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HARENDRA H. MEHTA AND ORS.

v.

MUKESH H. MEHTA AND ORS.

MAY 13, 1999

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[D.P. WADHWA AND SANTOSH HEGDE, JJ.]

Foreign Awards (Regulation and Enforcement) Act. 1961—Section 2(b), 7—Enforcement of foreign award—Conditions for—Parties, brothers having business both in India and in United States of America—Disputes of commercial nature—Arbitration proceedings held in United States of America—Whether it could be held as an award under the Foreign Awards Act—Held, Yes.

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The appellant's and respondents, two brothers families appointed their elder brother as an arbitrator to divide their vast businesses and properties both in the United States of America and India. The arbitrator gave his award in New York incorporating the settlement between the parties. Respondents applied to the Bombay High Court under the provisions of the Foreign Awards (Regulation and Enforcement) Act 1961, for enforcing the award. Single Judge of the High Court pronounced judgment according to the award as required u/s 6 of the Foreign Awards Act. This appeal had been filed challenging the judgment of the Bombay High Court enforcing the foreign award. The appellants submitted that the High Court could not order the award to be filed and give judgment in terms thereof as it was not an arbitral award as there was no dispute on the basis of which the arbitrator could give his award; that it was not an award under the Foreign Awards Act as the award was merely effecting a family settlement and dispute did not arise out of any international trade; that a fraud had been committed in getting the award and certain schedule which formed the part of the agreement to refer the dispute to arbitration, had been fraudulently substituted and that chapter XX-C of the Income Tax Act 1961 had been violated and the enforcement of the award in violation of the law of this country would be against the public policy.

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Dismissing the appeal, this Court

HELD : 1.1. In the instant case all the ingredients of a foreign award were there. Parties were having business both in India and in the United

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States of Amrica as a joint venture and they also acquired properties. Differences that arose between the parties were out of legal relationships and certainly of commercial nature under the laws of this country. Agreement to refer the disputes to Arbitration, in writing, was made in the United States where arbitration proceedings were held and award given. United States is a country to which clause (b) of section 2 of the Foreign Awards Act applies. In the present case, the parties were related to each other but that could not take the award outside the ambit of the Foreign Awards Act.

[574-G-H; 575-A]

1.2. The parties entered into the settlement during tendency of the arbitration proceedings. Appellant himself approached the courts in the United States never complaining that it was not an award. It cannot be held that the agreement stood revoked when the parties during the course of arbitration proceedings entered into a settlement among themselves and yet wanted the arbitrator to give his award in terms thereof. It is nobody's case that authority of the arbitrator was revoked at any time. [576-C-E]

1.3. A competent court in the State of New York rejected appellants' case that any fraud had been committed. Therefore, sub-section (2) of Section 7 of the Foreign Act would not be applicable. No conditions now exist under sub-section (1) of Section 7 of the Foreign Award Act not to enforce the award on the alleged ground of fraud. [576-H; 577-A]

1.4. Foreign Awards Act is a complete Code in itself providing for all the possible contingencies in relation to foreign awards. Once it is held that an award is a foreign award, the provisions of the Foreign Award Act would apply and where the conditions for enforcement of such an award exist as mentioned in Section 7 of this Act, the Court shall order the award to be filed and shall proceed to pronounce judgment granting ward and upon the judgment so pronounced, decree shall follow. It is not material for the Foreign Award Act that in any other country than India, a judgment has already been passed by a court of competent jurisdiction in terms of the award. A party may have other remedy for filing a suit passed on a foreign judgment but that will oust jurisdiction of the Court to enforce a foreign award under the Foreign Awards Act. [583-B-C]

1.5. A mere look at the agreement shows that it is not an agreement for transfer as understood in clause (a) of Section 269 UA of Chapter XX-C of the Income Tax Act. The settlement agreement also does not stipulate exchange of any immoveable property. It rather divides equally business and properties between appellants and respondents. In the present case, there is

A **no transfer of any immoveable property under the settlement agreement. The settlement agreement on the award did not require filing of any declaration under Chapter XX-C of the Income Tax Act. Moreover, in the case of a foreign award, provisions of Chapter XX-C of the IT Act are not attracted. A foreign award under the Foreign Award Act does not require registration under the Registration Act. [592-C-F; 593-A]**

B

R.M. Investment and Trading Co. Pvt. Ltd. **v.** *Boeing Co. & Anr.,* **[1994] 4 SCC 541;** *K.K. Modi* **v.** *K.N. Modi & Ors.,* **[1998] 3 SCC 573,** *Badat & Co.* **v.** *East India Trading Co.,* **[1964] 4 SCR 19;** *Baldevdas Shivlal & Anr.* **v.** *Filmistan Distributors (India) Pvt. Ltd.,* **AIR (1970) SC 406;** *Ruby Sales and Services (P) Ltd. & Anr.* **v.** *State of Maharashtra & Ors.,* **[1994] 1 SCC 531 and** *Lachman Das* **v.** *Ram Lal,* **[1989] 3 SCC 99, distinguished.**

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Renusagar Power Co. Ltd. **v.** *General Electric Co. & Anr.,* **[1984] 4 SCC 679 and** *Tehmi Sidhwa & Ors.* **v.** *Shiv Banerjee & Sons Pvt. Ltd.,* **[1974] 2 SCC 574, relied on.**

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CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4006 of 1995.

From the Judgment and Order dated 24.2.95 of the Bombay High Court in Arbitration Petition No. 102 of 1991.

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S. Ganesh, P.S. Sudheer, P. Venugopal and K.J. John for the Appellants.

S.K. Dholakia, Bhargava V. Desai and Siddharth Choudhary for the Respondents.

The Judgment of the Court was delivered by

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D.P. WADHWA, J. The Appellants (Harendra H. Mehta & Ors.) are challenging the judgment dated February 24, 1995 of the Bombay High Court enforcing the 'foreign award' dated October 31. 1990 on a petition filed by the Respondents (Mukesh H. Mehta & Ors.,). It was, however, directed that the enforcement of the same or execution of the decree shall be subject to the respondents' obtaining the necessary permission under Foreign Exchange Regulations Act, 1973 ('FERA', for short) as regards the enforcement part in India is concerned. The matter came to this Court on a certificate granted by the High Court under Article 134A read with Article 134(1)(c) of the Constitution. The impugned judgment had been rendered by a single Judge. There was some controversy if a single Judge could grant such a certificate.

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However, considering the importance of the issue involved, this Court admitted the appeal. The controversy, therefore, does not survive in the present appeal.

For convenience, we refer to the appellants as 'Harendra' and respondent as 'Mukesh'. Both Harendra and Mukesh are brothers. Harendra is elder to Mukesh. They appointed their older brother Lalit Mehta as arbitrator to divide their businesses and properties both in the United States of America (USA) and India. Lalit Mehta gave his award in New York. Some proceedings arising out of the arbitration agreement and the award were held there in the courts. Arbitration agreement was entered into at New York where arbitration proceedings held and award given. Mukesh applied to the Bombay High Court here under the provisions of the Foreign Awards (Regulation and Enforcement) Act, 1961 (for short, the 'Foreign Awards Act') for enforcing the award. High Court after contest ordered the award to be filed and pronounced judgment according to the award as required under Section 6 of the Foreign Awards Act. Harendra finds himself aggrieved by the judgment. That is how the matter before us.

We may now consider the controversy between the brothers in detail. Harendra and Mukesh were having vast businesses in the USA and India. They also acquired properties in both the countries. Disputes having arisen, they decided to divide and distribute their jointly held assets. Both have equal share in all the properties and businesses. On October 25, 1989, they entered into an agreement to refer their disputes to their elder brother Lalit Mehta. Their submission to the arbitrator is in the following terms:

"Lalit Mehta,

48 Arobor Lane,

Roslyn Hts.,

N.Y. 11577.

