

BOMBAY HIGH COURT

Kamani Engineering Corporation Ltd

Vs.

Societe De Traction Et D'electricite Societe Anonyme

Suit No. 296 of 1961 with Arbitration Petn. No. 16 of 1963

(K.K. Desai, J.)

10.07.1963

JUDGMENT

ORDER : (1-10) x x x x x x

K.K. Desai, J.

11. This matter must, therefore, be considered as if the 1937 Act was applicable to the agreement for arbitration as contained in Art. X of the contract between the parties. The contention of Mr. Parpia for the Defendants is that admittedly there is an agreement between the parties to which the Protocol set forth in the First Schedule to the Act of 1937 applies and that the Plaintiffs are parties to that agreement and the plaintiffs have commenced this suit. He contends that for that reason the Defendants are entitled to stay of this suit. Mr. Banaji for the Plaintiffs, however, argues that the Plaintiffs are not parties to "a submission" as mentioned in the section. The legal proceedings by way of this suit have not been commenced by any party to the submission as required under the section. There is no submission in respect of the matter that is contained in the plaintiffs' suit. The matter that is contained in the plaintiff's suit has not been agreed to be referred to any arbitration by a submission to which the plaintiffs are parties. Now, in connection with these contentions, it is necessary to emphasize and notice the language of the section. It is apparent on a reading of the section that the legal proceedings must be commenced by a party to a submission against other party to the submission. In that connection, by avoiding the words which need not be read for finding out the meaning of "submission", the section may be read as follows :

"xxxxx if any party to a submission xxxxx commences any legal proceedings in any Court against any other party to the submission xxxxx in respect of any matter agreed to be referred, any party to such legal proceedings may, xxxxx apply to the Court to stay the proceedings; xxxxx"

I have no doubt that having regard to the above quoted language of the section, the Defendants in this case are bound to prove and establish that the Plaintiffs are parties to a submission whereby matters in this suit have been agreed to be referred to arbitration. In default of their proving this essential fact, the above applications of the Defendants must fail.

12. Mr. Parpia contends that the "Request", which I have quoted above in detail, whilst relating facts, is a submission as mentioned in this section. This writing was not in existence at the date of the institution of this suit; and the above notice of motion. Admittedly, the submission and the "Request" is the unilateral attempt by the Defendants to refer the matter of their claim for Rs. 5,79,498/- to arbitration of the Tribunal mentioned in the "Request". The "Request" on which Mr. Parpia relies has come into existence for the first time on April 6, 1962, being the date on which the Court of first instance dismissed the Defendants' Notice of Motion which I am now again considering. Having regard to the above quoted language of the section, it also appears to me to be clear that the submission that is mentioned in the section must be made by all parties who want to refer the matter in dispute to arbitration. Some of the parties to a dispute cannot make the submission as contemplated in the section. The submission must also specify in all cases the matter agreed to be referred and legal proceedings must also relate to the matter agreed to be referred by the submission of the parties. Whatever the intent and purpose of the convention might have been and whatever the intent of the legislature was in enacting Section 3 of the 1937 Act, I am bound by the language of the section. The language does not warrant a finding that a submission as mentioned in the section can be made unilaterally or by one group of parties when the other group does not join in the submission. It is also clear that a Court would not be justified, having regard to the language of the section, to stay any proceedings, the subject-matters whereof are not agreed to be referred to arbitration by a submission agreed to between the parties. Prima facie, it is impossible for the Defendants to contend that by forwarding the "Request" which they describe as "submission" to the arbitral Tribunal they have referred to arbitration the matters of claims or reliefs that the Plaintiffs have raised in this suit.

