I. T. C. Limited

Vs

George Joseph Fernandes and Another

Civil Appeal No. 1975 of 1982

(G. L. Oza, K. N. Saikia JJ)

06.02.1989

JUDGMENT

K. N. SAIKIA, J. –

1. This appeal by special leave is from the appellate judgment of the Calcutta High Court in Appeal No. 75 of 1981 dismissing the appeal and upholding the judgment of the learned Single Judge granting stay of the appellant's suit on the respondent's application under Section 34 of the Arbitration Act, 1940.

2. The appellant as plaintiff has instituted Suit No. 736 of 1978 on September 29, 1978 in the original side of the Calcutta High Court against the respondent as first defendant and Canara Bank as second defendant stating in the plaint, inter alia, that the first defendant, was the sole and absolute owner of two fishing trawlers, Ave Maria-I and Ave Maria-II, registered under No. 1567 dated January 30, 1974 and No. 1568 dated January 30, 1974 with the Registrar of Indian Ships, Cochin; that the said trawlers were imported by the first defendant with financial assistance of the second defendant Canara Bank, under Import Licence No. P/CC/2062299 dated March 3, 1971 issued by or on behalf of the Chief Controller of Imports and Exports, Ministry of Commerce, Government of India, New Delhi, that in or about March 1977 the first defendant as owner agreed to charter and the plaintiff as charterer agreed to take on charter for the purpose of deep sea fishing, the said two trawlers on the terms and conditions contained in a "Bare Boat Charter Party" dated March 21, 1977, hereafter called, the agreement, executed at Calcutta, subject to the owner first defendant obtaining the requisite permission in writing from the Chief Controller of Imports and Exports and the no objection certificate of the second defendant for chartering the said trawlers; that within seven days of receipt of the approval of the Chief Controller of Imports and Exports or no objection certificate from the Canara Bank the first defendant owner will deliver the said trawlers to the plaintiff charterer at the Port of Vishakapatnam for carrying out the inspection of the said trawlers by its authorised agents to ascertain repairs to be carried out to the trawlers for making them fully operational without any defect whatsoever and also to ascertain the cost of such repairs and thereafter the charterer will undertake the repairs at the cost of the owner and bring them to fully operational condition without any defect including all aspects of refrigeration equipment; that the charterer will then conduct fishing trials to ascertain actual condition of the trawlers and in case the condition is fully satisfied according to the charterer, and the owner furnishes to the charterer all documents certifying seaworthiness and also supplies proof of compliance of preconditions, the Charter hiring shall commence on or from the date fishing trials are ended; that the charterer shall pay to the owner Rs. 50,000 per trawler per month payable in advance every month and shall continue to pay up to and including the date or redelivery of each trawler to the owner at Vishakapatnam (unless lost/sunk); that he shall keep a deposit of Rupees one lakh per trawler with

the owner during the period of the agreement to be adjusted without interest towards the charter hire against the last two months of charter period; that by a Letter No. CG/N-2-143-70-71 dated August 18, 1977 the Chief Controller of Imports and Exports granted permission to the first defendant to charter the said trawlers to the plaintiff on a charter rental of Rs. 50,000 per month per trawler for a period of three years; that the owner delivered the said two trawlers for repairs to the plaintiff at Vishakapatnam on or about September 30, 1977 and thereafter on or about February 2, 1978 the parties agreed to modify the agreement in the manner stated in a subsequent written agreement dated February 2, 1978 executed at Calcutta; and that according to the agreement after modification, the charter hire commenced from January 15, 1978 and the charter hire revised to Rs. 6,25,000 per trawler per year.

3. The plaintiff's main averments in the plaint are that the permission dated August 18, 1977 granted by the Chief Controller of Imports and Exports to the first defendant for chartering the said trawlers to the plaintiff was given under the said Import Licence to the first defendant and the permission was given subject to two conditions, namely, that the charter rental would be Rs. 50,000 per month and that the charter would be for a period of three years but the agreement dated March 21, 1977 was, in fact, for a period of two years with an option to the plaintiff to continue the hire for a further period of three years and as such the agreement was in contravention of and contrary to the terms of the said permission and consequently to the said Import Licence, and hence, illegal, against public policy and void; that the plaintiff and the first defendant entered into the agreement and its modifications dated February 2, 1978 on the basic, essential and fundamental assumption that the trawlers would be made fully operational and free from all defects by effecting repairs as contemplated thereby but the assumption was mistaken and not true and was subsequently discovered to be so mistaken that it rendered the agreement with its modifications void; that pursuant to the agreement the plaintiff paid to the first defendant through the second defendant the initial deposit of Rupees two lakhs in respect of the said two trawlers of the charter rent as agreed up to and for the month of July 1978, but in or about early September 1978 the plaintiff having discovered the agreement to have been void and illegal called upon the first defendant to take back or obtain permission of the said trawlers lying at Vishakapatnam at the risk and cost of the first defendant but he failed and neglected to do so; and that the first defendant is bound to pay or make compensation for all the advantages which he had received under the agreement and its modifications and the costs, charges and expenses which the plaintiff has incurred on the said trawlers, being assessed at Rs. 39,64,341 as per Schedule 'D' to the plaint. In the alternative it has been averred that in supplying the said trawlers the first defendant committed a fundamental breach of the agreement and its modifications which went to the root and affected the very substance of the same and which made its performance impossible and such a breach on the part of the first defendant has produced a situation fundamentally different from anything which the parties could as reasonable persons have contemplated when the agreement was entered into, and as the plaintiff has not been able to use or obtain any benefit out of the said trawlers, the plaintiff never was not is bound by the obligation under the agreement and the modification thereof and was entitled to and had duly rescinded the same and the plaintiff had in the premises suffered loss and damages which the first defendant is bound to compensate and such loss and damage is assessed reasonably at Rs. 39,64,341 particulars whereof have been given in Schedule 'D' thereof; and that the plaintiff is entitled to recover the said sum of Rs. 39,64,341 as money paid to and/or on account of the first defendant and expenses so incurred without any consideration and or for consideration which has totally failed and or to the use of the first defendant.

4. The plaintiff accordingly claimed, inter alia, a declaration that the agreement dated March 21, 1977 and the modifications thereof dated February 2, 1978 were, and are illegal, against public

policy and void; a decree for Rs. 39,64,341 against the first defendant; alternatively an enquiry into the amount due to the plaintiff from the first defendant and decree for a sum found due on such enquiry; in the alternative decree for the same amount as compensation for loss and damage and/or as money paid to or expenses incurred without any consideration or for consideration which has totally failed or to the use of the first defendant; and further and other reliefs.

