CALCUTTA HIGH COURT

Alliance Jute Mills Co

Vs.

Lalchand Dharamchand

Appeal No. 149 of 1972

(Ramendra Mohan Datta and Salil Kumar Hazra, JJ.)

19.07.1977

JUDGMENT

Ramendra Mohan Datta, J.

1. This appeal has been preferred from the judgment and order of Ghosh, J. D/-10-11-1971*staying the suit filed herein under Section 34 of the Arbitration Act, 1940.
* Reported in AIR 1973 Calcutta 243.

2. The facts are that by exchange of a bought and a corresponding sold note both bearing No. RJ-50521 dated March 16, 1968, through the broker R. L. Saraf and Co., the respondent No. 1 herein, Lalchand Dharamchand sold to the appellant 600 maunds of Agartala Mesta Fibre at the rate of Rs. 38.50 P. per maund working out at Rs. 103.15 p. per quintal, delivery on 31st March, 1968, at the buyers mill siding. The said contract between the parties was subject to the terms and conditions of the East India Jute and Hessian Exchange Association Ltd. relating to contracts for jute. The relevant bye-laws of the said Association contained an arbitration clause and the same provided as follows:

> "17. All matters, questions, disputes, difference and/or claims arising out of and/or concerning and/or in connection with and/or in consequence of or relating to this contract including matters relating to insurance and demurrage whether or not the obligations of either or both parties under this contract be subsisting at the time of such dispute and whether or not this contract has been terminated or purported to be terminated or completed shall be referred to the arbitration in accordance with the provisions for reference to arbitration contained in these bye-laws....."

3. Pursuant to the said contract the respondent No. 1 delivered certain quantities of mesta to the appellant and submitted bills for an aggregate sum of Rs. 20,319.37 p. on account of price of the Mesta sold and delivered. The said bills were submitted to the appellant through the said brokers the respondent No. 2 herein in terms of the said agreement. Between June 6 and August 29, 1968 the respondent No. 1 on several occasions demanded payment of the said price from the

appellant through the said brokers. The appellant in their turn claimed reduction in price to the extent of an aggregate sum of Rs. 612.96 p. on account of shortage in weight and undercharges. The appellant submitted their bills in respect of the said shortage and under-charges to the respondent No. 1.

4. Not having received the payment in respect of the price of goods sold and delivered in spite of several demands, the respondent No. 1 on 6th Sept., 1968 wrote to the Forward Market Commission, constituted under Forward Contract Regulations Act, complaining about the non-payment of the aforesaid price by the appellant. The respondent No. 1 by the said letter requested the said Forward Market Commission to direct the appellant to make payment. By another letter dated 18th September, 1968 the respondent No. 1 enquired of the said Forward Market Commission if they wanted to intervene in the matter. Thereafter by another letter dated 27th Sept., 1968 the respondent No. 1 demanded payment once again and threatened to go to arbitration if the same was not made within three days thereafter.

5. On or about 7th Oct., 1968 the respondent No. 1 referred its claim for the aforesaid price to the arbitration of the Bengal Chamber of Commerce and Industry in accordance with the said arbitration agreement contained in the said contract. On 28th Oct., 1968 the appellant asked for a fortnight's time from the arbitrator to file its statement. The Bengal Chamber of Commerce and Industry granted them time till 9th November, 1968. On 7th Nov., 1968, the appellant again asked for a further fortnight's time to file its statement and such prayer was also granted till 19th Nov., 1968. Thereafter the appellant once again asked for a further fortnight's time to file its statement and the same was granted till 4th December, 1968. On 4th Dec., 1968 the appellant filed its statement of facts in answer to the claim of the respondent No. 1. The appellant thereupon asked for inspection of the contract and the respondent No. l offered inspection and the same was communicated to the appellant by the Bengal Chamber of Commerce and industry. On 16th Nov., 1968 the respondent No. 1 filed its comments on the statement filed by the appellant. On December 26, 1968 the appellant asked for time to file its rejoinder to the aforesaid comments of the respondent. Such time was granted until 10th Jan., 1969. On 10th Jan., 1969 the appellant's solicitor wrote to the Bengal Chamber of Commerce and Industry asking for further three weeks time to file its rejoinder and such time was granted till Jan. 21, 1969 on which date the appellant's solicitor again prayed for a further fortnight's time to file its rejoinder. The date for holding the arbitration was postponed from time to tune till 14th Feb., 1969.

6. On 10th Feb., 1969 the appellant's solicitor informed the Bengal Chamber of Commerce and Industry that the appellant had filed a suit upon the whole of the subject-matter of the reference and served a notice under Section 35 of the Indian Arbitration Act, 1940. Thereupon the reference was held in abeyance by the arbitrator. The respondent's solicitor Mr. B. M. Bagaria wrote to the solicitor for the appellant requesting them to supply a copy of the plaint but it was not supplied until March 15, 1969.

7. The application herein, for stay of the said suit, under Section 34 was made on 29th April, 1969. The said suit, as it appears from the plaint, bad been filed by the company against the respondent No. 1 herein and against the said broker R. L. Saraf and Co., the respondent No. 2 herein, inter alia, for a declaration that the respondent No. 2 had no claim against the appellants being the plaintiff in the said suit under or in respect of the said contract dated 16th March, 1968 or in respect of the aforesaid bills submitted by the said broker to the buyer for price of the goods sold and delivered by the respondent No. 1 to the appellant under the said contract. The appellant

has claimed in the said plaint cancellation and delivery of the said contract end of the said bills and a declaration that the said broker has no claim, against the appellant under the said contract although the appellant admitted in the plaint that the said broker being the said Messrs. R. L. Saraf and Co. was a mere broker in respect of the said contract. The appellant has also claimed in the plaint a decree for Rs. 50,000 as damages for alleged libel published by the defendants in the said suit i.e. by the respondent No. 1 herein and by the said brokers. In para. 2 of the plaint the appellant relied on one of the terms and conditions as contained in the rules of the East India Jute and Hessian Exchange limited which provided as follows:-

> "It is expressly agreed and understood that all documents, correspondence and other papers in respect of this contract except those relating to any arbitration proceedings arising out of this contract shall pass through members/licensed brokers passing principal contracts and all payments under this contract except those due under arbitration awards shall be made through such members/licensed brokers."

