Societe De Traction Et D'electricite Societe Anonyme

Vs

Kamani Engineering Company Ltd.

Civil Appeal No. 196 of 1963

(B. P. Gajendragadkar, K. N. Wanchoo, K. C. Das Gupta JJ)

18.04.1963

JUDGMENT

SHAH, J. –

The question which falls to be determined in this appeal with certificate granted by the High Court of Bombay against an order refusing a motion for stay a suit, is :

> "Whether an agreement to refer a future dispute to arbitration according to the rules of the International Chamber of Commerce between a company registered under the Indian Companies Act and a foreigner is binding upon the former."

The facts which give rise to this question are these : Societe De Traction Et D'Electricite Societe Anonyme - hereinafter called, for the sake of brevity, "Traction" - is a Corporation incorporated under the laws of Belgium and carries on business as consulting and construction engineers at Brussels. The respondent Kamani Engineering Corporation Ltd - hereinafter called "Kamani" - is a company registered under the Indian Companies Act, 1913. Kamani carries on business amongst others, as an engineering concern. On April 22, 1959 Kamani entered into a 'Collaboration agreement' with Traction whereby the latter undertook to provide to Kamani technical assistance for the construction of overhead railway electrification, tramway systems and trolley buses in India, Burma, Ceylon and/or Nepal. The agreement contained an arbitration clause in Articles X, which provided :

> "All disputes arising in connection with the agreement during the period of the agreement or thereafter shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the Rules of the said International Chamber of Commerce."

On September 1, 1961, Kamani instituted suit No. 296 of 1961 in the High Court of Judicature at Bombay on its original side, inter alia, for -

> (1) a decree declaring that Traction had committed diverse breaches of the 'Collaboration agreement' and the agreement was on that account terminated by Traction, and Kamani stood discharged from all its obligations thereunder;
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> (2) a decree for accounts of the items contained in the invoice referred to in paragraphs 24 and 25 of the plaint and for ascertainment of the amount in the light of

the contentions and submissions set out;

(3) for a decree directing Traction to pay Rs. 9,00,000/- together with interest thereon at the rate of six per cent per annum from the date of the suit; and

(4) for the aforesaid purposes for an order that all enquiries be made, directions given, orders passed and Traction be directed to hand over to Kamani all documents, files, reports, correspondence etc., removed by the representatives of the Traction.

On January 22, 1962 Traction took out a notice of motion for an "order staying the proceedings in the suit pursuant to s. 3 of the Arbitration (Protocol and Convention) Act, 1937, and/or s. 34 of the Arbitration Act, 1940 and/or s. 151 of the Code of Civil Procedure, 1908 and/or the inherent powers of the High Court"; in the alternative for an order that Kamani, its servants and agents be restrained by an order and injunction from in any manner proceeding further with or from taking any further steps in the suit. Kantawalla, J. refused the motion and the order passed by him was confirmed in appeal by the High Court. The High Court held that the arbitration clause of the collaboration agreement was invalid, for it obliged Kamani, contrary to s. 389 of the Indian Companies Act, 1956, to go to arbitration otherwise than in accordance with the Arbitration Act X of 1940.

