(2012) 07 CAL CK 0053

Calcutta High Court

Case No: G.A. No. 3568 of 2011 and Extra Ordinary Suit No. 6 of 2011

Gujrat NRE Coke Limited and Another		APPELLANT
	Vs	
Gregarious Estates Incorporated and Others		RESPONDENT

Date of Decision: July 31, 2012

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 45, 7
- Specific Relief Act, 1963 - Section 41

Hon'ble Judges: I.P. Mukerji, J

Bench: Single Bench

Advocate: Abhrajit Mitra with Mr. Soumavo Ghose and Mr. M.S. Tiwari, for the Appellant; Bimal Chatterjee , Mr. T.K. Bose with Mr. A.K. De, Advocate for the Respondent No. 2, for the Respondent

Judgement

I.P. Mukerji, J.

The first defendant is a Liberian company. They deliver sea going vessels on charter. On 29th January, 2008 they entered into a time charterparty agreement with the first plaintiff. A vessel was to be let out on time charter for worldwide trading for a minimum period of 82 months which could extend to a maximum period of 86 months. The vessel was to be delivered straight from the yard. A delivery period was fixed between 1st June, 2011 and 31st December, 2011 as provided in Clause 82 of the charterparty. This clause further provides for notice to be given by this defendant about their readiness to deliver the vessel. The terms in this clause are in a language peculiar to the shipping trade. They provide for 90 days'' notice by this defendant about their readiness to deliver the vessel followed by other notices indicating the exact time period within which the vessel would be delivered. On 18th April, 2011, they gave 90 days'' notice. The vessel was to be delivered on 16th July, 2011 from the shipping yard at London. This was followed on 25th May, 2011 by 60

days'' notice of delivery on or about 23rd July, 2011 from the same yard. This was backed up by another notice of 23rd June, 2011 giving 30 days'' notice. The date of delivery remained the same i.e. 23rd July, 2011. This defendant says that the plaintiff was never ready to take delivery of the vessel. On their part they had made the vessel ready to be delivered from the yard on the appointed date.

2. The charterparty, according to the document stated that it was executed in London. It contained an Arbitration Clause. It was Clause 84. I will set out the terms:

Dispute Resolution Clause English Law, London Arbitration

(a) This contract shall be governed by and construed in accordance with English law and any dispute arising out of or in connection with this Contract shall be referred to arbitration in London in accordance with the Arbitration Act, 1996 or any statutory modification or re-enactment thereof save to the extent necessary to give effect to the provisions of this Clause.

The arbitration shall be conducted in accordance with the London Maritime Arbitrators Associaiton (LMAA) Terms current at the time when the arbitration proceedings are commenced.

The reference shall be to three arbitrators. A party wishing to refer a dispute to arbitration shall appoint its arbitrator and send notice of such appointment in writing to the other party requiring the other party to appoint its own arbitrator within 14 calendar days of that notice and stating that it will appoint it arbitrator as sole arbitrator unless the other party appoints its own arbitrator and gives notice that it has done so within the 14 days specified, the party referring a dispute to arbitration may without the requirement of any further prior notice to the other party, appoint its arbitrator as sole arbitrator and shall advise the other party accordingly. The award of a sole arbitrator shall be binding on both parties as if he had been appointed by agreement.

Nothing herein shall prevent the parties agreeing in writing to vary these provisions to provide for the appointment of a sole arbitrator.

In cases where neither the claim not any counterclaim exceeds the sum of USD 1000, 000 (or such other sum as the parties may agree) the arbitration shall be conducted in accordance with the LMAA Small Claims Procedure current at the time when the arbitration proceedings are commenced.

(b) Notwithstanding the above, the parties may agree at any time to refer to mediation any difference and/or dispute arising out of or in connection with this Contract.

(i) Either party may at any time and from time to time elect to refer the dispute or part of the dispute to mediation by service on the other party of a written notice (the "Mediation Notice") calling on the other party or agree to mediation.

(ii) The other party shall thereupon within 14 calendar days of receipt of the Mediation Notice confirm that they agree to mediation, in which case the parties shall thereafter agree a mediator within a further 14 calendar days, failing which on the application of either party a mediator will be appointed promptly by the Arbitration Tribunal ("the Tribunal") or such person as the Tribunal may designate for that purpose. The mediation shall be conducted in such place and in accordance with such procedure and on such terms as the parties may agree or, in the event of disagreement, as may be set by the mediator.