13. Apparently, the language of the section is not very happy and clear. As has been pointed out by Chakravarti, C.J. in the case of *W. Wood and Son Ltd. v. Bengal Corpn^l.*, the use of the word "submission" has created difficulties in the construction of the section. Before referring to the judgment in that case, I may state that it has appeared to me that the phrase "matter agreed to be referred" as appearing more than once in the section goes a long way to solve many difficulties which arise by reason of the language of the section. It bears repetition to state that there is no difficulty in holding that a party to a submission must commence legal proceedings and that the legal proceedings must be in respect of the matter agreed to be referred by the submission. The observations of Chakravarti, C.J. in this connection in the above case are as follows :

"It is arbitration agreements made between parties belonging to jurisdictions of different States that the Protocol recognises and what Section 3 of the Act contemplates is

obviously an actual reference to arbitration made in pursuance of one such agreement. Whatever words may be substituted for the word 'submission' in Section 3, it is impossible to escape the effect of the words 'made in pursuance of an agreement to which the Protocol xxxxx applies. If the agreement to which the protocol applies is an agreement for arbitration, there cannot possibly be an agreement in pursuance of that agreement. Section 3 must, therefore, be construed as contemplating a case where not only is there an arbitration agreement in force between the parties, but there has also been an actual reference to arbitration."

¹ AIR 1959 Cal 8

"If no reasonable construction of Section 3 would permit the reading of the word 'submission' as 'agreement', we cannot possibly enlarge the scope of the section by putting upon it a meaning unwarranted by the words which the Legislature has used. It is not inconceivable that since stay under Section 3 of the Arbitration (Protocol and Convention) Act is not discretionary with the Court but mandatory and since the effect of the section is that provision for an arbitration ousts the jurisdiction of the Court altogether, the Legislature might have considered it expedient to limit the operation of the section to cases where there had been an actual reference to arbitration. But as I have already stated, speculation as to the motive which influenced the Legislature is fruitless."

14. The discussion about this very matter in Russell on Arbitration is quoted in that case as follows :

"The words of the section, however, would seem to limit its operation to cases where some sort of 'agreement to submit' is followed, by an actual 'submission' made 'pursuant to' it. xxxxx"

The ultimate decision of the Court was;

"The point is not without difficulty, but giving the matter the best consideration I can, I have come to the conclusion that, it is not possible to read Section 3 of the Arbitration (Protocol and Convention) Act as not limited to cases where there is not only an arbitration agreement, but in pursuance to that agreement, a reference to an arbitration has also been made, xxxxx"

15. It is necessary to record that Mr. Banaji has relied upon the word "commences" as contained in the section and argued that it is impossible that where a submission has not been made prior to the date of institution of legal proceedings, the Court is called upon to grant stay under Section 3. Mr. Parpia has argued that the word "commences" in this section really has the meaning of "has commenced" and ought to be so construed. His argument is that the intention of the section could not have been that a recalcitrant party having agreed to refer a matter to arbitration should be allowed to proceed with litigation in Court. If the true construction of this section is that the

Court has no discretion and the Court's jurisdiction could be ousted by agreement of parties, the section must obviously be construed very strictly. If that is the true position there would be no warrant for construing the word "commences" as "has commenced".

16. From what has been read from the books as also from the above judgment of the Calcutta High Court, it has appeared that the authors of law books as well as Courts have construed the word "shall" in this section as compelling the Court to grant stay where the provisions of the section applied. That, however, leads to this difficulty that a party to a submission may refuse to proceed with or co-operate in arbitration and yet would be entitled to obtain stay from the Court. It is difficult to hold that it was intended that in such a case the Court should have no discretion to refuse stay. It appears to me that agreement of parties could never have been intended to absolutely oust jurisdiction of Courts. It is well established that agreements providing for ouster of jurisdiction of Courts are not enforced and are void. It is true that a Court would in its discretion enforce an agreement between the parties to go to arbitration, It is difficult to understand why an agreement to go to foreign arbitration must be considered more sacred than an agreement to go to arbitration under the Indian Arbitration Act itself. The least essential matter for success of an application for stay of legal proceedings apparently must be readiness and willingness of the applicant to carry out his part of the agreement, i.e. to proceed with arbitration. Because this essential is not mentioned in the section and the word "shall" is used, Court cannot fail to notice what is least essential in all claims for specific performance. It is not necessary to discuss this question in details in this case. It appears to me that in appropriate cases the Court would have power to refuse stay in application under the provisions of Section 3, though other conditions of the section are satisfied. In my view, the word "shall". In this section ought to be construed merely as "may". It appears to me that the ordinary jurisdiction of Court to try legal proceedings cannot be allowed to be compulsorily ousted by agreements of parties.

