Supreme Court of India
Renusagar Power Company Ltd vs General Electric Company And Anr on 16 August, 1984
Equivalent citations: 1985 AIR 1156, 1985 SCR (1) 432
Author: V Tulzapurkar
Bench: Tulzapurkar, V.D.

PETITIONER:
RENUSAGAR POWER COMPANY LTD.

Vs.

RESPONDENT:
GENERAL ELECTRIC COMPANY AND ANR.

DATE OF JUDGMENT16/08/1984

BENCH:
TULZAPURKAR, V.D.
BENCH:
TULZAPURKAR, V.D.
PATHAK, R.S.

CITATION:
1985 AIR 1156 1985 SCR (1) 432
1984 SCC (4) 679 1984 SCALE (2)321
CITATOR INFO :
F 1989 SC 839 (16)
R 1989 SC2198 (8)
R 1992 SC 232 (29)

ACT:

Foreign Awards (Recognition and Enforcement) Act, 1961 Section 3, scope of-Whether an earlier suit in the nature of a petition under section 33 of the Indian Arbitration Act, 1940 could be stayed on a petition under section 3 of the Foreign Awards Act, (a petition the nature of a petition under section 34 of the Indian Arbitration Act).

Interpretation of Statutes-Foreign Awards (Recognition and Enforcement) Act, 1961-Interpretation of Act calculated and designed to subserve the cause of facilitating international trade and promotion and providing speedy settlement of disputes arising in such trade-Any expression or phrase in the Act must receive an liberal construction consistent with its liberal and grammatical sense.

Scope purview of the Arbitral Clause in Article XVIII in the contract-Jurisdiction of an Arbitrator to decide the limits of his own jurisdiction-Whether a dispute inclusive of the arbitrators' jurisdiction comes within the scope of purview of Arbitration clause, primarily depends on the terms of the Arbitration clause.

Issuance of promissory notes further supported by Bank guarantee by the buyer towards the purchase price under the

contract itself and not by way of separate contract, whether discharges the obligation to pay the purchase price-Whether, the claims for the "Unpaid Regular Interest, Delinquent Interest and Compensatory Damages" be said to be "not arising out of the contract" and, therefore, not referable to Arbitration.

Words and phrases-"Arising out of", in relation to", "in consequence of", "concerning", "relating to", are expressions of widest amplitude and content and include even questions as to existence, validity scope and effect of Arbitration agreement.

Negotiable instruments-Negotiable instruments taken on account of debt whether operates as absolute discharge or not is a question of intention of parties-Bill or Promissory notes can never go in discharge of debt unless it is specified as a part of contract that it shall be so.

HEADNOTE:

The first respondents General Electric Company, a company incor-

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porated under the laws of the State of New York, USA, on a contract in writing dated August 24, 1964 agreed to sell to the appellant Renusagar Power Company Ltd., equipment for a thermal electric generating plant to be erected at Renukoot on the terms and conditions set out therein. Work to be performed under the contract included supply of equipment spare parts and services for which a sum of $ 13, 195,000 being the total purchase price and otherwise called the "Contract Base Price" was payable by Renusagar in lawful currency of the USA in the manner stipulated in the contract. Under the contract, the parties intended completion of (a) the delivery of the equipment and spare parts etc. within 15 months of the Contract Effective Date (December 31, 1964) i.e. upto March 30, 1966; (b) the erection of the plant within 16th to 30th month (i.e. from April 1, 1966 to June 30, 1967); so that (c) the plant would be fully operational by the end of 30th month from the Contract Effective Date i.e. by July 1, 1977.

The parties, therefore, agreed (a) that substantial payment of the purchase price by Renusagar should commence when the plant became operational i.e. June 30, 1967; (b) that no interest would be payable during the delivery period; (c) that interest shall be paid during the erection period and thereafter till payment but the interest during the erection period would be capitalised and added on to the principal; (d) that initially ten per cent of the total Contract Base Price ($ 1, 319, 500) should be paid either in cash or by means of a Letter of Credit within 30 days of the Contract Effective Date and that the balance of 90% of the purchase price plus interest at 6 1/2% per annum from 16th

to 30th month aggregating to US $ 12, 776,058,75 ($ 11, 875, 500 for principal plus $ 900, 558, 75 being the capitalised interest at the aforesaid rate for the aforesaid period) should be paid in accordance with the schedule of payments set out in the contract. The schedule for the payment of the said balance of 90% of the purchase price provided for payment to be made in sixteen six monthly instalments of U.S. $ 798,503.68 each, the first of such instalments being payable on 30.6.1967 and the last instalment falling due on 31.12.1974. The obligation to make such payment was to be evidenced by four series (A-B-C-D) of 16 unconditional negotiable promissory notes to be executed by Renusagar (Vide Article III); (e) that in case of first respondent receiving an exemption from the Government of India from payment of income tax on interests received by it from Renusagar then the interest for that portion of the period shall be computed at 6% instead of 61/2% per annum and that the concerned promissory notes would be replaced or substituted by fresh one reflecting the adjustment in payment of interest necessitated by the grant of tax exemption; (f) that should GEC's application for exemption be denied the appellants may withhold the Indian Income Tax applicable to any payments of interest but shall furnish the first respondents with tax receipts of all withheld amounts paid to the Government of India so as to enable first respondents to obtain corresponding credit for the sum in their US tax assessment (Vide Article XIV-B); (g) that the appellants shall furnish guarantee of the United Commercial Bank for payment of the full amount of promissory notes; (h) that the rights and obligation of the parties would be governed in all respects by the laws of the State of New York, U. S. A. (Vide Article XIX-A) and that (j) "Any disagreement arising out of or related to this contract which the parties are unable to resolve by sincere negotiation shall be finally settled in
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accordance with the Arbitration Rules of the International Chamber of Commerce. As provided in the said Rules, each party shall appoint one Arbitrator, and the Court of Arbitration of the International Chamber of Commerce shall appoint the third Arbitrator. Arbitration proceedings shall be conducted at such time and place as the Court of Arbitration shall decide. Judgment upon an award may be entered; in any court of competent jurisdiction." (Vide Arbitration Clause in Article XVII).

Pursuant to the said Contract the appellants fulfilled all preliminary conditions of the contract, including the furnishing of a guarantee executed by the UCO Bank irrevocably guaranteeing to the first respondents and to any subsequent holder in due course of the notes the full and prompt payment of the principal and interest on the notes. Subsequently on an agreement recorded in the first respondents letter dated June 11, 1965 and as approved by

the Central Government, the 1964 Contract (IGE-9584) was extended to include the supply of unfabricated structural steel to Renusagar for approximately U.S. $ 300,000 on the same conditions including the Arbitration Clause as contained in the original 1964 (IGE-9584) Contract, except that the appellants agreed and issued a fifth series, (E series) of sixteen promissory notes bearing interest at 61/2% per annum evidencing 90% of the price of the structural steel; and the payments dates thereof being the same dates as the corresponding promissory notes of the earlier four series.

During the implementation of the contract two events occurred giving rise to the GEC's three claims against the appellants that are sought to be referred to arbitration of International Chamber of Commerce, namely, (i) grant of exemption by the Government of India to G. E. C. in respect of interests on purchase price receivable by it from the appellants and the revocation thereof, leading the appellants to file a civil writ petition No. 179 of 1970 in the Delhi High Court and getting the revocation orders quashed and (ii) re-scheduling dates of payment of purchase price agreed to by the parties but not approved by the Reserve Bank of India and the Government of India.

The three claims of G. E. C. were (i) the Unpaid Regular interest to the tune of 2.1 million dollars (U. S.) wrongly deducted and wrongly with-held and kept with themselves by the appellants from 1970 onwards denying G. E. C. of the benefit of getting the corresponding credit in their U.S. tax assessment from 1970 onwards. The amount represented the difference between U. S. $ 24,12,680.20 (73% of the interest payable calculated on the basis of 61/2% subject to tax) and U. S. $ 21, 30, 785.52 (calculated on 6% tax free basis); (ii) Liability for Delinquent Interest on account of the delays in payment of four instalments of purchase price together with interest, due to the failure to have re-scheduling of payments approved by Reserve Bank and Government of India, to the tune of U. S. $ 7,84,151.84 (calculated on the basis of 6% tax free basis); and (iii) The Compensatory Damages arising out of non-payment of the aforesaid two claims of Unpaid Regular Interest and Delinquent Interest for over twelve years, the quantum being calculated by way of interest on those amounts at the market rate of

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18% per annum amounting to U.S. $ 41, 610, 534.88 upto 31.3.1982 (to be extended till the date of actual payment). According to G.E.C. the appellants for a long period of 12 years had illegally and wrongfully retained on one pretext or the other these two funds with itself and had enjoyed the use thereof for its own private advantage and had correspondingly totally deprived G.E.C. of their use for which the appellants must compensate by way of damages in as much as they must be regarded as a stake holder or

constructive trustee of those funds from the various dates on which the payments became due and payable and under the common law jurisdiction restitution was payable by a stake holder to the party ultimately determined to be a rightful beneficiary owner of the funds.

By a notice of intention to arbitrate dated March 1, 1982 G.E.C. called upon the appellants to remit the aforesaid sums and also addressed a letter dated March 2, 1982 to the Secretariat court of Arbitration of ICC containing a request for arbitration being undertaken by it seeking reliefs as set out in the notice to the appellants. After ICC took cognizance of the request for arbitration by G.E.C. it called upon the appellants to nominate its Arbitrator, file its reply and remit certain sums towards the administrative expense and arbitration fees.

Thereupon, the appellants on June 11, 1982 filed suit No. 832/82 in the Bombay High Court on its original side against G.E.C. and ICC seeking a declaration that the claims referred to the arbitration of ICC by G.E.C. were beyond the scope/purview of the arbitration agreement contained in Article XVII of contract IGE-9584 dated August 24, 1964 and that G.E.C. was not entitled to refer the same to the arbitration with consequential prayers for injunctions restraining G.E.C. and ICC from proceeding further with the reference and restraining I.C.C. from requiring the appellants to make the appellants to make any deposit towards administrative expenses and Arbitration fees and obtained an ex-parte ad-interim relief. On August 11, 1982 G.E.C. filed Arbitration Petition No. 96 of 1982 under section 3 of the Foreign Awards (Recognition and Enforcement) Act, 1961 seeking stay of suit No. 832 of 1982 and all proceedings therein with a prayer for vacating the ad-interim ex-parte reliefs obtained by the appellants in the said Suit.

Both the matters, G.E.C.'s stay petition under section 3 and the appellants' Notice of Motion for confirmation of ad-interim reliefs were heard together and by a common judgment and order dated April 19,20, 1983 the learned Single Judge allowed the Arbitration Petition 96 of 1982, granted the stay of Suit No. 832 of 1982 and all the proceedings therein since all the ingredients of section 3 of the Foreign Awards (Recognition and Enforcement) Act , 1961 had been satisfied and vacated all the interim reliefs granted earlier. The learned Judge held: (a) that the Arbitration Clause in the original 1964 Contract could be availed of by G.E.C. in as much as not only had the October 1968 Amendment kept alive all other terms and conditions of the 1964 Contract including Arbitration Clause but it had fallen through for lack of Government's approval; (b) though
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the first two claims sought to be referred to arbitration by G.E.C. were based on the promissory notes towards the purchase price was provided under the Contracts itself and

these were not by way of any independent or separate Contracts in discharge of the obligation to pay the purchase price under the contract and since the Arbitration Clause covered all the disputes arising out of the contract those claims fall within the Arbitration Clause and; (c) that the liability to pay the compensatory damages arose out of failure to carry out the terms and conditions of the contract in regard to payment of purchase price and that even assuming that the said claim was one in tort it was directly and inextricably connected with the terms and conditions of the contract and certainly "arose out of" the contract of was "in relation to" the contract and therefore, could be entertained by the Arbitrators.

Renusagar preferred two appeals being civil Appeal Nos. 404-405 of 1983 and contended: (a) An Arbitrator had no jurisdiction to decide the limits of his own jurisdiction and since in the case of International Arbitration the jurisdiction of the Arbitrator had to be decided according to the Law of the Forum where the question is raised (in the instant case being the Indian Law) the jurisdiction of the Arbitrator, according to that Law, had to be decided by the Court and not by the Arbitral Tribunal; (b) the dispute sought to be referred related substantially to the claim for interest and that claim was (and it was so stated in the notice of intention to arbitrate) founded on the promissory notes which were independent contracts by themselves and therefore, the claim did not arise out of the suit contract and hence could not be the subject matter of Arbitration; (c) that claim for compensatory interest was really a claim for damages arising out of tort and such a claim was in any case not case by the suit contract and fell outside the scope of the Arbitration Clause; and (d) in any event Renusagar had made out a prima facie against by raising serious triable issues in the suit which should enable it to claim an injunction restraining the arbitration proceedings.

The Court of appeal negatived all the contentions and ultimately confirmed the trial Judge's order whereby Renusagar's suit was stayed and the interim reliefs granted to it were vacated and hence the appeal by certificate by Renusagar.

Arguments for the appellants:-

(1) The Arbitration Petition under section 3 (which is really in the nature of a Petition under section 34 of the Indian Arbitration Act, 1940, is totally misconceived and liable to be dismissed because the Suit No. 832/1982 filed by the appellants is merely for a declaration that the three claims sought to be referred to arbitration are beyond the scope/purview of arbitration clause and no other relief on the merits of those claims is sought, and the Suit, being really in the nature of a petition under section 33 of the Indian Arbitration Act, 1940, in as much as it seeks to have the effect (scope) of the arbitration agreement determined, can never by stayed under section 3 of the Foreign Awards

Act.
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(2) The suit filed by the appellants is not "in respect of any matter agreed to be referred to arbitration" as required by section 3, and therefore, the stay sought for by G.E.C. should be refused;

(3) The Court acting under section 3 (like the Court acting under section 33 of the Indian Arbitration Act) being a court of limited Jurisdiction cannot determine the question of the existence, validity or effect of the arbitration agreement (which is the only issue to be tried in the appellants' suit) and it is for the court trying the suit to decide the question raised in the suit, and therefore, a stay, if granted under section 3 application would finally determine the suit or render it almost dead for all practical purposes and therefore, no relief on the said petition can be granted which will have such effect;

(4) The question raised in the suit relating to the effect (scope of the Arbitration Agreement, which is the same as the question relating to the existence thereof, is such as is incapable of being finally determined by the Arbitrators and hence such a suit cannot be stayed under section 3 of the Foreign Awards Act;

(5) The underlying commercial contract (IGE-9584) for sale of goods and services contains no obligation to pay any interest after June 30, 1967 (i.e. after the 30th month from the contract effective date) (whether six and a half per cent or six per cent) but that such obligation to pay interest after June 30, 1967 is only to be found in the promissory notes and the two claims of G.E.C., namely, first claim of 2.1 million U.S. dollars and the second claim for U.S. $ 78,151.84 towards approximately 80% for Unpaid Regular Interest and Delinquent Interest respectively, being dues after June 30, 1967, preferred before the arbitrators do not "arise out of" the contract nor are they "in relation to" thereto but arise under the promissory notes and hence fall outside the scope of arbitration agreement;

(6) The promissory notes executed by the appellants were in complete discharge of the obligation to pay purchase price and interest thereon under the contract and these notes constitute independent and separate contracts by themselves, and therefore, the liability arising out thereunder cannot be regarded as "any arising of the contract" or "in relation thereto" and what is more these claims have been described by the G.E.C. in their notice of intention to arbitrate as "arising under the promissory notes";

(7) The claim for compensatory damages being a liability arising in tort, for wrongful detention of the first two funds and since it was being enforced on the basis of appellants' status as a stake holder or constructive trustee the same is clearly outside the scope of the arbitration agreement; and

(8) Since the issue of arbitrarily of these claims is raised in the appellants' suit it is but proper that till the issue raised in the suit is finally decided by the Court, the arbitration proceedings should be injuncted.

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Arguments for respondent company:

(1) The schemes of the Foreign Awards Act and the Indian Arbitration Act, 1940 being not identical, there are various material differences which have a bearing on the issue whether a suit seeking determination of the effect (scope) of an arbitration agreement can or cannot be stayed in a petition under section 3 of the Foreign Awards Act and that answer to it depends upon proper construction to be placed on the section in the light of the scheme of that Act;

(2) Since all the ingredients of section 3 have been satisfied the stay of Renusagar's suit will be obligatory;

(3) Alternatively, the legal position is that both under English Law and Indian Law, it is open to the parties to have an arbitration agreement incorporating words of the widest amplitude so as to embrace even the questions of its existence, validity or effect (scope) but an enquiry into the scope and effect of an arbitration agreement and a challenge to the existence or validity thereof are not the same but fundamentally different in as much as the first pre-supposes that the arbitration agreement exists in fact and in law and the enquiry then is limited to the scope and effect thereof;

(4) Whenever it is said that an arbitrator cannot decide the question of his own jurisdiction all that is intended is that he cannot determine- that too finally, the question of the existence (factual) or validity (i.e. legal existence) of the arbitration agreement, if contained in the underlying commercial contract and this must be so, for, if the existence or validity of the underlying commercial contract is successfully challenged the arbitration clause which is the part and parcel thereof must perish with it and therefore, the Arbitrator will have no jurisdiction to decide the issue of the existence or validity of the agreement but even here if the arbitration agreement so widely worded if separate and independent from the commercial contract the arbitrator will have jurisdiction to decide the questions about existence or validity of the commercial contract; but these principles have no application whatsoever to a case where the issue relates to the scope and effect of the arbitration agreement contained in the underlying commercial contract and the arbitration agreement is wide enough to include such an issue, for, in such a case the Arbitrator will have Jurisdiction to decide that issue. Therefore, since in the instant case the Arbitration Clause contained in the underlying commercial contract IGE-9584 is of the widest amplitude it is the Court of Arbitration of I.C.C. which will have jurisdiction to

adjudicate not merely three claims of G.E.C. on merits but also the issue whether those claims fall within the Arbitration Clause or not;

(5) The issue pertaining to the scope and effect of the arbitration agreement, if raised in an application under section 34 of the Indian Arbitration Act, the Court has to decide it and the Courts' decision thereof

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will naturally be binding on the Arbitrators even though the issue was within the competence of the Arbitrators because of the wide wording of the Arbitration Clause. Here, since the Court has decided the issue whether the three claims "arise out of" or are "related to" the contract affirmatively it will be binding on the Court of Arbitration of I.C.C. and it will be futile for that court of Arbitration to go into that question again;

(6) The commercial contract (IGE-9584) does contain an obligation on the part of Renusagar to pay interest on unpaid purchase price after June 30, 1967 (and not merely in the promissory notes), which could be readily inferred from Art. III (a) 3(c) read with Article XIV-B and therefore the first two claims for Unpaid Regular Interest and Delinquent Interest due after June 30, 1967 preferred before the Arbitrators not merely "arise out of" but really arise "under" the contact;

(7) The third claim for Compensatory Damages which flows by way of corollary from wrongful detention of the first two funds which ought to have been paid under the Contract is so closely connected with the contract that it is clearly "in relation to it";

(8) The promissory notes executed by Renusagar were not and are not in discharge of the obligation to pay the price and interest thereon under the contract; nor do these notes constitute independents and separate contract by themselves. These are a part of the contract and the two are so inseverably and inextricably bound together that the obligation under the contract can never be deemed nor intended to have been completely discharged by the mere execution of the notes. The real nature of the claims preferred before the arbitrators and not the nomenclature or description thereof by any party would be relevant and decisive Alternatively, even assuming (a) that the promissory notes are not an inseverable and inextricable part of the Contract, (b) that the obligation arising under the Notes is totally different from the one arising under the contract and (c) that the Notes re in discharge of the obligation to make payment under the Contract (all of which are strongly denied), the three claims would still be covered by the Arbitration Clause which is of the widest amplitude, for it would be erroneous to determine whether a claim arises out of or in relation to the Contract by looking at the cause of action on which the claim is based.

(9) The Court of Appeal was justified in coming to the

conclusion that no prima facie case for injunction restraining arbitration proceedings had been made out by Renusagar and it had, therefore, rightly vacated the ad-interim injunction and stayed Renusagar's suit.