5. In the matter of the aforesaid Suit No. 736 of 1978, hereinafter referred to as 'the suit', the first defendant after receiving summons and entering appearance moved on April 25, 1979 an application under Section 34 of the Arbitration Act, 1940, hereinafter referred to as 'the Act', impleading the plaintiff (instant appellant) as first respondent and Canara Bank second defendant as second respondent stating, inter alia, that the agreement as modified on February 2, 1978 contained an arbitration clause; that the agreement has been and is perfectly binding and not violative of the conditions of the permission granted by the Controller of Imports and Exports; that the defects in the refrigeration system as alleged are factually wrong; that the plaintiff, his servants and agents have themselves materially deteriorated the machines and hence no amount was payable to the plaintiff as claimed in the plaint; and that all the disputes, contentions alleged to have arise in between the plaintiff and the defendant were wholly covered by the said arbitration clause contained in the agreement which was binding between the parties. Accordingly, it was prayed that the suit and all proceedings therein be stayed and interim orders, costs and other reliefs be granted. The plaintiff filed affidavit in opposition to the application and the applicant first defendant filed affidavit in reply.

6. The learned Single Judge in his judgment dated February 11, 1981 held, inter alia, that there was no question of invalidity for non-compliance of the conditions of the licence granted to the first defendant-applicant as necessary permission was obtained in respect of the agreement from the Chief Controller of Imports and Exports vide his letter dated August 18, 1977 and the modification of the agreement on February 2, 1978 could not and did not materially alter its terms to impair its validity and there was substantial compliance with the obtained permission; that though in a particular case if there was any doubt about facts, the matter had to be decided by trial on evidence, in this case, having regard to the admitted facts and conduct of the parties, it was not necessary to set down the matter for trial on evidence to determine the facts as the same could not be disputed; that having regard to the conduct of the parties in admitted documents, being the licence of the petitioner granted by the Chief Controller of Imports and Exports in respect of the said two trawlers and the provisions of the Import and Export Control Act, 1947, and Appendix 31 of the Import and Export Trade Control Hand Book for Rules and Procedure, 1979, the correspondence between the parties before the alleged discovery of purported mistake and illegality by the respondent (plaintiff) and particularly the letter dated July 18, 1978 from respondent 1 (plaintiff) to the applicant (first defendant) and the balance sheet of the plaintiff (respondent 1) ITC Ltd., for the year 1978, there is no question of any illegality or any mutual mistake; that the alleged fundamental breach is wholly covered by the arbitration clause as it is wide enough to include the same; that the arbitration clause is valid and binding between the parties; that the allegation of breach of contract and the claims made are within the jurisdiction of the arbitrator; and that all conditions under Section 34 of the Act have been satisfied in this case. Accordingly the learned Judge granted stay of the suit and directed the parties to take immediate steps for initiation of reference under the arbitration agreement.

7. On appeal, the learned Division Bench by an elaborate and erudite judgment dismissed the appeal holding, inter alia, that in the facts and circumstances of the case it could not be held that the trial court erred in exercising its discretion to decide the controversy, namely, whether the contract being void the arbitration clause also was void in the application without evidence and on the basis of

pleadings only nor was the discretion exercised improperly; that the learned Judge was not wrong in coming to the conclusion that the mistake as pleaded as to quality of the goods was not a mistake of such nature as to make the thing contracted for something different, and in holding that there was no case of mutual mistake of such a type as to quality of the thing contracted for which could have voided the parent contract which contained the arbitration clause; and that the learned Single Judge was right insofar as he held that the matters were arbitrable apart from the question of illegality of the contract. It was further held that there was no breach of conditions of the permission or the provisions of the Import and Export Control Act to render the contract illegal or void; and that the court having held that all the contentions and allegations were arbitrable, the granting stay in the suit was reasonable and proper.

8. Mr. Shanti Bhushan, the learned counsel for the appellant submits, inter alia, that the subject matter of the suit, namely, the question whether the agreement was void ab initio for mutual mistake was not arbitrable at all and the learned courts below erred in holding so; that even assuming but not admitting that the subject matter was arbitrable, it having involved complicated questions of facts the court ought not to have exercised jurisdiction on the application under Section 34 and in doing so it acted without jurisdiction and, assuming that the court had jurisdiction, it should have decided only after taking oral and documentary evidence and not merely on affidavits; that the agreement itself having been void ab initio due to mutual mistake the arbitration clause, namely, Clause 18 of the charter party, also perished with it and there was no scope for arbitration at all and the learned courts below erred in holding that all the contentions raised and allegations made in the suit were arbitrable under the arbitration clause; and that the agreement was void being violative of the conditions of the permission and for that matter the import licence and the provisions of the Import and Export Control Act.

9. Mr. C. S. Vaidyanathan, the learned counsel for the respondent refuting submits that there having been no mutual mistake so as to invalidate the agreement, the arbitration clause remains binding and the subject matter of the suit has rightly been held to be arbitrable; that the court rightly exercised jurisdiction on the application under Section 34 of the Arbitration Act on the basis of the affidavits and at no stage before argument the appellant as respondent 1 applied to the court for permission to adduce oral evidence, and stay of the suit was granted in accordance with law on the basis of the evidence on the record; that the agreement as modified was not void on the ground of violation of the permission or of the import licence or of the provisions of the Import and Export Control Act; and that the direction to proceed to arbitration is just and proper and the respondent has no objection to a retired Supreme Court Judge being appointed arbitrator.

10. The first question to be decided in this appeal, therefore, is whether in an application under Section 34 of the Indian Arbitration Act the court has jurisdiction to decide the validity of the contract containing the arbitration clause, and if so, whether it has to be decided on affidavits or on evidence.

11. To decide the question we may conveniently refer to the provisions of Section 34 of the Arbitration Act :

> 34. Power to stay legal proceedings where there is an arbitration agreement. - Where any party to an arbitration agreement or any person claiming under him commences any legal proceedings against any other party to the agreement or any person claiming under him in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time before filing a written statement or taking any

> other steps in the proceedings, apply to the judicial authority before which the proceedings, are pending to stay the proceedings; and if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, such authority may make an order staying the proceedings.

12. This section deals with the staying of a suit where there is an arbitration agreement concerning the subject matter of the suit and between the same parties. For the court to have power to exercise the direction conferred upon it by this section, there must have been a valid agreement to submit to arbitration. Where the objection is that the arbitration is a nullity, it amounts to an objection of want of jurisdiction. The term "arbitration agreement" includes "agreement to refer", and "submission" to arbitrator. A submission forming part of a void contract is itself void and cannot be enforced. Where a firm of bookmakers had engaged in betting transactions with the defendants on the terms that any dispute which might arise should be referred to arbitration, it was held that the whole contract was void and unenforceable and that the defendants could not be compelled to submit to arbitration : Joe Lee v. Lord Dalmeny ((1927) 1 Ch 300 : 136 LT 375). Where there is no valid arbitration agreement on the subject matter of the suit, there is no justification for staying a suit for that will deprive the plaintiff of his right to sue on that subject matter.

