PETITIONER:
SVENSKA HANDELSBANKEN

Vs.

RESPONDENT:
INDIAN CHARGE CHROME LTD.

DATE OF JUDGMENT24/01/1994

BENCH:
YOGESHWAR DAYAL (J)
BENCH:
YOGESHWAR DAYAL (J)
VERMA, JAGDISH SARAN (J)
JEEVAN REDDY, B.P. (J)

CITATION:
1994 SCR (1) 261 1994 SCC (2) 155
JT 1994 (1) 240 1994 SCALE (1)156

ACT:

HEADNOTE:

JUDGMENT:
The Judgment of the Court was delivered by
YOGESHWAR DAYAL, J.- Special leave granted in all these three matters. Heard. As the matters have been heard at length, the appeals are being disposed of.
2.All the three appeals arising out of the above said special leave petitions are directed against the order passed by the Single Judge of the High Court of Orissa at Cuttack dated June 17, 1993 whereby the Single Judge of the High Court dismissed three Civil Revision Petition Nos. 282, 283 and 284 of 1992 filed by defendant 4, defendants 5 to 11 and defendants 1 to 3 respectively in Title Suit No. 208 of 1991. All the three civil revision petitions arose out of the common order passed by the Subordinate Judge, Athagarh in proceedings arising out of three applications filed by the aforesaid set of defendants for stay of the suit filed by the plaintiff invoking Section 3 of the Foreign Awards (Recognition and Enforcement) Act, 1961 (hereinafter referred to as 'the Foreign Awards Act').
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3.Before we deal with the applications, it would be useful to state a few facts relevant for purposes of the decisions of these appeals.
4.The suit out of which the present appeals arise was filed by the plaintiff (hereinafter referred to as the 'borrower') before the Subordinate Judge, Cuttack for various reliefs against defendants 1 to 3 (hereinafter referred to as the 'suppliers'); defendants 4 to 11 (hereinafter referred to as the 'lenders'); and defendant 12, Industrial Development Bank of India, (hereinafter referred to as the 'guarantor'). Defendant 13 in the suit is M/s Indian Metals & Ferro Alloys Ltd., (in short 'IMFA').
5.IMFA issued a global tender for setting up a captive power plant, viz., a coal-fired power plant in Choudwar, Orissa. The tender indicated that credit by the suppliers

will be preferred. The suppliers submitted their tenders in this regard. Since the tender indicated that suppliers' credit for the entire project would be preferred, the suppliers approached defendant 4 (one of the lenders) to finance the project and inquiries were made to find out the possibilities for financial assistance by the Swedish Government in the form of interest at subsidised rates. As a result of negotiations the three suppliers entered into three contracts with the plaintiff.

6.Defendant 4 (one of the lenders) formed a consortium of banks with defendants 5 to 11 and an American Bank for financing the project. The American Bank subsequently assigned its interest in favour of one of the defendant banks (lenders). The lenders entered into two credit agreements dated October 30, 1984 with the borrower. The credit agreements were also entered into by defendant 4 for itself and on behalf of defendants 5 to 11. A third credit agreement dated November 15, 1984 was also entered into between the borrower and defendant 4 (lender) in its individual capacity. It is not necessary, for the purposes of present proceedings, to mention the quantum of credit agreements except to state that two additional credit agreements were also entered into between the borrower and the lenders supplemental to the first and second credit agreements providing for additional loans. All the credit agreements inter alia purported to provide payments by the lenders to the suppliers on various documents, as provided in the credit agreements, being presented to the lenders and also against a notice of draw down by the borrower. In relation to the third credit agreement the disbursements were to be made directly to the lenders in respect of the financial cost payable by the borrower upon notice of draw down by the borrower.

7.The loans were required to be repaid by twenty (subsequently amended to eighteen) equal semi-annual (six monthly) consecutive installments. The repayments were required to be made by the borrower without demand or notice. It was specifically provided in the credit agreements that:

> "Any amounts payable by the borrower shall be paid without set-off or counter-claim. The liability of the borrower to effect any payment under this agreement is thus unconditional and shall not in any way be
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>
> dependent upon the performance of the contracts i.e. the agreements between the borrower and the suppliers-exporters or be affected by any other claim which the borrower may have against the exporters or against any other party (natural or legal) collaborating with the exporters. "
>
> The credit agreements also provided:
>
> "All disputes arising from the provisions of this agreement or its performance shall be finally settled by arbitration under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by three arbitrators appointed in accordance with these rules. Arbitration shall take place in Stockholm and be conducted in the English language. The award of the arbitral tribunal is final and obligatory for the parties without any right for a further appeal or contestation of its fulfillment. The borrower

hereby expressly submits to the jurisdiction of the above mentioned arbitration tribunal."

8.The credit agreements also provided that the borrower shall furnish guarantees in favour of the lenders as security for the loans covering 100% of each of the loans plus interest, costs and fees payable under the credit agreements. As quoted above, the agreements also contained an arbitration clause which contemplates disputes arising from the agreements to be finally settled by arbitration under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by three arbitrators appointed in accordance with these rules. The arbitration is provided to take place at Stockholm.

9.On June 24, 1989 the plaintiff (borrower) took-over the plant and on June 25, 1989 issued a taking-over certificate. On July 28, 1989 the plaintiff authorised defendant 4 to disburse the balance 5% of the payment to defendant 3 as well.