Dismissing the appeals, the Court,

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HELD: 1.1 The question, whether under section 3 of the Foreign Award (Recognition and Enforcement) Act, 1961 having regard to its scope, a suit in the nature of a petition under section 33 of the Arbitration Act, 1940 could be stayed must necessarily depend upon a correct construction
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of the said section 3, by keeping in mind the objective sought to be achieved by that Act and its scheme and not on the basis of similar or analogous provisions that are to be found in the Arbitration Act, 1940 or the manner in which such similar or analogous provisions have been construed by Indian Courts. [491F-G; 492A-B]

1.2 The Statement of Objects and reasons shows that the Foreign Awards (Recognition and Enforcement) Act, 1961 seeks to achieve speedy settlement of disputes arising from international trade through arbitration. The Act, a successor to the Arbitration (Protocol and Convention) Act, 1937 was enacted to give effect to the New York International Convention on the Recognition and Enforcement of Arbitral Awards adopted on 10th June, 1958 and to which India is a party. Section 2 of the Act defines the expression "Foreign Awards", and closely follows the language of Article II of the convention which provides for recognition by contracting States of agreements, including arbitral clauses in writing by which the parties to the agreement undertake to submit to arbitration all or any difference 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. [492B; D;G]

1.3 Since the Act is calculated and designed to subserve the cause of facilitating international trade and promotion thereof by providing for speedy settlement of disputes arising in such trade through arbitration, any expression or phrase occurring therein should, therefore, receive consistent with its literal and grammatical sense, a liberal construction. An examination of the relevant provisions of the Foreign Awards Act and the Arbitration Act of 1940 show that the schemes of the two Acts are not identical and there are various differences which have a material bearing on the question under consideration and as such decisions on similar or analogous provisions contained in the Arbitration Act cannot 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. [492G; 493A-B]

1.4 On a plain reading of Section 3 of the Foreign Awards Act two things become very clear, namely, (i) the section opens with a non obstante clause giving over riding effect to the provisions contained therein and making it prevail over anything to the contrary contained in the Arbitration Act, 1940 or the Code of Civil Procedure, 1908; and (ii) unlike section 34 of the Arbitration Act which confers a discretion upon the Court, the section uses the mandatory expression "shall" and makes it obligatory upon the Court to pass the order staying the legal proceedings commenced by a party to the agreement if the conditions specified therein are fulfilled. [494A-B]

The conditions required to be fulfilled for invoking section 3 of the Foreign Awards act are:

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(1) there must be an agreement to which Article II of the Convention set forth in the Schedule applies. (It is not disputed that this is so in the instant case); [494C]

(2) a party to that agreement must commence legal proceedings against another party thereto; (it is again not disputed that Renusagar and G.E.C. are the two parties to the arbitration agreement an that Renusagar has commenced legal proceedings against G.E.C. by filing Suit No. 832 of 1982); [494D]

(3) the legal proceedings must be "in respect of any matter agreed to be referred to arbitration" "in such agreement; (the question whether this condition is fulfilled here needs to be decided), [494E]

(4) the application for stay must be made before filing the written statement or taking any other step in the legal proceedings; (admittedly this condition is fulfilled); [494F]

(5) The Court has to be satisfied that the agreement is valid, operative and capable of being performed; this relates to the satisfaction about 'existence and validity' of the arbitration agreement; (in the instant case these questions do not arise); and [494G]

(6) 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 the arbitrability of the claims (it will have to be dealt with while considering the satisfaction of condition (3). [494H]

(In the instant case, the parties were thus at issue as to the fulfilment of conditions (3) and (6) only and it is on the fulfilment of these that the obligation of the court to stay the suit of Renusagar will arise.) [495A]

1.5 The scheme of the two Acts (Foreign Awards Act and Arbitration Act) materially differ on several aspects having a bearing on the points at issue I as seen by an examination

of section 3, 4, 7, of the Foreign Awards Act, in juxtaposition with sections 32, 33 and 34 of the Arbitration Act. Under section 32 of the Arbitration Act suits no challenge the existence or validity of an arbitration agreement or award as also suits to have the effect (scope) of an arbitration agreement determined are barred and such questions can be raised only by an application under section 33 of the Act whereas under the Foreign Awards Act there is no provision similar or akin to sections 32 and 33 (and that is why a suit of the nature filed by Renusagar qua the arbitration agreement covered by the Convention is maintainable) but by virtue of sections 3 and 7 the same purpose is served though by different procedure. Sections 3 and 7 read together disclose a scheme that so far as questions of existence, validity and effect (scope) of the arbitration agreement are concerned, the determination thereof by the arbitrators is also subject to the decision of the Court and this

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decision of the court can be had either before the arbitration proceedings commence or during their pendency, if the matter is decided by the Court in a section 3 petition, as in the present case, or can be had under section 7 after the award is filed in the court and is sought to be enforced under section 6. True section 4(2) declares that a foreign award shall be filled treated as binding 'for all purposes' on persons as between when it is made but that is subject to section 7 where under enforceability thereof is made dependent upon satisfaction of certain conditions specified therein; for example, under section 7(1) (a) (iii) one of such conditions for enforceability is that the award should not deal with questions not referred nor should it contain decisions on matters beyond the scope of the agreement. In effect, section 3 of the Foreign Awards Act so to say combines in its own ambit both sections 33 and 34 of the Arbitration Act; in other words, questions regarding the existence, validity or effect (scope) of the arbitration agreement which can be decided under section 33 of the Arbitration Act are required to be decided under section 3 of the Foreign Awards Act be fore a stay of legal proceedings contemplated therein could be granted and the right to have legal proceedings stayed contained in section 34 of the Arbitration Act is also to be found in the same section 3. Further the Foreign Awards Act has also taken cognizance of the possibility that there may not be a Section 3 petition at all the matter being directly proceeded before the arbitrators and the possibility of the arbitrators giving a decision on an issue not within their competence or jurisdiction and in such cases section 7 contains a safeguard which prevents any such award from being made enforceable. Such being the scheme under the Foreign Awards Act the decisions of the Indian Courts on similar or

analogous provisions contained in the Arbitration Act would not be of any help to decide questions arising under the Foreign Awards Act. [495B-H; 496A-C]

Balabux Agarwalla v. Shree Luchminarain Manufacturing Co. ILR 1948 Calcutta page 265; Gaya Electric Supply Co. v. State of Bihar, [1953] SCR 572 at 579-580 held in applicable.

1.6 Conditions (3) and (6) which are inter related and in substance bear upon the same aspects and also satisfied since, firstly, the language of the Arbitration Clause is wide enough to embrace the issue of arbitrability of the claims and secondly, the phrase in section 3 of the Foreign Awards Act, namely. in respect of any matter agreed to be referred to the arbitration" cannot be given a narrow construction, because (a) there is nothing in the section warranting the same. What matters are agreed to be referred to arbitration will depend upon what language is employed by the parties to the arbitration agreement and there is nothing in law or equity which prevents the parties from referring even the questions of existence, validity or effect (scope) of the arbitration agreement itself to the arbitrators (in fact; Lord Porters' observations in Heymen v. Darwins Ltd. and DAs J's view in Balabux Aggarwala's case show that the parties can do it), and (b) the scheme of sections 3 and 7 of the Foreign Awards Act, clearly suggests that the relevant phrase would include even questions of existence, validity and effect (scope) of the arbitration agreement.

F] [496H;497A-

Shiva Jute Bailing Ltd. v. Hindley Co, [1960] 1 SCR 509, Khardah Company Ltd. v. Raymon and Co. (India) Private Ltd., [1963] 3 SCR 183

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Waverly Jute Mills Co. v. Raymonand Co., [1963] 3 SCR 209; M/s. R.N. Ganekar and Co. v. Hindustan Wires Ltd. AIR 1974 SC 203=[1974]1 SCC 309 at 313-314 distinguished and held in applicable.

2.1 Apart from the fact that the relevant rules of I.C.C. (particularly Rules 8.3 and 8.4) in terms confer jurisdiction upon the Arbitrations to decide questions as to the existence or validity of the Arbitration agreement contained in the commercial contract, in the instant case, since the parties to the underlying commercial contract have used the expressions "arising out of" or "related to this contract" in the Arbitration Clause XVII contained in the contract, the parties clearly intended to refer the issue pertaining to the effect (scope) of the Arbitration Agreement to the Court of Arbitration of International Chamber of Commerce, in other words the issue about the arbitrability of the three claims under reference has been referred. [465E-F; 471G-H; 472A]

2.2 Four propositions emerge very clearly from the authorities decided by the Indian Courts; [470F]

(a) Whether a given dispute inclusive of the arbitrator's jurisdiction comes within the scope or purview of an arbitration clause or not primarily depends upon the terms of the clause itself; it is a question of what the parties intend to provide and what language they employ; [470G-H]

(b) Expressions such as "arising out of" or "in respect of" or "in connection with" or "in relation to" or "inconsequence of" or "concerning" or "relating to" the contract are of the widest amplitude and content and include even questions as to the existence, validity and effect (scope) of the arbitration agreement; [471A-B]

(c) Ordinarily as a rule an arbitrator cannot clothe himself with power to decide the questions of his own jurisdiction (and it will be for the Court to decide those questions) but there is nothing to prevent the parties from investing him with power to decide those questions, as for instance, by a collateral or separate agreement which will be effective and operative; [471C]

(d) If, however, the arbitration clause, so widely worded as to include within its scope questions of its existence, validity and effect (scope). is contained in the underlying commercial contract then decided cases have made a distinction between questions as to the existence and or validity of the agreement on the one hand and its effect (scope) on the other and have held that in the case of former those questions cannot be decided by the arbitrator, as by sheer logic the arbitration clause must fall along with underlying commercial contract which is either non-existent or illegal while in the case of the latter it will ordinarily be for the arbitrator to decide the effect or scope of the arbitration agreement, i.e to decide the issue of arbitrability of the claim preferred before him. [471D-F] 444

Government of Gibralter v. Kenney and Anr. [1956] 3 All E. R. 22; Heyman v. Darwins Ltd, [1942] AC 356; Wilesford v. Watson, [1873] L R. 8 Ch. Appeals 473 quoted with approval.

Dhanrajmal Gobindram v. Shamji Kalidas and Co., [1961] 3 SCR 1020; Khardah Company Ltd. v. Raymon and Co. (India) Private Limited, [1963] 3 SCR 183; Jawahar Lal Burman v. Union of India, [1962] 3 SCR 769; Waverly Jute Mills Co. v. Raymon and Co. [1963] 3 SCR 209; Balabux Agarwalla v. Sree Luchminarain Manufacturing Co., ILR [1948] 1 Cal. 265 referred to.

2.3 All the three claims referred by G.E.C. to the Court of Arbitration of I.C.C. do "arise out of" and are "related to" the commercial contract (in fact the first two claims arise "under the contract") and squarely fall within the widely worded arbitration clause being Art. XVII contained in the commercial contract. The third claim for compensatory damages is directly, closely and inextricably connected with the terms and conditions of the contract the payments to be made thereunder and the breaches thereof and

since for adjudication thereof recourse to the contract would be necessary it is a claim "arising out of" and in any event "related to the contract". The Arbitration Clause embraces even the question of its effect (scope) that is to say it embraces the issue of the arbitrability of the three issues.

[488D-E, 489A-B]

2.4 The contract does contain the obligation to pay future interests on the unpaid purchase price from June 30, 1967 onwards till payment and the two claims of GEC for Unpaid Regular Interest and Delinquent Interest have been correctly preferred before the Court of Arbitration of ICC as arising not merely "out of" but "under the contract". [478D-E]

A combined reading of the provisions in sub-clause a, b,c, of clause 3 of Article-III and XIV-B of the contract (IGE-9584) clearly shows that the promissory notes are not the sole and exclusive repository of GEC's right to claim and receive further interest on unpaid price after June 30, 1967 but that the contract itself provides for the obligation to pay such interest after that date till payment. [476C-D, E-G]

Admittedly, interest on the purchase price at the agreed rate upto June 30, 1967 was capitalised and included in the principal amount of each of the instalments represented by the concerned promissory note as mentioned in the schedule of payments given in Article III-A, 3(b) of the Contract. The form of the promissory note attached as Exhibit 'B' to the contract as also the promissory notes that were actually executed clearly contain a recital that Renusagar "promises to pay to GEC interest thereon (i.e. on the capitalised principal) from June 30,1967 semi-annually at the rate of 6.5 per annum on the last date of June & December in each year until paid. The recital in each of the Promissory Note bas to be in terms of the provision in Article III-A 3 (c) of the commercial contract itself. Further Article XIV-B clearly shows that the parties to the contract were contemplating to obtain from the Government of India Income Tax exemption on the interest income which GEC was going to receive from Renusagar under the contract and the provision is that the "interest income" on which tax exemption was being

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sought, is said to include capitalised interest and interest thereon that is to say interest on the amounts of the promissory notes (which included capitalised interest), which obviously means further interest on outstanding principal balance under the notes from June 30, 1967 till payment.

[475F-H, 476A, 477A-F]

2.5 The contention that if Renusagar had failed to execute promissory notes as required under the contract, GEC would not have become entitled to receive or claim interest

after June 30, 1967 but would have had only a right to call upon Renusagar to execute such pro-notes and to claim damages for failure to fulfil contractual obligations cannot be accepted. The question is not what rights GEC would have had on Renusagar's failure to execute that promissory notes as required but the question is whit the contract provides for. Sub-clause (c) of clause 3 of Article III-A provides for not merely the execution of promissory notes but that the promissory notes would also bear interest after June 30, 1967. Further the very fact that the failure of Renusagar to execute promissory notes of course as required by the contract would have conferred a right of GEC to call upon Renusagar to execute such notes also shows that the obligation to pay interest after June 30, 1967 till payment has been provided for by the contract. [476D-H]

Commissioner of Income Tax v. M/s. Ogale Glass Works Ltd, AIR (1954) SC 429=[1955] 1 SCR 185; H.P. Gupta v. Hira Lal, [1970] 3 SCR 788; Bihari-Diwan Singh v. Jaffe & Sons, AIR 1922 Lahore 353; Dhiraj Lal v. Sir Jacob Behrens & Sons, AIR 1933 Allahabad 74; M/s. Vasavani Navji v. KPC Spinners, AIR 1983 Madras 31; Ghewarchand v. Spinnerei, Baillng Ltd., AIR 1950 Calcutta 568; NOVA (Jersey) Knit Ltd., v. Spinnerei, [1977] 2 All England Report 463; Monro v. Bognor Urban District Council, [1914-15] Reprint All England Report 523 referred to.

2.6 Neither the fact that the bank guarantee endorsed on each promissory note is restricted only to the payment of principal and interest on the note as per its terms and does not extend to or cover any residuary payment obligation contained in the contract, dehors the promissory note nor the fact that GEC has filed a Suit No. 786 of 1982 against UCO Bank in the Calcutta High Court to recover the million dollars for the interest as being due under the promissory notes read with guarantee, lead to an inference that the cause of action arose only out of pro-notes. Since the Bank guarantee is in connection with and endorsed on the promissory notes it would ordinarily refer to the obligation arising there under and not to any obligation arising under any other document and the question whether the contract contains such obligation to pay future interest must depend upon its contents and not upon what is not to be found in the bank guarantee. Again the suit against the UCO Bank is necessarily to be on the pro-notes read with the guarantee, the contract not being a document to which UCO Bank is a party. [477F-H, 478A-B]

Similarly, it is the substance of GEC's pleading (notice of intention to arbitrate) that matters and not the description of the claims. Though at one place in the Notice of Intention to arbitrate the two claims are (in fact only the first claim of 2.1 million U.S. dollars is) said to be "on the promissory notes", yet at the commencement of that notice the subject matter thereof is

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aptly stated as "Reg: Interest under the contract No. IGI-9584 between GEC and Renusagar" and the substance of the entire pleading shows how the first two claims have arisen under the contract and how under the terms thereof and in the correspondence their amounts got adjusted and quantified at certain figures and that reference the contract is not by way of any antecedent or historical fact. Viewed from any angle the two claims cannot be said to arise under the Promissory Notes. [478B-E]

2.7 Whether a negotiable instrument taken on account of debt operates as absolute discharge of the debt or not is always a question of intention of the parties to the commercial contract. Here, the promissory notes, on the terms of the Contract cannot be regarded as amounting to payment in discharge of the obligation arising under the Contract on the ground that since it is one of the modes of payment indicated in the Contract the execution of the notes should be held to be payments by way of discharging the obligation under the contract, because there is yet one mode of payment indicated the contract namely the opening of a Letter of Credit and the mere fact of the Letter of Credit having been opened by Renusagar in a bank in New york valid for 18 months will have to be regarded as actual payment which is hardly arguable. Further, a Bill or a promissory note can never go in the discharge of a debt unless it is a part of a contract that it shall be so.[478F-H,481E-F]

Commissioner of Income Tax v. Kameshwar Singh of Darbhanga, AIR [1933] P.C. 108; Keshav Mills Co. Ltd. v. Commissioner of Income Tax, AIR [1950] Bombay 166, quoted with approval.

Commissioner of Income Tax v. M/s. Ogale Glass Works Ltd., AIR [1954] SC 429=1955 (1) SCR 185; H.P. Gupta v. Hira Lal [1970] 3 SCR 788 discussed and distinguished.

2.8 The terms of the contract, far from showing that these were payments in discharge of the original obligation clearly indicate that the parties had intended that these were to operate as conditional payments. [481F-G]

If Article III of the contract which deals with the topic of payment of price for the sale of goods and services is carefully analysed, the following factors emerge very clearly; (a) that the pro-notes area not expressed to be payments; in fact it is in terms stated that the "total contract purchase price shall be paid by the purchaser in lawful money of the USA" (Article III-A) and promissory notes are not "lawful money of USA"; (b) that because the Contract so provides even the pro-notes also recite that the principal and interest there-under are "payable in lawful money of the USA; (c) that Article III-A (3) which deals with pro-notes provides for payment of the remaining 90% of the price "in accordance with the following Schedule of Payments" and expressly states that "the obligation to make such payments is to be evidenced by four series of purchaser's unconditional negotiable promissory notes" which

clearly shows that the pro-notes are not payments but are intended merely to be the evidence of the obligation to pay the price; (d) that though stated to be "unconditional and negotiable" (perhaps so between the drawer and subsequent assigness in case of negotiation), as between the seller and the purchaser these have been made
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subject to several conditions such as-(i) the amounts thereof were payable only on the assumption that deliveries of items of equipment were completed within 15 months of Contract Effective Date and interest at the rate of 6.5% was to become 6% on receipt of income Tax exemption (Art. III-A (3) (b) (ii) these were to lie in Escrow Agreements to be released to the seller synchronizing with the stated progress of supply of goods according to certain formulate (Art. III-D), (iii) these were to be replaced by fresh Notes depending on receipt of income-tax exemption (Art. III-A (3) (f) or price modification (Art. III.D); (iv) each one contains a default clause saying "upon default in the prompt and full payment of the principal or of the interest on this Note when due, all of the notes in each and every series, together with interest to the date of payment, shall immediately become due and be payable at the option and demand of the holder thereof". [481G-H; 482A-H]

These factors and circumstances and particularly the fact that these notes were as between the seller and the purchaser subject to several conditions leading to variation and adjustment and replacement and the default clause contained in each, clearly indicate that these were not intended to constitute independent or separate contracts by themselves but that they were a part and parcel of one integrated transaction embodied in the contract and that the promissory notes were and are meant to be governed at all times by various other terms of the Contract and could be modified and substituted under given conditions as set out in the Contract. Therefore, a dispute of non-payment of interest on the instalments-whether regular of delinquent-is a dispute "relating to the Contract," In fact, both the claims-2.1 million U.S. dollars and U.S. $ 7,84,151.84-arise "under the contract" and have been preferred by GEC before the Court of Arbitration of I.C.C. expressly on that basis and not under the promissory notes. [483A.E]

[The Court in view of the above, adopted "Non-liquet" on the submission for the appellant based on the so-called factors of unconditional nature and negotiability of the promissory notes as destroying the arbitrability of the claims thereunder and also the alternative submission for G.E.C. that the two claims would still fall within the wide expressions occurring in the contract even on the assumption that the promissory notes are severable from the Contract, that the obligation arising thereunder is different from the one under the Contract and that these promissory notes are in payment of the obligation to pay the price under the

contract] [483E-G]

2.9 As regards the third claim of compensatory damages, the mere fact that Renusagar is being saddled with this liability as tort-feaser, a stake-holder and/or a constructive trustee, by itself will not justify a conclusion that the same is not covered by the arbitration clause because the question is not whether the claim lies in tort but the question is whether even though it has lain in tort it "arises out of" or is "related to" the Contract, that is to say, whether it arises out of the terms of the Contract or is consequential upon any breach thereof. [483G-H; 484A]

The third claim is based on and is consequential upon and by way of corollary to the non-payment of the two detained amounts by Renusagar to GEC in breach of the terms of the contract. Therefore, before adjudicating upon this claim the adjudicating authority will have first to adjudicate

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upon the first two claims preferred by G.E.C. and only if it is found that GEC is entitled to receive the first two amounts which ought to have been paid by the appellant under the terms of the contract but which Renusagar had failed to pay that this third claim could, if at all be allowed to GEC. In the real sense, therefore, this third claim is directly, closely and inextricably connected with the terms and conditions of the Contract, the payments to be made thereunder and the breaches thereof and as such will have to be regarded as a claim "arising out of" or "related to" the contract. [484A-C]

Woolf v. Collis Removal Service, [1947] 2 All. E. R. 260; Astro Vencedor Compania Naviera SA of Panama v. Mabanaft G M b. h, [1971] 2 All. E. R. 130] Govt. of Gibralter v. Kenney & Anr. [1956] 3 All. E. R. 22 quoted with approval.

