

Mukesh H. Mehta and Others Vs. Harendra H. Mehta and Another

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Court : Mumbai

Decided On : Feb-24-1995

Reported in : 1995(3)BomCR686; [1998]92CompCas402(Bom); 1995(2)MhLj644

Judge : P.S. Patankar, J.

Acts : Income Tax Act, 1961, Sections - 269UA; [Foreign Exchange Regulation Act, 1973](#) - Sections 9, 19, 29, 44A, 47(2) and (3)

Appeal No. : Arbitration Petition No. 102 of 1991

Appellant : Mukesh H. Mehta and Others

Respondent : Harendra H. Mehta and Another

Advocate for Def. : H.J. Thakkar, Adv.

Advocate for Pet/Ap. : Janak Dawarkadas, Adv.

Judgement :

P.S. Patankar J.

1. This is a petition under section 5 of the Foreign Awards (Recognition and Enforcement) Act, 1961 (hereinafter called 'the Act of 1961'), for enforcement of the award dated October 31, 1990. The enforcement thereof is opposed by the respondents.

2. Petitioners Nos. 1 and 2 are husband and wife. Respondents Nos. 1 and 2, herein are husband and wife. All of them are non-resident Indians (NRI) and were residing in the U.S.A. (United States of America). They carried on jointly several businesses in India and in the U.S.A. The businesses were carried on through the agency of partnership firms, private limited companies, associations of persons and private trusts. Various properties came to be acquired.

3. The disputes arose between them prior to October, 1989. It was decided that the same be referred for the arbitration of the elder brother of petitioner No. 1 and respondent No. 1 for the purpose of dividing their joint businesses and properties in India and the U.S.A. The appointment was made by letter called 'first submission agreement'. Arbitration agreement came to be entered into between the parties on November 17, 1989, called 'second submission agreement'.

4. It seems that respondents Nos. 1 and 2 tried to stall the arbitration proceedings by going before the Supreme Court of the State of New York, County of Nassau, U.S.A., but failed and an order came to be passed on March 12, 1990. Thereafter, the parties agreed on March 20, 1990, to draw four packages of those properties and business in India and the U.S.A. Package A deals with the U.S.A. properties and businesses. Package A-1 deals with U.S. note which provided for payment in U.S. dollars for relinquishing the share and interest in jointly held U.S. businesses and properties. Package B deals with Indian businesses and properties. Package B-1 consists of Indian note which provided for payment in Indian rupees paid to the party relinquishing the share and interest in jointly held Indian businesses and properties. It was agreed that one party would have to choose A and B-1 collectively or B and A-1 collectively. Respondent No. 1 was responsible for preparing the packages and first choice was to be exercised by petitioner No. 1. Accordingly, petitioner No. 1 announced choice of packages B and A-1. It consists of Indian businesses and properties and 3.25 million US dollars. Respondents Nos. 1 and 2 got the businesses and properties in U.S.A. and a sum of Rs. 1,21,00,000. The award came to be announced at the very meeting on March 20, 1990. It was not signed by the learned arbitrator due to oversight and came to be signed on October 31, 1990, pursuant to the court's direction to that effect. It is a non-speaking award.

5. The petitioners moved the Supreme Court of the State of New York, County of Nassau, U.S.A. by filing proceedings for confirmation of the said award. Respondents Nos. 1 and 2 moved a cross-motion to set aside the said award. The cross-motion of respondents Nos. 1 and 2 was rejected on October 22, 1990. The petitioner's application came to be granted on January 8, 1991, and the award dated October 31, 1990, came to be confirmed. Respondents Nos. 1 and 2 filed appeals against the said order, but failed. Respondents Nos. 1 and 2 also signed some documents for implementing the award in respect of the Indian businesses and properties. One of the properties is a residential flat in Urvashi, 66, L. Jagmohandas Marg, Bombay-400 026, in a co-operative housing society. The petitioners took charge of the Indian businesses and properties and expressed their readiness to execute the documents to effectively transfer the U.S.A. businesses and properties to respondents Nos. 1 and 2. Respondents Nos. 1 and 2 took charges of the businesses and properties in the U.S.A., but declined to execute the necessary documents for transfer of the Indian businesses and properties in favour of the petitioner.

6. The respondents were not prepared to co-operate for implementation of the award which compelled the petitioners to move this petition for filing the award dated October 31, 1990, and for granting the judgment and decree in terms thereof.

7. In the petition, the petitioners expressed their willingness to file an application before the Reserve Bank of India under section 47(3) of the [Foreign Exchange Regulation Act, 1973](#) (in short 'the FFRA'), for permission under section 9 for transfer of shares of private companies from respondents Nos. 1 and 2 to the petitioners.

8. The main contentions raised on behalf of the respondents challenging the enforceability of the award are :

(i) It is not a foreign award because it does not deal with differences which can be considered as 'commercial' in nature.

(ii) It cannot be considered as 'foreign award' as it deals with differences between Indians though NRI, and it is not between the citizens of two different countries, i.e., one India and the other U.S.A.

