(BEFORE J.C. SHAH, V. RAMASWAMI AND A.N. GROVER, JJ.)

M/S V.O. TRACTOROEXPORT. MOSCOW — Appellant

Versus

M/S TARAPORE & COMPANY AND ANOTHER — Respondents

Civil Appeal Nos. 1208, 1209, 1833 and 1834 of 1964,

decided on 28th October, 1969

The following Judgments of the Court were delivered by

GROVER, J.—These connected appeals which involve points of importance and interest in international commercial arbitration arise out of a suit instituted on the original side of the High Court of Judicature at Madras by M/s Tarapore & Co. against M/s V.O. Tractaroexport, Moscow.

2. Initially the claim was for a permanent injunction restraining the Russian firm from realizing the proceeds of a Letter of Credit opened on June 9, 1965 with the Bank of India Ltd., Madras, which had also been impleaded as a defendant. Subsequently by an amendment of the plaint the plaintiff has confined relief to recovery of damages.

3. The facts chronologically are as follows: A contract was entered into on February 2, 1965, between the Indian and the Russian firms for the supply of earth-moving machinery for a value of Rs. 66,09,372.00. The machinery was required by the Indian firm for executing the work of excavation of a feeder canal as part of the Farraka Barrage Project. On June 9, 1965, the Indian firm opened a Letter of Credit with the Bank of India Ltd., for the entire value of the machinery in- favour of the Russian firm. The consignments started arriving at Calcutta in October 1965. On February 22, 1966, the Indian firm wrote to the Russian firm saying that there was something wrong with the design and working of motorised scrapers which had been supplied and which formed one of the items of machinery covered by the contract. On June 6, 1966 came the devaluation of the Indian rupee by 57.480/, as a result of which the amount that became payable by the Indian firm to the Russian firm under the contract increased by Rs 25 lakhs or so. On June 20, 1966, the Russian firm demanded an increase in the Letter of Credit owing to the devaluation. On August 1, 1966, the Indian firm served a notice on the Russian firm containing the main allegations relating to breach of contract on the part of the Russian firm. The latter was called upon to remedy the breaches and pay compensation. It was made clear that until this was done the Russian firm would not be entitled to encash the Letter of Credit for the balance amount. On August 4, 1966, the Indian firm filed a suit on the

original side of the Madras High Court and obtained an ex parte order of injunction in respect of the operation of the Letter of Credit. On August 14, 1966, the parties arrived at a settlement at Delhi after mutual discussion.

4. Pursuant to the agreement the suit was withdrawn by the Indian firm but no amicable settlement, as contemplated, took place. The Indian firm instituted a suit (No. C. S. 118 of 1967) on the original side of the Madras High Court on August 14, 1967. It also filed an application for an interim injunction in the matter of the operation of the Letter of Credit. On October 26, 1967, another application was filed for an interim injunction against the encashment of the devaluation drafts. On November 4, 1967, the Russian firm instituted proceedings in terms of the arbitral clause in the Contract before the Foreign Trade Arbitration Commission of the U. S. S. R Chamber of Commerce, Moscow. On November 14, 1967, the Russian firm entered appearance under protest before the Madras High Court in the suit filed by the Indian firm. On the same date the Russian firm filed an application under Section 3 of the Foreign Award? (Recognition and Enforcement) (Act XLV of 1961), hereinafter called the Act. A prayer was made for stay of the suit. On January 15, 1968, the Indian firm filed an application for an interim injunction restraining the Russian firm from taking any further part in the arbitration proceedings at Moscow. We are not concerned with the branch of the litigation which came up to this Court at a prior stage in respect of the interim injunctions granted by the single judge with regard to the operation of the Letter of Credit and the subsequent arrangement made for payment as a result of devaluation. It is sufficient to mention that the appeals brought to this Court were allowed on November 26, 196», and the temporary injunction granted by the learned single judge relating to the operation of the Letter of Credit was vacated.

5. The application which had been filed by the Russian firm for stay of the suit under Section 3 of the Act was dismissed by Ramamurthi, J., on April 12, 1968. The application of the Indian firm for an interim injunction restraining the Russian firm from taking any further part in the arbitration proceedings at Moscow was, however, granted. The Russian firm preferred appeals against the orders of the learned single judge before a division bench. The Bench maintained the orders of Ramamurthi, J. The present appeals have been brought by the Russian firm by special leave both against the order of the division bench and against the judgment of the learned single judge. This was presumably done because there was some controversy about the finality of the orders which had been made by the single judge of the High Court.

6. The questions which have to be determined in these appeals are quite narrow. The first question is whether the words "a submission made in pursuance of an agreement" mean an actual or completed reference made pursuant to an arbitration agreement or they mean an arbitration agreement that has come into existence as a result of a commercial

contract. According to the appellant firm whenever there is an arbitration agreement or an arbitral clause in a commercial contract of the nature mentioned in the Convention the court is bound to stay the suit provided the other conditions laid down in Section 3 are satisfied. On this approach the word "submission" is to be understood as an arbitration agreement or arbitral clause relating to existing or future differences and the word "agreement" means an agreement of a commercial or business character to which the Convention applies. The respondent firm maintains that the critical words "submission" and "agreement" must be given their natural and grammatical meaning and the word "submission" made in pursuance of an agreement can only mean an actual submission of the disputes to the arbitral tribunal. The word "agreement" can have reference to and can be construed only in the sense of an arbitration agreement or an arbitral clause in a commercial contract. It cannot mean a commercial contract because an arbitration agreement cannot be stated to have been made pursuant to a commercial contract. In other words, if submission has to be taken in the sense of an arbitration agreement it would render the words "submission made in pursuance of an agreement" meaningless and unintelligible. The second question relates to the jurisdiction of the Courts in this country to grant an injunction restraining a party which is in Moscow from proceeding with the conduct of arbitration before a tribunal there. Even if the courts have jurisdiction to grant an injunction, it is said, it would not be a proper exercise of that jurisdiction in the circumstances of the present. case to give an injunctory relief. The learned single judge has decided certain other controversial issues but the division bench did not go into them nor do we propose to deal with them unless the decision on the true and correct interpretation of Section 3 of the Act goes in favour of the appellant firm.

7. The Act has been enacted to enable effect to be given to the Convention on the recognition and enforcement of foreign arbitral awards done at New York on June 10, 1958, to which India is a party. Ira the statement of objects and reasons it has been pointed out that the procedure for settlement through arbitration of disputes arising from international trade was first regulated by the Geneva Protocol On Arbitration Clauses, 1923 and the Geneva Convention, on the Execution of Foreign Arbitral Awards to which India was a party and which was given/effect to in India by the Arbitration (Protocol and Convention) Act, 1937.

8. The provisions of the Act may be noticed. Sections 2 and 3 are in these terms:

> "Section 2.—In this Act unless the context otherwise requires, "foreign awards" means an award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India made on or after the 11th day of October 1960—
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> > *(a)* in pursuance of an agreement in writing for arbitration to which the Convention set forth in the Schedule applies; and

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

Section 3. "Notwithstanding anything contained in the Arbitration Act, 1940, or in the Code of Civil Procedure, 1908, if any party to a submission made in pursuance of an agreement to which the Convention set forth in the Schedule applies, or any person claiming through or under him commences any legal proceedings in any Court against any other party to the submission or any person claiming through or under him in respect of any matter agreed to be referred 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 proceeding?."