Dear Lalitbhai,

We, Harendra Mehta and Mukesh Mehta hereby appoint you as our sole arbitrator for the following difference of opinions.

They are related to :

1. All our business in USA & India

A 2. Social relationship.

Your award in the matter shall be binding on both of us and our legal heirs.

In areas where you need any assistance of any lawyers and/or technical
B or outside persons you are fully authorised to take such assistance.

On our part we agree to offer our fullest co-operation in giving you all the document, papers and any information you call for from time to time.

C We shall ensure full participation in the meetings and clarify whatever explanations and clarification you may seek.

we shall be prepared to sign any papers in advance that you ask for before the beginning of the arbitration proceedings which will remain solely in your custody.

D If you require the signatures of our wives and any of our representatives we shall give you the same as may be called for by you.

Yours sincerely,

E Sd/-

Harendra Mehta

Sd/-

Mukesh Mehta

F Sd/-

Witness"

Thereafter a formal agreement dated November 17, 1989 to refer the
G disputes to Arbitrator Lalit Mehta was entered into by the parties. It was signed by Harendra, his wife Amita Mehta and Harendra Mehta as Manager (Karta) of his HUF on the one part and Mukesh Mehta his wife Daksha Mehta and Mukesh Mehta as Manager (Karta) of his HUF on the other. This agreement gave the details of the businesses carried on by the parties and their properties in USA and India. The agreement was entered into in New
H York and was duly notorised there. It would appear that the formal agreement

dated November 17, 1989 to refer the disputes to Arbitrator superseded the earlier agreement dated October 25, 1989. A

Harendra challenged the agreement dated November 17, 1989 in the Supreme Court of the State of New York, Nassau County Court by motion dated February 16, 1990 on the ground that it was unconscionable, against public policy, entered under duress and coercion and that the arbitrator is biased and cannot be fair and impartial. this challenge was negatived by judgment dated March 12, 1990. It will be seen that the challenge to the agreement was made after the arbitrator had entered into reference. The court observed that Harendra was a seasoned businessman, having managed numerous successful businesses both in USA and in India. He signed not just one but two submission agreements. Court wondered why did he consent on two occasions that Lalit Mehta be chosen arbitrator if he allegedly had strained relations with him. There was nothing to show that any duress or coercion was caused. In short, the Court negatived all the pleas of Harendra and said that the agreement could not be declared invalid on a motion under Article 7503 of CPLR (Civil Practice Law Rules) and, therefore, "an application to declare the agreement invalid must await a trial and, therefore, was premature." B C D

During the pendency of the arbitration proceedings, parties settled their differences by entering into a detailed agreement on March 20, 1990. The agreement was to be retroactively effective as on March 1, 1999. The agreement detailed various properties and businesses which the parties were having. Harendra was to draw four packages 'A', 'A-1', 'B' and 'B-1' as under : E

" 'A'- USA properties and businesses

'A-1' - U.S.- Note for payment. In US $ and share in jointly held in US properties and businesses. F

'B'- Indian properties and businesses

'B'- Indian Note for payment in Indian rupees and certain India properties and share and interest in jointly held Indian properties and businesses." G

It was agreed that one party would choose A+B-1 or B+A-1. First choice was to be exercised by Mukesh. The arbitrator was to make his award in accordance with the selection of packages. Parties were to execute transfer and closing documents in terms of the award. The forms in which the documents were to be executed were also prescribed. It was also agreed that the parties H

A shall execute, from time to time, any and all further documents that may be required at any time to effectuate the award made in pursuance to the agreement. On refusal of any of the parties to execute the transfer and closing documents, it was agreed that Mr. Vinod Mehta shall be duly appointed attorney of each of the parties to execute the transfer and closing documents. There was also a penalty clause in case of failure or feusal to execute the B transfer and closing documents. That was irrespective of any other remedy open to the parties. Mukesh opted for the package B+A-1. On March 20, 1990 itself, the arbitrator rendered his award after the proceedings were held under CPLR 7507 incorporating the aforesaid settlement agreement of the same date. CPLR 7507 provides that the award shall be in writing, signed and C acknowledged by the arbitrator making it within the time fixed by the agreement, or if the time is not fixed, within such time as the court orders. There is also provision for delivering a copy of the award to each of the parties.

In proceedings under CPLR 7507 which were held on March 20, 1990 Amita Mehta, wife of Harendra, represented her husband as his attorney and D appeared in-person. Both Mukesh and his wife Daksha Mehta were present. They all waived notice of the hearing. They agreed that they had entered into and executed an agreement involving all the issues of the arbitration proceedings. Judge Ralph diamond, before whom the proceedings under CPLR 7507 were held, examined the parties who were present along with their E counsel as to the execution of the settlement agreement by each of the parties and thereafter the award made by the arbitrator. It was recorded that Mukesh had given the choice of packages A1 with B. It was also recorded that the arbitrator had two fold functions (1) to make the award and (2) to implement the award.

F Now, Mukesh Mehta brought a motion for an order pursuant to CPLR 7510 for confirmation of the award in the Nassau Country Court in the State of New York. Harendra also filed cross motion for an order pursuant to CPLR 7511(b) for vacating the award or in the alternative seeking modification of the award on the grounds mentioned in the cross motion. By judgment dated G October 22, 1990, the Court confirmed the award granting the motion of Mukesh Mehta with certain modifications. It observed that Harendra failed to demonstrate that the award either dealt with matters beyond the scope of what had been submitted or that he gave a completely irrational construction to the settlement agreement between the parties which was incorporated in the award and formed part of the award. There were certain typographical H errors in the judgment which were corrected by Order dated October 31, 1990.

A formal order was drawn on January 14, 1991 which read as under : A

"ORDERED AND ADJUDGED, pursuant to CPLR 7510 and 7514 that the award of the arbitrator, Lalit Mehta, dated October 31, 1990 is hereby confirmed and shall constitute a judgment of this court, provided however, that payments by A.D. Development Ltd. to Mukesh Mehta for the purchase of his shares of A.D. Development Ltd. shall B be limited pursuant to Business Corporation Law s. 514 to the availability of surplus, and it is further,

ORDERED AND ADJUDGED, that the branch of the motion of Mukesh Mehta and Daksha Mehta seeking reargument of this court's order and decision dated October 22, 1990 be, and the same hereby is C granted, and it is declared that the limitation of payments by A.D. Development Ltd. for the repurchase of shares to years in which the Corporation has a surplus is not applicable to others obligated to make such payments, and it is further,

ORDERED, that the cross-motion of Harendra pursuant to CPLR 7511(b) D for an order vacating such arbitration award on grounds of fraud or for modification of the award to substitute a different neutral party to determine certain matters be, and the same hereby is, denied without a hearing, and it is further,

ORDERED, that the branch of Harendra 's cross-motion pursuant to E CPLR 7514 seeking to compel Mukesh Mehta to comply with certain obligations pursuant to such arbitration award, and conditioning enforcement of any judgment against Harendra upon Mukesh Mehta's first fully complying therewith be, and the same hereby is, denied, and it is further, F

ORDERED AND ADJUDGED, that other remedies to enforce the award flow from this judgment and enforcement proceedings may be brought in an appropriate forum; and it is further,