Alliance Jute Mills Co. Ltd. v. Lal Chand Dharanchand and Another, AIR 1978 Cal. 19, Union of India v. Salweeh Timber Construction (India, & Ors. [1969] 2 SCR 224. Ruby General Insurance Co. Ltd. v. Peary Lal Kumar [1952] SCR 501, referred to.

Monro v. Bognor Urban District Council [1914-15] Reprint All. R. 523; Ghewarchand v. Shiva Jute Bailing Ltd, AIR 1950 Cal. 568 distinguished.

The question as to whether a claim based on tort is a claim de hors the contract which contains the arbitration clause or is directly or inextricably connected with the contract has to be decided on the facts of each case and the language used in the arbitration clause. [488G-H]

3.1 The contention that even assuming that arbitrability of the three claims falls within the wide ambit of the arbitration clause and that therefore Renusagar's suit is in respect of a matter agreed to be referred to the arbitration within the meaning of section 3,

in law, that is, under the law of Forum (being the Indian law, in the instant case) the issue of arbitrability of claim cannot be finally determined by the arbitrators but must rest with the court and, therefore Renusagar's suit cannot be stayed under section 3, cannot be accepted, in the face of the scheme envisaged in the Foreign Awards Act [498C-D]

3.2 The scheme that emerges on a combined reading of sections 3 and 7 of the Foreign Awards Act clearly contemplates that questions of existence, validity or effect (scope) of the arbitration agreement itself, in cases where such agreement itself, in cases where such agreement wide enough to include within its ambit such questions, may be decided by the arbitrators initially but their determination is subject to the decision of the court and such decision of the court can be had either before the arbitration proceedings commence or during their pendency, if the matter is decided in a section-3 petition or can be had under section 7 after the award is made and filed in the Court and is sought to be enforced by a party thereto. All that the condition (3) of section 3 requires is that the legal proceedings must be in respect of

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a matter "agreed to be referred to the arbitration" and there is no warrant to add further words namely, "agreed to be referred to the arbitration for final determination." [500H; 501A;D]

3.3 There is nothing in the general law of arbitration either English or Indian which prevents the arbitrators or on umpire from deciding questions of their own jurisdiction provisionally or tentatively and to proceed to make their awards on that basis, though their own jurisdiction would be subject to the final determination by the court and if the court takes a contrary view their award will not be given effectto and this is exactly the scheme of the Foreign Awards Act. [502E-F]

Attorney General for Manitoba v. Kelly and Ors., [1922] 1 AC 268 at 275; Dalmia Dairy Industries Ltd v. National Bank of Pakistan [1978] 2 Lioyed LR 223 at page 292-293; Becker Auto Radio's case [1978] 585 Federal 2nd series page 39; R. Prince and Co. v. Governor-General-in Council, AIR 1955 p. 240 at page 242; Municipal Board v. Eastern U.P. Electricity Supply Co. Ltd. and Ors. AIR 1958 see 506 at page 510; M/s. Jagan Nath Phool Chand v. Union of India and Ors AIR 1982 Delhi 93 at page 97 and 98; Vallabh Pitti v. Narsinpdas, 65 Bombay L.R. 20 held in applicable.

3.4. Further, the statement that many national arbitration laws allow the arbitrator to give a provisional ruling on his competence in order not to delay the arbitration and to alleviate dilatory tactics by obstructing respondents is borne out in regard to the general law of arbitration both English and Indian-by several decisions. Similarly, there is no difference between English law and

Indian law on the point that an arbitration agreement which empowers an arbitrator to decide the question of its existence, validity or effect (scope) is neither invalid nor void. [502G-H; 504 A]

Dalmia Dairy Industries Ltd. v. National Bank of Pakistan [1978] 2 Lloyed L.R. 223 at page 292, 293; Brown v. Oesterreichischer Walbesitzer R. Gmbh [1954] 1 QB P. 8; Lunada Exportadora and Ors. v. Tamari and Sons and Ors. [1967] 2 Llyod's Rep. 353; 364; Vallabh Pitti v. Narsingdas, 65 Bombay. L.R. 20; Pannallal Sagoremull v. Fatey Chand Muralidhar, [1951] 88 CLJ 34; Fertilizer Corporation of India v. Chemical Construction Corporation 75 Bombay Law Reporter 335 referred to.

3.5. However, in cases where the arbitration clause contained in the underlying commercial Contract is so widely worded as to include within its scope the questions cases have made a distinction between questions as to the its existence or validity of the agreement on the one hand and its effect (scope) on the other and have held that in the case of the former those questions can not be decided by the arbitrators, as by sheer logic the arbitration clause must fall along with the underlying commercial contract which is either non-existent or illegal, while in the case of the latter it will ordinarily be for the arbitrators to decide the effect (scope) of the arbitration agreement, for the reasons that (a) conceptually challenge to the existence of validity of the arbitration agreement con-
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tained in an underlaying commercial contract is fundamentally different from an inquiry into the scope and effect of such agreement in as much as the former goes to the root of the arbitration agreement whereas the latter presuppose that the arbitration agreement exists in fact and in law and the inquiry is then undertaken as to its true scope and effect; (b) whenever the question of arbitrators' jurisdiction depended upon the scope and effect of the agreement, courts have readily directed the parties to go before the arbitrators. [504H; 505A-B; D-F]

Heyman v. Darwin Ltd.[1942] AC 356; Jawahar Lal Burman v. Union of India [1962] 3 SCR 769; Water Supply Service India (P) Ltd. v. The Union of India and Ors., AIR 1971 SC 2083 at 2085; Willesford v. Watson [1873] L.R. 8 Ch. App. 473; referred to.

3.6 A stay of the suit either under section 3 of the Foreign Awards Act or under section 34 of the Arbitration Act, 1940 may have the effect of finally disposing of the suit for all practical purpose. But that is no reason why the relief of stay should be refused by the Court if the concerned legal provision requires the Court to do so. Here, section 3 itself indicates that the proper stage at which the Court has to be fully satisfied about these conditions is before granting the relief of stay in a section 3 petition and there is no question of the court getting

satisfied about these conditions on any prima facie view or a pro tanto finding thereon Parties have to put their entire material before the Court on these issues (which ever may be raised) and the Court has to record its finding thereon after considering such material. [507D-G]

Though section 34 of the Arbitration Act, 1940 confers a discretion upon the Court in the matter of granting stay of legal proceedings where there is an arbitration agreement, before granting the stay the court has to satisfy itself that arbitration agreement exists factually and legally and that the disputes between the parties are in regard to the matters agreed to be referred to arbitration (these aspects fall within the phrase 'if satisfied that there is no reason why the matter should not be referred,' occurring therein). The Court under section 34 must finally decide these issues before granting stay. [507H; 508A-B]

Where on an application made under section 34 of the Arbitration Act for stay of a suit, an issue is raised as to the formation, existence or validity of the contract containing the arbitration clause, the Court is not bound to refuse a stay but may in its discretion, on the application for stay, decide the issue as to the existence or validity of the arbitration agreement even though it may involve incidentally a decision as to the validity or existence of the parent contract. If this is the position under section 34 of the Arbitration Act which confers discretionary power upon the court, a fortiori the Court acting under section 3 of the Foreign Awards Act must decide such issues at that stage when the grant of stay is obligatory. [1975] 2 All. E.R. 549; Anderson Wright Ltd. v. Moran and Co. [1955] 1 SCR 862; Khushiram v. Hantumal [1948] 53 CWN 505 at page 518 referred to. [510B-C]

In the instant case, the issue pertained to the arbitrability of the three claims under the Arbitration clause in the contract and depended

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upon the proper construction thereof in the light of the conduct of the parties an surrounding circumstances and no prejudice was caused to any of the parties as both Renusagar's application for injunction and GEC's stay petition under section 3 were heard together and parties did put before the court-Trial court, the Appeal court and even Supreme Court-the entire material such as each wanted to rely upon and sought a decision on the concerned issue and therefore, the prayer for injunction restraining arbitration sought by Renusagar was rightly refused. The triable issue raised in the suit having been found upon against Renusagar no question of balance of convenience survives. [510E-F]

(The Court directed that the decision of issue of arbitrability of three claims will have to be regarded as final, conclusive and binding and that issue would not arise before the Court of arbitration of I.C.C. and even if it is raised it would be purely academic.) [510G-H]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 2434-35 of 1984 Appeals by Special leave from the Judgment and Order dated the 19th to 21st day of October, 1983 of the Bombay High Court in Appeal Nos. 404 & 405 of 1983.

F.S. Nariman, S.S. Ray, I.M.Chagla, P.L. Dubey, A.P.Chinoy, E.B. Desai, N.P. Bharucha, N.R. Khaitan, Anil Kumar Sharma & Praveen Kumar for the appellants.

N.A. Palkhivala, K.S. Cooper, S.F. Dastur & Dr. Y.S. Chitale, S.S. Shroff, S.A. Shroff & Mrs. P.S. Shroff for Respondents in CA. No. 1488 of 1984.

K.S. Cooper, J.J. Bhatt, Amit Desai, S.A. Shroff and Mrs. P.S. Shroff for the Respondent in CA. No. 1489 of 1984.

The Judgment of the Court was delivered by TULZAPURKAR, J. These two appeals raise the following two questions for our determination:

> 1. Whether under sec. 3 of the Foreign Awards (Recognition and Enforcement) Act, 1961, having regard to its scope, a suit in the nature of a petition under sec. 33 of the Arbitration Act, 1940 could be stayed ? If, so whether the Ist Respondents have made out a case for staying the Appellants' suit No. 832 of 1982 ?
>
> 2. Whether the three claims referred by the Ist Respondents to the Court of Arbitration of the 2nd Respondents are beyond the scope of the Arbitration Clause being Article XVII contained in the Contract dated August 24, 1964 or they are "arising out of or related to" the said Contract ?

The facts giving rise to the aforesaid two questions may be stated. The Appellants, Renusagar Power Company Limited (for short 'Renusagar') are a company incorporated under the Companies Act, 1956 having their Registered Office at Renukoot, District Mirzapur in Uttar Pradesh. The Ist Respondents, General Electric Company (for short 'G.E.C.') are a company incorporated under the laws of the State of New York and carry on their business inter alia at 570, Lexington Avenue, New York, U.S.A. The 2nd Respondents are the International, Chamber of Commerce (Court of Arbitration) (for short 'I.C.C.') having their registered office in Paris, France.

By a Contract in writing dated August 24, 1964 (bearing Ref. IGE. 9584) G.E.C. agreed' to sell to Renusagar equipment for a thermal electric generating plant to be erected at Renukoot on the terms and conditions set out therein. The work to be performed under the contract included the supply of equipment, spare-parts and services in accordance with the 'Proposed Specification's dated November 12, 1963 and contained in G.E.C.'s letter dated October 14, 1963 together with the attached Minutes of the Meeting of October 10, 1963. The total purchase price' called the 'contract

Base Price, for all the work was $ 13,195,000 payable by Renusagar in lawful currency of the U.S.A. in the manner stipulated in the Contract. It appears that the parties intended that delivery of the equipment and spare-parts etc. would be completed within 15 months of the Contract Effective Date (which was December 31, 1964), i.e. up to March 30, 1966 and that the erection of the plant would be completed within 16th to 30th Month (i.e. from April 1, 1966 to June 30, 1967) and that the plant would be fully operational by the end of 30th Month from the Contract Effective Date. The parties therefore, agreed that substantial payment of the purchase price by Renusagar should commence when the plant became operational, i.e. by June 30, 1967; it was also agreed that no interest would be payable by Renusagar during the delivery period, that interest shall be paid during the erection period (i.e. 16th to 30th Month) and thereafter till payment but the interest during the erection period would be capitalised and added on to the principal. Accordingly, Art. III of the Contract stipulated that initially 10% of the total Contract Base price (the amount coming to U.S. $ 1,319,500) should be paid either in cash or by means of a Letter of Credit within 30 days of the Contract Effective Date and that the balance of 90% of the purchase price plus interest at 6-1/2% per annum from 16th to 30th Month aggregating to U.S. $ 12,776,058,75 ($ 11,875,500. for principal plus $ 900,558,75 being the capitalised interest at the aforesaid rate for the aforesaid period) should be paid in accordance with the schedule of payments set out therein. The schedule for the payment of the said balance of 90% of the purchase price provided for payment to be made in sixteen six-monthly instalments of U.S. $ 798,503.68 each, the first of such instalments being payable on 30-6-1967, the second on 31-12-1967, the third on 30-6-1968, the fourth on 31-12-1968 and so on with the last instalment falling due on 31-12-1974. The obligation to make such payment was to be evidenced by 4-series (A-B-C-D) of 16 unconditional negotiable promissory notes to be executed by Renusagar. It was further agreed that in case G.E.C. received an exemption from the Government of India from payment of Income-Tax on interest receivable by it from Renusagar then the interest for that portion of the period shall be computed at 6% instead of 6.5% per annum and that the concerned promissory notes would be replaced or substituted by fresh promissory notes for amounts reflecting the adjustment in payment of interest necessitated by the grant of tax exemption. The Contract further provided under Art. XIV-B that should G.E.C.'s application for exemption be denied Renusagar may withhold the Indian Income-tax applicable to any payments of interest but shall furnish G.E.C with tax receipts on all with held amounts paid to the Government of India. Such provision was obviously made with a view to enable G.E.C. to obtain corresponding credit for the sum in their U.S. Tax Assessment. The Contract also required Renusagar to furnish guarantee of the United Commercial Bank for payment of the full amount of pro-

missory notes: the form of the promissory notes and the Deed of Guarantee were annexed to the Contract. Under Art. XIX-A it was provided that the rights and obligations of the parties would be governed in all respects by the laws of the State of New York, U.S.A. The Contract contained an Arbitration Clause in Art. XVII the relevant portion whereof runs thus:

> "Any disagreement arising out or of related to this contract which the parties are unable to resolve by sincere negotiation shall be finally settled in accordance with the Arbitration Rules of the International Chamber of Commerce. As provided in the said Rules, each party shall appoint one Arbitrator. and the Court of Arbitration of the International Chamber of Commerce shall appoint the third Arbitrator.....

> Arbitration proceedings shall be conducted at such time and place as the Court of Arbitration shall decide. Judgment upon an award may be entered in any court of competent jurisdiction."

Pursuant of the said Contract Renusagar made the initial payment 10% of the Contract Base price and also issued in all 64 promissory notes (16 in each of the four series) all dated 31-12-1964 but with due dates of payment synchronizing with the dates indicated in the Schedule of payments and forwarded the same to the Escrow Agent under the Escrow Arrangement mentioned in Art.III-B whereunder the Notes were to be released to G.E.C. in numerical sequence and in amounts determined by the Escrow Agents by applying certain (rather complicated) formulae specified in sub- clauses (a) to (e) of Clause-B. Renusagar also furnished a guarantee executed by the UCO Bank irrevocably guaranteeing to G.E.C. and to any subsequent holder in due course of the Notes the full and prompt payment of the principal and interest on the Notes. Subsequently by an agreement recorded in G.E.C.'s letter dt. June 11, 1965 and as approved by the Central Government the said 1964-Contract (IGE-9584) was extended to include the supply of unfabricated structural steel to Renusagar for approximately U.S. $ 300,000 on the same conditions in regard to payment as contained in the original 1964 Contract. It was agreed that Renusagar would issue a fifth series (E-series) of 16 promissory notes bearing interest at 6.5% per annum evidencing 90% of the price of the structural steel; the instalments under the 5th series were payable on the same dates as the corres-

ponding promissory notes of the earlier four series. It was expressly clarified in the letter of June 11. 1965 that except for the modifications made by it all other terms and conditions of the Contract IGE 9584 shall apply; in other words the Arbitration Clause of the 1964 Contract became applicable to the said supply of structural steel.

During the implementation of the Contract two events occurred giving rise to G.E.C.'s three claims against Renusagar that are sought to be referred to arbitration of I.C.C namely. (1) grant of tax exemption by the Government of India to G.E.C. in respect of interest on purchase price receivable by it from Renusagar and the revocation thereof and (2) re-scheduling of dates of payment of purchase price agreed to by the parties but not approved by the Reserve Bank and the Government of India.

As regards the former, it appears that by two orders dated September 3, 1965 and June 7, 1967 passed under s. 10(15) (iv) (c) of the Indian Income Tax Act 1961 the Government of India granted exemption to G.E.C. from payment of Indian income-tax on the interest receivable by it from Renusagar with the result that G.E.C. became entitled to receive the interest on the unpaid purchase price at the rate of 6% tax free instead at 6.5% subject to tax. However, by its subsequent order dated September 11, 1969, the Government of India purported to retrospectively cancel or revoke the said tax exemption, whereupon in or about May 1970 Renusagar filed a writ petition (Civil writ No. 179 of 1970) in the Delhi High Court challenging the said cancellation or revocation of tax exemption and further sought an injunction restraining the Government of India from implementing the said cancellation or revocation. On May 18, 1970 Renusagar obtained an order from the Delhi High Court that on its furnishing security for Rs. four lakhs the cancellation or

revocation of exemption shall be stayed and the Government of India and its officers were restrained by an interim injunction from enforcing or implementing the impugned order dated September 11, 1969; in other words on furnishing security of Rs. four lakhs (which Renusagar did) the tax exemption continued with the result that there was no necessity to deduct any amount from interest payable to G.E.C. nor to deposit the same as tax with the Indian Government. Even so, Renusagar by its letter dated June 30, 1970 informed G.E.C. that it would continue to calculate interest at 6.5% and make payment to G.E.C. after withholding and keeping in reserve the tax liability out of the amount due to it. The amount so withheld came to 73% of interest payable to G.E.C. on the instalments of purchase price after 1970 and Renusagar only made payment of interest to the tune of 7% to G.E.C. Surprisingly, the interest at 73% which represented the tax deducted at source was not even made over by Renusagar to the Indian Government which resulted in depriving G.E.C. of the benefit of getting the corresponding credit in their U. S. Tax Assessments. Ultimately the Delhi High Court by its judgment and order dated November 17, 1980 allowed Renusagar's writ petition and quashed the impugned order dt. Sept. 11, 1969 revoking the tax exemption. In the correspondence that ensued Renusagar not merely acknowledged that the amount so withheld and credited to reserve was U.S. $ 24,12, 680.20 (calculated on the basis of 6.5% subject to tax) (vide letter dt. 25.3.76 together with Statement attached) but also sought from the Commissioner of Income Tax a no- objection certificate and from the Reserve Bank its approval (vide Two Letters both dt. 3-6-1981) for making the remittance to G.E.C. of U.S. $ 21,30,785.52 (calculated on 6% tax free basis to which G.E.C. became entitled as a result of Delhi High Court's decision). It is this sum of 2.1 Million Dollars (U.S) being the Unpaid Regular Interest, wrongly deducted and wrongly withheld and kept with themselves by Renusagar from 1970 onwards which is the first claim referred by G.E.C. to the arbitration of I.C.C.

