* **HIGH COURT OF DELHI : NEW DELHI**

\+ **LPA No. 116 of 2010**

Judgment reserved on: February 17, 2010

% Judgment delivered on: April 21, 2010

Jindal Exports Ltd.
110 Babar Road,
Opp. World Trade Center,
New Delhi – 110 001.
India …Appellant

Through: Mr. Mukul Rohtagi and Mr. S.K. Bagaria, Sr. Advocates with Mr. Ramesh Singh, Mr. P.S. Sudheer & Ms. Anne Mathew, Advocates

Versus

Fuerst Day Lawson
FDL Head Office,
Devon House,
58-60 Katharine's Way
London
E1W1JP, United Kingdom. …Respondent

Through: Mr. Ramji Srinivasan, Sr. Advocate with Ms. Sangeeta Bharti, Ms. Nidhi and Mr. Ashish Kumar, Advocates

Coram:

HON'BLE THE ACTING CHIEF JUSTICE
HON'BLE MS. JUSTICE MUKTA GUPTA

1. Whether the Reporters of local papers may be allowed to see the judgment? Yes

2. To be referred to Reporter or not? Yes

3. Whether the judgment should be reported in the Digest? Yes

MADAN B. LOKUR, ACJ

The question for our consideration is rather narrow: Is an appeal under Clause 10 of the Letters Patent (as applicable to the Delhi High Court) maintainable against an order enforcing a foreign award (within the meaning of Sections 44 and 47 of the Arbitration and Conciliation Act, 1996 and Article II of the New York Convention)? The question is required to be answered in the context of Section 50 of the Arbitration and Conciliation Act, 1996 and, in our opinion, the answer is in the negative. For this conclusion, we rely upon a four-Judge decision of the Supreme Court in ***Union of India v. Mohindra Supply Co. AIR 1962 SC 256*** and a Constitution Bench decision in ***P.S. Sathappan v. Andhra Bank Ltd., (2004) 11 SCC 672***.

2. The broad facts of the case are that two "foreign awards"

were rendered in favour of the Respondent on 30th August, 1996 and 16th October, 1996. The Respondent moved execution petitions under the provisions of the Arbitration and Conciliation Act, 1996 (the Arbitration and Conciliation Act) for their enforcement, while the Appellant challenged their enforceability. By a judgment and order dated 11th December, 2009 a learned Single Judge directed the enforcement of the Awards. Feeling aggrieved, the Appellant is before us under Clause 10 of the Letters Patent as applicable to the Delhi High Court. By way of a preliminary objection, learned counsel for the Respondent contended that the appeal is not maintainable and for this he relied on Section 50 of the Arbitration and Conciliation Act.

Statutory provisions

3. Section 50 of the Arbitration and Conciliation Act reads as follows: -

> "**Appealable orders.—**(1) An appeal shall lie from the order refusing to—
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> (*a*) refer the parties to arbitration under Section 45;
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> (*b*) enforce a foreign award under Section 48;
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> to the Court authorised by law to hear appeals from such order.
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> (2) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or

take away any right to appeal to the Supreme Court."

4. The Delhi High Court was constituted by the Delhi High Court Act, 1966 (the DHC Act) and not by the Letters Patent. However, the Letters Patent as applicable to the erstwhile Punjab and Lahore High Courts are applicable to the Delhi High Court. Section 5 of the DHC Act confers original jurisdiction to the Delhi High Court while Section 10 thereof confers appellate jurisdiction. These provisions read as follows:

> **"5. Jurisdiction of High Court of Delhi**. - (1) The High Court of Delhi shall have, in respect of the territories for the time being included in the Union territory of Delhi, all such original, appellate and other jurisdiction as, under the law in force immediately before the appointed day, is exercisable in respect of the said territories by the High Court of Punjab.
>
> (2) 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 ordinary original civil jurisdiction in every suit the value of which exceeds rupees twenty lakhs.
>
> **10. Powers of Judges**. - (1) Where a single Judge of the High Court of Delhi exercises ordinary original civil jurisdiction conferred by sub-section (2) of section 5 on that Court, an appeal shall lie from the judgment of the single Judge to a Division Court of that High Court.
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> (2) Subject to the provisions of sub-section (1), the law in force immediately before the appointed day relating to the powers of the Chief Justice, single Judges and Division

Courts of the High Court of Punjab and with respect to all matters ancillary to the exercise of those powers, shall, with the necessary modifications, apply in relation to the High Court of Delhi."