10.It was on or about April 28, 1991 that the present suit was filed by the plaintiff for: (a) a declaration that the taking-over certificate dated June 25, 1989 is void/voidable instrument and the same may be delivered and cancelled; (b) it be further declared that the plaintiff is entitled to diminution/extinction of price towards the power plant as mentioned in Annexure 'A' to theplaint, in the alternative, if the court finds, that any amount is payable todefendants 1 to 11 jointly or severally, the same be directed to be paid asper reschedule of payment to be calculated on a cash flow basis on actual generation as determined on inquiry; (c) a decree of declaration that the guarantees obtained from defendants 12 and 13 by defendants 1 to 11 are void/voidable instruments and ought to be delivered and cancelled; (d) a decree of perpetual injunction restraining defendants 12 and 13 from making payments dated April 30, 1991 and payments falling due on subsequent dates under any guarantee to defendant 4 and/or defendants 4 to 11; and (e) a decree of perpetual injunction restraining defendants 4 to 11 from recalling the loan and/or taking any steps from recovering the said loan either in full or in part, etc. etc.

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11.On receipt of summons in the suit and notice on the application for interim injunction filed by the plaintiff (borrower), defendants 1 to 3 (suppliers) did not enter appearance. Defendant 4 (lender) entered appearance by power of attorney dated June 28, 1991 specifically in Misc. Case No. 143 of 1991 i.e. in relation to the application for interim injunction without any reference to the main suit. By this power of attorney defendant 4 appointed S/Shri A. Misra, H.P. Rath and P.N. Misra, Advocates on their behalf in Misc. Case No. 143 of 1991. Before filing of the power of attorney, defendant 4 also wrote to the plaintiff's counsel objecting to the jurisdiction of the court itself by letter dated May 31, 1991 and also sent a copy of this letter to the court opposing the order of ad interim injunction dated April 25, 1991 whereby the Subordinate Judge, Cuttack had injuncted defendant 12 from making payments to defendant 4. The letter dated May 31, 1991 reads thus:

"SVENSKA HANDELSBANKEN
Stockholm, Sweden
May 31, 1991

BY COURIER
Mr Rajen Mahapatra
Advocate,

7-A/3, Girdhar Apartments,
Feroz Shah Road,
New Delhi 110 001,
India.

Dear Sir,

Re: Order of injunction' dated April 25, 1991 the learned Subordinate Judge, 1st Court, Cuttack, Orissa in Misc. Case No. 143 of 1991 arising out of T.S. No. 208 of 1991.

We have received two letters from you, both dated April 27, 199 1, in respect of the above matter.

The first was a short covering letter and the second was enclosed with it. The second quotes the terms of an injunction apparently granted in the above matter. Enclosed with it was a copy of what appears to be the notes of the Honorable Judge.

We have never received anything further, either from you or from the Court. This is puzzling.

What is even more puzzling is how your clients could have made such an application, and how it could have been granted, when the Honorable Court quite clearly has no jurisdiction over us as a Swedish Corporation with no presence in India, or over any dispute between us and your client.

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Your clients and we signed three main credit agreements under which your clients' borrowings have taken place. Each of those agreements contained the following clauses:

(A) 'All amounts payable by the borrower under the agreement shall be paid without set-off or counter-claim. The liability of the borrower to effect any payment under this agreement is thus unconditional and shall not in any way be dependent upon performance of the contracts or be affected by any other claim which the Borrower may have against the exporters or against any other party (natural or legal) collaborating with the exporters.'

(B) 'This agreement shall be deemed to be made under and shall be construed in accordance with and governed in all respects by Swedish Law.'

(C) 'All disputes arising from the provisions of this agreement or its performance shall be finally settled by arbitration under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by three arbitrators appointed in accordance with these rules. Arbitration shall take place in Stockholm and be conducted in the English language. The award of the arbitral tribunal is final and obligatory for the parties without any right for a further appeal or contestation of its fulfillment. The borrower hereby expressly submits to the jurisdiction of the above mentioned arbitration tribunal.'

In the light of the above we find it incomprehensible how your client can seek to drag us into whatever dispute which he may have with the builders of the power plant. Nor do we understand how you can wrongly seek to circumvent the clearly provided sole forum, namely arbitration before the International Chamber of Commerce, with the hearings to be in Stockholm.

We are sending a copy of this letter to the Honorable Court in Cuttack.

Yours faithfully,
Svenska Handelsbanken
sd/- sd/-
Lena Bertllsen Gudrun Lundin Hollinder"

12. The substance of the letter is that the contracts contained an arbitration agreement which provided that all disputes arising from the provisions of Agreement or its performance shall be finally settled by arbitration under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by three arbitrators appointed in accordance with these rules. The arbitration agreement was agreed to be governed by Swedish Law.

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13.It appears that an application dated June 28, 1991 was filed by defendant 4 for vacating the interim injunction granted in Misc. Case No. 143 of 1991 and it was this application with which the aforesaid power of attorney dated June 28, 1991, specifically mentioning Misc. Case No. 143 of 1991, was filed in court. Written arguments were also filed on July 31, 1991 opposing the continuation of the interim injunction.

14.It also appears that on the same date i.e. July 3 1, 1991 an application was filed purporting to be on behalf of defendants 4 to 11 (lenders), without any power of attorney from defendants 5 to 11, stating inter alia "that these defendants are foreign banks and are residing outside the country, therefore six weeks time may kindly be granted enabling these defendants to file their written statement". It is not clear from the application which advocate had signed it.

15.It appears that another application dated August 24, 1991, purporting to be on behalf of defendants 4 to 11, without any power of attorney in favour of the counsel in the suit, was filed again asking for time of eight weeks being granted to defendants 4 to 11 to file their written statement.