Obviously this clause was relied upon for the purpose of showing that the broker had authority to enter into any contract on behalf of the respondent No. 1 herein and on the basis thereof the broker entered into a tripartite agreement in which the parties were, the appellant as the first party, the respondent No. 1 through the said broker as the second party and the said broker acting for its own self as the third party. In para. 4 of the plaint an agreement has been plead-ed to the effect that it was agreed by and between the parties that the said bills would not be payable until 4th July, 1968. Then in paragraph 5 it has been pleaded that there was shortage in weight and the plaintiff was entitled to recover from the defendants Railway under-charges paid by the plaintiff to the Railway authorities in respect of the said jute. In paragraph 6 of the plaint it is stated that the plaintiff being the appellant herein, duly submitted its bills to the respondent No. 1 through the said broker, being the respondent No. 2, for such shortage in weight and for the Railway undercharges paid by the plaintiff to the extent of a sum of Rs. 612.96 p. In para. 7 it is pleaded that a large sum of money, much in excess of the claim of the respondent No. 1 against the respondent No. 2, were due and payable by the said broker being the respondent No. 2 herein to the plaintiff. Then reference was made to the crucial para. 8 in which another agreement had been sought to be pleaded in the following manner:

> "Some time prior to 15th Oct., 1968 it was agreed by and between the plaintiff and the defendant No. 2 for self and on behalf of the defendant No. 1 that the bills of the defendant No. 2 being bills Nos. 1 and 2 aforesaid dated the 10th April, 1968 and 18th April, 1968 respectively will, after adjustment of the amount due to the plaintiff on account of short weight and quality claims as aforesaid will be paid by the defendant No. 2 to the defendant No. 1 out of the outstanding dues of the plaintiff from the defendant No. 2. The defendant No. 1 was and is bound by the said agreement in view of the terms and conditions aforesaid, The plaintiff states that the plaintiff in view of the said agreement, is deemed to have paid the dues of the said defendant No. 1 in terms of the said agreement dated 16th March, 1968."

8. Mr. Jain appearing on behalf of the appellant contends that the case of defamation as made in the plaint, is quite unconnected with the transaction in suit and, in any event, the defendant No. 2

the broker is not a party to the arbitration proceedings or a party to the arbitration agreement Accordingly, the Court should exercise its discretion not in favor of granting stay of the suit but in its discretion should allow the suit to proceed.

9. It is further contended by Mr. Jain that the aforesaid three letters dated 6th Sept, 1968, 18th Sept., 1968 and 22nd Oct., 1968 contained defamatory statements which had been made without any relation to the said contract and an action in tort had been made in the plaint claiming damages which arose out of the said tort.

10. Regarding para. 8 of the plaint Mr. Jain contends that the original contract had come to an end by virtue of the said subsequent contract as pleaded in para. 8 of the plaint. Although the word 'novation' had not been used but the plea of novation had in substance been pleaded therein.

11. There are three parties and in so far as the plaintiff's liability to the defendant No. 1 is concerned the same has been fully satisfied inasmuch as the liability has been taken over by the broker, the defendant No. 2 in the plaint Under those circumstances, the original contract having stood superseded in its entirety by the subsequent agreement by way of novation the subsisting arbitration agreement came to an end. In any event, it is contended that the parties to the suit and the parties to the said arbitration agreement are not the same and as such the suit cannot be stayed and, in any event, it cannot be stayed against the defendant No. 2. Mr. Jain contends that the merits of the suit proceeding should not be gone into in an application under Section 34 and whether or not the plaintiff's claim will ultimately succeed should not be taken into consideration in exercising the Court's discretion to stay or not to stay the suit

12. Mr. Das, on the other hand, contends on behalf of the respondent herein first, that the order under Section 34 is discretionary and the Appeal Court would be slow to disturb such discretion as exercised by the learned trial Judge unless the same has been exercised capriciously or on erroneous principles. Secondly, Mr. Das contends that an arbitration reference cannot be defeated by adding a third party in the suit against whom no real relief has been claimed. It is contended that the broker has been added only with a view to defeat the arbitration agreement. The Court would be competent to examine the pleadings and to find out if the plaint is vexatious and has been filed to stop the arbitration proceedings or to take the case outside the ambit of the arbitration agreement Thirdly, Mr. Das contends that even if the cause of action has been framed in tort the suit would be stayed; for the alleged tort arises directly or indirectly out of the contractual relationship of the parties. Fourthly, the entire question whether there has been a settlement or a novation or a discharge of the original contract by a subsequent contract can be referred to arbitration and the arbitrator is competent to decide the same. Fifthly, the Court can look into the subsequent event viz.

> (a) that no step had been taken as against the defendant No. 2 the broker, since the date of the order of the trial court whereby as against the defendant No. 2 no stay was granted; that being so, (i) the writ of summons should have been served on the said defendant, (ii) the time to serve in respect thereto had not been extended in due time, (iii) the provisions of Order 9, Rule 5 of the Civil P. C. had become operative and (iv) the suit would be bound to be dismissed on that ground and
> (b) that the arbitration proceedings had been continued since then and the arbitrators have

made an award in favour of the respondent No. 1 as far back as in 1972. The same has since been filed in Court. The appellant applied for stay before the Appeal Court in June 1972 but in or about July/August, 1972 an interim order for stay was vacated and the application for stay was dismissed.

13. That being the position, it is submitted by Mr. Das that the trial court's decision should not be disturbed and the appeal should be dismissed. Several decisions have been cited at the bar on the above points. Mr. Jain has referred to the cases of *Turnock v. Sartoris*[1], *Ramdas Dwarkadas v. Orient Pictures*[2], *Gaya Electric Supply Co. Ltd. v. State of Bihar*[3], *Johurmull Parasram v. Louis Dreyfus and Co. Ltd*[4]. *Union of India v. Kishorilal Gupta*[5], Mr. Das cited amongst other cases the case of *Damodar Valley Corporation v. K K. Kar*[6].