The Schedule contains the Convention on the recognition and enforcement of foreign arbitral awards. Article II may be reproduced with advantage:

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

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

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

9. In order to resolve the controversy on the first question the history of the International Protocols and Conventions as a result of which legislation had to be enacted in England and India as also the relevant provisions of the Arbitration law may be set out. The Geneva Protocol On Arbitration Clauses, 1923 recognised the validity of an agreement between each of the Contracting States whether relating to existing or future differences between parties subject respectively to the jurisdiction of different Contracting States by which the parties to a contract agreed to submit to arbitration all or any differences that might arise in connection with such

contract relating to commercial matters or to any other matter capable of submission by arbitration whether or not the arbitration was to take place in a country to whose jurisdiction none of the parties was subject. Article 4 of the Protocol was as follows:

> "The tribunals of the Contracting Parties, on being seized of a dispute regarding a contract made between persons to whom Article applies and including an arbitration agreement whether referring to present or future differences which is valid in virtue of the said Article and capable of being carried into effect, shall refer the parties on the application of either of them to the decision of the arbitrators....."

In order to give effect to this Protocol the Arbitration Clauses (Protocol) Act, 1924 was enacted in England. Section 1(1) of that Act contained provisions similar to Section 3 of the Act with certain differences. When the aforesaid Act of 1924 was enacted the meaning of "submission" as contained in Section 27 of the English Arbitration Act, 1889 was "a written agreement to submit present or future differences to arbitration whether an arbitrator was named therein or not".

10. The Arbitration (Foreign Awards) Act, 1930 was enacted to give effect to a certain convention on the execution of arbitral awards and to amend sub-section (1) of Section 1 of the Arbitration Clauses (Protocol) Act, 1924 which provision was described in Section 8 as one "for staying of legal proceedings in a court in respect of matters to be referred to arbitration under agreements to which the Protocol applies". The Arbitration Act, 1889 was amended by the Arbitration Act of 1934 which also provided for other matters relating to arbitration law in England. In sub-section (2) of Section 21 the expression "arbitration agreement" was defined to mean "a written agreement to submit present or future differences to arbitration whether an arbitrator was named therein or not".

11. Although the definition of the expression "arbitration agreement" was introduced by the amendment made by the Arbitration Act of 1934 the definition of the word "submission" contained in Section 27 of the Arbitration Act of 1889 remained unaffected and unchanged. To complete the history of legislation in England mention may be made of the Arbitration Act, 1950 which repealed the earlier enactments. Section 4(2) of this Act provided for stay when legal proceedings were commenced in court by any party "to a submission to arbitration made in pursuance of an agreement to which the Protocol set out in the First Schedule to this Act applies". The Schedule to this Act contained the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927. In this Act the definition of "submission" contained in the Act of 1889 was omitted. By Section 32 "arbitration agreement" was defined to mean "a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not".

12. In India the Arbitration (Protocol and Convention) Act, 1937 was enacted for the first time to give effect to the Protocol and the Convention of 1923 and 1927 respectively. This was done as the Government wanted to meet the widely expressed desire of the commercial world that arbitration agreements should be ensured effective recognition and protection. Section 3 of the 1937 Act employed the same language as is contained in Section 3 of the Act except with some minor differences. Both the Geneva Protocol of 1923 and the Convention of 1927 were appended as Schedules to this Act. So far as the ordinary arbitration law was concerned, prior to the enactment of the Indian Arbitration Act, 1940 there were two sets of laws applicable to what were called Presidency towns and areas which did not fall within those towns. The Indian Arbitration Act, 1889 applied to cases where the subject-matter submitted to arbitration was of a nature that if a suit were to be instituted it could be instituted in a Presidency town. Section 4(6) contained the definition of the word "submission" which was similar to the definition in the English Act of 1889. In the Civil Procedure Code of 1882, Part V dealt with arbitration. These provisions were applicable to such areas which were outside the Presidency towns. When the Civil Procedure Code, 1908 was enacted it contained in the 2nd Schedule similar provisions for arbitration. There was, however, no definition of "submission" or "arbitration agreement". The Arbitration Act, 1940 was meant to consolidate and amend the law relating to arbitration in India. The word "submission" was not defined but the word "arbitration agreement" in Section 2(*a*) was stated to mean a written agreement to submit present or future differences to arbitration whether the arbitrator was named therein or not.

13. The phraseology which has been employed in the English statute and the Indian enactment for giving effect to the Protocol and the Conventions relating to arbitration is practically the same. In the English Act of 1924 the words used were identical with the words to be found in Section 3 of the Act, namely, "a submission made in pursuance of an agreement". The only change which has been effected in the English Arbitration Act of 1950 in Section 4(2) is that the words "to arbitration" have been inserted within the words "submission" and "made". Among the authoritative text book writers there has been a good deal of divergence of opinion on the meaning of the above phraseology. In the 8th Edn. of the Conflict of Laws by Dicey and Morris, Rule 182 has been formulated which is based on Section 4(2) of the English Arbitration Act, 1950. Referring to Section 4(2) and the meaning of the words "a submission to arbitration made in pursuance of an agreement to which the Protocol applies" the authors are of the view that this condition is satisfied if the parties have agreed to submit present or future disputes to arbitration. The Court is, according to them, under a duty to stay proceedings although no arbitrators have been appointed. The word "submission" must be regarded as synonymous with the term "arbitration agreement" in the Protocol and the term "agreement to which the Protocol applies" is used "to identify the commercial or business contract between the parties". This statement is based on the judgment of Scarman, J., in *Owners of Cargo on Board the Merak* v. *The*

Merak (*Owners*)1. Even before the pronouncement of this judgment preference for the view which later on came to be expressed by Scarman, J., had been indicated in the 7th Edn. of the same book, (see pages 1075 to 1076). According to the well-known work of Russell on Arbitration, 17th Edition, the English translation of the Protocol is most obscure. This is what has been stated at page 79:

> "The words of the section, however would seem to limit its operation to cases where some sort of "agreement to submit" is followed by an actual submission' made 'pursuant to' it. (Presumably, the word "submission' here bears its natural meaning, of *a submission written or not of an actual dispute to the authority of an arbitral tribunal," rather than the statutory meaning which it bore under the 1889 Act and which is now borne by the phrase 'arbitration agreement'). Thus the common case of an agreement to refer which is never followed by a submission because the claimant prefers to sue instead, is apparently outside the section, although the Protocol clearly meant it to be covered; see the French text of Article 4."

The English translation of the French text in the 1950 Act has been stated to be a mistranslation. It has been suggested that the Parliament may have enacted not the true text of the Protocol but a very limited interpretation of the false translation. In Halsbury's Laws of England, Third Edition, Cumulative Supplement, 1968, Volume II, Arbitration, page 2, reference has been made to the decision of Scarman, J., in *The Merak's case* (supra) which was affirmed on appeal and which has been followed in *Unipat A. G.* v. *Dowty Hydraulic Units*2 the statement in the text being that this provision of law applies although no actual submission to arbitration has been made.

14. In *the Merak,* Scarman, J., read Section 4(2) of the Act of 1950 with the translation of the Protocol in the First Schedule to the. Act. According to him the Protocol was concerned with two agreements—one, a contract commercial in character or giving rise to a difference relating to matters that were either commercial or otherwise capable of settlement by arbitration between parties subject to the jurisdiction of different Contracting States; the other an arbitration agreement whereby the parties to such a contract agreed to submit their differences to arbitration. (The arbitration agreement might be itself included in and simultaneous with the commercial or business contract). Section 4(2) of the Act was intended to make the same distinction between the parties' business contract and their arbitration agreement. He proceeded to say:

> "It uses the term 'submission to arbitration' to identify the Protocol's agreement to submit their differences to arbitration and the term 'agreement to which the Protocol applies' to identify the commercial or business contract between the parties. Section 4(2), in my opinion, applies to agreements to submit to arbitration made in pursuance of a contract to which, because of its character and the character of its parties, the Protocol applies. The words 'in

pursuance *of* merely establish the link that there must be between the agreement to submit present or future differences to arbitration and the agreement of a commercial or business character between parties of a certain class to which the Protocol applies. They have in this context no temporal significance."