The relevant rules of the International Chamber of Commerce may be summarised. Article 7 provides by cl. (1) that the Court of Arbitration does not itself settle disputes except when otherwise stipulated : it appoints or confirms the nomination of arbitrators in accordance with the provisions following. If the parties have agreed to the settlement of a dispute by a sole arbitrator they may nominate him by common agreement for confirmation by the Court of Arbitration, failing agreement between the parties the arbitrator shall be appointed by the Court of Arbitration. If reference be to three arbitrators each party shall nominate an arbitrator for confirmation of the Court of Arbitration which shall appoint the third arbitrator. If the parties fail to agree on the number of the arbitrators the Court or Arbitration shall appoint a sole arbitrator who shall choose the National Committee or Committees from which it shall request nominations. The sole arbitrators and third arbitrators must be nationals of countries other than those of the parties. If any challenge be made by one of the parties to the appointment of an arbitrator, the decision of the Court of Arbitration which is the sole judge of the grounds of challenge, shall be final. On the death or refusal of an arbitrator to carry out his duties, or on resignation the Court of Arbitration if it appointed him, share nominate another arbitrator in his place. Article 8 deals with initiation of arbitration proceedings. By Art. 13 it is provided that when the parties agree to submit their disputes to arbitration by the International Chamber of Commerce, they shall be deemed to submit to arbitration in accordance with the Rules and if a party raises a plea as to the existence or validity of the arbitration clause, if the Court of Arbitration is satisfied as to the prima facie existence of such a clause, it may without prejudice to the admissibility or the merits of such plea, order that the arbitration shall proceed. Article 16 prescribes the procedure to be followed in the arbitration proceeding. The rules by which the arbitration proceedings shall be governed shall be the rules of the Chamber and, in the event of there being no provision in those Rules, those of the law of procedure chosen by the parties or, failing such choice, those of the law of the country in which the arbitrator holds the proceedings shall govern the proceeding. By Art. 18 the proceedings before the arbitrator are to take place in the country determined by the Court of Arbitration, unless the parties have agreed in advance upon the place of arbitration. Article 19 deals with the arbitrator's terms of reference. The arbitrator is required, before hearing of the case commences, to draw up in the presence of the parties a statement defining his terms of reference including the names and addresses of the parties, brief statement of the claims of the parties, terms of reference, statement of the case, indication of the

points at issue to be determined, the place of arbitration proceeding, and all other matters in order that the award when made shall be enforceable at law, or which in the opinion of the Court of Arbitration and the arbitrator, it is desirable to specify. Article 20 deals with the hearing of the case by the arbitrator and Art. 21 specifies the powers of the arbitrator. The arbitrator is competent to decide the dispute on the basis of the relevant documents, unless one one of the parties requests that a hearing be given. The arbitrator may suo motu, or on the request of the parties, summon the parties to appear before him at a specified place and time and if the parties or any of them having been duly summoned, fail to appear before the arbitrator he may, after satisfying himself that the summons was duly served upon the party or parties, proceed with the arbitration ex parte. Article 23 provides that the award shall be made within sixty days from the date on which the signed statements under Article 19 are submitted, but time may be extended by the Court of Arbitration. Article 25 deals with the decision regarding the costs of arbitration, arbitrator's fee and the administrative costs. By Article 26 the arbitrator has before completing the award to submit the same to the Court of Arbitration. The Court of Arbitration may lay down modifications as to its form and if need be draw the arbitrator's attention even to points connected with the merits of the case, and no award shall under any circumstances be issued until approved as to its from by the court of Arbitration. Articles 27 and 28 deal with the pronouncement and notification of the award. By Art. 28 the award is made final, it being undertaken by the parties that the award shall be carried out without delay, the parties having waived their right to any form of appeal, in so far as such waiver may be valid. By Art. 30 the award is required to be deposited with the Secretariat of the Court of Arbitration. This is followed by a general rule which states that in circumstances not specifically provided for, the Court of Arbitration and the arbitrator shall act on the basis of the rules and make their best efforts for the award to be enforceable at law.

The scheme of arbitration contemplated by these Rules is different from the scheme contemplated by ss. 3 to 38 of the Arbitration Act. Some of the striking provisions of the Rules are the power of the Court of Arbitration to appoint arbitrators or umpires, finality of the award without any provision for restore to the Civil Court to remit or to set aside the award even for misconduct of the arbitrator or an error apparent on the face of the award, and the power of the Court of Arbitration to modify the award and to given directions during the course of proceedings for arbitration, and similar provisions.

Kamani is, as already stated, a company registered under the Indian Companies Act of 1913 and by s. 3(1) of the Indian Companies, Act 1956, is a 'Company' for the purposes of that act. Section 389 of the Indian Companies Act, 1956 (before it was repealed by Act 65 of 1960) read as follows :-

> "(1) A company may, by written agreement refer to arbitration, in accordance with the Arbitration Act, 1940 (X of 1940), an existing or future difference between itself and any other company or person.
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> (2) A company which is a party to an arbitration may delegate to the arbitrator power to settle any terms or to determine any matter, capable of being lawfully settled or determined by the company itself, or by its Board of Directors, managing director, managing agent, secretaries and treasurers, or manager.
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> (3) The provision of the Arbitration Act, 1940 (X of 1940), shall apply to all arbitrations in pursuance of this Act to which a company is a party."

