Delhi High Court
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Compagnie De Saint Gobain vs Fertilizer Corporation Of India ... on 28 August, 1970
Equivalent citations: ILR 1970 Delhi 927
Author: P Khanna
Bench: P Khanna
JUDGMENT

P.N. Khanna, J.

(1) The petitioner-company, Compagnie de Saint Gobain, is a company incorporatedunder the laws of France with its registered officein Paris. It entered into a contract with Nungal Fertilizer Chemicals Private Limited, the predecessor-ininterest of the present respondent. Fertilizer Corporationof India Limited, which is a Government Companyregistered under the Companies Act, 1956 having itsregistered office in New Delhi, for the construction ofNangal Fertilizer group of plants. The contract wascontained in a letter dated 10/10/1957, issuedby the said respondent-company called "letter of instructions", which was followed by some subsequentcorrespondence between the parties. In arbitrationclause (para 23) in the said letter read as follows :

"EXCEPTas otherwise provided, all disputesand differences between the purchaser (the respondent) and yourselves (the petitioner) shall besettled by amicable arbitration in confirmity withregulations of the International Chamber of Commerce. The venue of arbitration shall be NewDelhi in India."

(2) Certain disputes having arisen between the parties,the petitioner on 19/06/1964 made an arbitral requestto the Court of the International Chamber of Commerce,Paris, for the adjudication of its claim made up of Dollarsand rupees in all amounting to Rs. 1,52,40,401.67.The respondent company contested the petitioner'sclaim; and filed a counter-claim made up of dollarsand rupees amounting in all to Rs. 2,70,18,167.00 oralternatively Rs 1,58,28,803.00, which, however, wasdisputed by the petitioner.

(3) In accordance with the rules of the InternationalChamber of Commerce, Paris, herein referred to asICC Rules', the Court of Arbitration, of the saidChamber herein referred to as 'the Court of Arbitration',constituted an arbitral tribunal consisting of Mr. SverreDaelhi, former Judge of the High Court of Norway,as the Chairman, Professor B. Goldman, nominee ofthe petitioner-company, and Mr. K.K. Shende, nomineeof the respondent-company, as the two other members.

(4) The said Tribunal held its first three sittings in NewDelhi 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 1CC Rules. Sittings of the Tribunal werethen held in Paris for recording evidence for some ofthe petitioner's witnesses. Further sittings were heldfrom time to time in New Delhi and finally in Mussourie(India). After the arguments on the counter-claimwere concluded, Mr. Sverre Daelhi resigned on 28/11/1967, Rt. Honble Lord Devlin of England wasappointed in his stead as the Chairman of the Tribunal.On October 11, 1968 Mr. K.K. Shende, a member ofthe Tribunal, died. A protocol was signed betweenthe parties agreeing that notwithstanding the deathof Mr. Shende the arbitration would continue and thatthe decision recorded by him before his death andsent to the Court of Arbitration would be taken onrecord. Professor B. Goidmen was requested to recordhis decision also in writing ; and Lord Deviin was requested to make the award. Lord Devlin heard argumentsof 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 shallhave jurisdiction to give his final award, thus constituting him the sole arbitrator.

(5) Lord Deviin submitted his award dated 29/09/1969 to the Court of Arbitration which was communicated from Paris, to the parties by the SecretaryGeneral of the said court, by his letter dated 16/10/1969. According to it a sum of Dollars 179,438and Rs. 56,65,978.00 were awarded in favor of therespondent-corporation

against the petitioner. As theaward amount was not paid and the petitioners did nothave any property in India, the respondent took outexecution of the award through the French Court.Certain bank accounts and trade-marks of the petitioner were attached. On the petitioner challengingthe said attachment, the French Court ordered it tofurnish bank guarantees instead, which were furnished.

(6) Another proceeding was filed by the petitioner inthe French Court seeking vacation of the order of execution. While this was pending, the present appheation was filed in this court under section 33 of the Arbitration Act, praying for an order declaring that theaforesaid award of Lord Devlin had no legal effector existence and was not enforceable or in the alternative for the suspension of the award till it was filedand made a rule of the Court under the Arbitration Act,1940. According to the petitioner's allegations, thepresent award becomes enforceable under the French law, in accordance with Article V(l)(e) of the "NewYork Convention of the year 1958 on the Recognitionand Enforcement of Foreign Arbitral Awards", by anorder of the President of the Civil Court, without anenquiry into the merits of the case, if the award hasbecome binding on the parties or has not been set asideor suspended by a competent authority of the countryin which or under the law of which the award was made.The petitioneis apprehended that the respondent wouldtake advantage of the jurisdiction of the French CivilCourt in enforcing the award without the same beingmade a rule of the Court. It was for this reason thatthe petitioner considered it necessary to move this courtunder 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 anullity 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 Courtas 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 beenfinally determined;

(4)That it deals with matters in respect ofwhich there is no arbitration agreement or areference.

