Delhi High Court
Delhi High Court
Fuerst Day Lawson Ltd. vs M/S. Jindal Exports Ltd. on 19 February, 1999
Equivalent citations: 1999 IIAD Delhi 265
Author: . M Sharma
Bench: . M Sharma
ORDER

Dr. M.K. Sharma, J.

1. This order, which I propose to pass, shall dispose of the application registered as E.A. 347/1998 filed by the respondent herein raising a preliminary objection about the aintainability of the execution petition filed by the petitioner herein and seeking for ismissal of the execution petition on the ground that the said petition is not aintainable.

2. An agreement was entered into between the petitioner and the respondent on 1.8.1994 whereunder the respondent was to supply certain goods to the petitioner during the period from January 1995 to June 1996. In course of execution of the aforesaid agreement certain disputes and differences arose between the parties and accordingly the petitioner filed a claim petition before the International General Produce Association, the body nominated by the petitioner as the arbitrators. It appears that the respondent objected to the aforesaid appointment. The arbitrators appointed entered into reference, received evidence and thereafter passed an award on 13.8.1996. By the aforesaid award the claims of the petitioner were allowed and by virtue of the said award the respondent was made liable to pay an amount of USD 408,600 to the petitioner. Thereafter the petitioner as decree holder filed an execution application in this court against the respondent for execution of the foreign award passed by the arbitrators on 13.8.1996. The said application was treated as an execution petition and in the purported exercise of powers vested under Order 21 of the Code of Civil Procedure, warrants of attachment were issued against the respondents in respect of its properties as described in the schedule annexed to the petition as ANNEXURE 'F'. Immediately thereafter the respondents appeared in the present proceedings and filed the aforesaid application in this court seeking for the aforesaid relief. On 9.9.1998 the said application was listed before the court. Counsel appearing for the respondent stated before the court that the attachment of the properties had caused enormous hardship to the business of the judgment debtor and therefore as an interim measure sought for recall and/or variance of the order dated 4.8.1998 passed by this court directing for issuance of warrants of attachment till the application filed by it is disposed of. Since the respondent was ready and wiling to deposit in court bond certificates of the Indian Railway Finance Corporation Limited, it was ordered that the said bond certificates might be retained by the Registry of this court as a security for the due satisfaction of the decree/award as and when enforced. The said order was passed so as to enable the respondent to continue its business ventures and functioning and the order was passed without prejudice to the rights and contentions of the parties in the present proceedings. The petitioner has filed its reply to the aforesaid application to which a rejoinder also stands filed. Accordingly the aforesaid application was taken up for conside fsionsration and disposal and arguments thereon were heard.

3. In the application filed by the respondents raising the preliminary objection, it is stated that the execution proceedings instituted by the petitioner are not maintainable and are premature and therefore, no attachment order could have been passed by this court on the basis of such premature proceedings which is without jurisdiction, therefore, the petition should be dismissed and the order passed on 9.9.1998 is required to be recalled.

4. Dr. L.M.Singhvi and Dr. A.M.Singhvi, Senior Counsel appearing for the respondent submitted that the execution application instituted by the petitioner in this court is misconceived, premature and is not maintainable in law. In support of their submissions the learned counsel placed before me the scheme of the Act particularly the provisions of Sections 46, 47, 48 & 49 of the Arbitration and Conciliation Act (hereinafter referred to as the Arbitration Act). It was submitted that before an execution petition could be filed in this

court there must be an application seeking enforcement of the award and thereafter only when the court is satisfied that the foreign award is enforceable under Part II of the said Act then only an execution petition is maintainable in the court. It was further submitted that only in the event of the court being satisfied that the foreign award is enforceable then only the award could be deemed to be a decree of that court capable of execution under Section 46 of the Act and such satisfaction as contemplated in Section 49 must be arrived at after giving notice of the award sought to be enforced and upon hearing the party against whom the award is sought to be enforced. They submitted that the present petition is not intainable as no proceedings under Section 49 have been instituted by the petitioner and therefore, they could not be permitted to get the award executed without having applied for prior approval of the court as envisaged under section 49 of the Act. It was also submitted that by instituting an execution proceeding which is not maintainable at this stage the petitioner has sought to deprive the respondents of their right to object to the enforcement of the foreign award and that the said execution proceeding is a nullity in the eye of law. The learned counsel for the respondent also submitted that the award in question, in Execution case No.168/1998, is governed by the provisions of the Foreign Awards Recognition and Enforcement Act, 1961 (hereinafter referred to as the FARE Act) and not by the Arbitration and Conciliation Act, 1996. In support of his contention the learned counsel submitted that the request for arbitration was received by the respondent on 20.11.1995 and the petitioner filed their claims with the arbitrators on 18.12.1995. The Arbitral Tribunal was also constituted on 24.1.1996 and therefore, in view of the provisions of Section 85 read with Section 21 of the Arbitration and Conciliation Act, the provisions of the new Act for enforcement/execution are not applicable and the provisions of the FARE Act, 1961 would apply to the enforcement of the award. Counsel also submitted that no order could be issued either for attachment of properties of respondent or for furnishing security by the respondent, for satisfaction of the deemed decree at this stage, as the provisions of either section 48 or of section 9 are not applicable to the facts and circumstances of the present case. In support of their contention the learned counsel relied upon various decisions and the scheme of the FARE Act, 1961 and the Arbitration and Conciliation Act, 1996 to which reference shall be made at a later stage.