ORDERED, that the branch of Harendra's cross-motion pursuant to CPLR 6302 and 6311 to enjoin Mukesh Mehta and Daksha Mehta from G taking any additional action concerning certain Indian documents released to them by the law firm of D.M. Harish & Co., and compelling Mukesh Mehta to deliver such documents to the court pending further proceedings be, and the same hereby is denied, and it is further,

ORDERED AND ADJUDGED, that pursuant to the provisions of H

A paragraphs "12", "15" and "17" of the Settlement Agreement dated March 20, 1990 incorporated into the award of the arbitrator, Mukesh Mehta, residing at 48 Arbor Lane, Roslyn Heights, New York 11577 shall recover from A.D. Development Ltd., a New York Corporation having its principal place of business located at 22, Athex Drive, Glen Cove, New York 11542 the sum of $ 265,000 less the sum of $146.293 B paid on account thereof, making the net sum of $188, 706.21, with interest upon $ 68706.31 of said sum from October 31, 1990 to December 31, 1990 at the rate of 9% per annum, in the amount of $1,030.59; and interest on $25,000 from November 1, 1999 to December 31, 1990 at the rate of 9% per annum, in the amount of $375; with interest on $25,000 C from December 1, 1990 to December 31, 1990 at the rate of 9% per annum, in the amount of $187.50; and making in all a judgment of $120,299.30 as of December 31, 1990; and it is further..."

Objections of Harendra to the award were, thus, rejected by the Nassau County Court. It, however, modified the award limiting and restricting the D payment to be made to Mukesh by the US company for his share and passed judgment confirming the award so modified.

In those proceedings under CPLR 7510, the Court noticed that arbitration proceedings were recorded under oath held before a Court Reporter and Notary Public and though language of the award showed that the arbitrator E had signed and affirmed the award but, in fact, he did not actually sign the award or deliver a copy to each party as required by CPLR 7507. The Court, however, observed that the parties agreed that the failure of the arbitrator to issue an award shall not affect the validity or binding effect of settlement agreement. The Court, therefore, permitted to the arbitrator to sign and affirm F the award in compliance with CPLR 7507 and serve a copy on the parties or their attorneys. Liberty was then granted to Mukesh to renew his application to confirm the signed award. In pursuance with this direction by the Court, the arbitrator signed his award on October 31, 1990.

Amita Mehta then filed an affidavit on February 13, 1992 in Nassau G County Court alleging that duly initiated schedules A and B of the Settlement Agreement had been fraudulently substituted by other non-initialed schedules which contained some entirely new clauses. By order dated September 20, 1993, the Supreme Court of New York Appellate Division rejected her plea regarding fraudulent substitution of schedules.

H Now, the scene shifted to India when Mukesh moved the Bombay High

Court under provisions of the Foreign Awards Act for enforcement of the Award dated October 31, 1990 of Lalit Mehta the arbitrator, contending the same to be a foreign award. Harendra raised various pleas in opposition thereto. High Court after elaborate discussion rejected all of them and ordered that the award be filed and proceeded to pronounce judgment according to the award and thereafter decree followed.

Mr. Ganesh, learned counsel for the appellant, submitted that the High Court could not order the award to be filed and give judgment in terms thereof. His objections to the impugned judgment were :

1. It is not an arbitral award inasmuch as there was no dispute on the basis of which the arbitrator could give his award. The arbitrator merely acted as a rubber stamp.

2. It is not an award under the Foreign Awards Act as the award is merely effecting a family settlement. It is not of commercial nature. Dispute did not arise out of any international trade.

3. Chapter XX-C of the Income Tax Act, 1961 has been violated and the enforcement of the award in violation of the law of this country would be against the public policy.

4. The award merged in the foreign judgment of a New York Court which modified the award. So only the judgment could be enforced.

5. A fraud has been committed in getting the award and further that certain schedules which formed part of the agreement to refer the disputes to arbitration have been fraudulently substituted.

6. Supreme Court of the State of New York had already passed judgment on June 6,1995 directing enforcement of the award which would now be foreign judgment. The respondent has, in fact, filed a suit in the Bombay High Court on the basis of the foreign judgment which suit was filed in 1996 and service was effected on the appellant only in 1997.

Detailing his objections Mr. Ganesh said :

He read the objects and reasons of the Foreign Awards Act. Definition of 'foreign Award' is given in Section 2 of that Act and also Articles I and II of the New York Convention of Recognition and Enforcement of Foreign

A Awards which is schedule to the Foreign Awards Act. Argument was that Foreign Awards Act is inapplicable as it is not a 'foreign award'.

Section 2 of the Foreign Awards Act defines the "foreign award" to mean an award on differences between persons arising out of legal relationship, whether contractually or not considered as commercial under the law in force B in India, made on or after the 11th day of October, 1960-

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

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

Article 1 of the New York Convention is as under :

"Article I

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1. This convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of difference between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic E awards in the State where their recognition and enforcement are sought.

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by the permanent arbitral bodies to which the parties have submitted.

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3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another G Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration."

Article II of the Convention is in somewhat similar terms as the expression H 'foreign award' under Section 2 of the Foreign Awards Act and it is as under :

"Article II A

1. Each Contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration. B

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in and exchange of letters or telegrams.

3. The Court of a Contracting State, when seized of an action in a C matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

Submission of Mr. Ganesh was that it is not a foreign award because D (i) there was no commercial dispute arising out of any international trade; (ii) award does not relate to any commercial dispute arising in the course of international trade; and (iii) legal relationship between the parties was of family members having equal shares in the properties and businesses who merely sought separation and partition of their respective shares. He said that E mere fact that some of the properties happened to be derived form the business done by the parties could not convert the award into foreign award. To support his submission, he referred to two decisions of this Court in *R.M. Investment and Trading Co. Ltd.* v. *Boeing Co. and Anr.*, [1994] 4 SCC 54 and *Renusagar Power Co. Ltd.* v. *General Electronic Co. & Anr.*, [1984] 4 SCC 679. In our view these two judgments do not help the appellants. Rather F the stress in these judgments is that broad and not restricted construction should be given to the word "commercial" appearing in Section 2 of the Foreign Awards Act. In *R.M. Investment and Trading Companies Pvt. Limited's* case, terms of the agreement required the petitioner to play an active role in promoting the sale and to provide "commercial and managerial assistance and G information" which may be helpful in respondents sales efforts. It was held that relationship between the appellants and respondents was of commercial nature. This Court said that the word "commercial" under Section 2 of the Foreign Awards Act should be liberally construed. In *Renusagar's case* no doubt this Court observed that the Foreign Awards Act was calculated and designed to subserve the cause of facilitating international trade and promotion H

A thereof by providing for speedy settlement of disputes arising in such trade through arbitration and also said that any expression or phrase occurring therein should receive consistent with its literal and grammatical sense a liberal construction.

B In ordinary parlance "commercial means"

> "1. of, engaged in, or concerned with, commerce. 2 Having profit as primary and rather than artistic etc. value; philistine." (the Concise Oxford Dictionary).

C In Black's Law Dictionary, "commercial" is defined as :

> "Relates to or is connected with trade and traffic or commerce in general; is occupied with business and commerce. *Anderson* v. *Humble Oil & Refining Co.*, 226 Ga. 174 S.E. 2d 415, 416."

D The word "trade" is also defined in the Black's Law Dictionary. It is :

> "the act or the business or buying and selling for money; traffic; barter. *May* v. *Sloan,* 101 U.S. 231, 25, L.Ed. 797. Purchase and sale of goods and services between businesses, states or nations. Trade is not a technical word and is ordinarily used in three senses: (1) in that of exchanging goods or commodities by barter or by buying and selling for money; (2) in that of a business occupation generally; (3) in that of a mechanical employment, in contradistinction to the learned professions, agriculture, of the liberal arts. *People* v. *Volar vort of America,* Inc., 10 Misc. 2d 378, 174 N.Y. S. 2d 789, 793.