(iii) The award is not enforceable as it involves violation of Chapter XXC of the Income-tax Act, 1961. The flat in Urvashi building is worth millions of rupees and hence enforcement of the award without the necessary no objection certificate is against public policy.

(iv) The award seeks to transfer shares in Indian companies to NRIs without the permission of the Reserve Bank of India, and, therefore, violates the [Foreign Exchange Regulation Act, 1973](#) ('the FERA', for short), and so is against the public policy.

(v) The award has been made a rule of the court in the U.S.A. and is, therefore, executable as a decree. The award has merged in a foreign judgment which can only be enforced in India by a suit on a foreign judgment or can be executed as a decree with leave of the court as per the Code of Civil Procedure;

(vi) The petitioners cannot enforce the award as they are only seeking to enforce the Indian part.

Learned counsel for the respondents also raised three more contentions :

(i) The award is based on an alleged settlement agreement between the parties which is procured by fraud and misrepresentation by the petitioners. Respondents Nos. 1 and 2 have filed Suit No. 2878 of 1993 for a declaration that it is void and it is pending in the court.

(ii) The gift deed regarding Urvashi flat is not genuine gift deed executed out of love and affection. It is a fraud on the Income-tax Act and the Bombay Stamp Act.

(iii) The minor son of respondent No. 1 by name Amish has filed Suit No. 3527 of 1994 on attaining majority and challenging the transfer of interest in the Urvashi flat. The same is pending.

Points (i) and (ii) of para 9 stated above require me to appreciate the evidence and to go behind the settlement between the parties and the award. It is not within the scope of my enquiry. The narrow scope of enquiry is whether the award is enforceable or not under section 7 of the Act of 1961 or enforcement of such an award would be contrary to the public policy of our country. These points do not fall within the scope of section 7. Further, already such objections were raised before the USA court which came to be rejected. Even an attempt is made by respondents Nos. 1 and 2 by filing Suit No. 2878 of 1993 in this court challenging the settlement agreement - arbitration agreement - between the parties, pleading that it was brought about by fraud and misrepresentation. Relief of declaration was sought after exhausting the remedies in the U.S.A. and after three years of the award, clearly as an after-thought. As far as point (iii) is concerned, the said son, Amish, has filed Suit No. 3527 of 1994, in this court. Just a few weeks ago, he moved an application for stay of these proceedings. But it has been rejected. It is not necessary to deal with this in this matter and it would suffice to mention that it is designed just to delay the enforcement of the award.

9. The first contention raised is that it is not a foreign award because it does not deal with differences between the parties which can be considered as 'commercial' in nature.

10. It is submitted by learned counsel for the respondents that this cannot be called a 'foreign award' as it does not relate to a commercial relationship between the parties. It was relating to a mere domestic relationship between the parties. It is contended on behalf of the petitioners that essentially the relationship between the parties was commercial. It is immaterial that petitioner No. 1 and respondent No. 1 are brothers and that cannot make the award domestic. The parties wanted to resolve the disputes which arose in the course of business and wanted mainly to divide the businesses and incidentally to divide the properties and separate for good. A lot of debate has taken place at the Bar about this point and so I deal with it in a little detailed manner.

11. It is averred in the petition that the petitioners and the respondents have jointly carried on certain business in India and the U.S.A. and have jointly held properties

in the U.S.A. and India. Several businesses were carried on by the parties in the two countries through the agency of partnership firms, private limited companies, association of persons and private trusts. The settlement agreement is clear in this respect. It has been averred in the affidavit-in-reply dated May 16, 1994, of respondent No. 1 that the award is not on the differences between the petitioners and the respondents arising out of any legal relationship which can be considered as commercial under any law in force in India. The agreement dated November 17, 1989, between the parties recites that there were several assets consisting of businesses and properties jointly owned or held by the parties and that the parties desired for arbitration for dividing them, As petitioner No. 1 and respondent No. 1 are brothers, the relationship between parties is not a commercial relationship and the disputes between them did not arise out of relationship which can be considered as commercial in India. Learned counsel pointed out that there is a list of properties and businesses as schedules 'A' and 'B' to the settlement agreement. The same are to be divided. There is also mention about some common property. This is based on the submission agreement which provided similarly for division and clause 12 thereof requires that transfer documents be executed by the parties in respect thereof.

12. I shall first peep into some historical background of relevant legislation. After the First World War international trade expanded to a great extent. The zeal of the parties to resolve differences arising out of such international transactions out of court, led them to have recourse to arbitration. The League of Nations intervened and this led to the signing of the Protocol on Arbitration Clauses at Geneva on September 24, 1923. India was a signatory to it. According to it, the arbitration agreement could be in respect of differences that may arise in connection with the contract relating to commercial matters and to any other matter capable of settlement by arbitration. The protocol was followed by the Convention on Execution of Foreign Awards, 1927, to which India was also a party. This convention was given effect to by passing the Arbitration (Protocol and Convention) Act, 1937 (hereinafter called 'the 1937 Act'). In view of the definition of foreign award contained in section 2 thereof, a foreign award could be one, which is given on differences relating to the matters considered as commercial under the law enforced in India. In 1958, there was a new convention called 'the

New York Convention on Recognition and Enforcement of Foreign Arbitral Awards'. This was adopted to increase the effectiveness of arbitration in settlement of private law disputes by securing uniformity in the diverse national arbitration laws in the area of recognition and enforcement of foreign awards. This was to remedy the defects in the Geneva Convention of 1927, which hampered the speedy settlement of disputes. This came to be ratified by India in 1960. India has embodied the provisions of the Convention in the Act of 1961. The definition of foreign award contained in section 2 is as follows :

'2. Definition. - In this Act, unless the context otherwise requires, 'foreign award' means an award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960 -

(a) in pursuance of an agreement in writing for arbitration to which the Convention set forth in the Schedule applies, and

(b) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made, may, by notification in the Official Gazette, declare to be territories to which the said Convention applies.'