As regards the latter it may be stated that on account of the alleged delays in the shipment and erection schedule Renusagar requested G.E.C to grant deferment in the payment schedule and as a result of the negotiations that ensued, Renusagar and G.E.C., inter alia, purported to amend the dates of payment of the purchase price evidenced by the promissory notes and certain decisions in that be half were recorded in a Memorandum dated December 30, 1966 and letters dated January 5, 1967, October 4, 1967 and October 9, 1967; this purported re-scheduling of the dates of payment of the purchase price as arrived at by the aforesaid documents was sought to be reflected by the parties in the said Contract I.G.E. 9584 by executing a formal Amendment dated October 1, 1968 thereto. This Amendment expressly provided that all other terms and conditions of the original contract shall remain in full force and effect. Renusagar executed fresh promissory notes as per the Amendment dt. Oct. 1, 1968 as also having regard to tax exemption granted as above and sent them to the Escrow Agents. The October 1968 Amendment was, however, subject to the approval of the Reserve Bank and the Central Government. It appears that in December 1968 the parties once again attempted to re-schedule the payment of instalments of purchase price. In July 1969 Renusagar sought the Central Government's approval to the re-scheduling of the dates of payment as embodied in October 1968 Amendment as also in the Memorandum of the Meeting held in December 1968 but by letters dated August 1, 1969 and August 4, 1969 the Central Government declined to approve the re-scheduling of the dates of payment on the ground that it would result in larger out-flow of foreign exchange and advised Renusagar to effect payments as per the original schedule including instalments which had since fallen due. The result was that the original schedule of payment

remained operative and there was delay on the part of the Renusagar to make payment of certain instalments on due dates. Such delays occurred in respect of four instalments, namely, instalments No.1 evidenced by promissory note No.1 was payable on 30.6.1967 but was paid (in instalments) by July 1970; instalment No.2 evidenced by promissory note No.2 was payable on 31.12.1967 but the same was paid (in instalments) by December 1972; instalment No.4 evidenced by promissory note No.4 was payable on 31.12.68 but was paid (in instalments) by December 1973; and instalment No. 5 represented by promissory note No. 5 was payable on 30.6.1969 but was, in fact, paid (in instalment) by February 1976. On account of the delays in the payment of instalments of purchase price together with interest Renusagar became liable to pay delinquent interest to G.E.C. In the correspondence on the subject Renusagar accepted the liability to pay such delinquent interest and made annual acknowledgements thereof. In its telex message dated March 25, 1976 Renusagar in terms acknowledged its liability to pay such delinquent interest amounting to U.S. $ 8,48,010 52 (calculated on the basis of 6.5% subject to tax) to G.E.C., which liability if calculated on 6% tax free basis, to which G.E.C. became entitled as a result of the Delhi High Court's decision, comes to US. $ 7,84,151.84. This liability for Delinquent Interest is the second claim referred by G.E.C to the arbitration of I.C.C.

The third claim for Compensatory Damages which G.E.C. has made against Renusagar and which is sought to be referred to arbitration arises out of non-payment of the aforesaid two claims of Unpaid Regular Interest and Delinquent Interest for over 12 years, the quantum being calculated by way of interest on those two amounts at the market rate of 18% per annum amounting to U.S. $ 4,160,534.88 up to 31 3.1982 (to be extended till date of actual payment). According to G.E.C. for a long period of 12 years Renu sagar has illegally and wrongfully retained these two funds with itself and has enjoyed the use thereof for its own private advantage has correspondingly totally deprived G.E.C. of their use for which Renusagar must compensate. G.E.C. has also asserted that such compensatory damages are due to it from Renusagar because Renu sagar must be regarded as stake-holder or constructive trustee of those funds from the various dates on which they became due and payable but Renusagar has managed to retain them with itself on one pretext or the other and under the common law jurisprudence shared equally by Indian and American law, restitution is payable by a stake-holder to the party ultimately determined to be rightful beneficiary and owner of the funds.

It may be stated that though in the correspondence indicated above Renusagar accepted its liability to pay the Unpaid Regular Interest (2.1 million U.S. Dollars) and the Delinquent Interest (U.S. $ 784, 151.84), by its letter dated September 21, 1981 Renusagar put forward certain counter-claims and in a statement attached to that letter enlisted about 6 or 7 matters giving rise to such counter-claims against G.E.C. By a notice of intention to arbitrate dated March 1, 1982, G.E.C. called upon Renusagar to remit the aforesaid three claims, failing which steps to refer the disputes to the Court of arbitration of I.C.C. in pursuance of Art. XVII of the Contract were threatened and this was followed by a letter dated March 2, 1982 addressed to the Secretariat, Court of Arbitration of I.C.C. containing a Request for Arbitration being undertaken by it seeking reliefs as set out in the notice to Renusagar. After I.C.C. took cognizance of the Request for Arbitration by G.E.C. it called upon Renusagar to nominate its Arbitrator, file its reply and remit certain sums towards the administrative expenses and arbitration fees.

On June 11, 1982, Renusagar filed suit No. 832/1982 in the Bombay High Court on its Original Side against G.E.C. and I.C.C. seeking a declaration that the claims referred to the arbitration of I.C.C. by G.E.C. were beyond the scope purview of the arbitration agreement contained in Art. XVII of Contract I.G.E. 9584 dated August 24, 1964 and that G.E.C. was not entitled to refer the same to the arbitration; a consequential prayer for injunction restraining G.E.C. and I.C.C. from proceeding further with the reference was also made and an injuction was also sought against I.C.C. restraining it from requiring Renusagar to make any deposit towards administrative expenses and arbitration fees. On the some day on a notice of Motion an ex-parte ad interim relief in the aforesaid terms was obtained by Renusagar. On August 11, 1982 G.E.C. filed Arbitration Petition No. 96 of 1982 under s. 3 of the Foreign Awards (Recognitation and Enforcement) Act, 1961 seeking stay of suit No. 832 of 1982 and all proceedings therein and a prayer for vacating the ad interim reliefs obtained by Renusagar was also made.

Both the matters, G.E.C's. stay petition under s. 3 and Renusagar, Notice of Motion for confirmation of ad interim reliefs were heard together and disposed of by Mr. Justice Pendse by a common judgment and order dated April 19-20, 1983. On a consideration of the rival contentions that were urged before him the learned Judge negatived Renusagar's contention that the Arbitration Clause in the original 1964 Contract could not be availed of by G.E.C. as a fresh agreement creating new rights and liabilities had come into existence by reason of Oct. 1968 Amendment which did not provide for arbitration on two grounds namely that the Oct. 1968 Amendment had kept alive all other terms and conditions of the 1964 Contract including Arbitration Clause and in any case the Oct. 1968 Amendment had fallen through for lack of Government's approval; he also took the view that though the first two claims sought to be referred to arbitration by G.E.C. were based on the promissory notes executed by Renusagar the issuance of the promissory notes towards the purchase price was provided under the Contract itself and these were not by way of any independent or separate contracts in discharge of the obligation to pay the purchase price under the contract and since the Arbitration Clause covered all disputes arising out of the Contract those claims fell within the Arbitration Clause; and as regards the third claim for compensatory damages he took the view that the liability to pay the same arose due to failure to carry out the terms and conditions of the Contract in regard to payment of purchase price and that even assuming that the said claim was one in tort it was directly and inextricably connected with the terms and conditions of the Contract and certainly " arose out of" the Contract or was " in relation to" the Contract and therefore could be entertained by the Arbitrators. As regards the prayer for stay of suit the learned Judge held that since all the ingredients of s. 3 of the Foreign Awards (Recognition and Enforcement) Act, 1961 had been satisfied it was obligatory upon the Court to stay the suit and G.E.C. was entitled to that relief. He therefore, allowed the Arbitration Petition 96/1982, granted the stay of suit and all the proceedings therein and vacated all the interim reliefs which were granted earlier by the ad interim order. Renusagar preferred two appeals being Civil Appeal Nos. 404-405 of 1983. At the hearing of the appeals Counsel for Renusagar raised four contention: firsts, according to him an Arbitrator had no jurisdiction to decide the limits of his own jurisdiction and since in the case of international arbitration the jurisdiction of the Arbitrator had to be decided according to the law of the Forum where the question is raised in the instant case being the Indian Law) the jurisdiction of the Arbitrator, according to that law, had to be decided by the Court and not by the Arbitral Tribunal; secondly, the dispute sought to be referred related substantially to the claim for interest and that

claim had to be (and was so stated in the Notice of intention to arbitrate) founded on the promissory notes which were independent contracts by themselves and therefore, the claim did not arise out of the suit Contract and hence could not be the subject of arbitration; thirdly the claim for compensatory interest was really a claim for damages arising out of tort and such a claim was in any case not covered by the suit Contract and fell outside the scope of the Arbitration Clause; and fourthly, in any event, Renusagar had made out a prima facie case by raising serious triable issues in the suit which should enable it to claim an injuction restraining the arbitration proceedings. Though G.E.C. had raised a contention that the question of the Arbitrator's jurisdiction had to be decided according to American Law counsel for G.E.C. made a concession that for the purposes of the appeals the Court should proceed on the basis that question was to be decided according to Indian Law. Proceeding on that basis the court of Appeal negatived all the contentions and ultimately confirmed the trial Judge's order whereby Renusagar's suit was stayed and the ad interim reliefs were vacated.

In support of these appeals preferred against the judgment and order of the Court of appeal dated October 19- 20-21, 1983 Counsel for Renusagar have basically raised two contentions: (1) that under s.3 of the Foreign Awards (Recognition and Enforcement) Act, 1961 (for short 'the Foreign Awards Act), having regard to its scope, a suit in the nature of a petition under s.33 of the Arbitration Act 1940. cannot be stayed and that no case has been made out by G.E.C. for staying Renusagar's suit No. 832/1982 which is of that nature and (2) that on merits the three claims referred by G.E C. to the Court of Arbitration of I.C.C. are beyond the scope/purview of the Arbitra-

tion Clause being Art. XVII contained in the Contract I.G.E. 9584 as these do not "arise out of" nor "relate to" the said Contract.

By way of elaborating the first contention Counsel pointed out that suit No. 832/1982 filed by Renusagar is merely for a declaration that the three claims sought to be referred to arbitration are beyond the scope and purview of the Arbitration Clause and no other relief on the merits of those claims is sought, that such a suit is really in the nature of a petition under s.33 of the Arbitration Act, 1940, inasmuch as it seeks to have the effect (scope) of the arbitration agreement determined, that such a suit can never be stayed under s.3 of the Foreign Awards Act and that, therefore, the petition under s.3 (which is really in the nature of s.34 application under the Arbitration Act, 1940) is totally misconceived and liable to be dismissed; Counsel further submitted that the suit filed by Renusagar is not "in respect of any matter agreed to be referred to arbitration" as required by s.3 and, therefore, the stay sought for by G.E.C. should be refused; Counsel further urged that the Court acting under s.3 (like the Court acting under s.34 of the Arbitration Act) being a Court of limited jurisdiction cannot determine the question of the existence, validity or effect of the arbitration agreement (which is the only issue to be tried in Ranusagar's suit) and it is for the Court trying the suit to decide the question raised in the suit and, therefore, a stay, if granted under s.3, would finally determine the suit or render it almost dead for all practical purposes and, therefore, no relief on the stay petition can be granted which will have such effect; Counsel finally submitted that the question raised in the suit relating to the effect (scope) of the arbitration agreement, which is the same as the question relating to the existence thereof, is such as is incapable of being finally determined by the Arbitrators and hence such a suit cannot be stayed under s.3 of the Foreign Awards Act. According

to Counsel the aforesaid submissions are founded on the well- settled position in law-English and Indian that questions or issues which pertain to the existence, validity or effect (scope) of an arbitration agreement contained in the underlying commercial Contract are matters which relate to the jurisdiction of the Arbitrator and are not within the competence of the Arbitrator however widely worded the Arbitration agreement may be but these have to be decided by the Court in an application under s.33 or in a suit which is of that nature as is the case here. On the other hand Counsel for G.E.C. contended that the schemes of the Foreign Awards Act and the Indian Arbitration Act 1940 are not identical, that there are various material differences which have a bearing on the issue whether a suit seeking determination of the effect (scope) of an arbitration agreement can or cannot be stayed in a petition under s.3 of the Foreign Awards Act and that the answer to the said question will depend upon proper construction to be placed on s.3 in the light of the scheme of that Act; Counsel urged that since all the ingredients of s.3 have been satisfied the stay of Renusagar's suit will be obligatory. Alternatively, Counsel contended that the legal position both under English and Indian Law is not as has been submitted by Counsel for Renusagar; Counsel urged both under English law and Indian law it is well settled that it is open to the parties to have an arbitration agreement incorporating words of the widest amplitude so as to embrace even the questions of its existence, validity or effect (scope) but according to him an enquiry into the scope and effect of an arbitration agreement and a challenge to the existence or validity thereof are not the same but fundamentally different inasmuch as the first pre-supposes that the arbitration agreement exists in fact and in law and the enquiry then is limited to the scope and effect thereof; counsel further contended that whenever it is said that an arbitrator cannot decide the question of his own jurisdiction all that is intended is that he cannot determine-that too finally, the question of the existence (factual) or validity (i.e. legal existence) of the arbitration agreement if contained in the underlying commercial Contract and this must be so, for, if the existence or validity of the underlying commercial Contract is successfully challenged the arbitration clause which is the part and parcel thereof must perish with it and therefore the Arbitrator will have no jurisdiction to decide the issue of the existence or validity of the agreement; but even here it is well settled that if the arbitration agreement so widely worded is separate and independent from the commercial Contract the arbitrator will have jurisdiction to decide the questions about the existence or validity of the commercial contract; but Counsel urged that these principles have no application whatsoever to a case where the issue relates to the scope and effect of the arbitration agreement contained in the underlying commercial contract and the arbitration agreement is wide enough to include such an issue, for, in such a case the Arbitrator will have jurisdiction to decide that issue. This being the well settled legal position Counsel urged that since in the instant case the Arbitration Clause contained in the underlying commercial Contract IGE 9584 is of the widest amplitude it is the Court of Arbitration of I.C.C. which will have jurisdiction to adjudicate not merely three claims of G.E.C. on merits but also the issue whether those claims fall within the Arbitration Clause or not. However, Counsel further contended that the issue pertaining to the scope and effect of the arbitration agreement, if raised in an application under sec. 34 of the Arbitration Act the Court has to decide it and the Court's decision thereof will naturally be binding on the Arbitrators even though the issue was within the competence of the Arbitrators because of the wide wording of the Arbitration Clause and that is why the Court of Appeal has rightly expressed the view that since it has decided the issue whether the three claims "arise out of" or are "related to" the contract affirmatively it will be binding on the Court of Arbitration of I.C.C. and it will be futile for that court of Arbitration to go into that

question again.

By way of elaborating the second contention Counsel submitted that the under-lying commercial Contract (I.G.E. 9584) for supply and sale of goods and services contains no obligation to pay any interest after June 30, 1967 (i.e. after the 30th month from the Contract Effective Date) whether at 6-1/2% or 6% but that such obligation to pay interest after June 30, 1967 is only to be found in the promissory notes and G.E.C.'s first claim of 2.1 million U.S. Dollars is essentially (approx. 80%) for unpaid regular interest due after June 30, 1967 and the second claim for U.S. $ 78,151.84 is entirely for delinquent interest due after June 30, 1967 and, therefore, substantially these two claims preferred before the Arbitrators do not "arise out of" the Contract nor are they "in relation" thereto but arise under the promissory notes and hence fall outside the scope of arbitration agreement; according to counsel further the promissory notes executed by Ranusagar were in complete discharge of the obligation to pay price and interest thereon under the Contract and these notes constitute independent and separate contracts by themselves and, therefore, the liability arising thereunder cannot be regarded as any arising out of the contract or in relation thereto and what is more these claims have been described by G.E.C. in their Notice of intention to arbitrate as arising under the promissory notes; as regards the claim for compensatory damages, it being a liability arising in tort for wrongful retention of the first two funds and since it was being enforced on the basis of Renusagar's status as a stakeholder or constructive trustee the same is clearly outside the scope of the arbitration agreement. Such being the precise nature of the three claims that have been referred by G.E.C. to arbitration, counsel urged that since the issue of arbitrability of these claims is being raised in Renusagar's suit it is but proper that till the issue raised in the suit is finally decided by the Court the arbitration proceedings should be injuncted. On the other hand Counsel for G.E.C. vehemently disputed that the Commercial Contract (IGE 9584) contains no obligation to pay any interest on unpaid purchase after June 30, 1967 or that such obligation to pay interest after that date is only to be found in the promissory notes; he pointed out that such obligation is to be found in the Contract itself and could be readily inferred from Art. III(A)3(c) read with Art.XIV-B and as such the first two claims for Unpaid Regular Interest and Delinquent Interest due after June 30, 1967, preferred before the arbitrators not merely "arise out of" but really arise "under" the Contract; further the third claim for Compensatory Damages which flows by way of corollary from wrongful detention of the first two funds which ought to have been paid under the Contract is so closely connected with the contract that it is clearly "in relation to it"; all the three claims thus fall within the scope of the Arbitration Clause. Counsel seriously disputed that the promissory notes executed by Renusagar were or are in discharge of the obligation to pay the price and interest thereon under the Contract or that these notes constitute independent and separate contracts by themselves but contended that these are a part of the Contract and the two are so in severable and inextricably bound together that the obligation under the Contract can never be deemed nor intended to have been completely discharged by the mere execution of the notes and in support of this contention several aspects of and circumstances emerging from the Contract were relied upon by him. Counsel urged that real nature of the claims preferred before the Arbitrators and not the nomenclature or description thereof by any party would be relevant and decisive and in this behalf was quick to point out that Renusagar, though it now contends that such interest arises "under the promissory notes" has described it as payable "under the contract" in para 4 of its writ petition No. 179 of 1970 filed in Delhi High Court. Alternatively, Counsel contended that even assuming (a) that the promissory

notes are not an in severable and inextricable part of the Contract, (b) that the obligation arising under the notes is totally different from the one arising under the Contract and (c) that the notes are in discharge of the obligation to make payment under the Contract (all of which are strongly denied), the three claims would still be covered by the Arbitration Clause which is of the widest amplitude, for according to him it would be erroneous to determine whether a claim arises out of or in relation to the Contract by looking at the cause of action on which the claim is based. That being the position Counsel submitted that the Court of Appeal was justified in coming to the conclusion that no prima facie case for injunction restraining arbitration proceedings had been made out by Renusagar and it had therefore rightly vacated the ad interim injunction and stay ed Renusagar's suit.

It will be convenient to deal with the second question raised by counsel for the appellants in these appeals first, namely, whether on merits the three claims referred by G.E.C. to the Court of Arbitration of I.C.C. are beyond the scope/purview of the arbitration clause being Article XVII contained in the Commercial Contract IGE 9584 ? The answer to this question must depend upon (a) what disputes are covered by the arbitration agreement and (b) what is the real nature of these claims under the reference. Aspect (a) Obviously depends upon the language used in the arbitration agreement whose construction would be relevant for deciding both the questions (i) whether it embraces even questions of its existence, validity and effect (scope) (particularly the last which bears on the arbitrability of the three claims) and (ii) whether the three claims fall within its scope or purview; in other words, is the language of the arbitration agreement wide enough to cover either of the questions or both. The arbitration clause in the Commercial Contract has already been set out in extenso in the earlier part of the judgment and the relevant words thereof are : "any disagreement arising out of or related to this contract" shall be finally settled in accordance with the Arbitration Rules of the International Chamber of Commerce. It may be stated that though the relevant rules of I.C.C. (particularly Rules 8.3 and 8.4) in terms confer jurisdiction upon the arbitrations to decide questions as to the existence or validity of the arbitration agreement contained in the commercial contract, Counsel for G.E.C. principally relied upon the language used in the aforesaid arbitration clause contained in the Contract itself for contending that it was of widest amplitude and would cover both the questions (i) and (ii). According to him, the English Courts as well as this Court have held that the words "under the contract" are wide but the words 'arising out of" the contract are still wider and the words "relating to" or "in relation to" "in respect of" or "in connection with" or "concerning" the contract have the widest possible content. In view of the authorities to which we were referred, we find considerable force in this contention of Counsel for G.E.C.

In Govt. of Gibralter v. Kenney & Anr(1), the arbitration clause covered:

> "…. any dispute or difference which shall arise or occur between the parties hereto in relation to any thing or matter arising out of or under this agreement..."

and Sellers, J. has observed at page 26 of the Report that "the distinction between matters "arising out of" and "under" the agreement is referred to in most of the speeches in Heyman v. Darwins Ltd. and it is quite clear that "arising out of" is very much wider that "under" the agreement.

In Heyman v. Darwins Ltd.(2) a contract for sole selling agency contained an arbitration clause in the following terms:

> "If any dispute shall arise between the parties hereto in respect of this agreement or any of the provisions herein contained or anything arising hereout the same shall be referred for arbitration in accordance with the provisions of the Arbitration Act, 1889."

Though the main point decided by the House of Lords in the case was that where the parties were one in asserting that they had entered into a binding contract a subsequent repudiation thereof by one of them did not have the effect of annulling the arbitration clause contained in the contract, each one of the law Lords dealt with the aspect of the wide language that had been used in the arbitration clause (words being "in respect of") and the distinction between matters "arising out of" and "under the agreement" has been put in the clearest terms by Lord Porter at page 399 of the Report thus :-

> "In such a case (case of repudiation) the question of damage has still to be determined and the question whether there has been repudiation may be still in issue. Are these disputes under the contract-I use the word "under" advisedly since expressions such as "arising out of" or "concerning" have a wider meaning ? I think they are."