(iii) If the other party does not agree to mediate, that fact may be brought to the attention of the Tribunal and may be taken into account by the Tribunal when allocating the costs of the arbitration as between the parties.

(iv) The mediation shall not affect the right of either party to seek such relief of take such steps as it considers necessary to protect its interest.

(v) Either party may advise the Tribunal that they have agreed to mediation. The arbitration procedure shall continue during the conduct of the mediation but the Tribunal may take the mediation timetable into account when setting the timetable for steps in the arbitration.

(vi) Unless otherwise agreed or specified in the mediation terms each party shall bear its own costs incurred in the mediation and the parties shall share equally the mediator''s costs and expenses.

(vii) The mediation process shall be without prejudice and confidential and no information or documents disclosed during it shall be revealed to the Tribunal except to the extent that they are disclosable under the law and procedure governing the arbitration.

3. It stipulated that the contract would be governed and interpreted according to the English Law. The place of arbitration would be London. Arbitration would be in accordance with the English Arbitration Act, 1996. If a dispute arose a party proposing to refer it to arbitration was to appoint its arbitrator and send notice of it to the other party. The other party would have to appoint its own arbitrator within 14 calendar days of that notice. If the other party did not appoint its arbitrator the arbitrator appointed by the first party would automatically assume office as the sole arbitrator.

4. On 13th July, 2011, the plaintiff filed a suit in this Court against the defendants. It was numbered as C.S. No. 161 of 2011. The plaintiff, inter alia, sought a decree restraining the first defendant from proceeding in terms of the charterparty agreement. It also sought a declaration that the arbitration agreement between the first plaintiff and the first defendant was void and a money decree, damages and so on.

5. The suit was filed on the footing that the charterparty agreement was entered into at the registered office of the first plaintiff within jurisdiction. The case in the plaint is that the first plaintiff was desirous of transporting coal from Australia to its plants in India. For that purpose it needed a ready vessel. The first plaintiff wanted to charter the vessel from the first defendant provided it was under the management of the second, third and fourth defendants. The fifth defendant Bhatia International Pet Limited also known as BIPL Operation started acting for first plaintiff. The first plaintiff found out that the second, third and fourth defendants had not been involved with the first defendant since April, 2010.

6. Then it was alleged that the requisite notice of 30 days was not given about the readiness of the vessel and hence there was a fundamental breach of the contract. Furthermore, the plaintiffs were assured of earning Rs. 56.25 crores after seven years of the charterparty agreement. Because of the above misrepresentation and the absence of 30 days'' notice, the plaintiffs would be deprived of the profit. The arbitration agreement was between the first plaintiff represented by the second plaintiff and the first defendant represented by the second, third and fourth defendants. As the first defendant was not being managed by these defendants, the arbitration agreement became inoperative. The fifth defendant could not be the manager or owner of the first defendant.

7. On 27th July, 2011 an interlocutory application in aid of the above suit (G.A. 2306 of 2011) was served on the first defendant.

8. Proceedings were taken out by the first defendant in the High Court of Justice of England and Wales, in its Queen''s Bench Division, Commercial Court. An application was made in that Court under the Arbitration and Conciliation Act, 1996. The order that was sought was an anti-suit injunction. It appears to have been filed on 1st August, 2011. The first defendant considered the injunction so urgent that their counsel telephoned Mrs. Justice Thirlwall on 1st August, 2011. The telephone call lasted for 1 hour 15 minutes, between 6.45 p.m. and 8 p.m. An order of injunction was passed on that day commanding the plaintiffs being the defendants in the English action to withdraw the interlocutory application being G.A. 2306 of 2011 and furthermore restraining them from taking any steps in the suit C.S. No. 161 of 2011. The case was placed for further hearing on 26th August, 2011 wrongly printed as 26th August, 2010 in the body of the order. By a letter dated 2nd August, 2011 the solicitors for the first defendant forwarded the order of the English Court dated 1st August, 2011, to the first plaintiff.