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> An occupation or regular means of livelihood and is business one practices other work in which one engages regularly. One's calling; occupation; gainful employment; means of livelihood. *People* v. *Carr.,* 163 Cal. App. 2d 568, 329 P. 2d 746, 752."

We do not understand as to how it could be said that the award was not a foreign award. All the ingredients of Foreign award were there. Parties were having business both in India and in the United States of America as a joint venture and they also acquired properties. Differences that arose between the parties were out of legal relationships and certainly of commercial nature under the laws of this country. Agreement to refer the disputes to arbitration, in writing, was made in the United States where arbitration proceedings held and award given. It is not disputed that United States is a

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country to which clause (b) of Section 2 of the Foreign Awards Act applies. In the present case, the parties are no doubt related to each other but that could not take the award outside the ambit of the Foreign Awards Act. We asked Mr. Ganesh as to what would happen if there were two strangers having businesses both in India and in United States or when there was a joint venture between an Indian and a US national having properties both moveable and immovable in both the countries and disputes having arisen and award given in the United States. Mr. Ganesh, in spite of his resourcefulness, was unable to give any convincing reply. There is no merit in the objection of the appellant that the award is not a foreign award and that it is outside the Foreign Awards Act.

That the award is not an arbitral award, submission of Mr. Ganesh was that the arbitration agreement which was entered into on November 17, 1989 stood revoked after the parties arrived at the settlement agreement dated March 20, 1990. Earlier agreement dated October 25, 1989 to refer the disputes to arbitration stood superseded by the agreement dated November 17, 1989. Mr. Ganesh read in detail the terms of the settlement agreement to contend that parties themselves had resolved their disputes and that agreement was to take effect irrespective of the fact whether the arbitrator gave his award in terms thereof or not. He said arbitrator was to act merely as a rubber stamp after parties had opted for various packages containing their businesses and properties . Submission in brief was that unless there was dispute or difference, there could be no arbitration. The arbitrator was not only not required to act judicially after the agreements dated November 17, 1989 had been arrived at between the parties but, in fact, he was prevented from acting judicially and giving any decision whatsoever affecting the fights of parties. He was not expected to hear or apply his mind or perform any of the arbitration functions. In such a situation, even though there was in existence an arbitration agreement that stood revoked for one basic and simple reason that at that time there existed no dispute. The agreement was straightaway made into the award. In support of his submissions, Mr. Ganesh referred to a decision of this Court in *K.K. Modi,* v. *K.N. Modi & Ors.,* [1983] 3 SCC 573 to contend that when a person has been authorised to decide a certain dispute between the parties but he has no function to perform as arbitrator, he could not give an award. But in that case, under clause (9) of the Memorandum of Understanding between the parties there were different contentions; one contending that the clause constituted arbitration agreement, the other contending to the contrary. This clause (9) was as follows :

A "Implementation will be done in consultation with the financial institutions. For all disputes, clarifications etc. in respect of implementation of this agreement, the same shall be referred to the Chairman, IFCI or his nominees whose decisions will be final and binding on both the groups".

B It was in this context that this Court said that looking at the nature of the functions expected to be performed by the Chairmen, IFCI, his decision is not arbitration award. This judgment hardly helps Mr. Ganesh in his submissions. In the present case, the parties entered into the settlement during pendency of the arbitration proceedings. Appellant himself approached C the courts in the United States never complaining that it was not an award. In proceedings under CPLR 7507 and CPLR 7510, Harendra had even accepted the execution of the settlement agreement and the award made by the arbitrator. We find that no such plea was taken either in the High Court or in the grounds of appeal to this Court. Nassau County Court noticed the functions to be performed by the arbitrator in the settlement agreement. We do not find D any merit in the argument of Mr. Ganesh that arbitration agreement stood revoked when the parties during the course of arbitration proceedings entered into a settlement among themselves and yet wanted the arbitrator to give his award in terms thereof. It is nobody's case that authority of the arbitrator was revoked at any time. This argument of Mr. Ganesh seems to us to be made E in more desperation.

Nassau County Court did not modify the award as such it merely corrected the award so as to conform to the law of the State of New York.

Contention of the appellants that fraud was committed substituting F schedules in the award which schedules formed part of the settlement agreement referring disputes to arbitration was also a subject matter of challenge in Nassau County Court by the appellants which was rejected.

Section 7 of the Foreign Award Act details the circumstances under which a foreign award may not be enforced. These are :

G "7. Conditions for enforcement of foreign awards . - (1) A foreign award may not be enforced under this Act --

(a) if the party against whom it is sought to enforce the award proves to the Court dealing with the case that --

H (i) the parties to the agreement were under the law applicable to

them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it, or failing any indication thereon, under the law of the country where the award made; or A

(ii) the party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or B

(iii) the award deals with questions not referred or contains decisions on matter beyond the scope of the agreement :

Provided that if the decisions on matter submitted to arbitration can be separated from those not submitted, that part of the award which contains decisions on matter submitted to arbitration may be enforced; or C

(iv) the composition of the arbitral authority or the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or failing such agreement, was not in accordance with the law of the country where the arbitration took place; or D

(v) 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; or E

(b) if the Court dealing with the case is satisfied that -

(i) the subject-matter of the difference is not capable of settlement by arbitration under the law of India; or

(ii) the enforcement of the award will be contrary to public policy; F

(2) If the court before which a foreign award is sought to be relied upon is satisfied that an application for the setting aside of suspension of the award has been made to a competent authority referred to in sub-clause (v) of clause (a) of sub-section (1), the court may, if it deems proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the away, order the other party to furnish suitable security." G

Supreme Court of New York, Appellate Division rejected the appellants plea regarding fraudulent substitution of the schedules to the award. It will be seen that a competent court in the State of New York rejected the contention H

A of the appellants that any fraud had been committed. Therefore, sub-section (2) of Section 7 of the Foreign Awards Act would not be applicable. There are no conditions now exist under sub-section (1) of Section 7 of the Foreign Awards Act not to enforce the award on the alleged ground of fraud. We find no merit in the plea of the appellant that schedules to the award were substituted. This contention of the appellants must fail.

B

It was then submitted by Mr. Ganesh that it was the case of the respondents themselves that the foreign award had already merged into judgment dated January 8, 1991 of the Nassau County Court of the New York State. Under CPLR 7514, a judgement shall be entered upon the confirmation C of an award. CPLR 7514 of the New York Arbitration Law is as under :

> "7514, Judgement on an Award
>
> *(a) Entry.* A judgment shall be entered upon the confirmation of an award.
>
> D *(b) Judgment-roll,* The judgement-roll consists of the original or a copy of the agreement and each written extension of time within which to make an award; the statement required by section seventy-five hundred eight [7508] where the award was by confession; the award; each paper submitted to the court and each order of the court upon an application sections 7510 and 7511; and a copy of the judgment."

