PETITIONER:
OIL & NATURAL GAS COMMISSION

Vs.

RESPONDENT:
WESTERN COMPANY OF NORTH AMERICA

DATE OF JUDGMENT16/01/1987

BENCH:
THAKKAR, M.P. (J)
BENCH:
THAKKAR, M.P. (J)
SINGH, K.N. (J)

CITATION:
1987 AIR 674 1987 SCR (1)1024
1987 SCC (1) 496 JT 1987 (1) 160
1987 SCALE (1)67
CITATOR INFO :
D 1989 SC 818 (12)

ACT:
Arbitration Act, 1940---Sections 2(e), 14, 17, 30 and 33Award-Only when transformed into a judgment and decree under Section 17 becomes enforceable--New York Convention--Article V(1)(e)--Expression 'not yet become binding on the parties'--Interpretation and significance of--Test applicable--Enforceability as per law of the country which governs the award--Arbitration proceedings' between American Company and ONGC--Award rendered in favour of American Company--ONGC invoking jurisdiction of Bombay High Court under Sections 30 & 33 to set aside award--HeM Indian Court alone has jurisdiction to pronounce on validity/enforceability of award.

Arbitration (Protocol and Convention) Act, 1937--Section 7Conditions for enforcement of foreign awards--New York Convention-Article V(1)(e)--Effect of expression 'not yet become binding on the parties'--The clause--Recognition and enforcement of award-When arises.

Specific Relief Act 1963--Section 41(b)--Conditions for applicability.
Words & Phrases--'Not yet become binding on the parties'.

HEADNOTE:
A drilling contract was entered into by the appellant and the respondent which provided that in the case of differences arising out of the aforesaid contract, the matter shall be referred to arbitration, that the arbitration proceedings shall be held in accordance with the provisions of the Indian Arbitration Act, 1940, and that the validity and interpretation thereof shall be governed by the laws of India. The agreed venue for hearing was London.

A dispute arose between the parties and it was referred to Arbitration. Consequent upon the inability of the two Arbitrators to agree on the matters outstanding in the reference, the Umpire entered upon the arbitration and straight away rendered his interim award, without affording any hearing to the parties and the same was lodged in the
1025
High Court at the instance of the respondent. Subsequently,

the Umpire rendered a final award relating to costs.

About a mouth after the lodging of the award in the High Court, the respondent filed a plaint in the U.S. District Court seeking an order confirming the interim and final awards and a judgment against the appellant for the payment of a sum of $ 256,815.45 by way of interest until the date of judgment and costs etc.

The appellant, however, instituted a Petition under Sections 30 and 33 of the Arbitration Act for setting aside the aforesaid awards and for an interim order restraining the respondent from proceeding further with the action instituted in the U.S. Court.

A Single Judge of the High Court granted exparte interim restraint order but vacated the same after hearing the parties. The High Court held that the action to enforce the award as a foreign award in the U.S. Court was quite in order and that the mere fact that a petition to set aside the award had already been instituted in the Indian Court and was pending at the time of the institution of the action in the U.S. Court was a matter of no consequence for the purposes of consideration of the question as to whether or not the respondent should be restrained from proceeding further with the action in the U.S. Court, that it was open to the respondent to enforce the award in the U.S. Court and, therefore, it would not be appropriate to grant the injunction restraining enforcement, and that it was open to the appellant to contend before the U.S. Court that the petition for setting aside the award cannot be said to be vexatious or oppressive.

In the appeal to this Court it was submitted on behalf of the appellant that the award sought to be enforced in the U.S. Court may itself be set aside by the Indian Court and in that event, an extremely anomalous situation would be created, that since the validity of the award in question and its enforceability have to be determined by an Indian Court which alone has jurisdiction under the Indian Arbitration Act of 1940, the American Court would have no jurisdiction in this behalf, that the enforceability of the award must be determined in the context of the Indian Law as the Arbitration proceedings are subject to the Indian Law and are governed by the Indian Arbitration Act of 1940, and that if the award in question is permitted to be enforced in U.S. Court without its being confirmed by a court in India or U.S. Court it would not be in conformity with law, justice or equity.

1026

On behalf of the respondent it was contended that the action in the U.S.A. Court could not be considered as being oppressive to the appellant and that even if it is so, the High Court has no jurisdiction to grant such a restraint order, and that the appellant had suppressed the fact that it had appeared in the USA Court and succeed in pursuading the USA Court to vacate the seizure order obtained by the respondent and thereby disentitled itself to seek any equitable order.

Allowing the appeal, this Court,

HELD: 1. I Under the Indian law, an arbitral award is unenforceable until it is made a rule of the Court, and a judgment and consequential decree are passed' in terms of the award. Till an award is transformed into a judgment and decree under Section 17 of the Indian Arbitration Act, it is altogether lifeless, from the point of enforceability. Life is infused into the award in the sense of its becoming enforceable only after it is made a rule of the Court upon the judgment and decree in terms of the award being passed.

[1042D-E]

1.2 In the instant case, the arbitration proceedings are governed by the Indian Arbitration Act of 1940 and a proceeding under the Act for affirming the award and making it a rule of the Court or for setting it aside can be instituted only in an Indian Court. The expression "Court" as defined by Section 2(e) of the Act leaves no room for doubt on this score and the Indian Court alone has the jurisdiction to pronounce on the validity or enforceability of the award. [1038A-B]

2.1 Article V(1)(e) of the New York Convention provides that recognition and enforcement of the award will be refused if the award "has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which or under the law of which that award was made." [1043A-B]

2.2 The significance of the expression "not yet become binding on the parties" employed in Article V(1)(e) cannot be lost sight of. The expression postulates that the Convention has visualised a time later than the making of the award. [1044A-B]

2.3 The award which is sought to be enforced as foreign award will have to be tested with reference to the key words contained in Article V(1)(e) of the Convention and the question will have to be answered whether the award has become binding on the parties or has not yet become binding on the parties. The test has to be applied in the
1027
context of the law of the country governing the arbitration proceedings or the country. under the law of which the award has been made. [1044C-D]

2.4 The enforceability must be determined as per the law applicable to the award. French, German and Italian Courts have taken the view that the enforceability as per the law of the country which governs the award is the essential pre-condition for asserting that it has become binding under Article V(1)(e). [1047B-C]

2.5 India has acceded to the New York Convention. One of the Objects of the New York Convention was to evolve consensus amongst the covenanting nations in regard to the execution of foreign arbitral awards in the concerned Nations. The necessity for such a consensus was felt with the end in view to facilitate international trade and commerce by removing technical and legal bottle necks which directly or indirectly impede the smooth flow of the river of international commerce. Since India has acceded to this Convention it would be reasonable to assume that India also subscribes to the philosophy and ideology of the New York Convention as regards the necessity for evolving a suitable formula to overcome this problem. The Court dealing with the matters arising out of arbitration agreements of the nature envisioned by the New York Convention must, therefore, adopt an approach informed by the spirit underlying the Convention. [1050G-H; 1051A-B]