5. Clause 10 and Clause 37 of the Letters Patent, as applicable to the Delhi High Court read as follows:

> 10. **Appeals to the High Court from Judges of the Court** – And we do further ordain that an appeal shall lie to the said High Court of Judicature at Lahore from the judgment (not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the Superintendence of the said High Court, and not being an order made in the exercise of revisional jurisdiction, and not being a sentence or order passed or made in the exercise of the power of Superintendence under the provisions of Section 107 of the Government of India Act, or in the exercise of criminal jurisdiction) of one Judge of the said High Court or one Judge of any Division Court, pursuant to Section 108 of the Government of India Act, and that notwithstanding anything hereinbefore provided an appeal shall lie to the said High Court from a judgment of one Judge of the said High Court or one Judge of any Division Court, pursuant of Section 108 of the Government of India Act, made on or after the first day of February, one thousand nine hundred and twenty-nine in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court where the Judge who passed the judgment declares that the case is a fit one for appeal; but that the right of appeal from other judgments of Judges of the said High Court or of such Division Court shall be to Us, Our heirs or Successors in our or their Privy Council, as hereinafter provided.

> 37. **Powers of Indian Legislatures Preserved** – And we do further ordain and declare that all the provisions of these Our Letters Patent are subject to the legislative powers of the Governor-General in Legislative Council, and also of the Governor-General in Council under Section 71 of the Government of India Act, 1915 and also of the Governor-General in cases of emergency under Section 72 of that Act, and may be in all respects amended and altered thereby."

6. That the Letters Patent provide not only a forum for appeal but also a right of appeal can no longer be in doubt. In paragraph 32 of ***Shah Babulal Khimji v. Jayaben D. Kania, (1981) 4 SCC 8*** the Supreme Court acknowledged, after referring to a passage from ***Mohindra Supply*** that:

> **"**Thus, **this Court has clearly held that the right to appeal against judgments under the letters patent was not affected by Section 104(1) of the Code of 1908** and the decision therefore fully supports the argument of Mr Sorabjee that there is no inconsistency between the letters patent jurisdiction and Section 104 read with Order 43 Rule 1 of the Code of 1908." (emphasis given).

7. Therefore, four "categories" of appeals lie to the Delhi High Court.

> a. Firstly, appeals under Section 10 of the DHC Act but they are limited only to those judgments referable to Section 5(2) thereof. Admittedly, an appeal pertaining to the

Arbitration and Conciliation Act cannot be filed under Section 10 of the DHC Act.

b. Secondly, appeals under the Code of Civil Procedure. However, it is nobody's case before us that an order or judgment passed under the Arbitration and Conciliation Act is appealable under the provisions of the Code.

c. Thirdly, appeals under different statutes. For example, Section 50 of the Arbitration and Conciliation Act (which we are concerned with) itself provides for an appeal.

d. Fourthly, appeals under Clause 10 of the Letters Patent.

8. We are concerned in this case only with the fourth "category" of appeals. It is nobody's case that the third "category" of appeals is relevant simply because Section 50 of the Arbitration and Conciliation Act does not provide for an appeal in a case such as the present. It is for this reason that we are concerned only with the fourth "category" of appeals with the contention of learned counsel for the Appellant being that Section 50 of the Arbitration and Conciliation Act does not and cannot inhibit the right of appeal under Clause 10 of the Letters Patent.

Discussion of *Mohindra Supply*

9. A handful of judgments have been cited before us in this

context and we propose to deal with them. The first is ***Mohindra Supply*** a decision rendered by four learned Judges. In that case, the Subordinate Judge, First Class, Delhi declined to set aside an award passed under the provisions of the Arbitration Act, 1940. An appeal against that order was allowed by a learned Single Judge and the award was set aside. Against the order of the learned Single Judge an appeal was preferred under Clause 10 of the Letters Patent. It was held that an appeal was maintainable notwithstanding the bar contained in Section 39(2) of the Arbitration Act, 1940. The correctness of this view was before the Supreme Court.