(8) The learned counsel for the petitioner did not elaborateground No. (3) at all and stated at the bar that he wouldnot press, for the present, the fourth ground. Heconfined his challenge to the award on the first twogrounds only.

(9) An objection was raised by Mr. B. Sen, the learnedcounsel for the respondent, that the award was notgoverned by the Indian law and the Arbitration Act, Xof 1940 was not applicable. The French Courts, it wasfurther submitted, having already executed the awardand dismissed the petitioner's application, this courtshould not decide this application in order to avoid apossible conflict of decisions, more especially as underthe orders of the Paris Court the respondent has alreadyreceived the amount of its claim granted to it under theaward in as much as the Bank guarantees furnished bythe petitioner are available to it and can be enforced atits will at any time without resort to any fuither proceedings in court. In respect of the first objectionMr. Sen relied upon Articles 26, 27 and 28 of the ICCRules, which read as follows:

"ARTICLE26 Award to he passed by theCourt of Arbitration. Before completing theaward, the arbitrator shall submit the same to theCourt of Arbitration. The Court may lay downmodifications as to its form and if need be, drawthe arbitrator's attention even to points connectedwith the merits of the case but with due regard tothe arbitrator's liberty of decision. No awardshall under any circumstances be issued untilapproved as to its forn by the court of Arbitration.

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

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

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

2.XX Xx Xx XX

(12) According to Mr. Sen, the Court of Arbitrationis the final authority, whose approval is a conditionprecedent to the completion of the award, which isissued by the Secretariat of the Chamber from Paris.The award is actually made thus out of India, althougha deeming provision has been made in Article 27 wherebythe award is deemed to be made at the place of arbitration proceedings. In the present case, the placeof arbitration proceedings was agreed to be in Indiain the first instance, New Delhi having beenspecifically mentioned to be the venue of arbitrationproceedings. By mutual consent, the parties agreedsubsequently that the proceedings shall take place in New Delhi, Paris and Mussourie (India). It couldnot, therefore, be said that India is the only place wherethe arbitration proceedings took place. The arbitrationproceedings also took place in Paris and as the awardwas fact made in Paris, the deeming provision in Article27 would not make any difference. For the IndianCourts, the award urged Mr. Sen, would remain a foreignaward. He relied on Mis Lachman Das Sat Lal andanother v. Parmeshri Dass and another , where it was held that the award made and signedat Karachi was a foreign award. Mr. Sen also submittedthat the scheme of the Arbitration Act was entirelydifferent from the scheme contemplated under the ICCRules and for the proposition he relied upon the judgment of the Supreme Court in Societe De Tractionet D' Electricite Societe Anonyme v. Kamani Engineering Company Ltd. where commenting on the Icc Rules, it was

observed that "thescheme of arbitration contemplated by these Rules18 different from the scheme contemplated by ss. 3 to 38 of the Arbitration Act". In these circumstances,the learned counsel submitted that application under section 33 of the Arbitration Act was misconceived anduntenable. The arguments of Mr. Sen, however, reston a faulty premise. His contention that the awardwas made outside India and is not governed by theIndian Arbitiation Act has no basis.

(13) Para 18 of the letter of instructions specifically provides that "the contract will be governed by the lawsof India". The arbitration clause in para 23 of the saidletter states that "the venue of all arbitration shall beNew Delhi in India". Article 7 of the Icc Rulesprovides that the Court of Arbitration does not byitself settle disputes. It appoints and confirms thenomination of arbitrators. Although the Court ofArbitration, Paris, has to approve the form of the awardbefore it is completed, the award nonetheless remainsthat of the arbitrator, whose liberty of decision is notprejudiced. According to Article 16, the arbitrationproceedings are governed by the Icc Rules and in theevent of no provision in the rules, those of the law ofprocedure chosen by the parties, or failing such choice,those of the law of the country in which the arbitratorholds the proceedings. Article 18 provides that theproceedings before the arbitrator shall take place in thecountry determined by the Court of Arbitration unlessthe parties shall have agreed in advance upon the placeof arbitration, which in the present case was agreed tobe India. According to Article 27, the arbitral awardshall be deemed to be made at the place of the arbitration proceedings, and on the date of signature by thearbitrator.