The High Court held that an Indian Company could, because of s. 389 refer an existing or future

dispute between itself and any other company or person to arbitration only in accordance with the Arbitration Act, 1940 and not otherwise; that any arbitration agreement which obliged the Company to submit itself to arbitration according to a scheme of arbitration different from the Arbitration Act, 1940 would not be binding upon the Indian Company, and therefore the Court had no power to enforce compliance with an invalid convenant, and to stay the suit instituted by an Indian company in breach thereof. In recording that conclusion the High Court was guided by its earlier judgment in Societe Italians per Lavori Marittimi v. Hind Constructions Ltd. [Appeal No. 63 of 1959 decided on September 22, 1960, (Unreported.)], that it was not permissible to a Company incorporated under the Indian Companies Act to refer disputes to arbitration otherwise than in accordance with the Arbitration otherwise than in accordance with the Arbitration Act.

In support of the appeal Mr. Setalvad contended that s. 389 is an enabling provision and does not compel an Indian Company to agree to refer differences to arbitration only in accordance with the provisions of the Indian Arbitration Act, 1940 i.e. if the Company desires to refer a dispute to arbitration under the Arbitration Act, 1940, it may do so, but the power to submit to arbitration being an incident of the power to enter into contracts for the purpose of carrying on its business, is unrestricted and that sub-s. (3) of section 389 applies not to consensual arbitrations but only to statutory arbitrations in pursuance of the Companies Act, e.g. arbitrations under section 494(3)(b) of the companies Act 1956.

It cannot be disputed that the use of the expression 'may' is not decisive. Having regard to the context, the expression 'may' used in a statute has varying significance. In some contexts it is purely permissive, in others, it may confer a power and make it obligatory upon the person invested with the power to exercise it as laid down.

A company under the Indian Companies Act is entitled to enter into contracts for all such purposes as are by its constitution within its competence. It is invested with a legal personality, and a commercial company may subject to restrictions specifically imposed upon it by its memorandum or Articles, always enter into contracts for the purpose of its business subject in the matter of form to s. 46 of the Companies Act. An arbitration agreement being a contract to submit present or future differences between the parties not to the ordinary courts but before a tribunal chosen by the parties, if the company has the power to submit a dispute to arbitration out of court. By s. 28 of the Indian Contract Act agreements in restraint of legal proceedings are declared void, subject however to the rule that a contract by which two or more persons agree that any dispute which has arisen or which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, is not illegal. Section 389 of the Companies to agree to refer disputes which have arisen or which may arise to arbitration : the section recognises the right of a company to refer present disputes to arbitration, and seeks to regulate the right by placing a restriction upon the exercise of that right. It is pertinent to remember that the Arbitration Act, 1940 is in form a code relating to the law of arbitration and applies to all arbitrations : it applies to all arbitrations to which persons natural and legal are parties. The power of the Company to enter into an arbitration agreement is therefore not conferred for the first time by the Companies Act; it is merely regulated by s. 389 of the Companies Act. In other words, a company within the meaning of the Companies Act, 1956 has the power to refer present or future disputes to arbitration, but such reference has because of the statutory provision to be in accordance with the Arbitration Act, 1940. Sub-section (3) of s. 389 makes the provisions of the Arbitration Act, applicable to all arbitrations to which a company is a party, provided they are in pursuance of the Companies Act. There is no warrant for holding that sub-s. (3) is independent of sub-s. (1). Sub-section (1) affirms the power of a company to refer differences between it and another company or persons, and also regulates it. Sub-section (3) makes the