The definition, therefore, contains four requirements -

(i) it must be an award on differences between persons who have legal relationship with one another, such relations may be contractual or not;

(ii) legal relationship must be considered as commercial under the law in force in India;

(iii) the award must be made on or after October 11, 1960; and

(iv) the award must be in pursuance of an agreement in writing for arbitration to which the New York Convention applies. Thus, the second requirement restricts the applicability to differences arising out of legal relationships which are considered as commercial under the law in India, whether the relationship is contractual or not. It is known as commercial reservation.

In support of this submission, learned counsel for the respondents first relied upon *Kamani Engineering Corporation Ltd. v. Society De Traction Et D'Electricity Society Anonyme*, : AIR1965 Bom114 . This court was called upon to decide as to whether an agreement to provide the necessary technical assistance for overhead traction, electrification of railways, tramways, etc., could be considered as 'commercial', under the 1937 Act. It was held that it was a contract merely for technical assistance. It did not involve the defendant into any business with the plaintiffs. It was not in any sense commercial as there was no participation in profits between the parties. The remuneration of the defendants was for that reason described as 'fees' and was only on percentage basis. The defendants have kept themselves out of any commercial relationship and it was more like the relationship between a solicitor or advocate on the one hand and client on the other. The services rendered were, therefore, essentially of professional character and cannot be called as commercial. This is not the position in the present case and hence it has no application.

13. The next case relied upon is *Indian Organic Chemicals Ltd. v. Chemtex Fibres Inc.*, : AIR1978 Bom106 . In the said case, the plaintiff wanted to establish in India facilities for manufacture of 6,100 metric tonnes of plastic staple fibre per annum, etc. Defendant No. 1 was to supply machinery. The technical know-how was supplied by defendant No. 2 who was also to approve the machinery supplied. Defendant No. 3 stood as a guarantor for proper performance by defendants Nos. 1 and 2. Three agreements were entered into between the parties. In the said case, it was held (Mridul J.) an agreement must be commercial not as normally understood but by virtue of the provisions of law in force in India. There must be some legal provision which expressly makes provision for recognising a legal relationship as commercial and in the absence of such legislative provision section 2 of the 1961 Act could not be invoked. It is necessary that there must be some legal provision, which would specify or indicate that a legal relationships were to be considered as commercial for the purpose of the 1961 Act.

14. First this is not the contention here. Further, this view came to be overruled by the Division Bench of this court in the judgment in *European Grain and Shipping Ltd. v. Bombay Extractions Pvt. Ltd.*, : AIR1983 Bom36 . It came to be held that

the mere use of the word 'under' preceding the words 'the law in force in India' would not necessarily mean that one has to find a statutory provision or a provision of law which specifically deals with the subject of the particular legal relationship being commercial in nature. This phrase came to be interpreted by the Division Bench and it was held that it is not necessary that there should be a statutory provision enumerating such legal relationship for determining whether the relationship is commercial or not. It was finally held (page 48): 'We have no doubt that the contract in the instant case, which was for the sale and purchase of a commodity, was clearly a contract which brought about legal relationship which was commercial in nature under the Indian law'. It is obvious that this has no application to the facts of the present case.

The phrase 'commercial' came to be considered by the apex court in *R. M. Investment and Trading Co. Pvt. Ltd. v. Boeing Co.* : [1994]1SCR837 . In the said case, an Indian company by name R. M. Investment entered into an agreement with Boeing Co. of U.S.A. R. M. Investment agreed to provide Boeing with consultancy services for sale of Boeing aircrafts in India. Agreements for purchase of two Boeing aircrafts came to be executed between Boeing and Air India. R. M. Investment claimed commission from Boeing for the said transaction. But Boeing refused to pay. R. M. Investment filed a suit in the High Court claiming compensation and remuneration for its consultancy services. The agreement contained an arbitration clause which provided that 'any controversy or claim arising out of, or relating to, this agreement, or any breach thereof, which the parties have not been able to resolve with due diligence amicably, shall be settled by arbitration conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association. In the said suit, R. M. Investment filed an application for injunction and an interim order. Boeing moved an application under section 3 of the Act of 1961 for the stay of the said suit in view of the arbitral clause. The matter landed in the apex court. The apex court observed (page 607) : 'While construing the expression 'commercial' in section 2 of the Act it has to be borne in mind that the `Act is calculated and designed to subserve the cause of facilitating international trade and promotion thereof by providing for speedy settlement of disputes arising in such trade through arbitration and any expression or phrase occurring therein should receive, consistent with its literal and

