

# CALCUTTA HIGH COURT

W.F.D. and Co

Vs.

Hiralal

Award Case No. 153 of 1969

(Salil K. Roy Choudhury, J.)

25.07.1975

## ORDER

**Salil K. Roy Choudhury, J.**

1. This is an application under Section 34 of the Arbitration Act for stay of the suit.

2. The material facts which are not in serious controversy are as follows that by a contract dated the 9th July, 1968 the respondent agreed to sell and the petitioner agreed to buy certain quantities of raw jutes at agreed rates on the terms and conditions contained in the said contract. It appears that the said contract is governed by the Forward Contract Regulation Act, 1952 and the rules and bye-laws of the East India Hessian Exchange Ltd. regarding transferable specific delivery contract for raw jutes. The relevant bye-laws are in Chapter V of the Working Manual, Vol. III of the East India Hessian Exchange Ltd. 1(b), 1(c), 2, 12(a) 15 and 17. It appears that there were various notifications by the East India Hessian Exchange Ltd. under the Forward Contract Regulation Act and the bye-laws relating to the transferable specific delivery contracts for raw jute prescribing the requirements for serial numbered contract forms, registration of the said contracts and also the period within which the contract is to be entered into etc. Some of them are annexed to the affidavit-in-opposition of the respondent affirmed by one Pannalal Sethi on 10th July, 1969 in this application. Disputes arose out of the said contract and the petitioner referred the disputes to Bengal Chamber of Commerce and Industry, Tribunal of arbitration on or about March 9, 1969 and the said Tribunal of arbitration, Bengal Chamber of Commerce and Industry duly constituted a Court and entered upon the reference as it would appear from the letter dated 20th March, 1969 a copy of which was served on the respondent. Thereafter the respondent through his Solicitor took several adjournments before the Tribunal of arbitration, Bengal Chamber of Commerce and Industry and ultimately served a notice under Section 35 of the Arbitration Act dated the 4th April, 1969 after filing a suit in this Court being (*Hiralal Pannalal v. W. F. Ducat and Co. Pvt. Ltd.*). In the said plaint the respondent alleged the said contract to be a purported contract and in paragraphs 1 to 7, it is alleged that due to breach of the respondent and also due to the act of fraud, the contract was cancelled and thereafter in paragraphs 8 to 26, it is alleged that the said contract was void and illegal for non-compliance of the statutory provisions under the Forward Contract Regulation Act, 1952 and the rules and

<sup>1</sup> suit No. 1140 of 1969 (Cal)

bye-laws relating to transferable specific delivery contract in raw jute as made by East India Hessian Exchange Ltd., rules and bye-laws and also various notifications mentioned therein.

3. In short, the allegations are, mainly, that the contract was not in the prescribed form under the relevant rules and bye-laws of the East India Hessian Exchange Ltd. which is the statutory force and the same was not serially numbered as required by the notification made under the said Act and bye-laws and it was not registered. Thereafter, the validity of the contract is specifically challenged pleading non-compliance of the statutory provisions of the said Forward Contract Regulation Act and the rules and bye-laws relating to transferable specific delivery contracts in raw jute.

4. After the suit was filed the petitioner has made this applications for stay of the suit on the 6th June, 1969 and thereafter strangely enough after directions were given for filing affidavit the matter appeared in the list and was adjourned and kept pending nearly for the last six years. I am told that the matter was once part-heard before B.C. Mitra, J. (as he then was) and thereafter it was released but the fact remains that the petitioner never took serious diligent step for getting the matter heard and in fact the respondent mentioned it before me and brought the matter in the list for ultimate disposal.

5. Mr. A.C. Bhabra appearing with Mrs. Khastagir submitted before me that the suit is not maintainable as it has been instituted male fide only to delay the hearing of the reference which the petitioner has initiated before the Bengal Chamber of Commerce and Industry, Tribunal of Arbitration and the Tribunal of Arbitration interpreted the arbitration clause in the contract. Mr. Bhabra drawing my attention to the plaint submitted that the plaint has got two parts. In the first part from paragraphs 1 to 7, it has been specifically admitted that the contract was valid and it is sought to be cancelled, on the ground as alleged in the plaint and in the second part from paragraphs 8 to 26 the validity of the contract is being challenged on the ground of various non-compliances of the statutory provisions of the Forward Contract Regulation Act and the bye-laws framed thereunder by the East India Hessian Exchange Ltd. in respect of transferable specific delivery contract for raw jute. Mr. Bhabra in his usual fairness conceded that the question of validity of the contract cannot be gone into by the Arbitrator as the same is beyond his jurisdiction and that has to be gone into in the suit and therefore the suit should be partially stayed in respect of said question of cancellation of the contract which is pleaded in paragraphs 1 to 7 and in the relevant prayers in respect of the same and the suit with regard to other portion being paragraphs 8 to 26 may be proceeded with. Mr. Bhabra submitted after drawing my attention to the decision in the case of *Jawahar Lal Burman v. Union of India*<sup>2</sup>, that the respondent has instituted this suit with a view to prevent the arbitration proceeding as long as possible and the suit; according to the said Supreme Court decision, suit for declaration than the contract is illegal and invalid which contained the arbitration clause, is also hit by Section 32 of the Arbitration Act. Mr. Bhabra further submitted that there is no illegality or invalidity in the said contract as there is substantial compliance of the prescribed form of TSD contract for raw jute as prescribed by the East Indian Hessian Exchange Ltd. Mr. Bhabra has drawn my attention to the Working Manual, Vol. III of the East India Hessian Exchange Ltd. and submitted that the question of serially numbered contract forms and registration of the same as well as the question of (October) portion of