Incidentally, while laying down the ratio in the case as indicated above, Viscount Simon L.C. also stated the law as to the circumstances under which an arbitration clause in a commercial contract would become unenforceable thus :-

> "If the dispute is whether the contract which contains the clause has ever been entered into at all, that issue cannot go to arbitration under the clause, for the party who denies that he has ever entered into the contract is thereby denying that he has ever joined in the submission. Similarly, if one party to the alleged contract is contending that it is void ab initio (because for example the making of such a contract is illegal), the arbitration clause cannot operate, for on this view the clause itself also is void."

In Dhanrajmal Gobindram v. Shamji Kalidas & Co.(1) this Court has clearly taken the view that all questions which could be decided in an application filed under s. 20 of the Arbitration Act, 1940 (and such questions involve dealing with objections to the existence, validity or effect (i.e. scope) of the agreement itself) would be encompassed by a clause which contains the words "arising out of" or "in relation to" the contract. The relevant observations at pp. 1040-41 of the Report run thus :

> "We may dispose of here a supplementary argument that the dispute till now is about the legal existence of the agreement including the arbitration clause, and that this is not a dispute arising out of, or in relation to a cotton transaction. Reference was made to certain observations in Heyman v. Darwins Ltd. In our opinion, the words of

> the Bye-law "arising out of or in relation to contracts" are sufficiently wide to comprehend matters, which can legitimately arise under s. 20. The argument is that, when a party questions the very existence of a contract, no dispute can be said to arise out of it. We think that this not correct, and even if it were, the further words "in relation to" are sufficiently wide to comprehend even such a case."

In Khardah Company Ltd. v. Raymon & Co. (India) Private Ltd.(2) this Court, though ultimately it held that a dispute as to the validity of the underlying commercial contract containing an arbitration clause was not one which the arbitrators were competent to decide and that when the contract was invalid every part of it including the arbitration clause was also invalid, on question of construction of the expressions used in the arbitration clause did hold that the expressions used were wide enough to cover a dispute as to the validity of the contract. Act page 188 of the report Justice Venkatarama Aiyer has observed thus:

> "It cannot be disputed that the expressions "arising out of" or "concerning" or "in connection with" or 'in consequence of" in "relating to this contract" occurring in clause 14 are of sufficient amplitude to take in a dispute as to the validity of the agreement dated September 7, 1955".
>
> As observed by Lord Porter in Heyman v. Darwins Ltd.

(supra) although as a rule the arbitrator cannot clothe himself with jurisdiction the question of his jurisdiction must ultimately depend on the wording of the Arbitration Clause. At page 392 of the Report the learned law Lord has observed thus:

> "I think it essential to remember that the question whether a given dispute comes within the provisions of an arbitration clause or not primarily depends on the terms of the clause itself. If two parties purport to enter into a contract and a dispute arises whether they have done so or not, or whether the alleged contract is binding on them, I see no reason why they should not submit that dispute to arbitration. Equally I see no reason why, if at the time when they purport to make the contract they foresee the possibility of such a dispute arising, they should not provide in the contract itself for the submission to arbitration of a dispute whether the contract ever bound them or continues to do so. They might, for instance, stipulate that, if a dispute should arise whether there had been such fraud, misrepresentation or concealment in the negotiations between them as to make an apparent contract voidable, that dispute should be submitted to arbitration. It may require very clear language to effect this result, and it may be true to say that such a contract is really collateral to the agreement supposed to have been made, but I do not see why it should not be done."

As an instance of a clause held to be wide enough to include a determination of the ambit of the arbitrator's authority the learned law Lord cited the decision in Willesford v. Watson(1). In that case a mining lease contained an agreement to refer the disputes between the lessors and lessees to arbitrators or their umpire and the arbitration clause was very widely worded so as to include inter

alia any dispute "touching these presents or any clause or matter or the thing herein contained or the construction hereof", in other words a dispute between the parties as to whether the instrument, according to its true construction did or did not warrant a particular thing to be done thereunder, was referable to and within the scope and authority of the arbitrators and at page 477 of the Report Lord Selborne, L.C. observed (which observations have been quoted with the approval by Lord Porter in Heyman v. Darwins Ltd.) thus:

> "It struck me throughout that the endeavour of the Appellants has been to require this Court to do the very thing which the arbitrators ought to do-that is to say, to look into the whole matter, to construe the instrument, and to decide whether the thing which is complained of its inside or outside of the agreement."

Finally, the Court of Appeal held that the Court would not decide but would leave it to the arbitrators to decide whether the matter in dispute between the parties was within the agreement to refer and stayed the suit.

In Jawahar Lal Burman v. Union of India(1) while dealing with the scheme of ss. 31, 32 and 33 and as also the scope of the s. 33 of the Arbitration Act 1940 this Court has noted and recognised the distinction between the existence or validity of the arbitration agreement on the one hand and its effect (scope on the other, though in ss.31(2), 32 and 33 all the three clubbed or spoken of together. At page 777 of the Report the Court has specifically said that the effect of an arbitration agreement is treated as distinct from the existence of the agreement" and has further observed that "an application to have the effect of an arbitration agreement (determined) can be made provided the existence of the agreement is not in dispute." It is true that this distinction been has noted for purposes of procedural aspects arising under the three sections but the several authorities discussed above. Particularly Heyman v. Darwins Ltd. and Willesford v. Watson (which has been digested and annotated at two places in Russel on Arbitration at pp.91 and 171) have made the distinction substantively.

In Balabux Agarwalla v. Sree Luchminarain Mfg. Co.(1) Das, J. has clearly envisaged the possibility of disputes as to the existence, validity or effect of an arbitration agreement being properly referred to the arbitration of an arbitrator by means of a collateral or subsequent agreement between the parties and the learned Judge has pointed out that there was nothing in the scheme of ss.31 or 33 of the Arbitration Act, 1940 to indicate that such disputes can never form the subject matter of an arbitration agreement or must always be decided by the Court as opposed to an arbitrator.

In Waverly Jute Mills Co. v. Raymon & Co.(2) at p.224 of the Report the following statement of law appears:

> "A dispute as to the validity of a contract could be the subject-matter of an agreement of arbitration in the same manner as a dispute relating to a claim made under the contract. But such an agreement would be effective and operative only when it is separate from and independent of the contract which is impugned as illegal. Where, however, it is a term of the very contract whose validity is in question, it has, as held

by us in Kharda Co. Ltd. case, no existence apart from the impugned contract and must perish with it."

Four propositions emerge very clearly from the authorities discussed above:

1. Whether a given dispute inclusive of the arbitrator's jurisdiction comes within the scope or purview of an arbitration clause or not primarily depends upon the terms of the clause itself; it is a question of what the parties intend to provide and what language they employ,

2. Expressions such as 'arising out of" or "in respect of" or "in connection with" or "in relation to" or "in consequence of" or "concerning" or "relating to" the contract are of the widest amplitude and content and include even questions as to the existence, validity and effect (scope) of the arbitration agreement.

3. Ordinarily as a rule an arbitrator cannot clothe himself with power to decide the questions of his own jurisdiction (and it will be for the Court to decide those questions) but there is nothing to prevent the parties from investing him with power to decide those questions, as for instance, by a collateral or separate agreement which will be effective and operative.

4. If, however, the arbitration clause, so widely worded as to include within its scope questions of its existence validity and effect (scope), is contained in the underlying commercial contract then decided cases have made a distinction between question as to the existence and or validity of the agreement on the one hand and its effect (scope) on the other and have held that in the case of former those questions cannot be decided by the arbitrator, as by sheer logic the arbitration clause must fall along with underlying commercial contract which is either non-existent or illegal while in the case of the latter it will ordinarily be for the arbitrator to decide the effect or scope of the arbitration agreement i.e. to decide the issue of arbitrability of the claims preferred before him.

At this stage, however, we are concerned with only the first three propositions mentioned above about which no serious dispute was raised by Counsel for Renusagar. We are conscious that Counsel for Renusagar have strongly disputed the correctness of proposition No. 4 above, but we propose to deal with their caveat against it together with the authorities relied upon by them in support thereof later. At this stage it will suffice to observe that since the parties to the underlying Commercial Contract here have used the expressions "arising out of" or "related to this contract" in the arbitration clause contained in the Contract, there can be no doubt that the parties clearly intended to refer the issue pertaining to the effect (scope) of the arbitration agreement to the Court of Arbitration of I.C.C. in other words, the issue about arbitrability of the three claims under reference has been referred.

Turning to aspect (b) which is really the crux of the matter on merits, we shall have to ascertain the precise nature of the three claims in order to determine whether they fall within the arbitration clause which uses expressions of the widest possible amplitude and content. While narrating the chronological events in the earlier part of our judgment we have indicated what these three claims are and how they have arisen. The three claims are: (a) 2.1 million U.S. dollars being the Unpaid Regular Interest, (b) U.S. $ 7,84,151.84 being the Delinquent Interest and (c) 4.1 million U.S. dollars being the Compensatory Damages. As explained earlier the first claim represents the quantum of 73% of the regular interest which was wrongly deducted and wrongly withheld and retained by Renusagar from 1970 onwards allegedly for payment of income-tax notwithstanding the Delhi High Court's judgment in effect retrospectively restoring the tax exemption granted in favour of G.E.C.; the second claim represents interest claimed by G.E.C. on account of the delay that occurred in the payment of four instalments of purchase price together with interest on their due dates as per the original Schedule of Payment, while the third claim is by way of compensation for illegally and wrongfully retaining and enjoying the use of the first two funds by Renusagar and depriving G.E.C. the use thereof for 12 long years. Whereas Renusagar has contended that none of these claims falls within the purview of the arbitration clause G.E.C. has claimed that all of them do within the wide language of that clause.

As regards the first two claims Counsel for Renusagar have pointed out that admittedly the first claim substantially (approx. 80%) and the second claim entirely are for interest due after June 30, 1967 (i.e. after 30th month from the Contract Effective Date) and according to Counsel since the underlying Commercial Contract (IGE 9584) for supply and sale of goods and services contains no obligation to pay any interest after June 30 1967 and since only the promissory notes provide for payment of such interest after June 30, 1967, these two claims do not "arise out of" the contract, nor are they "in relation thereto" but arise under the promissory notes and hence fall outside the scope of arbitration clause. Counsel further urged that the promissory notes executed by Renusagar were in complete discharge of obligation to pay price and interest thereon under the Contract and since these notes constitute independent and separate contracts by themselves the liability arising thereunder cannot be regarded as any arising out of the Contract or in relation thereto and in this behalf strong reliance was placed by Counsel on the fact that in its Notice of intention to arbitrate G.E.C. has described these claims as arising "under the promissory notes". Counsel pointed out that Article III of the Contract provides for payment of the total purchase price in three modes, the third mode being by executing promissory notes and urged that since the requisite promissory notes were executed by Renusagar these notes must be regarded as having been executed in the complete discharge and satisfaction of the obligation under the Contract and that the sole obligation which survives since after the execution of the notes is the one which arises under the notes. In support of this contention counsel relied upon two decisions of this Court, namely, (1) M/s. Ogale Glass Works Ltd. case where the posting of cheques by a purchaser by way of remitting the bills payable to the seller was held to amount to payment (that is, in discharge of the obligation to pay the price for goods purchased) and (2) H.P. Gupta v. Hira Lal where the posting of a dividend warrant (cheque) by a company at Delhi for despatching it to a shareholder at his registered address (which was Meerut) as per Art. 132 of the Articles of Association was deemed as payment to the shareholder in discharge of the company's obligation and a criminal complaint for the alleged failure to discharge the obligation against the company properly lay in the Court of Delhi Magistrate. Counsel also relied

on two important factors (a) unconditional nature and (b) negotiability of the promissory notes-both requirements of Art. III (3) (a) of the Contract, as destroying the arbitrability of the claims thereunder, the contention being that if parties agreed that the balance price of 90% should be paid by executing "unconditional negotiable promissory notes" the parties could never intend to make the claims arising thereunder arbitrable. In support of this contention Counsel strongly relied on certain observations of Lord Wilberforce in NOVA (Jersey) Knit Ltd. v. Kammgarn Spinnerei to the effect that if bills of exchange were to contain an arbitration clause they would not be valid bills, as also on Byles on Bills of Exchange: 25th Edn. at p. 10 where the above observation in that case has been digested. Reference was also made to Albert Jan Van Den Berg's treatise New York Convention of 1958-Towards a Uniform Judicial Interpretation' wherein at pp. 147-148 the learned author has made a reference to this Nova (Jersey) case with his own comments on how the Court of Appeal and the House of Lords have differed on the question whether there can be said to be an arbitrable dispute in regard to a bill of exchange, the former holding that there was in the case a dispute as to the liability on the bills of exchange, the dispute being whether or not the bills should be paid having regard to the cross-claim to be decided in arbitration and the latter holding that there was none as English law clearly did not allow reliance on unliquidated cross claims to set-off a claim on a bill of exchange and on that basis the House of Lords by majority held that the action on the bills of exchange should not be stayed. Reliance was also placed on three decisions of Asian High Courts in Bihari-Diwan Singh v. Jaffe & Sons Dhiraj Lal v. Sir Jacob Behrans & Sons and M/s Vasanji Navj v. K.P.C. Spinners in all of which more of less the same view has been taken that when a suit on a negotiable instrument issued in payment of price of goods sold under a contract and accepted by the seller is brought the action should not be stayed because of the arbitration clause contained in the original commercial contract; in the last case the Madras High Court has observed that even if the suit was traced to the original contract and the plaint referred to antecedent facts which gave arise to the issue of the cheques by the defendant in favour of the plaintiff the arbitration clause could not come into play as the suit was on dishonored cheques and there was no dispute as regards the quality of the goods or quantum of the sale consideration. It is obvious that this last part of Counsel's submission may hold good only if these two claims are held to arise solely under the promissory notes and that the notes are held to be in complete discharge of the obligation under the Commercial Contract and constitute independent and separate contracts by themselves but not otherwise.

As regards the third claim Counsel urged a two-fold contention. First, that the claim obviously arises in tort out of wrongful retention of monies under the first two claims for long 12 years and Renusagar is being saddled with this liability in its capacity as a tort-feaser, stake- holder or constructive trustee and hence is not covered by the arbitration clause; and secondly that if the first two claims are not covered by the arbitration clause this claim would also fall outside its purview. It was pointed out that it cannot be said to be any incidental claim for interest because compensation is claimed at the market rate of 18 per cent. In support of this contention Counsel relied upon two decisions, namely; (1) Monro v. Bognor Urban District Council where the Court of Appeal took the view that where the action brought was for damages for fraudulent mis-representation and referred to matters wholly outside the powers of the arbitrator with which he could not possibly deal, the defendants could not get the action stayed because it could not be said that the dispute was upon or in relation to or in connection with the contract and (2) Ghewarchand v. Shiva Jute Bailing Ltd.

where the Calcutta High Court has held that where the suit was wholly based on tort, then that action was not to be considered to be in relation to or in connection with a contract merely because it was shown that had there been ever no contract there would not have been any cause of action and what the Court had to look into was what the substance of the plaint was and not how the claim was framed.

For the reasons which we shall presently indicate we are unable to accept any of the above submissions urged by Counsel for Renusagar. As regards the first two claims, in the first place it is not possible to hold that the Commercial Contract does not contain any obligation to pay interest on the unpaid purchase price after June 30, 1967 or that the obligation to pay such interest after that date is to be found only in the promissory notes. Admittedly, interest on the purchase price at the agreed rate up to June 30, 1967 was capitalized and included in the principal amount of each of the instalments represented by the concerned promissory note as mentioned in the Schedule of Payments given in Art. III-A 3 (b) of the Contract and the question is whether the obligation to pay further interest after that date till payment is provided for only in the promissory notes or also in the contract. Undoubtedly the form of the promissory note attached as Exhibit 'B' to the Contract as also the promissory notes that were actually executed clearly contain a recital that Renusagar "Promises to pay to G.E.C. interest thereon (i.e. on the capitalized principal) from June 30, 1967 semi-annually at the rate of 6 1/2 % per annum on the last day of June and December in each year until paid". But Counsel for G.E.C. has in our opinion rightly relied upon two provisions in the Contract which clearly show that the obligation to pay such interest after June 30, 1967 till payment has been provided for by the Contract.

Article III-A 3 (c) (relevant portion) runs thus: "The notes shall be prepared substantially in the form shown in the attached 'Exhibit B' entitled 'Promissory Note' and shall bear interest, at the rate of 6 1/2% per annum on the outstanding principal balance, commencing thirty(30 months after Contract Effective Date....."

It is no doubt true that the promissory notes executed by Renusagar recited the obligation to pay future interest after June 30, 1967 till payment but obviously the promissory notes incorporated such obligation therein because of the aforesaid provision in Art. III-A 3 (c). The aforesaid sub-clause in the Contract itself says that the notes shall bear interest at the rate specified on the outstanding principal balance after June 30, 1967; in other words it is the Contract which provides for interest being payable on the outstanding principal balance after June 30, 1967. Counsel for Renusagar, however, argued that the contract and aforesaid clause merely provide for the execution of promissory notes which, it is provided shall bear interest after June 30, 1967 and the argument proceeded further to say that if Renusagar had failed to executive promissory notes as required (i.e. bearing interest after June 30, 1967) G.E.C. would not have become entitled to receive or claim interest after June 30, 1967 but would have had only a right to call upon Renusagar to execute such pro- notes and or two claim damage for failure to fulfil contractual obligations. It is impossible to accept this argument. The question is not what rights G.E.C. would have had on Renusagar's failure to execute the promissory notes as required but the question is what the contract provides for. It cannot be disputed that the aforesaid sub-clause in the Contract provides for not merely the execution of promissory notes but that the promissory notes would also bear interest after June 30,

1967. Further the very fact that the failure of Renusagar to execute promissory notes as required,... of course as required by the Contract, would have conferred a right on G.E.C. to call upon Renusagar to execute such notes also shows that the obligation to pay interest after June 30, 1967 till payment has been provided for by the contract.

Article XIV-B, (which deals with the topic of taxes and proposed exemption from income-tax to be obtained by G.E.C.) (relevant portion) runs thus:

> "Seller intends to apply to the Central Government of India for exemption from income tax on the interest income (including capitalized interest and interest thereon) received by seller on the principal amounts of the promissory notes. Purchaser will assist Seller in expediting Seller's application for exemption and will furnish such information in support thereof as may be required by Seller or the Central Government of India....."

The above provision clearly shows that the parties to the contract were contemplating to obtain from the Government of India income tax exemption on the interest income which G.E.C. was going to receive from Renusagar under the Contract and the clause indicates the things each party was required to do in that connection but the important aspect of the provision is that the interest income', on which tax exemption was being sought, is said to include capitalized interest and interest thereon that is to say interest on the amounts of the promissory notes (which included capitalized interest), which obviously means further interest on outstanding principal balance under the notes from June 30, 1967 onwards till payment. In our view these provisions which are to be found in the contract clearly show that the promissory notes are not sole and exclusive repository of GEC's right to claim and receive future interest on unpaid price after June 30, 1967 but that the contract itself provides for the obligation to pay such interest after that date till payment.

Reference was made to the fact that the Bank Guarantee endorsed on each promissory note is restricted only to the payment of principal and interest on the note as per its terms and does not extend to or cover any residuary payment obligation contained in the Contract, de hours the promissory-note. But this is as it normally should be. Since the bank guarantee is in connection with and endorsed on the promissory note it would ordinarily refer to the obligations arising thereunder and not to any obligation arising under any other document and the question whether the Contract contains such obligation to pay future interest must depend upon its contents and not upon what is not to be found in the bank guarantee. Similarly, counsel for Renusagar also referred to the fact that G.E.C.

has filed a suit (Suit no. 786/1982) against the UCO Bank in the Calcutta High Court to recover 2.1 million U.S. Dollars for the interest as being due under the promissory notes read with the guarantee. But here again that fact is neither here nor there, because the suit against the UCO Bank has to be on the promotes read with the guarantee, the Contract not being a document to which UCO Bank is a party. But things will have to be seen in different perspective when claims are made by G.E.C. against Renusagar and in that behalf it is the substance of G.E.C.'s pleading (Notice of Intention to Arbitrate that will have to be looked into and not how the claims described therein.