16.On or about November 1, 1991 the defendant 4 filed an application purporting to be under Section 3 of the Foreign Awards Act for stay of the suit. Another application under Section 3 of the Foreign Awards Act was also filed on behalf of defendants 5 to II supported by a separate power of attorney in favour of the counsel in the suit in support of the applications under Section 3 of the Foreign Awards Act.

17.In reply to the applications filed on behalf of defendant 4 and defendants 5 to 11 it was inter alia pleaded on behalf of the plaintiff that the applications under Section 3 of the Foreign Awards Act were not maintainable and that defendant 4 had taken steps in the proceedings and having participated in the proceedings with a view to contest the same on merits, it is not entitled to file the present application. Reference was made to the applications dated June 28, 1991 and August 24, 1991. Reference was also made to the application dated August 24, 1991 on behalf of defendants 5 to 11 as well apart from taking other pleas to oppose the applications for stay.

18.During the pendency of the applications under Section 3 of the Foreign Awards Act, in reply to the objections filed by the plaintiff to the application, an affidavit was filed on behalf of defendant 4 Ms Barbro Margareta Lundberg which denied having taken any steps in the proceedings so as to disentitle defendant 4 from making the application under Section 3 of the Foreign Awards Act. It was deposed thus:

> "(a) It is denied that D-4 has taken any step in the proceedings so as to disentitle it from moving this application under Section 3 of the

Foreign Awards (Recognition and Enforcement) Act, 1961 ('the 1961 Act') for the following reasons:

(i) D-4 engaged the services of Shri D.A. Misra, ('Mr Misra') Advocate of Orissa High Court, in or about June 19, 1991.

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Extensive discussions were held with Mr Misra at the offices of M/s Clifford Chance in London (Solicitors of D-4) when it was made clear to Mr Misra that under no circumstances should he take any steps whatever which might result in D-4 being deemed to have submitted to the jurisdiction of the Indian Courts or to have entered into the merits of the dispute in Suit No. 208 of 1991 because D-4 wanted to reserve to itself the option of compelling plaintiff to arbitrate the dispute, as agreed. D-4 in the presence and with the help of Mr Misra prepared an affidavit by Ms Helene Melin, an officer of D-4, contesting the jurisdiction of the Indian Courts and relying upon the arbitration provisions contained in the credit agreements. On behalf of D-4, M/s Clifford Chance, by their letter of instructions dated June 19, 1991 expressly instructed Mr Misra to take no steps in the action nor to do anything else which might be construed as a submission to the jurisdiction of the Indian Courts in respect of this matter. This letter was personally handed over to Mr Misra during the course of the meetings held in London. In the presence of two officers of D-4 and their said English Solicitors Mr Misra read the letter and accepted these instructions. He assured his clients D-4 that he would act in accordance with these very clear and explicit instructions. A copy of the letter dated June 19, 1991 is annexed as Annexure 'A'.

(ii)The Vakalatnama issued by D-4 to Mr Misra in the injunction proceedings (Misc. Case No. 143 of 1991) is restricted compared to the normal form. This was done intentionally and was discussed and agreed with Mr Misra at the meetings in London in June 1991. The usual right of substitution was deleted because D-4 wanted to control who was to represent it in the injunction proceedings. Mr Misra indicated what names he wanted inserted in the power of attorney, and wrote them down. D-4 asked questions about these persons and Mr Misra gave information about them which satisfied D-4. ... D-4 intended to authorise the Mr Misra that it met in London to defend the injunction, not any other person who may be called Misra. Subsequently D-4 has found that 'Misra' is a common name in Cuttack. D-4 submits that it is not bound by actions taken in its name by Mr Ashouk Misra, or any other person who has not been authorized by it in the Vakalatnama.

(iii)Again, by letters dated July 17, and August 1, 1991, M/s Clifford Chance instructed Mr Misra not to take any steps whatever in

either the misc. case application for an injunction brought by the plaintiff or in the main suit, without instructions. They repeated their previous express instructions that under no circumstances should steps be taken in the
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action. Copies of the said letters dated July 17, and August 1, 1991 is annexed as Annexure 'B'.

(iv)It appears that on or about July 3 1, 1991 a purported ,application' was filed before this Hon'ble Court seeking time to file a written statement on behalf of D-4. It is submitted that this purported 'application' was filed contrary to the express prior instructions of D-4 and in glaring breach of duty. He further purported to apply on behalf of Respondents 5 to 11. As is plain from the annexures and in particular the Vakalatnama, M
r
Misra was only instructed by and on behalf of D-4, and no one else.

(v) It further appears that a second 'application' was filed on August 24, 1991, seeking additional time to file a written statement. Again, neither D-4 nor their English Solicitors were informed in advance as to the filing of this application, and the filing of the document took place contrary to the express instructions of both. Indeed on or about August 13, 1991 a representative of M/s Clifford Chance traveled from Delhi to Cuttack with Mr Misra to attend the court hearing on August 14, and also held meetings with Mr Misra in Delhi and Cuttack on 13, 14, and 15 August. During those meetings it was repeatedly stressed to Mr Misra how important it was for D-4 to retain its ability to insist on arbitration as agreed by the parties in writing, and accordingly that no step in the action be taken on behalf of D-4. Mr Misra made no mention of the impugned application.

(vi) D-4 only became aware of the filing of the 'application' dated July 31, 1991 at the end of August 1991, and immediately by their Solicitor's letter dated September 2, 1991 called upon Mr Misra to explain.

It is noteworthy, and very surprising that no mention was made of this 'application' during the series of meetings held in India in mid-August referred to above, or in correspondence or later telephone conversation.