3. Section 41 (b) of the Specific Relief Act will be attracted only in a fact-situation where an injunction is sought to restrain a party from instituting or prosecuting any action in a Court in India which is either of co-ordinate jurisdiction or is higher to the Court from which the injunction is sought in the hierarchy of Courts in India. [1049B-C]

4.1 There cannot be any doubt that the respondent can institute an action in the U.S. Court for the enforcement of the award in question notwithstanding the fact that the application for setting aside the award had already been

instituted and was already pending before the Indian Court and that the appellant can approach the U.S. Court for seeking a stay of the proceedings initiated by the respondent for procuring a judgment in terms of the award in question. Merely on this ground the relief claimed by the appellant cannot be refused. [1035B-D]

4.2 As per the contract, while the parties are governed by the Indian Arbitration Act and the Indian Courts have the exclusive jurisdiction to affirm or set aside the award under the said act, the respondent is seeking to violate the very arbitration clause on the basis of

1028

which the award has been obtained by seeking confirmation of the award in the New York Court under the American Law. This amounts to an improper use of the forum in American in violation of the stipulation to be governed by the Indian law which by necessary implication means a stipulation to exclude the USA Court to seek an affirmation and to seek it only under the Indian Arbitration Act from an Indian Court. If the restraint order is not granted, serious prejudice would be occasioned and a party violating the very arbitration clause on the basis of which the award has come into existence will have secured an order enforcing the order from a foreign court in violation of the very clause. [1038D-G]

5.1 The respondent has prayed for confirmation of award. The American Court may still proceed to confirm the award, and in doing so it would take into account the American law and not the Indian law or the Indian Arbitration Act of 1940. The American Court will be doing so at the behest and at the instance of the respondent which has in terms agreed that the arbitration proceedings will be governed by the Indian Arbitration Act of 1940. Not only the matter will be decided by a court other than the court agreed upon between the parties but it will be decided by a court under a law other than the law agreed upon. Such an unesthetic situation should not be allowed. Even though it was conceded by the respondent that -

the American Court has no jurisdiction to confirm the award in view of the New York Convention, in the event of the award rendered by the Umpire, the validity of which is not tested either by an American Court or an Indian Court, being enforced by an American Court, it will be an extremely uphill task to pursuade the Court to hold that a foreign award can be enforced on the mere making of it without it being open to challenge in either the country of its origin or the country where it was sought to be enforced. [1041H; 1042A, B-C]

5.2 In the event of the award rendered by the Umpire being set aside by the Indian Court, an extremely anomolous situation would arise inasmuch as the successful party may well have recovered the amount awarded as per the award from the assets of the losing party in the USA after procuring a judgment in terms of the award from the USA Court, which would result in an irreversible the damage being done to the losing party for the Court in USA would have enforced a non-existing award under which nothing could have been recovered. It would also result in the valuable court time in the USA being invested in a nonissue and the said Court would have acted on and enforced an award which did not exist in the eye of law. The USA Court would have done something which could not have been done if the respondent company

1029

had waited during the pendency of the proceedings in the

Indian Court. The losing party in that event would be obliged to initiate fresh proceedings in the USA Court for the amount already recovered from it, pursuant to the judgment rendered by the USA Court in enforcing the award which is set aside by the Indian Court. All this would happen if the restraint order as prayed by the losing party is not granted and this can be avoided if it is granted. [1037D-H]

5.3 The American Court would have enforced an award which is a lifeless award in the country of its origin and under the law of the country of its origin which law governs the award by choice and consent. [1042E-F]

6. I It would neither be just nor fair on the part of the Indian Court to deny relief to the appellant when it is likely to be placed in such an awkward situation if the relief is refused. It would be difficult to conceive of a more appropriate case for granting such relief. [1042G-H]

6.2 The facts of this case are eminently suitable for granting a restraint order. No doubt, this Court sparingly exercises the jurisdiction to restrain a party from proceeding further with an action in a foreign court. However, the question is whether on the facts and circumstances of this case it would not be unjust and unreasonable not to restrain the respondent from proceeding further with the action in the American Court. This is one of those rare cases where the Court would be failing in its duty if it hesitated in granting the restraint order, for, to oblige the appellant to face the aforesaid proceedings in the American Court would be oppressive in the facts and circumstances of the case. [1048C-F]

6.3 It would be unfair to refuse the restraint order in a case like the present one for the action in the foreign court would be oppressive in the facts and circumstances of the case and in such a situation the courts have undoubted jurisdiction to grant such a restraint order, whenever the circumstances of the case make it necessary or expedient to do so or the ends of justice so require. [1049D-E]

6.4 There was no deliberate suppression by the appellant, and it would, therefore, not be proper to refuse relief to the appellant on this account. [1050B-C]

6.5 While this Court is inclined to grant the restraint order, fairness demands that it should not be unconditional. There are good and valid reasons for making the restraint order conditional in the sense
1030
that the appellant should be required to pay the charges payable in respect of the user of rig belonging to the respondent Company at the undisputed rate regardless of the outcome of the petition instituted by it the High Court for setting aside the award rendered by the Umpire. [1050E-G].

6.6 It is no doubt true that if the arbitral award is set aside by the Indian Court no amount would be recoverable under the said award. That, however, does not mean that the liability to pay the undisputed amount which has already been incurred by the appellant disappears. It would not be fair on the part of the appellant to withhold the amount which in any case is admittedly due and payable. The respondent can accept the amount without prejudice to its rights and contentious, to claim a larger amount. No prejudice will he occasioned to the appellant by making the payment of the admitted amount regardless of the fact that the respondent is claiming a larger amount. In any case the appellant which seeks an equitable relief cannot be heard to say that it is not prepared to act in a manner just and equitable regardless of the niceties and nuances Of legal arguments. [1051B-E]

[The order passed by the High Court on April 3, 1986 set aside, and the earlier order passed by it on January 20, 1986 restored subject to certain conditions imposed by the Court.]
Cotton Corporation of India v. United Industrial Bank, [1983] 3 SCR 962;V/O Tractoroexport, Moscow v. M/s Tarapore
JUDGMENT:
England Vol. 24 page 579 para 1039 referred to.

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CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1557 of 1986

From the Judgment and Order dated 3.4.1986 of the Bombay High Court in Interim Petition No. 11 of 1986.

K. Parasaran, Attorney General, B. Datta, Additional Solicitor General, S.S. Shroff, S.A. Shroff, R.K. Joshi, Mrs. P.S. Shroff. Anil K. Sharma and Mohan Parasaran for the Appellant.