14. Referring to *Turnock v. Sartoris (1889) 43 Ch D 150* (supra) a Bench of this Court, in the case of *Rungta and Sons (Pvt.) Ltd. v. Jugometal Trg. Republike, reported in*[7] observed that in that case the existence and the validity of the subsequent agreement was not disputed but the dispute arose between the parties as to the rights under both the lease and the subsequent agreement. In that case the Court held that the arbitration clause referred to questions arising under the lease alone and refused to stay the suit. It was held that the subsequent agreement could not be treated as part of the lease. Referring to the said Bombay case. AIR 1942 Bombay 332, the Bench observed that the original agreement containing the arbitration clause was followed by a tripartite arrangement which did not contain an arbitration clause and in which a third party was concerned. The suit sought to be stayed was in respect of disputes arising under both agreements. Though the validity of the second agreement was disputed by the defendants it was argued upon the assumption that it was binding upon the defendants and it was contended that it formed part and parcel of the original agreement. It was held that the two agreements could not be treated as one agreement and the arbitration clause in the first agreement did not cover disputes arising under the second agreement and on that basis the principle in *Turnock v. Sartoris* (supra) was applied and stay was refused. The Bench in the above decision in the case of Rungta and Sons (P.) Ltd. (supra) applied the principles in *Uttam Chand Saligram v. Jewa Mamooji*[8], where Rankin, J. decided:

> "Where the original contract for sale of goods is followed by a settlement contract whereby the buyer sells back the goods to the seller and the claim by the buyer for the consequential money difference is disputed by the seller the dispute arises out of the contract and it is open to the buyer to found his claim upon the submission contained in the original contract."

In that case the Bench went so far as to hold that the dispute as to whether there was a subsequent arrangement in substitution of the original contract could be covered by the arbitration clause if the scope of the arbitration clause was wide enough to cover it. In that connection the Bench agreed with the decision of Das, J. in *Balabux Agarwala v. Luchminarain Jute Manufacturing Co. Ltd*[9]., where it was held

[1](1889) 43 Ch D 150
[2] AIR 1942 Bom 332
[3] AIR 1953 SC 182
[4] AIR 1949 Cal 179: (52 Cal WN 137)
[5] AIR 1959 SC 1362
[6] AIR 1974 SC 158
[7]63 Cal WN 527
[9](1947) 51 Cal WN 863

[8] ILR 46 Cal 534
that a dispute whether there was a valid contract in settlement of the original contract was a dispute arising out of or relating to the original contract or the fulfilment thereof. The Bench noted that on appeal from the said judgment of Das J. his aforesaid ruling on the point was not challenged and his decision was affirmed (1948) 52 Cal WN 521 . The Bench also approved another decision of Das, J. in the case of *Khusiram Benarashilal v. Kian Gwan Co. (Cal) Ltd*[10]*.,* where it was held that a dispute whether there was a subsequent arrangement extending the time for delivery was a dispute arising out of the contract. The Bench did not agree with the contrary opinion as expressed by Blackwell, J. in *Ramdas Dwarkadas v. Orient Pictures, AIR 1942 Bombay 332* (supra).

15. In Kishorilal Gupta's case, AIR 1959 Supreme Court 1362 the original contract was finally concluded in terms of the settlement and it was stipulated therein that no party would have any claim against each other. That being so, the said Supreme Court case has no application to the facts of the case before us. In *Damodar Valley Corporation v. K. K. Kar*[11]*,* the Supreme Court decided that when the disputed subsequent agreement came up and at the same time when the original agreement subsisted the Arbitrator possessed his jurisdiction to decide the question as to whether or not the subsequent agreement had been entered into. The Supreme Court observed at page 160 as follows:

> "It appears to us that the question whether there has been a full and final settlement of a claim in the contract is itself a dispute arising 'upon' or 'in relation to' or 'in connection with' the contract. These words are wide enough to cover the dispute sought to be referred. The respondent's contention is that the contract has been repudiated by the appellant unilaterally as a result of which he had no option but to accept that repudiation because if the appellant was not ready to receive the goods he could not supply them to him or force him to receive them. In the circumstances, while accepting the repudiation, without conceding that the appellant had a right to repudiate the contract, he could claim damages for breach of contract. Such claim for damages is a dispute or difference which arises between himself and the appellant and is 'upon' or 'in relation to' or 'in connection with' the contract."

16. In our case also similar expressions appear in the arbitration agreement. In this case the arbitration agreement is wide enough to bring within its ambit even the dispute as to whether or not the substituted agreement was entered into by and between the parties. Here in this case the appellant has set up the said agreement which has been totally denied and disputed by the respondent No. 1 and as such the dispute in connection therewith is a matter which arises 'out of the original contract and is undoubtedly a matter 'connected with' and 'related to' the said contract. In para. 2 of the plaint the appellant itself has relied on the terms and conditions for the purpose of showing that the broker had the authority to represent the respondent No. 1 in entering into such an agreement. In other words, in order to find out whether such an agreement as pleaded in para. 8 of the plaint was entered into or not, one has to look into and consider the terms and conditions of the earlier contract. Moreover, the subsequent contract mentioned in the plaint was in 'consequence of and/or 'relating to' the question, of payment by the appellant to the respondent No. 1 in discharge of its liabilities under the original contract and that is a

[10](1951) 88 Cal LJ 165
[11] AIR 1974 SC 158
matter which is certainly covered by the arbitration clause. The respondent No. 1 herein in its petition for stay has not only denied the said subsequent agreement but has stated that its dues under the original agreement have not been paid. The dispute thus arising is sought to be extinguished by the appellant by setting up the said subsequent agreement and by adding the broker as a third party thereto. There is no averment in the plaint to show in what capacity the broker could represent the seller in the matter of discharging the buyer's liability towards the seller. There is no pleading whatsoever as to whether the broker was acting under the authority of or as the/ agent of the seller in entering into the said agreement nor is there any pleading that the said contract was ratified by the seller. There is no express pleading of novation nor is there any pleading from which it would appear that the original contract was superseded by the subsequent contract. The effect of the pleading in the plaint is that the original contract containing the arbitration clause is subsisting and is not superseded by the subsequent agreement as pleaded. That being the position, the ratio of the Supreme Court decision in the case of *Union of India v. Kishorilal Gupta reported in*[12] cannot apply in the present case.