13. In Heyman v. Darwins (1942 AC 356 : (1942) 1 All ER 337), Lord Macmillan pointed out at pages 370-371 :

> If it appears that the dispute is whether there has ever been a binding contract between the parties, such a dispute cannot be covered by an arbitration clause in the challenged contract. If there has never been a contract at all, there has never been as part of it an agreement to arbitrate. The greater includes the less. Further, a claim to set aside a contract on such grounds as fraud, duress or essential error cannot be the subject matter of a reference under an arbitration clause in the contract sought to be set aside. Again, an admittedly binding contract containing general arbitration clause may stipulate that in certain events the contract shall come to an end. If a question arises whether the contract has for any such reason come to an end I can see no reason why the arbitrator should not decide that question. It is clear, too, that the parties to a contract may agree to bring it to an end to all intents and purposes and to treat it as if it had never existed. In such a case, if there be an arbitration clause in the contract, it perishes with the contract. If the parties substitute a new contract for the contract which they have abrogated the arbitration clause in the abrogated contract cannot be invoked for the determination of questions under the new agreement. All this is more or less elementary.

14. Earlier in Monro v. Bognor Urban District Council ((1915) 3 KB 167 : 84 LJKB 1091 : 112 LT 969) where a building contract had been entered into between the plaintiff and the defendants for a construction of sewerage works contained an arbitration clause which provided that if at any time any question, dispute or difference should arise between the parties upon or in relation to or in connection with the contract, the matter should be referred to arbitration and during the progress of the works disputes arose between the parties mainly as to the nature of the site upon which the works had to be carried out, which the plaintiff alleged was different from that which he had been led to believe by the specification. The plaintiff having brought an action against the defendants

claiming, inter alia, damages for fraudulent misrepresentation whereby he was induced to enter into the contract, the defendants took out a summons asking that all proceeding in the action be stayed and the matter be referred to arbitration. It was held that the action, being based on fraud, referred to matters wholly outside the powers of the arbitrator, with which he could not possibly deal, and so could not be said to be a question, dispute or difference upon or in relation to or in connection with the contract and as such referable to arbitration under the arbitration clause.

15. In Jawahar Lal Burman v. Union of India ((1962) 3 SCR 769 : AIR 1962 SC 378) it was held that Section 32 of the Act creates a bar against the institution of suits with regard to an arbitration agreement or award or any ground whatsoever. Thus if a party affirms the existence of an arbitration agreement or its validity it is not open to the party to file a suit for the purpose of obtaining a declaration about the existence of the said agreement or its validity. The bar to the suit thus created by Section 32 of the Act inevitably raises the question as to what remedy is open to a party to adopt in order to obtain an appropriate declaration about the existence or validity of an arbitration agreement. It was held that having regard to the scheme of Sections 31, 32 and 33 of the Act in matters which fall within the bar created by Section 32, if a suit cannot be filed it is not necessarily intended that an application can be made under the court's powers provided for by Section 31 and impliedly recognised by Section 32 of the Act. In the later part of Section 33 an application can be made to have the effect or purport of the agreement determined but not its existence. That means that an application to have the effect of the agreement can be made provided the existence of the agreement is not in dispute, and that a party affirming the existence of an arbitration agreement cannot apply under Section 33 for obtaining a decision that the agreement in question exists.

16. In Waverly Jute Mills Co. Ltd. v. Raymon & Co. (India) Pvt. Ltd. ((1963) 3 SCR 209 : AIR 1963 SC 90) the Constitution Bench reiterated the decision in Khardah Co. Ltd. v. Raymon & Co. India (Pvt.) Ltd. ((1963) 3 SCR 183 : AIR 1962 SC 1810) where it was held that if a contract is illegal and void, the arbitration clause which is one of the terms of the contract thereof must also perish along with it and that a dispute relating to the validity of the contract is in such a case for the court and not for the arbitrator to decide. Where the arbitration clause is a term of the particular contract whose validity is in question it has no existence apart from the impugned contract and must perish with it.

17. In Renusagar Co. v. General Electric Co. ((1984) 4 SCC 679, 738, para 59 : (1985) 1 SCR 432, 507-08) it has been reiterated that though Section 34 of the Arbitration Act, 1940 confers a discretion upon the court in the matter of granting stay of legal proceedings where there is an arbitration agreement, it cannot be disputed that before granting the stay the court has to satisfy itself that arbitration agreement exists factually and legally and that the disputes between the parties are in regard to the matters agreed to be referred to arbitration and that decided cases have taken the view that the court must satisfy itself about these matter before the stay order is issued. In other words, court under Section 34 must finally decide these issues before granting stay.

18. Among High Court decisions reference may be made to Banwari Lal v. Hindu College, Delhi (AIR 1949 E Punj 165), wherein it has been held at paragraph 33 that the Arbitration Act has been enacted merely with the object of consolidating the law relating to arbitrations, and the question of the existence or validity of the contract containing an arbitration agreement being not a matter falling within the puvview of the Act, it cannot be said with any show of reason, that Section 32 takes away the jurisdiction of the courts to give appropriate relief in suit brought either to contest or to establish, the existence or validity of the contract. In Johurmull Parasram v. Louis Dreyfus & Co. Ltd. ((1947-48) 52 Cal WN 137 : AIR 1949 Cal 179) it was held at para 4 that the court must