grammatical sense, a liberal construction' . . . The expression 'commercial' should, therefore; be construed broadly having regard to the manifold activities which are an integral part of international trade today'. It was held that the relationship between R. M. Investment and Boeing was commercial. The word 'commercial' which undoubtedly, is derived from the term 'commerce' and the term 'commerce' is a term of largest import. It embraces every phase of commercial and business activity and intercourse including the transportation, purchase, sale, exchange of commodities and supply of information and technical assistance between subjects of different States. Even Stroud's Judicial Dictionary of Words and Phrases (fourth edition), volume I, gives one of the meanings of 'commercial' as 'whenever capital is to be laid out on any work and a risk run of profit or loss, it is a commercial venture'. The learned authors Alan Redfern and Martin Hunter on Law and Practice of International Commercial Arbitration (second edition), say as follows :

'Thus, it would be permissible to hold an arbitration between two merchants over a commercial contract which they had made in the course of their business but not for example in respect of a contract for the separation of property made on the marriage of their children.

Yet, whilst there is no universally accepted definition of the term commercial, it has now become part of the language. It serves, for instance, to distinguish international commercial arbitrations from international arbitrations between States concerned with boundary disputes and other political issues. It also serves to distinguish them from arbitrations (which are usually but not necessarily domestic) concerned with such matters as property tenure, employment and family law.'

Thus, the phrase used commercial relationship is in contradistinction with matrimonial or family or cultural or social or political relationship. It would not embrace that type of dispute. In the present case, the parties went on doing businesses in India and the U.S.A. and acquired various properties. Essentially they wanted to separate that business relationship and incidentally the properties acquired to avoid multiplicity of proceedings. That petitioner No. 1 and respondent No. 1 are brothers would not make the relationship between them domestic or family relationship. On principle, I see no difference between two individuals

joining together and entering into a commercial venture and two brothers entering into such a commercial venture none the less the relationship between the two is 'commercial'. I find nothing to detract from holding otherwise.

15. The second point raised is, it cannot be considered as a 'foreign award' as it deals with differences between Indians, though NRI and it is not between the citizens of two different countries, i.e., one Indian and the other the U.S.A.

16. Learned counsel for the respondents submitted that the award concerned two NRIs, but not between citizens of two different countries. The properties and businesses may be in India and U.S.A., but that is not sufficient. It must relate to the international trade or business which presupposes that the award is passed in respect of the parties who are subject to two national jurisdictions and whose rights and liabilities are governed by two different legal systems. It is submitted that then only it can be called a 'foreign award'. In support of this he has relied upon certain observations from para. 39 of *Indian Organic Chemicals Ltd. v. Chemtex Fibres Inc.*, : AIR1978 Bom106 . They are 'I, therefore, take the view that the concept of commercial relationship in section 2 of the 1961 Act takes within its ambit all relationships which arise out of or are ancillary and incidental to the business dealings between citizens of two States. The concept takes within its fold all legal relationships pertaining to the international trade in all its forms between the citizens of different States.' It is further contended that those observations came to be approved by the Division Bench in *European Grain and Shipping Ltd. v. Bombay Extractions Pvt. Ltd.*, : AIR1983 Bom36 , I have already pointed out what is the point involved before the single judge and the Division Bench. The point presently raised was not at all involved or discussed. Further, the Division Bench has not cited the said passage for approving the point raised herein. In fact the Division Bench has pointed out the requirements of section 2 of the 1961 Act in para 17, but it is not stated that the parties should be belonging to two different nations. In my opinion, neither before the learned single judge nor before the Division Bench such a question arose and, therefore, these observations underlined by me cannot be treated as a ratio. The question raised and decided was what is the interpretation of the phrase 'under the law in force in India' contained in section 2. This came to be interpreted by the single judge and the

said interpretation was not approved by the Division Bench as pointed out above holding that the word 'under' in a given case may require reference to a particular provision of law or may mean 'according to law'. The first restricted meaning was accepted by single judge, while the Division Bench accepted the second.

17. It is also to be noted that it was a consensual settlement agreement between parties here. Clause No. 14 of the arbitration agreement dated November 17, 1989, provided that the agreement shall be governed by the U.S.A. Arbitration Act and judgments may be entered by any court having the jurisdiction thereof.

18. I have pointed out some history of legislation earlier. Section 2 of the 1937 Act offered the following definition of the phrase 'foreign award'.

'(a) in pursuance of an agreement for arbitration to which the protocol set forth in the First Schedule applies, and

(b) between persons of whom one is subject to the jurisdiction of some one of such powers as the Central Government, being satisfied that reciprocal provisions have been made, may, by notification in the Official Gazette, declare to be parties to the Convention set forth in the Second Schedule, and of whom the other is subject to the jurisdiction of some other of the powers aforesaid, and

(c) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made, may, by like notification, declare to be territories to which the said Convention applies.'