(14) It is not disputed that before the nomination ofLord 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 ofthe respondent, who in their application, for the purpose,expressly stated that "in the event of the Tribunal itselfrecording the evidence in Paris, it is to be understoodthat such an act will not constitute a change of venueof 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 consentedto record the evidence of their witnesses by the Tribunalitself in Paris, on the condition that by itself it shallnot imply a change of venue of the proceedings, wehereby modify our first order of recording the evidencein Paris on commission or letter of request and decideto record such evidence by the Tribunal itself". Thevenue 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 tobe the sole arbitrator, is -concerned, he conducted theentire

proceedings in India only. The award itselfdoes not a appear to have been signed in Paris andmust be presumed to have been made in India. It wasaccordingly en Indian award to which the provisions of the Indian Arbitration Act, 1940 apply.

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

"SUBJECTto the provisions of section 46 andsave in so far as is otherwise provided by any lawfor the time being in force, the provisions of thisAct shall apply to all arbitrations and to all proceedings there under.

(16) Provided that an arbitration award otherwiseobtained may with the consent of all the parties interested be adjust into consideration as s compromise or adjustment of a suit by any court beforewhich the suit is pending."

(17) The provisions of section 46 have no relevancy for ourpresent purposes. The Act, therefore, applies to allarbitrations, of whatsoever nature and all proceedingsthere under save as is otherwise provided by the lawfor the time being in force. Unless, therefore, any lawprovides otherwise, the Arbitration Act, 1940 willgovern the arbitration in this case.

(18) According to Mr. Sen, the award of Lord Devlinis governed by the Arbitration (Protocol & Convention)Act, 1937, herein called 'the 1937 Act,' or by the ForeignAwords (Recognition & Enforcement) Act, 1961, herein called the 1961 Act', and that these are the lawswhich provide otherwise. These two enactments whichare more or less analogous in terms were passed by theIndian Legislature to give effect to certain InternationalProtocols and Conventions, framed to meet the widelyexpressed desire in the commercial circles throughoutthe world to accord recognition and protection toarbitraticn agreements and awards. The first was theGeneva Protocol of Arbitration Clauses (1923) and theInternational Convention on the Execution of theForeign Arbitral Awards (1937). These were signedat Geneva on behalf of India subject to certain reservations limiting India's obligation under the instruments to commercial contracts. For the purpose ofgiving effect to this protoco] and for enabling the saidConvention to become operative in India the 1937 Actwas passed. On 10/06/1958, came the Conventionon the Pecognition & Enforcement of Foreign ArbitralAward?, at New York, to which India was a party. Inorder to give effect to the New York Convention the1961 Act was passed. According to the definition of'foreign award' given, in section 2 of the 1961 Act itmeans an award made on or after 1. 1th day of October,1967. According to section 10 the aforesaid 1937 Actceased, to have effect in relation to Foreign Awards towhich the said 1961 Act applied. The award in thepresent case having been made on 29/09/1969the 19 Act would, if applicable, be the only relevantprovision, requiring attention to see if it provides otherwise than as provided in the arbitration Act, 150.

(19) Turning to the New York Convention, given in theSchedule to the 1961 Act, it is plain that it applies according to its Article I, to such arbitral awards, only, whichare 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 inIndia, its recognition and enforcement were sought notin India, but in France. The Convention under theIndian law would be applicable only if the award wasnot made in India and its recognition, and enforcementwere sought here. This not being the case, the NewYork Convention in the Schedule to the 1961 Act hasno application, to this award in India. The New YorkConvention may be applicable to this very award inFrance, as for the purpose of Courts in France, it havingbeen made in India, is a foreign award. This petitionwas accepted by the Pa.ris 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 Bankaccounts. It is mentioned in the said court order thatthe award was made in India and that the parties werein agreement on the applicability of the New YorkConvention of 10/06/1958. The award was thusrecognised in Paris, to be an award made in India andthus 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 fordeclaring the effect validity or the existence of an award.Even Article V(i)(e) of the Convention given in theSchedule to the 1961 Act provides that the award hasto be set aside or superseded, if so required, by a competent authority of the country, in which or under thelaw of which, that was made. The matters for whichthere is no provision in. the 1961 Act or the Convention,have thus to be dealt with by the ordinary law of theland under the law of which the award was made. Theprovisions of section 33 of the Arbitration Act. therefore, are not ousted under any circumstance.