provisions of the Arbitration Act applicable to all arbitrations to which a company is a party : it is not restricted to mere statutory arbitrations to which a company is obliged to submit by virtue of the provisions of the Companies Act. To invest sub-s. (3) with a restricted meaning, is to make it redundant. The only provision of the Companies Act which compels a company to go to arbitration in respect of a dispute is s. 494(3)(b). By that clause a member of a transferor company in voluntary liquidation expressing dissent against an arrangement relating to the acceptance of shares, policies or other interest or participation in profits in the transferee company in consideration of the business of the former may require the liquidator to purchase his interest at a price to be determined by agreement or by arbitration in the manner provided by s. 494, and sub-s. (6) expressly makes the provisions of the Arbitration Act applicable to such arbitration. It may be observed that the words "other than those restricting the application of that Act" in sub-s. (6) have no meaning. They have been merely copied from s. 208C of the Companies Act of 1913, in which they survived by some inadvertance, even after the repeal of the Arbitration Act of 1899. Our attention has not been invited to any other provisions under the Indian Companies Act under which compulsory arbitration has to be undertaken between a company and another company or person and in regard to which no provision relating to the applicability of the Arbitration Act has expressly been made. The provisions relating to arbitration in the earlier Companies Act also confirm that view. A retrospect of legislation relating to arbitration in the context of the law relating to Companies would serve also in clearing the ground in appreciating the reasons which led to conflicting decision in the High Courts.

It may not be necessary to enter upon a detailed review of the Regulations and Acts in force prior to the year 1882. It may be sufficient to observe that in the Presidency towns of Calcutta, Madras and Bombay there were diverse Regulations in operation which provided for machinery for amicable settlement of disputes of civil nature by arbitration. For the first time by Act 8 of 1859, in the Code of Civil Procedure a provision was made for reference of disputes to arbitration by parties to the suit applying to the Court in which the suit was pending in which the matter was referred to arbitration. Then came the Indian Contract Act 9 of 1872, which recognized the validity of contracts requiring parties to submit their disputes either present or future to arbitration. In 1822 the Indian Companies Act 6 of 1882 was enacted which by ss. 96 to 123 made provisions for arbitration out of Court of disputes, in which companies were concerned. A company could refer by writing under its common seal any matter whatsoever in dispute between itself and any other company or person, and the procedure prescribed in those sections applied. This group of sections dealt exhaustively with arbitrations out of court to which the company was a party. Besides enacting the procedure for arbitration, it provided that the award of the arbitrator was not liable to be set aside on any ground of irregularity or informality. On the application of any party interested the arbitration agreement could be filed in the High Court having jurisdiction, and an order of reference could be made thereon. Immediately in the wake of the Companies Act, 1882 the Code of Civil Procedure (Act 14 of 1882) was enacted which provided by Ch. XXXVII the general law relating to arbitration. Sections 506 to 522 dealt with arbitration in a pending suit. If all the parties to a suit desired that any matter in difference between them in the suit be referred to arbitration, they could, at any time before judgment was pronounced, apply to the Court for an order of reference. By s. 523 provision was made enabling the parties to an arbitration agreement to file it in Court and the Court if satisfied as to the existence of the arbitration agreement could make a reference as to the arbitrator appointed by the parties or nominated by the Court and the provisions relating to arbitration in the earlier sections in so far as they related to or were consistent with the agreement applied. Section 525 enabled any person interested in the award made in a matter referred to arbitration without the intervention of a Court of Justice to file the same in Court and if no ground for setting aside the

award was made out, the Court could order that the same be filed. Chapter XXXVII, therefore, dealt with arbitration generally - arbitration in pending proceedings, arbitrations pursuant to orders passed by the Court referring a dispute on an agreement filed in Court, and filing of awards made by arbitrators appointed by valid agreements out of Court. The combined effect of the Indian Companies Act, ss. 96 to 123 and the Code of Civil Procedure ss. 506 to 526 was that where a Company was a party to an arbitration out of Court, the arbitration proceedings had to take place in accordance with the Companies Act and could be enforced in the manner provided thereunder. Filing of an arbitration agreement in Court for reference was also governed by the Companies Act, but arbitration in a pending suit to which a Company was a party was governed by the Code of Civil Procedure.