5. Mr. Ashwini Kumar appearing for the petitioner while contending that the preliminary objection is without any merit and basis, drew my attention to the Statement of Objects and Reasons of the Arbitration and Conciliation Act, 1996 as also to the views of text book writers and jurists with regard to ratio of interpretation of Statutes. It was submitted that none of the objections as raised by the respondents has any merit when considered in the light of the statement of Objects and Reasons, scheme of the Act and the relevant provisions when interpreted in the light of settled principles of interpretation of Statutes. It was submitted that scheme of Chapter II, Part I of the 1996 Act does not envisage a prior notice by the court to the party against whom the award is sought to be enforced so as to enable the said party to object to its enforcement and according to him such a procedure which was contained in the FARE Act, 1961, has been done away with, having been expressly deleted and/or repealed under the provisions of sections 46 to 49 of the Act when read in proper perspective. He also submitted that an execution petition could be filed by a party in whose favour the award is made, seeking for execution of the award, which is deemed to be a decree under the law and at that stage the requirement of notice is excluded by the express repeal of Section 5 of the FARE Act,1961. According to him the pplicability of the rules of natural justice is done away with in view of the change in the law that has been brought in by the provisions of the new Act. He submitted that for the purpose of enforcement of the award at the threshold stage i.e. upon the making of the application under Section 47 of the Act the award is deemed enforceable as if it was a decree by virtue of the legal fiction in Section 49 and that the enforce ability of the award may however, be challenged after the enforcement process is set in motion by a party against whom the award is enforced by moving appropriate application under section 49 which has now been done by the respondent and thus the proceedings in the present case have been validly constituted and instituted and the interim orders passed by this court are valid. It was also submitted that no objection whatsoever was taken in the pleadings based on the provisions of section 5 of the 1996 Act and the aforesaid objection could not be taken during the course of the arguments. It was also submitted that in accordance with the provisions of Section 85 read with Section 21 of the Act the ommencement of arbitral proceedings would be the date on which the request for reference of the dispute is received by the respondent unless otherwise agreed between the parties. In this case, according to the counsel, there is an agreement

between the parties, that the rbitration proceedings would commence only when the Arbitral Tribunal would proceed with the arbitration after the tribunal is validly constituted, objections thereto, if any, are withdrawn or dismissed and the party against whom the claim is made would file its reply within 30 days time. According to the learned counsel, therefore, the provisions of the new Act were ex facie applicable and not the provisions of FARE Act 1961. The learned counsel also submitted that this court has ample power to direct for furnishing of security for due satisfaction of the award/decree as such power is vested in this court under the provisions of Section 9 read with Section 48 of the Arbitration and Conciliation Act and also under the inherent powers of this court. In support of his submissions the learned counsel also relied upon various decisions of this court as also of the Supreme Court which are being discussed at an appropriate and subsequent stage.

6. Having set out the facts of the case and the submissions of the learned counsel appearing for the parties I may now proceed to decide the preliminary objection raised by the respondent relating to the maintain ability of the execution petition in this court.

7. In order to appreciate and for judging the merits of the contentions of the counsel for the rival parties it would be appropriate to extract below the relevant provisions of the Foreign Awards Recognition and Enforcement Act, 1961 (FARE Act, 1961 for short) vis-a-vis the provisions of the new Arbitration and Conciliation Act, 1996 which repealed FARE Act also.