One of the main reasons which prevailed in *The Merak's case* (supra) was that by construing 'submission to arbitration' as an actual submission of an existing dispute to a particular arbitrator, it would make ''nonsense of the Protocol".

15. Now, as stated in Halsbury's Laws of England, Volume 36, page 414, there is a presumption that Parliament does not assert or assume Jurisdiction which goes beyond the limits established by the common consent of nations and statutes are to be interpreted provided that their language permits, so as not to be inconsistent with the comity of nations or with the established principles of International Law. But this principle applies only where there is an ambiguity and must give way before a clearly expressed intention. If statutory enactments are clear in meaning, they must be construed according to their meaning even though they are contrary to the comity of nations or International Law,

16. We may look at another well-recognised principle. In this country, as is the case in England, the treaty or International Protocol or convention does not become effective or operative of its own force as in some of the continental countries unless domestic legislation has been introduced to attain a specified result. Once, the Parliament has legislated, the Court must first look at the legislation and construe the language employed in it. If the terms of the legislative enactment do not suffer from any ambiguity or lack of clarity they must be given effect to even if they do not carry out the treaty obligations. But the treaty or the Protocol or the convention becomes important if the meaning of the expressions used by the Parliament is not clear and can be construed in more than one way. The reason is that if one of the meanings which can be properly ascribed is in consonance with the treaty obligations and the other meaning is not so consonant, the meaning which is consonant is to be preferred. Even where an Act had been passed to give effect to the convention which was scheduled to it, the words employed in the Act had to be interpreted in the well-established sense which they had in municipal law. (See *Barras* v. *Aberdeen Steam Trawling & Fishing Co. Ltd.*3

17. The approach in "*The Merak"* appears to have been dominated by the Protocol of 1923 and the question to be examined is whether the language of Section 4(2) of the English Act of 1950 and Section 3 of the Act contains any such ambiguity or suffers from any such lack of clarity as would justify the use of the Protocol to the extent made in the English case. The term 'submission' as defined in the English Act of 1889 and the Indian Act of 1889 was meant to cover both an arbitration clause by which

the parties agreed that if disputes arose they would be referred to arbitration and also an actual submission of a particular dispute or disputes to the authority of a particular arbitrator. For the sake of convenience, a distinction could be made by calling the first "an agreement to refer" and the second, "a submission". The term "arbitration agreement" as defined by the English Act of 1950 and the Indian Act of 1940 also covers both "an agreement to refer" and "an actual submission". Turning to the words used in Section 3 of the Act "submission made in pursuance of an agreement to which the convention set forth in the schedule applies", the first critical expression "submission" can have both the meanings in view of the historical background of the legislation which was enacted to give effect to the Protocol and the Conventions. If this term is to be given the larger meaning of including of "an agreement to refer" as also "an actual submission" of a particular dispute, it has to be determined which meaning would be appropriate in the context in which the term "submission" has been used in Section 3 of the Act. - If "submission" means "agreement to refer" or "an arbitral clause in a commercial contract", it makes the entire set of words unintelligible and completely ambiguous. It is difficult to comprehend in that case why the Legislature should have used the words which follow the term "submission", namely, "made in pursuance of an agreement". This brings us to the true import of the expression "agreement". If by "agreement" is meant a commercial contract of the nature mentioned in the "*Merak",* the words "made in pursuance of" convey no sense. Another anomaly which militates against the established rule of interpretation would arise if by the word "agreement" is meant a commercial contract. It cannot, even by stretching the language bear that meaning in the second part of Section 3 which reads:

> "..... .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."

Here the "agreement" can have reference to and mean not the commercial contract to which the convention set forth in the schedule applies but only the agreement to refer or the arbitral clause. Unless the context so compels or requires, the same meaning must ordinarily be attributed or given to the same words used in the section. The above difficulties completely disappear if "submission" is given the second meaning of an actual submission of a particular dispute or disputes to the authority of a particular arbitrator. The words which we are construing then have a clear, consistent and intelligible meaning, namely, an actual submission made in pursuance of an arbitration agreement or arbitral clause to which the convention set forth in the schedule applies. The words "in pursuance of" are also thus saved-and not rendered otiose. The courts have to be guided by the words of the statute in which the Legislature of the country has expressed its intention. If Section 3 cannot be so read as to permit the meaning of the word "submission" to be taken as an arbitral clause or an agreement to refer, the courts would not be

justified in so straining the language of the section as to ascribe the meaning which cannot be warranted by the words employed by the Legislature. We are aware of no rule of interpretation by which rank ambiguity can be first introduced by giving certain expressions a particular meaning and then an attempt can be made to emerge out of semantic confusion and obscurity by having resort to the presumed intention of the Legislature to give effect to international obligations.

18. It is true that by taking the above view the purpose and object behind the Protocol and the conventions may not be fully carried out. The intention underlying Article 4 of the Protocol of 1923 and Article 2 of the Convention of 1958 undoubtedly appears to be that whenever the parties have agreed that their differences arising out of a commercial contract be referred to an arbitration, the court of a contracting State when seized of an action in the matter, shall refer the parties to an arbitration unless it finds that the agreement is null and void or is inoperative or incapable of being performed. We apprehend it would hardly be conducive to international commercial arbitration not to have legislation giving full and complete effect to what is provided by the Protocol and the Conventions. We also share in full measure the anxiety and the effort of those who desire to respect the terms of international Protocols and Conventions in letter and spirit. But we are bound by the mandate of the Legislature, Once it has expressed its intention in words which have a clear significance and meaning, the courts are precluded from speculating about the t reasons for not effectuating the purpose underlying the Protocol and the conventions. The consistent view of the Indian courts on the interpretation of the critical words in Section 3 of the Act of 1937 has not been in favour of what prevailed in the "*Merak".* In the leading casein *W. Wood & Sons Ltd.* v. *Bengal Corporation*,4 Chakravarti, C. J., while delivering the judgment of the Court, examined the various aspects of the question including the terms of the Protocol of 1923 and the Convention of 1927 and said:

> "If the agreement to which the Protocol applies is an agreement for arbitration, there cannot possibly be an agreement in pursuance of that agreement. Section 3 must, therefore, be construed as contemplating a case where not only is there an arbitration agreement in force between the parties but there has also been an actual reference to arbitration."

19. The learned Single Judge has given some reasons why in England as also in India the statutes insist upon an actual submission before a stay of the suit can be granted. It has been pointed out that in different countries the law relating to arbitration is naturally different. Actual submission has been made a condition precedent for granting stay but the court has been left with no discretion in England and in India. In some of the other countries the order for stay of a suit contrary to the arbitral clause is discretionary, there being no difference between the municipal arbitration and arbitration under the Protocol. It was presumably for this reason that the Parliament insisted upon real dispute between the parties and an

actual reference or submission to an arbitration to resolve the particular point or points in dispute as a condition for stay. We do not consider that it would be right to speculate about the reasons which prevailed with the Parliament in enacting Section 3 of the Act in the language in which it has been done. It is abundantly clear that the Parliament did not employ language which would indicate an unequivocal intention that in the presence of an agreement to refer to an arbitral clause in a commercial contract, the provisions for granting stay - under the' section would immediately become applicable irrespective of an actual submission or a completed reference. As it was open to the Legislature to a deviate from the terms of the Protocol and the Convention it appears to have given only a limited effect to the provisions of the 1958 Convention. A clear deviation from the rigid and strict rule that the courts must stay a suit whenever an international commercial arbitration as contemplated by the Protocol and the Conventions, was to take place, is to be found in Section 3. It is of a nature which is common to all provisions relating to stay in English and Indian arbitration laws, the provisions being that the application to the court for stay of the suit must be made by a party before filing a written statement or taking any other step in the proceedings. If the condition is not fulfilled, no stay can be granted. It cannot thus be said that Section 3 of the Act or similar previsions in the prior Act of 1937 or the English Statutes were enacted to give effect in its entirety to the strict rule contained in the Protocol and the Conventions.