E

He said the respondents filed a suit in the Bombay High Court on its original side (Suit No. 3787/96) on the basis of the judgment of Nassau County Court dated 8.1.1991 and that suit is pending of which service was effected on the appellants only in August 1996. A copy of plaint in the suit F filed by the respondents was shown to us during the course of hearing. Respondents in that prayed as under :

> (a) That the Hon'ble Court be pleased to order and declares that the said foreign judgment dated 8th January, 1991 delivered by the Supreme Court of Nassau. USA as confirmed by the Appellate Division of the G Supreme Court of New York dated 20th September 1993 is final, conclusive and binding upon the plaintiffs as well as the Defendants herein;
>
> (b) That this Hon'ble Court be pleased to pass a decree in terms of the said Foreign Judgment dated 8th January, 1991 delivered by the H Supreme Court of Nassau, USA as confirmed by the Appellate Division

of the Supreme Court of New York dated 20th September, 1993." A

Thus, the argument was that when respondents have themselves filed suit on the basis of the foreign judgement, they could not have recourse to Foreign Awards Act. It was the foreign judgment in which the award merged which would now hold the field. In support of this submission reference was made to a decision of this Court in *Badat & Company* v. *East India Trading Co.* [1964] 4 SCR 19. This judgement, in our view, is not applicable in the present case. If read out of context, it may appear to be a so applicable but it is not so. In this case, dispute arose between Badat & Co., an Indian firm and East Indian Trading Company, a Private Ltd. Company incorporated under the laws of the State of New York in USA for supply of turmeric by the Indian firm to the foreign company. Parties had agreed to do business on the terms of the American Spice Trade Association. Under the rules of the Association all questions and controversies and all claims arising under the contract shall be submitted to and settled by arbitration. American company invoked the arbitration agreement. It obtained two *exparte* awards totalling US $18748. American Company then adopted proceedings in the Supreme Court of the State of New York to have the said awards confirmed and judgment entered thereon. Judgment confirming the awards was pronounced on April 13, 1950. American company thereupon instituted the suit in the Bombay High Court on January 14, 1954. Suit was substantially based on the foreign judgment and in the alternative on the two awards given by a domestic tribunal functioning in New York. Indian firm raised number of pleas in defence. It was submitted that Indian firm was not residing within the limits of the original jurisdiction of the Bombay High Court or carry on business therein and the High Court had no jurisdiction to entertain the suit. It was not disputed that the Indian firm on the date of the suit had ceased to reside or carry on business within the limits of the civil jurisdiction of the Bombay High Court. The matter could have rested at that but this court proceeded to examine the position regarding the enforcement of foreign awards and foreign judgments based upon awards. It referred to the provisions of the Arbitration (Protocol and Convention) Act, 1937 and observed that it was common ground that the provisions of that Act were not applicable to the awards in question. It said that apart from the provisions of that Act, foreign awards and foreign judgments based upon awards were enforceable in India on the same grounds and in the same circumstances on which they were enforceable in England under the common law on grounds of justice, equity and good conscience. This Court then examined the law on the subject in England and

A said that there was conflict of opinion on a number of points concerning the enforcement of foreign awards and judgments based upon foreign awards. However, certain propositions appear to be clear and these were stated as under :

> "One is that where the award is followed by a judgment in a proceeding
> B which is not merely formal but which permits of objections being taken to the validity of the award by the party against whom judgment is sought, the judgment will be enforceable in England. Even in that case, however, the plaintiff will have the right to sue on the original cause of action. The second principle is that even a foreign award will
> C be enforced in England provided it satisfies *mutatis mutandis* the tests applicable for the enforcement of foreign judgements on the ground that it creates a contractual obligation arising out of submission to arbitration. On two matters connected with this there is difference of opinion. One is whether an award which is followed by a judgment can be enforced as an award in England or whether the judgment
> D alone can be enforced. The other is whether an award which is not enforceable in the country in which it was made without obtaining an enforcement order or a judgement can be enforced in England or whether in such a case the only remedy is to sue on the original cause of action. The third principle is that a foreign judgment or a foreign
> E award may be sued upon in England as giving good cause of action provided certain conditions are fulfilled one of which is that it has become final."

Bearing in mind these principles this Court again considered whether judgment of the Supreme Court of New York would be enforced against the
F Indian firm by instituting a suit on the original side of the High Court and said that the judgment furnished an independent cause of action and, therefore, the question would be whether the cause of action furnished by it arose within the limits of the original jurisdiction of the Bombay High Court. The judgment was rendered in New York and, therefore, the cause of action furnished by it arose at that place and not that anywhere else. This Court then
G said that cause of action was really independent of the cause of action afforded by the contract and, therefore, if advantage was sought to be taken of it, the suit would not lie at Bombay, Finally the Court said :

> "(1) that there was a contract between the parties whereunder disputes between them could be referred to arbitration to a tribunal in a
> H foreign country;

(2) that the award is in accordance with the terms of the agreements; A

(3) that the award is valid according to the law governing arbitration proceedings obtaining in the country where the award was made;

(4) that it was final according to the law of that country; and

(5) that it was a subsisting award at the date of suit. B

Then the court observed as follows :

"A view has been expressed in some English case that an award must also be enforceable in the country in which it was made before a suit can be brought in England on its basis. But upon the view we are taking it is not necessary to decide this point. Now, when a suit is brought by a plaintiff on the basis of an award it is not necessary for him to prove that the amount claimed was actually payable to him in respect of the dispute nor is it open to the defendants to challenge the validity of such an award on grounds like those which are available in India under S.30 of the Arbitration Act. A very limited challenge to the claim based on the award is permissible to the defendants and that is one of the reasons why it is important to ascertain whether the award has in fact attained finality in the country in which it was made. We will assume that the plaintiffs have satisfactorily established the first three of the five conditions which we have set out above. The question then is whether the fourth and the fifth conditions have been satisfied." C D E

The Court then considered the requirements of the laws of New York State for giving an award finality and after examining various provisions said that "from all these provisions it would be abundantly clear that the award has no finality till the entire procedure is gone through and that the award as such can never be enforced. What is enforceable is the judgment." It then added "No doubt, as a result of the judgement the decision of the arbitrators became unchallengable in the New York State and for all practical purposes in India as well but in the process the award made by them has given way to the judgment of the Supreme Court of New York. It is this judgment which can now furnish a cause of action to the plaintiffs and not the awards". This Court then finally held : F G

"No doubt, an award can furnish a fresh cause of action. But the award must be final. If the law of the country in which it was made gives finality to judgment based upon an award and not to the award H

A itself, the award can furnish no cause of action for a suit in India. In these circumstances, we hold that though the High Court of Bombay has jurisdiction to enforce a final award made in a foreign country in pursuance of a submission made within the limits of its original jurisdiction, the awards in question being not final, cannot furnish a valid cause of action for the suit. Upon this view we allow the appeal B and dismiss the suit with costs throughout."

The judgment of this Court in *Badat & Co.* is based on the English Common Law. Provisions of the Arbitration (Protocol and Convention) Act, 1937 were held to be inapplicable to the facts of the case. Here we are C concerning with the provisions of Foreign Awards Act which give effect to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards held at New York on June 10, 1958 to which India was a party. To enforce a foreign award, what we have to see is : if it is a foreign award within the meaning of Section 2 of the Foreign Awards Act and conditions as prescribed by Section 7 for its enforcement exist. Under Section 4 of this Act, D a foreign award shall, subject to the provisions of the Act, be enforceable in India as if it were an award made on a matter referred to arbitration in India. The Court has to apply the provision of the Foreign Awards Act to enforce a foreign award within the meaning of Section 2 of the said Act. It would not be relevant to consider if the foreign award has attained finality in the country E where it was made. Further, if a judgment has been obtained on the basis of the award in the country of its origin, the person in whose favour the judgment is made may also be entitled to file suit in his country based on that judgment if it satisfies the criteria laid by law in this country. That may give that person an alternative mode to enforce the award but that would not mean that the provision of Foreign Award Act can be given a go by. We, therefore, F find no force in the submission of Mr. Ganesh that once the award attained finality in the Supreme Court of New York, proceedings to enforce foreign award would not be maintainable and that only suit could be filed on the foreign judgment, being the judgment given by the Supreme Court of New York, In *Renusagar's*, this Court said :

G "Moreover, an examination of the relevant provisions of this Act (Foreign Awards Act) and the Arbitration Act, 1940 will show that the schemes of the two Acts are not identical and as will be pointed out at the appropriate stage there are various differences which have a material bearing on the question under consideration and as such H decisions on similar or analogous provisions contained in the

Arbitration Act may not help in deciding the issue arising under the Foreign Awards Act because just as the Arbitration Act, 1940 is a consolidating enactment governing all domestic awards the Foreign Awards Act constitutes a complete code by itself providing for all possible contingencies in relation to foreign awards made pursuant to agreements to which Article II of the Convention applies."