19. I have already quoted section 2 of the 1961 Act defining 'foreign award'. The Act of 1961 repealed the Act of 1937. Thus, clauses (a) and (c) in the definition of the 'foreign award' in section 2 of the Act of 1937 are retained while clause (b) is dropped. It is crystal clear that it is dropped with a view that it is not necessary now that the dispute should be necessarily between the persons belonging to two different States. This was to bring the definition in tune with the New York Convention, 1958. In the course of time, it was noticed that the parties belonging to the same State are having inter se commercial relationship, carry on business in other States and acquire properties. To settle the disputes between them this

distinct improvement was effected. It is only necessary that parties should belong to the States which have ratified the Convention and subject to commercial reservation as stipulated by section 2. The Geneva Protocol on Arbitration 1923 was followed by the Convention of 1927. The Convention, inter alia, provided for conditions which are necessary for recognition or enforcement of a foreign arbitral award. Under the Act of 1937, one of the conditions was that the parties should be subject to the jurisdiction of two States. The Act of 1937 was based on the Convention of 1927. This is precisely given the go-by by the New York Convention of 1958 on which the Act of 1961 is based.

20. Learned counsel for the respondents contended that the said clause (b) of section 2 of the 1937 Act is not incorporated in section 2 of the 1961 Act because it was well understood that the parties should be of two different States as the Act was meant for promotion and smooth running of international trade. The object clause of the Act of 1961 shows that it is to facilitate smooth running and promotion of international trade or business. But it can easily be envisaged that parties belonging to one State may carry on such international business or trade in some other State and disputes may arise between them in that respect. Specifically to remedy this, the definition is suitably structured first in the New York Convention of 1958 and the same is adopted in the Act of 1961. If that was not so, suppose in this case the businesses are carried on by the parties in the U.S.A. only and properties are also acquired, then they would be required to come to this country only for resolution of their disputes. This requires to be eschewed. Hence, I hold that it is not necessary for treating the award as a foreign award that the parties should belong to two different States or be subject to two different national jurisdictions.

21. Thirdly, it is contended that the award is not enforceable as it involves violations of Chapter XXC of the Income-tax Act, 1961. The flat in Urvashi building is worth millions of rupees, hence enforcement of the award is against public policy as the no-objection certificate is not obtained from the income-tax authorities for transfer of it.

22. It is contended that the award is not enforceable in India inasmuch as it is against the public policy of India because it involves violation of Chapter XXC of the Income-tax Act, 1961, when it provides for transfer of a flat situated in the building Urvashi in a co-operative housing society from respondents Nos. 1 and 2 to petitioners Nos. 1 and 2. It has been averred in the affidavit-in-reply dated May 16, 1994, of respondent No. 1 that the Urvashi flat cannot be transferred without a no-objection certificate from the income-tax authorities as it is governed by Chapter XXC of the Income-tax Act, 1961. In the affidavit in rejoinder of petitioner No. 1, dated December 22, 1994, it has been pointed out that such a plea is raised designedly as the form for transfer requires signatures of both the parties. The respondents would not give such signatures in view of their resistance. It is denied that the award is violative of the provisions of the Income-tax Act. It is pointed out that the flat stands in the name of petitioners Nos. 1 and 2 and respondents Nos. 1 and 2, and the effect of implementation of the award would be to delete the names of respondents Nos. 1 and 2. There is no question of transfer involved. There is no question of under valuation to avoid payment of income-tax. It is only part of a larger settlement between the parties. It is further stated that even assuming that it is necessary, execution of the decree can be made subject to it and the award is not vitiated on that count. The petitioners are willing to obtain such permission.

23. Section 269UC deals with restrictions on transfer of immovable property. Section 269UC(1) provides that no transfer of any immovable property worth more than Rs. 10 lakhs shall be effected unless the agreement for transfer is entered into between the transferor and transferee in accordance with sub-section (2). At least four months before the intended transfer, under sub-section (3), the said agreement is required to be submitted to the appropriate authority. Under section 269UD(1), the appropriate authority can order purchase of the same by the Central Government as provided therein. There is the first proviso to it, which says that no such order shall be passed after the expiration of a period of two months from the end of the month in which the statement (form) is received by the appropriate authority (after June 1, 1993 - three months as per the second proviso). Section 269UE(1) provides that on the date of such order, the property vests in the Central Government. Section 269UA(b) defines 'apparent consideration' in relation to transfer by way of sale or exchange or lease.

Admittedly, we are concerned with 'by way of exchange', i.e., section 269UA(b)(1)(ii), it is as follows :

'269UA. In this Chapter, unless the context otherwise requires, -

....

(b) 'apparent consideration', -

(1) in relation to any immovable property in respect of which an agreement for transfer is made, being immovable property of the nature referred to in sub-clause (i) of clause (d), means, - . . . (ii) if the immovable property is to be transferred by way of exchange, -

(A) in a case where the consideration for the transfer consists of a thing or things only, the price that such thing or things would ordinarily fetch on sale in the open market on the date on which the agreement for transfer is made;

(B) in a case where the consideration for the transfer consists of a thing or things and a sum of money, the aggregate of the price that such thing or things would ordinarily fetch on sale in the open market on the date on which the agreement for transfer is made, and such sum.'