(vii)By his letter dated September 8, 1991, Mr Misra informed D4's English Solicitors that the filing of an application for adjournment for the purposes of filing a written statement does not amount to a step in the action. A copy of that letter is annexed as Annexure 'C'. No mention was made in this letter of the second 'application' dated August 24, 1991.

(viii)The first time D-4 or its English Solicitors became aware of the second 'application' of August 24, 1991 was when it

was mentioned in plaintiff's objection filed herein. It came as a complete surprise.

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(ix)As a result of his actions D-4 discharged Mr Misra as their Advocate by letter dated October 16, 199 1. No reply was ever received to this letter. However, Mr Misra sent D-4 an account for his services under cover of a letter dated December 31, 1991 (Annexure Da). D-4 has refused to pay this account in all the circumstances (Annexure Db).

(b) The Vakalatnama granted to D-4's advocate was strictly limited by deliberate choice. It is annexed hereto as Annexure 'E'. The full circumstances surrounding the grant of the Vakalatnama, were set out in sub-paragraph (a) above. It will be observed that the Vakalatnama is in favour of only the following persons 'Shri A. Misra, H.P. Rath, P. Panda, G. Rath, B. Das Advocates'. There is no right to delegate. The person who signed the two ,applications' dated July 3 1, and August 24, 1991 respectively was not authorized by D-4 in its Vakalatnama to act on its behalf.

Those documents are accordingly unauthorised, a nullity and void. It is submitted that neither was an 'application' and accordingly neither constitutes a step in the action.

(c) It will be observed, further, that the Vakalatnama is specifically given only in respect of Misc. Case No. 143 of 199 1, and no other court proceedings. This was also deliberate, because D-4 was at all times anxious to ensure that it preserved its right to have any disputes settled by arbitration as agreed, as can be seen from the correspondence annexed hereto and referred to above, and the further letters dated August 7, August 19, and October 4, 1991 annexed hereto and marked Annexure 'F'. The two impugned ,applications' are brought in Title Suit No. 208 of 1991. D-4 did not authorize Mr Misra to act in Title Suit No. 208 of 1991. No Vakalatnama authorizing any person to act on behalf of D-4 in Title Suit No. 208 of 1991 was filed until M/s Swarup John & Co. filed their Vakalatnama on ... 199 1. Accordingly, it is submitted that the impugned applications are each a nullity, void and of no effect, and therefore could not be a step in the action.

(d) It will be observed, further, that the Vakalatnama as filed is granted by D-4 only. D75 to 11 are not parties to that Vakalatnama. D-5 to 11 had not been properly served in any of these proceedings in July and August 1991 when the impugned applications were filed. They had not issued any Vakalatnama nor were any Vakalatnamas either given to Mr Misra or filed on behalf of D-5 to 11, and for this reason, also, the impugned applications are void and of no effect.

(e) In all these circumstances it is further or alternatively submitted that the Hon'ble

> Court erred on both occasions in granting time on the basis of each of the two impugned applications. It is submitted that the Hon'ble Court had no power to act on applications brought by persons without authority and/or in the wrong proceedings
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> and/or on behalf of the wrong parties and/or in response to void applications, and accordingly the Hon'ble Court made a serious mistake."

Along with the affidavit all the documents mentioned in it were also filed.

19.The trial court, however, dismissed the applications for stay filed by defendant 4 and defendants 5 to 11 by its order dated June 23, 1992.

20.At this stage it would be useful to state the facts in relation to an application filed under Section 3 of the Foreign Awards Act on behalf of defendants 1 to 3 (suppliers).

21.It will be noticed that so far as the suppliers are concerned, they never put in any appearance to oppose the application for ad interim injunction that the plaintiff had filed against defendants 4 to 12. They, however, filed the application purporting to be under Section 3 of the Foreign Awards Act for stay of the suit in view of three separate contracts entered into between the borrower and the suppliers containing arbitration clauses.

22.The application filed on behalf of defendants 1 to 3 (suppliers) was also dismissed by the trial court on the same date.

23.The trial court relied on the decision of this Court in Renusagar Power Co. Ltd. v. General Electric Co.' and noticed the conditions required for stayof suit under Section 3 of the Foreign Awards Act as held by this Court inthe said case, which read as under: (SCC p. 725, para 51)

> "(i) there must be an agreement to which Article II of the Convention set forth in the Schedule applies;
> (ii)a party to that agreement must commence legal proceedings against another party thereto;
> (iii)the legal proceedings must be 'in respect of any matter agreed to be referred to arbitration' in such agreement;
> (iv)the application for stay must be made before filing the written statement or taking any other step in the legal proceedings;
> (v) the Court has to be satisfied that the agreement is valid, operative and capable of being performed; this relates to the satisfaction about the 'existence and validity' of the arbitration agreement;
> (vi)the Court has to be satisfied that there are disputes between the parties with regard to the matters agreed to be referred; this relates to effect (scope) of the arbitration agreement touching the issue of arbitrability of the claims."

24.After noticing the analysis of Section 3 of the Foreign Awards Act in Renusagar case' it took the view that all the defendants have failed to satisfy conditions (i), (iii), (v) and (vi) and defendant 4 have not satisfied/fulfilled condition (iv) also, by its impugned judgment dated June 23, 1992.