17. As stated above, one of the contentions of Mr. Das is that an arbitration reference cannot be defeated by adding a third party in the suit against whom there is no real right to relief and the Court would be competent to examine and to find out if the plaint is vexatious and has been filed solely with a view to stop the arbitration proceedings. In support of his contention Mr. Das has relied on a single Bench decision of this Court in *Shree Bajrang Jute Mills Ltd. v. Fulchand Kanhaiyalal Co. reported in*[13] In that case it was observed by D. N. Sinha, J. (as he then was) that the court was entitled to look into the nature of the plaint and see whether it was a mere vexatious and a frivolous attempt to stop the arbitration proceedings. In the facts and circumstances of that case Sinha J. held that the suit filed before him was frivolous and vexatious and was intended merely to delay and defeat the arbitration proceedings. In deciding the said point Sinha J. relied on a passage of the Supreme Court decision reported in *(Jawahar Lal Barman v. Union of India*[14]*).* The said passage dealt with the object of the legislature in enacting Section 32 and Section 33 of the Arbitration Act. In the same judgment Sinha J. relied on a passage from the judgment of Das J. in the case of *Khushi Ram Banarasi Das v. Hanutmal*[15]*,* which reads as follows:

> "But if the matter is one of discretion. I do not see why, if an apparently illusory demonstrably frivolous plea is set out disputing the formation, existence or validity of the arbitration agreement, the Court should not, as a matter of discretion determine whether any such issue has been legally raised and, if so, decide that issue on the application itself and if necessary set down the issue for trial on evidence,"

18. Sinha J. further observed that the decision in *Khushi Ram Banarasi Das v. Hanutmal ((1949) 53 Cal WN 505)* (supra) has been approved by the Supreme Court in *Anderson Right Ltd. v. Moran*[16]*,* On that basis Sinha J. stayed the suit to the extent it was covered by the arbitration clause.

19. It will appear from the facts of the case before Sinha J. that the same was of extreme

[12] AIR 1959 SC 1362
[13] AIR 1963 Cal 140
[14] AIR 1962 SC 378
[15](1949) 53 Cal WN 505
[16] AIR 1955 SC 53

nature. In my opinion, the point which arose before Sinha J. is not free from doubt and in the facts and circumstances of this case, it is not necessary for us to go into and to decide the same.

20. We are, however, of the view that the Court is empowered to look into the plaint and any petition, affidavit, papers and documents connected with the application under Section 34 of the Arbitration Act in order to find out whether the subject-matter of the suit is within the scope of the Arbitration Act. The Court is empowered to go into the pleading to find out if the original agreement containing the arbitration clause has been superseded by the subsequent agreement as pleaded.

21. Mr. Das refers to the counter statement filed on behalf of the appellant before the arbitrator to show there from that the pleading relating to subsequent agreement is different from what had been pleaded in the plaint. There the agreement related to the parties to the agreement and the broker had not been brought in as a party. It is not necessary for us to consider the effect of such an averment in the counter statement because that would amount to judging the merit of the subsequent agreement All that the Court can look into, as we have done, is to see whether there is any pleading as to how the broker is coming into the picture as a third party. In the absence of any such pleading we can consider the scope of the subject-matter of the suit as confined to the buyer and the seller alone and to doing so, we find that it is covered by the arbitration agreement as contained in the original contract.

21A. The next point urged by Mr. jain is that the claim in damages for defamation is quite unconnected with the contract and the arbitration agreement cannot be relied on in respect of such a claim. It is argued that the action in tort is a matter which was not agreed to be referred to the arbitration. Mr. Jain has relied on the case of *Johurmull Parasram v. Louis Dreyfus and Co. Ltd, reported in*[17] where the Bench of this Court consisting of Harries, C. J. and Mukherjea, J. observed, in an application under Section 34, that at that stage the Court must consider the suit as it was pleaded and framed. It was further observed that if the suit as pleaded was a suit independent of the contract, then the Court would have no power to stay the suit though the Court would be satisfied that the frame of the suit was merely a means of avoiding the consequence of alleging the true nature of the claim. The Bench applied the principle laid down in *Monroe v. Bognor Urban District Council*[18]*,* The Court did not consider in that case whether the suit, as framed, was maintainable or not. The only question which was considered was whether the suit, as framed, was within the ambit of the arbitration clause. The Bench held in that case that the claim was framed not under the contract containing the arbitration clause but that was really a claim based on tort and implied contract and, that being se, it was held that the trial Judge was wrong in making an order staying the suit and the appeal was allowed. The application for stay was dismissed. In my opinion, the above case is distinguishable from the facts of the case before us.

22. The next case cited by Mr. Jain is *Ghewarchand v. Shiva Jute Bailing Ltd. reported in*[19] That was a case where the suit was based wholly on tort and the action complained of was totally unconnected with the contract. There the Bench came to the finding that the

[17]52 Cal WN 137 [19] AIR 1950 Cal 568

[18](1915-3 KB 167)

cause of action in the suit had no connection directly or indirectly with the contract itself and the reference to the contract was only a link in the story to show how the goods came to be in the

possession of the defendants. The Bench considered the principle decided in *Woolf v. Collis Removal Service*[20], but in the facts of that case held that the said principle did not apply. The principle enunciated in the above English decision was that even though the suit was technically framed in tort there might be sufficiently close connection between the claim as made and the transaction under the contract to bring the claim within the ambit of the arbitration clause and the claims which were entirely unrelated to the transaction covered by the contract would be excluded from its scope.

23. In my opinion, the principle decided in the above English case may be applied to the facts of the case before us. Such a case also came up for decision before a Bench of this Court in the matter under Section 34 of the Arbitration Act in the case of *National Co. Ltd. v. Bengal Boating Co. reported in*[21] The Court below granted the stay of the suit. In that case the defendant was to carry by boat the products of the plaintiff from the plaintiff's mills to different places within the port limits of Calcutta under an agreement between the parties. The defendant was wrongfully holding 438 bales of gunny and the plaintiff claimed specific delivery in respect thereof and in the alternative a sum of Rs. 3,29,681 as the value thereof. One of the terms of the said agreement was that the matter in dispute would be resolved by arbitration under the Indian Arbitration Act. The arbitration clause was as follows:-

> "Term No. 14. That for any infringement of the terms and conditions hereinbefore mentioned or any dispute or difference arising out of or pertaining to the said terms and conditions, the matter shall be resolved by arbitration under the Indian Arbitration Act."

It was contended that the claim arose out of tort and not out of contract and, therefore, the arbitration clause was not attracted. It was contended that it was primarily based on wrongful detention of the goods and, in the alternative, for damages for conversion thereof.