Section 269UA(f) defines 'transfer'. Learned counsel for the respondents emphasised section 269UA(f)(ii). It is as follows :

'(f) 'transfer', - . . .

(ii) in relation to any immovable property of the nature referred to in sub-clause (ii) of clause (d), means the doing of anything (whether by way of admitting as a member of or by way of transfer of shares in a co-operative society or company or other association of persons or by way of any agreement or arrangement or in any other manner whatsoever) which has the effect of transferring or enabling the enjoyment of, such property.'

24. It is pointed out that for implementation of the award, shares in the co-operative society of Urvashi building standing in the joint names of the parties shall

be required to be transferred to the names of petitioners Nos. 1 and 2 and hence it is covered by the definition of 'transfer'. It is not possible to accept that any exchange as such is taking place between the parties in this case. Nothing specific is transferred in consideration. There is no surrender of interest for consideration in the said flat. There is, therefore, no question of black money being generated. It is a part of a larger settlement between the parties. The flat already stands in the name of petitioners Nos. 1 and 2 and respondents Nos. 1 and 2. The effect of implementation of the award would be that the names of respondents Nos. 1 and 2 would be deleted. It cannot come within section 269UA(f)(ii). It would be under the award of the arbitrator and judgment of the court and not by volition of the parties. Even assuming that it amounts to transfer, the passing of the judgment in terms of the award would not be against the public policy of Chapter XXC. The award is passed and judgment can be given in view of section 6(1) of the Arbitration Act, 1961. Even the decree following under section 6(2) can be made subject to the interested party following the procedure under Chapter XXC.

25. Further, in my opinion, it will not be contrary to the public policy and the award cannot be said to be unenforceable in view of section 7(1)(b)(ii). It is well accepted that public policy is a vague term and of uncertain import. It is necessary to invoke it in clear and incontestable cases of harm to the public. It is necessary to construe it strictly. In *Renusagar Power Co. Ltd. v. General Electric Co.* : AIR 1994 SC860 , the apex court, while considering the provisions of the FERA, held that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to (i) the fundamental policy of Indian law; or (ii) the interest of India; or (iii) justice or morality. The court should be anxious in not defeating the foreign award by finding out some defect and then equating it with the public policy of the country. The enforcement should not be denied on this specious ground because the award is not acceptable to the party against whom enforcement is sought, otherwise this would be defeating the very object of the New York Convention of 1958 and the Act of 1961. Therefore, I hold that first there is no violation of Chapter XXC of the Income-tax Act and in any case it cannot be said that the award is against the public policy of this country and hence unenforceable. The enforcement of the award cannot be defeated on that ground.

25. It is broadly contended by learned counsel for the respondents that the award is in violation of the provisions of the FERA and hence against public policy and not enforceable.

26. The petitioners in the petition expressed their readiness to make an application under the FERA for permission if necessary :

(i) under section 47(3) for execution of the decree that may be granted in terms of the award; and

(ii) under section 9 for transfer of shares of private companies from the respondents to the petitioners; and

(iii) for set off regarding money payment in US dollars. In the affidavit-in-reply, it is contended that it is absolutely necessary to obtain the permission or no objection certificate of the Reserve Bank beforehand and the award is not enforceable. In para 9, the allegations are particularised. However, in view of Life Insurance Corporation of India v. Escorts Ltd. : 1986(8)ECC189 , it is very fairly conceded by learned counsel for the respondents that ex post facto sanction can be obtained in the case of transfer covered under section 29. What has been pressed is that in the case of transfer of shares in Indian companies and for holding or acquiring or disposing of foreign securities ban NRI, under section 19(l)(b) read with section 19(1)(c) and section 19(5), prior permission of the Reserve Bank of India is required and as the said permission is not obtained the award is against the public policy and void. In the affidavit-in-rejoinder, it has been pointed out that such point was raised before the State of New York, County of Nassau, U.S.A. court and before the Court of Appeals of the State of New York, but it was negatived and, therefore, the respondents cannot raise such contention. It is also pointed out that appropriate permission shall be obtained by the petitioners at an appropriate stage and in any case it cannot be said that the award is against the public policy. The necessary permission can be secured before the execution of the award and prior permission is not necessary. In fact, I find that the judgment of the apex court in Life Insurance Corporation of India v. Escorts Ltd. : 1986(8)ECC189 , considered the scope of section 19(1)(b) also and came to the conclusion that the expression 'prior permission' is not used in section 24. The expression 'general and special

permission' does not mean 'prior permission'. Thus, the provision under section 29(1)(b) and section 19(1)(b) is the same. Section 47(3) also used the phrase 'permission' and not 'prior permission'.