10. Section 39 of the Arbitration Act, 1940 reads as follows: -

> "39. **Appealable orders**.—(1) An appeal shall lie from the following orders passed under this Act (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order:
> An order—
>
> (i) superseding an arbitration;
> (ii) on an award stated in the form of a special case;
> (iii) modifying or correcting an award;
> (iv) filing or refusing to file an arbitration agreement;
> (v) staying or refusing to stay legal proceedings where there is an arbitration agreement;
> (vi) setting aside or refusing to set aside an award:
>
> Provided that the provisions of this section shall not apply to

any order passed by a Small Cause Court.

(2) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court."

11. The Supreme Court was of the opinion that the problem to which attention must be directed was whether the right to appeal under the Letters Patent is at all restricted by Section 39(1) and (2) of the Arbitration Act, 1940. Answering this in the affirmative, it was held in paragraph 5 of the Report:

> "But the Letters Patent are declared by clause 37 subject to the legislative power of the Governor-General in Council and also of the Governor-in-Council under the Government of India Act, 1915, and may in all respects be amended or altered in exercise of legislative authority. Under Section 39(1), an appeal lies from the orders specified in that sub-section and from no others. **The legislature has plainly expressed itself that the right of appeal against orders passed under the Arbitration Act may be exercised only in respect of certain orders. The right to appeal against other orders is expressly taken away.** If by the express provision contained in Section 39(1), a right to appeal from a judgment which may otherwise be available under the Letters Patent is restricted, there is no ground for holding that clause (2) does not similarly restrict the exercise of appellate power granted by the Letters Patent." (emphasis given)

12. The Supreme Court considered the legislative history (leading to the enactment of Section 4 of the Code of Civil Procedure)

and the law relating to the right of appeal under the Letters Patent. It was then held in paragraph 17 of the Report:

> "There is in the Arbitration Act no provision similar to Section 4 of the Code of Civil Procedure which preserves powers reserved to courts under special statutes. There is also nothing in the expression "authorised by law to hear appeals from original decrees of the Court" contained in Section 39(1) of the Arbitration Act which by implication reserves the jurisdiction under the Letters Patent to entertain an appeal against the order passed in arbitration proceedings. Therefore**, in so far as Letters Patent deal with appeals against orders passed in arbitration proceedings, they must be read subject to the provisions of Section 39(1) and (2) of the Arbitration Act.**"

13. The Supreme Court then held that the law relating to appeals pertaining to the Arbitration Act, 1940 was intended to be different from the law prior to its enactment. This is what the Supreme Court said in paragraph 19 of the Report:

> "The Arbitration Act which is a consolidating and amending Act, being substantially in the form of a code relating to arbitration must be construed without any assumption that it was not intended to alter the law relating to appeals. The words of the statue are plain and explicit and they must be given their full effect and must be interpreted in their natural meaning, uninfluenced by any assumptions derived from the previous state of the law and without any assumption that the legislature must have intended to leave the existing law unaltered. **In our view the legislature has made a deliberate departure from the law prevailing before the enactment of Act 10 of 1940 by codifying the law relating to appeals in Section 39.**" (emphasis given)

Accordingly, the Supreme Court held that an appeal under Clause 10 of the Letters Patent was not competent in view of the bar placed by Section 39 of the Arbitration Act, 1940.

14. The conclusions arrived at by the Supreme Court in ***Mohindra Supply*** are as follows: -

> a. Clause 37 of the Letters Patent permits an amendment or alteration of the Letters Patent in exercise of legislative power.
>
> b. The Letters Patent are subject to the provisions of the Arbitration Act, 1940 which must be given their full effect and natural meaning.
>
> c. The right of appeal under the Arbitration Act, 1940 is restricted and this restriction extends to the right available under the Letters Patent by an exercise of legislative power.

