**CALCUTTA HIGH COURT**

Bajrang Electric Steel Co. Private Ltd

Vs.

Commissioners for the Port of Calcutta

Suit No. 1337 of 1956

(P.B. Mukharji, J.)

03.01.1957

**ORDER**

**P.B. Mukharji, J.**

1. This is an application by seven persons (1) Leonard Henry George Mazotti, (2) Henry Twiggs Tribble, (3) Kenneth Lloyds Lancashire, (4) Percy Frederick Canmer, (5) William Lenson Arnold Derby, (6) Leonard Ernest Hart, and (7) Anthony Eugine Myddelton Gale under the Indian Arbitration (Protocol and Convention) Act of 1937. It invokes Section 3 of the Indian Arbitration (Protocol and Convention) Act of 1937 for stay of a pending suit in this Court.

2. The matter relates to an Arbitration Agreement said to be contained in the Policy of Marine Insurance dated the 1st April, 1953 issued in favor of Metemicals Ltd., by Lloyds underwriters to cover certain risks for shipment.

3. In this application the petitioners want to stay the suit No. 1337 of 1956 instituted in this Court on or about the 16th May, 1956.

4. I have come to the conclusion that this application must fail on many grounds.

5. My first reason is that this suit was instituted by the plaintiff Shree Bajrang Electric Steel Co. Private Ltd., the respondent to this application, against four different defendants of which Lloyds Underwriters are the third defendant. I, therefore, cannot see any reason why on the application of the Lloyds Underwriters, only one of four defendants, the entire suit should be stayed. That would mean staying the suit against the other defendants who are neither parties to the Arbitration Agreement nor with whom there can be any Arbitration. Therefore the suit in so far as it is against the other three defendants cannot be stayed on the ground that there is an arbitration agreement between the plaintiff and the present applicants.

6. That means that at best the applicants can ask for a stay of the suit against themselves and no others. That is a course which has its peculiar difficulties mainly because that must mean trial of a suit piecemeal, stay of a suit against only this defendant, and prosecution of the suit with regard

to other defendants. I consider such a procedure most undesirable and unfair unless there are cogent reasons to the contrary. I find no such cogent reasons in this case.

7. My next reason is that the entire application is incompetent and is misconceived under the Indian Arbitration (Protocol and Convention) Act of 1937. The relevant clause in this case reads as follows :-

> "All disputes must be referred to England for settlement, and no legal proceedings shall be taken to enforce any claim except in England, where the underwriters are alone domiciled and carry on business."

8. The language of this clause does not refer to the particular kind of Arbitration that is the subject of Protocol and Arbitration Clauses to which I understand both India and the United Kingdom are signatories. The language appears to me to do nothing more than stipulate a choice of legal forum in England. That legal forum may be an English Arbitration under the English Arbitration Acts or in the public Courts in England. Whatever view one takes whether it is an English Arbitration in England or a legal proceeding in English Courts of law, this much is clear beyond doubt that it is not the Protocol Arbitration within the meaning of the Arbitration (Protocol and Convention) Act of 1937 under which the present application is made. No doubt when two Courts have concurrent jurisdiction to deal with a dispute, the parties may agree by a contract that Courts of a particular land should decide that dispute. That law is well-settled in India and is also the law in England which would appear from the decision of the English Court of Appeal in - '*Austrian Lloyd Steamship Co. v. Gresham Life Assurance Society, Ltd*[1].', There the clause was :

> "For all disputes which may arise out of the contract of insurance, all the parties interested expressly agree to submit to the jurisdiction of the Courts of Budapest having jurisdiction in such matters."

The English Court of Appeal held that such a condition constituted a 'submission' within the meaning of Section 4 of the English Arbitration Act of 1889. Haldane's argument that the word 'submission' in Section 4 of that English Arbitration Act was not confined to an "arbitration" in the technical sense of the term but included every case in which the parties constituted a tribunal for themselves appears to have been accepted by the Court of Appeal in England. This decision, however, does not at all help the applicants in the present case because this is not an application under the Indian Arbitration Act or the English Arbitration Act for stay of the suit on the ground that either of these Acts applied. On the contrary, this is an application under the Arbitration (Protocol and Convention) Act of 1937, and unless the applicants satisfy that the Protocol applies in the present case, this application must fail.