24. The said Bench took into consideration the said previous Bench decision in *Ghewarchand v. Shiva Jute Bailing Ltd. (AIR 1950 Calcutta 568)* (supra). Several other decisions of this Court had also been referred to as also the Supreme Court decision in *Gaya Electric Supply Co. Ltd. v. State of Bihar (AIR 1953 Supreme Court 182)* (supra) and ultimately after reviewing the various authorities the said Division Bench applied the principle decided in *Woolf v. Collis Removal Service (1948-l KB 11)* (supra) and upheld the decision of the trial Court and dismissed the appeal. The Bench observed in that case that the overwhelming character of the agreement was that the arbitration clause which embraced disputes or differences arising out of or pertaining to the terms or the infringement of any term or condition, in the ultimate analysis, would resolve into the question whether the goods were carried from the mill premises to different places within the port limit of Calcutta or whether there was any dispute which arose within the terms and conditions of carriage.

25. In my opinion, this is also another case where the claim in damages for defamation

[20](1948) I KB 11 [21](1967) 71 Cal WN 1051

arises out of and in connection with the non-payment of the bills of the seller. In going into the question of tort the Court would necessarily have to go into the terms and conditions of the contract relating to payment. The claim in tort is directly and inextricably connected with the terms and conditions of the contract and so it comes within the scope of the arbitration

agreement. The arbitration clause herein is wide enough to cover the dispute relating to the claim in damages in tort inasmuch as the same arises out of the contract and is inextricably connected with and/ or is related to it.

26. Mr. jain has referred to the said three letters but the said letters would not have been written but for the fact that there was a claim under the contract. In other words, in deciding the question of damages for defamation it would be necessary to take recourse to the first agreement in connection with the question of payment and on the question as to whether such letters could be written by the unpaid sellers to the said association with copies to the broker for getting payment under the contract. On this point Mr. Jain has referred to the case of *Gauri Shankar and Sons v. Union of India reported in*[22] and Mr. Das has referred to the case of *Astro Vencedor v. Mabanaft G m b H. reported in*[23] and *Union of India v. Salween Timber and Const Co*[24]*. (India)* and the case of *Woolf v. Collis Removal Service*[25]*,*

27. In the said case of *Gauri Shankar and Sons v. Union of India*[26]*,* the contractor filed a suit for damages for breach of contract as also for damages suffered by him for libel on account of the circulation of a decision of the Railway authorities cancelling the contract of the contractor and removing his name from the list of the approved contractors. They had suffered in their reputation by reason of the said wrongful and malicious act on the part of the Railway authorities.

28. In that case the learned Civil Judge of Moradabad stayed the suit under Section 34 of the Arbitration Act. The appeal Court took into consideration the fact that in spite of the claim for damages for defamation various allegations had been made against the responsible railway servants viz. the Chief Engineer, Deputy Chief Engineer and others. It was also taken into consideration that the arbitrator in that case would be the Deputy Chief Engineer, who would be equal in rank to one of the officers whose conduct would be subject to enquiry; and that he was lower in rank than the other officer viz. the Chief Engineer and, as such, the Allahabad Bench did not think it desirable that an enquiry against the Chief Engineer should be entrusted in the hands of the then Deputy Chief Engineer. The Bench also took the view that, in any event the said part of the case should not have been allowed to be proceeded with in arbitration. Accordingly, on the basis of the concession that the claim in contract was fully covered by the arbitration agreement, the suit in respect thereto was stayed and the appeal was allowed in part and the claim for damages for defamation was sent back to the Civil Judge to be tried before him. In that case the Allahabad Bench did not follow the principle laid down in *Woolf v. Collis Removal Service, (1947-2 All England Reporter 260)* (supra). In the above case before Allahabad Bench the arbitration clause provided as follows:

> "In the event of any question or dispute arising under these conditions or in connection with the contract (except as to any matter the decision of which is specially provided for by these conditions) the same shall be referred to the award of arbitrator who shall be....."

[22] AIR 1953 All 446
[23] 1971 (2) All England Reporter 1301
[24] AIR 1969 SC 488
[25] 1947 (2) All England Reporter 260
[26] AIR 1953 All 446

29. The Bench held that the claim in tort "brought by the appellant was totally distinct from the contractual disputes arising between the parties". The Bench relied on the decision in the case of

Monroe v. Bognor Urban District Council[27], the arbitration clause whereof was in substance similar to that of the Allahabad case. In the above case of *Monroe v. Bognor* the contractor sued to avoid the contract on the ground that his consent thereto had been obtained by fraudulent misrepresentation. There it was held that the suit was not barred because the alleged fraudulent misrepresentation was not a dispute "upon or in relation to or in connection with the contract". The Allahabad Bench distinguished the case before them from the case of *Woolf v. Collis Removal Service (1947-2 All England Reporter 260)* (supra) on the ground that there the language of the arbitration clause was of wider import.

30. In my opinion, the view as expressed by the Calcutta High Court Bench decision in the aforesaid case of *National Co. Ltd. v. Bengal Boating Co. (1967) 71 Cal WN 1051* (supra) is acceptable to this Bench in preference to the view expressed by the Allahabad Bench, more particularly, in view of the fact that the arbitration clause in the contract involved in this case before us is of much wider import than the arbitration clause before the Allahabad Bench. It was undoubtedly a matter 'concerning' or 'in consequence of or 'relating to' the said contract. Such expressions were absent in the arbitration clause before the Allahabad Bench.

31. The test for determining whether a dispute was 'arising out of the contract' or 'in connection with the contract' and so on, was laid down by the Supreme Court in the case of *Union of India v. Salween Timber and Construction Co. (India)*[28], The test was whether recourse to the contract by which both the parties were bound was necessary for the purpose of determining whether the claim of the party was justified or otherwise. If it was necessary to take recourse to the terms of the contract for the purpose of deciding the matter in dispute, it must be held, that the matter was within the scope of the arbitration clause and the arbitrator had jurisdiction to dcide that dispute.

32. Applying the above tests to the facts of the case before us it would be seen that recourse must be had to the terms of the contract relating to payment in order to decide the dispute as to whether the said letters contained any defamatory statement or not. If a plea of justification is taken in the action for libel as it would appear from the correspondence between the parties forming the parts of the records herein, it would be a relevant consideration for going into the terms and conditions of the contract whether such letters could be written for the purpose of realization of the dues of the defendant No. 1 for stay.