20. Another significant feature which cannot escape notice is that the Parliament in England and India must be presumed to have been aware when the English Act of 1950 and the Act were enacted that the expression 'submission' had been abandoned in the Arbitration Acts and, instead, the term 'arbitration agreement' had come to be defined as meaning what submission meant according to the definitions in the English Act of 1889 and Indian Arbitration Act of 1899. Notwithstanding this, the expression 'submission* was employed in Section 4(2) of the English Act of 1950 and Section 3 of the Act. If the intention was to have the wider meaning the proper and correct term to use was "arbitration agreement" and logically those words would have been employed. It is more plausible that the Parliament by retaining the expression 'submission' wanted to give it the meaning of an actual submission, as by then there had been firm expression of opinion in the well-known work of Russell on Arbitration and by jurists like Prof. Arthur Nassbaum in an article "Treaties on Commercial Arbitration" in Vol. 56 of the Harvard Law Review, pointing to that meaning being given to 'submission'. In India the High Courts bad uniformally and in unequivocal terms taken that view. (See *W. Wood & Son Ltd.,* supra).

21. The language in the relevant article of the Convention of 1958 had also undergone a change. According to Article II, the term "agreement in writing" was to include an arbitral clause in a contractor an arbitration agreement and that term was stated to mean something by which the parties undertook to submit to arbitration all or any differences which had arisen or which might arise between them in respect of any defined legal

relationship whether contractual or not concerning a subject-matter capable of settlement by arbitration. Thus, the term "agreement in writing" embraced an arbitral clause or an agreement simpliciter to refer to arbitration as also an actual submission of the disputes to the arbitrator. It was equivalent to 'Arbitration Agreement' as defined in the Act. By not using that term and by employing the expression 'submission' in Section 3 the Parliament appears to have indicated an intention to restrict the meaning of that expression to an actual submission or a complete reference.

22. Whatever way Section 3 of the Act is looked at, it is difficult to reach the conclusion that 'submission' means an agreement to refer or an arbitral clause and does not mean an actual submission or completed reference, and that the word "agreement" means a commercial contract and not an agreement to refer or an arbitral clause.

23. The next question is whether the High Court was justified in granting an interim injunction restraining the Russian Firm from proceeding with arbitration at Moscow. The position of the Russian Firm is that neither it nor the Foreign Trade Arbitration Commission of the U. S. S. R. Chamber of Commerce which is seized of the arbitration proceedings is amenable to the jurisdiction of the courts is India. The presence in India of the party sought to be injuncted is a condition pre-requisite for the grant of an injunction. Alternatively, the Indian Firm has been guilty of breach of the agreement to refer the matter to arbitration at Moscow and therefore it has disentitled itself to the exercise of the Court's discretion in its favour in the matter of granting an injunction.

24. Now, it is common ground that the point about the Russian Firm having no representative in India was not agitated before the High Court. The position taken up in the plaint was that the Russian Firm was carrying on business in the U. S. S. R. and at Madras. The controversy before the High Court appears to have been confined only to what is stated in Para 5 of the counter-affidavit of the Russian Firm, namely, that in the presence of the Arbitration agreement in the contract entered into between the parties, the only proper remedy for the Indian Firm was to submit the disputes to the arbitration tribunal at Moscow.

25. The rule as stated in Halsbury's Laws of England, Vol.21, at page 407, is that with regard to foreign proceedings, the court will restrain a person within its jurisdiction from instituting or prosecuting suits in a foreign court whenever the circumstances of the case make such an interposition necessary or proper. This jurisdiction will be exercised whenever there is vexation or oppression. In England, courts, have been very cautious and have largely refrained from granting stay of proceedings in foreign courts (Cheshire's Private Industrial Law, 7th Ed., pages 108-110). The injunction is, however, issued against a party and not a foreign court.

26. Although it is a moot point whether Section 35 of the Arbitration Act, 1940, will be applicable to the present case, in *Shiva Jute Baling Limited* v. *Hindley & Company Limited*,5 it was assumed that Section 35 applied to protocol arbitration and the principle embodied in that section cannot be completely ignored while considering the question of injunction. According to that section no reference nor award can be rendered invalid by reason only of the commencement of legal proceedings upon the subject of the reference, but when legal proceedings upon the whole of the subject-matter of the reference have been commenced between all the parties to the reference and a notice thereof has been given to the arbitrators or umpire, all further proceedings in a pending reference shall, unless a stay of proceedings is granted under Section 34, be invalid.

27. If the venue of the arbitration proceedings had been in India and if the provisions of the Arbitration Act of 1940, had been applicable, the suit and the arbitration proceedings could not have been allowed to go on simultaneously and either the suit would have been stayed under Section 34 or if it was not stayed, and the arbitrators were notified about the pendency of the suit, they would have had to stay the arbitration proceedings because under Section 35 such proceedings would become invalid if there was identity between the subject-matter of the reference and the suit. In the present case, when the suit is not being stayed under Section 3 of the Act it would be contrary to the principle underlying Section 35 not to grant an injunction restraining the Russian Firm from proceeding with the arbitration at Moscow. The principle essentially is that the arbitrators should not proceed with the arbitration side by side in rivalry or in competition as if it were a Civil Court.

28. Ordinarily, a party which has entered into a contract of which an arbitral clause forms an integral part should not receive the assistance of the court when it seeks to resile from it. But in the present case a suit is being tried in the courts of this country which, for the reasons already stated, cannot be stayed under Section 3 of the Act in the absence of an actual submission of the disputes to the arbitral tribunal at Moscow prior to the institution of the suit. The only proper course to follow is to restrain the Russian Firm which has gone *to the* Moscow Tribunal for adjudication of the disputes from getting the matter decided by the tribunal so long as the suit here is pending and has not been disposed of.

29. In this context, we cannot also ignore what has been represented during the arguments. The current restrictions imposed by the Government of India on the availability of foreign exchange of which judicial notice can be taken will make it virtually impossible for the Indian Firm to take its witnesses to Moscow for examination before the Arbitral Tribunal and to otherwise properly conduct the proceedings there. Thus, the proceedings before that tribunal are likely to be in effect ex parte. The High Court was, therefore, right in exercising discretion in the matter of granting an interim injunction in favour of the Indian Firm.

30. The appeals fail and are dismissed but in view of the peculiar nature of the points involved, there will be no order as to costs.

The Judgment of the Court *was* delivered by

RAMASWAMI, J.— I regret I am unable to agree with the judgment pronounced by Grover, J.