F.S. Nariman, S.N. Thakkar, Ravinder Narain, Gulam Vahamwati, S. Sukumaran, D.N. Mishra, Adittiya Narain, Mrs. A.K. Verma and Miss Lira Goswami for the Respondent.

The Judgment of the Court was delivered by

1031

THAKKAR, J. Was the High Court 'right' in granting the restraint order earlier, and 'wrong' in vacating the said order later'?

By the order in question the Respondent, Western Company of North America (Western Company), was restrained from proceeding further with an action instituted by it in a USA Court against the appellant. Oil and Natural Gas Commission (ONGC). The said action was targeted at seeking a judgment from the concerned court in U.S.A. on the basis of an arbitral award rendered by an Umpire in arbitration proceedings held in London but governed by the Indian Arbitration Act, 194.0, which was the law of choice of the parties as per the arbitration clause contained in the drilling contract entered into between the parties. The Western Company has moved the USA Court for a judgment in terms of the award not withstanding the fact that:-

1) ONGC had already initiated proceedings in an Indian Court to set aside the award and the said proceeding was as yet pending in the Indian Court.

2) The said award was not as yet enforceable in India as a domestic award inasmuch as a Judgment in accordance with the Indian law had yet to be procured in an Indian Court, by the Western Company.

The events culminating in the order under appeal may be briefly and broadly recounted. The appellant, ONGC and the Respondent Western Company, had entered into a drilling contract. The contract provided for any differences arising out of the agreement being referred to arbitration. The arbitration proceedings were to be governed by the Indian Arbitration Act 1940 read with the relevant rules. A dispute had arisen between the parties. It was referred to two Arbitrators and an Umpire was also appointed. The Arbitrators entered on the reference in London which was the agreed venue for hearing as per the Arbitration Clause contained in the contract. On October 1, 1985 the Arbitrators informed the Umpire that they were unable to agree on the matters outstanding in the reference. Consequently the Umpire entered upon the arbitration and straightaway proceeded to

declare his non-speaking award (styled as interim award) on October 17, 1985 without affording any hearing to the parties on the matters outstanding in the reference. The Umpire did not afford a hearing subsequent to his entering upon the arbitration presumably because even when the matter was within the domain of the Arbitrators (and not of the
1032
Umpire), and the Arbitrators were seized of the matter, the Umpire used to remain present at the hearings conducted by the Arbitrators. Having been present throughout the proceedings whilst the Arbitrators were in charge of the same, the Umpire presumably considered it unnecessary to hear the parties or their counsel after he Was seized of the matter and it came within his domain in the wake of the disagreement between the two Arbitrators. And the Umpire straightaway proceeded to declare the interim award on October 17, 1985. Thereafter, on November 5, 1985, the Respondent, Western Company, requested the Umpire to authorise one Shri D.C. Singhania to file the award dated October 17, 1985 in the appropriate Court in India. The Umpire accordingly authorised the said Shri Singhania in this behalf. And pursuant to the said authority the award rendered by the Umpire was lodged in the Bombay High Court on November 22, 1985. Subsequently, on November 28, 1985 the Umpire rendered a supplementary award relating to costs which has been termed as 'final' award. About a month after the lodging of the award in the High Court of Bombay by the Umpire at the instance of the Respondent, Western Company, the latter lodged a plaint in the U.S. District Court, inter alia, seeking an order (1) confirming the two awards dated October 17, 1985 and November 28, 1985 rendered by the Umpire (2) a Judgment against the ONGC. (Appellant herein) in the amount of $ 256,815.45 by way of interest until the date of he Judgment and costs etc.

On January 20, 1986, appellant ONGC on its part instituted an Arbitration Petition No. 10 of 1986 under Sections 30 & 33 of the Indian Arbitration Act 1940 for setting aside the awards rendered by the Umpire. Inter alia the challenge was rooted in the following. reasoning. While as per the Indian Arbitration Act 1940 which admittedly governed the arbitration proceedings the Umpire would come on the scene only provided and only when the Arbitrators gave him notice in writing that they were unable to agree, and the Umpire would enter upon the reference in lieu of the Arbitrators only subsequent thereto, in the present case the Umpire had neither held any proceedings nor had afforded any opportunity of being heard to the ONGC after entering upon the reference. The appellant, ONGC, also prayed for an interim order restraining the Western Company from proceeding further with the action instituted in the U.S. Court. The learned Single Judge granted an ex-parte interim restraint order on January 20, 1986 but vacated the same after hearing the parties by his impugned order giving rise to the present appeal by Special Leave.

1. Interim Order No. 11 of 1986 passed on April 3, 1986 in Arbitration Petition No. 10 of 1986.

1033

In order to confine the dialogue strictly within the brackets of the scope of the problem, four points deserve to be made at the outset before adverting to the impugned order rendered by the High Court.

1) We are not concerned with the merits of the main dispute between the parties which was the subject-matter of arbitration and which pertains to the charges payable for a jack-up

drilling unit and related services provided by Western Company to ONGC. The equipment was utilised beyond the period stipulated in the contract. In regard to the employment of the equipment beyond the contractual period Western Company claimed payment at US $ 41,600 per operating day which was the rate stipulated for the user of the equipment for the stipulated time-frame. The ONGC on the other hand has contended that in the context of the correspondence between the parties pertaining to the employment of the equipment beyond the stipulated period the Western Company is entitled to claim only US $ 18,500 per day. The dispute concerns the claim for payment for the user of the equipment for the extended period (136 days and 16 hours). We are however not concerned with the merits of the claim giving rise to the dispute and differences which was referred to the Arbitrators.

2) We are not concerned with the merits of the contentions raised in the petition instituted by ONGC in the High Court of Bombay in order to challenge the arbitral award rendered by the Umpire except to the limited extent of examining whether ONGC has a prima facie case.

3) We are not concerned with the question as to how an arbitral award which is not a domestic award in India can be enforced in a Court in India in the context of the Indian legislation enacted in that behalf namely the Foreign Awards (Recognition and Enforcement) Act, 1961. The said Act was enacted in order to give effect to an international convention known as New York Convention to which India has acceded. The provisions of the said Act would be attracted only if a foreign award is sought to be enforced in an Indian Court. We are not concerned with such a situation. The award which is the subject-matter of controversy in the present case is admittedly a domestic award for the purposes of the Indian Courts, governed by

1034

the provisions of the Indian Arbitration Act of 1940. When the Western Company seeks to enforce the award in question in the US Court they do so on the premise that it is a foreign award in the US Court. In considering the question as regards the proceeding initiated by the Western Company in the US Court, there is no occasion to invoke the provisions of the aforesaid Act. The provisions of the said Act can be invoked only when an award which is not a domestic award in India is sought to be enforced in India. Such is not the situation in the present case. We are therefore not at all concerned with the provisions of the said Act.