(21) In Kamani's case , relied upon byMr. Sen the

Supreme Court had no occasion to go intothe question of the applicability of the 1937 Act, as itwas not disputed that the proposed arbitration underthe Rules of the International Chamber of Commercewas governed by the Protocol on Arbitration Clausesagreed to at Jeneva on 24/09/1923; and theProtocol 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 casethat section 47 of the Arbitration Act made the provisions of the Arbitration Act applicable to all arbitrations and to all proceedings subject, however, to theprovisions of section 46 and so far as was otherwiseprovided in law for the time being in force. Underthis section, therefore, the court was of the view that"the legislature has clearly made the provisions of theArbitration (Protocol & Convention) Act, 1937 applicable to consensual arbitration, under the ArbitrationAct, 1940, when the conditions prescribed for the application of that Act are attracted, even if the scheme ofArbitration recognised thereby is inconsistent withsections 3 to 38 of the Arbitration Act, 1940". It wasonly by virtue of the applicability of the Arbitration Act,1940 itself that the 1937 Act was held to apply to theproceedings under the Icc Rules, which was admittedto be otherwise applicable in the circumstances of thatcase.

(22) In M/s Lachman Das Sat Lal's , 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 wasopen to the parties "to agree that any dispute arisingbetween them shall be submitted to arbitration at anyplace and in any particular country in any part of theworld". As arbitration proceedings in that case tookplace in Karachi in pursuance of the arbitration agreement, the award was made and signed at Karachi, itwas 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 thecountry where the proceedings are to take place andconsequently the award is to be made. The SupremeCourt 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 contractusor lex loci solutionis is a matter of presumption; but thereare accepted rules for determining which of them isapplicable. Where the parties have expressed themselves, the intention so expressed overrides any presumption. Where there is no expressed intention, then therule to apply is to infer the intention from the termsand 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 haveagreed that in case of dispute the Bombay High Courtwould have jurisdiction.. .. ..If Courts ofa particular country are chosen, it is expected, unlessthere be either expressed intention or evidence, that they would apply in their own law to the case.....The second circumstance is that the arbitration clauseindicated an arbitration in India. Of such arbitrationclause in agreements, it has been said on more than oneoccasion that they lead to an inference that the partieshave adopted the law of the country in which arbitrationis to be made." In the case before me, the partieshad expressly agreed, in para 18 of the letter of instructions, as stated above, that "the contract will be governedby the laws of India". The proceedings took placein India. It is, therefore, a clear case governed byIndian Laws. The Arbitration Act is not excludedby the 1961 Act, , by any other law. The objectionof Mr. Sen, therefore, has no merit. It is an Indianaward governed by the Arbitration Act, 1940 and thepresent application under section 33 of the Act ismaintainable.

(23) The other objection of Mr. Sen that the courtsin Paris being seized of the matter, the courts in Indiashould not entertain the present application, is equallydevoid of force. The Court in Paris, being the courtof a country,

the laws of which do not apply to this award,will not determine the existence, validity or effect of thisaward. They on the other hand, will recognise and enforce the award under the new York Convention, unlessthe petitioner can establish that the award is not bindingon the parties, or has been set aside or suspended bya competent court in India : vide sub-clause (c) ofclause (1) of article V of the New York Convention.The courts in India alone are competent to decide theapplication under section 33 of the Arbitration Actfiled on behalf of the petitioner-company ; and thequestion of a conflict of the decision in India withthat in Paris does not arise.