32. The first respondent had entered into a contract with the Government of India for the excavation work in the feeder canal of the Farakka Barrage project. To fulfil this contract with the Government of India and for the excavation work the first respondent required certain construction machinery such as scrapers, both towed and motorised, crawlers, tractors and bulldozers. The respondent No. 1 agreed to purchase them from the appellant and the latter agreed to supply and deliver and the terms and conditions of the contract were embodied in a document, dated February Z, 1965 signed by both the parties. In pursuance of the contract the first respondent opened a confirmed irrevocable and divisible letter of credit with the second respondent for the entire value of the equipment, that is, Rs 66,09,372/- in favour of the appellant negotiable through the Bank of Foreign Trade of the U. S. S. R., Moscow. Under the said letter of credit the second respondent was required to pay to the appellant on production of the documents particularised in the letter of credit along with the drafts. One of the conditions of the letter of credit was that 25°/g of the amount should be paid on the presentation of the specified documents and the balance of 75°/o within one year from the date of the first payment. On the strength of the contract the appellant supplied all the machinery which it undertook to supply by about the end of December 1965. After the machinery was used for some time the first respondent complained that the machinery did no t conform to the terms and conditions of the contract and consequently it had incurred and continued to incur considerable loss. Meanwhile the Indian rupee was devalued on June 6, 1966 and in consequence the price of the machinery went up by about 57.48%. The increase in the price of the machinery was in accordance with the gold clause of the contract entered into between the parties. Clause 13 of the Contract read as follows:

> "The sellers and the buyers shall take all measures to settle amicably any disputes and differences which may arise out of or in connection with this contract. In case of the parties being unable to arrive at an amicable settlement, all disputes are to be submitted without application to the ordinary courts for the settlement by Foreign Trade Arbitration Commission at the U. S. S. R. Chamber of Commerce in Moscow in accordance with the Rules of Procedure of the said Commission. The Arbitration award will be final and binding upon both parties."

Ignoring this clause the first respondent instituted a suit C. S. 134 of 1966 in the Madras High Court and obtained an ex parte injunction against the

appellant and the second respondent restraining them from negotiating the letter of credit. The appellant protested that the first respondent should not have instituted a suit in violation of the arbitration clause in the contract. By a subsequent agreement, dated August 14, 1966 the appellant and the first respondent agreed to settle the matter amicably in accordance with the contract. The appellant consented to extend the payment of letter of credit by one year and the first respondent thereupon withdrew the suit in C. S. 134 of 1966. The respondent No. 1 is said to have accepted the devaluation drafts representing increase in the price of the machinary consequent on the devaluation of the Indian rupee in accordance with the clause in the contract. Though correspondence was going on between the parties, no settlement could be arrived at. When the time came for the payment of the balance of 75° /g of the letter of credit the first respondent instituted a suit C.S.I 18 of 1967 in the Madras High Court in violation of the arbitral clause and obtained an **ex** parte injuction against the appellant from operating the letter of credit. On November 5, 1967 the appellant instituted arbitral proceedings before the Foreign Trade Arbitration Commission of U. S. S. R. Chamber of Commerce, Moscow in accordance with Clause 13 of the contract for payment of the price of the machinery. Notice was issued to the first respondent to choose its nominee to represent it in the Arbitration Commission and the date of hearing was also notified by the first respondent. But the first respondent failed to appear before the Foreign Trade Arbitration Commission. Thereafter the appellant entered appearance in C. S. 118 of 1967 under protest and filed an application No. 2604 of 1967 before the High Court under Section 3 of the Foreign Awards (Recognition and Enforcement) Act, 1961 (45 of 1961) for the stay of the suit. The first respondent also filed an application No. 106 of 1968 before the High Court praying that the appellant should be restrained from taking part in the arbitration proceedings at Moscow. After hearing the parties Ramamurthi, J., dismissed the application of the appellant No. 2604 of 1967 . The learned Judge allowed the application of the first respondent and granted an injuction restraining the appellant from taking part in the arbitral proceedings at Moscow. The appellant preferred appeals 0. S. A. 25 and 26 of 1968 against the orders of Ramamurthi, J. The appeals were dimissed by a Division Bench of the High Court on December 16, 1968.

33. The question involved in this case is: What is the true interpretation and effect of Section 3 of the Foreign Awards (Recognition and Enforcement) Act, 1961 (45 of 1961) (hereinafter referred to as the Act)? Section 3 of the Act states:

> "Notwithstanding anything contained in the Arbitration Act, 1940 or in the Code of Civil Procedure, 1908, if any party to a submission made in pursuance of an agreement to which the Convention set forth in the Schedule applies, or any person claiming through or under him commences any legal proceedings in any Court against any other party to the submission or any person claiming through or under him in respect of any matter agreed to be referred 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."

34. Section 3 refers to the Convention which is set fourth in the Schedule. It is an international Protocol to which this country was a signatory and which was effected at New York on June 10, 1968. Article 2 of this Convention has three clauses and reads as follows:

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

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

3. The Court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."The argument of the first respondent is that Section 3 of the Act can be invoked by the appellant only if it had implemented the arbitration agreement by actually submitting the dispute to the arbitrator or arbitrators prior to the institution of the suit. In the present case if there was any such reference to arbitration it was only on November 4, 1967, that is, about three weeks after the suit had been filed in the High Court. The contrary view point was put forward by Mr Mohan Kumaramangalam on behalf of the appellant. It was said that Section 3 of the Act should be interpreted in the context of the articles of the Convention set out in the schedule and it was not necessary that there should be an actual submission to arbitration before the institution of the suit. If there was an arbitral clause whether this was followed by reference to arbitration by any of the parties or not the very existence of this clause in the commercial agreement would render stay of the suit mandatory under Section 3 of the Act. The argument was that Article 2 of the Convention makes it clear that under the Convention the court of contracting State must, when seized of such an action refer the parties to arbitration. Section 3 of the Act must be read in consonance with this obligation. Any interpretation of that section which will restrict this obligation could be justified only if the plain words necessitate such a reading. The argument of the appellant is that the words "if any party to a submission made in pursuance of an agreement to which the convention set forth in the schedule

applies" really mean that the submission is the arbitral clause itself and the agreement is a commercial agreement which includes or embodies that clause.

35. It is necessary in this connection to refer to the legislative history of the section. The reason is that both the expressions "submission" and "agreement of arbitration" have got a special meaning because of the evolution of the statute law. The English Arbitration Act of 1889 (52-53 Geo V. c. 49) is the first amending and consolidating statute relating to arbitration. Section 27 of the Act defined "submission" as follows:

> 'submission' means a written agreement to submit present or future differences to arbitration whether an arbitrator is named therein or not."

There is no definition of "agreement" as such and no difference is made between a mere arbitral clause that is an agreement to refer to an arbitration and an actual submission to arbitration after the disputes have arisen. A submission defined by Section 27 comprehends both meanings. Section 4 of the 1889 Act provided that if any party to a submission commenced any legal proceedings against any other party to a settlement the latter may apply to the court concerned to stay the proceedings and the court if it is satisfied that there is no reason why the matter should not be referred in accordance with the submission it may make an order staying the proceedings. In the Indian Arbitration Act of 1889 Section 4(*a*) defines "submission" in exactly the same terms as Section 27 of the English Act of 1889, that is, a submission means a written agreement to submit present or future differences to arbitration whether an arbitration is named or not. In the Arbitration Clauses (Protocol) Act, of 1924 (14 & 15 Geo. V. c. 39) we have the phrase "submission made in pursuance of an agreement" and the phrase "submission" appears to be employed in the special statutory sense. Section 1 of this Act states:

> *"Staying of Court proceedings is respect of matters to be referred to arbitration under commercial agreement.*—(1) Notwithstanding anything in the Arbitration Act, 1889, if any party to a submission made in pursuance of an agreement to which the said protocol applies or any person claiming through or under him, commences any legal proceedings in any court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking other steps in the proceedings, apply to that Court to stay the proceedings, and that Court or a Judge thereof, unless satisfied that the agreement or arbitration has become inoperative or cannot proceed, shall make an order staying the proceedings."