Thus, as held in *Renusagar's* case [1984] 4 SCC 679, Foreign Awards Act is a complete Code in itself providing for all the possible contingencies in relation to foreign awards. Once it is held that an award is a foreign award, the provisions of the Foreign Awards Act would apply and where the conditions for enforcement of such an award exist as mentioned in Section 7 of this Act, the Court shall order the award to be filed and shall proceed to pronounce judgment granting award and upon the judgment so pronounced, decree shall follow. It is not material for the purpose of enforcement of a foreign award under the Foreign Awards Act that in any other country than India, a judgment has already been passed by a Court of competent jurisdiction in terms of that award. A party may have other remedy for filing a suit passed on a foreign judgment but that will not oust jurisdiction of the Court to enforce a foreign award under the Foreign Awards Act. Provisions as contained in Sections 13 and 14 of the Code of Civil Procedure (for short, the 'Code') would apply when a suit is brought on a foreign award. Under Section 44A of the Code, there is a provision for execution of decrees passed by Courts in reciprocating territory. Explanation 1 to this section defines "reciprocating territory" to mean any country or territory outside India which the Central Government may, by notification, in the Official Gazette, declare to be a reciprocating territory for the purposes of this section, Reciprocating territory specified in Section 44A of the Code may not be same as that specified in clause (b) of Section 2 of the Foreign Awards Act. We are not called upon to decide in the present proceedings what is the effect of the judgment given on the award in question in the United States and how the High Court would proceed in the matter when a suit has been filed on the basis of the judgment. The argument that the foreign award has merged in the judgment of the Supreme Court of the State of New York has, therefore, to be rejected.

Main stress of Mr. Ganesh has been on the plea that the award is bad for non-compliance with the provisions of Chapter XX-C of the Income Tax Act, 1961 (for short, the 'IT Act'). Chapter XX-C confers on the Central Government (through Income-Tax Department) primitive right to purchase an immovable property for the amount of "apparent consideration", where the

A Appropriate Authority (constituted under the IT Act) finds that such "apparent consideration" is 15% or more below the fair market value of the property. Chapter XX-C gives the Income-Tax Department statutory right of purchase of immoveable property in respect of which the parties have entered into an "agreement for transfer" within the meaning of Section 269 UA(a) of the IT Act. Section 269 UC requires that if an "agreement for transfer" has been B entered into, the parties must thereupon reduce it to writing and file the requisite statement in the prescribed form with the Appropriate Authority, thereby enabling the Appropriate Authority to consider the transaction and then to decide whether or not to exercise its statutory power of compulsory purchase. Rule 48 L (2) of the Income Tax Rules, 1962 lays down that the C statement under Section 269UC must be furnished within 15 days from the date of the entering into the "agreement for transfer". Failure to comply with this statutory requirement attracts criminal sanctions user Section 276 AB. The term "transfer" has been given a wide meaning under Section 269 UA (f). It was submitted that the purpose behind the insertion of these provisions is to ensure that each and every transaction concerning "transfer" of D "immoveable property" (which terms are very widely defined in Section 269 UA(f) and Section 269 UA(d) of the IT Act) comes under the scrutiny of the Appropriate Authority as only then can there be a check on proliferation of uncounted money. It is stated that this Chapter was introduced in order to tackle the extremely grave problem of rampant tax evasion and generation of E black money which is then utilised for acquisition of immoveable properties at prices which are shown to be far below their real market value.

The mere fact that the documents of conveyance/exchange/lease are to be executed subsequently in pursuance of the said "agreement for transfer" is of no relevance or consequence at all. In fact, such documents of conveyance F can be executed only if and after the requisite no objection certificate (NOC) under the provisions of Chapter XX-C is issued. The scheme of Chapter XX-C is that once an "agreement for transfer" has been entered into, the parties have to mandatorily comply with the requirements of Chapter XX-C and are prohibited from effecting "transfer" of the property without first complying G with the provisions of Chapter XX-C, that is to say, filing the Section 269 UC statement within the specified time and obtain the requisited NOC from the Appropriate Authority. It was submitted that the only situation in which Chapter XX-C does not apply is where the transfer of property takes place without such an agreement ever having been reached and without the volition of the owner, such as, for example, when the property is sold by auction under H a Court's order. Conversely, whenever there is an "agreement for transfer" as

defined under Chapter XX-C, which has been entered into between the parties, Chapter XX-C would be applicable in all force. A

As to what was the background under which Chapter XX-C came to be incorporated under the IT Act, Mr. Ganesh referred to a decision of this Court in *C.B. Gautam* v. *Union of India & Ors.,* (1993) 199 ITR 530, where this Court noticed the arguments of the Union of India as : B

> "...the main reason behind the introduction of this Chapter in the Income-tax Act was the desire to curb large scale evasion of income-tax and to counter to other modes of tax evasion adopted by various assessees to deprive the Government of its legitimate tax dues. It was felt that a lot of tax evasion was involved in transfers of immovable properties in urban areas. Reference is made in the affidavit to the recommendations of the Direct Taxes Inquiry Committee chaired by the Hon'ble Mr. Justice Wanchoo, retired Chief Justice of India and known as the Wanchoo Committee. In this interim report in 1970, the Wanchoo Committee took the view that understatement of prices in the sale deeds of the immovable properties was a widespread method of tax evasion and recommended, by way of a drastic remedy, that the Government should empower itself to acquire the property where the consideration was found to be understated in the sale deeds. It was in pursuance of this recommendation that the provisions of Chapter XX-A were introduced in the Income-tax Act. However, the provision of that Chapter were found inadequate for dealing with the evil of under valuation of immovable properties in sale deeds and agreements to sell with a view to evade tax and certain difficulties emerged in the effective enforcement of the provisions of Chapter XX-A. It was in these circumstances that Chapter XX-C was introduced in the Income-tax Act. It may be mentioned here that the provisions of Chapter XX-A ceased to operate in respect of transfers of immovable property made after September 30, 1986, and as from October 1, 1986, the provisions of Chapter XX-C came into force."

Mr. Ganesh submitted that the settlement agreement dated March 20, 1990 attracted the provisions of Chapter XX-C of the Income Tax Act and, thus, it mandatorily required compliance with the provisions of that chapter. The award was at best only a consent award which stood on no better: fooling than or on the same footing as a consent decree. He said in view of the decision of this Court that a consent decree is nothing but a private agreement between the parties and that the seal of the Court which is added

A thereto does not in any manner change its character or effect in law.

In *Baldevdas Shivlal and Anr.* v. *Filmistan Distributors (India). Pvt. Ltd. & Ors.*, AIR (1970) SC 406, this Court was considering whether a consent decree operates as *res judicata*. It said that consent decree does not operate as res judicata as it is merely the record of a contract between the parties to B a suit to which is super-added the seal of the court and that a matter in contest in a suit may operate as res judicata only if there is an adjudication by the court. The Court said that the terms of Section 11 of the Code of Civil Procedure left no scope for a contrary view. On this, Mr. Ganesh based an argument that award was nothing but a contract which contained transfer of C interest, immoveable property in India by Harendra and Mukesh and, thus, fall within the scope of Chapter XX-C of the IT Act.