THE FOREIGN AWARDS (RECOGNITION & THE ARBITRATION & CONCILIATION ENFORCEMENT) ACT, 1961. ACT, 1996. CHAPTER 1

NEW YORK CONVENTION AWARDS

2. Definition.- In this Act, 44. Definition.- In this Chapter, unless the context otherwise unless the context otherwise requires, 'foreign award' means requires, 'foreign award' means an an award on differences between arbitral award on differences persons arising out of legal re- between persons arising out of lationships, whether contractual legal relationships, whether or not, considered as commercial contractual or not, considered as under the law in force in India, commercial under the law in force made on or after the 11th day of in India, made on or after the October, 1960 - 11th day of October, 1960 - (a) in pursuance of an agreement (a) in pursuance of an agreement in writing for arbitration to in writing for arbitration to which the Convention set forth in which the Convention set forth in the Schedule applies, and the First Schedule applies, and (b)In one of such territories as (b) in one of such territories as the Central Government, being the Central Government, being satisfied that reciprocal satisfied that reciprocal provisions have been made may, provisions have been made, may by by notification in the Official notification in the Official Gazette, declare to be territor- Gazette, declare to be territories ies to which the said Convention to which the said Convention applies. applies.

3. Stay of proceedings in respect 45. Power of judicial authority to of matters to be referred to refer parties to arbitration.- arbitration.-

Notwithstanding anything contained Notwithstanding anything contained in the Arbitration Act, 1940 (10 in Part I or in the Code of Civil of 1940) or in the Code of Civil Procedure, 1908 (5 of 1908), a Procedure, 1908 (5 of 1908), if judicial authority, when seized of any party to a submission made an action in a matter in respect in pursuance of an agreement to of which the parties have made an which the Convention set forth agreement referred to in section in the Schedule applies, or any 44, shall, at the request of one person claiming through or under of the parties or any person him commences any legal proceed claiming through or under him, ings in any court against any refer the parties to arbitration, other party to the submission unless it finds that the said or any person claiming through agreement is null and void, or under him in respect of any inoperative or incapable of being matter agreed to be referred, performed.

any party to such legal

proceedings may, at any time after

appearance and before filing a

written statement or taking any

other step in the proceedings,

apply to the court to stay the

proceedings and the court, unless

satisfied that the agreement is

null and void, inoperative or

incapable of being performed or

that there is not in fact any

dispute between the parties with

regard to the matter agreed to be

referred, shall make an order

staying the proceedings.

4. Effect of foreign awards.- 46. When foreign award binding.- (1) A foreign award shall, subject Any foreign award which would be to the provisions of this Act, be enforceable under this Chapter enforceable in India as if it were shall be treated as binding for an award made on a matter referred all purposes on the persons as to arbitration in India. between whom it was made, and may accordingly be relied on by any of

(2) Any foreign award which would those persons by way of defense, be enforceable under this Act set off or otherwise in any legal shall be treated as binding for proceedings in India and any all purposes on the persons as references in this Chapter to between whom it was made, and may enforcing a foreign award shall be accordingly be relied on by any of construed as including references those persons by way of defense, to relying on an award. 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.

5. Filing of foreign award in No such provision in this Act. court.- (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.

8. Evidence.- (1) The party 47. Evidence.- (1) The party applying for the enforcement of a applying for the enforcement of a foreign award shall, at the time foreign award shall, at the time of the application, produce - of the application, produce before the Court -

(a) the original award or a copy (a) the original award or a copy thereof, duly authenticated in the thereof, duly authenticated in the manner required by the law of the manner required by the law of the country in which it was made; country in which it was made; (b) the original agreement for (b) the original agreement for arbitration or a duly certified arbitration or a duly certified copy thereof; and copy thereof; and

(c) such evidence as may be (c) such evidence as may be necessary to prove that the award necessary to prove that the award is a foreign award. is a foreign award. (2) If the award or agreement (2) If the award or agreement to requiring to be produced under be produced under sub-section (1) sub-section (1) is in a foreign is in a foreign language, the language, the party seeking to party seeking to enforce the award enforce the award shall produce a shall produce a translation into translation into English certified English certified as correct by a as correct by a diplomatic or diplomatic or consular agent of consular agent of the country to the country to which that party which that party belongs or belongs or certified as correct in certified as correct in such other such other manner as may be manner as may be sufficient sufficient to the law in force in according to the law in force in India.

India.