<sup>2</sup> AIR 1962 SC 378 (paragraphs 6, 7, 12 and 13)

the contract being invalid as it was entered into prior to the notification dated 4th October, 1968 and *prima facie* not tenable as the said non-compliances do not render the contract invalid but may amount to breach of the statutory rules. At this stage, I am not going into those questions as those are matters which are not disputed by the parties, that those have to be gone into in the suit and the validity of the contract whether it is hit by the said provisions of bye-laws of East India Hessian Exchange Ltd. relating to transferable specific delivery contract for raw jute which case is to be tried and which is the subject-matter of the suit. Mr. Bhabra submitted that that portion be stayed but the arbitration regarding the other portion of the claim of the respondent as alleged in paragraphs 1 to 7 of the plaint be proceeded with in the reference. Mr. Bhabra submitted that if it is ultimately held that the contract is legal and valid and if the suit is not stayed and arbitration is not proceeded with regarding the cause of action as alleged in paragraphs 1 to 7 and also in respect of the claim of the petitioner before the arbitrator the petitioner would suffer irreparable loss or injury. In my view, that course does not seem to me the proper course, as it may be that the contract may be declared to be void for noncompliance of the statutory provisions and requirements of the Forward Contract Regulation Act and the rules and bye-laws of the East India Hessian Exchange Ltd. relating to transferable specific delivery contract for raw jute and the various notifications made there under. Therefore, the reference to arbitration would be infructuous, baseless, futile and waste of time and money.

In my view, it appears also that the proper course would be not to stay the suit but expedite the suit and it will be convenient to deal with both the question in the facts and circumstances of this case and the suit should be expedited.

6. Mr. R.C. Deb appearing with Mr. S.K. Gupta for the respondent has drawn my attention to the various bye-laws for the trading in transferable specific delivery contract in raw jute as contained in the working Manual, Vol. 3 of the East India Hessian Exchange Ltd. and the provisions of the Forward Contract Regulation Act, 1952 as pleaded in the plaint and also in the affidavit-in-opposition filed in this application and submitted that the question as to the validity of the contract should be gone into in this application as it is the duty of the Court in Section 34 application, to go into the same if raised. Mr. Gupta referred me also to the decision in the case of *Jawahar Lal Burman v. Union of India*,<sup>3</sup> and also decision in the case of *Anderson Wright Ltd. v. Moran and Co*<sup>4</sup>, and submitted that the Court should go into question of validity of the contract. In my view, in the facts and circumstances of the case, the question of validity which involves disputed question of facts as to various notifications and bye-laws which have been specifically pleaded in the plaint and also in the affidavit-in-opposition, it is not necessary that I should go into the question in this application as the suit would be tried in the usual course. The principle which governs the grant or refusal of the stay by exercise of the discretionary power by the Court under Section 34 of the Arbitration Act may be summarized as follows :-

The power to grant stay of a suit under Section 34 of the Arbitration Act, is a discretionary power of the Court which must be exercised judicially. It is not as a matter of course, that the stay can be granted. The conditions necessary for grant

<sup>3</sup> AIR 1962 SC 378

<sup>4</sup> AIR 1955 SC 53

of stay of a suit has been laid down in the Supreme Court decision in *Anderson Wright Ltd. v. Moran and Co*<sup>5</sup>, It has been held in the said decision of the Supreme Court

that:-

"The first and essential pre-requisite of making an Order of stay under Section 34 of the Arbitration Act, is that there is a binding agreement between the parties to the suit which is sought to be stayed. 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, viz. (1) what is the dispute in the suit and (2) what dispute the arbitration clause covers?"

It has also been further held that where in an application made under Section 34 of the Arbitration Act, for stay, 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, in 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 of the existence of the parent contract. In the said decision Supreme Court remanded the matter to the High Court for deciding an issue in the proceeding under Section 34 of the Arbitration Act, the question whether the Respondent was or was not a party to the Arbitration agreement with the direction that if the Court is of the opinion that the Respondent was in fact a party, the suit shall be stayed and the appellant would be allowed to proceed by way of arbitration in accordance with the arbitration clause. If on the other hand, the finding is adverse to the appellant, the application will be dismissed. It appears that after the matter was remanded to the High Court, the matter again went up to the Supreme Court and that Court finally, declined to stay the suit having regard to the considerable delay in the proceeding and also due to the fact that questions relating to custom of the market and liability of the plaintiff under Section 230 of the Contract Act, had to be determined and it was held that power to stay was not considered enforceable as a matter of course. See (*Anderson Wright Ltd. v. Moran and Co. Ltd.*<sup>6</sup>. unreported decision of the Supreme Court decided on 1-12-1961, relevant portion of which is quoted in *State of U. P. v. Janki Saran*<sup>7</sup>).