27. First, though I am not prepared to accept the submission of learned counsel for the petitioners that as such a point was decided by the U.S.A. court, it cannot be raised here. The said decision is of little importance for considering whether enforcement of the award is against the public policy of this country or not. What I have to consider is whether the award is unenforceable because it is contrary to the public policy of this country. Learned counsel for the respondents sought to rely upon *Algemene Bank Nederland NV v. Satish Dayalal Choksi* : AIR1990 Bom170 . It arose out of notice under Order 21, rule 22 of the Civil Procedure Code, for leave to execute the decree of the Supreme Court of Hongkong in Bombay. It was held that for filing a suit on a foreign guarantee the permission of the Reserve Bank of India under section 26(6) of the FERA (as it then stood) is not necessary. What is necessary under section 47(3) of the FERA is permission before taking any steps for enforcement of the judgment or order. It was held as follows (pages 513, 514) :

'Under Order 21, rule 22, inter alia, where an application for execution of a foreign decree is filed under the provisions of section 44A, leave is necessary. Therefore, before any leave can be obtained under Order 21, rule 22, it is necessary to make an application under Order 21, rule 11.'

'A prior permission of the Reserve Bank or the Central Government, as the case may be, is therefore, required before taking any step for the enforcement of the decree, including an application under Order 21, rule 22'.

28. In my opinion, this in fact supports the petitioners in submitting that the award or passing of the judgment thereon is not against public policy but only execution thereof can be subject to getting the necessary permission. Therefore, the decree can be passed subject to obtaining such permission under section 47(3). The same is the position in *Renusagar Power Co. Ltd.'s case* : AIR 1994 SC860 and *Renusagar Power Co. Ltd. v. General Electric Co.*, : [1985]1SCR432 . The original contract postulated payment of interest till payment and the effect of the order of

the Government of India dated August 1, 1969, was that the original schedule of payment remained operative. However, interest was also awarded for delayed payment of instalments. It was contended that payment of the same was violative of the FERA and against the public policy. Relying upon *Life Insurance Corporation of India v. Escorts Ltd.* : 1986(8)ECC189, it came to be held that the FERA is a statute enacted for the national economic interest and the object of various provisions in the said Act is to ensure that the nation does not lose foreign exchange which is very much essential for the economic survival of the nation. It came to be observed (at page 222 of 81 Comp Cas) :

'Keeping in view, the aforesaid objects underlying the FERA and the principles governing enforcement of exchange control laws followed in other countries, we are of the view that the provisions contained in the FERA have been enacted to safeguard the economic interests of India and any violation of the said provisions would be contrary to the public policy of India as envisaged in section 7(1)(b)(ii) of the Act'. It came to be held (at page 226 of 81 Comp Cas) : 'In our view the earlier refusal by the Government to give its approval to the rescheduling of payment of instalments does not in any way preclude the Government of India from considering the matter in the light of the subsequent developments and it cannot be said that merely because the Government of India had refused to give its approval to rescheduling of payment of instalments it would not grant permission under section 47(3) of the FERA to the enforcement of the judgment that may be passed in these proceedings.'

29. Thus, it was held that enforcement of the foreign award would not involve violation of any of the provisions of the FERA and hence it cannot be said that the award was unenforceable in view of section 7(1)(b)(ii) of the Act of 1961. Precisely in this case also it cannot be said that the award is unenforceable in view of the provisions of the FERA. A foreign award involves two aspects - recognition and enforcement. Enforcement of the judgment, i.e., decree, can be made subject to obtaining necessary permission under the Act. It is not necessary that prior permission ought to have been obtained as neither section 29 nor section 19 uses the phrase 'prior permission'. In view of section 47(2) and (3) the responsibility of obtaining the permission of the Reserve Bank of India before enforcement of the

judgment or the decree would be upon the petitioners.

30. However, the contention of learned counsel for the petitioners that such a permission is not at all necessary as both the parties are NRIs holds no water. The learned advocate relied upon section 19(1)(f) and section 19(5) for the purpose. These provisions speak about 'person' which would obviously include 'non-resident Indian'.

31. It is next urged that the award has merged in the foreign judgment. This court in Northern Sales Co. Ltd. v. Reliable Extraction Industries Pvt. Ltd. : AIR1985 Bom332 , (Pendse J.) relying on Russell on Arbitration, East India Trading Co. v. Badat and Co : AIR1959 Bom414 and Badat and Co. v. East India Trading Co. : [1964]4SCR19 , negatived this point. It was under section 5(1) of the 1961 Act. The award was dated June 10, 1980, and the order dated June 10, 1981, was passed by the Master in Chambers merely for enforcement of the award in the same manner as the judgment or order pursuant to section 26. In view of the contentions, the first question arose whether it was a judgment or merely an enforcement order and, secondly, even if it is a judgment, does the award stand merged in the judgment. The learned judge first held that it is only an enforcement order and not a judgment. Then he considered the second submission and came to the conclusion that the award does not merge. The learned judge quoted the following para from Russell on Arbitration (20th edition, page 367) in support (at page 334 of AIR 1985 Bom) :

"Merger of an award in judgment : In English law, any cause of action, whether a right of action under a contract or in respect of a tort or in respect of any other cause of action, is merged in and effaced by an English civil judgment pronounced thereon'.

This proposition is only another way of stating the well-known rule as to res judicata and is of course an illustration of that rule of public policy which holds that interest reipublicae ut sit finis litium. Indeed if the propositions were not a sound one, there could never be an end to any litigation.