consider a suit as it is pleaded and framed. If it comes to a conclusion that a suit as pleaded in a suit on the contract or arising out of the contract containing the arbitration clause then the suit should be stayed. But on the other hand if the suit is pleaded as a suit independent of the contract then the court has no power to stay the suit although it is satisfied that the frame of the suit is merely a means of avoiding the consequences of alleging the true nature of the claim. In considering the question of stay of the suit the court is not entitled to go into the question as to what is substantially the nature of the claim. So also in Pramada Prasad v. Sagarmal Agarwala (AIR 1952 Pat 352 : 1952 Bh LR Pat 216) it was observed that from the language of the Section 34 it is clear that party can apply to stay a legal proceeding only when the repudiation is of the right or obligation in respect of any matter agreed to be referred, and not when the very existence of the agreement is repudiated. The court relied on the decision in Monro v. Bognor Urban District Council ((1915) 3 KB 167 : 84 LJKB 1091 : 112 LT 969). In Narsingh Prasad v. Dhanraj Mills (ILR 21 544 : AIR 1943 Pat 53 : 204 IC 583) Harries, C.J. held that where an agreement is impeached on the ground of fraud and the dispute is as to the factum or validity of contract, such a dispute does not fall under the arbitration clause and should be decided by the court. Similarly in Birla Jute Manufacturing Co. Ltd. v. Dulichand (AIR 1953 Cal 450 : 97 CWN 756 : 91 CLJ 236) it was held at paragraph 15 that a dispute as to the validity of the contract cannot be held to be within an arbitration agreement contained in the contract itself and such a dispute cannot be referred to arbitrators or dealt with by them under such an agreement, unless the parties agreed to include it in the arbitration clause. Otherwise where the contract itself is repudiated in the sense that its original existence or its binding force is challenged, for example, where it is said that the parties were never 'ad idem' or where it is said that the contract is voidable ab initio on the ground of fraud, misrepresentation or mistake and it has been avoided, the parties are not bound by any contract and escape the obligation to perform any of its terms, including the arbitration clause, unless the provisions of that clause are wide enough to included the question of jurisdiction as well. In W. F. Ducat & Co. Pvt. Ltd. v. Hiralal Pannalal (AIR 1976 Cal 126 : 81 CWN 219), Salil K. Roy Choudhary, J., held at paragraph 8 that where in a suit the plaintiff alleges that the contract containing the arbitration clause is void and illegal and prima facie it appears that there are sufficient grounds on which the legality of the said contract has been challenged for non-compliance of the statutory requirement, the court should decline to exercise discretion in favour of the stay of the suit. Similarly in General Enterprises v. Jardine Handerson Ltd. (AIR 1978 Cal 407 : 82 CWN 437), Sabyasachi Mukharji, J., as his Lordship then was, held that if the contract containing the arbitration clause was obtained by fraud the stay of the suit could not be granted under Section 34 of the Act. Thus, while there is no doubt about the law as enunciated in the above English and Indian decisions, namely, where the validity, existence or legality of the contract is challenged in the suit on grounds de hors, independent of, or external to the terms or stipulations of the contract, the court in an application under Section 34 of the Act shall have no jurisdiction to go into the question, and that in large majority of cases it would be applicable, in appropriate cases, having regard to the nature of the dispute raised in the pleadings of the suit, the compass and scope of the arbitration clause in the contract, the surrounding facts and circumstances of the case having a bearing on the question of genuine grievance falling outside or inside the arbitration agreement and the objects and spirit of the Arbitration Act, the court may be justified in deciding the validity, existence or legality of the challenged contract containing the arbitration agreement. In Heyman v. Darwins (1942 AC 356 : (1942) 1 All ER 337) Viscount Simon, L.C. stated thus :

> If the dispute is whether the contract which contains the clause has ever been entered into at all, that issue cannot go to arbitration under the clause, for the party who denies that he has ever entered into the contract is thereby denying that he has ever

> joined in the submission. Similarly, if one party to the alleged contract is contending that it is void ab initio (because for example, the making of such a contract is illegal), the arbitration clause cannot operate, for on this view the clause itself also is void. But, in a situation where the parties are at one in asserting that they entered into a binding contract, but a difference has arisen between them whether there has been a breach by one side or the other, or whether circumstance have arisen which have discharged one or both parties from further performance, such differences should be regarded as differences which have arisen "in respect of" or "with regard to" or "under" the contract, and an arbitration clause which uses these, or similar, expressions should be construed accordingly.

Section 34 of the Arbitration Act, deals with the staying of a suit where reference concerning the subject matter of the suit and between the same parties is pending. This section corresponds to Section 4 of the English Arbitration Act. Whether a particular dispute arising out of a particular contract is referable to arbitration or not must necessarily depend on the intention of the parties as embodied in the arbitration clause. If the dispute is squarely covered by the arbitration clause the relevant provisions of the Act will be attracted. Section 32 puts a bar to suits contesting arbitration agreement or award by providing that notwithstanding any law for the time being in force, no suit shall lie on any ground whatsoever for a decision upon the existence, effect or validity of an arbitration agreement or award, nor shall any arbitration agreement or award be enforced, set aside, amended, modified or in any way affected or otherwise than as provided in the Act. Section 33 of the Act provides that any party to an arbitration or any person claiming under him desiring to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either determined shall apply to the court and the court shall decide the question on affidavits : Provided that where the court deems it just and expedient it may set down the application for hearing on other evidence also, and it may pass such orders for discovery and particulars as it may do in a suit.

19. It may be noted that Sections 32, 33 and 34 speak of an arbitration agreement as defined in Section 2(a) of the Act which means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not. In the instant case the arbitration clause forms a part of the agreement, namely, the charter party. The question is whether the validity or otherwise of the charter party itself can be said to have been covered within the arbitration clause. On scrutiny of Clause 18 we find that any dispute or difference in respect of the construction, meaning or effect or as to the rights and liabilities of the parties thereunder or any other matter arising out of this agreement shall be referred to arbitration. Can the validity of the contract itself as embodied in the charter party be said to have arisen out of the contract or can the validity or otherwise of the contract in the charter party itself be said to be construction, meaning or effect or rights and liabilities of the party thereunder ? In our opinion, the answer is in the negative. The arbitration agreement is not the same as the contract in the charter party. It cannot, therefore, be said that the validity or otherwise of the charter party was covered by Clause 18. In Khardah Company Ltd. v. Raymon & Co. (India) Pvt. Ltd. ((1963) 3 SCR 183 : AIR 1962 SC 1810) the appellant company entered into a contract on September 7, 1955 for the purchase of certain goods and Clause 14 thereto provided that all disputes arising out of or concerning the contract should be referred to the arbitration of the Bengal Chamber of Commerce. The respondents having failed to deliver the goods as agreed the appellants applied to the Bengal Chamber of Commerce for arbitration and an award made in favour of the appellant. Thereupon the respondent filed an application in the High Court of Calcutta under Section 33 of the Arbitration Act, 1940 challenging the validity of the award on the ground that the contract dated September 7, 1955 itself was illegal as it was in