17. Mr. Banaji has relied upon the preamble and Section 2 of the Act and argued that to the arbitration clause and the contract between the parties the provisions of the Act are not applicable at all. The relevant parts of the preamble and Section 2 run as follows :

"Whereas India was a State signatory to the Protocol on Arbitration Clauses set forth xxxxx, subject in each case to a reservation of the right to limit its obligations in respect thereof to contracts which are considered as commercial under the law in force in India.

"2. xxxxx 'foreign award' means an award on differences relating to matters considered as commercial under the law in force in India xxxxx." His contention is that the contract between the parties is not commercial. The differences between the parties do not relate to matters which are considered as commercial under the law in force in India. In this connection, both parties have relied upon the various provisions in the contract between the parties as also the details of claims as contained in the plaint. It is sufficient to refer in this connection to Art. IV in the contract. This article defines the scope of work to be done by the Defendants. It appears that the work had to be done in Brussels and India,

Burma, Ceylon and Nepal. The object of the agreement is mentioned in Art. II and in substance is that Traction has to provide Kamani (Plaintiffs) the necessary technical assistance for the construction of overhead equipment, for railway electrification, tramway systems and trolley buses in India, Burma, Ceylon and Nepal. The technical assistance is to have two particular aspects, (1) consisting of preparation and drawing up of proposals and (2) consisting of assistance in execution of works entrusted to it. The details of works appear to be (i) study of tender documents by Traction, (ii) calls for tenders for supply of equipment, (iii) analysis of tenders received and proposals as to tenders to be selected and (iv) preparation of technical documents to be attached to proposals to be made by Kamani. Traction also had to do site study of sections to be electrified, to find out cost elements depending on local conditions and detailed analysis of specifications and their attachments. They had further to do works like design, preparation of documents for ordering materials and equipment, assistance in setting up time schedules for supply of equipment and for erection work, preparation of records (for location of poles and diverse other things necessary in completing the works) and supply of necessary field staff (engineers, technicians, foremen and head linemen) for organisation supervision of site work. Traction also agreed to train trainees sent by Kaman to the offices of Traction in Brussels. The above describes the nature of the contract between the parties and the works to be done. In Art. VI the remuneration of Traction is described as "fees" and fixed on percentage basis, for such remuneration Traction is authorised to prepare invoices and it is provided that the same may be checked by Chartered Accountants. The question is whether this contract should be considered as relating to matters considered as commercial under the law in force in India's mentioned in Section 2 and whether the contract is commercial as envisaged in the preamble of the Act. In this connection, Mr. Parpia has relied upon certain authorities, but the best authority in favour of the Defendants is the observations of Shah, J. in the case of *Atiabari Tea Co. Ltd. v. State of Assam*², at p. 259. The question before the Court related to the competence of Assam Legislature to enact the Assam Taxation (on Goods carried by Roads or Inland Waterways) Act, 1954. The Court was called upon to consider whether, having regard to the provisions in Article 301 of the Constitution, the Assam Legislature was not prevented from enacting the above law. The Article 301 provides :

"Subject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free."