15. We do not find any substantial difference between Section 50 of the Arbitration and Conciliation Act and Section 39 of the Arbitration Act, 1940. [There is some difference, but we will deal with that a little later.] Both provide for appeals and yet place restrictions thereon. The historical and conceptual background for the enactment of the Arbitration Act, 1940 is applicable to the Arbitration and Conciliation

Act. If anything, judicial review has been further circumscribed so that arbitration proceedings may continue with a minimum of judicial interference. That being the position, in our opinion, in view of the clear law laid down by the Supreme Court the present appeal under Clause 10 of the Letters Patent is not maintainable considering the express language of Section 50 of the Arbitration and Conciliation Act.

16. We may note that a similar view has been expressed by other Division Benches of this Court (though for different reasons) in ***Shivnath Rai Harnarain India Co. v. Glencore Grain Rotterdam, 2009 (4) Arb. LR 272, Wee Aar Constructive Builders v. Simplex Concrete Piles (India) Ltd., MANU/DE/0223/2010*** and ***ITE India (P) Ltd. v. Mukesh Sharma & Others, MANU/DE/2571/2009***.

A contrary view

17. Learned counsel for the Appellant referred to ***Vinita M. Khanolkar v. Pragna M. Pai, (1998) 1 SCC 500*** to contend that an appeal under the Letters Patent would be maintainable despite a statutory bar. In that case, the concerned statute was the Specific Relief, 1963. There is no dispute about the principles relating to the

maintainability of an appeal under the Letters Patent, but the history and the provisions of the Specific Relief are completely different from the history and the provisions of the Arbitration Act, 1940. Therefore, the general principles laid down in ***Khanolkar*** really do not advance the case of the Appellant vis-à-vis the maintainability of an appeal under the Letters Patent with reference to the Arbitration Act, 1940. We would like to emphasize that historically the Arbitration Act, 1940 (and the Arbitration and Conciliation Act) stand on a different footing altogether and their provisions must be construed in that context.

18. At this stage, we may mention that it was brought to our notice that in ***Orma Impex Pvt. Ltd. v. Nissai ASB Pte Ltd., (1999) 2 SCC 541*** the Supreme Court expressed the opinion that there was a conflict of views between ***Mohindra Supply*** and ***Khanolkar***. The conflict was referred to a larger Bench. It seems that the larger Bench has not yet expressed any view on the conflict. But be that as it may, until the conflict is resolved, for the purposes of this case we prefer to follow the law laid down by the four-Judge Bench in ***Mohindra Supply*** vis-à-vis the interplay between the Letters Patent and the Arbitration Act, 1940 rather than the two-Judge Bench decision in ***Khanolkar*** vis-à-

vis the interplay between the Letters Patent and the Specific Relief Act.

Section 50 of the Arbitration and Conciliation Act

19. Learned counsel for the Appellant sought to draw a distinction between Section 39 of the Arbitration Act, 1940 (dealt with in ***Mohindra Supply***) and Section 37 of the Arbitration and Conciliation Act on the one hand and Section 50 of the Arbitration and Conciliation Act on the other. We have already reproduced above Section 39 of the Arbitration Act, 1940 and Section 50 of the Arbitration and Conciliation Act. Section 37 of the Arbitration Act, 1940 reads as follows:

> "37. **Appealable orders.—**(1) An appeal shall lie from the following orders (and from no others) to the court authorised by law to hear appeals from original decrees of the Court passing the order, namely:—
>
> (*a*) granting or refusing to grant any measure under Section 9;
>
> (*b*) setting aside or refusing to set aside an arbitral award under Section 34.
>
> (2) An appeal shall also lie to a court from an order of the arbitral tribunal—
>
> (*a*) accepting the plea referred to in sub-section (2) or sub-section (3) of Section 16; or
>
> (3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court."