9. By a letter dated 3rd August, 2011 the solicitors for the first defendant gave notice to the first plaintiff to appoint an arbitrator by 17th August, 2011 failing which they would appoint Mr. Baker Harber as the sole arbitrator or agree to the appointment of Mr. Baker Harber as the Sole Arbitrator without further notice. This notice was sent out under Clause 84 of the Charterparty.

10. The plaintiffs hit back. They filed another suit before the learned City Civil Court, Calcutta (Title Suit No. 1513 of 2011) for an injunction restraining the first defendant from proceeding with the English action and from invoking the arbitration clause. On 9th August, 2011 the Court refused the order of injunction.

11. From this order of the learned City Civil Court a first appeal was preferred by the plaintiffs before a Division Bench of this Court. On 12th August, 2011 this Court passed an ex parte order restraining the first defendant from proceeding with the English action and also from taking any step with regard to the arbitration agreement. On 16th September, 2011 the Division Bench continued its order of injunction till 21st September, 2011. The validity of this interim order expired on 21st September, 2011.

12. As the first plaintiff had not appointed its arbitrator, by operation of Article 84 of the Charterparty, Mr. Baker Harber was appointed as the sole arbitrator.

13. The plaintiffs acted swiftly. An application was filed in this Court (ALP No. 14 of 2011) under Clause 13 of the Letters Patent. It appeared in the list for consideration on 30th September, 2011. Directions were given for filing affidavits. An interim injunction was also passed on the same day restraining the first defendant from taking steps in the arbitration for five weeks after the ensuing long vacation. The first defendant appealed against this order. On 16th November, 2011, the Appeal Court directed the trial Judge to dispose of the Clause 13 Application for transfer. On 29th November, 2011, the Clause 13 Application was allowed transferring the City Civil Court suit to this Court.

14. On 1st December, 2011 a statement of claim was filed by the first defendant before Mr. Baker Harber, sole arbitrator.

15. It appears that on 2nd December, 2011 Patherya J was approached for extending the interim order of injunction made on 30th September, 2011. Her ladyship observed that since the City Civil Court suit had already been transferred and the application for transfer had been disposed of no further order extending the injunction could be passed. This order was passed on 2nd December, 2011.

16. Hence, the interim order staying arbitration was no longer valid.

17. The first plaintiff now made another application before this court in the transferred suit (EOS No. 6 of 2011) renewing its prayer for injunction. The application came up before me. I was not convinced that such an order of injunction could be passed by this Court. I made an order on 21st December, 2011 reserving liberty to the first plaintiff to approach the Court of Appeal of England and Wales to set aside the order of the English Court made on 1st August, 2011. I observed that till those steps were taken, the Arbitral Tribunal was not to take any further steps till 31st January, 2012. The first plaintiff appealed. A Division Bench of our Court by an order of 10th January, 2012 directed me to clarify this order. The clarification was

made by me by two orders dated 27th January, 2012 and 2nd February, 2012.

18. After transfer of the City Civil Court suit an application had been made therein on or about 14th December, 2011 by the first plaintiff, for continuation of the order of injunction passed by the Division Bench of this Court in the appeal against the order of the learned City Civil Court, refusing injunction. It is this application which was considered by me and is being dealt with in this judgment.

CONTENTIONS:

PLAINTIFFS

19. Mr. Abhrajit Mitra, learned Advocate appearing on behalf of the plaintiffs made very elaborate submissions which are summarized in point form. I will deal with the details when I discuss the merits of the case.

a) The first defendant did not make an application u/s 45 of the Arbitration and Conciliation Act, 1996 in suit No. 161 of 2011, in this Court. That section provides that any party to an international arbitration agreement could request the Court to refer the parties to arbitration. The Court is to consider such request and if found to be valid, refer the parties to arbitration. No such request was ever made by the defendant.

b) He places Section 32 and Section 33(1)(a) and (b) of the Civil Jurisdiction and Judgments Act, 1982, a United Kingdom Act. There is a specific provision therein that appearing in a foreign Court to submit that the parties should be referred to arbitration did not amount to submission to the jurisdiction of the foreign Court. These sections of the Act related to situations as to when a judgment given by a Court of an overseas country would not be recognized in the United Kingdom. Therefore there was no question of the first defendant contending that it did not make the section 45 Application because it did not want to submit to the jurisdiction of the Court of this country.