7. In the present case before me, the plaintiff-respondent has specifically alleged that the contract containing the arbitration clause is void and illegal inter alia, for non-compliance of the statutory provisions under the Forward Contract Regulation Act, 1952 and the Rules and bye-laws of the East India Hessian Exchange Ltd. relating to trading in Transferable Specific Delivery contracts in raw jute as for example the contract not being in prescribed form, not in serially numbered contract form and registered with the said Association as required under its bye-laws referred to above, and also the delivery for the October period under the contract is in violation of the notification under the said Act and as such, the contract between the parties is void and illegal. These are questions beyond the jurisdiction of the Arbitrator and cannot be referred to arbitration which is conceded by Mr. Bhabra, appearing for the petitioner. Reference may also be made to the leading English decision on this aspect of the matter for consideration of Court in granting of a suit in *Monro v. Bagnor U. D. C.*<sup>8</sup>, where in a Building contract, the contractor brought an action against the employer claiming *inter alia* damages for fraudulent misrepresentation whereby the contractor was induced to enter

<sup>5</sup> AIR 1955 SC 53 at p. 55 para 7

<sup>6</sup> AIR 1955 SC 53 and C. A. No. 452 of 1958

<sup>7</sup> AIR 1973 SC 2071 at p. 2074 para 3

<sup>8</sup>1914-15 A. E. R. reprint 523

into the contract and in an application for stay of the suit, 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 and the application for stay was refused holding that the plaintiff's claim was not within the scope of the submission to arbitration. Here I may also refer to the Supreme Court decision in the *Printers (Mysore) Pvt. Ltd. v. Pothan Joseph*<sup>9</sup>, where the Supreme Court dealing with the principles of the exercise of discretionary power for stay of a suit under Section 34 of the Arbitration Act, observed that "it would be difficult, and it is indeed, inexpedient to lay down any inflexible rules which should govern the exercise of the said discretion. No test can, indeed, be laid down, the automatic application of which will help the solution of the problem of the exercise of judicial discretion". As was observed by Bowen, L. J., in *Gardener v. Jay*<sup>10</sup>, "the discretion, like other judicial discretion, must be exercised according to common sense and according to justice."

8. Applying all those principles to the facts of this case, it appears to me that this is not a proper case where Court should exercise its discretion in favor of the stay of the suit. Firstly, it is admitted that the question to be determined in the Suit is as to the legality of the contract between the parties, containing the Arbitration Clause. Prima facie, it appears to me that there are sufficient grounds on which the legality of the said contract has been challenged for non-compliance of the statutory requirements of a Forward Contract which is a Transferable Specific Delivery Contract in jute goods admittedly governed by the rules and bye-laws of the East India Hessian Exchange Ltd. constituted under the Forward Contract Regulation Act, 1952. Therefore, the said question is beyond the jurisdiction of the Arbitrator and it is admitted by both the parties that the same cannot be said to be covered by the Arbitration clause. Secondly, the other portion of the claim made in the plaint although within the scope of the arbitration clause but would be entirely dependent on the decision as to the issue raised whether there is a valid and legally binding contract between the parties. As such, it will be not proper to grant partial stay of the suit at this stage and lastly, it is now well settled that stay cannot be granted as a matter of course and the inordinate delay in getting the matter heard by the petitioner for nearly six years, in my view, is a matter to be taken into consideration in refusing the stay. (See *State of U. P. v. Janki Saran*<sup>11</sup>,

9. Mr. Gupta has submitted that the Court should decide the question of the legality of the said contract which has been specifically raised in this application in view of the principles laid down in the decision of the Supreme Court in *Anderson Wright Ltd. v. Moran and Co. Ltd*<sup>12</sup>. In my view, having regard to the disputes raised as to the existence of the notifications and other questions as to various facts, it is desirable that the said question may be tried in the suit in the regular way.

10. In that view of the matter, the application for stay must be dismissed.

11. In the result, I am making the following order:-

<sup>9</sup> AIR 1960 SC 1156

<sup>10</sup>(1885) 29 Ch D 50 at p. 58

<sup>11</sup> AIR 1973 SC 2071 paragraph 3 at p. 2074

<sup>12</sup> AIR 1955 SC 53

The application is dismissed. The petitioner to file the written statement within a

fortnight from date. Cross Order for discovery within a week thereafter. Inspection forthwith thereafter. Suit to appear on the top of the appropriate prospective list four weeks hence. Liberty to applying for fixing an early date for hearing.

12. I make no order as to costs as both the parties are equally responsible for keeping this matter pending in this Court for an inordinately long period without taking any diligent and real step for disposal of the matter earlier.

Application dismissed.