7. Conditions for enforcement of 48. Conditions for enforcement of foreign awards.- (1) A foreign foreign awards.- (1) Enforcement award may not be enforced under of a foreign award may be refused, this Act - at the request of the party against whom it is invoked, only

(a) if the party against whom it if that party furnishes to the is sought to enforce the award Court proof that - proves to the court dealing with

the case that - (a) the parties to the agreement referred to in section 44 were,

(i) the parties to the agreement under the law applicable to them, were, under the law applicable to under some incapacity, or the said them, under some incapacity, or agreement is not valid under the the said agreement is not valid law to which the parties have under the law to which the parties subjected it or, failing any have subjected it, or failing any indication thereon, under the law indication thereon, under the law of the country where the award was of the country where the award was made; or

made; or

(b) the party against whom the

(ii) that party was not given award is invoked was not given proper notice of the appointment proper notice of the appointment of the arbitrator or of the of the arbitrator or of the arbitration proceedings, or was arbitral proceedings or was otherwise unable to present his otherwise unable to present his case; or case; or

(iii) the award deals with (c) the award deals with a question not referred or contains difference not contemplated by or decisions or matters beyond the not falling within the terms of scope of the agreement the submission to arbitration, or it contains decisions on matters

Provided that if the decisions on beyond the scope of the submission matters submitted to arbitration to arbitration; can be separated from those not

submitted, that part of the award Provided that, if the decisions on which contains decisions on matters submitted to arbitration matters submitted to arbitration can be separated from those not so may be enforced; or submitted, that part of the award which contains decisions on

(iv) the composition of the matters submitted to arbitration arbitral authority or the arbitral may be enforced; or procedure was not in accordance

with the agreement of the parties (d) the composition of the or, failing such agreement, was arbitral authority or the arbitral not in accordance with the law of procedure was not in accordance the country where the arbitration with the agreement of the parties, took place; or or, failing such agreement, was not in accordance with the law of

(v) the award has not yet become the country where the arbitration binding on the parties or has been took place; or set aside or suspended by a

competent authority of the country (e) the award has not yet become in which, or under the law of binding on the parties, or has which, that award was made; or been set aside or suspended by a competent authority of the country

(b) if the court dealing with the in which, or under the law of case is satisfied that - which, that award was made. (i) the subject-matter of the (2) Enforcement of an arbitral difference is not capable of award may also be refused if the settlement by arbitration under Court finds that - the law of India; or

(a) the subject matter of the

(ii) the enforcement of the award difference is not capable of will be contrary to public policy. settlement by arbitration under the law of India; or

(b) the enforcement of the award would be contrary to the public policy of India.

Explanation.- Without prejudice

to the generality of clause (b)

of this section, it is hereby

declared, for the avoidance of

any doubt, that an award is in

conflict with the public policy

of India if the making of the

award was induced or affected

by fraud or corruption.

(2) If the Court before which (3) If an application for the foreign award is sought to be setting aside or suspension of the relied upon is satisfied that an award has been made to a competent application for the setting aside authority referred to in clause or suspension of the award has (e) of sub-section (1) the Court been made to a competent authority may, if it considers it proper, referred to in sub-clause (v) of adjourn the decision on the clause (a) of sub-section (1), the enforcement of the award and may court may, if it deems proper, also, on the application of the adjourn the decision on the party claiming enforcement of the enforcement of the award and may award, order the other party to also, on the application of the give suitable security. party claiming enforcement of the

award, order the other party to

furnish suitable security.

6. Enforcement of foreign award.- 49.Enforcement of foreign awards.- (1) Where the court is satisfied Where the Court is satisfied that that the foreign award is the foreign award is enforceable enforceable under this Act, the under this Chapter, the award court shall order the award to be shall be deemed to be a decree of filed and shall proceed to that court.

pronounce judgment according to

the award.

(2) 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.

8. A particular and specified mode and manner is provided for and prescribed for enforcement of a foreign award in India both under the Foreign Awards (Recognition and Enforcement) Act, 1961 as also the Arbitration and Conciliation Act, 1996. With the coming into force of the Arbitration and Conciliation Act, 1996 the provisions of the FARE Act, 1961 stood repealed subject to the saving clause. The new provisions which have been enacted for enforcing an award in India would indicate that before the said foreign award could be enforced there is a necessity for a party to obtain a foreign award which is defined under the provisions of section 44 of the Arbitration and Conciliation Act, 1996. After a foreign award is made the same could be enforced in India when the court is satisfied that the foreign award is enforceable. The said satisfaction is arrived at when the party in whose favour the award is made apply for its enforcement. Thus a party has to apply for under Section 46 & 47 of the Arbitration Act seeking for enforcement of the foreign award. A foreign award becomes binding between the persons as against whom the same is made for all practical purposes when the same is nforceable under the provisions of sections 46 to 49 of the Arbitration and Conciliation Act. Section 47 provides that a person seeking for enforcement of a foreign award has to apply for the said relief before the court enclosing therewith the documents as mentioned specifically in section 47 of the Act. A right is given to the party as against whom the foreign award is sought to be enforced, to raise objections as against the aforesaid enforcement of a foreign award on any of the grounds as mentioned in the provisions of section

48. Section 49 on the other hand provides that it is only when the court is satisfied that the foreign award is enforceable under Chapter I of Part II the award could be deemed to be a decree of the particular court.