In 1899 the Indian Legislature enacted the Indian Arbitration Act, 9 of 1899. That Act had a limited operation. By s. 2 it was provided that it shall apply only in cases where if the subject-matter submitted to arbitration were the subject of a suit, the suit could, whether with lead or otherwise, be instituted in a Presidency-town. By the proviso it was open to the Local Government, to declare the Act applicable in other local area as if it were a Presidency-town. By s. 3 proviso (2) it was provided that nothing in the Act shall affect the provisions of the Indian Companies Act, 1882 relating to arbitration. The provisions of the Indian Companies Act, 1882 contained in ss. 96 to 123 therefore continued to remain in operation and to apply to companies notwithstanding the enactment of the Indian Arbitration Act, 1899. The Civil Procedure Code of 1882 was repealed by Act 5 of 1908 and the provisions relating to arbitration substantially on the same pattern as in the Code of 1882 were incorporated in a separate schedule in a new Code. Clauses 1 to 16 dealt with references to arbitration of the differences between the parties to a suit if they applied in writing in that behalf. Clauses 17 to 19 dealt with orders of references an agreements to refer disputes to arbitration, and clauses 20 and 21 dealt with the filing and enforcement of awards. Section 89 was specially enacted in the Code which provided by the first sub-section :

> "(1) Save in so far as is otherwise provided by the Indian Arbitration Act, 1899, or by any other law for the time being in force, all references to arbitration whether by an order in a suit or otherwise, and all proceedings thereunder, shall be governed by the provisions contained in the Second Schedule."

The effect of s. 89 was to make the Second Schedule applicable to all arbitrations other than those governed by the Indian Arbitration Act, 1899 or any other law for the time being in force. Therefore since the enactment of the Code of Civil Procedure, 1908 all arbitrations out of Court where a company was a party had to be conducted in the manner provided by the Companies Act, 1882 but arbitrations during the pendancy of a suit or references to arbitrations by filing an arbitration agreement could be made under the appropriate clauses of the Code of Civil Procedure. The Indian Companies Act, 1882 was repealed by the Companies Act 7 of 1913. By s. 290 of that Act read with Schedule IV the Indian Companies Act of 1882 and the second proviso to s. 3 of the Indian Arbitration Act, 1899 were repealed. The Indian Companies Act, 1913 incorporated a new section 152 which by the first clauses authorised a company by written agreement to refer to arbitration, in accordance with the Indian Arbitration Act, 1899, an existing or future difference between itself and any other company or person, and by the third sub-section enacted that the provisions of the Indian Arbitration Act, 1899, other than those restricting the application of the Act in respect of the subject-matter of the arbitration, shall apply to all arbitrations between companies and persons in pursuance of the Companies Act. The arbitrations to which a company was a party had therefore to take place irrespective of the restrictions contained in s. 2 of the Arbitration Act, 1899, according to the provisions of the Arbitration Act, 1899. Section 214 of the Companies Act, 1913 (which was

later renumbered as s. 208C by Act XXII of 1936) provided for compulsory arbitration for purchasing the interest of a member of a Company in voluntary liquidation when the business of the company was agreed to be transferred to another company in the course of liquidation and the liquidator and the member could not agree as to the price payable in respect thereof. By cl. (6) of that section it was expressly provided that the provisions of the Arbitration Act, 1899, other than those restricting the application of that Act in respect of the subject-matter of the arbitration, shall apply to all arbitrations in pursuance of s. 214.

The Government of India was a party to the Protocol on Arbitration Clauses and the Convention on the Execution of Foreign Arbitral Awards. To enforce the terms of the Protocol, the Indian Legislature enacted the Arbitration (Protocol and Convention) Act, 6 of 1937 for enforcement of foreign awards on differences relating to matters considered as commercial under the law in force in British India in pursuance of an arbitration agreement to which the Protocol set forth in the First Schedule applied, between persons who were subject to the jurisdiction of the powers notified by the Governor-General in that behalf as parties to the Convention. By s. 3 of that Act it was provided that :

> "Notwithstanding anything contained in the Indian 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 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 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."

By this enactment an obligation in the conditions set out in s. 3 was imposed upon the Court, unless it was satisfied that the agreement of arbitration had become inoperative or could not proceed, to direct that the suit filed in any Court in India against any other party to the submission shall be stayed. This provision applied to all arbitration agreements whether a company was or was not a party thereto.