In *Ruby Sales and Services (P) Ltd. & Anr.* v. *State of Maharashtra & Ors.*, [1994] 1 SCC 531, question before this Court was whether a consent decree whereunder the title of immoveable property is conveyed expressly D falls under the definition of "conveyance" under Section 2(g) or "instrument" under Section 2(1) of the Act or such consent decree falls outside the ambit and scope of the definition of "conveyance" or "instrument" under the Act. This Court upheld the view of the Division Bench of the Bombay High Court that having regard to the recital in the consent decree itself, the consent decree on its true interpretation, is a conveyance itself and is covered by the E definition of "conveyance" under the Stamp Act and at any rate the consent decree fulfils all the requirements of transfer under the consent decree in favour of the vendees and as such a consent decree would be liable to stamp duty under the Act. This Court noticed that the consent decree depends on the terms thereof. Merely because an agreement is put in the shape of a F consent decree it does not change the contents of the document. It remains an agreement and it is subject to all rights and liabilities which any agreement may suffer. Having a stamp of court affixed will not change the nature of the document. A compromise decree does not stand on a higher footing than the agreement which preceded it. A consent decree is a mere creature of the agreement on which it is founded and is liable to be set aside on any of the G grounds which will invalidate the agreement.

Further submission of Mr. Ganesh was that an award is also an "agreement for transfer" within the meaning of Chapter XX-C. The award declare the right of Mukesh to immoveable properties comprised in the packages H selected by him and also similarly declare the rights of Harendra in respect

of immoveable properties including in the packages allotted to him. Both these sets of packages including a large number of immoveable properties located in and outside Mumbai in India and also in the United States. It was, thus, submitted that the arbitral award which declares the rights of the parties in respect of immoveable properties was compulsorily required to be registered under the provisions of the Registration Act, 1908 and if the award was not registered, the Court cannot look at such an award or pass a decree in terms thereof, Reference was made to a decision of this Court in *Lachhman Dass* v. *Ram Lal & Anr.*, [1989] 3 SCC 99.

It was, thus, submitted that since the award in the present case was not registered, the impugned judgment and decree passed which are in terms of the said unregistered award are to be set aside. Judgment of this Court in *Tehmi Sidhwa & Ors.* v. *Shiv Banerjee & sons Pvt. Ltd.*, [1974] 2 SCC 574, was sought to be distinguished. Section 269 UC of Chapter XX-C prescribes registration of a transfer unless the requisite NOC obtained. In *Lachhman Dass* v. *Ram Lal & Anr.*, [1989] 3 SCC 99, there was dispute between the brothers respecting certain piece of land which stood in the name of the appellant. Claim of the respondent was that it was Benami in the name of the appellant. They set an arbitration who gave his award and then filed the same in the Court for making that rule of the Court. One of the objections raised by the appellant was that the award was bad and unenforceable. It was not properly stamped nor it was registered one and as such could not be made rule of the court. The award which was under the Arbitration Act, 1940 said that half ownership of the disputed land was now be owned by the respondent. Then the award gave certain directions. This Court said that the award affected immoveable property of the value of over Rs 100/- and as such required to be registered under the Registration Act. In *Mrs. Tehmi P. Sidhwa & Ors.* v. *Shiv Benerjee & Sons Pvt. Ltd. & Anr.*, [1974] 2 SCC 574, the award under the Arbitration Act, 1940 directed partition of immovable property of the value of more than Rs. 1,00,000. The question was if it requires registration under Section 17(1)(b) of the Registration Act. This Court after examining the award said that if the award related to partition of immoveable property of the value exceeding Rs. 100, it would require registration but then it to be seen if the award operated to create rights in immovable property or whether it merely created a right to obtain another document which would when executed create any such right. Since the award merely created a right to obtain another document, it would fall under section 17(2)(v) and not under Section 17(1)(b) of the Registration and would not require registration.

Lastly, it was submitted that if what the High Court in the impugned

A judgment says is correct, it would become extremely easy to bypass the provisions of Chapter XX-C thereby effectively reducing it to a dead letter as it could always be possible for parties first to enter into an agreement and then to get an arbitral award in terms of such an agreement within or outside India and then claim that the provisions of Chapter XX-C are not attracted. Mr. Ganesh said that if this interpretation was to be accepted. Chapter XX-C would become completely unworkable and meaningless and its underlying public purpose and policy would be totally frustrated.

B

We do not think that submissions made by Mr. Ganesh on Chapter XX-C of IT Act have any sound basis. Settlement agreement dated March 20, 1990 is not a mere agreement for transfer. As noted above, parties have vast businesses and properties both in India and in the USA. Settlement agreement was between (1) Harendra Mehta, his wife Amita Mehta and he himself as Karta of Harendra Mehta HUF; (2) Mukesh Mehta, his wife Daksha Mehta and he himself as Karta of Mukesh Mehta HUF; (3) Mettaco Enterprises Trust; and (4) A.D. Developments Ltd., a New York Corporation having its principal office at New York. The settlement agreement runs into 57 long pages. It is a complex agreement. It also mentioned litigation between parties pending in the Supreme Court of the State of New York, Nassau County Court. After the parties have got their respective packages of the properties and businesses both in India and in the United States the award required the parties to execute transfer and closing documents. In this respect, clause 5 of the settlement agreement would be relevant and is as under :

C

D

E

> "Further, at the closing, the parties will execute transfer and closing documents to be mutually agreed to by the parties' respective attorneys. If the parties attorneys cannot agree on the sum and substance of the closing comments, the firm of Skadden, Arps, Slate, Meaghr & Flom or if they refuse the firm of Simpson, Thacher & Bartlett shall choose the appropriate transfer and closing documents and the choice made by this firm shall be binding upon the parties of this agreement and the cost of any consultation of assistance in preparation of the Transfer and closing documents shall be shared equally between the parties. It is specifically understood that the transfer and closing documents referred to herein are the United States Businesses and Properties Transfer and closing documents. The parties have already agreed that the opinion of D.M. Harish & Company with respect to the transfer and closing documents of Indian Businesses and properties will be final and binding on the parties."

F

G

H

This clause also provided as to how the documents would be executed if any party refuses to execute the aforesaid transfer and closing documents. Then there are various terms regarding continuances of their obligations under the businesses and properties even though there is separation and division of assets between two different groups. Settlement agreement also stipulates certain rights of one party with respect to the assests falling to the share of the other. All these clauses are not to be read in isolation and they form part of one composite agreement. It is not necessary to detail various clauses of the settlement agreement. It will, however, be interesting to note some part of the proceedings under CPLR 7507 before Judge Ralph Diamond on March 20, 1990 Mr. Sciacca represented Harendra while Mr. Ravi Khanna represented Mukesh. Anita Mehta appeared for herself and as attorney to her husband Harendra Mehta :

> "THE COURT : It is my understanding that the agreement as well as the plan that has been selected will all be included as part of the arbitrator's award.
>
> MR. SCIACCA : Correct.
>
> MR. KHANNA : Correct.
>
> LALIT MEHTA (Arbitrator) : It is the further understanding of the arbitrator that two plans of settlement have been, pursuant to said agreement, proposed by Harendra and presented to Mukesh for acceptance of one of the plans.
>
> I now address Mukesh Mehta and ask if he has had an opportunity to review the plan and make a selection.
>
> MUKESH MEHTA : Yes, I have selected the India Plan which is B combined with, I believe, A-I, which is the second half of the B plan.
>
> The B plan is the Indian package which enumerates the various assets including Mettaco Engineering, Mettaco Cold rolling Private Limited, Mettaco Alloys Private Limited, Mettaco Rolling Industries, Mettaco International, Mettaco Corporation, Progressive Sales Private Limited, Mettaco Enterprises Trust, Daksh Holding and Trading Private Limited, Amish Holding and Trading Private Limited, Shaanamish Holding and Trading Private Limited, H.H. Associates, Amish Associates, D.M. Associates, an apartment in Urvach Building.