1 (1984) 4 SCC 679: AIR 1985 SC 11 56
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25.Three sets of revision petitions were filed before the High Court one on behalf of defendants 1 to 3 (suppliers), second on behalf of defendant 4 (one of the lenders) and third on behalf of defendants 5 to II (other lenders). The High Court by its impugned order dated June 17, 1993 dismissed all the three revision petitions. It took the view that conditions (i), (ii), (iii) and (vi) as laid down by this Court in the aforesaid case of Renusagar1 were satisfied in respect of all the defendants. It, however, took the view that so far as condition (v) is concerned it is not satisfied in respect of all the defendants. It held that the agreements for arbitration by different arbitrators one between defendants 1 to 3 and the borrower (plaintiff) and the other between the borrower (plaintiff) and lenders by other set of arbitrators make the agreements inoperative and are not capable of being performed. The High Court, however, again affirmed the finding of the trial court that defendant 4 has not satisfied condition (iv) inasmuch as before filing the application for stay, defendant 4 had taken other steps in the legal proceedings.

26.There was no dispute before us so far as the lenders' applications were concerned that they were governed by Section 3 of the Foreign Awards Act for the purpose of stay of the suit as the arbitration was contemplated under the Rules of Conciliation and Arbitration of the International Chamber of Commerce, which was to take place in Stockholm and the parties rights were to be governed by Swedish Law. Therefore, we are dealing first with the question of compliance of Section 3 of the Foreign Awards Act on behalf of defendant 4 and defendants 5 to 11. Section 3 of the Foreign Awards Act reads as under:

> "3. Stay of proceedings in respect of matters to be referred to arbitration.- Notwithstanding anything contained in the Arbitration Act, 1940, or in the Code of Civil Procedure, 1908, if any party to an agreement to which Article II of the Convention set forth in the Schedule applies, or any person claiming through or under him commences any legal proceedings in any court against any other party to the agreement or any person claiming through or under him in respect of any matter agreed to be referred to arbitration in such agreement, any party to such legal proceedings may, at any time after appearance and before filing a written statement or taking, any other step in the proceedings, apply to the Court to stay the proceedings and the Court, unless satisfied, that the agreement is null and void, inoperative or incapable of being performed or that there is not, in fact, any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings."

27.Condition (iv) as culled out from the decision in the case of Renusagar1 is really not complete. The condition really is that where one of the parties to the arbitration agreement, in spite of it, commences any legal proceedings in any court against the other party, any party to such legal proceedings may, at any time after appearance and before filing a written
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statement or taking any other step in the proceedings, apply to the court to stay the proceedings. One of the conditions for applicability of condition (iv) is that there must be appearance on its behalf before court in which the proceedings are pending and after filing appearance, but before filing the written statement or taking other steps in those proceedings, the party concerned must apply for stay. The condition of putting in appearance is equally important. It is clear from the discussions of the facts by the trial court as well as in view of the affidavit filed on behalf of defendant 4 of Ms Barbro Margareta Lundberg and the express instructions conveyed to its counsel with the power of attorney dated June 28, 1991 which was specifically limited to the Misc, Case No. 143 of 1991, it limited the act of appearance merely to oppose the application for ad interim injunction operating against defendant 4. It is again clear that the party concerned must put in appearance in the suit before applying for stay under Section 3 of the Foreign Awards Act. At the stage applications purporting to be on behalf of defendants 4 to 11 were filed on July 31, 1991 and August 24, 1991, seeking time to file written statement, no appearance had been filed on behalf of defendants 5 to 11 at all and no appearance had been filed in the suit on behalf of defendant 4. It will again be observed that the Vakalatnama dated June 24, 1991 was specifically given in respect of Misc. Case No. 143 of 1991 and no other court proceedings. No power of attorney was filed on behalf of defendant 4 in the suit at all with either of the two applications seeking time for filing written statement. The applications for seeking time were filed contrary to the express instructions given to the counsel appearing on behalf of defendant 4 vide communication dated June 19, 1991 as is clear from paragraphs 1 to 3 thereof which are as under:

> "1. The instructions at present are to contest only the jurisdiction of the Court in Cuttack over defendants 4 to II in the pending proceedings.
> 2. Accordingly, you are under no circumstances to take any step in the action (in the technical sense) or to do anything else which might be construed as a submission to the jurisdiction of any Indian Court in respect of this matter.
> 3. Clients and the Syndicate of banks they represent consider this matter to be so important that you are not to divert from these instructions without express written instructions either from Svenska Handelsbanken (in the person of Mrs Lundberg or Mrs Malin) or from my firm."

28.The relevant part of second communication dated July 17, 1991 which was sent by Fax reads as follows:

> "May I please remind you that your present instructions are only to bring the pending application relating to jurisdiction in the Court of the Subordinate Judge in Cuttack, and not to take any other steps either in that application or in the main action. Should we lose and you wish to advise an appeal, please do so and seek written instructions from us."
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29.The express instructions were again given to the counsel on August 1, 1991by Fax, relevant part whereof reads as under:

"As I understand the position we are awaiting a decision of the lower court on Monday, 5th August. Whatever that decision may be your express instructions remain to take no other step whatever in either the application or the action without the written instructions of this firm or the clients. Under no circumstances should any step be taken in the action which would submit either Svenska or any of the other members of the banking consortium to the jurisdiction of the Indian Courts."

30.We may also at this stage quote the actual power of attorney executed on behalf of defendant 4 in Misc. Case No. 143 of 1991 which reads:

"Svenska Handelsbanken
FORM OF VAKALATNAMA
IN THE COURT OF THE SUBORDINATE JUDGE, CUTTACK
Miscellaneous Case No. 143 of 1991
Between
INDIAN CHARGE CHROME LTD.
Versus
ASEA STAL AB & ORS.