True, at one place in the Notice of Intention to Arbitrate the two claims are-(in fact, only the first claim of 2.1 million U.S. Dollars is) said to be "on the promissory notes" but much cannot be made of that fact because at the commencement of that Notice the subject-matter thereof is stated as: "Re: Interest payable under the Contract No. IGE 9584 between GEC and Renusagar" and the substance of the entire pleading, on careful scrutiny, shows how the first two claims have arisen under the Contract and how under the terms thereof and in the correspondence their amounts got adjusted and quantified at certain figures and it is also clear that the reference to the Contract is not way of any antecedent or historical fact. It is, therefore, clear that the Contract contains the obligation to pay future interest from June 30, 1967 onwards till payment and that these two claims have been preferred by G.E.C. before the Court of Arbitration of I.C.C. as arising not merely "out of" but under the Contract.

Secondly, the promissory notes, on the terms of the Contract, cannot be regarded as amounting to payment in discharge of the obligation arising under the Contract. It was submitted that since it is one of the modes of payment indicated in the Contract the execution of the notes should be held to be payments by way of discharging the obligation under the Contract. The snap answer to this submission is that since the Contract also indicates the opening of a Letter of Credit as yet another mode of payment, the mere fact of the Letter of Credit having been opened by Renusagar in a Bank in New York City valid for 18 months will have to be regarded as actual payment which is hardly arguable. But the real answer to the submission is that it is always a question of intention of the parties whether a negotiable instrument taken on account of a debt operates as an absolute discharge of the debt or not. In Bhashyam & Adiga's treatise on the Negotiable Instruments Act (14th Edn.) the law on this aspect has, in our view, been correctly summarised at page 774 thus:

> "It is always a question of intention of parties whether a bill or a promissory note or a cheque taken on account of a debt, operates as an absolute discharge of the debt, or only as a conditional payment of it. Generally speaking, a bill or note can never go in discharge of a debt unless it is a part of the contract that it shall be so: for, a mere promise to pay cannot be regarded as an effective payment..... This rule may also be based on the general principle of law that one simple executory contract does not ordinarily extinguish another, the presumption in such cases is that the bill or promissory note is taken only as a conditional payment."

In Commissioner of Income-Tax v. Kameshwar Singh of Darbhanga the Privy Council has enunciated the legal principle very clearly at page 115 of the Report thus:

> "A debtor who gives his creditor a promissory note for the sum he owes can in no sense be said to pay his creditor; he merely gives him a document or voucher of debt possessing certain legal attributes. So far then as this item of Rs. 17,34,596 (represented by a promissory note given to the assessee by his debtor) is concerned the assessee did not receive payment of any taxable income from his debtor or indeed any payment at all."

The aforesaid statement of law enunciated by privy Council has been quoted with approval by the Bombay High Court in Keshav Mills Co. Ltd. v. Commissioner of Income Tax. It was a case where cheques and hundis were issued in payment of price for goods sold and delivered and the question was whether such cheques and hundis amounted to payments resulting in unconditional discharge of the liability to pay the price, and the Division Bench speaking through Chagla, C.J. observed thus:-

> "Now, I should have thought that ordinarily the payment of debt by a cheque never results in the discharge of the debt. The cheque merely represents an order by the drawer of the cheque to his banker to pay the amount to the person named in the cheque, and till that payment is made the debt is not discharged. Therefore, the sending of the cheque, as I said before, ordinarily is not an unconditional discharge of the liability. The same would be the position with regard to the hundis. But I can well imagine a case where there may be an arrangement between a creditor and a debtor that the receipt of a cheque or a hundi by a creditor may result in an unconditional discharge of the debt, and in the event of the cheque or hundi not being honoured the creditor would have no right to sue on the original cause of action but only on the cheque or the hundi. That would be a pure question of fact. The Privy Council has taken the same view of the law as is to be found in Commissioner of Income Tax v Kameshwar Singh."

(supra) It may be stated here that even in the two decisions of this Court on which Counsel for Renusagar have placed reliance the aforesaid principle of law has been accepted but all that has happened is that each case turned on its own facts and special circumstances on the basis of which this Court held that the parties had intended to and agreed to accept and treat the posting of the instruments (cheques in one case and dividend warrant in the other) as actual payment in discharge of the original obligation. For instance in Ogale Glass Works Ltd. case (supra) the question that arose for determination on this aspect of the matter was whether the assessee (seller) could be said to have received income (sale proceeds) in British Indian within the meaning of sec.4(1)(a) of the Indian Income-Tax Act, 1922 when the Government of India (the purchaser of goods) had sent the sale proceeds by means of cheques drawn and posted in Delhi but received by the assessee in Aundhan Indian State ? The answer to the question depended upon whether the posting of cheques in Delhi amounted to payment to the assessee and the Court held that it did by relying upon four or five special circumstances that obtained in the case. Apart from the fact that clause 15 of the Contract itself provided for payment of the sale proceeds by cheques, the Court noticed (a) that in the bills submitted by him to the Government the assessee has expressly asked for payment by cheques, (b) that as per the normal course of business usage parties intended that remittances should be by post, (c) that the assessee had by making a request in that behalf constituted the post office his agent, (d) that accordingly the Govt. had sent cheques in payment of the bills by post,

(e) that the assessee had sent formal stamped receipts only after the receipt of the cheques and not in advance along with the bills submitted by him and (f) very importantly the drawer of the cheques was the Government of India and the drawer was the Reserve Bank of India for whose solvency there could be no apprehension at all in the mind of the assessee. It was in these circumstances that

the Court came to the conclusion that the parties had intended to treat the posting of cheques as payment. In H.P. Gupta v. Hiralal (supra) the question was whether the posting of a dividend warrant cheque by the Company at Delhi (where its Registered Office was situated) for dispatching it to the shareholder at his registered address (which was Meerut) amounted to payment to the shareholder in discharge of the Company's obligation to pay the declared dividend and this Court held that it did in view of sec. 205 (5) of the Indian Companies Act. 1956 and Art. 132 of the Articles of Association of the Company as both the said provisions entitled the Company to pay the dividend either in cash or by posting a cheque or warrant at the registered address of a shareholder. The Court pointed out that Art.132, which constituted an agreement between the Company and its shareholder had the effect that if the warrant (cheque) was sent by post at the latter's registered address that will be equivalent to payment.

Bearing the aforesaid general principle in mind that a bill or a promissory note can never go in the discharge of a debt unless it is a part of a contract that it shall be so, it will have to be seen whether the promissory notes executed by Renusagar in this case were intended to operate as payments by way of absolute discharge of the obligation under the Contract or only as conditional payments. In our view the terms of the Contract, far from showing that these were payments in discharge of the original obligation, clearly indicate that the parties had intended that these were to operate as conditional payments. If Art. III of the Contract, which deals with the topic of Payment of price for the sale of goods and services, is carefully analysed the following factors emerge very clearly:

> (a) that the pro-notes are not expressed to be payments: in fact, it is in terms stated that the "total contract base price shall be paid by purchaser in lawful money of the USA" (Art. III-A) and surely promissory notes are not "lawful money" of USA:
>
> (b) that because the Contract so provides even the pro-notes also recite that the principal and interest thereunder are "payable in lawful money of the USA";

(c) that Art. III-A (3) which deals with pro-notes provides for payment of the remaining 90% of the price "in accordance with the following Schedule of Payments" and expressly states that "the obligation to make such payments is to be evidenced by four series of purchaser's unconditional negotiable promissory notes", which clearly shows that the pro-notes are not payments but are intended merely to be the evidence of the obligation to pay the price;

(d) that though stated to be "unconditional and negotiable" (perhaps so between the drawer and subsequent assignees in case of negotiation), as between the seller and the purchaser these have been made subject to several conditions such as-(1) the amounts thereof were payable only on the assumption that deliveries of items of equipment were completed within 15 months of Contract Effective Date and interest at the rate of 6 1/2% was to become 6% on receipt of income-tax exemption (Art. III-A(3) (b),

(ii) these were to lie in Escrow Arrangement to be released to the seller synchronizing with the stated progress of supply of goods according to certain formulae (Art. III-D).

(iii) these were to be replaced by fresh Notes depending on receipt of income-tax exemption (Art.III-A(3)(f) or price modification (Art.III-D) : (iv) each one-contains a default clause saying "upon default in the prompt and full payment the principal or of the interest on this Note when due, all of the notes in each and every series, together with interest to the date of payment, shall immediately become due and be payable and the option and demand of the holder thereof."

Having regard to the aforesaid factors that emerge from the various terms specified above it is very clear that the execution of the promissory notes was not intended to nor did it amount to payment by way of discharging the obligation under the contract but the notes were clearly intended to operate as conditional payments.

Thirdly the very factors and circumstances enumerated above in connection with the promissory notes and particulary, the fact that these notes were as between the seller and the purchaser subject to several conditions leading to variation and adjustment and replacement and the default clause contained in each, clearly indicate that these were not intended to constitute or separate contracts by themselves but that they were a part and parcel of one integrated transaction embodied in the contract; in fact the aspects mentioned in (d) above clearly show that the promissory notes were and are meant to be governed at all times by various other terms of the Contract and could be modified and substituted under given conditions as set out in the Contract. Hence it is impossible to accede to the proposition that a dispute of nonpayment of interest on the instalments whether regular or delinquent-is not a dispute "relating to the Contract." In fact, as stated earlier, both the claims-2.1 million U.S. dollars and U.S. $7,84,151.84- arise "under the Contract" and have been preferred by G.E.C. before the Court of Arbitration of I.C.C. expressly on that basis and not under the promissory notes. In view of this conclusion of ours it is unnecessary to deal with the further submission of Counsel for Renusagar based on the so- called factors of unconditional nature and negotiability of the promissory notes as destroying the arbitrability of the claims thereunder as also the case law relied upon in support thereof. Similarly this conclusion of ours also makes it unnecessary for us to deal with the alternative submission made by counsel for G.E.C. that these claims would still fall within the wide expressions occurring in the Contract even on the assumption that the promissory notes are severable from the Contract, that the obligation arising thereunder is different from the one under the Contract and that these notes are in payment of the obligation to pay the price under the Contract.

As regards the third claim of compensatory damages it is true that Renusagar is being saddled with this liability as tort-feaser, a stake-holder and/or a constructive trustee, but, in our view, that aspect by itself will not justify a conclusion that the same is not covered by the arbitration clause because the question is not whether the claim lies in tort but the question is whether even though it has lain in tort it "arises out of" or is "related to" the Contract, that is to say, whether it arises out of the terms of the Contract or is consequential upon any breach thereof. As explained earlier, this claim is based on and is consequential upon and by way of corollary to the non- payment of the two detained amounts by Renusagar to G.E.C. in breach of the terms of the Contract. In other words, it is clear that before adjudicating upon this claim the adjudicating authority will have first necessarily to adjudicate upon first two claims preferred by G.E.C. and only if it is found that G.E.C. is entitled to receive that first two amounts which ought to have been paid by Renusagar under the terms of the

Contract but which Renusagar had failed to pay that this third claim could, if at all, be allowed to G.E.C. In the real sense, therefore, this claim is directly, closely and inextricably connected with the terms and conditions of the Contract, the payments to be made thereunder and the breaches thereof and as such will have to be regarded as a claim :`arising out of" or "related to" the Contract. As we shall point out presently Court in one of its decisions has laid down the test for determining the question in such cases and the test is whether recourse to the contract, by which both the parties are bound, would be necessary for the purpose of determining whether the claim in question was justified or otherwise and this test, as indicated above, is clearly satisfied with regard to the third claim in the instant case.

We may, at this stage, refer to a passage in Russel on Arbitration and a few decided cases which fortify our aforesaid conclusion. In Russel on Arbitration (20th Edn.) the following statement of law occurs at page 90:

"Claims in tort may be so intimately connected with a contract that a clause of appropriate width designed primarily to make contractual disputes arbitrable will nevertheless render such claims in tort arbitrable as well."

In Woolf v. Collis Removal Service (1) the defendants had contracted to remove plaintiff's furniture and effects from London to their store in Marlow and there safely to keep and take care of them, but, according to the plaintiff, the defendants had, in breach of the Contract, removed the goods to a different destination where some were lost and others damaged. Alternatively the plaintiff claimed that the goods were lost and damaged owing to the negligence of the defendants in using an unsuitable place in which to store them and guarding them inefficiently. The clause providing for arbitration ran: "If the customer makes any claims upon or counterclaim to any claim made by the contractors" the same shall be referred to the decision of the two arbitrators. The question was whether the claim for damages was covered by this clause. The Court of Appeal held that even if the claim in negligence was a claim in tort and not under the contract yet there was a sufficient close connection between that claim and the transaction to bring the claim within the arbitration clause. This authority clearly shows that even though a claim may not directly arise under the contract which contains an arbitration clause, if there was sufficient close connection between that claim and the transaction under the contract it will be covered by the arbitration clause.

In Astro Vencedor Compania Naviera SA of Panama v. Mabanaft G m b H(1) the arbitration clause contained in a Contract of charter-party ran: "any dispute arising during the execution of this charterparty" shall be settled by two arbitrators, one to be appointed by the Owners and the other by the charterers. The relevant charterers ordered the vessel to a Dutch port not named in the bill of lading whereby satisfactory bills of lading were not available in time and disputes arose as to unloading. By action of the relevant charterers the vessel was arrested and released on a bank guarantee. Later, under a charter quite unconnected with the relevant charterers the vessel happened to be again in a Dutch port and was arrested again as a result of disputes as to the satisfactory nature of the original bank guarantee. The owners arbitrated a claim for damages in respect of each of the two arrests of the vessel. The charterers argued that these were claims in tort and outside the arbitrator's jurisdiction. The Court held that arbitrator had jurisdiction (1) over the

first arrest as it was closely connected with the dispute under the contract, and was indeed a direct consequence of a claim for damage under the contract, and (2) over the second arrest as it was part and parcel of the original arrest.

The decision of Sellers, J. in Government of Gibralter v. Kenney and Another (supra) has already been referred by us in the earlier part of our judgment in the context of the distinction made between matters "arising out of" and "under the agreement" and the learned Judge's view that the former expression is wider than the latter but that decision is relevant to the question which is now under consideration. In that case disputes arose concerning the first defendant's remuneration receivable from the plaintiff under a contract for services and one of the claims put forward by the first defendant was for a sum of money on a quantum merit basis for services rendered, it being alleged that the agreement had ceased to have any application to those services. The disputes were referred to the arbitration of second defendant under a clause which was very wide and covered " any dispute or difference which shall arise or occur between the parties hereto in relation to anything or matter arising out of or under this agreement". A question arose as to whether a claim based on quantum merit would fall within the arbitration clause and Sellers, J. held that it did observating as under :

"It is true that a quantum merit is a quasi-

contract and arises, in a sense, on an implied contract and not on any express agreement, but, in my view, in the circumstances of this case (although it may not be in all cases) the quantum merit is an incident which arises out of the contract. It is not a remedy for breach or arising on frustration, but it is an incident, in my view, which does arise as a consequence of the contract or `arising out of' it. One has only to look at the pleadings, at the points of claim, and to visualise what is involved in the arbitration to see the close association between the written contract and the claim advanced in this way on a quantum merit."

In Alliance Jute Mills Co. Ltd. v. Lal Chand Dharanchand and Another(1) disputes between the parties to a commercial contract were arbitrable under the bye-laws of the East India Jute & Hessian Exchange Association and the relevant bye-law ran thus : "All matters, questions, disputes, difference and/or claims arising out of and/or concerning and/or in connection with and/or in consequence of or relating to this contract shall be referred to arbitration....." Under the commercial Contract Respondent No. 1 had sold, through a broker, certain quantities of fibre to the appellant-mill and after effecting delivery of the goods Respondent No. 1 had submitted bills to the appellant-mill again through the broker ; the appellant-mill, however, claimed reduction in price on account of shortage in weight and submitted claims in that respect. Since the price was not paid, Respondent No. 1 referred the claim to the arbitration of Bengal Chamber of Commerce and Industry. The appellant-mill informed the Chamber of Commerce and Industry that it had filed a suit upon the whole of the subject matter of the reference and served a Notice under s. 35 of the Arbitration Act. In suit so filed against Respondent No. 1 and the broker apart from the declaration sought that the broker had no claims against the appellant-mill in respect of the Contract or in respect of the bills submitted by the broker for the price of goods sold and delivered the appellant-mill had also claimed a decree for Rs. 50,000 as damages for the alleged libel published

by respondent No. 1 and the broker. In an application for stay of the suit under s. 34 of the Arbitration Act. 1940, one of the questions raised was whether the arbitration clause was wide enough to include the claim for damages for the alleged libel. The High Court held that the claim in damages for defamation arose "out of" and "in connection with" the non-payment of the bills of respondent No. 1 and in going into the question of tort the Court would necessarily have to go into the terms and conditions of the Contract relating to payment and that the claim in tort was directly and inextricably connected with the terms and conditions of the Contract and as such came within the scope of the arbitration clause which was wide enough to cover the same. In this view of the matter Court stayed the suit under s.34 of the Arbitration Act.

Lastly, we would refer to the decision of this Court in Union of India v. Salween Timber Construction (India) Ors.(1) where the Court has laid down the test for determining the question whether the arbitrators would have jurisdiction to adjudicate upon a claim made by one of the parties to a Contract, though not strictly arising "under" it. In that case a dispute arose between the appellant (Union of India) and the respondent regarding the supply of timber made by the respondent under a contract between the parties. One of the items in dispute was a claim by the respondent that there was an excess supply of timber to cover up possible rejection, which should have been returned by the appellant with compensation for deterioration, or that payment should be made for it as the market rate. The appellant contended that the terms of contract did not require the respondent to tender for inspection any quantity in excess of the contracted quantity, that the claim was in detinue relating to an involuntary bailment and not in relation to anything done in the performance, implementation or execution of the contract and, therefore, it was not a dispute arising out of the contractor in connection with the contract. Arbitration Clause in the contract covered any question or dispute arising under the contract or `in connection with the Contract'. On the question whether the arbitrators had jurisdiction to adjudicate upon that claim this Court, relying upon its earlier decision in Ruby General Insurance Co. Ltd. v. Peary Lal Kumar(1) held, that the test for determining the question is whether recourse to the contract by which both the parties are bound, was necessary for the purpose of determining whether the claim of the respondent was justified or otherwise and since it was necessary in the case to have recourse to the terms of the contract for the purpose of deciding the matter in dispute the matter was within the scope of the arbitration clause and the arbitrators had jurisdiction to decide it.

As stated earlier since this third claim for compensatory damages is directly, closely and inextricably connected with the terms and conditions of the Contract, the payments to be made thereunder and the breaches thereof and since for adjudication thereof recourse to the Contract would be necessary it will have to be held that it is a claim "arising out of" and in any event "related to" the Contract.

As regards the two decisions, Monro v. Bognor Urban District Council (supra) and Ghewarchand Rampuria v. Shiva Jute Bailing Ltd. (supra) relied upon by Counsel for Renusagar we would like to point out that both are distinguishable and each turned on its own facts. In the former case the contractor had filed a suit to recover damages for the fraudulent misrepresentation as also to have the contract declared void on the ground that his consent thereto had been obtained by fraudulent misrepresentation and in effect the Court of Appeal held that the alleged fraudulent misrepresentation was not a dispute "upon or in relation to or in connection with the Contract and,

therefore, the suit was not liable to stayed nor was the dispute liable to be referred to arbitration. In the latter case the suit was based wholly on tort and tort alone and the action complained of was totally unconnected with the Contract; the High Court actually recorded a finding that the cause of action in the suit had no connection direct or indirect with the Contract itself and the reference to the Contract was only a link in the story to show how the goods came to be in the possession of the defendants and the claim was not based in any way on or related to the contract itself. In the final analysis the question as to whether a claim based on tort is a claim de hors the contract which contains the arbitration clause or is directly or inextricably connected with the contract has to be decided on the facts of each case and the language used in the arbitration clause Having regard to the aforesaid discussion we are clearly of the view that all the three claims referred by G.E.C. to the Court of Arbitration of I.C.C. do "arise out of" and are "related to" the Commercial Contract (in fact the first two claims arise "under the Contract") and squarely fall within the widely worded arbitration clause being Art. XVII contained in the Commercial Contract. It is also clear that the arbitration clause embraces even the question of its effect (scope), that is to say, it embraces the issue of the arbitrability of the three claims. Questions whether in law, namely, the law of the Forum, the arbitrators will have jurisdiction and power to decide the arbitrability of the claims or not and whether Renusagar's suit is liable to be stayed or not will be considered by us next but at this stage we are categorically negativing the contentions of Counsel for Renusagar that on merits the three claims are beyond the scope or purview of the arbitration clause or that the arbitration clause on its own language does not embrace the issue of arbitrability of the three claims.