Clause 1 of the Schedule states:

> "Each of the contracting States recognises the validity of an agreement whether relating to existing or future differences between parties, subject respectively to the jurisdiction of different contracting States by which the parties to a contract agree to submit to arbitration all or any differences that may arise in connection with such contract relating to commercial matters or to any other matter capable of settlement by arbitration, whether or not the arbitration is to take place in a country to whose jurisdiction none of the parties is subject.
>
> Each contracting State reserves the right to limit the obligation mentioned above to contracts as commercial under its national law. Any contracting State which avails itself of this right will notify the Secretary, General of the League of Nations, in order that the other contracting States may be so informed."

In 1930 the Arbitration (Foreign Awards) Act, 1930 (20 Geo. 5, c. 15) was enacted in order to give effect to the 1927 Geneva Convention on the execution of arbitral awards. Section 8 of this Act explains the phrase "arbitration agreement" by reference to the 1924 Act.

36. The next statute in England is the Arbitration Act, 1934 (24-25 Geo. V. c. 14). Section 8, read along with the First Schedule dealt with the powers of the court, among other matters, to pass various orders such as interim injunction, appointment of receiver, orders for preservation of properties or for protecting rights of parties, *etc.* Section 21 of this Act defines the expression "arbitration agreement" to mean a written agreement to submit present or future differences to arbitration whether an arbitrator is named or not. Nothing was said about the definition of "submission" in Section 27 of the Act of 1889. Virtually the effect is that in the place of the word "submission" the phrase "arbitration agreement" is substituted and has a synonymous meaning.

37. In India the Arbitration Act, 1889 was repealed and replaced by the Arbitration Act of 1940. The Act dealt with only municipal or local arbitrations and so far as foreign arbitration was concerned, the Indian Protocol Act of 1937 (Act 6 of 1937) was enacted. Section 3 of this Act states:

> "Notwithstanding anything contained in the Arbitration Act, 1899, or in the Code of Civil Procedure, 1908, if any party to a submission made in pursuance of an agreement to which the Protocol set forth in the First Schedule as modified by the reservation subject to which it was signed by India applies, or any person claiming through or under him, commences any legal proceeding in any Court against any other party to the submission or any person claiming through or under him in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time after appearance and

before filing a written statement or taking any other steps in the proceedings, apply to the Court to stay the proceedings; and the Court unless satisfied that the agreement or arbitration has become inoperative or cannot proceed, 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."

The First Schedule of this Act contains articles of the 1923 Convention of which Article 1 reads as follows:

> "Each of the contracting States recognises the validity of an agreement whether relating to existing or future differences between parties subject respectively to the jurisdiction of different contracting States by which the parties to a contract agree to submit to arbitration all or any differences that may arise in connection with contract relating to commercial matters or to any other matter capable of settlement by arbitration, whether or not the arbitration is to take place in a country to whose jurisdiction none of the parties is subject."

The Second Schedule contains the 1927 Convention and Article 1 reads as follows:

> "In the territories of any High Contracting Party to which the present Convention applies, an arbitral award made in pursuance of an agreement, whether relating to existing or future differences (hereinafter called 'a submission to arbitration') covered by the Protocol on Arbitration Clauses opened at Geneva on September 24, 1923, shall be recognised as binding and shall be enforced in accordance with the rules of the procedure of the territory where the award is relied upon, provided that the said award has been made in a territory of one of the High Contracting parties to which the present Convention applies and between persons who are subject to the jurisdiction of one of the High Contracting Parties.

To obtain such recognition or enforcement, it shall further be necessary:

> (*a*) that the award has been made in pursuance of a submission to arbitration which is valid under the law applicable thereto;
>
> (*b*) that the subject-matter of the award is capable of settlement by arbitration under the law of the country in which the award is sought to be relied upon
>
> (*c*) that the award has been made by the Arbitral Tribunal provided for in the submission to arbitration or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure.
>
> (*d*) that the award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is

open to opposition, appeal or pourvoi en cassation (in the countries where such forms of procedure exist) or, if it is proved that any proceedings for the purpose of contesting the validity of the award are pending;

(*e*) that the recognition or enforcement of the awards is not contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon."

It should be noticed that Article 1 of the 1927 Convention defines an "arbitration agreement" as "a submission to arbitration".

38. The next event in the legislative history is the New York Convention adopted at the United Nations Conference in June, 1958 on International and Commercial Arbitrations. It was felt that the international conventions uptil then reached did not effectuate a speedy settlement of disputes and did not meet the requirements of international trade and commerce and disputes arising therefrom and that there should be some modification and the Convention was agreed to by almost all the countries. India accepted the same and enacted the Foreign Awards (Recognition and Enforcement) Act, 1961 to implement the Conventions so far as India was concerned. This Act of 1961 repealed the Protocol Act of 1937. With regard to Section 3, the provision concerning stay of proceedings in a civil court in violation of the arbitral clause, the language is the same as in the Protocol Act of 1937.

39. The question presented for determination is what is the true meaning and effect of the words "if any party to a submission made in pursuance of the agreement to which the said protocol applies?" in Section 3 of the Act. Even at the time of the Act of 1889, the word "submission" had received a special meaning as including a mere agreement to refer to arbitration as well as an actual reference or submission to arbitration and this special meaning was given statutory recognition in the Act of 1889 by defining 'submission' in this special manner. In the Arbitration Clauses (Protocol) Act, 1924 the phrase "submission made in pursuance of the agreement" is used and the word "submission" is employed in the statutory sense. In the Indian Arbitration Act, 1889, Section 4(*a*) defines submission in exactly the same terms as Section 27 of the English Act of 1889. In the English Arbitration Act of 1934 the word 'agreement' is defined in Section 21 (2) as a "written agreement to submit present or future differences to arbitration whether the arbitrator is named therein or not". It is clear, therefore, that the expression "arbitration agreement" and the word "submission" are synonymous and connote the same idea. In my opinion the expression "submission made in pursuance of an agreement" in Section 3 of the Act must be construed in its historical setting. The word "submission" must, therefore, be interpreted to mean that the arbitral clause itself and the word "agreement" as the commercial or the business agreement which includes or embodies that clause. In other words the word "submission" in the opening words of the section means an agreement to refer to arbitration and the words "the agreement to which the Convention set forth in the schedule applies" mean the business

agreement or contract containing the arbitral clause. It follows, therefore, that if there is an arbitral clause whether this is followed by actual reference to arbitration or not, the very existence of this clause in the commercial agreement would render the stay of the suit mandatory under Section 3 of the Act.

40. The view that I have expressed is also consistent with the rule of construction that as far as practicable the municipal law must be interpreted by the courts in conformity with international obligations which the law may seek to effectuate. It is well settled that if the language of a section is ambiguous or is capable of more than one meaning the protocol itself becomes relevant for there is a prima facie presumption that Parliament does not intend to act in breach of international law, including specific treaty obligations. In the words of Diplock, L. J., in *Salomon* v. *Commissioners of Customs and Excise*:6

> "If the terms of the legislation are clear and unambiguous they must *be* given effect to whether or not they carry out Her Majesty's treaty obligations, for the sovereign power of the Queen in Parliament extends to breaking treaties (see *Ellerman Lines Ltd* v. *Murray*7) and any remedy for such a breach of an international obligation lies in a forum other than Her Majesty's own courts. If the terms of the legislation are not clear, however, but are reasonably capable of more than one meaning, the treaty itself becomes relevant, for there is a prima facie presumption that Parliament does not intend to act in breach of international law, including therein specific treaty obligations; and if one of the meanings which can reasonably be ascribed to the legislation is consonant with the treaty obligations and another or others are not, the meaning which is consonant is to be preferred. Thus, in case of lack of clarity in the words used in the legislation, the terms of the treaty are relevant to enable the court to make its choice between the possible meanings of these words by applying this presumption."