4) We are not directly concerned with the law governing the enforcement of the foreign award in an USA Court. We would be undertaking an inappropriate exercise in being drawn into a discussion in depth as regards the law govern-

ing enforcement of foreign awards in USA, the procedure to be followed, or as to the interpretation of the relevant provisions as made by the US Court. So also it would be inappropriate to speculate on the view that is likely to be taken by the American Court or to anticipate its interpretation or its verdict in regard to the relevant matters at that end.

The order under appeal may now be subjected to scrutiny. The High Court has vacated the interim order granted by it earlier on the following grounds:-

1) That it was open to the Western Company to enforce the award in the US Court and that accordingly it would not be appropriate to grant the injuction restraining them from enforcing the same at that end.

2) That it was open to the ONGC to contend before the US Court that the petition for setting aside the award which was sought to be enforced in the US Court was already pending in the Indian Court.

3) That the proceeding in the US Court cannot be said to be vexatious or oppressive.

The High Court has examined the question as to whether the
1035
action instituted by the Western Company against ONGC was maintainable in the context of the New York Convention in the light of the relevant Articles of the Convention and has come to the conclusion that an action to enforce the award in question as a foreign award in the US Court was quite in order. The view is expressed that the mere fact that a petition to set aside the award had already been instituted in the Indian Court and was pending in the Indian Court at the time of the institution of the action in the US Court was a matter of no consequence, for the purposes of consideration of the question as to whether or not Western Company should be restrained from proceeding further with the action in the US Court. Now, there cannot be any doubt that the Western Company can institute an action in the US Court for the enforcement of the award in question notwithstanding the fact that the application for setting aside the award had already been instituted and was already pending before the Indian Court. So also there would not be any doubt or dispute about the proposition that the ONGC can approach the US Court for seeking a stay of the proceedings initiated by the Western Company for procuring a judgment in terms of the award in question. But merely on this ground the relief claimed by ONGC cannot be refused. To say that the Court in America has the jurisdiction to entertain the action and to say that the American Court can be approached for staying the action is tantamount to virtually cold-shouldering the substantial questions raised by ONGC and' seeking an escapist over-simplification of the matter. The points urged by the ONGC are of considerable importance and deserve to be accorded serious consideration.

Prominence deserves to be accorded to the following factors which appear to be of great significance:

1) It is not in dispute that the arbitration clause contained in the contract which has given rise to the disputes and differences between the parties in terms provides that:

"The arbitration proceedings shall be held in accordance with the provisions of the Indian Arbitration Act, 1940 and the rules made thereunder as amended from time to time."

(Vide clause 14 of the Contract)

2) There is also an agreement between the parties that the validity and interpretation thereof shall be "governed by the laws of India" (vide clause 18 of the contract)

1036

3) Under the Indian Law, having regard to the scheme of the Arbitration Act of 1940, an arbitral award as such is not enforceable or executable. It is only after the award is filed in the Indian Court and is made a rule of the Court by virtue of a judgment and decree in terms of the award that life in the sense of enforceability is infused in the lifeless award. (Vide Sections 141 and 172of the Arbitration Act)

The situation which emerges is somewhat an incongrous one. The arbitral award rendered by the Umpire may itself be set-aside and become non-existant if the ONGC is able to Successfully assail it in the petition under section 30/33 for setting aside the award in question in' India. The High Court does not hold that the petition is prima facie liable to fail. We do not wish to express any opinion on the merits of the petition as in our opinion it would be improper to do so and might occasion prejudice one way or the other. We are however not prepared to assume for the purpose of the present discussion that the petition is liable to fail. The question is wide open.The final decision of the Court cannot and need not be anticipated.

In the light of the foregoing discussion, the following submissions, pressed into service by the appellant, ONGC, require to be examined.

(1) The award sought to be enforced in the USA Court may itself be set aside by the Indian Court and in that

1. 14(1)&(2):

"14.(1) When the arbitrators or umpire have made their award, they shall sign it and shall give notice in writing to the parties of the making and signing thereof and of the amount of fees and charges payable in respect of the arbitration and award.

2) The arbitrators or umpire shall, at the request of any party to the arbitration agreement or any person claiming under such party or if so directed by the Court and upon payment of the fees and charges due in respect of the arbitration and award and of the costs and charges of filing, the award cause the award or a signed copy of it, together with any depositions and documents which may have been taken and proved before them, to be filed in Court, and the Court shall thereupon give notice to the parties of the filing of the award.

3. x x x"

2.17. Judgment in terms of award-Where the Court sees no causc to remit the award or any of the matters referred to arbitration for reconsideration or to set aside the award, the Court shall, after the time for making an application to set aside the award has expired, or such application having been made, after refusing it, proceeded to pronounce judgment according to the award, and upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except on the ground that it is in excess of, or not otherwise in accordance with, the award."

1037

event, an anomalous situation would be created.

(2) Since the validity of the award in question and its enforceability have to be deter-

mined by an Indian Court, which alone has jurisdiction under the Indian Arbitration Act of 1940, the American Court would have no jurisdiction in this behalf.

(3) The enforceability of the award must be determined in the context of the Indian Law as the arbitration proceedings are admittedly subject to the Indian Law and are governed by the Indian Arbitration Act of 1940.

(4) If the award in question is permitted to be enforced in USA without its being affirmed by a Court in India or a USA Court, it would not be in conformity with law, justice or equity.

There is considerable force in the argument advanced in the context of the possibility of the award rendered by the Umpire being set aside by the Indian Court. In that event an extremely anomalous situation would arise inasmuch as the successful party (Western Company) may well have recovered the amount awarded as per the award from the assets of the losing party in the USA after procuring a judgment in terms of the award from USA Court. It would result in an irreversible damage being done to the losing party (ONGC) for the Court in the USA would have enforced a non-existent award under which nothing could have been recovered. It would result in the valuable Court time of the USA Court being invested in a non-issue and the said Court would have acted on and enforced an award which did not exist in the eye of law. The U.S.A. Court would have done something which it would not have done if the Western Company had waited during the pendency of the proceedings in the Indian Court. The parties would also be obliged to spend large amounts by way of costs incurred for engaging counsel and for incidental matters. The losing party in that event would be obliged to initiate fresh proceedings in the USA Court for restitution of the amount already recovered from it, pursuant to the judgment rendered by the USA Court in enforcing the award which is set aside by the Indian Court. Both the sides would have to incur huge expenditure in connection with the attendent legal proceedings for engaging counsel and for incidental matters once again. All this would happen if the restraint order as prayed by the losing party is not granted. And all this can be avoided if it is granted.