c) When Court proceedings and arbitration are pending side by side, the Court may in an appropriate situation stay the arbitration and continue with the suit. He referred me to the case of Albon vs. Naza Motor Trading Sdn Bhd reported in 2008 1 LLR 1. He also cited my judgment in the case of South City Projects (Kolkata) Limited Vs. Jugal Kishore Sadani & Ors. reported in 2010 (4) CLT 55. He showed me the case of Nicco Corporation Limited vs. Prysmian Cavi E Sistemi Energia Srl and Another reported in 2010 (11) SCC 744.

d) The English arbitration was oppressive for the plaintiffs. On that ground the plaintiffs were entitled to obtain stay of the arbitration. He relied on the case of Albon vs Naza Motor Trading Sdn Bhd reported in 2008 1 LLR 1 and the case of Compagnie Europeene De Cereals S.A. vs. Tradax Export S.A. reported in 1986 2 LLR 301. A suit is maintainable to refer the parties to arbitration, instead of resorting to the Arbitration and Conciliation Act, 1996. He cited the cases of Mahesh Kumar Vs.

Rajasthan State Road Transport Corporation, ; Marwadi Shares And Finance Pvt. Ltd. vs. Kishorkumar Nagjibhai Mavani reported in 2009 2 Arb. LR 198.

e) The Court could issue an injunction restraining foreign parties. He cited the case of Bhagwandas Auto Finance Ltd. and Others Vs. Citicorp Finance (India) Limited., ; V.O. Tractoroexport, Moscow Vs. Tarapore and Company and Another, ; Oil and Natural Gas Commission Vs. Western Company of North America, ; Nicco Corporation Limited vs. Prysmian Cavi E Sistemi Energia Srl and Another reported in 2010 (11) SCC 744.

f) An injunction against a foreign party could be enforced by a Court which passed an order of injunction, relying on Bhagwan Shankar Vs. Rajaram Bapu Vithal, .

DEFENDANT No. 1:

20. Mr. Bimal Kumar Chatterjee, learned Senior Advocate assisted by Mr. Tilak Kumar Bose made the following submissions:

a) It would appear from the charterparty that it was concluded in London on 29th January, 2008. This fact is mentioned in the Charterparty itself, although the plaintiffs wrongfully claimed that this agreement was concluded at their place of business at Camac Street, Kolkata.

b) Clause 84 was the arbitration clause. It said that the place of arbitration would be London. The substantive law to govern the disputes between the parties was English law. He submitted that England had a closer connection with the contract and the transactions between the parties. Hence, this Court should decline jurisdiction. The parties may be referred to arbitration. He relied on the case of Smith Kline & French Laboratories Ltd. and Others vs. Bloch reported in 1983 (1) WLR 730 and Barclays Bank plc Vs. Homan and others reported in 1993 BCLC 680.

c) The agreement was for manufacture and making available by the first defendant to the plaintiffs, a vessel of the specification mentioned in the Charterparty, from the yard. Delivery was to be made between 1st June, 2011 and 31st December, 2011. The Charterparty contemplated various notices regarding readiness for delivery of the vessel, to be given by the first defendant to the plaintiff. Such notices were to be delivered 90 days, 60 days and 30 days prior to delivery. The 30 days notice was issued on 23rd June, 2011.

d) After receipt of this notice the plaintiffs instituted the suit in this Court. They filed the suit so as to avoid taking delivery of the vessel and to avoid chartering it. They were unwilling to fulfill the terms of the Charterparty agreement.

e) Clause 129 of the Charterparty provided for a profit sharing arrangement between first plaintiff and the first defendant after completion of seven years.

f) The plaintiffs did not deny the existence of the charterparty agreement but their case is that this agreement has become avoidable. u/s 7 of the Arbitration and

Conciliation Act, 1996 of the United Kingdom, the arbitration agreement is to be taken as a separate agreement. This has also been held by our Courts in the cases of Union of India (UOI) Vs. Birla Cotton Spinning and Weaving Mills Ltd., and M/s. Indian Drugs and Pharmaceuticals Ltd. Vs. M/s. Indo Swiss Synthetics Gem Manufacturing Co. Ltd. and others,

g) Section 41 of the Specific Relief Act forbids an order of injunction to be made restraining a Court which is not subordinate to the Court passing the order, from proceeding with a case. Reliance was placed in Section 41(b) of this Act.