33. The point was also considered by the Court of Appeal in England in the case of *Astro Vencedor Compania Naviera SA of Panama v. Mabanaft G m b H*[29]. There the question was whether the claim for damages for wrongful arrest of a ship came within the scope of the arbitration clause and whether the Umpire had jurisdiction to deal with it. Both the Courts below and the appeal Court held in the affirmative. The reason was that the claim

[27](1915) 3 KB 167 [29](1971) 2 All England Reporter 1301

[28] AIR 1960 SC 488

for wrongful arrest, although a claim in tort had sufficient close connection with the Charterers' claim under the contract against the owners. There also it was held that the arrest was made to enforce that claim and "was so closely connected with it as to bring within the arbitration clause the rightness or wrongness of the arrest" of the vessel. There also it was contended that in *Woolf v. Collis Removal Service (1947-2 All England Reporter 260)* (supra), the claim in tort came within the arbitration clause under very special circumstances. There the claim in negligence could be quoted either in contract or in tort and on that ground such a dispute was held to come

within the ambit of the arbitration clause. But it was contended that the claim in tort before the Court of Appeal in England was entirely separate from the contract. Lord Denning, M. R. did not accept the argument. In that case the arbitration clause was in the following terms:

> "any dispute arising during execution of this Charter party shall be settled in London, owners or charterers each appointing an arbitrator - Merchant or Broker - and the two thus chosen, if they cannot agree, shall nominate a third arbitrator - Merchant or Broker - whose decision shall be final....."

At pages 1308-1309 Lord Denning M. R. observed:

> "The arrest of the ship was the direct consequence of the Charterers' claim for damages against the ship owners. The charterers arrested the ship so as to enforce their claim. Their claim - that the ship owners had wrongfully stopped discharging the oil - was certainly a claim which arose out of the contract during the execution of it. It was plainly within the arbitration clause. It had necessarily to be decided by the arbitrator. The arrest was simply the follow-up to that claim. It was so closely connected with it that the rightness or wrongness of the arrest is also within the scope of the arbitration." ** ** **

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> "In that case the Umpire found that the claim of the charterers was bad. He dismissed it out of hand. At once the question arises: was not then the arrest unlawful? It seems to me that the arrests were so much part and parcel of the enquiry that they came within the broad scope of the arbitration clause. I agree with the way Mocatta, J. put it. If the claim or the issue has a sufficiently close connection with the claim under the contract, then it comes within the arbitration clause."

34. It is true that in the instant case the arbitration clause is not so wide as in *Woolf v. Collis Removal Service (1947-2 All England Reporter 260)* (supra), but the scope herein is wide enough to cover "all matters, questions, disputes, differences and/ or claims arising out of and/or concerning and/or in connection with and/or in consequence of or relating to this contract" Even apart from the above, reading the agreement as a whole it would appear that its scope was wide enough to cover even a cause of action in tort provided that such claim in tort would directly or indirectly have a nexus or relationship with the contract containing the arbitration clause. Under such circumstances, the suit should be stayed even though the suit has been framed in tort. In my opinion, the claim in tort as pleaded in the plaint arose in course of the respondent attempting to realise the price of goods sold and delivered to the appellant under the contract and in course of making such attempt all that they had done was to refer the matter to the Association of which both were members with a view to realise their dues. The nature of the contract was such that the payment must necessarily have to be made through the broker. This was one of the transactions where the broker, it seemed, did not co-operate with the result, that the respondent might be apprehending that without the broker's co-operation it would be difficult to realize the money

unless the same was referred to the Association and in doing so, the respondent, inter alia, wrote to the Forward Market Commission on 6th September, 1968 as follows:

"Lalchand Dharamchand
Post Box No. 2345

12, India Exchange Place,
Calcutta-1.
To

The Officer-in-Charge, Regional Office,
Forward Market Commission,
P-29, Mission Row Extension (2nd floor),
Calcutta 12.
Dear Sir,
Re: Cont. No. RJ-50521/157A dated 16-3-68 A/C. M/s. Alliance Jute Mills Co. Ltd. Our Jute value.

Bill No.	Date	Amount
J/171	1-4-68	Rs. 6,765.63
J/173		Rs. 6,765.63
J/7		Rs. 6,788.11

Brokers' Corresponding Bill No. 1 dated 10-4-68 for Rs. 13,248.97 and Bill No. 2 dated 18-4-68 for Rs. 6,746.05.We have to inform you that we entered into the above contract with M/s. Alliance Jute Mills Co. Ltd. through the brokers M/s. R. L. Saraf and Co. for supply of 22394 Kgs. or 600 mds. Agartala Mesta Fibre. That we duly performed the contract and submitted our above jute value bills to the brokers through our Bank for collection of payment only.We also like to mention that at the time of entering into the contract or thereafter had no agreement or arrangement for submission of the bills upon usance by the brokers. That we regularly called at the brokers' office to demand payment of the bills but at no time the brokers informed us that the bills were tendered upon usance and at all time put off payments on some pleas or other. That in view of inconsiderable delay we by our letter dated 6-6-1968 addressed to M/s. R. L. Saraf and Co. and copies to the buyers demanded payment of the bills.That to our utter surprise the buyers by their letter dated 20-6-68 addressed to the brokers and copies to us informed that the brokers' bills would be matured for payment on 4th July, 1968 whereupon we contacted the brokers who then disclosed that their bills were usance of 60 days in the understanding that interest @ 9% would be payable by the buyers after 10 days from the date of acceptance of the bills till the date of payment. The brokers could not reconcile how both the bills of different dates would mature on the same date viz. 4th "July, 1968.That the specified date 4th July long expired but yet no gesture made towards payment of the bills.

As we feel our position most uncertain in Tribunal case of the Bengal Chamber of Commerce and Industry in view of the fact that during pending of the case the buyers may declare that they had paid the bills of the brokers who are also reticent over the matter. We have no alternative but to request you to please immediately call from the buyers and the brokers the actual position. Please also direct the buyers and the brokers to pay our bills together with interest without the least possible delay or to state the reason of withholding payment. Kindly take all possible steps so that the buyers and the brokers are compelled to pay our bills.

Please treat this as most urgent.