Known all men by these presents, that by this Vakalatnama. We, Svenska Handelsbanken, Kungstradgardsgatan 2, S-106 70 Stockholm, Sweden, opposite party No. 4 in the aforesaid case, do hereby appoint and retain Shri A. Misra, H.P. Rath, P. Panda, G. Rath, B. Das, Advocates to appear for us, in the above case and to conduct and prosecute (or defend) the same and all proceedings that may be taken in respect of any application connected with the same, or any decree or order passed therein including all applications for return of documents or receipt of any moneys that may be payable to us in the said case and also in applications for review, appeals under Orissa High Court Order and in applications for leave to appeal to Supreme Court.

Dated ... 1991
Received from the executant(s)
satisfied and accepted as I hold
no brief for the other side.
Advocate Svenska Handelsbanken
sd/- sd/-
Astor Olsson Lars Kinander
Accepted as above
Advocate Signatures of the Executants
Accepted as above
Advocate
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Accepted as above
Advocate"

31. It will be noticed that this power of attorney is not in usual terms which normally authorise a counsel to enter into compromise or to appoint any other counsel on his behalf. The power of attorney is specifically in Misc. Case No. 143 of 1991. Again it contains no power on the counsel to appoint any other counsel on his behalf in the application even.

32. A combined reading of the correspondence as disclosed in the affidavit filed on behalf of defendant 4 shows that no power of attorney has been executed on behalf of defendant 4 in favour of any counsel so far as the main suit is concerned. The counsel was given express instructions not to put in appearance or take any step in the proceedings relating to suit. If the applications dated July 31, 1991 and August 24, 1991 had been moved with either express or

implied instructions of the lender, defendant 4, there can be no doubt that it would normally amount to taking legal steps in the proceedings relating to suit. But in view of the power of attorney being merely to the proceedings in Misc. Case No. 143 of 1991 coupled with the express instructions to the contrary, the counsel had no power or authority to file any application seeking time for filing written statement. The filing of the two applications is totally ultra vires the authority and specific instructions of defendant 4 and was thus totally unauthorised and of no effect on defendant 4.

33. As late as 1930 the Privy Council in the case of Sourendra Nath Mitra v. Tarubala Dasi2 made the following two observations at page 161 of the report:

> "Two observations may be added. First, the implied authority of counsel is not an appendage of office, a dignity added by the Courts to the status of barrister or advocate at law. It is implied in the interests of the client, to give the fullest beneficial effect to his employment of the advocate. Secondly, the implied authority can always be countermanded by the express directions of the client. No advocate has actual authority to settle a case against the express instructions of his client. If he considers such express instructions contrary to the interests of his client, his remedy is to return his brief."

34. The Supreme Court also had an occasion to examine the power of the pleader to enter into a compromise without the consent of the party concerned in the case of Jamilabai Abdul Kadar v. Shankarlal Gulabchand3. It upheld the implied power of the advocate as well as the pleader to compromise but in paragraph 9 of the judgment observed that one thing is certain "that if a suitor countermands his pleader's authority to enter into a compromise or withholds, by express recital in the vakalat, the power to compromise the legal proceeding, the pleader (or, for that matter, the

2 AIR 1930 PC 158 :57 IA 133: 34 CWN 453

3 (1975) 2 SCC 609

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advocate) cannot go against such advice and bind the principal, his client. This is as illegal as it is unprofessional".

35. We are thus constrained to reverse the findings of both the trial court as well as the High Court regarding non-satisfaction of condition (iv) as noticed in the case of Renusagar1 by defendant 4. On the other hand we are constrained to hold that no appearance whatsoever was made by defendant 4 so far as the suit is concerned and in fact the instructions were to the contrary so far as the counsel is concerned. He acted contrary to express instructions and defendant 4 cannot be bound by such unauthorised "acting" by its advocate contrary to the express instructions. Since there was no appearance also on behalf of defendant 4 in the suit no question arose of taking any steps in such proceedings and, therefore, condition (iv) as contemplated in the case of Renusagarl is fully satisfied by defendant 4 as well as by defendants 5 to

36. It will be noticed that the only other finding of the High Court against defendant 4 for declining stay of the suit is common with other defendants appellants before us, namely that they have not satisfied condition (v) as spelt out in the aforesaid case of Renusagarl.

37. The High Court at the end of paragraph 8 of its judgment gave the following findings:

> "Thus, factually, I am satisfied that Article II of the convention set forth in the schedule to the Foreign Awards Act applies to each of the agreements with the three sets of applicants. Suit out of which these civil revisions arise as legal proceedings initiated by plaintiff which is a party to each of the agreements with the applicants. Such suit relates broadly to defects in the equipments supplied, erection and commission of the power plant by defendants 1 to 3 and non-satisfaction of terms for payment to defendants 1 to 3 by defendant 4. These are all in respect of matters agreed to be referred to arbitration as per the clauses to that effect in the various agreements. By alleging fraudulent misrepresentations in the plaint against the applicants, plaintiff cannot avoid the arbitration clauses in view of the broad language of the different clauses, where question of fraudulent representation can also be effectively answered in the award to be binding on the parties to the agreement. Therefore, conditions (i), (ii), (iii) and (vi) as laid down by the Supreme Court for application of Section 3 are satisfied in this case in respect of all the applicants."
>
> Again in paragraph 16 of the judgment it was observed thus:
>
> "It is next to be examined whether condition (v) is satisfied in respect of these three applications. There can be no doubt that each of the agreements standing by itself is valid, operative and capable of being per .formed. Thus the condition relating to existence and validity of each of the agreements are satisfied. But when all the agreements are put together, a different situation arises."
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38. We are concerned with the validity, operativeness and capability of being performed of the arbitration agreements (1) between the borrower and the suppliers and (2) between the borrower and the lenders. The finding of the High Court is that they are valid, operative and capable of being performed if left with themselves between the borrower and the suppliers on the one hand and between the borrower and the lenders on the other. The High Court, however, took the view that they have become inoperative as the agreement with the lenders is before one set of arbitrators in proceedings to be held at Stockholm i.e. against the lenders and before other set of arbitrators in proceedings to be held at Paris i.e. against the suppliers, though, the body, which is to conduct the arbitration proceedings is the same. This makes the agreements either invalid, inoperative or incapable of being performed.