contravention of the notification of the Central Government dated October 29, 1953. It was held that the dispute as to the validity of the contract dated September 7, 1955, was not one which the arbitrators were competent to decide under Clause 14 and that in consequence the respondents were entitled to maintain the application under Section 33 of the Act and that where an agreement is invalid every part of it including clause as to arbitration contained therein must also be invalid. In Anderson Wright Ltd. v. Moran and Company ((1955) 1 SCR 862 : AIR 1955 SC 53) it has been laid down that in order that a stay may be granted under Section 34 of the Act, it is necessary, among others, that the legal proceedings which is sought to be stayed must be in respect of a matter agreed to be referred and the court must be satisfied that there is no sufficient reason why the matter should not be referred to an arbitrator in accordance with the arbitration agreement. The question whether the dispute in the suit falls within the arbitration clause really presupposes that there is such agreement and involves consideration of two matters, i.e. (i) what is the dispute in the suit and (ii) what dispute the arbitration clause covers. It is incumbent upon the court to decide whether there is a binding contract for arbitration between the parties. If it is found that the dispute in the suit is not covered by the arbitration clause the application for stay may be dismissed. In Damodar Valley Corporation v. K. K. Kar ((1974) 1 SCC 141 : (1974) 2 SCR 240) it has been held that as the contract is an outcome of the agreement between the parties it is equally open to the parties thereto and to court to bring to an end or to treat it as if it never existed. It may also be open to the parties to terminate previous contract and substitute in the place a new contract or alter the original contract in such a way that it cannot subsist. In all these cases since the entire contract is put to an end, the arbitration clause, which is a part of it, also perishes along with it. Where, therefore, the dispute between the parties is that the contract itself does not subsist either as a result of its being substituted by a new contract or by rescission or alteration, that dispute cannot be referred to the arbitration as the arbitration clause itself would perish if the averment was found to be valid. As the very jurisdiction of the arbitrator is dependent upon the existence of the arbitration clause under which he is appointed, the parties have no right to invoke a clause which perished with the contract. In case of rescission it would put an end to the rights of the parties to the contract in future but it may permit claiming of damages either for previous breaches or for the breach which constitutes the termination. The contract being consensual, the question whether the arbitration clause survives or perishes would depend on the nature of the controversy and its effect upon the existence or survival of the contract itself. A dispute as to the binding nature of the contract cannot be determined by resort to arbitration because the arbitration clause itself stands or falls accordingly to the determination of the question in dispute. As was held in Hirji Mulji v. Cheong Yue Steamship Co. (1926 AC 497 : 95 LJ PC 121 : 134 LT 737), "a contract that has determined is in the same position as one that has never been concluded at all". In Heyman v. Darwins (1942 AC 356 : (1942) 1 All ER 337) Lord Porter pointed out that it is not

in every instance in which it is claimed that the arbitrator has no jurisdiction the court will refuse to stay an action. If this were the case such a claim would always defeat an agreement to submit disputes to arbitration, at any rate until the question of jurisdiction had been decided. The court to which an application for stay is made is put in possession of the facts and arguments and must in such a case make up its mind whether the arbitrator has jurisdiction or not as best it can on the evidence before it. Indeed, the application for stay gives an opportunity for putting these and other considerations before the court that it may determine whether the action shall be stayed or not.

These observations were accepted by S. R. Das, J. in the case of Khusiram v. Hanutmal ((1948) 53 Cal WN 505, 518) wherein it was held that where on an application made under Section 34 of the Arbitration Act for stay of a suit, an issue is raised as to the formation, existence or validity of the contract containing the arbitration clause, the court is not bound to refuse a stay but may in its

discretion, on the application for stay, decide the issue as to the existence or validity of the arbitration agreement even though it may involve incidentally a decision as to the validity or existence of the present contract. Their Lordships in Anderson Wright Ltd. v. Moran and Company ((1955) 1 SCR 862 : AIR 1955 SC 53) reiterating the above passage observed : "We are in entire agreement with the view enunciated above. "Thus, where in an application under Section 34 of the Act an issue is raised as to the validity or existence of the contract containing the arbitration clause, the court has to decide first of all whether there is binding arbitration agreement, even though it may involve incidentally a decision as to the validity or existence of the parent contract. The court has to bear in mind that a contract is an agreement enforceable at law and that it is for the parties to make their own contract and not for the court to make one for them. Court is only to interpret the contract. The stipulations in the contract have, therefore, to be examined in the light of the dispute raised in the pleadings of the suit. If it is found that the dispute raised in the suit is outside or independent of the contract it follows that the arbitration clause will not encompass that dispute. However, as the parties were free to make their own contract they were also free to have agreed as to what matters would be referred to arbitration. If the arbitration clause is so wide as to have included the very validity or otherwise of the contract on the grounds of fraud, misrepresentation, mutual mistake or any valid reason the arbitrator will surely have jurisdiction to decide even that dispute. Two extreme cases have to be avoided, namely, if simply because there is an arbitration clause all suits including one questioning the validity or existence or binding nature of the parent contract is to be referred to arbitrator irrespective of whether the arbitration clause covered it or not, then in all cases of contracts containing arbitration clause the parties shall be deprived of the right of a civil suit. On the other hand if despite the arbitration clause having included or covered ex facie even a dispute as to the existence, validity or binding nature of the parent contract, to allow the suit to proceed and to deprive the arbitrator of his jurisdiction to decide the question will go contrary to the policy and objects of the Arbitration Act as embodied in Section 32, 33, and 34 of the Act. Both the extremes have, therefore, to be avoided. The proper approach would be to examine the issues raised in the suit and to ascertain whether it squarely falls within the compass of the arbitration clause and take a decision before granting the stay of the suit. If an issue is raised as to the formation, existence or validity of the contract containing the arbitration clause, the court has to exercise discretion to decide or not to decide the issue of validity or otherwise of the arbitration agreement even though it may involve incidentally a decision as to validity or existence of the challenged contract. Should the court find the present contract to be void ab initio or illegal or non-existent, it will be without jurisdiction to grant stay. If the challenged contract is found to be valid and binding and the dispute raised in the suit covered by the arbitration clause, stay of the suit may be justified. In the instant case considering the issues raised, the arbitration clause and surrounding circumstances and the part played by the parties pursuant to the charter party since execution to the modification and thereafter till objection raised by the appellant-plaintiff, we are of the view that the learned trial court did not err in proceeding to decide the issue of validity or legality of the parent contract.

