion as u/s 28(1), "the Court may, if it thinks fit, whether the time for making the award has expired or not and whether the award has been made or not, enlarge from time to time, the time for making the award." The court, it will be seen, has suo motu power to move in the matter. An application was, however, made at the end of arguments on behalf of the respondent praying for suitable

extension of time for making the award up to the day on which the said award was made. It is not disputed that time can be extended even after the award has been made. Subba Rao J. of the Supreme Court speaking for himself and BP. Sinha C.J. and Madhok J. in the case of Hari Shankar Lal Vs. Shambhunath Prasad and Others, , observed: "Section 28 of the Act enables the court to - extend the time for making of the award; extension of time may be given even after the award has been factually made. So till the time is extended an award cannot be made, though, when extended, the award factually made may be treated as an award made within the time so extended. To put it differently, if time was not extended by court, the document described as an award would be treated as non est."

(29) Mr. Pai submitted that the discretion of the court should not be exercised in favor of enlarging the time as prayed in this case, as that would be unfair to the petitioner. His request to the arbitrator to file the award in court was not acceded to. He, therefore, had no opportunity to file objections to it. The award being out of time is non est) as was held by the Supreme Court in Hari Shankar Lal Vs. Shambhunath Prasad and Others, . the petitioner in the bona fide belief that the award is a nullity took no further steps to have the award filed in court to enable it to file objections u/s 30, Arbitration Act. Now, the time for the petitioner to make an application in court u/s 14 of the Arbitration Act, has expired, and if the time is enlarged by the court, the petitioner may be faced with difficulty in filing objections and may be highly prejudiced. The enlargement of time is a matter of discretion which should not be exercised in the respondent's favor in view of the above circumstances, submitted Mr. Pai.

(30) It was urged on behalf of the respondent that the award was made within the time allowed by the Court of Arbitration in accordance with ICC Rules, agreed upon by the parties, as governing the arbitration. The award, was, thus, made in time as extended in accordance with the agreement of the parties, it was at their specific request that the arbitrator after conclusion of the argument proceeded to make the award. The petitioner had all along been participating in the arbitration proceedings which started in 1964 or 1965; and never questioned the arbitrator's power to proceed, although the enlargement of time had not been granted by the Court. The dates for proceeding in the case were being fixed from time to time, admittedly by the consent of the parties. The proceedings had dragged on over several years and the parties had incurred considerable time and expense. The court should exercise its discretion for enlarging time as prayed, urged the learned counsel.

(31) The contentions of Mr. Sen are not without force. There was voluminous documentary material, oral evidence and various other complicated issues which had to be tackled. The arbitrator had spent considerable thought over the matter and had written a well considered award supported by a statement of reasons, running into 162 paragraphs and a resume of the arbitrator's findings. The delay in writing the award therefore, is not unreasonable. The respondent

has not been shown to have delayed or hampered the proceedings. Nor does it appear in any manner to be responsible for the delay in the making of the award". the petitioner, in fact, participated in the proceedings throughout ; and always waived objections to further dates being fixed even though the proceedings had continued over several years. Even when Mr. K.K. Shende, one of the arbitrators died, the parties had expressed their keenness to see the arbitration through. The petitioner thus took a chance of a decision favorable to it. And now when the award has gone against it, its objection to the enlargement of time are wholly unjustified. Its non-filing of an application u/s 14, Arbitration Act earlier, for filing of the award in court has no relevance for the present purposes. The petitioner itself knew as stated in para 19 of the petition that under the "French law the award is much exercisable by order of the court without enquiring in the merits of the case, if the award has become binding and has not been set aside by a competent authority of the court in which or under the law of which the award was made. It is the petitioner's case that the award was made in India under the Indian law. It was, Therefore, for the petitioners to take timely steps to have the award declared a nullity, it thought it was so, more especially as it was aware that it could be enlarged by the court even after the award had been made. The petitioner not having moved the court u/s 14, earlier cannot plead its own neglect, for invoking the exercise of court's discretion against the grant of time. The petitioner has now filed an independent application u/s 14, Arbitration Act, in respect of which nothing said in this judgment, will have any effect; nor should it be taken as an expression of opinion affecting that application. The said application shall be tried on its own merits, and the petitioner will be granted appropriate relief, if found entitled to any. But, that has no relevance for the purpose of extending or not extending time for making the award.

(32) Mr. P. A. I. submitted that the time should not be enlarged in this case also because the petitioner has very serious objections to the award on merits. But it was for the arbitrator to decide the merits of the case; and in case the court can go into the award u/s 30 of the Arbitration Act after its being filed in court, the petitioner will have an opportunity to urge its objections, after its application u/s 14 is granted and the award is allowed to be filed in court. Without the award being before the court, nothing can be said about the petitioner's objections on the merits.