The argument before the Court was that the tax levied by the Assam Act was infringing the freedom guaranteed relating to trade, commerce and intercourse throughout the territory of India by Article 301. Whilst discussing the true effect of the Article 301, it was observed :

"Trade and commerce do not mean merely traffic in goods, i.e., exchange of commodities for money or other commodities. In the complexities of modern conditions, in their wide sweep are included carriage of persons and goods by road, rail, air and waterways,

contracts, banking, insurance transactions in the stock exchanges and forward markets, communication of information, supply of energy, postal and telegraphic services and many more activities too numerous to be exhaustively - enumerated which may be called commercial intercourse. Movement of goods from place to place may in some instances be an important ingredient of effective commercial intercourse, but movement is not an essential ingredient thereof. Dealings in goods and other commercial activities which do not import a concept of movement are as much part of trade and commerce as transactions involving movement of goods. The guarantee of freedom of trade and commerce is not addressed merely against prohibitions, xxxxx. Every sequence in the series of operations which constitutes trade or commerce is an act of trade or commerce and burdens or impediments imposed on any such step are restrictions on the freedom of trade, commerce and intercourse. What is guaranteed is freedom in its widest amplitude - xxxxx".

Mr. Parpia has strongly relied upon the above observations and particularly the words "communication of information". Mr. Banaji has relied upon the definitions of the words "commerce" and "commercial" as contained in Webster's Third New International Dictionary (unabridged). He has also relied upon the Rules on the Original Side of this

² AIR 1961 SC 232

Court defining "Commercial causes". Mr. Parpia has relied upon the following observations in the case of *W. and A. McArthur Ltd. v. State of Queensland*³, ourt :

"It stands to reason that if 'trade, commerce, and intercourse' embrace not only the act of transporting goods and persons across the border of adjacent States but the whole transaction of exchange and travel between States, the protection of Section 92 is as applicable to the initial and the final steps as to the one single intermediate step Which takes place at the very boundary, xxxxx One view Insisted on by the defendants was, however, that 'trade, commerce, and intercourse among the States' was confined to the mere act of transportation of goods across the border, and a grudging assent was given to personal passage from one State to another independent of trade and commerce. This attitude was necessary preparatory to the contention as to the meaning of 'absolutely free'. We have therefore to examine the matter. The terms 'trade, commerce, and intercourse' are not terms of art. They are expressions of fact, they are terms of common knowledge, as well known to laymen as to lawyers, and better understood in detail by traders and commercial men than by Judges. xxxxx The particular instances that may fall within the ambit of the expression depend upon the varying phases and development of trade, commerce and intercourse itself. Aviation and wireless telephony have lately added to the list of instances, but the essential character of the class remains the same. 'Trade and commerce' between different countries - we leave out for the present the word 'intercourse' has never been confined to the mere act of transportation of merchandise over the frontier. That the words include that act is, of course, a truism. But that they go

far beyond it is a fact quite as undoubted. All the commercial arrangements of which transportation is the direct and necessary result form part of 'trade and commerce'. The mutual communings, the negotiations, verbal and by correspondence, the bargain, the transport and the delivery are all, but not exclusively, parts of that class of relations between mankind which the world calls 'trade and commerce' xxxxx". There is further discussion in this case which has not been relied upon by either side.

18. As regards the case before the Supreme Court as also in the Commonwealth Law Reports, I must say that the discussion was more concerned with the freedom guaranteed by the words "trade, commerce and intercourse". The Court was anxious to consider the question of legality of the Statutes and legislative competence of Legislatures.

19. These observations are not irrelevant and must be borne in mind before deciding whether the contract in this suit should be held to be relating to matters considered as commercial under the law in force in India. It is difficult to find the exact meaning of the phrase "matters considered as commercial under the law in force in India". Neither side has been able to point out to me any particular law wherein the phrases "commercial" or "matters commercial" have been defined. I apprehend that the intent of the Legislature while using the above phrase was that in matters of commercial contracts foreign arbitration's and awards should be recognized and enforced. Having regard to the purpose of the Act, I have no doubt that widest meaning must be given to the word "Commercial" as contained in Section 2. It is also important to bear in mind that though in the preamble the word "contracts" is used, in the section the phrase is "relating to matters considered as