20. The contention of learned counsel was that Sections 39 and 37 reproduced above incorporate the words "and from no others" which are conspicuously missing in Section 50 and this omission is deliberate. He submitted that the intention was to leave a window open for an appeal under Section 50 of the Arbitration and Conciliation Act, which window did not exist under the Arbitration Act, 1940 and is kept closed under Section 39 of the Arbitration and Conciliation Act. Given the position in law laid down in ***Mohindra Supply***, the use of the words "and from no others" really makes no difference except to emphasize that an appeal may be filed only against limited orders. The fact of the matter is that an appeal under the Letters Patent is not available against all orders passed under the Arbitration and Conciliation Act whether or not the words "and from no others" exist in Section 50 of the Arbitration and Conciliation Act.

21. This issue may be looked at from two different perspectives: the addition of words in a statute and giving a literal interpretation to the words used in the statute.

22. In our opinion, it would not be impermissible (if necessary)

for us to read the words "and from no others" into Section 50 of the Arbitration and Conciliation Act. In his monumental work ***Principles of Statutory Interpretation (12th Edition, 2010)*** Justice G.P. Singh cites (on page 78) Craies ***Statute Law (7th Edition, page 109)*** to the effect:

> "...where the alternative lies between either supplying by implication words which appear to have been accidentally omitted, or adopting a construction which deprives certain existing words of all meaning, it is permissible to supply the words."

23. Accepting this principle, it appears to us that if the words "and from no others" are not read into Section 50 of the Arbitration and Conciliation Act, that Section would be completely emasculated. The result of the emasculation would be that despite the statutory prohibition, an appeal would lie against all orders passed under Part I of Chapter II (pertaining to foreign awards under the New York Convention) and Part II of Chapter II (pertaining to foreign awards under the Geneva Convention) of the Arbitration and Conciliation Act, while limiting the right of appeal in respect of domestic awards. Surely, this was not and cannot be considered the legislative intent. It is unlikely that Parliament took a conscious decision to make foreign awards more amenable to judicial review as against domestic awards. No such decision is discernible, nor was any such submission made

before us.

24. Similarly, in ***Bennion on Statutory Interpretation, 5th Edition, 2008*** it is stated under Section 315 (page 986) that "The court seeks to avoid a construction that creates an anomaly or otherwise produces an irrational or illogical result." Keeping these principles in mind, we find no difficulty in reading the words "and from no others" in Section 50 of the Arbitration and Conciliation Act, although we think it unnecessary.

25. As far as a literal interpretation of Section 50 of the Arbitration and Conciliation Act is concerned, it is quite clear that if Section 50 of the Arbitration and Conciliation Act is read literally, an appeal cannot be filed except in the situations mentioned therein. So, if the Section is to be read literally, the controversy raised in this case would not even survive. In this context, we may cite the following passage from ***Stock v. Frank Jones (Tipton) Ltd., [1978] 1 WLR 231*** (from ***Bennion*** page 986):

> "...a court would only be justified in departing from the plain words of a statute were it satisfied that: (1) there is clear and gross balance of anomaly; (2) Parliament, the legislative promoters and the draftsman could not have

> envisaged such anomaly and could not have been prepared to accept it in the interests of a supervening legislative objective; (3) the anomaly can be obviated without detriment to such legislative objective; (4) the language of the statute is susceptible of the modification required to obviate the anomaly".

26. Relying on the above principle, we should read Section 50 of the Arbitration and Conciliation Act literally, and if we do, the present appeal would not be maintainable. However, if there is an anomalous situation created (assuming learned counsel for the Appellant is right in relying on the absence of the words "and from no others") then we are compelled to read those words into Section 50 of the Arbitration and Conciliation Act. Therefore, every whichever way the issue is looked at, the present appeal would not be maintainable under Clause 10 of the Letters Patent.

Alternative view

27. Assuming ***Mohindra Supply*** has not been correctly decided, can the right of appeal under the Letters Patent be curtailed as against an order passed under the Arbitration and Conciliation Act and if so, then how. We are looking at this alternative de hors Clause 37 of the Letters Patent but in view of the observations in ***Sathappan***.