9. Counsel for the petitioner submitted that the words 'enforcement' and 'execution' are synonymous and therefore, a party in whose favour a foreign award is made is entitled to treat the award as a decree itself and file an execution petition immediately seeking for enforcement/execution of the decree. According to him upon the making of an application under section 47 of the Act the award is deemed enforceable as if it were a decree by virtue of a legal fiction in section 49 but the enforceability of the award could be challenged after the enforcement process is set in motion by a party against whom the award is enforced by moving an appropriate application under section 48. Counsel submitted that at the initial stage requirement of notice upon filing of the execution application is excluded by the express repeal of the provisions of section 5 of the FARE Act, 1961 and the modification of section 6 with the repeal of section 6(2) thereof. In support of his submission the learned counsel sought to rely upon the Statement of Objects and Reasons of the Arbitration and Conciliation Act, and certain passages from the commentary on the said new Act by Shri S.K.Chawla and Dr. P.C.Rao. Counsel also relied upon certain passages from the Interpretation of Statutes by Maxwell and also the decisions of the Supreme Court in State of Punjab Vs. Amar Singh ; Renu Sagar Power Company Ltd. Vs. General

Electric Company, and Director of Enforcement Vs. Deepak Mahajan, .

10. The aforesaid submission of the learned counsel for the petitioner was refuted by the learned counsel appearing for the respondent contending inter alia that when the language of the provisions is clear and unambiguous no external aid is to be supplied. He further submitted that the interpretation sought to be given by the petitioner to the scheme of the Act is fallacious as while interpreting a Statute its plain meaning must be given effect to irrespective of the consequences. Inasmuch as where the language of a Statute is clear and unambiguous its plain words are to be interpreted on its own terms and no other mode of interpretation is permitted.

11. It is settled law that Statement of Objects and Reasons accompanying the legislation when introduced in the Parliament cannot be used as the only determining factor of the true meaning of the intent and substance of the Statute. However, as was held by the Supreme Court in Chern Toong Shang Vs. Commander S.D.Baijal, , the Objects and Reasons of the Act could be taken into consideration in interpreting the provisions of the Statute in case of doubt. Such statement of objects and reasons seeks only to explain what reason induced the mover to introduce the bill in the house, what object is sought to be achieved and what objects and reasons are not voted upon by members. The bill, if it is introduced in the house, and during the course of its discussions and during the process till it is approved by the house and becomes an Act may undergo radical changes during its passage through the House or Houses and there is no guarantee that the reasons which led to its introduction and the Objects thereby sought to be achieved have remained the same throughout till the bill emerges from the house as an Act of the Legislature. During the process the Objects and Reasons for which the bill was introduced in the House, may or may not have undergone certain changes and may or may not correspond to what it was originally there. The same, therefore, may not reflect the actual intention of the Legislature. But it could be held that the same may be referred to for the limited purpose of ascertaining the purpose of the mover at the time of introducing the same. In other words the statement of objects and reasons may be the evidence of surrounding circumstances. At the same time it is also settled law that where the language of the Act is clear and explicit, the court must give effect to it whatever may be the consequences, for in that case the words of the Statute speak the intention of the Legislature.

12. A comparative reading of the provisions of the FARE Act and the new provisions of Arbitration and Conciliation Act, so far enforcement of foreign award is concerned indicate that the provisions of the two Acts are almost peri material except for the provisions of Section 5 of FARE Act which stood deleted and substantial change in section 6 of FARE Act in the new Arbitration & Conciliation Act, 1996. Under the FARE Act a procedure was laid down for filing of foreign award in court and making the same a Rule of

Court, which has since been done away with under the provisions of the new Act. Except for that change there is no other material change in the new provisions enacted for enforcement of a foreign award. That was probably because of the fact that both the FARE Act of 1961 and the Arbitration and Conciliation Act, 1996 are founded on the New York Convention. According to section 46 a foreign award, in order to be treated as binding, has to be enforceable, for which a specific mode is provided for enjoining the party to apply for such enforcement of a foreign award by filing an application and alongwith the application some documents are to be enclosed therewith.