20. The question whether the validity and legality of the parent contract could be decided without taking oral evidence need not detain us long. All the relevant documents and affidavits were before the court and were considered. Mr. Shanti Bhushan submits that in deep sea fishing, use of trawlers, requirement and standard of refrigeration system in the trawlers so as to maintain - 20 degree F temperature in their fish-holds are highly technical matters and given the opportunity the appellant-plaintiff could have produced expert evidence in the matter. Counsel, however, states, that at no stage of the proceedings before argument any written or even oral application was made seeking permission to adduce oral evidence. Admittedly, it was only during argument that oral prayer was made. We are, therefore, of the view that no illegality was committed by the trial court in this regard

considering the facts and circumstances of the case. The learned Judge rightly observed that if there was any doubt about facts, the matter had to be decided by trial on evidence, in this case the admitted facts could not be disputed. The learned courts have also exercised discretion to grant stay. Even if it appears that the discretion could have also been exercised to decide the issue of invalidity in a trial on evidence adduced, this Court would not substitute its view for that of the trial court, unless the ends of justice required it to be done. Since it was said by the Court of Appeal in Ormerod v. Todmorden ((1882) 8 QBD 664 : 51 LJ QB 348 : 46 LT 669) that while it had jurisdiction to review the discretion of the judge it would not do so except in a case in which it clearly thought that the judge had wrongly exercised his discretion and that an injustice had thereby been done by his order. This was approved in Charles Osenton & Co. v. Johnston (1942 AC 130 : (1941) 2 All ER 245 : 165 LT 235) holding that a legitimate exercise of the jurisdiction would not be disturbed in appeal but a wrongful exercise of the discretion will be corrected by the House of Lords. Referring to Gardner v. Jay ((1885) 29 Ch D 50 : 54 LJ Ch 762 : 52 LT 395) it was ruled in the Printers (Mysore) Pvt. Ltd. v. Pothan Joseph ((1960) 3 SCR 713 : AIR 1960 SC 1156) that this Court would not lightly interfere under Article 136 of the Constitution with the concurrent exercise of discretion of the courts below under Section 34 of the Act. Before it can justify do so, the appellant must satisfy the court, on the relevant facts referred by the courts below, that they exercised their discretion in a manifestly unreasonable or perverse way, which was likely to defeat the ends of justice. The appellant has failed to do so in this case.

21. The next question is whether the courts below were correct in holding that there was no mutual mistake so as to render the agreement void ab initio under Section 20 of the Contract Act.

22. Section 20 of the Indian Contract Act, 1872 provided that where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void. The explanation to the section says that an erroneous opinion as to the value of the thing which forms subject matter of the agreement is not be deemed a mistake as to a matter of fact. Where the parties make mutual mistake misunderstanding each other and are at cross purposes, there is no real correspondence of offer and acceptance and the parties are not really consensus ad idem. There is thus no agreement at all; and the contract is also void. A common mistake is there where both parties are mistaken about the same vital fact although both parties are ad idem, e.g. the subject matter of the contract has already perished. The contract in such a case is void as the illustrations to the section make clear. In U. P. Government v. Nanhoo Mal (AIR 1960 All 420 : 1960 All LJ 193 : ILR (1959) 2 All 561) it has been observed that Section 20 is concerned with common mistake of fact and not mutual mistake. A common mistake is made or shared alike by both while mutual means made or entertained by each of the persons towards or with regard to each other. In Cooper v. Phibbs (LR (1867) 2 HL 149 : 16 LT 678 : 15 WR 1049 (HL)), A agreed to take a lease of a fishery from B, though contrary to the belief of both parties at the time, A was tenant for life of the fishery and B had no title at all. Lord Westbury applied the principle that if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that the agreement is liable to be set aside as having proceeded upon a common mistake. The transfer of ownership being impossible, the stipulation was naturali ratione inunitilis. This principle of Cooper v. Phibbs (LR (1867) 2 HL 149 : 16 LT 678 : 15 WR 1049 (HL)) has been followed in Earl Beauchamp v. Winn ((1873) 6 HL 223 : 22 WR 193) and Huddersfield Banking Co. v. Lister (Henry) & Sons ((1895) 2 Ch 273 : 64 LJ Ch 523 : 72 LT 203). However, Lord Atkin in Bell v. Lever Bros Ltd. (1932 AC 161 : (1931) All ER 1, 27 (Rep)) following Kennedy v. Panama Royal Mail Co. (LR (1867) 2 QB 580 : 8 B&S 571 : 36 LJ QB 260) and Smith v. Hughes (LR (1871) 6 QB 597 : 40 LJ QB 221 : 25 LT 329) described the statement of Westbury too wide and said that the correct view was that there was a contract which the vender was either incapable of

performing or had committed breach of a stipulation as to title; the contract was unenforceable but not void. In Bell v. Lever Bros Ltd. (1932 AC 161 : (1931) All ER 1, 27 (Rep)) an agreement of service between the company and two of the directors of its subsidiary company was terminated on payment of compensation. The parties proceeded on the assumption that the service agreement was not liable to immediate termination by reason of misconduct of the directors which assumption proved to be mistaken. Fraud was however negatived. In an action by the company for rescission of contract and repayment of moneys paid the agreement was set aside on the ground of mutual mistake as to the quality of the service contract. The accepted proposition was that whenever it is to be inferred from the terms of the contract or its surrounding circumstances that the consensus has been reached upon the basis of a particular contractual assumption, and that assumption is not true, the contract is avoided; i.e. it is void ab initio if the assumption is of present fact and it ceases to bind if the assumption is of future fact. The assumption must have been fundamental to the continued validity of the contract or a foundation essential to its existence. Lord Atkins observed that the common standard for mutual mistake and implied conditions as to the existing or as to future fact is : Does the state of new facts destroy the identity of the subject matter as it was in the original state of facts ? In the words of Lord Thankerton the error must be such that it either appeared on the face of the contract that the matter as to which the mistake existed was an essential and integral element of the subject matter of the contract or was an inevitable inference from the nature of the contract that all parties so regarded it. Where each party is mistaken as to the other's intention, though neither realises that the respective promises have been misunderstood, there is mutual mistake. The illustration in Cheshire and Fifoot's Law of Contract is, if B were to offer to sell his Ford Cortina car to A and A were to accept in the belief that the offer related to a Ford Zephyr. In such a case, no doubt, if the minds of the parties could be probed, genuine consent would be found wanting. But the question is not what the parties had in their minds, but what reasonable third parties would infer from their words or conduct. The court has to ascertain "the sense of the promises". In other words, it decides whether a sensible third party would take the agreement to mean what A understood it to mean or what B understood it to mean, or whether indeed any meaning can be attributed to it at all. Blackburn, J. in Smith v. Hughes (LR (1871) 6 QB 597 : 40 LJ QB 221 : 25 LT 329) at page 607 said :

> If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree the other party's terms.