1038

Equally forceful is the plea urged in the context of the argument that the concerned Court in India alone would have jurisdiction to determine the question regarding enforceability or otherwise of the award in question, for, admittedly, the arbitration proceedings are governed by the Indian Arbitration Act of 1940. And that a proceeding under the Indian Arbitration Act for affirming the award and making it a rule of the Court or for setting aside can be instituted only in an Indian Court. The expression "Court" as defined by Section 2(e)1 of the Arbitration Act leaves no room for doubt on this score. Thus the Indian Court alone has the jurisdiction to pronounce on the validity or enforceability of the award in question. But the successful party (Western Company) has invoked the jurisdiction of the USA Court to seek affirmation of the award. In fact reliefs Nos. 1 and 2 claimed by the Western Company in the USA Court are in the following terms.

1) An order confirming the interim award dated October 17, 1985.

2) An order confirming the final award dated November 28, 1985.

Thus, while as per the contract, parties are governed by the Indian Arbitration Act and the Indian Courts have the exclusive jurisdiction to affirm or set aside the award under the said Act, the Western Company is seeking to violate the very arbitration clause on the basis of which the award have been obtained by seeking confirmation of the award in the New York Court under the American Law. Will it not amount to an improper use of the forum in America in violation of the stipulation to be governed by the Indian law which by necessary implication means a stipulation to exclude the USA Court to seek an affirmation and to seek it only under the Indian Arbitration Act from an Indian Court? If the restraint order is not granted, serious prejudice would be occasioned and a party violating the very arbitration clause on the basis of which the award has come into existence will have secured an order enforcing the order from a foreign court in violation of that very clause. When this aspect was pointed out to the learned counsel for the Western Company in the context of another facet of this very question namely the possibility of the Indian Court taking one view and the American

1. "2(e) "Court" means a Civil Court having jurisdiction to decide the questions forming the subject-matter of the reference if the same had been the subject-matter of suit, but does not, except for the purpose of arbitration proceedings under section 21 include a Small Cause Court."

1039

Court taking a contrary view, counsel stated that though the Western Company had made a prayer for confirmation of the award, the New York Court had no jurisdiction under the Convention to confirm or set aside the award. It is not appropriate on the part of this Court to anticipate the decision of the New York Court. If the Western Company is aware of the legal position and is sure of the legal position that the New York Court has no jurisdiction to confirm the award, pray why has the Western Company prayed for the said relief in the New York Court? We cannot proceed on the basis of the assertion made on behalf of the Western Company that the New York Court has no such jurisdiction. For ought we know the prayer made by the Western Company may well be granted and the legal position propounded by the counsel before us may not prevail with the New York Court. Surely, the Western Company itself is not going to contend before the New York Court that even though it has sought this relief the Court has no jurisdiction to grant it. In any case, the Western Company could have amended the plaint lodged in the New York Court by deleting this prayer which it has not done so far. Be that as it may, as the matter presently stands the appellant has invoked the jurisdiction of the New York Court to pronounce on the same question which is required to be pronounced upon by the Indian Court notwithstanding the fact that only an Indian Court has the jurisdiction to pronounce upon this vital question in view of the stipulation contained in the arbitration agreement itself. The appellant has invoked the jurisdiction of the New York Court in a matter which it could not have invited the New York Court to decide. The Western Company has also invoked the jurisdiction of a Court other than the Court which as per the arbitration agreement has the jurisdiction in the matter. And there is a likelihood of conflicting decisions on the very vital issue resulting in legal chaos. The apprehension about legal chaos is more than well-founded. Assuming that the American Court decides that it has jurisdiction to confirm the award and confirms the award, whereas the Indian Court forms the opinion that the award is

invalid and sets it aside, what will happen? The Western Company would have recovered the amount as per the award in question by obtaining a judgment in the American Court upon the award being confirmed by the said Court. And the losing party, ONGC, would be helpless to recover the amount notwithstanding the fact that the award has been set aside by the Indian Court, for, the amount would then not be recoverable under the American law in the American Court, the latter having held the award to be valid. The questions posed to the counsel for the Western Company in this behalf and his answers relevant to the material extent, in his own words, along with the questions deserve to be quoted:

1040

QUESTIONS	ANSWERS
It is an award under Indian law regardless of the fact that it was rendered by the umpire while sitting in London.Since law in India does not make it enforceable on mere filing of the award but only on it being made a rule (subject to its being corrected-varied-annulled or modified) should a parallel proceeding be permitted for its enforcement outside India before it has become enforceable in India? Particularly when the Indian Court is already seized of the matter and parties are bound by Indian law?	Yes: this is precisely what the convention contemplates The N.Y.proceedings is not a parallel proceeding but an independent concurrent one permissible under US Law and under Art. 1 of the N.Y. Convention acceded to by the U.S. the N.Y. Court will take into consideration the pendency of the proceedings in India; but it is for that Court to so exercise its discretion under Art. VI
Western company has prayed for:-	
1. An order confirming the Iterim award dated October 17,1985.	The proceedings in New York and Bombay do not involve "the very matters which will" have to be death with by the Bombay High Court"
Now these are the very matters which will have to be dealt with by the Bombay High Court in the matter arising out of the filing of the award-The award may be confirmed (or set aside) decree may be passed (or refused). Can these very matters be permitted to be agitated in the parallel proceedings under "American Law" when parties have in express terms the award. While the co-agreed to be goverend by the law mplaint in the New York in India? And what will happen if case does make a prayer the Indian Court and the American to confirm (as well as Court take conflicting views ? enforce) the awards, the Which view will prevail? Will	The Bombay Court will not have to consider whether to issue an order of enforcement against assets of ONGC, as will the New York Court. Moreover, the New York Court will not have to decide, as the Bombay Court will, whether to set aside New York Court is without jurisdiction under the convention to confirm or set aside an award; it is only competent

1041

there not be legal chaos?	to "recognised and enforce" foreign awards, as stated in paragraph 13 of the New York complaint. Thus, whatever the prayer for relief, the Bombay Court alone will decide the issues of confirmation/set aside,and there will not be any conflicting jurisdiction.

There is no question as to which Court decision would prevail in the event of a conflicting result: the Indian Court judgment setting aside the awards. In that event ONGC could take the Indian Court decision to a court in the United States to have it recognized and enforced so as to recover any monies that Western may have obtained pursuant to an American Court order.

The possibility of conflicting act comes in parallel proceedings such as these does not mean that one court must assert exclusive jurisdiction in order to prevent "legal chaos".