(24) Another objection was raised by Mr. Sen that thiscourt has no jurisdiction to entertain this applicationeven if an application under section 33 of the Arbitration Act, 1940 is competent. According to him, allquestions relating to the validity effect or existence ofan award or an arbitration agreement between the partiesto the agreement, have to be decided under section 31(2) of the Arbitration Act, 1940, by the court in whichthe award may be filed and by no other court. Accordingto section 31(1) of the said Act, an award can be filedin any court having jurisdiction in the matter to whichthe reference relates. According to section 2(c) ofthe Act, 'Court' means a civil court having jurisdictionto decide the questions forming the subject matter ofthe reference, if the same had been the subject matterof a suit. The learned counsel submitted that the matterin controversy between the parties relates to a turnkey job for the construction of Nangal Fertilizer Groupof 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 tothe learned counsel, has been made dependent not uponthe residence or place of business of the parties ; buton the subject-matter of the reference. Under thecircumstances, the learned counsel submitted, this courthas no jurisdiction to entertain the present petition.He relied on Inder Chand Join v. Pooran Chand BansiDhar , where the head-note readsas follows:

"INorder to determine the question whetherthe Court before which applications underSs. 32 and 33 are filed has jurisdiction to entertainthem, it must be ascertained what the questionsare, which form the subject matter of the referenceto arbitration and then supposing those questionshad arisen in a suit, which is the court whichwould have jurisdiction to entertain the suit,whether in fact any part of the cause of actionin the suit, which the opposite party might haveinstituted arising out of the subject matter ofreference arose within the jurisdiction of the courtbefore which the applications are filed."

(25) Mr. Sen submitted that the question of residence orplace of business of the respondent mentioned in subsections (a) or (b) of section 20 of the Code of CivilProcedure, 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 thedetermining factor. As no part of the cause of actionhas arisen in Delhi in the present case, there is no matterto which the reference relates over which this courthas jurisdiction.

(26) It may, however, be observed that section 120 ofthe Code of Civil Procedure specifically excludes theapplicability 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 itsoriginal side is not dependent merely on the cause actionin the case. The jurisdiction appears to be much wider.Sub-section (2) of section 5 of the Delhi High CourtAct, 1966 lays down that notwithstanding anythingcontained in any law for the time being in force, theHigh Court of Delhi shall also have in respect of thesaid Territories (Territories for the time being includedin the Union Territory of Delhi), ordinary original civiljurisdiction in every suit the value of which exceedsRs. 50,000.00. This would mean that the Delhi HighCourt would have jurisdiction in the matter to whichthe reference relates, if it has some nexus with the saidterritories. The residence or place of business in theUnion Territory of Delhi of the respondent or defendant in a case dealing with the mattei to which the reference relates, coupled with the fact that the entirecorrespondence dealing with such matter took placewith the Delhi office alone, would be a sufficient nexusof such kind to give jurisdiction to this court. Thejurisdiction is not because of the residence or of thelocation of the place of business of the respondent, butbecause of the subject matter of the reference whichhas a nexus or connection with the territory concernedthrough such residence or the location of the place ofbusiness of the respondent and because of the

entirematerial correspondence having taken place with theDelhi 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 theoriginal tender submitted by the petitioner was acceptedby the respondent by its letter dated 10/10/1957,in Delhi. The petitioner, however, was requested tointimate its acceptance of the terms and conditions setout therein. The petitioner in reply, while conveyingits acceptance suggested a revision of certain terms insome foot-notes and asked for its acceptance by therespondent. There appears to have followed somecorrespondence intended to clarify certain terms of thecontract. The last letter was dated 3/06/1958, writtenby the respondent from New Delhi, whereby it conveyedits agreement to the revised text of the foot-note whichhad been submitted to it by the petitioner. This letterwas thus the final acceptance in New Delhi of the termsof the contract. The contract, therefore, was concludedat New Delhi. A part of the subject matter of thereference matured and, therefore, a part of the cause ofaction arose in New Delhi. There does exist sufficientnexus, under the circumstances, between the subjectmatter to which the reference relates and the UnionTerritory 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 anullity, Mr. Pai submitted that the arbitrator had become functus officio when he made his award dated 29/09/1969. The time limit under Article 23of the I.C.C. Rules within which the award could bemade, was 60 days from the date on which he signed thestatement defining his terms of reference. The arbitratorcould be deemed to ha.ve done this latest by 25/04/1969, while he made his award on 29/09/1969,along after the said sixty days had expired. Extensionsgranted by the court of Arbitration relied upon by Mr.Sen, are of no consequence, submitted Mr. Pai, in viewof sub-section (2) of section 28 of the Arbitration Act,which reads as follows:

"ANYprovision in an arbitration agreementwhereby the arbitrators or umpire may, exceptwith the consent of all the parties to the agreement, enlarge the time for making the award, shallbe 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 formaking the award can be taken as the order of the arbitrator; but this being without the consent of the partieswas void and of no effect in view of section 28(2) of theArbitration Act. Even if the Court of Arbitration wastaken to be independent of and separate from thearbitrator, the enlargement of time, which is thefunction of the court under section 28(2) of the Arbitration Act, cannot be granted by a person acquiringauthority for such purpose by agreement of the partiesas 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 discussionas under section 28(1), "the Court may, if it thinks fit,whether the time for making the award has expired ornot 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 movein the matter. An application was, however, made atthe end of arguments on behalf of the respondent, praying for suitable extension of time for making the awardup to the day on which the said award was made. IT is not disputed that time can be extended even after theaward has been made. Subba Rao J. of the SupremeCourt speaking for himself and BP. Sinha C.J. andMadholkal J. in the case cf Hari Shanker Lal v. ShambhuNath , observed: "Section 28 of the Act enables the court to -extend the time formaking of the award; extension of time may be giveneven after the award has been factually made. So tillthe 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. Toput it differently, if time was not extended by court,the document described as an award would be treatedas non est."

(29) Mr Pai submitted that the discretion of the courtshould not be exercised in favor of enlarging the timeas prayed in this case, as that would be unfair to the petitioner. His request to the arbitrator to file the awardin court was not acceded to. He, therefore, had noopportunity to file objections to it. The award beingout of time is non est) as was held by the Supreme Courtin Hari Shanker Lal's case . the petitioner in the bonafide belief that the award is a nullitytook no further steps to have the award filed in courtto enable it to file objections under section 30, Arbitration Act. Now, the time for the petitioner to make anapplication in court under

section 14 of the ArbitrationAct, 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 oftime is a matter of discretion which should not be exercised in the respondent's favor in view of the abovecircumstances, submitted Mr. Pai.

(30) It was urged on behalf of the respondent that theaward was made within the time allowed by the Courtof Arbitration in accordance with Icc Rules, agreedupon by the parties, as governing the arbitration. Theaward, was, thus, made in time as extended in accordancewith the agreement of the parties, it was at their specificrequest that the arbitrator after conclusion of the argument proceeded to make the award. The petitionerhad all along been participating in the arbitration proceedings which started in 1964 or 1965; and neverquestioned the arbitratior's power to proceed, althoughthe enlargement of time had not been granted by theCourt. The dates for proceeding in the case werebeing fixed from time to time, admittedly by the consentof the parties. The proceedings had dragged on overseveral years and the parties had incurred considerabletime and expense. The court should exercise its discretion for enlarging time as prayed, urged the learnedcounsel.

(31) The contentions of Mr. Sen are not without force.There was voluminous documentary material, oralevidence and various other complicated issues whichhad to be tackled. The arbitrator had spent considerable thought over the matter and had written a wellconsidered 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 notbeen 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 datesbeing fixed even though the proceedings had continuedover servers 1 years. Even when Mr. K.K. Shende, oneof the arbitrators died, the parties had expressed theirkeenness to see the arbitration through. The petitionerthus took a chance of a decision favorable to it. Andnow when the award has gone against it, its objectionto the enlargement of time are wholly unjustified. Itsnon-filing of an application under section 14, Arbitration Act earlier, for filing of the award in court has norelevance for the present purposes. The petitioner itself knew as stated in para 19 of the petition that underthe 'French law the award is much exercisable by orderof the court without enquiring in the merits of the case,if the award has become binding and has not been setaside by a competent authority of the court in whichor under the law of which the sward was made. IT is the petitioner's case that the award was made in Indiaunder the Indian law. It was, therefore, for the petitioners to take timely steps to have the award declareda nullity, it thought it was so, more especially as it wasaware that could be enlarged by the court even after theaward had been made. The petitioner not havingmoved the court under section 14, earlier cannot pleadits own neglect, for invoking the exercise of court'sdiscretion against the grant of time. The petitioner hasnow filed an independent application under section 14,Arbitration Act, in respect of which nothing said inthis judgment, will have any effect; nor should it betaken as an expression of opinion affecting that application. The said application shall be tried on its ownmerits, and the petitioner will be granted appropriaterelief, if found entitled to any. But, that has no relevance for the purpose of extending or not extendingtime for making the award.