Applying this principle to [the present case it is manifest that Article 2 of the Convention which is contained in the Schedule to the Act imposes a duty on the court of a contracting State when seized of such an action to refer the parties to arbitration. Section 3 of the Act must, therefore, be read in consonance with this international obligation and any interpretation of Section 3 which would restrict the obligation or impose a refinement not warranted by the Convention itself will not be justified.

41. This view is also borne out by the reasoning of Scarman, J., in *Owners of-Cargo on Board The Merak* v. *The Merak*8 In that case the plaintiffs' timber was shipped aboard the Merak under bills of lading which stated that the voyage was "as per charter dated April 21, 1961" and contained a clause incorporating "all the terms, conditions, clauses... .including Clause 30 contained in the said charter party". Clause 30 was irrelevant to a bill of lading and was inserted in mistake for the arbitration Clause 38. The

incorporation clause was followed by a clause giving paramount effect to the Hague Rules. In the c6urse of the voyage the cargo was damaged and just within 12 months of the final discharge of the cargo the plaintiffs, as endorsees of the bills of lading, issued a writ claiming damages from the Merak's owners, who relying on the arbitration clause, moved for a stay of the proceedings under Section 4 of the Arbitration Act, 1950. The plaintiffs opposed the motion on the grounds that the arbitration clause was not incorporated in the bills of lading; that the dispute did not arise out of the April charterparty or any bills of lading issued thereunder; and that the arbitration clause must in any event be rejected because it was repugnant to the paramount clause giving effect to the Hague Rules, which by Article III, Rule 6 provided for bringing 'suit' and not for arbitration. Scraman, J., holding that Section 4(2) of the Arbitration Act, 1950 gave effect to the intention of the protocol on arbitration clauses to which the sub-section related, rejected the plaintiffs' contentions and stayed the proceedings. In the course of his judgment Scarman, J., observed as follows:

> "In my opinion, the sub-section must be read together with the protocol as it stands translated into the English of the First Schedule to the Act. Article 1 of the translated protocol provides for the recognition of the validity of an agreement whether relating to existing or future differences whereby the parties to a contract agree to submit to arbitration differences arising in-connection with that contract, and expressly reserved to contracting States the right to limit the obligation of recognition to contracts which are considered commercial. Article 4 provides that the tribunals of the contracting States, on being seized of a dispute regarding a contract which includes an arbitration agreement whether referring to present or future differences, shall refer the dispute to arbitration. Thus the protocol is concerned with two agreements—one, a contract, commercial in character or giving rise to a difference relating to matters that are either commercial or otherwise capable of settlement by arbitration, between parties subject to the jurisdiction of different contracting States; the other, an arbitration agreement whereby the parties to such a contract agree to submit their differences to arbitration. It is clear from the protocol that the arbitration agreement may itself be included in and simultaneous with the commercial or business contract between the parties. In my opinion Section 4(2) of the Act is intended to make the same distinction between the parties' business contract and their arbitration agreement, and no other distinction. It uses the term "submission to arbitration" to identify the protocol's agreement to submit their differences to arbitration and the term "agreement" to which the protocol applies to identify the commercial or business contract between the parties. Section 4(2) in my opinion, applies to agreements to submit to arbitration made in pursuance of a contract to which, because of its character and the character of its parties, the protocol applies. The words "in pursuance of" merely establish the link that there must be between the agreement to submit present or future differences to arbitration and the agreement of a commercial or business character between parties of a certain class

to which the protocol applies. They have in this context no temporal significance.

I see no reason for having to construe 'submission to arbitration' as an actual submission of an existing dispute to a particular arbitrator. The Act of 1950 does not say that I must. It makes nonsense of the protocol so to do. The Act of 1924 which first introduced the subsection, was an Act to give effect to the protocol and there is respectable, though now antiquated authority, namely, the repealed Section 27 of the Act of 1889, for giving a wider meaning to 'submission* if the context so requires. The term 'submission to arbitration' is not now defined by statute, and must, in my opinion, be given a meaning appropriate to its context. While, no doubt, it is often convenient to use the term to distinguish an actual reference of a particular dispute to arbitration from an 'arbitration agreement' it would be wrong so to do in construing this particular sub-section. Accordingly, I find myself able to say that the sub-section gives effect to the intention of the protocol, the intention clearly being that when there is a business contract between parties subject to different contracting States those parties are to be referred to arbitration if they have so agreed, whether their agreement relates to present or future differences."

The same view is expressed in Dicey & Morris, The Conflict of Laws, 8th Edn., p. 1076:

> "Section 4(2) of the Act imposes upon the court a duty to stay the proceedings if a party relies on 'a submission to arbitration made in pursuance of an agreement to which the protocol applies'. This condition is satisfied if the parties have agreed to submit present or future disputes to arbitration. The term 'submission' includes an agreement to refer. The court is therefore under a duty to stay the proceedings although no arbitrators have been appointed, and the fact that an arbitration clause is included in the contract between the parties suffices for the application of Section 4(2). There is thus no discrepancy between the section and Article 4 of the protocol to which it purports to give effect. According to Article 4 the court must "refer the parties to the decision of the arbitrators" if the contract between the parties includes "an arbitration agreement whether referring to present or to future differences". The word "submission" used in Section 4(2) must be regarded as synonymous with the term 'arbitration agreement' in the protocol and the term 'agreement to which the protocol applies' is used in the section 'to identify the commercial or business contract between the parties'. The controversy surrounding the interpretation of Section 4(2) (to which reference was made in the previous edition of this book) was left undecided in *Radio Publicity Ltd.* v. *Compagnie Luxembourgeoise de Radiodefusion*.9 It was, however, settled by the decision of Scarman, J., in The Merak (supra) and the point was not disputed in the Court of Appeal."

42. If the opposite view for which Respondent No. 1 contends is adopted and if it is held that the section only applies if the parties have submitted an actual dispute to arbitration the purpose of Section 3 of the Act and of the ratification of the New York Protocol of 1958 by India would have been largely frustrated. Such an interpretation would be contrary to the avowed object and intention of the Act which is "to give effect to the Convention on the recognition and enforcement of foreign arbitral awards" done at New York on June 10, 1958. When there is ambiguity in the language of the section it is the duty of the court to adopt that construction which will effectuate the object of the Act and not nullify the intention of Parliament and make the provision devoid of all meaning.

43. On behalf of the first respondent it was said that there was a presumption that the Legislature in re-enacting a section of the law must be presumed to have been aware of the intervening judicial interpretation and to have given its approval to it. The classic statement of the rule is that of James, L. J., in *Ex. p. Campbell*:10

> "Where once certain words in an Act of Parliament have received a judicial construction in one of the Superior Courts, and the Legislature has repeated them without any alteration in a subsequent statute, I conceive that the Legislature must be taken to have used them according to the meaning which a Court of competent jurisdiction has given them."

But the rule is better and more moderately stated by the Judicial Committee in *Webb* v. *Outrim*,11 where the words of Griffith, C. J., in the Australian case *D. Emden* v. *Redder*,12 are adopted: "When a particular form of legislative enactment, which has received authoritative interpretation, whether by judicial decision or by a long course of practice is adopted in the framing of a later statute, it is a sound rule of construction to hold that the words so adopted were intended by the Legislature to bear the meaning which has been so put upon them". Even in this qualified form, however, the rule has not been acknowledged without protest (See the speech of Lord Blanesburgh in *Barras* v. *Aberdeen Steam Trawling Co.*13 The presumption is weak and is passed on an optimistic fiction. The rule has been criticised by Dr C. K. Alien:

> "The second petrifying factor is the real or supposed rule (now, however, questioned) that once a word or phrase has been given a certain judicial meaning, it is doomed to bear that meaning not only in all subsequent cases, but in all subsequent statutes. This is an offshoot of the somewhat optimistic assumption that the Legislature must be presumed to know the actual state of the law. Consequently, if a word has once been given a particular meaning in any case of authority, however obscure in connection with any statute, however recondite the draftsman who uses that word in a later enactment is, so to speak, 'affected with notice' of the judicial interpretation, however remote it may be from the matter in hand. It need hardly be said that in the huge mass of our case law this

assumption is a transparent fiction." ('Law in the Making' pp. 508-9).