The submission that while the validity of the award is required to be tested in the context of the Indian Law if the Western Company is permitted to pursue the matter in the American Court, the matter would be decided under a law other than the Indian Law, by the American Court. Admittedly, Western Company has prayed for confirmation of the award. The American Court may still proceed to confirm the award. And in doing so the American Court would take into account the American law and not the Indian law or the Indian Arbitration Act of 1940. And the American Court would be doing so at the behest and the instance of Western Company which has in terms agreed that the arbitration proceedings. will be governed by the Indian Arbitration Act of 1940. Not only the matter will be decided by a Court other than the Court agreed upon between the parties but it will
1042
be decided by a Court under a law other than the law agreed upon. Should or should not such an unaesthetic situation be foreclosed?

The last submission is also quite impressive. If the Western Company is right in the posture assumed by it in this Court at the time of the hearing that the American Court has no jurisdiction to confirm the award in view of the New York Convention is correct, the resultant position would be this: The award rendered by the Umpire, the validity of which is not tested either by an American Court or an Indian Court will have been enforced by an American Court. It will be an extremely uphill task to persuade the Court to hold that a foreign award can be enforced on the mere making of it without it being open to challenge in either the country of its origin or the country where it was sought to be enforced. And that its validity may perhaps be tested for academic purposes in the country of origin after the award is enforced and for seeking restitution later on if possible and if there are assets which can be proceeded against in the country where the award has been enforced. It is essential to emphasise at this juncture and in this context that under the Indian law, an arbitral award is unenforceable until it is made a rule of the Court and a judgment and consequential decree are passed in terms of the award. Till an award is transformed into a judgment and decree under Section 17 of the Arbitration Act, it is altogether lifeless from the point of view of its enforceability. Life is infused into the award in the sense of its becoming enforceable only after it is made a rule of the Court upon the judgment and decree in terms of the award being passed. The American Court would have therefore enforced an award which is a lifeless award in the country of its origin and under the law of the country of its origin which law governs the award by choice and consent.

We are of the opinion that the appellant, ONGC, should not be obliged to face such a situation as would arise in

the light of the aforesaid discussion in the facts and circumstances of the present case. To drive the appellant in a tight comer and oblige it to be placed in such an inextricable situation as would arise if the Western Company is permitted to go ahead with the proceedings in the American Court would be oppressive to the ONGC. It would be neither just nor fair on the part of the Indian Court to deny relief to the ONGC when it is likely to be placed in such an awkward situation if the relief is refused. It would be difficult to conceive of a more appropriate case for granting such relief. The reasons which have been just now articulated are good and sufficient for granting the relief and accordingly it appears unnecessary to examine the meaning and content of the relevant arti-

1043

cles of the New York Convention for the purposes of the present appeal. All the same we will briefly indicate the questions which were debated in the context of the Convention since considerable debate has centred around the interpretation and scope of some of the articles of the Convention. Article V(1)(e) provides that recognition and enforcement of the award will be refused if the award "has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which or under the law of which that award was made." It was contended on behalf of Western Company that the legislative history of the New York Convention discloses that under the Geneva Protocol--given effect to by the Arbitration (Protocol and Convention) Act, 1937--it was provided that an award would not be enforced if it was not considered as 'final' and it was not 'final' if it is proved that any proceedings for the purpose of contesting the validity of the award were pending. This provision aroused a great deal of controversy as it was felt that the requirement of the Geneva Convention that the award has become final in the country in which it has been made was considered to be burdensome and inadequate and that the New York Convention has accordingly changed the format and the word "final" was replaced by the word "binding" in Art. V(1)(e) .In these premises it was argued that for the purposes of the Convention the award should be considered as binding if no further recourse to another arbitral tribunal was open and that the possibility of recourse to a Court of law should not prevent the award from being binding. On the other hand it was contended on behalf of ONGC that an award should be treated as binding only when it has become enforceable in the country of origin. It was argued that the word "binding" was used in the sense of an award from which the parties could not wriggle out. So far as the present matter is concerned it is unnecessary to examine this aspect at length or in depth for we are not resting our decision on the question as to whether the American Court is likely to refuse enforcement or not. As we indicated at the outset, it would be improper for us to anticipate the decision of the American Court on this aspect. We are inclined to rest our decision on the reasoning which we have indicated a short while ago. We would there-

1. "V(1)(d) Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

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

1044
fore consider it appropriate to refrain from getting drawn into an academic debate on this issue. We however consider that it is desirable to bring into focus certain aspects of the matter in the context of the debate on this point. The significance of the expression "not yet become binding on the parties" employed in Article V(1)(e) cannot be lost sight of. The expression postulates that the Convention has visualised an award which becomes binding at a point of time later than the making of the award. In other words the provision has in its contemplation the fact that an award in some cases may become binding on the mere making of it and in some cases may become binding only at a later stage. If this was not so there was no point in using the expression "not yet become binding". The award which is sought to be enforced as foreign award will have thus to be tested with reference to the key words contained in Article V(1)(e) of the Convention and the question will have to be answered whether the award has become binding on the parties or has not yet become binding on the parties. It is evident that the test has to be applied in the context of the law of the country governing the arbitration proceedings or the country under the law of which the award was made. This conclusion is reinforced by the views expressed by Albert Jan Van den Berg in his treatise--The New York Arbitration Convention of 1958--Towards a Uniform Judicial Interpretation at page 341 as under:

> "Most of the authors are also of the opinion that the moment at which an award becomes binding within the meaning of Article V(1)(e) is to be determined under the law governing the award. However, they also differ at which moment this should be assumed under that law.'

He has also referred to a judgment rendered by the Italian Supreme Court which supports this proposition. Says the author:

> "Furthermore, whilst declaring that the Convention has eliminated the "double Exequatur", the Italian Supreme Court held that the Court of Appeal has correctly ascertained that the award in question, made in the United States, had become binding under the relevant law of the United States."
> (Corte di Cassazione (Sez. 1), April 1, 1980 no. 2448, Lanificio Waiter Banci S.a.S. v. Bobbie Brooks Inc. (Italy no. 40) affirming Corte di Appello of Florence, October 8, 1977 (Italy no. 29).

1045
The author has also adverted to this dimension of the matter at pages 338 to 340 of his treatise in the following passage:-

> "Furthermore, the Courts have unanimously held that the party against whom the enforcement is sought has to prove that the award has not become binding. It still happens in some cases that a respondent merely asserts that the award has not become binding. In these cases the courts have invariably held that the respondent should furnish proof to this effect.
> The above interpretation of the term "binding" is also almost unanimously affirmed by the authors. To this extent there exists a uniformity of interpretation.

The uniformity of the interpretation begins to waver, however, when it comes to the question at which moment an award can be considered to have become binding under Article V(1)(e). Although in no case has it been held hitherto that the award in question was to be considered as not having become binding, the various reasonings are diverse. If this situation continues, it may occur that an award will not be considered as binding by one court, whilst the same award would have been considered as binding by another court.