(32) Mr. Pa.i submitted that the time should not be enlarged in this case also because the petitioner has veryserious objections to the award on merits. But it wasfor the arbitrator to decide the merits of the case;and in case the court can go into the award under section 30 of the Arbitration Act after its being filed in court,the petitioner will have an opportunity to urge its objections, after its application under section 14 is grantedand the award is allowed to be filed in court. Withoutthe award being before the court, nothing can be saidabout the petitioner's objections on the merits.

(33) The learned counsel have cited a number of judgmentsfor and against the grant of the prayer for enlargementof time ; but all of them are based on the fact of eachindividual case. There can be no doubt that the enlargement of time for making the award is entirelywithin the discretion of the court. In KanhayalalDugar v. Askaran Kishanlal ,it was observed that the court's power under section 28 to extend time are entirely discretionary and are notlimited. The court can enlarge time for making theaward even after the

award has been made and evenafter the time has expired. It was also held that oneof the persuasive consideration before the court wouldbe, "that after all the time, expense and trouble in goinginto arbitration and actually having the award, regardingwhich 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 ruleof 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 numberof decisions of various courts, viz. RamSahai v. Babu Lal, Seo Narain Lal v. PrabhuChand , Salt Pamandas Sagriaram v. T.S. Manikyam Pillai

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MohammedHussain Rowther (FB), andSardoolSingh v. Hari Singh . In all these cases was held that no partycan be prejudiced by the mere existence of an award,which does not become operative and enforceable untilit has been filed in court and the court adjudicatingupon its validity passes a judgment and a decree inaccordance therewith.

(35) It is not necessary to go into the marits of the afore-said decisions, as this question was considered by theSupreme Court in M/s Uttum Singh Duggall v. Unionof India, Ca 162 of 1962 authoritatively decided on 1 1/10/1962. It was held that "after an award hasbeen pronounced, the rights and liabilities of the partiesin respect of the said claims can be determined onlyon the basis of the said award. After an award is pronounced, no action can be started on the original claimwhich had been the subject matter of the reference.The court approvingly quoted from the observationof Mookerjee J. of the Calcutta High Court in the caseof Bhajabari Saha Banikya v. Behary Lal Basak Il 33Cal. 881, at 888, as fellows: "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 ofit regular, is conclusive upon the merits of the controversy submitted, unless possibly the parties have intendedthat the award shall not be final and conclusive.....in reality, an award possess all the elements of vitalityeven though it has not been formally enforced and it maybe relied upon in a litigation between the parties relatingto the same subject matter". This view was approved andaffirmed by the Supreme Court in Satish Kumar v.Surinder Kumar & others . It washeld that an award has some legal force and is nota mere waste paper, further, if the award is finaland 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, agreeingwith the majority, observed that "the award does createrights 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? rightsand is final and, therefore, binding ; although in case IT is sought to be enforced in India, some further stepsmay be required to be taken for that purpose.

(36) Mr. Pai submitted that the award in the present case was not final as it wa.s signed and completed byLord Devlin before submitting it to the Court of Arbitration. According to Article 26 of the Icc Rules, theaward is required to be approved by the Court of Arbitration before it can be completed by the arbitrator. Thisaccording to the learned counsel appears not to have been done. But, the award was admittedly communicated to the parties by the Secretariat of the InternationalChamber of Commerce, in accordance with Article28 of the Icc Rules. The formalities required underArticle 26 being matters of domestic procedure, mustbe preslimed to have been fully complied with. Theobjection of the learned counsel, therefore, has noforce.

(37) Mr. Pai also referred to Article 29 of the Icc Rulesand submitted that the arbitral award is stated to befinal; but nothing is stated about its binding effect.This article being a specific provision in the .contractbetween the parties, indicates, according to him, anintention of the parties different from para 7 of the firstSchedule of the Arbitration Act, which would have madethe award net only final but binding also. But, section 3 of the Arbitration Act applies the provisions set outin the first Schedule to every arbitration agreement,unless a different intention is expressed. Nothing havingbeen said about its binding nature, the award wouldbecome binding under the provision to that effect inclause 7 of the first Schedule. Further, sub-clause (2) ofArticle 29 says that the pai ties undertake to carry outthe award without delay, showing thereby the unmistakable intention of the parties to remain bound by theaward. If the award is final, it implies that the awardis 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 bindingon the parties : although further steps may be requiredto be taken to make it a decree of the court, if it is soughtto be enforced in India. In the circumstances of thiscase, there will be no order as to costs. This will disposeof O.H.P. 98/70 filed by the respondent for enlargingtime for making the award.