This Act was followed by the Arbitration Act, X of 1940. The Act was enacted in the form of a complete code on the law of arbitration in India. All consensual arbitrations were governed by the Arbitration Act and by s. 46 the provisions of the Act, except sub-s (1) of s. 6 and ss. 7, 12, 36 and 37 were made applicable to every arbitration under any other enactment for the time being in force, as if the arbitration were pursuant to an arbitration agreement, and as if that other enactment were an arbitration agreement, except in so far as the Act was inconsistent with that other enactment or with any rules made thereunder. By s. 47 it was provided that :

> "Subject to the provisions of section 46, and save in so far as is otherwise provided by any law for the time being in force, the provisions of this Act shall apply to all arbitrations and to all proceedings thereunder :
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> Provided that an arbitration award otherwise obtained may with the consent of all the

parties interested be taken into consideration as a compromise or adjustment of a suit by any court before which the suit is pending."

By s. 49 read with Fourth Schedule the figure "1899" in s. 152(1) & (3) in the Companies Act, 1913 was substituted by the figure "1940" and the words in sub-s. (3) "other than those restricting the application of the Act in respect of the subject-matter of the arbitration" were deleted. So also s. 89 of the Code of Civil Procedure was deleted. The effect of this amendment was to make the Arbitration Act applicable to all arbitrations in pursuance of the Companies Act, 1913 in which a company was a party. No amendment, however, was made in the Arbitration (Protocol and Convention) Act, 6 of 1937 and none such was necessary. By virtue of the saving clause in s. 47 the provisions of the Arbitration (Protocol and Convention) Act, 1937 continued to operate.

The Indian Companies Act, 7 of 1913 was repealed by the Companies Act I of 1956 and s. 389 took the place of s. 152 of the former Act with a slight modification. Under the Arbitration Act, 1899 read with the Companies Act, 1913, the power of a company to refer differences to arbitration fell to be determined in certain cases which arose, before the High Courts of Lahore, Calcutta and Madras. In Sita Ram Balmukand v. The Punjab National Bank Ltd. Ambala City [(1936) I.L.R. 17 Lah. 722 F.B.], there was a private arbitration in a dispute between the Punjab National Bank Ltd. and a debtor of the bank and the arbitrator made his award in favour of the Bank. This award was filed in the Court of the Senior Subordinate Judge, Ambala under Sch. I of the Code of Civil Procedure, 1908 and a decree was obtained in accordance with the provisions of that Schedule. Execution was then taken out and the property of the debtor was attached. The debtor contended that the award and the decree by the Court were invalid, because arbitration to which a company was a party had, in view of the provisions of s. 152 of the Indian Companies Act, to take place in accordance with the provisions of the Arbitration Act, 1899 and the award could only be filed in the Court of the District Judge and not in the Court of the Senior Subordinate Judge and therefore the proceedings in execution "were ultra vires". The High Court held that s. 152 of the Indian Companies Act, 1913, enacted an enabling provision and did not make it obligatory upon the parties one of which was a company, to go to arbitration in accordance with the requirements of the Indian Arbitration Act, 1899. The provisions of s. 152 in the view of the Court being permissive, the Company could apply to have an award filed in Court under paragraph 21(1) of Sch. II to the Code of Civil Procedure and the decree passed by the Senior Subordinate Judge was not a nullity as contended by the debtor. Bhide J., who delivered the judgment of the Court observed that the general policy of the Legislature as disclosed by s. 152 of the Indian Companies Act, 1913, was not to make compliance in arbitration proceedings with the provisions of the Indian Arbitration Act, 1899, obligatory outside the Presidency-towns and that s. 152 being an enabling provision it merely conferred power on companies to refer disputes to arbitration under the Indian Arbitration Act, 1899, by an agreement in writing when that course was preferred. This view was not accepted by the Calcutta High Court in Jhirighat Native Tea Company Ltd. v. Bipul Chandra Gupta [I.L.R. (1940) 1 Cal. 358.]. In that case the jurisdiction of the District Court to entertain a petition under paragraph-20 of Sch. II of the Code of Civil Procedure for an order filing an award made out of court where one of the parties to the dispute was a company registered under the Indian Companies Act, 1913, was challenged. It was held by the High Court of Calcutta that by virtue of the provisions of s. 152 sub-ss. (1) and (3) of the Indian Companies Act, 1913, all arbitrations between companies and persons had to take place in accordance with the provisions of ss. 3 to 22 of the Indian Arbitration Act, 1899, and for that purpose, s. 2 of the Indian Arbitration Act restricting its local application was to be treated as non-existent. The Court also opined that in view of s. 89 of the Code of Civil Procedure, 1908, the Second Schedule to the Code had no application to arbitration between a company and a person or to arbitrations under s. 208C of the Companies Act, 1913. It