In finding the answer to the question at which moment the award can be considered binding, the prevailing judicial interpretation seems to be that this question is to be determined under the law applicable to the award. The law applicable to the award is according to Article V(1)(e), the law of the country in which, or under the law of which, that award was made (the country of origin). Several courts appear to search under the applicable law for the moment at which the award can be considered to be inchoate for enforcement in the country of origin. Others attempt to find an equivalent of the term "binding" under the arbitration law of the country of origin.

Before the Court of Appeal of Naples, the Italian respondent had resisted to request for enforcement of an award made in London, alleging that the award should have been declared. enforceable in England. The Court rejected the 1046
defence, reasoning that the legal effect of the award was not to be determined under Italian law, according to which an award becomes binding only upon an enforcement order of the Pretore, but should be assessed under English law according to which the leave for enforcement is not necessary in order to confer binding force upon the award.

Another example is the Court of First Instance of Strasbourg before which the French respondent had asserted that the enforcement of an award made in F.R. Germany could not be granted because a leave for enforcement had not been issued by a German Court. Whilst observing that the Convention has abolished the "double exequatur", the Court reasoned that the award had become binding when it had been deposited with the German Court. The latter is indeed a prerequisite for the binding force (verbhindliehkeit) of an award under German law.

The binding force of an award under German law was also considered by the Court of Appeal of Basle. The Court referred to the Report of the Swiss Federal Council (Conseil federal) accompanying the implementation of the Convention in Switzerland, in which it is stated that "an award is binding within the meaning of Article V(1)(e) when the award complies with the conditions required for being capable for being declared enforceable in the country in which it was made." The Court held that the

award was binding on the ground that a declaration of enforceability of the award had been issued by the Court of First Instance of Hamburg.

This decision might create the impression that in order to be binding under Article V(1)(e), an award made in F.R. Germany must have been declared enforceable by a German Court. However, the Swiss Consell federal merely meant to say that "binding" should be understood as "ready for enforcement" and not as "enforced". If the Court had followed this interpretation, it would probably have reached the same conclusion as the above-mentioned Court of First Instance of Strasbourg which considered the award to be binding under German law once it had been deposited with the German Court. Nevertheless, both courts have in common that they considered the ques-

1047

tion at which moment an award becomes binding within the meaning of Article V(1)(e) under the law applicable to the award.

Following propositions emerge from the passage quoted hereinabove.

(1) That the enforceability must be determined as per the law applicable to the award.

(2) French, German and Italian Courts have taken the view that the enforceability as per the law of the country which governs the award is essential pre-condition for asserting that it has become binding under Article V(1)(e).

The aforesaid passages and the propositions emerging therefrom thus buttress and reinforce the view which has been expressed by us.

It was next contended on behalf of Western Company that in the five cases decided under the New York Convention involving parallel proceedings, in no case did a Court decide that an injunction such as sought by ONGC was necessary. In two of these five cases, Norsolor v. Pabalk (France), and Fertilizer Corporation of India v. IDI Management (US) the Courts, concerned about the possibility of conflicting results, ordered a stay of their enforcement proceeding; in the FCI case the court did so only upon the providing of a guarantee to secure the amount of the award at issue. In the other three cases, the court declined to exercise their discretion to stay an enforcement proceeding (Gutaverken (Sweden), Southern Pacific Properties v. Egypt (The Netherlands), and St. Gobain (France). The Court in SPP did so only because the respondent refused to provide security, thus demonstrating its bad faith. In SPP there was in fact a conflicting result when the Dutch Court entered an enforcement order on the very same day as a French Court annulled the award. Such is the argument. We are afraid that this argument loses sight of the fact that in the present matter we are not concerned with the question as to whether a foreign court should adjourn the decision on the enforcement of the award under Article VI. 1 We are not enforcing any foreign award and the question

1. "Article VI--If an application for the setting aside or suspension of the award has been made to a competent authority referred to in Article V(1)(e) the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party

claiming enforcement of the award, order the other party to give suitable security."
1048
is not whether or not a decision on enforcement should be adjourned. It is the American Court which will have to address itself to that question if an occasion arises.
The decisions relied upon by the counsel for the Western Company have relevance from the perspective of the problem faced by a Court enforcing a foreign award before which a prayer for adjournment of the. decision is made. In so far as we are concerned, the question is whether the Western Company should be restrained by us from proceeding with the action instituted in the American Court. We are therefore not persuaded by the aforesaid submission urged by learned counsel for the Western Company.

In the result we are of the opinion that the facts of this case are eminently suitable for granting a restraint order as prayed by ONGC. It is no doubt true that this Court sparingly exercises the jurisdiction to restrain a party from proceeding further with an action in a foreign court. We have the utmost respect for the American Court. The question however is whether on the facts and circumstances of this case it would not be unjust and unreasonable not to restrain the Western Company from proceeding further with the action in the American Court in the facts and circumstances outlined earlier. We would be extremely slow to grant such a restraint order but in the facts and circumstances of this matter we are convinced that this is one of those rare cases where we would be failing in our duty if we hesitate in granting the restraint order, for, to oblige the ONGC to face the aforesaid proceedings in the American Court would be opperssive in the facts and circumstances discussed earlier. But before we pass an appropriate order in this behalf, we must deal with the plea that the High Court does not have the jurisdiction to grant such a restraint order even if the proceeding in the foreign court is considered to be oppressive. Counsel for the-Respondent has placed reliance on Cotton Corporation of India v. United Industrial Bank, [1983] 3 S.C.R. 962 in support of this plea. In Cotton Corporation's case, the question before the Court was whether in the context of Section 41(b) of the Specific Relief Act, the Court was justified in granting the injunction. The said provision runs thus:

> "41. An injunction cannot be granted:-
> (
> a
>)
> .....
> ....
> (b) to restrain any person from instituting or prosecuting
> 1049
> any proceeding in a court not subordinate to that from which the injuction is sought;
> ....."
> (Emphasis added)

This provision, in our opinion, will be attracted only in a fact-situation where an injuction is sought to restrain a party from instituting or prosecuting any action in a Court in India which is either of ordinate jurisdiction or is higher to the Court from which the injuction is sought in the hierarchy of Courts in India. There is nothing in Cotton Corporation's case which supports the proposition that the High Court has no jurisdiction to grant an injunction or a restraint order in exercise of its inherent powers in a

situation like the one in the present case. In fact this Court had granted such a restraint order in V/O Tractoroexport, Moscow v. M/s Tarapore & Company and Anr., [1970] 3 S.C.R, 53 and had restrained a party from proceeding with an arbitration proceedings in a foreign country (in Moscow). As we have pointed out earlier, it would be unfair to refuse the restraint order in a case like the present. one for the action in the foreign Court would be oppressive in the facts and circumstances of the case. And in such a situation the Courts have undoubted jurisdiction to grant such a restraint order whenever the circumstances of the case make it necessary or expedient to do so or the ends of justice so require. The following passage extracted from paragraph 1039 of Halsbury's Laws of England Vol. 24 at, page 579 supports this point of view:-

> "With regard to foreign proceedings the court will restrain a person within its jurisdiction from instituting or prosecuting proceedings in a foreign court whenever the circumstances of the case make such an inter-position necessary or expedient. In a proper case the court in this country may restrain person who has actually recovered judgment in a foreign court from proceeding to enforce that judgment. The jurisdiction is discretionary and the court will give credit to foreign courts for doing justice in their own jurisdiction."