39. The above extracts and reasoning of the judgment of the High Court show that each of the three defendants 1 to 3 had satisfied all the requirements of Section 3 of the Foreign Awards Act and each was entitled to have the suit proceedings stayed against them so that the disputes could be resolved only by the foreign arbitration proceedings stipulated by them with the plaintiff in their respective

arbitration agreements.

40. The only ground given by the High Court for refusing the stay of the suit against defendants 1 to 3 is as mentioned earlier. The High Court has also pointed out that since the plaint does not make severable allegations against different defendants who are parties to different contracts, with different arbitration agreements and the allegations made by the plaintiff against different defendants are such that they cannot be separated from each other and since the arbitrations between the plaintiff and different defendants may have to go to different arbitrators, all the arbitration clauses must be treated as having become inoperative. It has further been observed by the High Court that if all the agreements containing arbitration clauses with different defendants had envisaged only one arbitrator for adjudicating all the disputes, the fact that there were several. agreements with the different defendants would not have affected the matter and the award given by common arbitrators could have bound all the parties in the suit.

41. It appears to us that the aforesaid reasoning of the High Court is strained and totally erroneous. It also amounts to disregarding the mandatory provision of Section 3 of the Foreign Awards Act.

42. For purposes of the present case we are, for the present, considering merely the applications for stay of the suit filed on behalf of the lenders. It is C. clear from their applications that all the conditions envisaged for the applicability of Section 3 of the Foreign Awards Act are fully complied with.

43. The plaintiff by merely entering into other contracts with different parties cannot prejudice or defeat the rights of the different party under the different contract, particularly when the right to foreign arbitration has been provided by Parliament as an indefeasible right in which the court, does not have any kind of discretion.

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44. The arbitration is contemplated as per Section 3 of the Foreign Awards Act. The plaintiff by filing a plaint, cannot make the arbitration clause invalid or inoperative. Therefore, the finding of the High Court that the arbitration agreements have become inoperative and incapable of being performed or invalid is errors in law and, therefore, must be set aside.

45. Mr Venugopal, learned counsel for the borrower/plaintiff referred us to clause 18 of the agreement so far as the lenders are concerned which reads as under:

" 1 8. Governing Law : Jurisdiction

18.02 All disputes arising from the provisions of this Agreement or its performance shall be finally settled by arbitration under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by three arbitrators appointed in accordance with these rules.Arbitration shall take place in Stockholm and be conducted in the English language. The award of the arbitral tribunal is final and obligatory for the parties without any right for a further appeal or contestation of its fulfillment. The borrower hereby expressly submits to the jurisdiction of the above mentioned arbitration tribunal.

18.03 Notwithstanding the provisions of the foregoing clause, the lender reserves the right to commence proceedings against the borrower in the Courts of India or Sweden or

> the United Kingdom or the State of New York and the borrower hereby expressly submits to the jurisdiction of such courts.
>
> 18.04 The borrower hereby irrevocably appoints the Ambassador of India to Sweden as its process agent to receive service of any proceedings on its behalf."

46. Mr Venugopal submitted that in view of clause 18.03 there is no arbitration clause at all in the contracts governing the lenders as one party alone is bound by such an agreement and the other is not bound by such agreement, the agreement is not an arbitration agreement. It was submitted that inasmuch as clause 18.02 of the contract declares "the borrower hereby expressly submits to the jurisdiction of the above mentioned arbitration tribunal" but clause 18.03 through a non-obstante clause relieves the lenders of their duty to have the disputes settled through arbitration and authorises the lenders to commence proceedings in the courts of India or any other country as the lenders may determine. It was submitted that it is only in the agreement of defendant 4 that instead of any other country, which is struck off, Sweden, the United Kingdom or the State of New York are mentioned. However, clause 18.04 makes it clear that the real purpose of rendering clause 18.02 inapplicable was to enable the lenders to sue the borrower in Sweden. It was submitted that where the arbitration clause is rendered inapplicable to a party to the dispute at his choice, the said clause is no arbitration clause at all.

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47. It will be noticed that it is totally a new point urged on behalf of the plaintiff borrower that there is no arbitration clause so far as defendant 4 and defendants 5 to 11 are concerned.

48. Since it is a disputed question of fact, we ought not to allow it to be raised for the first time. However, the arbitration agreements are before us and the clause is admitted. Defendant 4 has throughout been relying upon clause 18.02 of the contract and still is ready and willing to have the dispute settled by arbitration under the said clause, should the plaintiff raise it before the ICC in accordance with clause 18.02. It is the plaintiff who is resisting arbitration and once the suit instituted by it in India is stayed it is for the plaintiff to have the matter resolved by arbitration.

49. Clause 18.02 of the contract is the arbitration agreement. It clearly provides that "all disputes ... shall be finally settled by arbitration ... the award of the Arbitral Tribunal is final and obligatory for all purposes without any right for a further appeal or contestation of its fulfillment. ..." Both parties are, therefore, required to have the disputes settled by arbitration and both parties are bound by the award.