13. Section 48 lays down the conditions for enforcement of foreign awards and if a party can prove to the satisfaction of the court that any of the conditions mentioned therein is attracted, nforcement of the foreign award would be refused. Section 48 contains two types of objections which could be raised to oppose enforcement of a foreign award - (a) those that can be raised by a party against whom the award is sought to be enforced under section 48(1); (b) those which the court must suo moto itself under Section 48(2). In this regard the observation of the Supreme Court in Renusagar Power Company Ltd. Vs. General Electric Company, reported in AIR 1983 SC 1156 is relevant and material and I quote "under the New Work Convention the party against whom the award is sought to be enforced can object to recognition and enforcement of foreign award on grounds set out in subclauses (a) to (e) of clause (1) of Article V and the court can, on its own motion, refuse recognition and enforcement of a foreign award for two additional reasons set out in sub-clauses (a) & (b) of clause (2) of Article 5". The same provisions exist both under FARE Act and the Arbitration and Conciliation Act, 1996. Thus there is no change at all to the aforesaid provisions.

The satisfaction of the court as contemplated under Section 49 can be arrived at only after the court is satisfied that none of the grounds as mentioned in Section 48(2) of the Act exists and that if an objection is filed as contemplated under section 48(1) of the Act by the party is dismissed. It is only after that satisfaction which was required to be arrived at by the court under Section 48 that the foreign award is enforceable is reached and recorded then only the award becomes a deemed decree of that court. The aforesaid provisions postulate and/or pre-suppose that in order to arrive at the aforesaid satisfaction the court itself has the responsibility to scrutinise the award even in absence of an objection by a party to come to a satisfaction that the award does not suffer from any of the vices as mentioned in section 48(2) of the Act. When it is found that none of the conditions as mentioned in the said provision is attracted the court would explicitly record its satisfaction that the award is enforceable and then and then only and thereupon the award becomes deemed decree of that court. The execution petition could be filed in an appropriate court only when there is a decree. Without there being a decree of the court no execution petition could be filed in the competent executing court.Thus in order to arrive at and to express the explicit satisfaction by the court the parties are to be heard even on the issue of section 48(2) and also on objections if any filed by the aggrieved party seeking for refusing enforcement. It is only when the parties are heard then only the court could arrive at a reasonable and sound satisfaction.

It is not necessary that requirement of the principles of natural justice is required to be specified in all the provisions of the Statute. It could at times be implied in the provisions and procedure prescribed by law. It is settled law that the principles of natural justice such as opportunity of hearing is implicit in the exercise of power onferred by the provisions inspite of the fact that there is no express requirement in that regard in the statutory provisions. Under Section 48(2) of the Act the court has to be satisfied and also come to a definite conclusion that the enforcement of the award would not be contrary to the public policy of India. In Central Inland Water Transport Corporation Ltd. Vs. Brojo Nath Ganguly; it was held that the principles governing public policy must be and are capable, on proper occasions, of expansion and modification. In a matter like that and to come to such a conclusion the court must have the assistance of both the parties and should give an opportunity of hearing to both the parties.

The same issue could also be looked into from another angle. Under sub-section (1) of section 48 of the Act, the court has been empowered to refuse enforcement of a foreign award if the party against whom the foreign award is sought to be enforced is able to prove and establish that any of the grounds mentioned therein is

satisfied. Such steps could be taken by the party concerned only when it receives a notice from the court, to the effect that the said award is sought to be enforced against him in that particular court. Otherwise there could also be the possibility of institution of proceedings in different courts for cause of action for the proceedings could also arise in parts in two different courts having territorial jurisdiction. For if cause of action arises in two different courts a proceeding for enforcement might be filed in one court whereas objections against the award could be filed in a different court which also may have territorial jurisdiction to try the proceedings and thus leading to complications.

Accordingly, in my considered opinion, rules and principles of natural justice are embodied in the aforesaid provisions and, therefore, when a party applies seeking for enforcement of an award notice has to go to the other party atleast to the extent of intimating him that such an application has been filed in the court seeking for enforcement of the award. On service of notice the court shall proceed to hear the parties in order to determine and record its satisfaction and at that stage the court would examine existence or otherwise of the two conditions as found in Section 48(2) of the Act as also the objection if filed by the party under section 48(1) of the Act is disposed of by recording satisfaction as envisaged under section 49 of the Act. Any contrary argument and decision to the effect that no notice is required to be given to the parties at that stage, in my considered opinion, is fallacious and without merit. Once the award is held to be enforceable by the court then the same becomes binding on all the parties connected with the said award and thus the said award becomes deemed decree in accordance with the provisions of the Act, which would be and could be executed through the process of the court.