It was because this position was fully realized that it was argued on behalf of the Respondent that the action in the U.S.A. Court could not be considered as being oppressive to the ONGC. We have already dealt with this aspect and reached a conclusion adverse to Western Company. There is thus no merit in the submission that the High
1050
Court of Bombay has no jurisdiction in this behalf.

It was also urged that the ONGC had suppressed the fact that it had appeared in the U.S.A. Court and had succeeded in persuading the U.S.A. Court to vacate the seizure order obtained by the Western Company and had thereby disentitled itself to seek an equitable order. In our opinion in the first place there was no deliberate suppression, and in any case it was not necessary to apprise the Court about the said development. It would therefore not be proper to refuse relief to the ONGC on this account. We are therefore unable to accede to this submission either.

Before we conclude we consider it necessary to place on record the fact that it is perhaps on account of some understanding gap that it is observed by the High Court in its judgment:

> "It was also not disputed that an award could be enforced in the USA without the Respondents obtaining a decree in terms of the award from this Court."

The learned Additional Solicitor General has solemnly stated before us that no such concession was made by him. The learned counsel for the Western Company, with the fairness expected of him, has confirmed that the learned Additional Solicitor General had not made any such concession. Whilst nothing turns on it, we are adverting to this aspect for the sake of fairness to the learned Additional Solicitor General.

And now we come to the conclusion. While we are inclined to grant the restraint order as prayed, we are of the opinion that fairness demands that we do not make it unconditional but make it conditional to the extent indicated

hereafter. There are good and valid reasons for making the restraint order conditional in the sense that ONGC should be required to pay the charges payable in respect of the user of the rig belonging to the Western Company at the undisputed rate regardless of the outcome of the petition instituted by the ONGC in the High Court for setting aside the award rendered by the Umpire. India has acceded to the New York Convention. One of the objects of the New York Convention was to evolve consensus amongst the covenanting nations in regard to the execution of foreign arbitral awards in the concerned Nations. The necessity for such a consensus was presumably felt with the end in view to facilitate international trade and commerce by removing technical and legal bottle necks which directly or indi-
1051
rectly impede the smooth flow of the river of international commerce. Since India has acceded to this Convention it would be reasonable to assume that India also subscribes to the philosophy and ideology of the New York Convention as regards the necessity for evolving a suitable formula to overcome this problem. The Court dealing with the matters arising out of arbitration agreements of the nature envisioned by the New York Convention must therefore adopt an approach informed by the spirit underlying the Convention. It is no doubt true that if the arbitral award is set aside by the Indian Court, no amount would be recoverable under the said award. That however does not mean that the liability to pay the undisputed amount which has already been incurred by ONGC disappears. It would not be fair on the part of ONGC to withhold the amount which in any case is admittedly due and payable. The Western Company can accept the amount without prejudice to its rights and contentions to claim a larger amount. No prejudice will be occasioned to ONGC by making the payment of the admitted amount regardless of the fact that the Western Company is claiming a larger amount. And in any case, ONGC which seeks an equitable relief cannot be heard to say that it is not prepared to act in a just and equitable manner regardless of the niceties and nuances of legal arguments. These are the reasons which make us take the view that the restraint order deserves to be made conditional on the ONGC paying the undisputed dues at an early date subject to final adjustment in the light of final determination of the dispute.

We accordingly allow this appeal and direct as under:-

The appeal is allowed. The order passed by the Bomby High Court on April 3, 1986 is set aside. The order passed by the Bombay High Court on January 20, 1986 is restored subject to the conditions engrafted hereafter.

II

The appellant ONGC shall pay to the Respondent Western Company, in the manner indicated hereinafter, the amount payable at the undisputed rate of $ 18,500 per day for the period as computed by the Umpire in his award amounting to $ 2,528,339 along with interest at 12% till the date of payment.
1052

III

The said amount will be paid to the Respondent, Western Company, by wire transfer to their Bank Account No. 144-0-33008 at Manufacturers Hanover Trust Company, New York, U.S.A. within four weeks of the Respondent filing an undertaking (without prejudice to their rights and contentions) in this Court in the terms indicated hereinbelow, namely, (a) to accept the said amount subject to the final outcome of Arbitration Petition No. 10 of 1986 pending in the High

Court of Bombay or the appeal, if any, arising from the order passed by the High Court in the said matter and (b) further provided the Respondent files an undertaking in this Court to treat the said payment by way of protanto satisfaction in respect of (i) the Award in question, in case it stands confirmed or (ii) a fresh award, if any, that may be passed in future in connection with the original cause of action or (iii) in respect of the original claim giving rise to the arbitration proceedings in question.

IV

In case the Respondent, Western Company, files undertakings in this Court as contemplated in Clause III hereinabove and yet the appellant ONGC fails to make the payment in the manner indicated in Clause II hereinabove within four weeks of the date of filing of the said undertakings the order of stay granted as per Clause I hereinabove shall stand vacated.

V

The learned Single Judge before whom the Arbitration Petition No. 10 of 1986 is pending shall refer the matter to a Division Bench having regard to the fact that (1) it raises important and complex questions and (2) that it is desirable that the matter is expeditiously disposed of and a Letters Patent Appeal is avoided and (3) that the matter concerns a commercial transaction of international character.

The learned Chief Justice of Bombay High Court may constitute a Division Bench to hear this matter with a request to the Division Bench to dispose of the same expeditiously.

1053

VII

The Division Bench constituted by the Chief Justice will afford reasonable opportunity to the parties to file their statements of claims, affidavits etc. and shall post the matter for directions within two weeks of the statements, affidavits etc. being filed. The Division Bench will direct that the matter is posted for hearing at the earliest and will hear the matter from day to day and dispose it of expeditiously, preferably within six months (excluding the time granted at the joint request of the parties or at the instance of the Respondent) of the commencement of the arguments.

VIII

There will be no order regarding costs.

IX

Parties will be at liberty to apply to this Court for further directions from time to time in case of necessity.

N.P.V. Appeal Allowed.

1054