50. It is significant to note that in the present case, no dispute is being raised by defendant 4. It Is only the plaintiff who is disputing its liability to pay.

51. When parties agree to have their disputes settled by arbitration it does not mean that both have bound themselves not to go to court to have the disputes settled. At page 163 of Russel on Arbitration, Twentieth Edn. it is stated that "a party to a contract to refer disputes to arbitration has a perfect right to bring an action in respect of those disputes, and the court has jurisdiction to try such disputes. Any provision to the contrary would be all ouster of the jurisdiction of the Courts."

52. Lord Macmillan in the House of Lords decision in

Heyinan v. Darwins Ltd. 4 pointed out as under:

> "I venture to think that not enough attention has been directed to the true nature and function of an arbitration clause in a contract. It is quite distinct from the other clauses. The other clauses set out the obligations which the parties undertake towards each other hinc inde. But the arbitration clause does not impose on one of the parties an obligation in favour of the other. It embodies the agreement of both parties that, if any dispute arises with regard to the obligations which the one party has undertaken to the other, such dispute shall be settled by a tribunal of their own constitution."

53. It may be that even after entering into an arbitration clause any party may institute legal proceedings. It is for the other party to seek stay of the suit by showing the arbitration clause and satisfying the terms of the provisions of law empowering the court to stay the suit. Clause 18.03, therefore, merely states what is otherwise the legal position. The object of

4 1942 AC 356, 373 : 166 LT 306, 3 12 : (1942) 1 All ER 337
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clause 18.03 is to reserve to defendant 4 the right to suit for money advanced. It is intended to be exercised in cases where there is no dispute whatsoever but still payments have not been made. These are standard clauses in all credit agreements. Clause 18.03 gives an additional right. To the extent this clause is exercised in cases where there are disputes, it would be the exercise of a legal right and both parties have agreed that the borrower will submit to the jurisdiction of the court. In such an eventuality defendant 4 would have elected to exercise the right under clause 18.03, which is in addition to and not in derogation of the arbitration clause in clause 18.02. As the arbitration clause remains untouched by clause 18.03, if defendant 4 was to sue the plaintiff under clause 18.03 for recovery of its loan, it may be open to the plaintiff (borrower) to apply under Section 3 and seek stay of the suit. The stay of the suit could be granted notwithstanding clause 18.03 for the simple reason that the agreement to submit to the jurisdiction to the court under clause 18.03 relates to the maintainability of the suit in a court agreed to by both parties, but does not affect the question whether the proceedings should be stayed in view of the arbitration clause. The plaintiff may well elect to have the dispute decided in court or it may apply under Section 3 of the Foreign Awards Act or a similar provision in Sweden, England or United States, depending on where defendant 4 files the suit. Such clauses like clause 18.03 do not affect the factum or binding nature of the arbitration agreement in clause 18.02.

54. There is no question of parallel proceedings by reason of the nonobstante clause in clause 1 8.03. The plaintiff can have the dispute settled by arbitration as agreed in clause 18.02 or it may have the dispute settled in a court in proceedings instituted by defendant 4. However, the plaintiff cannot institute proceedings in any court against defendant 4. It is clear from a reading of clause 18.02 and clause 18.03 that there will be no parallel proceedings.

55. There is thus no obstacle in the applications filed on behalf of defendant 4 and defendants 5 to II for staying the suit filed by the borrower/plaintiff under the provisions of

Section 3 of the Foreign Awards Act.

56. Coming now to the application filed on behalf of defendants 1 to 3 under Section 3 of the Foreign Awards Act, Mr Venugopal submitted a new argument in supporting the conclusion of the courts below. The argument was that so far as defendants 1 to 3 are concerned, Section 3 of the Foreign Awards Act is not applicable in view of the agreement between the borrower and the suppliers as contained in clause. 14 of the contract. He further submitted that since as per clause 14. 1, the contract was to be construed and governed according to the laws of India, the application for stay of suit should be governed by Indian Arbitration Act, 1940 and not by Section 3 of the Foreign Awards Act, which though is an Indian law, yet, in view of the provisions of Section 9(b) of the Foreign Awards Act, this Court should take a view that only Section 34 of the Arbitration Act, 1940 would apply to the present suit in view of clause 14.1 of the contract.

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57. Learned counsel appearing on behalf of the suppliers/defendants 1 to 3 submitted that this point should not be allowed to be raised for the first time at this stage and, at any rate, Section 9(b) of the Foreign Awards Act applies only at the stage 'after the award' and does not apply to the stage before award'.

58. However, the question whether Section 34 of the Arbitration Act,1940 or Section 3 of the Foreign Awards Act will govern the application filed on behalf of defendants 1 to 3 is concerned, need not detain us, inasmuch as we have already held that the suit filed by the plaintiff, as such, is liable to be stayed in view of the applications for stay filed by the lenders i.e. defendant 4 and defendants 5 to 11 and, therefore, we leave this question open.

59. The result is that the appeals filed on behalf of defendant 4 and defendants 5 to 11 are accepted; the impugned order of the High Court dated June 17, 1993 and of the trial court dated June 23, 1992 are set aside and the suit is directed to be stayed as contemplated by Section 3 of the Foreign Awards Act. The orders of the trial court on the application for stay filed on behalf of defendants 1 to 3 are also set aside but in view of our orders on the application filed on behalf of the lenders, no separate orders are being passed on the application for stay filed on behalf of defendants 1 to 3. Parties are, however, left to bear their own costs of the present proceedings.

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