Yours faithfully,
For Lalchand Dharamchand
Sd. Illegible.

C.C. to
The Secretary,
The East India Jute and Hessian Exchange
Ltd., Calcutta.
Messrs. Alliance Jute Mills Co. Ltd. (Buyers), Calcutta.
Messrs. R. L. Saraf and Co. (brokers), Calcutta."

35. Copies of the said letter were sent to the Secretary East India Jute and Hessian Exchange Limited, Calcutta, buyers and the brokers. Thereafter, on 18th Sept., 1968 the respondent wrote/to the East India Jute and Hessian Exchange Ltd., inter alia, as follows:

"Lalchand Dharamchand.

Post Box No. 2345
12 India Exchange Place,
Calcutta
18th September, 1968.

To
The Secretary,
East India Jute and Hessian Exchange Ltd.,
43, Netaji Subhas Road,
Calcutta-1.
C. C. to:
1. The Offlcer-in-Charge, F.M.C., P-29, Mission Row Extensions (2nd Floor), Calcutta-13.
2. M/s. Alliance Jute Mills Co. Ltd., Calcutta.
3. M/s. R. L. Saraf and Co., Calcutta.
Dear Sir, Re: Cont. No. RJ-50521/157A dated
16-3-68 a/c Alliance Jute Mills Co. Ltd.

Our Bill Nos.	Date	Amount
J/171	1-4-68	Rs. 6,765.63
J/175	3-4-68	Rs. 6,765.63
J/7	16-4-68	Rs. 6,788.11

Brokers' Bill No. 1 decided on 10-4-68 for Rs. 13,248.97 and Bill No. 2 D/-18-4-68 for Rs. 6,646.05.We beg to refer to our letter dated 6-9-68 which has neither been acknowledged receipt nor attended to by any of the above mentioned addressee and that of the reasons best known to you.We understand that you had already received several complaints against the same Mill Buyers and the Brokers complaining their willful or intentional nonfulfilment of the promise in the contract and flagrant breach thereof. As your esteemed Association is deemed to have undertaken to safeguard the raw jute and jute goods trade or to uphold raw jute therein as provided in Rules Nos. 1 (1) and 2 (i) of Chapter XII of Volume III for trading in T.S.D. contracts in raw jute and jute goods we fail to understand how you do not take adequate steps with the powers conferred upon you under the provision of Chapter XII of the Bye-laws to safeguard the raw jute in this country.

In case you do not intend to intervene in the matter and prove your inability to take any steps against your member or members please immediately inform us why the provisions in Chapter XII of the Bye-laws should not be declared as infructuous and of no avail. Please also inform us at your earliest whether or not you will take any steps in the matter so that on hearing from you we may refer our case to arbitration. We have already reported you that the buyers have not yet declared whether any payment against our above bills has been made to the brokers and as such we apprehend that during pending of the arbitration case the buyers may declare that the cheque has been made but the brokers did not collect and whereby the trend of case may turn otherwise. It is, therefore, incumbent on your part at least to obtain an explanation from the buyers for withholding payment of our bills.We hope you will please acknowledge receipt hereof suggesting therein what we should do in the matter. Please treat this as urgent.

Yours faithfully,
For Lalchand Dharamchand
Sd/ Illegible."

36. From the above letter, it would appear that the respondent was insisting upon the said Association's intervention in the matter. They have also intimated in what way they were apprehending in the matter of collection of the bill.

37. Thereafter on 10th Oct., 1968, the respondent referred the matter to arbitration and the arbitrator entered upon the reference as stated hereinabove. The subject-matter of the reference was nothing but the dispute relating to the realization of the said three bills covered by the said contract The appellant filed a counter-statement but there was nothing mentioned about any claim for damages for defamation. They claimed a sum of Rs. 615.90 P. on account of short

weight and undercharges which remained outstanding against the respondent. Their main stand was that the broker was liable to make the payment from out of Rs. 50,000 which was due and payable by the said brokers in respect of their various bills. On October 22, 1968, the respondent herein wrote another letter to the Secretary, East India Jute and Hessian Exchange Ltd. in continuation of the letter dated 18th Sept., 1968 as follows:

"Lalchand Dharamchand.
12 India Exchange Place,
Calcutta-1.
Dated 22nd Oct., 1968.

To
The Secretary,
East India Jute and Hessian Exchange Ltd.,
43, Netaji Subhas Road,
Calcutta-1.

Dear Sir,

Re : Raw Jute Contract No. RJ-50521/167A D/-16-3-68 to Alliance Jute Mill. Brokers Bill No. 1 decided on 10-4-68 for..... Rs. 13,246.97
2, dated 18-4-68 for Rs. 6,646.05

We have to refer to our last letter dated 18th September, 1968 to you whereafter we have received a copy of a letter No. A/60 of 15-10-68 of the buyer, Messrs. Alliance Jute Mills Co. Ltd., original addressed to you. A copy of the said letter is enclosed herewith.

We also beg to enclose herewith a copy of a letter dated 10-10-68 of the brokers, Messrs. R. L. Saraf and Co., originally addressed to you.

It will be noted from the aforesaid letter of the buyers that they have also set up an arrangement with the brokers to which we have no concern although the said alleged arrangement has been wholly denied by the brokers in their aforesaid letter. In this connection we beg to enclose herewith a copy of letter dated 20th June, 1968, addressed to Messrs. R. L. Saraf and Co. and copy of us by the buyers, Messrs. Alliance Jute Mills Co. Ltd, in which they stated the date of maturity of bills as on 4th July, 1968 although it is done arbitrarily by the buyers.

In any event the buyers being the party to the contract they are liable to pay the same and as such we duly filed out case with the Bengal Chamber of Commerce and Industry and that as early as on the 7th Oct., 1968.

In the premises, the subject-matter of the case being subjudiced to arbitration after several references to you requesting to take suitable action against your said members, further continuance of correspondence in the matter is useless. But we regret that you did not take any prompt action in the matter against your member.

Thanking you.

Yours faithfully,
For Lalchand Dharamchand
Sd/- Illegible."

Enclo: As stated (3)
Copy to:
1. The Regional Officer/F.M.C./P-29 Mission Row Extension, Calcutta with 3 enclosures.
2. Messrs. Alliance Jute Mills Co. Ltd., 3, Netaji Subhas Road, Calcutta.
3. Messrs. R. L. Saraf and Co., 23/24 Radha Bazar Street, Calcutta."