³²⁸ Com-W. LR at p. 546

where phrase "trade, commerce and intercourse" was a matter of discussion before the C commercial". Commerce has been held to be a thing involving idea of profits and Mr. Parpia has with some force contended that a contract made to make profits ought to be considered commercial. According to him, this is a contract made for making profits and, therefore, is commercial. He has contended that in modern times collaboration agreements for sale of "Know-How" or technical assistance have come into existence and these agreements are all commercial. Mr. Banaji has, however, with equal emphasis contended that this contract is a contract of technical assistance. It is not a contract for sale of anything. According to his contention, the work that the Defendants agreed to undertake was of the nature of work that an architect undertakes in connection with "construction contracts". It appears to me that the work that the Defendants undertook was of a professional character and did not involve any business or commerce at all. The contract is on the face of it only a contract for technical assistance. The contract does not involve the Defendants into any business of the Plaintiffs. It is not in any sense participation in profits between the parties. The remuneration of the Defendants is for that reason described as "fees" and is only on percentage basis. By this contract, the Defendants refused to be involved into any business of the Plaintiffs and/or any contracts of the Plaintiffs. They have scrupulously kept themselves out of any commercial relations with the Plaintiffs. In

my view, the contract is more like a retainer or contract that is made between a Solicitor a counsel and an advocate on the one hand and a client on the other. It is difficult to describe such a contract as commercial. It is therefore, difficult for me to accept Mr. Parpia's contention that this contract should be held to be relating to matters considered as commercial according to law in force in India.

20. Mr. Banaji has also argued that since the Defendants have filed their own counterclaim in this Court, they are not entitled to reliefs either under Section 3 of the 1937 Act or wider Section 34 of the Indian Arbitration Act. The contention is that the filing of the counterclaim is entirely voluntary and is an independent institution of suit by the Defendants themselves in the jurisdiction of this Court. This act should be considered as estoppel and waiver of the rights of the Defendants to have the disputes between the parties decided under agreement of arbitration. This step is unequivocal expression of the Defendants that the rights of the parties should be decided by this Court. Such a step in the proceedings even taken subsequent to an application for stay under either of the sections ought to be treated as sufficient good reason why the Plaintiffs are not bound to go to arbitrators and the Defendants should be refused stay of the suit. It is clear unequivocal expression by the Defendants that they are at the stage of counterclaim not ready and willing to do all things necessary for the proper conduct of arbitration. This contention is developed by arguing that there is no application before the Court for stay of the counterclaim which ought to be treated as independent proceedings instituted by the Defendants in this Court. The Defendants to the counterclaim (Plaintiffs) on the contrary, are desirous that the counterclaim should also be disposed of by this Court.

21. Mr. Parpia has in reply contended that the Defendants had taken proceedings by way of Notice of Motion and Arbitration Petition No. 16 of 1963 long prior to filing of the counterclaim. The Plaintiffs had by the order dated January 10, 1963, agreed with the Defendants that the Defendants might file their written statement and counterclaim without prejudice to their contentions. The Defendants had, according to Mr. Parpia, unequivocally, by taking the above proceedings and pursuing appeals to the Division Bench of this Court and to the Supreme Court, exhibited their intention that the matters in dispute between the parties should be decided by arbitration only. The Defendants by praecipe dated April 19, 1963, even wrote to the Prothonotary of this Court to find out if the Notice of Motion could be heard at an early date. The Defendants' claim for payment of money was getting barred by the Law of Limitation. The Defendants, therefore, were obliged to file the counterclaim on April 22, 1963, in this Court. There is no doubt that these are very strong circumstances showing the intention of the Defendants that they desired that the disputes between the parties ought to be decided by arbitration. The question that arises is as to what is the effect of the Defendants' institution of the counterclaim in this Court. Obviously, there is no application, for stay of the counterclaim. The scheme of Section 34 is that defendant to a suit is not entitled to stay if he filed written statement or takes any other steps in the proceedings before making his application under the section. The scheme also is that the applicant defendant must be continuously ready and willing to do all