We shall now deal with the principal legal contention raised in support of these appeals by Counsel for Renusagar that under s. 3 of the Foreign Awards Act, 1961, having regard to its scope, a suit in the nature of a petition under s. 33 of the Arbitration Act, 1940 can never be stayed, that G.E.C.'s Arbitration Petition (No. 96 of 1982) in that behalf is totally mis-conceived and that no case has been made out for staying Renusagar's suit which is in the nature of a petition under s. 33 of the Arbitration Act. In this behalf submissions of Counsel may be analysed thus :

(a) That two decisions - one of the Calcutta High Court in Balabux Agarwalla's case (supra) and the other of this Court in Gaya Electric Supply Co's case(1), have settled the legal position under Arbitration Act 1940 that a Court acting under s. 34 is a Court of limited jurisdiction performing a limited function and that a petition under s. 33 (which raises issues regarding the existence, validity or effect of an arbitration agreement) cannot be stayed by invoking s. 34 of that Act, unless, there be a fresh arbitration agreement to refer those very issues in regard to the previous arbitration agreement and, therefore, it should similarly be held that s. 3 of the Foreign Awards Act, (which is similar to s. 34 of the Arbitration Act) cannot be invoked to stay a suit which is in the nature of as. 33 petition and Counsel pointed out that Renusagar's suit is precisely a suit of that nature, wherein the effect (scope) of the arbitration clause contained in the commercial contract only has been put in issue and no relief on the merits of these claims is sought.

(b) That Renusagar's suit is not a suit "in respect of any matter agreed to be referred to arbitration" as required by s. 3 of the Foreign Awards Act and, therefore, the stay sought by G.E.C. should be refused; in other words, Counsel urged that the phrase "in respect of my matter agreed to be referred arbitration" occurring in s. 3 should be construed to cover only disputes or claims on merits

referred to the arbitrators and not issues as to the existence, validity or effect of the arbitration agreed, (particularly its scope that is the arbitrability of the claims) and for placing such narrow construction on the relevant phrase occurring in s. 3 Counsel mainly relied on a decision of this Court in Shiva Jute Baling Ltd. v. Hindley Co.(1) where this Court, while construing s. 35 in the context of s. 33 and s. 34 of the Arbitration Act, has on the facts in the case held that there could be no identity of the subject matter under reference to the arbitrator and the subject matter of a s. 33 petition, that is to say, the issues and prayers that from the basis of an application under s. 33 could not be subject-matter of the reference to the arbitrators ; Counsel also relied upon three more decisions of this Court in Khardah Company's case (supra), Waverly Jute Mills' case (supra) and M/s. R.N. Ganekar & Co's(2) case where, according to Counsel, observations supporting the above view have been made.

(c) That even of the assumption that arbitrability of the three claims is factually covered by the wide language of the arbitration clause in question here and that the suit is `in respect of a matter agreed to be referred to the arbitration', in law, that is to say, under the law of the Forum (being the Indian Law in the instant case) the issue of arbitrability of the claims raised in the suit cannot be finally determined by the arbitrators but must rest with the Court and, therefore, Renusagar's suit cannot be stayed under s. 3 ; in this behalf Counsel urged that both English Law as well as Indian Law is the same (the latter being the law of Forum here) and does not allow questions of arbitrators' own jurisdiction to rest finally with the arbitrators and in support reliance was placed on a number of decisions English, American and Indian (particularly decision in Attorney-General for Manitoba v. Kally & Ors.(1), Dalmia Dairy(2) case, Backer Auto Radio(3) case, Municipal Board v. Eastern U.P. Electric Supply Co. Ltd & Ors(4), M/s. Jagan Nath Phool Chand v. Union of India & Ors.,(5) R. Prince & Co. v. Governor General in Council(6), Vallabh Pitti v. Narsingdas(7) as well as certain passages in Russell on Arbitration 20th Edn. at pages 91-92 and 111- 112 and Albert Jan Van Dan Berg's Treatise on New York Convention at pages 311-312.

(d) That a stay, if granted as sought by G.E.C., would render Renusagar's suit dead for all practical purposes, and, therefore, no such relief should be granted which will have the effect of finally determining the suit merely on a prima facie view or a pro tanto finding on the issue of arbitrability of the claims and in support reliance was placed on Strauss & Co's.(8) case.

We shall examine each one of these submissions put forward to strengthen the main legal contention urged in the support of these appeals presently.

At the out set we would like to observe that the answer to the question whether Renusagar's suit which is in the nature of a petition under s. 33 of the Arbitration Act could be stayed under s. 3 of the Foreign Awards Act must necessarily depend upon a correct construction of the said s. 3 and it is obvious that the provisions of that section will have to be construed by keeping in mind the objective sought to be achieved by that Act and its scheme and not on the basis of similar or analogous provisions that are to be found in the Arbitration Act, 1940 or the manner in which such similar or analogous provisions have been construed by our Courts. The Statement of Objects and Reasons shows that the Act seeks to achieve speedy settlement of disputes arising from international trade through arbitration. The Act is a successor to the Arbitration (Protocol & Convention) Act, 1937. The

earlier Act was intended to effectuate the purposes of Geneva Convention of 1927 ; it was, however, felt that the Geneva Convention hampered the speedy settlement of disputes through arbitration and hence no longer met the requirements of the international trade due to certain defects and, therefore, in order to remedy, inter-alia, those defects, a craft Convention was prepared by the International Chamber of Commerce, which was considered by the United Nations Economic and Social Council in consultation with the Governments of the various countries and nongovernmental organisations and finally a new International Convention on the Recognition and Enforcement of Arbitral Awards was adopted at New York on 10th June, 1958. The Convention was duly ratified by the Government of India and was deposited with the Secretary-General of the United Nations on 13th July, 1960. The present Act was enacted, as its long title indicates, to give effect to the said New York International Convention on the Recognition and Enforcement of Foreign Arbitral Awards to which India is a party. Article II of the Convention provides for recognition by Contracting States of agreements, including arbitral clauses in writing, by which the parties to the agreement undertake to submit to arbitration and 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 and s. 2 of the Act defines the expression "foreign award" accordingly, i.e. closely following the language of Article II of the Convention. It is obvious that since the Act is calculated and designed to subserve the cause of facilitating international trade and promotion thereof by providing for speedy settlement of disputes arising in such trade through arbitration, any expression or phrase occurring therein should receive, consisting with its literal and grammatical sense, a liberal construction. Moreover, an examination of the relevant provisions of this 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 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. With these preliminary observations we now turn to the question of proper construction of s. 3 of the Foreign Awards Act.

Section 3 of the Foreign Awards Act, 1961 as amended by Act 47 of 1973, (omitting unnecessary words) 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, commences any legal proceedings in any court against any other party to the agreement, 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".

It may be stated that prior to its amendment by Act 47 of 1973 the words in the old section 3 were : "If any party to a submission made in pursuance of an agreement" which were construed by this Court in V/O Tractoroexport, case as prescribing a requirement that there must be an actual reference made to the arbitrators before any party to the arbitration agreement could invoke the section and Parliament immediately stepped in and amended the section by substituting in their place the words : "if any party to an agreement" thereby facilitating the stay of legal proceedings even before any actual reference is made and compelling speedy settlement of disputes through agreed arbitration. On a plain reading of the section as it now stands two things become very clear. In the first place the section opens a non-obstante clause giving overriding effect to the provision contained therein and making it prevail over anything to the contrary contained in the Arbitration Act, 1940 or the Code of Civil Procedure, 1908. Secondly, unlike s 34 of the Arbitration Act which confers a discretion upon the Court, the section uses the mandatory expression "shall" and makes it obligatory upon the Court to pass the order staying the legal proceedings commenced by a party to the agreement if the conditions specified therein are fulfilled. The conditions required to be fulfilled for invoking sec. 3 are :

(i) there must be an agreement to which Article II of the Convention set forth in the Schedule applies. (It is not disputed that this is so in the instant case) ;

(ii) a party to that agreement must commence legal proceedings against another party thereto. (It is again not disputed that Renusagar and G.E.C. are the two parties to the arbitration agreement and that Renusagar has commenced legal proceedings against G.E.C. by filing suit No. 832 of 1982 ;

(iii) the legal proceedings must be "in respect of any matter agreed to be referred to arbitration" in such agreement. (The question whether this condition is fulfilled here needs to be decided) ;

(iv) the application for stay must be made before filing the written statement or taking any other step in the legal proceedings. (Admittedly this condition is fulfilled) ;

(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. (In the instant case these questions do not arise) ;

(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. (It will have to be dealt with while considering the satisfaction of condition (iii) above).

As stated above Counsel for Renusagar have urged that conditions (iii) and (vi) and not satisfied and hence stay of Renusagar's suit ought to be refused while according to Counsel for G.E.C. all the conditions including these two have been fulfilled and it is obligatory upon the Court to stay the suit.

Before dealing with the question whether conditions

(iii) and (vi) are satisfied in this case or not we would briefly indicate how the schemes of the two Acts (Foreign Awards Act and Arbitration Act) materially differ on several aspects having a bearing on the points at issue. An examination of ss. 3, 4 and 7 of the Foreign Awards Act in juxtaposition with ss. 32, 33 and 34 of the Arbitration Acts brings out these differences. Under s. 32 of the Arbitration Acts suits to challenge the existence or validity of an arbitration agreement or award as also suits to have the effect (scope) of an arbitration agreement determined are barred and such questions can be raised only by an application under s. 33 of the Act whereas under the Foreign Awards Act there is no provision similar or akin to ss. 32 and 33 (and that is why a suit of the nature filed by Renusagar qua the arbitration agreement covered by the Convention is maintainable) but by virtue of ss. 3 and 7 the same purpose is served though by different procedure. Sections 3 and 7 read together disclose a scheme that so far as questions of existence, validity and effect (scope) of the arbitration agreement are concerned, the determination thereof by the arbitrators is also subject to the decision of the Court and this decision of the Court can be had either before the arbitration proceedings commence or during their pendency, if the matter is decided by the Court in a s. 3 petition, as in the present case, or can be had under s. 7 after the award is filed in the Court and is sought to be enforced under s. 6. True, section 4(2) declares that a foreign award shall be treated as binding `for all purposes' on persons as between whom it is made but that is subject to s. 7 whereunder enforcibility thereof is made dependent upon satisfaction of certain conditions specified therein : for example, under s. 7(1)(a)(iii) one of such conditions for enforcibility is that the award should not deal with questions not referred nor should it contain decisions on matters beyond the scope of the agreement. In effect, s. 3 of the Foreign Awards Act so to say combines in its own ambit both ss. 33 and 34 of the Arbitration Act ; in other words, questions regarding the existence, validity or effect (scope) of the arbitration agreement which can be decided under s. 33 of the Arbitration Act are required to be decided under s. 3 of the Foreign Awards Acts before a stay of egal proceedings contemplated therein could be granted and the right to have legal proceedings stayed contained in s. 34 of the Arbitration Act is also to be found in the same s. 3. Further the Foreign Awards Act has also taken cognizance of the possibility that there may not be s. 3 petition at all the matter being directly proceeded before the arbitrators and the possibility of the arbitrators giving a decision on an issue not within their competence or jurisdiction and such cases s. 7 contains a safe-guard which prevents any such award from being made enforceable. Such being the scheme under the Foreign Awards Act we would reiterate our view that decisions of our Courts on similar or analogous provisions contained in the Arbitration Act would not be of any help to decide questions arising under the Foreign Awards Act. For instance, the view taken by the Calcutta High Court in Balabux Agrawalla's case (supra) and by this Court in Gaya Electric Supply Co.s case (supra) that a Court acting under s. 34 of the Arbitration Act is a Court of limited jurisdiction performing a limited function and that a petition under s. 33 cannot be stayed by invoking s. 34 of that Act will be of no avail whatever in face of the express provisions contained under s. 3 of the Foreign Awards Act which section, as indicated earlier, combines within its own ambit both sections 33 and 34 of the Arbitration Act and those questions have to be decided by the Court before granting stay. Similarly, the broad principle that an arbitrator has no power to determine questions of his own jurisdiction (which include questions regarding the existence, validity and effect i.e. scope of the arbitration agreement) and that neither English Law nor Indian Law allows these questions to rest with the arbitrator (for which Counsel for Renusagar have been contending and we shall deal with it later) would be hardly applicable to any foreign award made under the Act. if the scheme of the Act

emerging from a combined reading of ss. 3 and 7 clearly shows that so far as the questions of existence, validity and effect (scope) of the arbitration agreement are concerned, the determination thereof by the arbitrators is subject to the decision of the Court and that this decision of the Court can be had under s. 7 even after the award is made and filed in the Court but before it is made enforceable ; s. (7)(a)(i) and (iii) show that the award can be challenged on these grounds which implies that the arbitrators have decided those questions while making their award.

Turning now to the question whether in this case conditions (iii) and (vi) indicated above are satisfied or not we would like to observe that the two conditions are inter-related and in substance bear upon the same aspects and, therefore, could be dealt with together. The main question is whether Renusagar's suit can be said to be "respect of any matter agreed to be referred to arbitration" ? On this, Counsel for Renusagar put forward a two-pronged submission. Initially it was urged that the arbitration clause in the Contract does not include within its scope the issue of arbitrability of the three claims and so the suit is not liable to be stayed but we have already negatived this part of the submission by holding that the language of the arbitration clause is wide enough to embrace the issue of the arbitrability of the claims. Now the submission is that the phrase "in respect of any matter agreed to be referred to the arbitration" occurring in s. 3 should be construed as covering only the disputes or claims on merits which have been referred to the arbitrators and since Renusagar's suit merely raises the issue of arbitrability of those claims the suit cannot be said to be in respect of any matter agreed to be referred to arbitration; in other words, the submission is that the relevant phrase in s. 3 should be given a narrow construction. In the first place there is nothing in the section which warrants the placing of such narrow construction on the relevant phrase. What matters are agreed to be referred to arbitration will depend upon what language is employed by the parties to the arbitration agreement and as we have indicated earlier there is nothing in law or equity which prevents the parties from referring even the questions of existence, validity or effects (scope) of the arbitration agreement itself to the arbitrators (in fact. Lord Porter's observations quoted earlier from Heymen v. Darwins Ltd. and Das J's view in Balabux Agarwala's case show that the parties can do it.) Secondly, the scheme of ss. 3 and 7 of the Foreign Awards Act, as discussed earlier, clearly suggests that the relevant phrase would include even questions of existence, validity and effect (scope) of the arbitration agreement. It is, therefore, not possible to place a narrow construction on that phrase in s. 3 as suggested by Counsel for Renusagar. The decision of this Court in Shiva Jute Bailing Ltd. case (supra) and the supporting observations in three other decisions of this Court, namely, Kharda Co's case, Waverly Jute Mills case and M/s. R.N. Ganekar & Co's case (all supra) on which reliance was placed by Counsel for Renusagar are of no avail for two reasons - (i) they deal with a position arising under ss. 33, 34 and 35 of the Arbitration Act and the manner in which certain phrases occurring therein are construed would offer no guidance in construing the relevant phrase occurring in s. 3 of the Foreign Awards Act which will have to be construed on its own language and in the light of the scheme of the Foreign Awards Act and (ii) though the ratio in Shiva Jute Bailing Ltd. case has been expressed rather broadly it cannot be forgotten that in each one of the four cases the question pertained to either the existence or the validity of the arbitration agreement and not the effect (scope) thereof, (i.e. not the issue of the arbitrability of the claims) and, therefore, the ratio in that case as also the supporting observations made in the other three cases will have to be understood as being applicable to the actual issue that arose on the facts of each on of them. We therefore, conclude that both the

conditions (iii) and (vi) are satisfied in the instant case.

The next contention-and this has been, if one may so, the crux of the entire submission of Counsel for Renusagar in the case-is that arbitrability of the three claims falls within the wide ambit of the arbitration clause and that therefore Renusagar's suit is in respect of a matter agreed to be referred to the arbitration within the meaning of sec. 3, in law, that is to say under the law of the Forum (being the Indian law in the instant case) the issue of arbitrability of claims cannot be finally determined by the arbitrators but must rest with the Court and therefore Renusagar's suit cannot be stayed under that section. According to Counsel both English law as well as Indian law is the same which does not allow questions of arbitrator's own jurisdiction to rest finally with the Arbitrators and in support of this proposition Counsel relied upon the following authorities:

(a) Attorney-General for Manitoba v. Kelly and Ors, (supra) where the Privy Council at page 276 of the Report has observed thus : "Whenever there is a difference of between the parties as to the authority conferred on an umpire under an agreed submission, the decision rests ultimately with the Court and not with umpire : Produce Brokers Co. v. Olympia Oil and Cake Co. It would be impossible to allow an umpire to arrogate to himself jurisdiction over a question which, on the true construction of the submission, was not referred to him. An umpire cannot widen the area of his jurisdiction by holding, contrary to the fact, that the matter which he affects to decide is within the submission of the parties."

(b) Dalmia Dairy Industries Ltd. v. National Bank of Pakistan (supra) where the enforcibility of the award made by a sole arbitrator pursuant to an arbitration clause contained in the document of guarantee executed by the National Bank of Pakistan in favour of Dalmia Dairy Industries Ltd. was resisted by the Bank inter-alia on the ground that the arbitrator was not entitled to decide the question of his own jurisdiction when the validity of the contract of guarantee itself was disputed, and the Court of Appeal at pages 292-293 of the Report observed thus : "Whilst we recognise that in answering issue I(B) differently from the learned Judge we are rejecting this preference on this issue Mr. Sikri's evidence rather than that of Mr. Lall, we reach our conclusion for the reason that we find nothing in the learned Judge's judgment or in Mr. Sikri's evidence or in the Indian authorities, which seems to us justify departure from the logical conclusion that there is no difference in principal between a contract containing an arbitration clause admittedly concluded but void for initial illegality and a contract containing such a clause admittedly concluded but where it is alleged that either the contract or the arbitration clause or both have become void because of subsequent illegality. It seem to us to follow that even where the arbitration clause is framed as widely as in the present claim and bears the construction which we have upheld in our answer to issue 1(A), Indian law will not allow effect to be given to it so as to allow an arbitrator appointed thereunder finally to determine his own jurisdiction."

(e) Becker Auto-Radio case (supra) where the United States Court of Appeals (3rd Circuit) has expressed the view that the question of arbitrability of a dispute is for the Court to decide (para 7 at page 44 of the Report read with footnote 10).

(d) R. Prince and Co. v. Governor-General in Council (supra) where following the aforesaid Privy Council decision the Punjab High Court at page 242 of the Report has observed thus : "It is well established that an arbitrator or umpire must not go beyond the submission and although there is a presumption in favour of the validity of the award and the onus of proving that the arbitrator has exceeded his jurisdiction rests on the person alleging it, if an award extends to matters not within the scope of the submission it must be held to be void to the extent that it is in excess of the submission. An Arbitrator cannot give himself jurisdiction by a wrong decision as to the facts upon which the limit of his jurisdiction depends and where there is a difference between the parties as to the authority of the arbitrator under an agreed submission the decision rests with the Court and not with the arbitrator." Observations in similar strain made by the Allahabad High Court in Municipal Board v. Eastern U.P. Electricity Supply Co. Ltd. and Ors. (supra), by the Delhi High Court in M/s. Jagan Nath Phool Chand v. Union of India & Ors. (supra) and by the Bombay High Court in Vallabh Pitti v. Narsingdas (supra) were also relied upon.

(e) Russell on Arbitration (20th Edition) : At pages 91-92 the following statement of law occurs : "It can hardly be with in the arbitrator's jurisdiction to decide whether or not a condition precedent to his jurisdiction has been fulfilled. It has indeed several times been said bluntly that an arbitrator has no power to decide his own jurisdiction and in one case where rules of an institution prepared to conduct arbitrations gave the arbitrator such power, the court will ignore this when asked to enforce the award, and decide the question itself" : Dalmia Dairy Industry's case. Again at page 112 the learned author has digested Dalmia Dairy Industry's case thus : "Again some of the rules give the arbitrator power to decide whether he has jurisdiction in a particular dispute. But English court will never give effect to such rules and accordingly, if it is sought to enforce in England an award given after such a decision by the arbitrator, the court will not accept it but will have to determine the question of jurisdiction for itself."