(33) The learned counsel have cited a number of judgments for and against the grant of the prayer for enlargement of time ; but all of them are based on the facts of each individual case. There can be no doubt that the enlargement of time for making the award is entirely within the discretion of the court. In *Kanhayalal Dugar Vs. Ashkaran Kishanlal*, it was observed that the court's power u/s 28 to extend time are entirely discretionary and are not limited. The court can enlarge time for making the award even after the award has been made and even after the time has expired. It was also held that one of the persuasive considerations before the court would be, "that after all the time, expense and trouble in going into arbitration and actually having the award, regarding which there is no

meritorious objection, it is properto enlarge the time and make the award, the fruit ofso much time, labour and expense, effective and notto frustrate it by refusing time."" Looking to all the factsand circumstance stated above, I am satisfied that it isa fit case where time for making the award should beextended. I, Therefore, enlarge the time until 29-9-1969,the date on which the award was made in this case. Theaward was, Therefore, made within the time allowedby law ; and is not invalid on the ground of being madebeyond time.

(34) Coming to the merits of the case, Mr. G.B. Paithe learned counsel for the petitioner-company submitted that an award, which has not been made a rule of the court and has not become a decree of the court, is a nullity and as such has no existence in law and remains a dead letter. The learned counsel cited a number of decisions of various courts, viz. Ram Sahai Vs. Babu Lal, , Seonarain Lal Vs. Prabhu Chand, , Sait Pamandass Sugnaram Vs. T.S. Manikyam Pillai and Others, , O. Mohamed Yusuf Levai Saheb Vs. S. Hajee Mohammed Hussain Rowther (died) and Others, , and Sardool Singh Vs. Hari Singh and Others, . In all these cases was held that no party can be prejudiced by the mere existence of an award, which does not become operative and enforceable until it has been filed in court and the court adjudicating upon its validity passes a judgment and a decree in accordance therewith.

(35) It is not necessary to go into the merits of the afore-said decisions, as this question was considered by the Supreme Court in M/s Uttum Singh Duggall v. Union of India, Ca 162 of 1962 authoritatively decided on 11/10/1962. It was held that "after an award has been pronounced, the rights and liabilities of the parties in respect of the said claims can be determined only on the basis of the said award. After an award is pronounced, no action can be started on the original claim which had been the subject matter of the reference. The court approvingly quoted from the observation of Mookerjee J. of the Calcutta High Court in the case of Bhajabari Saha Banikya v. Behary Lal Basak 33 Cal. 881, as follows: "The award is in fact, a final adjudication of a court of the parties own choice, and until impeached upon sufficient grounds in an appropriate proceedings, an award, which is on the face of it regular, is conclusive upon the merits of the controversy submitted, unless possibly the parties have intended that the award shall not be final and conclusive.....in reality, an award possess all the elements of vitality even though it has not been formally enforced and it may be relied upon in a litigation between the parties relating to the same subject matter". This view was approved and affirmed by the Supreme Court in Satish Kumar and Others Vs. Surinder Kumar and Others, . It was held that an award has some legal force and is not a mere waste paper, further, if the award is final and binding on the parties, it can hardly be said that it is a waste paper, unless it is made a rule of the court. Mr. Justice Hegde, in a separate judgment, agreeing with the majority, observed that "the award does create rights in that property, but those rights cannot be enforced until the award is made a decree of the Court". The award under consideration, thus create? rights and is final and, Therefore, binding ; although in case it is sought to be enforced in India, some

further steps may be required to be taken for that purpose.

(36) Mr. Pai submitted that the award in the present case was not final as it was signed and completed by Lord Devlin before submitting it to the Court of Arbitration. According to Article 26 of the Icc Rules, the award is required to be approved by the Court of Arbitration before it can be completed by the arbitrator. This according to the learned counsel appears not to have been done. But, the award was admittedly communicated to the parties by the Secretariat of the International Chamber of Commerce, in accordance with Article 28 of the Icc Rules. The formalities required under Article 26 being matters of domestic procedure, must be presumed to have been fully complied with. The objection of the learned counsel, Therefore, has no force.

(37) Mr. Pai also referred to Article 29 of the Icc Rules and submitted that the arbitral award is stated to be final; but nothing is stated about its binding effect. This article being a specific provision in the contract between the parties, indicates, according to him, an intention of the parties different from para 7 of the first Schedule of the Arbitration Act, which would have made the award not only final but binding also. But, section 3 of the Arbitration Act applies the provisions set out in the first Schedule to every arbitration agreement, unless a different intention is expressed. Nothing having been said about its binding nature, the award would become binding under the provision to that effect in clause 7 of the first Schedule. Further, sub-clause (2) of Article 29 says that the parties undertake to carry out the award without delay, showing thereby the unmistakable intention of the parties to remain bound by the award. If the award is final, it implies that the award is binding on the parties; and the contentions of Mr. Pai to the contrary has no basis.

(38) In the result, the award dated 29/09/1969 of Lord Devlin, is declared to be final and binding on the parties: although further steps may be required to be taken to make it a decree of the court, if it is sought to be enforced in India. In the circumstances of this case, there will be no order as to costs. This will dispose of O.H.P. 98/70 filed by the respondent for enlarging time for making the award.