14. The petitioner has in the present case straightaway filed an execution petition construing as if the award has already become a decree. A bare perusal of the application filed would show that the same was filed in the format No.6 in appendix 'E' which is a format for an application for execution of a decree. The said format is a statutory format for filing an application under Order 21 read with rules 10 and 11. Order 21 Rule 10 provides that where the holder of a decree desires to execute it, he would apply to the court which passed the decree and such application could be in writing as provided for under Rule 11 thereof in a tabular form which is prescribed under form No.6 Appendix 'E'. It is thus apparent that the petitioner treated the award to be a decree and therefore, applied for execution of the sad decree in the tabular form. The provisions for enforcement of a foreign award however, specifically state that only when the court is satisfied and holds that the award is enforceable then and then only the award would be deemed to be a decree of that court. Therefore, so long the process for recording the satisfaction that the award is enforce able is not complete, the same does not become a decree and therefore, cannot be executed as if it was a decree. The said foreign award per se cannot be said to be final and binding so long as it is not held as enforceable and does not become a deemed decree by virtue of the provisions of Section 49 of the Act.

15. Having decided so let me now deal with the other objection raised by the respondent with regard to the maintainability of the petition. It was submitted that to the facts and circumstances of the present case the provisions of the new Arbitration Act of 1996 are not applicable and that the arbitration in the present proceedings are governed within the scope and ambit of the repeal and saving clause. Section 85 of the Arbitration and Conciliation Act provides that by virtue of the said provisions of Section 85 the FARE Act of 1961 and the Arbitration Act of 1940 are repealed. It further provides that notwithstanding the aforesaid repeal the provisions of the said enactments including the Arbitration Act, 1940 and the FARE Act would apply in relation to arbitral proceedings which commenced before the new Act came into force unless otherwise agreed by the parties. However, the provisions of the Arbitration and Conciliation Act would apply in relation to arbitral proceedings which commenced on or after the new Act came into force. The vital and relevant consideration, therefore, is as to whether the arbitral proceedings in the present case commenced before coming into force of the new Act. It has been held by the Supreme Curt in the decision of Construction Company Pvt. Ltd. Vs. Konkan Railway Construction, that the new Act came into force on 26.1.1996. It was stated in the said decision as follows:-

"A mere look at sub-section (2)(a) of section 85 shows that despite the repeal of Arbitration Act, 1940, the provisions of the said enactment shall be applicable in relation to arbitration proceedings which have commenced prior to the coming into force of the new Act. The new Act came into force on 26.1.1996. The question therefore, arises whether on that date the arbitration proceedings in the present four suits had commenced or not. For resolving this controversy we may turn to Section 21 of the new Act which lays down that unless otherwise agreed to between the parties, the arbitration suit in respect of arbitration dispute commenced on the date on which the request for referring the dispute for arbitration is received by the respondents. There fore, petitioner for referring the disputes for arbitration were moved for consideration of the respondents on and after 26.1.1996 or prior thereto."

A mere look at sub-section 2(a) of section 85 shows that despite the repeal of Arbitration Act, 1940 and FARE Act, 1961 the provisions of the said enactment shall be applicable in relation to arbitration proceedings which have commenced prior to coming into force of the new Act. The new Act came into force on 26.1.1996. The question therefore, arises whether on that date the arbitration proceedings in the present case had commenced or not. For resolving this controversy we may turn to section 21 of the new Act which lays down that unless otherwise agreed to between the parties the arbitration suit in respect of arbitration dispute commenced on the date on which the request for referring the dispute for arbitration is received by the respondents. It is, therefore, quite clear that the date of receipt of notice for referring the disputes to arbitration is the date on which the arbitration proceeding has commenced.

16. Request for arbitration in the present case was received by the respondents on 20.11.1995. The petitioner also filed their claims with the arbitrators on 18.12.1995 and the Arbitral Tribunal was constituted on 24.1.1996. Counsel for the petitioner however, submitted that the provisions of section 21 of the Act used a non obstante clause when it states 'unless otherwise agreed by the parties'. He therefore, submitted that the interpretation given hereinabove to the effect that the arbitration proceedings shall be held to have commenced on the date on which a request for that dispute to be referred to arbitration is received by the respondent would be valid only when there is no contrary agreement between the parties. According to the counsel in the present case there was an agreement between the parties to the contrary and therefore, that contrary agreement would be applicable in the present case. In this connection and in order to show that there was a contrary decision learned counsel drew my attention to the Rules of Arbitration and Appeal of The International General Produce Association. Relying on the provisions of Rules 1(b)(i) and 3(b)(ii) of the said rules it was contended by the counsel that there was a special agreement which provides that the arbitration would commence only upon formation of the Arbitral Tribunal.