9. On the construction of the actual clause, I am of opinion that the Protocol Arbitration does not apply to this case. On a true construction of the present clause, I am satisfied that it only stipulates that disputes shall be decided in England and no legal proceeding should be taken to enforce any claim except in England, so that it can at best stipulate for English Arbitration in England or trial of the dispute in English Courts of law in England. I have

[1](1903) 1 KB 249

little hesitation in holding that it does not contemplate Protocol Convention such as is contemplated by the Arbitration (Protocol and Convention) Act of 1937.

10. I am also fortified in this view by the consideration that the Protocol applies only in case of citizens of countries or States which are signatories to the Protocol and not other countries. Lloyds Underwriters have to do business which extend all over the world, and it is possible that they will be dealing with a State or the citizen of a State who is not a signatory to the Protocol at all. The fact that it so happens in this case that it is an Indian trader and an English Insurance Company who are involved in the dispute and where both the United Kingdom and India happen to be signatories to the Protocol, cannot determine the construction of this clause. I should have thought that the applicants' counsel's contention that the Protocol applied would be most embarrassing to his clients, the Lloyds Underwriters, because if as a point of construction this clause is construed to mean always a Protocol Arbitration, then it will be quite ineffective in dealing with disputes involving the citizen of a State which is not a signatory to the Protocol. I am therefore satisfied that this could never have been the intention of this clause. It is intended to be of universal application to every dispute with Lloyds Underwriters. It therefore means that venue for the reference and settlement of all disputes and for all legal proceedings to enforce claim under the policy of insurance is England.

11. My next reason is that the applicants have failed to satisfy this Court that Section 3 of the Arbitration (Protocol and Convention) Act 1937, can at all be invoked to the present case. It must be recalled that the whole of this application is made under that particular section of that particular Act. The relevant and important words of that section for the purposes of this application are –

> "No party to a submission made in pursuance of an agreement to which the protocol set forth in the first schedule applies." The learned editor of Russell on Arbitration, fourteenth edition, discusses the agreement to which the English Arbitration Clauses (Protocol) Act, 1924, applies, and in doing so, says at p. 400 :-
> "The agreements falling within this Act are those made between parties subject to the jurisdiction of two different Contracting States, which agreements contain a clause providing for the submission to arbitration of future disputes. The arbitration contemplated may be held in any country, not necessarily within the jurisdiction of any of the Contracting States.

It is to be observed that the Act refers to submissions made in pursuance of agreements providing for the submission of future disputes. It is therefore submitted that it only applies where –

1. there is an agreement between citizens of different States; and
2. such agreement contains a clause agreeing to submit future disputes to arbitration; and
3. a submission has been made in pursuance of such agreement of an actual and existing dispute after it has arisen.

If this is correct, it limits very materially the scope of the Act; for where, as frequently occurs, there is no separate formal submission after the dispute has arisen, but merely a demand for

arbitration in pursuance of a pre-existing submission, it is thought that the Act would not apply, and that the Court would in such cases retain its unfettered discretion to grant or refuse a stay."

12. I took a similar view in my judgment in - '*Wood and Sons Ltd. v. Bengal Corporation', reported in*[2] *where* I said that submission to arbitration in pursuance to an agreement to which the Protocol applied was basic to the very jurisdiction invoked under the Arbitration (Protocol and Convention) Act, 1937, of this country. I do not consider that in this case there is any submission at all. As Russell puts it, there must not only be an agreement containing a clause agreeing to submit future disputes to arbitration but there must also be, in addition, an actual submission made in pursuance of such agreement after a dispute has arisen. The applicants in this case also fail by that test.

13. I cannot help feeling that the applicants were very badly advised in making the present application under Section 3 of the Indian Arbitration (Protocol and Convention) Act, 1937, and thereby chose a remedy which the law does not permit.

14. For the reasons stated above, this application must fail. I dismiss this application with costs.

Application dismissed.

[2]60 Cal WN 578 : AIR 1956 Cal 238, at p. 583 (of CWN) : at p. 240 (of AIR)