h) In any event the case of the plaintiffs in the plaint is about inadequate notice and breach of the agreement by the first five defendants and that the plaintiffs by such action stood discharged from performing their obligations under the agreement. This dispute can well be adjudged by the arbitrator or arbitrators appointed under the arbitration agreement.

i) Thereafter I was taken in detail through the statement of claim filed by the first defendant before the learned arbitrator, basing its case on damages. Reliance was placed on the case of Modi Entertainment Network and Another Vs. W.S.G. Cricket Pte. Ltd. reported in AIR 2003 SCC 341 to contend that where a forum was the natural forum for institution of a proceeding, an anti-suit injunction should not be passed.

21. I will discuss the submissions of the first defendant in detail as I discuss the merits of this matter.

DISCUSSION AND FINDINGS:

22. The suit of the plaintiffs was first in point of time. It was filed on or about 13th July, 2011 in this Court and numbered as C.S. No. 161 of 2011. What was the grievance of the plaintiffs in this suit? The sixth defendant was described as a well known broker in the shipping trade. They approached the plaintiffs and told them that they knew the second, third and fourth defendants and that these defendants controlled the first defendant. On this representation the charterparty agreement dated 29th January, 2008 was executed in London. According to the plaintiffs it was executed at 22 Camac Street, Kolkata. Then the notices dated 18th April, 2011 25th May, 2011, 23rd June, 2011 and 12th July, 2011 about the readiness of the vessel were delivered by the fifth defendant, M/s. Bhatia International Pte Ltd. also known as BIPL Operation. They were said to be acting on behalf of the first defendant. The plaintiffs learnt from the sixth defendant that the second, third and fourth defendants were not representing the first defendant from April, 2010.

23. Thereafter breach of the charterparty is alleged in paragraph 13 of the plaint. Thirty days'' notice was not given by the said defendants to the plaintiffs, it is alleged.

24. The cause of action of the suit seems to be that the plaintiffs entered into the charterparty with the first defendant with the understanding that the second, third and fourth defendants were in control thereof and would continue be in its control. On that basis the plaintiffs expected to earn "super profit" after completion of seven years of the charterparty agreement, in accordance with that agreement. The expectation of profit was Rs. 56.25 crores. The second, third and fourth defendants were obliged to give thirty days'' notice before any change of management of the first defendant. Hence, the notices pleaded in paragraph 10 of the plaint were bad. The notices were issued without authority. Thus, there was fraud. The agreement became voidable. A declaration was, inter alia, sought that the arbitration agreement was null and void. A decree for Rs. 56.25 crores was claimed. The said notices were to be adjudged, void, delivered up and cancelled. The defendants were to be restrained from proceeding with the charterparty agreement.

25. Then comes the second event. On 1st August, 2011 an action was instituted in the Queen''s Bench Division of the High Court of Justice of England and Wales by the first defendant. Thirlwall J passed an ex parte order of injunction on the same day asking the plaintiffs to withdraw the interim application filed in connection with the above suit in this Court and also restraining them from taking any steps in the suit. The first defendant was permitted to serve out an arbitration claim.

26. Then, comes the third event. The plaintiffs retaliated by filing a second suit being T.S. No. 1513 of 2011 in the learned City Civil Court, on 4th August, 2011 seeking an injunction restraining the first defendant from proceeding with the English suit and from invoking the arbitration agreement. The learned City Civil Court did not pass any interim order. On appeal this Court passed an order of injunction restraining prosecution of the English action and the arbitration in London. The order was for a limited period of time and was not extended. Thereafter, an application was filed in this Court (A.L.P. No. 14 of 2011) for transfer of the City Civil suit to this High Court. In that application a limited interim order to the above effect was passed. The City Civil Court suit was later directed to be transferred to this Court. After transfer of the City Civil Court suit to this Court an application was made in that transferred suit, which is being disposed of by this judgment, for an injunction in the same vein. In that application an interim order was passed, which is continuing to the effect that parities would not take any steps in the arbitration.