The proposition is indeed so elementary that it is impossible to find high and direct judicial authority for it. It is so ingrained in English law and that the only judicial pronouncements thereon are in cases where a possible exception to the rule is being discussed. For example, questions sometimes arise as to whether and if so to what extent, strangers are bound by a judgment; or whether a judgment creditor need be content with the rate of interest applicable to a judgment debt when the deed creating the debt stipulated for a higher rate of interest until payment was actually effected.

In particular English law makes this exception to the generality of the rule, that a foreign judgment is not accorded the power of merging and effacing the cause of action on which it was given. This is an insular quirk probably peculiar to English law, and is so anomalous that even the most learned writers sometimes forget it.

But the doctrine of merger of a cause of action in an English judgment has never been doubted and it follows that after judgment, it is no longer open for a claimant in any jurisdiction governed by English law to sue upon the award. Though indeed, a successful action was brought on an award after a judgment had been obtained to enforce it in England in the case of *Oppenheim and Co. v. Mahomed Haneef* [1922] 1 AC 482. The Privy Council felt it necessary to explain that in order to prevent misconception it appeared desirable to add that it was not pleaded or contended at any stage of the proceedings that the award had merged in the English judgment. Quite plainly it had, and if the parties had raised the point, the Privy Council would have been obliged to so hold. As the parties had not raised the point the Privy Council had to add their rider by way of self exculpation.'

Then it was held (at page 334 of AIR 1985 Bom) :

'The passage unmistakably establishes that a foreign judgment is not accorded the power of merging and effacing the cause of action on which it was given under the English law. Therefore, even assuming that the order passed by the Master in Chambers is a judgment, still it being a foreign judgment, as far as this court is concerned, it will not have the effect of effacing the cause of action, that is the award secured by the petitioners in their favour.'

32. In *East India Trading Co. v. Badat and Co.* : AIR1959 Bom414 , one of the contentions raised was whether a foreign award no longer survives after the judgment was passed in terms of the award by the Supreme Court of New York. It came to be observed (at page 417) : 'If it is open to a party suing on a foreign judgment to rely in the alternative on the original cause of action, we should have thought that it would be equally competent to a party who has obtained a foreign judgment on the award to rely on the original cause of action which in this case happens to be the award. Therefore, the award is as much a cause of action quae the foreign judgment as a contract or any other right which the party has litigated and which has resulted in a foreign judgment. Instead of going to court on the contracts which were entered into between the parties and obtaining a decree, the parties here first went to the domestic tribunal, obtained the award and then proceeded to complete the award and make it enforceable by obtaining a judgment. Therefore, in this case, the cause of action was constituted by the award and the judgment was obtained because the plaintiffs had the award in their favour. Therefore, it would seem to us that on principle there is no reason why the plaintiffs should be debarred from relying on the award as the original cause of action which resulted in the foreign judgment being obtained.'

33. Against this an appeal was preferred to the apex court. The judgment of the apex court is reported in *Badat and Co. v. East India Trading Co.* : [1964]4SCR19 . The majority judgment did not touch this aspect, though it was set aside on the ground of jurisdiction. In fact the minority judgment delivered by Mr. Justice Subba Rao accepted the said conclusion of the Division Bench that the award does not merge in the foreign judgment and can be made a cause of action for enforcement. The learned advocate for the petitioners contended that in the case of *Northern Sales Co. Ltd. v. Reliable Extraction Industries P. Ltd.*, : AIR1985 Bom332 , should not have considered this point as it was not necessary in view of the finding on the first point. It is not possible to accede to this submission. Alternate submissions were advanced and hence considered in detail and decided.

34. In view of this, I hold that obtaining of judgment from the U.S.A. court by the petitioners would not have the effect of effacing the cause of action for

enforcement of the award or that the award has merged in the judgment. The petitioners have correctly instituted these proceedings.

35. It is lastly submitted that the petitioners cannot enforce the award as they are only seeking to enforce a part - the Indian part. This is not correct. The petitioners have painted out that they are dealing with the Indian part of the award that involves Indian businesses and properties. It has been confirmed by the U.S.A. court already and the U.S.A. businesses and properties have already been dealt with. They have expressed their readiness to implement the award fully by executing the necessary documents. Respondents Nos. 1 and 2 are not co-operating and are raising objections since the beginning to delay the proceedings. The award is implemented to a large extent as the businesses and properties are in the possession of the parties as provided by the award. The Indian part of the award has to be implemented here. It is contended that the award is composite and the petitioners committed breach of the obligation under it and it cannot be enforced fully. It is all vague and baseless. The petitioners have expressed their readiness and willingness for implementation and only the respondents are objecting. In any case, this cannot be an objection under section 7 of the 1961 Act to hold that the award is unenforceable.

36. Hence, I pass the following order :

The petition is granted in terms of prayers (a) and (b) of the petition. The judgment to follow in terms of the said award. However, enforcement of the same or execution of the decree shall be subject to the petitioners obtaining the necessary permission under the FERA as regards the enforcement part in India is concerned.

37. No costs.

38. The learned advocate for the respondents prays for certificate under article 134A read with article 134(1)(c) of the Constitution of India. In my opinion, this involves a substantial question of law under the Foreign Awards (Recognition and Enforcement) Act, 1961, which requires consideration by the apex court. Hence the certificate is granted.