was observed that the words "in pursuance of this Act" (i.e. the Companies Act) qualified the phrase "shall apply" and, therefore the meaning of s. 152 was that the provisions of the Indian Arbitration Act, 1899, except s. 2 thereof shall apply to all arbitrations between companies and persons by the force and effect of the Companies Act itself.

In East Bengal Bank Ltd. v. Jogesh Chandra Banerji [I.L.R. (1940) 2 Cal. 237], Mitter J. modified the second proposition which was somewhat broadly stated. He held that even where one party or both the parties to a suit are companies registered under the Indian Companies Act, arbitration proceedings pendentee lite between them are governed by the second schedule to the Code of Civil Procedure, 1908, and not the provisions of s. 152 of the Companies Act, 1913. It was pointed out that the Indian Arbitration Act, 1899, only applied to arbitration by agreement without intervention of the Court and the Act had no application to arbitration relating to the subject-matter of a pending suit by the force and effect of s. 152 of the Indian Companies Act. The view expressed in Jhirighat Native Tea Company's Case [I.L.R. (1940) 1 Cal. 358.], was approved by the Madras High Court in The Catholic Bank Ltd. Mangalore v. F. P. S. Albuquerque [I.L.R. (1944) Mad. 385 F.B.]. In that case the Court held that after the enactment of the Indian Companies Act, 1913 and before the Indian Arbitration Act, 1940, came into force, a company could submit differences to arbitration only under the provisions of the Indian Arbitration Act 1899, and consequently Companies were (for the purpose of arbitration out of court) not governed by Sch. II of the Code of Civil Procedure. All these cases arose under the Indian Arbitration Act, 1899 read with the Indian Companies Act, 1913, and the question mooted was whether the Subordinate Judge, who was approached on the assumption that Sch. II of the Code of Civil Procedure applied, was competent to pass a decree on an award made out of court, or to entertain a petition for filing such an award.

In 1960 the Bombay High Court had occasion to consider the effect of s. 152 of the Indian Companies Act 7 of 1913, in its relation to the Arbitration Act of 1940. The Court in that case after referring to the Lahore, the Calcutta and the Madras decisions observed in Societe Italians per Lavori Marittimi v. Hind Constructions Ltd., [Appeal No. 63 of 1959 decided on September 22, 1960.], decided by Mudholkar acting C.J. and S. M. Shah, J, after referring to the marginal note of s. 152 :

> "Undoubtedly a corporation has powers which are incidental to the performance of the objects for which that corporation was established. It can, therefore, be said and properly be said that a power to carry on business implies also an incidental power to refer a dispute arising from that business to arbitration. It was, therefore, not at all necessary to make specific provisions in the Indian Companies Act of the kind which we find in section 152 of the Act of 1913 for enabling a corporation to enter into an agreement for arbitration. The fact that the legislature has enacted this provision would show that the legislature by enacting it had no object in view other than to limit the exercise of that power."

The Court therefore held that an arbitration agreement whereby an Indian Company had agreed to refer future dispute under a collaboration agreement with an Italian Corporation, was unenforceable by virtue of s. 152 of the Indian Companies Act, and the suit filed by the Indian company for a declaration that the "dredging agreement" had been validly terminated, and for damages for breach of contract, and accounts of profits and losses could not be ordered to be stayed either under s. 34 of the Arbitration Act or s. 3 of the Arbitration (Protocol and Convention) Act, 1937, or under s. 151 of the Code of Civil Procedure.

On a review of the statutory provisions and the authorities we are of the view that s. 152 of the Indian Companies Act, 1913, and s. 389 of the Indian Companies Act, I of 1956, were intended to provide that all arbitrations to which a company is a party shall be conducted in accordance with the provisions of the Indian Arbitration Act, X of 1940. For reasons which we have already stated s. 389(1) of the Companies Act, 1956, regulated the power of Indian Companies to agree to submit differences to arbitration and by sub-s. (3) the provisions of the Arbitration Act, 1940, applied to all arbitrations to which an Indian Company was a party.