A LALIT MEHTA (Arbitrator) : That is on Nepenacy Road in Bombay. That is the Petit Hall Apartment.

MR. SCIACCA : Don't read it. We will sign it.

MR. KHANNA : The Indian Plan B is three pages. It is in B conjunction with another plan.

MUKESH MEHTA : I have to take A1 with B.

MR. KHANNA : That is two pages.

MUKESH MEHTA : Plan B along with Plan A1. That is how C the pages are prepared.

MR. KHANNA : That's it.

THE COURT : Is there any problem? My understanding is there are two plans. Each plan has two parts. And the two parts you are D talking about is part of that one plan.

MR. KHANNA : That is how the agreement is made out. Anyone picking the India Plan will pick out Plan A1.

LALIT MEHTA (Arbitrator) : There is no objection.

E MR. SCIACCA : That is right.

LALIT MEHTA (Arbitrator) : Therefore, that plan is what number? Let the lawyer see it.

MR. SCIACCA : Plan A and Plan B1.

F Let Mukesh Mehta sign A1 and Plan B.

(Mukesh Mehta signed Agreement.)

LALIT MEHTA (Arbitrator) : May I request that each side check each and every page.

G MUKESH MEHTA : Should we initial each page?

LALIT MEHTA (Arbitrator) : Yes.

(Each page initiated.)

H THE COURT : May I suggest the following : when the arbitrator's

award is complete it's going to include a number of exhibits. A

Exhibit A will be the agreement itself.

Exhibit B will be the plan selected by Mukesh and Daksh.

Let's have the reporter so mark it so their will be no question as to what we are referring to. B

(Settlement Agreement marked as Exhibit 'A' for identification.)

Plan B and Plan A1 marked as Exhibit B for identification)

MR. SCIACCA : Just to be clear, the plan that Mukesh has chosen is Exhibit B to this stipulation and arbitration proceeding. C

Plan B which is the Indian Package and Plan A1 which is the United States note.

MR. KHANNA : Plan B is 3 pages and A1 is two pages. Therefore, Exhibit B is 5 pages in all. Each of which have been either initiated or signed by Mukesh. D

MR. SCIACCA : Attorneys for both side have initiated Exhibit B immediately beneath the Exhibit mark.

E

THE COURT : Regarding Exhibit C, which is being made a part of the arbitrator award, that is regarding Harendra Mehta which properties will be going to Harendra or Plan A, the United States package, and B-1, the Indian note, which we are collectively marking at this proceeding as Exhibit C. The United States Package is four pages and the Indian Note is four pages. There is a total of eight pages in Exhibit C. F

(Plan A and Plan B-1, the Indian Note, marked as Exhibit C for Identification.)

MR. KHANNA : Each of these pages have been initialed by Amita Mehta and the attorneys immediately below the Exhibit mark. G

THE COURT : I would also like the reporter to maker as Exhibit D, the Power of Attorney, going from Harendra to Amita.

(Power of Attorney marked as Exhibit 'D' for identification.) H

A THE COURT : Regarding transfer documents, it is my understanding and the arbitrators understanding, that an agreement has been made regarding these transfer documents.

MR. SCIACCA : Correct, that is provided for in a transfer agreement.

B THE COURT : According to the original submission, the arbitrator had a twofold function.

One was to make the award.

And two was to implement that award..."

C Again a mere look at the agreement shows that it is not an agreement for transfer as understood in clause (a) of Section 269 UA of Chapter XX-C of the IT Act. The settlement agreement also does not stipulate exchange of any immoveable property. It rather divides equally businesses and properties between Harendra and Mukesh. "Exchange" has been defined under Section D 118 of the Transfer of Property Act where two persons mutually transfer the ownership of one thing for ownership of another. When we consider exchange of immoveable property falling within the definition of 'exchange' in Section 118 both the properties would situated in India. Agreement for transfer refers to immoveable property which is defined in clause (d) of Section 269UA. It E is difficult to appreciate the arguments of Mr. Ganesh as to how in the present case, there is transfer of any immoveable property under the settlement agreement. It appears to us that the bone of contention is a flat in Urvashi building in *Mumbai* which formed part of B+A1 of Mukesh. It was not disputed before us that for this the appellants did execute a gift deed in favour of the respondents on advice received but no steps were taken to F compel the transaction as, it appears, relations soured. This would also show that the settlement agreement on the award did not require filing of any declaration under Chapter XX-C of the IT Act. Moreover, in our view in the case of a foreign award, provisions of Chapter XX-C of the IT Act are not attracted. It was said that under Chapter XX-C a net has been thrown wide G to bring within its purview all sorts of immoveable properties but that net is not wide enough to cover foreign award covering businesses and properties both in India and in a foreign country. Apprehension of Mr. Ganesh that if we give this interpretation a method can be found by the parties to escape the rigour of Chapter XX-C knocking at the very provision of law which strikes at the root of black-money rampant in the sale and purchase of H immoveable property. If that is so, legislature can always stop in to block the

gap if it finds there is any escapement of revenue. We are also of the view that a foreign award under the Foreign Award Act does not require registration under the Registration Act.

A decree or order of a court does not require registration under clause (b) of sub-section (1) of Section 17 of the Registration Act. This is the effect of clause (vi) of sub-section (2) of Section 17. Earlier under this clause (vi) before its amendment in 1929 even an award did not require registration. However, after omission of the words "and any award" an award creating or declaring right or interest in immoveable property of the value of Rs. 100 would require registration. But then that award would be an award under the Arbitration Act, 1940 and certainly not a foreign award.

Let us examine this argument of Mr. Ganesh that foreign award required registration from another angle. He said that the foreign award has already merged in the foreign judgment on the basis of which Mukesh has brought suit in the Bombay High Court. A foreign judgment does not require registration as the process of suit having been decreed on that basis will have to be gone through. When a decree is passed by the Court, it does not require registration in view of clause (vi) of sub-section (2) of Section 17 of the Registration Act. A decree or order of a court affecting the rights mentioned in Section 17(1)(b) and (c) would not require registration. It would, however, require registration where the decree or order on the basis of compromise affects the immoveable property other than that which is the subject matter of the suit or proceeding. Even a decree passed by the foreign court execution of which is sought under Section 44A of the Code of Civil Procedure would not require registration. That being the position, we are of the view that foreign award under the provisions of the Foreign Awards Act does not require registration under the Registration Act. In any case, in the present case the award creates a right to obtain transfer and closing documents which as regards Indian properties and businesses are yet to be executed by D.M. Harish & Co., Chartered Accountants. Decision of this Court in *Mrs. Tehmi P. Sidhwa,* case [1974] 2 SCC 579, as rightly pointed by Mr. Dholakia, learned counsel appearing for the respondents, would be fully applicable and the argument that the award required registration has to be rejected on this ground as well.

After having examined all the contentions raised by the appellants, we find no ground to interfere in the impugned judgment of the High Court. Appeal is accordingly dismissed with costs.

R.A. Appeal dismissed.