17. I have considered the aforesaid submission in the light of the provisions and the rules relied upon. Rule 1(b)(i) states that any objection to either arbitrator on the ground that either arbitrator was not eligible to serve must be made in writing and shall be to the satisfaction of the Management Committee of the Association before the commencement of the arbitration. In my considered opinion, this provision does not in any manner lay down or provide that the parties intended that the arbitration proceedings would commence only upon constitution of the arbitral tribunal. The expression 'commencement of arbitration' in section 21 is not synonymous as the expression used in rule 1(b)(i) of the rules relied upon by the counsel for the petitioner nor do the said two expressions signify the same meaning. Reliance on the provisions of rule 3(b)(ii) is also in my considered opinion misconceived. The said provision provides that if a party against whom a claim is made wishes to reply, such reply together with supporting documents shall be despatched in writing to the Association and also to the other party without delay and that the said despatch in writing shall not be made not later than 30 days from the claimants' submissions and filing receipt of such reply the arbitrators shall proceed with the arbitration without delay. This provision, does not at all deal with the concept of the time factor of the commencement of the arbitration proceeding. In my considered opinion none of the said rules deals with the date of the commencement of the arbitration proceedings. An agreement which is an agreement of the nature as envisaged under Section 21 of the Arbitration Act, 1996 which takes away applicability of section 85 and 21 of the Act must be express, clear and unambiguous. Therefore, I cannot, but hold, that in the totality of the facts and circumstances there was no agreement between the parties which would run contrary

to the date of commencement as envisaged under section 21 of the Act.

18. Counsel for the petitioner, during the course of arguments also sought to submit that these objections were not raised by the respondent in its pleadings and therefore, should not be allowed to be argued. I however, cannot agree and accept the contention of the learned counsel for the petitioner on the simple reason that this objection which relates to jurisdiction goes to the root of the matter and therefore, could be allowed to be argued even if there be no such specific pleading. But on perusal of the pleadings in the present case I find that such a pleading has been raised by the respondent contending inter alia that the petition of the petitioner is premature and not maintainable.

Material facts although are not pleaded in the pleading for holding the petition to be premature and not maintainable, the same does not and cannot prevent and/or take away the right of the court to scrutinise and to decide as to whether the petition is maintainable or not and as to whether this court has jurisdiction to try the matter or not.

19. Having held thus, let me proceed to decide the present case now in the light of the aforesaid conclusions arrived at by me. The present petition as stated has been filed by the petitioner for execution of the decree and in the format prescribed for an execution petition under Order 21 Rule 10 & 11 CPC, treating the foreign award as if it is a decree. The petition in such format cannot be said to be maintainable at this stage when the award is yet to be made a Rule of the Court satisfaction that the award is enforceable is yet to be recorded. The enforcement of the foreign award in question would be guided and covered by the provisions of the FARE Act, 1961 and not by the provisions of enforcement of foreign awards as enacted under the Arbitration and Conciliation Act.

20. I have held that there was no agreement between the parties laying down the date of commencement of the arbitration proceedings contrary to the intention of the provisions of section 85 and section , it was observed that the rule adopted in Taylor Vs. Taylor is well ecognised and is founded on sound principle. It was further observed in the said decision as follows:-

"Its result is that if a statute has conferred a power to do an t and has laid down the method in which that power has to be exercised, it necessarily prohibits the doing of the act in any other manner than that which has been prescribed. The principle behind the rule is that if this were not so, the statutory provision might as well not have been enacted."

p> 21. In my considered opinion, no execution proceeding can be instituted by the petitioner in the facts and circumstances of the case without first filing a suit and obtaining an order for filing of the award and making the said award a Rule of the Court. The proceeding initiated by the petitioner is not maintainable in its present form and is therefore, liable to be dismissed, which I hereby do. During the course of aforesaid proceedings an order was passed for furnishing security which stood furnished for a total amount of Rs.4.24 Crores for both the Execution Petitions No.168/1998 and 169/1998. Since it is held that this petition is not maintainable the securities furnished to the extent of Rs. 1,74,00,000/- stands released, the balance being retained in pursuance of the order passed today in Ex.No.169/1998. The petition stands disposed of in terms of this order.