things necessary to the proper conduct of arbitration. The intent of the above provisions of the section, obviously, is that if defendant takes any steps even subsequent to his application for stay of the suit which may be considered as his own steps in the proceedings and or his own independent steps to proceed with the matter in Court to that extent, his application must be prejudiced. His steps are evidence that he, having regard to those steps, has not continued to remain ready and willing to do all things necessary for the proper conduct of arbitration. I requested Mr. Parpia to produce any authority where even after filing a written statement the Court has granted stay under Section 34 to the applicant-defendant. For apparent reasons, he was unable to produce any such authority. I find it extremely difficult to hold that in spite of the defendant having filed his counterclaim in this Court, he should be entitled to stay of the suit under Section 34 of the Indian Arbitration Act. In my view, having regard to the intent and purpose of Section 34, it is clear that any party who files written statement, and more so a counterclaim, is not and cannot be entitled to stay of the suit. The agreement made between the parties for filing of the counterclaim without prejudice to the rights and contentions cannot be enforceable and/or binding on the Court. If the Defendants to the counterclaim do not press for stay of the counterclaim, the Defendants to the suit cannot go to arbitration in respect of that counterclaim. The arbitrators would lose jurisdiction to decide the counterclaim when they have notice that the counterclaim is filed in Court. The Defendants are helpless, because they cannot apply for withdrawal of the counterclaim at this stage without securing, in the first instance, stay of the suit. In these circumstances, it is difficult to accept Mr. Parpia's contention that the Defendants in this suit are entitled to stay of the suit under Section 34. These very considerations appear to me to be applicable to the petition for stay under Section 3 of the 1937 Act. Obviously, by filing their counterclaim in this Court, the Defendants have deprived the arbitral Tribunal of its jurisdiction to consider the matters of counterclaim in arbitration. In my view, the result of the act of filing of the counterclaim in this Court as regards the matters of the counterclaim must be that the arbitral Tribunal cannot with the notice of such institution proceed to decide the reliefs claimed in the counterclaim. As the defendants to the counterclaim do not desire stay of the counterclaim, it is obvious that the arbitration has become inoperative to the extent of the counterclaim. For this reason also, the Defendants are not entitled to stay of the suit under Section 3 of the 1937 Act.

22. In connection with the discretion that the Court has for granting or refusing stay under Section 34 of the Indian Arbitration Act, Mr. Banaji has argued by relying upon various facts mentioned in the affidavits that the stay of the suit ought to be refused. He contends that the bulk of evidence is in India. A large part of the work was done in India even by the representatives who were sent by the Defendants to India. He also contends that there is correspondence with the Railway administration that is relevant to decide the questions raised in the suit and counterclaim. There are relevant books of account and other documents of the Plaintiffs which are all in India. These arguments have not impressed me at all. Even if these contentions are true, it is obvious that the Plaintiffs must have known when agreeing to the arbitration clause as contained in Art. X of the contract that in connection with the work done in pursuance of the

contract, there would be bulk of evidence both in India as well as in Brussels. The work would be done in a large way in Brussels as well as in India. Relevant evidence must come into existence and would exist both in India as well as Brussels. In spite of that knowledge, the Plaintiffs agreed to go to arbitration of the foreign Tribunal as mentioned in Art. X of the contract. The Plaintiffs cannot escape from the result of their own agreement arrived at after knowledge of these facts which they must be deemed to have known. One argument of the Plaintiffs was that foreign exchange would not be available if the suit was stayed and the Plaintiffs were made to refer their claim to arbitration. This may be a difficulty. There is no evidence of proof of that difficulty at present. If and when the Plaintiffs after making sincere applications for foreign exchange are unable to secure the same, the question as to whether the Plaintiffs should not in those circumstances be forced to go to arbitration of foreign Tribunal may arise. I am not sure that applications made by the Plaintiffs in appropriate way would be defeated. It is quite possible that such applications may be granted and the Plaintiffs may secure foreign exchange. For this reason alone, I am not prepared to hold that balance of convenience requires that stay should be refused.

23. Under the circumstances, the above Notice of Motion and the petition of the Defendants are dismissed with costs.

Petition dismissed.