38. The aforesaid letters which were the subject-matter of the claim in tort in the plaint have been set out not for the purpose of examining whether the allegations therein amounted to defamatory statements or not but for the purpose of considering how and in what matter the damages for defamation arose herein, or in other wards whether the claim in tort has a close nexus with the contract entered into by and between the parties and containing the arbitration clause.

39. The Allahabad Bench decision in Gauri Shanker's case (AIR 1953 Allahabad 446), (supra) is distinguishable in several respects. The contract was put an end to. Thereafter, actions were taken for the removal of the contractor's name from the list of approved contractors. Thereafter, the fact of such removal of the contractor's name from the list of approved contractors was circulated to all the Station Masters, thereby debarring the contractor from securing any contract from the railway administration in future. This subsequent action on the part of the railway authorities was complained of as amounting to a claim in tort. The contractor filed the suit both for damages for breach of contract as also for compensation for libel and their claim in tort was held not to be covered by the arbitration clause and was allowed to be proceeded with in suit. Then again, it appears that in the matter of exercising discretion under Section 34 of the Arbitration Act. the Bench took into consideration some important matters which must have impelled the Court in not allowing the claim in tort to be proceeded with before the arbitrator. In respect of the claim in tort, the plaintiff made allegations against responsible public servants, namely, the Chief Engineer, the Deputy Chief Engineer and others. Since the arbitrator under the arbitration agreement was the Deputy Chief Engineer who would not be equal in rank to one of the officers whose conduct would be subject to enquiry and whose rank would be lower than the other officers, it was considered that the decision by the arbitrator would not be just and proper in the facts of that case. Under those circumstances, the Bench of the of the Allahabad High Court did not follow the principle laid down in *Woolf v. Collis Removal Service (1947-2 All England Reporter 260)* (supra).

40. In my opinion, the principle decided in the above English decision applies to the facts of the case before us. In any event, since the Allahabad Bench decision in Gauri Shankar's case (supra), the principle has been further developed by the Supreme Court as has been laid down in the case of *Union of India v. Salween Timber and Construction Co. (India) Ltd. (AIR 1969 Supreme Court 488)* (supra) and in my opinion, that principle as laid down applies to the facts of the case before us. In my opinion, it is necessary to take recourse to the terms of the contract for the purpose of deciding the claim in tort and, as such, it is within the scope of the arbitration clause and the matter should be decided in arbitration. Whether the allegations made in the said letters set out hereinabove amounted to contain defamatory statements or not and whether the plaintiff has suffered damages on account of such defamation or not are matters which are exclusively within the jurisdiction of the arbitrator to decide. It is undoubtedly a claim arising directly out of the contract. It is, no doubt, connected with and is related to the contract. The letters were written in course of realization of the bills under the contract and, as such, the claim arises out of and is

concerning the contract. In short, there is a close nexus between the claim in tort and the contract itself. As observed above, the terms and conditions of the contract would be most relevant for the purpose of deciding the claim in tort. It necessarily follows that the claim in tort cannot be decided without recourse to the contract. That being the position, the suit cannot be allowed to be proceeded with and the matter must be decided in the forum which was agreed to by and between the parties.

41. In view of the conclusion arrived at by me on the points just now discussed, it is not necessary, in my opinion, to go into several other points raised by Mr. Das as indicated above. Since the said points have been urged by Mr. Das, I would however only record the arguments made by him.

42. Mr. Das has argued that by introducing the third party, viz., the broker in the plaint filed herein, the arbitration clause cannot be defeated and for that purpose he has relied on the decision in the case of *Biswanath Rungta v. Oriental Industrial Engineering (P.) Ltd. reported in*[30] In my opinion, that case has no application here inasmuch as the third party therein although impleaded in the suit was not a party to the contract or the arbitration clause.

43. Regarding the subsequent facts, Mr. Das has contended that the award has already been made in 1972 and in view of that, the Court should not at this stage disturb the finding of the court below. It is contended that the disputes have merged into award. In any event, it is urged that the claim for damages for defamation was not stated in the counter-statement of facts filed before the arbitration of the Bengal Chamber of Commerce and Industry. Accordingly, no question of conflict could arise. There could be no scope of conflict, because the question of tort was not there before the Arbitrator.

44. It is next argued that the award having been made, all disputes have merged into it and this is final and binding between the parties. For that purpose Mr. Das has relied on para. 7 of the First Schedule to the Arbitration Act, 1940 where it is provided that the award shall be final and binding on the parties and persons claiming under them respectively. Mr. Das has referred to AIR 1970 Supreme Court 833 and (1906) ILR 33 Cal 881.

45. In view of my findings herein, I have no hesitation to hold that the learned Judge rightly arrived at the conclusion in respect of the various points raised before him and there is no reason in this case which would justify any interference with the discretion exercised by the learned Judge. The learned Judge rightly concluded that the subsequent contract pleaded in para. 8 of the plaint did not expressly supersede the original contract dated 16th March, 1968 nor did it satisfy or discharge the said original contract. The subsequent contract merely sought to discharge the obligation of the appellant and provided that the broker would discharge the said liability of the appellant out of the moneys due by the broker to the appellant. The respondent No. 1 had denied the subsequent agreement mentioned in the plaint. Thus there was a dispute with regard to the question as to whether the subsequent agreement extinguished the original agreement or not. The learned Judge concluded that the arbitration agreement being sufficiently wide covered the said dispute and as such the dispute could be the subject-matter of reference. Accordingly, in my opinion, the learned Judge of the Court below has rightly held that the said question as to whether the subsequent contract had extinguished the original contract could be the subject-matter of the reference because it was covered by the said arbitration

[30] AIR 1975 C 1 222
clause. ***(****Rungta and Sons v. J. T R*[31]*) Damodar Valley v. K. K. Kar (AIR 1974 Supreme Court 158)* (supra). The learned Judge, according to me, has rightly stayed the suit against the defendant No. 1, the appellant herein.

46. The points argued herein, as indicated above, having been decided by me against the appellant, the appeal is bound to be and is hereby dismissed with costs. Certified for two counsel.

Hazra, J.

47. I agree.

Appeal dismissed.
[31]63 Cal WN 527 at p. 534