That however is not decisive of the question which falls to be determined before us. Section 47 of the Arbitration Act, 1940, is as much a part of the Indian Arbitration Act as any other provision and that section makes the provisions of the Arbitration Act applicable to all arbitrations and to all proceedings thereunder but subject to the provisions of s. 46 and save in so far as is otherwise provided by any law for the time being in force. We are not concerned in the present case with a statutory arbitration. But by the use of the words "save in so far as is otherwise provided by any law for the time being in force", the Legislature has clearly made the provisions of the Arbitration (Protocol and Convention) Act, 1937, applicable to consensual arbitrations under the Arbitration Act of 1940 when the conditions prescribed for the application of that Act are attracted, even if the scheme of arbitration recognised thereby is inconsistent with ss. 3 to 38 of the Arbitration Act, 1940. The Arbitration (Protocol and Convention) Act 6 of 1937 was enacted for giving effect to the protocol on arbitration clauses set forth in the First Schedule and of the conventions on the execution of foreign arbitral awards set forth in the Second Schedule and for enabling the conventions to become operative in India. It is not disputed that the proposed arbitration between Traction and Kamani under the Rules of the International Chamber of Commerce is governed by the Protocol on Arbitration Clauses agreed to at Geneva on September 24, 1923, and the Protocol in the First Schedule applies. The Arbitration (Protocol and Convention) Act 6 of 1937, being a law otherwise providing for arbitration the provisions thereof would by virtue of s. 47 be applicable to arbitrations under s. 389 of the Indian Companies Act, 1956, if the conditions regarding their applicability are fulfilled. That Act applies to arbitrations whether parties to the submission are individuals or companies. By virtue of s. 389 sub-ss. (1) and (3) of the Indian Companies Act 1 of 1956, (before that section was repealed in 1960) an Indian Company may agree to refer differences between itself and any other company or person by written agreement in accordance with the Arbitration Act, 1940 and the provisions of the Arbitration Act, 1940 apply to all Arbitrations in pursuance of the Companies Act to which a company is a party. Arbitration according to the provisions of the Arbitration (Protocol and Convention) Act 6 of 1937 being recognised by the Arbitration Act an agreement to refer disputes in accordance with the rules of the International Chamber of Commerce is not inconsistent with s. 389 of the Companies Act, 1956. In Societe Italians per Lavori Marittimi's case [Appeal No. 63 of 1959 decided on September 22, 1960.], the attention of the Court was, it appears, not invited to the provisions of s. 47 of the Arbitration Act, 1940, in its relation to the Arbitration (Protocol and Convention) Act 6 of 1937 and the Court refused to stay the action commenced in contravention of the arbitration agreement on the footing that an arbitration agreement which contemplated reference otherwise than in the manner provided by the Arbitration Act, 1940, ss. 1 to 38 was inffective not being persmissible under the provisions of s. 152 of the Companies Act 1913 and "therefore impossible and completely prohibited". This view in our judgment, cannot be sustained. In the present case, Kantawala, J. and the High Court proceeded upon the view (as they were bound to do) that the decision in Societe Italian per Lavori Marittimi's case [Appeal No. 63 of 1959 decided on September 22, 1960.] was sufficient to justify the contention of Kamani that the suit could not be stayed, the arbitration agreement being inffective and invalid. For reasons already set out by us, that assumption cannot be supported. Whether having

regard to the terms of s. 3 of the Arbitration (Protocol and Convention) Act 6 of 1937 stay may be granted of the suit commenced by Kamani is a question on which no decision has been recorded by the Trial Judge nor the High Court, and we will not be justified in this appeal in entering upon questions of fact for the first time without having the benefit of the view of the High Court on those questions.

The appeal will therefore be allowed, and the proceeding remanded to the Court of First Instance to be heard and disposed of according to law. Costs in this Court and before the Division Bench of the High Court will abide the result of the proceeding taken pursuant to this order in the Trial Court.

Appeal allowed.

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