44. Mr Raman referred to the decisions of the Calcutta High Court and of the Bombay High Court in *Bajrang Electric Steel Co.* v. *Commissioners for Port of Calcutta*,14 *W. Wood & Sons Ltd.* v. *Bengal Corporation*,15 and *K. E. Corporation* v. *S. De Traction*.16 It was held in these cases that before the court stays proceedings under Section S of the Act there must be an actual submission by both the parties to arbitrators of the particular point in dispute. It was argued that in enacting Section 3 Parliament was not content with a mere readiness of the parties to go to arbitration but it insisted on something more, that is, the actual implementation of the arbitration agreement by the parties concerned by setting up the machinery of arbitration in motion. I am unable to accept this line of reasoning. It is not said that there is a long course of practice or a series of decisions of various High Courts taking a particular view of Section 3 of the Act. The decisions referred to by the respondent are not numerous and it is unsafe and unrealistic to draw the presumption that Parliament in re-enacting Section 3 of the Act, was aware of the intervening judicial interpretation and set its seal of approval upon it. In *R.* v. *Bow Road Domestic Proceedings Court*,17 Lord Denning pointed out that though the decision in *R.* v. *Blane*,18 stood for over 100 years, if it was quite an erroneous precedent, the fact that Parliament had re-enacted the provisions of the statute, did not authorise the erroenous interpretation.

45. It is, however, maintained by the respondent that the words "submission" and "agreement" must be given their natural and grammatical meaning and the words "submission made in pursuance of an agreement" can only mean an actual submission of the disputes to the arbitral tribunal. So the word "agreement" can have reference to and can be construed only in the sense of an arbitration agreement or arbitral clause in a commercial contract. It cannot mean a commercial contract because an arbitration agreement cannot be stated to have been made pursuant to a commercial contract. The contention is that if submission has to be taken in the sense of an arbitration agreement it would render the words "submission made in pursuance of an agreement" meaningless and unintelligible. In my opinion the agreement proceeds on a fallacy.' A statute should not be construed as a theorem of Euclid but the statute must be construed with some imagination of the purpose which lies behind the statute. The doctrine of literal interpretation is not always the best method for ascertaining the intention of Parliament. The better rule of interpretation is that a statute should be so construed as to prevent the mischief and advance the remedy according to the true intent of the makers of the statute. The principle was for example, applied by Lord Halsbury in *Eastman Photographic Co.* v. *Comptroller of Patents*,19 where the question was whether the word 'solio' used as a trade mark, was an invented or a descriptive word. In examining this question Lord Halsbury said: "Among the things which have passed into canons of construction recorded in *Heydon's case* we are to see what was the law before the Act was passed, and what was the mischief or defect for which the law had

not provided, what remedy Parliament appointed and the reason of the remedy". At p. 575 Lord Halsbury proceeded to state:

> "Turner, L. J., in *Hawkins* v. *Cathercole*,20 and adding his own high authority to that of the Judges in *Stradling* v. *Morgan*,21 after enforcing the proposition that the intention of the Legislature must be regarded, quotes at length the judgment in that case: that the judges have collected the intention 'sometimes by considering the cause and necessity of making the Act.. ..sometimes foreign circumstances' (thereby meaning extraneous circumstances), so that they have ever been guided by the intent of the Legislature, which they have always taken according to the necessity of the matter, and according to that 'which is consonant to reason and good discretion'. And he adds: "We have, therefore, to consider not merely the words of this Act of Parliament but the intent of the Legislature to be collected from the cause and necessity of the Act being made, from a comparison of its several parts, and from foreign (meaning extraneous) circumstances so far as they can justly be considered to throw light upon the subject."

46. For the reasons expressed I hold that the appellant is entitled under Section 3 of the Act for an order of stay of the proceedings in C. S. 118 of 1967 pending in the Madras High Court on the ground that in terms of the Contract dated February 2, 1965 the parties expressly agreed that all disputes arising out of the contract should be settled by arbitration by the Foreign Trade Arbitration Commission of the U. S. S. R. Chamber of Commerce at Moscow.

47. It is not, however, possible to decide these appeals finally because the respondent has opposed the application for stay on other grounds also. Ramamurti, J., found that the arbitral clause in the contract of February 2, 1965 had ceased to be effective as between the parties as a result of the agreement dated August 14, 1966, Ex. p-32 "and that it will be wholly unrealistic..... hold that the moment an amicable settlement as provided in Ex. p-32 proved futile, the entire contract, Ex. p-4 revived...." On the further aspect that admittedly Section 3 itself contains an exception that the mandatory obligation to stay is not incumbent on the court if the court is satisfied that "the agreement is null and void, inoperative or incapable of being performed" Ramamurti, J., was apparently of the view that the alleged nullity of the contract on the basis of mutual mistake was a matter that the court has to examine further after recording evidence and that was a ground on which proceedings cannot be stayed under Section 3.

I consider, therefore, that C. A. 1209 and 1834 of 1969 should be set down for further hearing on these points.

48. Civil Appeal Nos. 1208 and 1833 of 1969 arise out of the application No. 106 of 1968 filed by the first respondent for injunction to restrain the first respondent for taking further part in the arbitration proceedings in Moscow. Ramamurti, J., took the view that since the application No. 2604 of 1967 for stay of the proceedings in the pending suit C. S. 118 of 1967 had been dismissed the first respondent's injunction petition should be allowed on the ground that the two forums were mutually exclusive. In the connected appeals I have taken the view that the appellant would be entitled to an order of stay of the proceedings in C. S. 118 of 1967 under Section 3 of Act 45 of 1961. Even assuming that Section 3 of the Act is not applicable this is not a proper case in which the High Court should have issued an injunction restraining the appellant from proceeding with the arbitration. As a rule the Court has to exercise its discretion with great circumspection for it is imperative that the right of access to the tribunals of a country should not be lightly interfered with. It is not sufficient merely to show that two actions have started for it is not prima facie vexatious to commence two actions about the same subject-matter one here and one abroad. (See *McHenry* v. *Lewis*,22 The reason of this reluctance to exercise the jurisdiction is that owing to a possible difference between the laws of the two countries, the stay of one of the actions may deprive the plaintiff of some advantage which he is justified in pursuing.

49. Thus he may have a personal remedy in one country and a remedy only against the goods in another; or a remedy against land in one State but no such remedy in another. The rule, therefore, is that a plea of lis alibi pendens will not succeed and the court will order a stay of proceedings unless the defendant proves vexation in point of facts. He must show that the continued prosecution of both actions is oppressive or embarrassing, an onus which he will find it difficult to discharge if the plaintiff can indicate some material, advantage that is likely to result from each separate action. Each case, therefore, depends upon the setting of its own facts and circumstances. In the facts of the present case I am of opinion that no case for injunction has been made out and the order of Ramamurti, J., dated April 12, 1968 allowing the application of respondent No. 106 of 1968 should be set aside. I would accordingly allow the appeal Nos. 1208 of 1969 and 1833 of 1969 with costs.