In our view the aforesaid authorities relied on by Counsel for Renusagar do not touch the real question which we have to decide in the case. The question is whether in view of the wide arbitration clause which embraces questions of existence, validity or effect (scope) of the agreement itself Renusagar's suit (which is in respect of a matter agreed to be referred) should be stayed so as to enable the arbitrators to proceed with the reference and make their award and that question is required to be considered in regard to foreign awards to be made under the Foreign Awards Act and as such must be considered in light of the scheme of that Act and will necessarily be governed by the provisions thereof. As explained earlier the scheme that emerges on a combined reading of ss. 3 and 7 of the Foreign Awards Act clearly contemplates that questions of existence, validity or effect (scope) of the arbitration agreement itself, in cases where such agreement is wide enough to include within its ambit such questions, may be decided by the arbitrators initially but their deter-

mination is subject to the decision of the Court and such decision of the Court can be had either before the arbitration proceedings commence or during their pendency, if the matter is decided in a section 3 petition or can be had under sec. 7 after the award is mane and filed in the Court and is sought to be enforce by a party thereto. In the face of such schemes envisaged by the Foreign Awards Act which governs this case it will be difficult to accept the contention that the arbitrators will have no jurisdiction to decide questions regarding the existence, validity or effect (scope) of the

arbitration agreement. In fact the scheme makes for avoidance of dilatory tactics on the part of any party to such agreement by merely raising a plea of lack of arbitrator's competence-and a frivolous plea at that-and enables the arbitrator to determine the plea one way or the other and if negatived to proceed to make his award with the further safeguard that the Court would be in a position to entertain and decide the same plea finally when the award is sough to be enforced. All that condition (iii) of sec. 3 requires is that the legal proceedings must be in respect of a matter "agreed to be referred to the arbitration" and there is no warrant to add further words namely, "agreed to be referred to the arbitration for final determination". Obviously if the occasion to decide the question of arbitrator's jurisdiction arises at an earlier stage namely in a section-3 petition the Court has to decide it before granting stay of the legal proceedings and such decision of the Court on that question will be conclusive and binding on the arbitrator and the question before him will then become academic. It is thus clear that under the scheme questions of existence, validity of effect (scope) of the arbitration agreement itself, in cases where the arbitration clause embraces within its scope such questions, (unless decided by the Court in a section-3 petition) could be initially determined by the arbitrators, which would be subject to the final decision of the Court. This position under the New York Convention (to give effect to which the Foreign Awards Act was passed) has been clarified by Albert Jan Van Den Berg in his treatise of New York Convention at page 312-a passage on which Counsel for Renusagar relied. This is what learned author has stated:

"The Convention does not imply that the arbitrator may give a final decision on his competence. Under almost all arbitration laws the arbitrator has no power to give such final decision; as arbitration excludes the competence of the courts, which is considered as a far-reaching effect, the courts retain the last word in this matter. Many laws, however, allow the arbitrator to give a provisional ruling on his competence in order not to delay the arbitration and to alleviate dilatory tactics by obstructive respondents. This principle that the court has the last word on the arbitrator's competence is not different for the New York Convention. If it were otherwise, the Convention would have contained express provisions to that effect in order to make clear that in deviates from the prevailing principles of the national arbitration laws." Secondly, even the aforesaid authorities on which reliance has been placed by Counsel for Renusagar (excepting perhaps the American decision in Becker Auto-Radio case merely lay down that the decision on questions of arbitrator's jurisdiction (assuming no distinction is made between questions regarding the existence or validity of the agreement on the one hand and effect (scope) thereof on the other) rests finally or ultimately with the Court and not with the Arbitrator or Umpire. [As regards the American decision in Becker Auto-Radio case it may be stated, as pointed out by Counsel for G.E.C. that the point was not decided but the statement or observation was made on concession of the parties; and as regards statement of law at pages 91-92 in Russell on Arbitration it must be pointed out that the passage pressed into service by Counsel is merely a half portion of the statement of law but the fuller statement of law, as we shall indicate later, gives a different picture.] These authorities do not suggest that the arbitrator or umpire may not decide these questions even provisionally or tentatively, In other words, there is nothing in the general law of arbitration either English or Indian which prevents the arbitrators or an umpire from deciding questions of their own jurisdiction provisionally or tentatively and to proceed to make their awards on that basis, though it is clear that their provisional or tentative decision on questions of their own jurisdiction would be subject to the final determination by the Court and if the Court takes a contrary view their award will not be given

effect to and in our view this is exactly the scheme of the Foreign Awards Act.

It may not be out of place to mention here that the statement of Albert Jan van den Berg that many national arbitration laws allow the arbitrator to give a provisional ruling on his competence in order not to delay the arbitration and to alleviate dilatory tactics by obstructing respondents is borne out in regard to the general law of arbitration both English and Indian by several decisions. The position under English law has been summarised in Russel on Arbitration at pages 91-92 where a fuller statement of law (to which we had adverted earlier) appears thus:

"It can hardly be within the arbitrator's jurisdiction to decide whether or not a condition precedent to his jurisdiction has been fulfilled. It has indeed several times been said bluntly that an arbitrator has no power to decide his own jurisdiction and in one case where rules of an institution prepared to conduct arbitrations gave the arbitrator such power, the Court will ignore this when asked to enforce the award, and decide the question itself. However, an arbitrator is always entitled to enquire whether or not he has jurisdiction. An umpire faced with a dispute whether or not there was a contract from which alone his jurisdiction, if any, can arise can adopt one of a number of courses. He can refuse to deal with the matter at all and leave the parties to go to court, or he can consider the matter and if he forms the view that the contract upon which the claimant is relying and from which, if established, alone his jurisdiction can arise is in truth the contract, he can proceed accordingly." (The first part of the statement is based on Dalmia Dairy Industry's(1) case (supra) while the latter part is based on Brown v. Oesterrei-chischer Waldbesitzer R. Gmbh and Per Roskill J. in Luanda Exportadora and Ors. v. Tamari & Sons & Others,(2) So far as Indian Law is concerned the position is clarified in Vallabh Pitti v. Narsingdas (supra)...a decision on which Counsel for Renusagar relied where the Bombay High Court has held that the jurisdiction of the arbitrators to decide the question of existence of the contract which contains an arbitration clause is not wholly taken away by mere denial of its existence; that the arbitrator may consider the question of jurisdiction, not to give final and binding judgment on that question but in order to determine what course they should adopt; that they may in a case hold that they have no jurisdiction and direct the party who affirms the jurisdiction to obtain a decision of the Court under the Arbitration Act but on the other hand if they are satisfied that they have got jurisdiction they may proceed with the arbitration and make their award; but a decree in terms of such award may not be made by the Court if at the time when one is sought the Court decides question of jurisdiction otherwise. The High Court pointed out that a similar view was taken by Bachawat, J. in Pannallal Sagoremull v. Fatey Chand Muralidhar(3) and that after deciding the question in issue he affirmed the award and passed a decree in terms thereof. Similarly, it may be pointed out that there is no difference between English law and Indian law on the point that an arbitration agreement which empowers an arbitrator to decide the question of its existence, validity or effect (scope) is neither invalid nor void. In Heyman v. Darwins Ltd. Lord Wright's observations at p. 385 of the Report clearly suggest that there can be a valid agreement to refer any dispute to arbitration including a dispute as to whether the contract in which the arbitration clause is contained was ever entered into at all, or whether if there was, it had been avoided or ended. As regards Indian law in Fertilizer Corporation of India v. Chemical Construction Corporation(1) the Bombay High Court has clarified this position while dealing with Rules 3 and 4 of Article 13 of the Rules of Conciliation and Arbitration framed by the International Chamber of Commerce under which the arbitrators were clothed with a power to

decide, inter alia, a question as to the existence and validity of the Contract. Not only has the High Court held that the conferral of such power on the arbitrators does not render the Rules void but has further gone on to hold that if such a plea is raised by way of a defence in an application for stay of suit under s. 34 of the Arbitration Act it will be for the Court to consider the validity of the arbitration agreement itself and if in the opinion of the Court the contract which contains the arbitration clause is valid no question is likely to arise before the arbitrators on that point and even if such question were to arise the arbitrators will be concluded by the decision of the Court. We may point out that following this decision in Fertilizer Corporation's case (supra) the Court of Appeal in Dalmia Dairy Industries' case (supra) has held that the Rules of I.C.C enabling the Arbitral Tribunal to decide its own jurisdiction were not void (vide page 290 of the Report) and it has further noted without disapproval the further observations of the Bombay High Court that if the court once itself decides the question that the arbitrators had jurisdiction then that point would hardly be raised before the arbitrators and if it were the arbitrators would be bound by the decision of the Court on the point.

In view of the position which arises from the aforesaid discussion it is really unnecessary for us to go into and decide the question whether, in cases where the arbitration clause contained in the underlying Commercial Contract is so widely worded as to include within its scope the questions of its existence, validity or effect (scope), the decided cases have made a distinction between questions as to the existence or validity of the agreement on the one hand and its effect (scope) on the other and have held that in the case of the former those questions cannot be decided by the arbitrators, as by sheer logic the arbitration clause must fall along with the underlying Commercial Contract which is either non-existent or illegal, while in the case of the latter it will ordinarily be for the arbitrators to decide the effect (scope) of the arbitration agreement as is contended for by Counsel for G.E.C., because both under the scheme of the Foreign Awards Act as well as under the general law of arbitration obtaining in England and in India, the decision of the arbitrator on the question of his own jurisdiction will have to be regarded as provisional or tentative, subject to final determination of that question by the Court. However, on a consideration of the rival authorities that have been cited at the Bar bay Counsel on either side we are inclined to accept the contention of Counsel for G.E.C. for the following reasons: (a) that conceptually a challenge to the existence or validity of the arbitration agreement contained in an underlying Commercial Contract is fundamentally different from an inquiry into the scope and effect of such agreement in as much as the former goes to the root of the arbitration agreement whereas the latter pre-supposes that the arbitration agreement exists in fact and in law and the inquiry is then undertaken as to its true scope and effect; (b) that indisputably, decided cases have made this distinction between the two concepts, e.g. in Jawahar Lal Barman's case (supra) this Court has noted this distinction for the purposes of procedural aspects arising under ss. 31(2), 32 and 33 of the Arbitration Act, 1940, but the English cases particularly Heyman v. Darwins Ltd. (supra) and Willesford v. Watson (supra) have made that distinction substantively; (c) that certain observations made by this Court in para 6 of its judgment in Water Supply Service India (P) Ltd. v. The Union of India and Others(1) on which Counsel for Renusagar have relied in support of their contention that existence of an arbitration agreement is the same as the effect (scope) thereof, do not, in our view, have the effect of equating the question of the scope of the arbitration agreement with the question of its existence; in that case the application made under s. 5 of the Arbitration Act to revoke the arbitration was obviously mis-conceived inasmuch as the

ground on which the revocation was sought was that the disputes sought to be referred to arbitration were not within the purview of the arbitration clause and it was in that context that the observations were made in para 6 of the judgment to say that such a dispute was as regards the existence of the arbitration agreement; in fact, the ratio of the decision was that the controversy raised in the case fell within the scope of s. 33 of the Arbitration Act and not s. 5; in any case, in our view, the incidental observation in para 6 of the judgment in that case on which Counsel for Renusagar have relied cannot outweigh the distinction which has been noticed by this Court in its well-considered judgment in Jawahar Lal Barman's case (supra); (d) that an analysis of several decisions cited at the Bar, we venture to suggest, shows that almost all the decision which articulate the principle broadly by saying that an arbitrator has no power to decide questions of his own jurisdiction are cases in which the question of either the existence or the validity of the arbitration agreement was involved, whereas whenever the question of arbitrator's jurisdiction depended upon the scope or effect of the arbitration agreement Courts appear to have readily directed the parties to go before the arbitrators; and (e) in any event the decision of the Court of Appeal in Chancery in Willesford v. Watson (supra)-which decision has been annotated and digested in Russell on Arbitration (20th Edn.)-is a clear authority for the proposition that where the arbitration clause was very widely worded so as to include within its scope any dispute "touching the construction of" the contract which contained the arbitration clause, the Court would not decide but would leave it to the arbitrator to decide the question whether the matter in dispute between the parties fell within the arbitration agreement. In fact, the Court of Appeal in that case repelled every endeavour on the part of the appellants to require the Court to do the very thing which lay within the competence of the arbitrators-that is to say, to look into the whole matter, to construe the instrument and to decide whether the thing complained of was inside or outside the agreement, and directed the parties to go to arbitration by staying the suit. It would be debatable whether in such a case where the Court has expressly declined to decide the dispute involved between the parties and has directed the parties to go to arbitration, the arbitrator's decision on the question of his jurisdiction would again be subject to Court's decision. Would it not be a case similar to the case falling within the principle of a specific question of law being expressly referred to an arbitrator whose decision thereon finally binds the parties: But as stated at the out set, the aforesaid question on which we have expressed our view, does not arise for decision in this case.

It was next contended by Counsel for Renusagar that a stay, if granted as sought by G.E.C. in a petition under s. 3, it would render Renusagar's suit dead for all practical purpose and there will be nothing left to be decided in the suit either because the suit is stayed indefinitely or alternatively because the decision on the issue would operate as red judicata in the suit, and, therefore, no relief of stay should be granted which will have such effect merely on a prima facie view or a pro tanto finding on the issue of arbitrability of the claims, in support Counsel relied upon a decision of the Allahabad High Court in Strauss Company's case (supra)-a case arising under the earlier Indian Arbitration Act 1899-where that High Court has expressed the view that, "a stay order under s. 19 of the Arbitration Act, when the arbitration has in fact taken place, is sufficient finally to dispose of the suit". In other words, the contention was that a section 3 petition could not be a proper stage to decide the issue of arbitrability of the claims but the same should be decided in the suit when it will be finally tried. If regard be had to the provisions of s. 3 as well as the legal position arising under decided cases the contention will be found to be devoid of any substance. It may be that a stay of the

suit either under s. 3 of the Foreign Awards Act or under s. 34 of the Arbitration Act, 1940 may have the effect of finally disposing of the suit for all practical proposes as pointed out by the Allahabad High Court. But that is no reason why the relief of stay should be refused by the Court if the concerned legal provision requires the Court to do so. Here we are concerned with s. 3 which makes it obligatory upon the Court to stay the legal proceedings if the conditions of the section are satisfied and what is more the section itself requires that before any stay is granted the Court should be satisfied that the arbitration agreement is valid, operative and capable of being performed and that there are disputes between the parties with regard to the matters agreed to be referred to arbitration (condition (v) and (vi) mentioned earlier). In other words, the section itself indicates that the proper stage at which the Court has to be fully satisfied about these conditions is before granting the relief of stay in a s. 3 petition and there is no question of the Court getting satisfied about these conditions on any prima facie view or a pro tanto finding thereon. Parties have to put their entire material before the Court on these issues (whichever may be raised) and the Court has to record its finding thereon after considering such material.

It may be stated that though s.34 of the Arbitration Act, 1940 confers a discretion upon the Court in the matter of granting stay of legal proceedings where there is an arbitration agreement, it cannot be disputed that before granting the stay the Court has to satisfy itself that arbitration agreement exists factually and legally and that the disputes between the parties are in regard to the matters agreed to be referred to arbitration (these aspects fall within the phrase 'if satisfied that there is no reason by the matter should not be referred' occurring therein) and decided cases have taken the view that the Court must satisfy itself about these matters before the stay order is issued. In other words, Court under s.34 must finally decide these issues before granting stay. In Phagwandas v. Atmasing on a consideration Act the Bombay of the scheme underlying ss. 32,33 and 34 of the Arbitration High Court has taken the view that is a defendant who applies for stay s. 34 has to say that there is an arbitration agreement that if the plaintiff says that there is no agreement then the issues arises between the parties and there nothing in s. 34 to prevent the Court from deciding that issue to enable it to pass an order under that Section. The same position under s. 4(1) of the English Arbitration Act, 1950 has been affirmed in a judgment of the Court of Appeal in England in Modern Building Wale Ltd. v. Limmer and Trinidad Co. Ltd.(2) The Court of Appeal held that where a party claimed that proceedings should be stayed because there was an arbitration agreement in force the Court was under a duty to construe the terms of the contract in order to decide whether there was a valid arbitration clause and that question had to be determined at an interlocutory stage because it had to be done before the defendant took any step in the action. In Anderson Wright Ltd. v. Meran & Co.(3) the respondent (Moran & Co.) sold certain goods to the appellant under a number of similar contracts, which contained a wide arbitration clause. Respondent, however, described himself as broker when signing the contracts. The appellants wanted to claim damages from the respondent for non-delivery of the goods under the contract-notes and desired to refer the same to the arbitration. To prevent this arbitration the respondent filed a suit for a declaration that he was not a party to the said contracts, he having signed the same as broker and that he had incurred no liability thereunder and he further prayed for the consequential relief of an injunction restraining the appellant from claiming damages in respect of the said contracts. The appellant applied for the stay of the suit under s. 34 of the Arbitration Act. Learned trial Judge granted stay of the suit. The Appellate Bench of the High Court took the view that the only matter in dispute between parties was whether the

respondent was a party to the contract or not and that this dispute was outside the scope of the arbitration agreement but no opinion was expressed on the question whether there was a binding arbitration agreement between the parties (which was the only issue in the suit, the relief on merits being consequential) since that would, in the opinion of the Appellate Court, create a bar of res judicata against one of the party. This Court, however, held that it was incumbent upon a Court, when invited to stay a suit under s. 34 of the Arbitration Act, to decide first of all whether there is a binding arbitration agreement between the parties or not. At page 870 of the Report the Court has observed thus:

> "In this case it is certainly not admitted that the respondent was a party to the contract. In fact, that is the subject-matter of controversy in the suit itself. But, as has been said already, the question having been raised in this application under s. 34 of the Arbitration Act, the Court has undoubted jurisdiction to decide it for the purpose of finding as to whether or not there is a binding arbitration agreement between the parties to the suit."

The Court actually sent the case back for a decision of that question with a direction that if the Court came to the conclusion that the respondent was, in fact, a party to the contracts, the suit shall be stayed and the appellant would be allowed to proceed by way of arbitration but, if, on the other hand, the finding was adverse to the appellant the application for stay will be dismissed. Counsel for Renusagar pointed out that the suit did not merely raise the issue that the respondent was not a party to the contract- notes and that therefore, there was no arbitration agreement between the parties but also claimed relief on merits, namely, an injunction restraining the appellant from claiming damages in respect of the said contracts and, therefore, the direction to stay the suit in case the finding on the main issue went a against the respondent, had some meaning but in the instant case before us no relief on merits has been claimed by Renusagar in its suit which merely raises the issue of arbitrability of the claims. In our view, this distinction is neither valid nor relevant to the question under consideration. Not valid because the only issue which the suit (filed by Moran & Co.) raised was whether there was binding arbitration agreement between the parties or not and an adverse decision thereon in a sec. 34 application would have had the effect of disposing of the suit for all practical purposes, the consequential relief automatically falling to the ground along with such adverse decision. Not relevant because the question of issue is whether a sec. 34 application is proper stage for deciding such issue though it may have the effect of the issue becoming res-judicata in the suit. What is of significance is that the decision of this Court does show that notwithstanding the fact that a finding on the issue that the respondent was a party to the contracts would have operated as res-judicata in the respondents' suit, the Court directed that issue to be decided in a s. 34 petition for stay. In deciding the question under s. 34 in this manner the Court expressed its entire agreement with the view enunciated by Mr. Justice S.R. Das in Khushiram v. Hantumal that where on an application made under sec. 34 of the Arbitration Act for stay of a suit, an issue is raised as to the formation, existence or validity of the contract containing the arbitration clause, the Court is not bound to refuse a stay but may in its discretion, on the application for stay, decide the issue as to the existence or validity of the arbitration agreement even though it may involve incidentally a decision as to the validity or existence of the parent contract. If this is the position under s. 34 of the Arbitration Act which confers discretionary power upon the Court a fortiori the

Court acting under s. 3 of the Foreign Awards Act must decide such issues at that stage when the grant of stay is obligatory.

In the instant case the issue pertained to the arbitrability of the three claims under the Arbitration clause in the contract and depended upon the proper construction thereof in light of the conduct of the parties and surrounding circumstances and no prejudice was caused to any of the parties as both Renusagar's application for injunction and G.E.C.'s stay petition under sec. 3 were heard together and parties did put before the Court-Trial Court, the Appeal Court and even before us the entire material such as each wanted to rely upon and sought a decision on the concerned issue and we are satisfied that the finding recorded by both the lower courts on the issue is correct; and in that view of the matter the prayer for injunction restraining arbitration sought by Renusagar could not be granted and was rightly refused. The triable issue raised in the suit having been found upon against Renusagar no question of balance of convenience survives.

We would reiterate that the Court's decision on the issue of arbitrability of three claims will have to be regarded as final, conclusive and binding and that issue would not arise before the Court of arbitration of I.C.C. and even if it is raised it would be purely academic.

In the result both the appeals filed by Renusagar against G.E.C. are dismissed with costs.

S.R. Appeals dismissed.