23. This case establishes that a contract is void at law only if some term can be implied in both offer and acceptance which prevents the contract from coming into operation. In Solle v. Butcher ((1950) 1 KB 671, 691 : (1949) 2 All ER 1107, 1119) Lord Denning said that once a contract has been made, that is to say, once the parties, whatever their inmost states of mind, have to all outward appearances agreed with sufficient certainty in the same terms on the subject matter, then the contract is good unless and until it is set aside for failure of some condition on which the existence of the contract depends, or for fraud, or on some equitable ground. Neither party can rely upon his own mistake to say that it was a nullity from the beginning, no matter that it was a mistake which to his mind was fundamental, and no matter that the other party knew that he was under a mistake. A fortiori, if the other party did not know the mistake, but shared it. There is no doubt that the application of the doctrine of mutual mistake depends upon the true construction of the contract made between the parties. A mutual misunderstanding will not nullify a contract but only if the terms of the contract construed in the light of the nature of the contract and of the circumstances

believed to exist at the time it was done show that is was never intended to apply to the situation which in reality existed at that time, will the contract be held void. Mistake as to the quality of the article contracted for may not always avoid the contract. As Lord Atkin said in Bell v. Lever Bros Ltd. (1932 AC 161 : (1931) All ER 1, 27 (Rep)) mistake as to the quality of the thing contracted for raises more difficult questions. In such a case a mistake will not affect assent unless it is the mistake of both parties, and is as to the existence of some quality which makes the thing without the quality essentially different from the thing as it was believed to be. A distinction has, therefore, to be made between a mistake as to substance or essence on the one hand, and a mistake as to quality or attributes on the other. A mistake of the former type, will avoid the contract whereas a mistake of the letter type will not. Such a distinction was made in Kennedy v. Panama Royal Mail Co. Ltd. (LR (1867) 2 QB 580 : 8 B&S 571 : 36 LJ QB 260) It may be said that if there be misapprehension as to the substance of the thing there is no contract : but if it be a difference in some quality or accident, even though the misapprehension may have been the actuating motive to the purchaser, yet the contract remains binding. Thus a mistake as to an essential and integral element in the subject matter of the contract will avoid the contract. A mistake will not affect assent unless it is the mistake of both parties, and is as to the existence of some quality which makes the thing without the quality essentially different from the thing as it was believed to be. A distinction, therefore, should be drawn between a mistake as to the substance of the thing contracted for, which will avoid the contract and mistake as to its quality which will be without effect. According to circumstances even a mistake as to the substance of the thing contracted for may not necessarily render a contract void as was observed in Solle v. Butcher ((1950) 1 KB 671, 691 : (1949) 2 All ER 1107, 1119). Similarly in Frederick E. Rose (London) Ltd. v. William H. Pim Junior & Co. Ltd. ((1953) 2 QB 450 : (1953) 2 All ER 739 : 1953 Lioyd's Rep 238) where both parties entered into a contract for the sale of horse-beans, which were quite different from the feveroles which they each believed them to be, yet the contract was held not to be void. Thus there must be a difference so complete that, if the contract were enforced in the actual circumstances which have unexpectedly emerged, this would involve an obligation fundamentally different from that which the parties believed they were undertaking. In Sheikh Brothers Ltd. v. Arnold (1957 AC 136 : (1957) 2 WLR 254), Bell v. Lever Bros (1932 AC 161 : (1931) All ER 1, 27 (Rep)) was applied.

24. Applying the above principles of law to the facts of the instant case, we find that the two fishing trawlers Ave Maria-I and Ave Maria-II were imported by the respondent on January 30, 1974 and were operated by him based at Vishakapatnam. At the time of negotiations survey report relating to the trawlers dated February 20, 1977 of ABS Worldwide & Technical Services India Pvt. Ltd. was handed over by the respondent to the appellant and thereafter the agreement was executed on March 21, 1977. Delivery of the trawlers was to be made seven days after receipt of the approval or no objection certificate for carrying out inspection to ascertain repairs to be carried out for making the trawlers fully operational and to ascertain the cost of such repairs. On July 10, 1977 trawlers were delivered to the charterer for inspection and repairs. On November 12, 1977 the charterer wrote to the owner asking for payment of hire charges from October 1, 1977 and pointing out delays in repairs. The owner also requested the charterer to pay port charges with effect from October 1, 1977. On February 2, 1978 the charter party was modified to the extent that charter hire would commence from January 15, 1978 and that as the charterer had incurred substantial charges on repairs the owner shall bear only Rs. 1.5 lakhs per trawler for repairs carried out up to the commencement of the charter hire. The charter hire was revised to Rs. 6,25,000 per trawlers per year and an amount of Rs. 6,70,000 paid towards deposit and charter hire from January 15, 1978 to May 1978. In the first week of March 1978 the charterer paid Rs. 1,04,000 towards charter hire for June 1978. On July 18, 1978 the charterer wrote to the owner setting out payments made and

claiming adjustment of Rs. 90,000 towards repair charges and transferring Rs. 14,000 towards charter hire. It was only on September 14, 1978 that the charterer for the first time raised some complaints and objections on the trawlers and questioned the very validity of the agreement. On September 14, 1978 the trawlers were inspected by Kamath & D'Abrie Marine Surveyers who submitted their report on September 26, 1978 and the suit was filed on September 29, 1978.

25. The appellant-plaintiff's averment, as we have already mentioned, is that the trawlers suffered from inherent and latent defects in the refrigeration system which was an essential part of such trawlers and which were not discoverable by ordinary diligence at the time of entering into the agreement on March 21, 1977 and as such they were not fully operational. It is not their grievance that there was no refrigeration system at all in the trawlers but that only it was not of a particular standard, namely that even after extensive repairs it could not be brought to the standard of - 20 Degree F but attained only - 10 Degree F. The learned counsel for the appellant submits that for deep sea fishing the temperature in the trawler's fish-hold has to be - 20 Degree F and - 10 Degree F would not be adequate and as a result the trawlers cannot be used for deep sea fishing. The grievance has been made that no opportunity to lead expert evidence on this question was available to the appellant. The question, therefore, arises under the facts and circumstances of the case, namely, whether the deficiency in the refrigeration systems to the extent of - 10 Degree F made the trawlers essentially different from trawlers with a refrigeration system of - 20 Degree F. The other question is whether this standard of the refrigeration system was in the minds of the parties at the time of entering into the contract and there was a mutual mistake regarding this, and the contracting minds were, therefore, not ad idem. From the series of steps taken for repairs and the stipulations in the charter party including the modifications thereof we are unable to hold that it was a case of mutual mistake as to a quality which made the trawlers transferred essentially different from the trawlers that the parties in their minds agreed to transfer. This being the position we have to agree with the learned courts below that there was no mutual mistake and the contract would not be avoided on this ground.