28. In ***Sathappan*** the issue before the Supreme Court was whether a Letters Patent appeal is maintainable against an order passed by a learned Single Judge of the High Court sitting in appellate jurisdiction under the Code of Civil Procedure. After surveying the case law, it was held in paragraph 22 of the Report:

> "Thus the unanimous view of all courts till 1996 was that Section 104(1) CPC specifically saved letters patent appeals and the bar under Section 104(2) did not apply to letters patent appeals. The view has been that **a letters patent appeal cannot be ousted by implication but the right of an appeal under the Letters Patent can be taken away by an express provision in an appropriate legislation. The express provision need not refer to or use the words "letters patent" but if on a reading of the provision it is clear that all further appeals are barred then even a letters patent appeal would be barred.**" (emphasis given).

29. The Supreme Court also considered the post-1996 case law in view of the decisions rendered in ***Resham Singh Pyara Singh v. Abdul Sattar, (1996) 1 SCC 49*** and ***New Kenilworth Hotel (P) Ltd. v. Orissa State Finance Corpn., (1997) 3 SCC 462.*** After overruling both the decisions as not laying down the correct law, the Supreme Court noted that it has continued to hold the view that an appeal under the Letters Patent is not affected by Section 104(1) of the Code of Civil

Procedure. Thus, in ***Chandra Kanta Sinha v. Oriental Insurance Co. Ltd. (2001) 6 SCC 15*** it was held that a Letters Patent appeal was maintainable against the judgment/order of a learned Single Judge passed in a first appeal under Section 140 of the Motor Vehicles Act. Then, in ***Sharda Devi v. State of Bihar, (2002) 3 SCC 705*** the question arose whether a Letters Patent appeal was maintainable in view of Section 54 of the Land Acquisition Act. It was held that when a Letters Patent grants to the High Court a power of appeal against a judgment of a learned Single Judge, the right to entertain such an appeal does not get excluded unless the statutory enactment excludes such an appeal. It was held that as Section 54 of the Land Acquisition Act did not bar a Letters Patent appeal, such an appeal was maintainable. Similarly, in ***Subal Paul v. Malina Paul, (2003) 10 SCC 361*** it was held that the Letters Patent permitted a right of appeal against the order/judgment passed under any Act unless the same was expressly excluded. Section 299 of the Succession Act permitted an appeal under the Code of Civil Procedure against an order of the District Judge. Though no further appeal was provided by Section 299 of the Succession Act, an appeal under the Letters Patent was saved/permitted by the words "any other law for the time being in force" in Section 104(1) of the Code of Civil

Procedure.

30. The sum and substance of the above discussion is this:

a. An appeal is (obviously) permissible if the relevant statute permits it.

b. Even if the relevant statute does not permit an appeal, it may yet be preferred under the Letters Patent, unless that is expressly excluded.

c. Exclusion of the Letters Patent may not be stated in those precise words "but if on a reading of the provision it is clear that all further appeals are barred then even a letters patent appeal would be barred."

31. On a reading of Section 50 of the Arbitration and Conciliation Act there is no doubt that "all further appeals are barred" except those mentioned therein. Clearly, therefore, even if it is assumed that the correctness of the view expressed in ***Mohindra Supply*** is in doubt and that Clause 37 of the Letters Patent is inapplicable, even then the Letters Patent can be overridden by statute. This is all the more so in the case of the Delhi High Court which was established by the DHC Act and not by the Letters Patent. Section 50 of the Arbitration and Conciliation Act bars all appeals under that statute, except those permitted. To this extent, it limits the operation of the Letters Patent as

applicable to the Delhi High Court and thereby bars appeals such as the present. Therefore, on a reading of ***Sathappan*** it is clear that an appeal under the Letters Patent would not be competent in a case such as the present.

Conclusion

32. We hold that whichever way the question is looked at, an appeal under Clause 10 of the Letters Patent (as applicable to the Delhi High Court) is not maintainable against an order passed under Section 50 of the Arbitration and Conciliation Act (except the orders specified therein).

33. Since the impugned order in this appeal does not fall in any of the categories specified in Section 50 of the Arbitration and Conciliation Act, the appeal is dismissed as not maintainable.

(MADAN B. LOKUR)
ACTING CHIEF JUSTICE

APRIL 21, 2010 **(MUKTA GUPTA)**
ncg **JUDGE**
Certified that the corrected copy of the judgment has been transmitted to the main Server.