26. The next question is that of illegality or otherwise of the agreement. The trial court exercised its discretion to go into the question and arrived at the finding that there was no illegality on the ground of violation of the permission or the conditions of licence granted by the Chief Controller of Exports and Imports. The learned lower appellate court upheld that finding. It is settled law that where the subject matter of a reference is illegal no award can be of any binding effect. In Taylor v. Barnett ((1953) 1 WLR 562 : (1953) All ER 843 : (1953) 1 Lioyd's Rep 181), the plaintiff had agreed to purchase goods from the defendants. The defendants had agreed to deliver. The goods were subject to the price control, sales at price in excess of the control price being forbidden by regulations at the time of making the contract (though not at the time of the delivery). The control price was less than the agreed price. The umpire awarded the plaintiffs damages and the award was good on the fact of it, but it was held that the award should be set aside for illegality. If the contract itself was illegal, the controversy as to whether it was illegal or not would not be a dispute arising out of the contract as also would be the question whether the contract was void ab initio. When, however, it is found that a binding contract was made which was not illegal what follows from such a contract would be covered by the expression "dispute arising out of the contract". To stay a suit under Section 34 of the Act the court has to see, inter alia whether there was a valid agreement to have the dispute concerned settled by arbitration and that the proceedings are in respect of a dispute so agreed to be referred. In Taylor v. Barnett ((1953) 1 WLR 562 : (1953) 1 All ER 843 : (1953) 1 Lioyd's Rep 181) Singleton, J., expressed the opinion that an arbitrator is guilty of misconduct if he knows or recognises that a contract is illegal and thereafter proceeds to make award upon dispute arising under that contract. The illegality of a contract can be an issue in deciding want of jurisdiction. The

first and essential prerequisite to making an order of stay under Section 34 of the Act, as was ruled in Anderson Wright Ltd. ((1955) 1 SCR 862 : AIR 1955 SC 53), is that there is a binding arbitration agreement between the parties to the suit which is sought to be stayed. Public policy imposes certain limitations on the freedom of contract by forbidding the making of certain contracts. In such cases though all other requisites for formation of the contract are complied with, parties to such forbidden contracts are not allowed to enforce any rights under them. In clear cases the law strikes at the agreement itself by making the contract illegal. However, the effect and nature of illegality will depend upon the facts and circumstances of each case. Thus, the effect of illegality are by no means uniform. In other words, the effect of illegality is not the same in all cases. Where a statute makes a contract illegal or where a certain type of contract is expressly prohibited there can be no doubt that such a contract will not be enforceable. In Re Arbitration between Mahmoud & Isphani ((1921) 2 KB 716 : 90 LJKB 821 : 125 LT 161) by a wartime statutory order it was forbidden to buy or sell linseed oil without a licence from the Food Controller. The plaintiff had a licence to sell to other licensed dealer. He agreed to sell and deliver to the defendant a quantity of linseed oil, and before the contract was made, asked the defendant whether he possessed a licence, the defendant falsely assured him that he did. Subsequently, however, the defendant refused to accept the oil on the ground that he had no licence. The plaintiff having brought an action for damages for non-acceptance, the Court of Appeal refused to entertain the action even if the plaintiff was ignorant, at the time the contract was made, of the facts which brought it within the statutory prohibition observing that it was a clear and unequivocal declaration by the legislature in the public interest that this particular kind of contract shall not be entered into. A contract which was not illegal from the beginning may be rendered illegal later by the method of performance which did not comply with the statutory requirements. The appellant's burden was to show that the charter party was illegal to take it out of the arbitration clause for if the contract is illegal and not binding on the parties the arbitration clause would also be not binding. Once it is shown to have been illegal it would be unenforceable as ex turpi causa non oritur actio. Again it is a settled principle that one who knowingly enters into a contract with improper object cannot enforce his rights thereunder. The learned counsel for the appellant submitted that the import of trawlers was subject to the conditions of the import of trawlers was subject to the conditions of the import licence, and one of the conditions was that the goods imported under it will be utilised in the licence holder's factories and that no portion thereof will be sold or will be permitted to be utilised by any other party or placed with any financier other than the banks authorised to deal in the foreign exchange and State Financial Corporation, provided that particulars of goods to be pledged are reported by the licensee to the licensing authorities. We are of the view that this was a proforma condition in the licence No. P/CC/206299 dated March 3, 1971 and could not appropriately be applied to the imported trawlers. Needless to observe that the appellant-plaintiff was also a party to the agreement of charter party in respect of the two imported trawlers. We are also of the view that though it purported to be actual user's licence there was no violation of this condition in view of the express permission granted by the Controller vide his Memo No. GG. IV/28/143/70/71/374 dated August 17, 1977 with specific reference to the licence No. P/CC/2062299 dated March 3, 1971 allowing the chartering of the two imported trawlers to be delivered to plaintiff M/s. ITC India Ltd. We also agree with the learned courts below that the modifications dated February 2, 1978 did not make any alteration so as to make the agreement contrary to the terms and conditions of the permission inasmuch as the permission was for a period of three years. The option to continue hire of the trawler for a further period of three years did not ipso facto violate the permission. There was also no violation as to the duration of the charter party.

27. The next question is whether the disputes under the charter party raised in the suit are arbitrable.

The Division Bench held that the learned Single Judge was right insofar as he held that the matters were arbitrable apart from the question of illegality or invalidity of the contract. We agree with this view inasmuch as it is obvious that the question of invalidity of the contract due to the alleged mutual mistake would be de hors and independent of the contract and as such would not be referable under the arbitration clause. Insofar as the question of illegality of the charter party is concerned as the appellant-plaintiff has not established that the charter party was illegal or void ab initio, the question whether the modification as alleged had rendered the contract illegal would be covered by arbitration clause which reads :

> Any dispute or difference at any time arising between the parties hereto in respect of the construction meaning or effect or as to the rights and liabilities of the parties aforesaid hereunder or any other matter arising out of this agreement, shall be referred to arbitration in accordance with the subject to the provision of the Indian Arbitration Act, 1940 or any statutory modification or re-enactment thereto or thereof for the time being in force and the venue of arbitration shall be Madras or Calcutta, and not elsewhere and the award or awards in such arbitration shall be made a rule of court of competent jurisdiction at the instance of either party.

28. We agree that under the above clause the reliefs claimed in the suit other than the question of ab initio invalidity or illegality of the contract would be referable. However, it will be within the jurisdiction of the arbitrator to decide the scope of his jurisdiction as we have said earlier that the court cannot make a contract between the parties and its power ends with interpretation of the contract between them. The same principle also applies to the arbitration agreement unless of course, the parties to the arbitration agreement authorise the court to make and modify the agreement for themselves.

29. Mr. C. S. Vaidyanathan for the respondents states that the respondent shall have no objection to a retired Judge of the Supreme Court being appointed as arbitration and the respondents shall not raise the question of limitation as indicated by Mr. Shanti Bhushan learned counsel for the appellant. We have no doubt that the arbitrator so appointed shall proceed in accordance with law to decide the questions including that of jurisdiction, if raised.

30. In the result, we find no merit in this appeal and hence it is dismissed leaving the parties to bear their own costs.

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