LAW:

27. The law on the subject is so masterfully elucidated by Lord Denning MR presiding over the Court of Appeal in the case of Smith Kline vs. French Laboratories Ltd. And Others reported in 1983 (1) WLR 730. The law is authoritatively expounded in his Lordship''s uniquely simple writing style. In the past, a litigant was permitted to institute legal proceedings in any jurisdiction in which he was entitled. He could choose the jurisdiction where he would get the maximum benefit in damages, in costs and so on. Nobody could stop him from filing a case in that jurisdiction unless

the defendant could show that gross injustice would be caused to him. The law changed over time. Discretion came to be vested in the Court. It had to hold the balance between the plaintiff and the defendant. The Court would weigh the relevant advantages and disadvantages of each party, their convenience and decide "according to which way the balance comes down." In that case one Dr. Bloch was a resident in England. He worked in England. The contract was with an English company executed in England and governed by English law. When he filed an application in the United States the defendant applied for an injunction. Lord Denning held that the "natural forum" was in England and public interest required that the dispute be tried in England rather than in the United States. He granted the injunction. This judgment relied on the leading case on the subject in the United Kingdom, Castanho Vs. Brown & Root (U.K.) Ltd. 1981 AC 557 decided by the House of Lords which held that this jurisdiction was to be exercised with great caution. Apart from the question of convenience, the juridical advantage of the plaintiff in the foreign country, i.e. the prospect of getting higher damages or more reliefs was to be given great weight. This case refined the principles laid down in earlier decisions of the House in The Atlantic Star [1974] AC 436 and M/s Shannon Vs. Rock Glass Ltd. 1978 AC 795. Great caution is required in exercise of this jurisdiction because an order of injunction restraining a person from prosecuting litigation in a foreign country has the potentiality of interfering with the judicial process of the other country which was held in British Airways Board vs. Laker Airways Ltd. (1984) 3 AER 1124.

28. Next I come to the case of Barclays Bank PLC vs. Homan and Others reported in (1993) BCLC 680. This was also a decision of the Court of Appeal of England and Wales. It was held that injunction restraining proceedings in a foreign Court was a discretionary remedy. The English court will take comity into account in exercising this discretion. The presumption is that an English court has no superiority over a foreign Court to decide what justice requires. The foreign Judge is usually the best person to decide whether his Court should accept or decline jurisdiction. The English court would only exercise jurisdiction if the proceedings before the foreign Court were such that the English court must intervene to prevent injustice. Normally, even to decide the question of vexation or oppression the foreign Court would be the best judge. The English court would only exercise its discretion to stay foreign proceedings if the foreign court was likely to assert a jurisdiction which would be contrary to International law. Injunction could only be issued against a foreigner, outside the jurisdiction, if he was amenable to the jurisdiction of the Court.

29. Therefore, in my opinion, the duty of the English Judge, as conceived by Lord Denning in Smith Kline and French And Others vs. Bloch (Supra) that he should watch the scales to see which side of it came down, has been conditioned by the subsequent judgments. The principles as enunciated by Lord Denning in his simple but authoritative way are still the same but it is normally for the foreign Court to decide which way the scale tips. It was only in case of threatened violation of

international law or injustice or vexation that the Court can interfere to stay foreign proceedings. In Albon vs Naza Motor Trading Sdn Bhd reported in 2008 1 LLR 1 the same Court of Appeal issued an order of injunction restraining a party from prosecuting a foreign arbitration. In that case, one party started arbitration in a foreign land, by forging the signature of the other party to create an arbitration agreement. On such facts the Court of Appeal held that circumstances had been made out to warrant an injunction restraining the prosecution of the foreign proceedings. In Compagnie Europeene De Cereals S.A. vs. Tradax Export S.A. reported in 1986 2 LLR 301 an action had been instituted in the English court by originating summons for declaration that the arbitration agreement had been frustrated, abandoned or rescinded and that any claim in respect of the contract was time barred under the Limitation Act, 1950-1980. An injunction was sought restraining Tradax from proceeding with the arbitration. The Queen''s Bench held that both the suit and the arbitration could not go side by side.

30. The case of Modi Entertainment Network and Another Vs. W.S.G. Cricket PTE. Ltd., concerned a dispute arising out of assignment of television and advertisement rights in an ICC cricket tournament in Kenya. There was a chosen forum in the agreement, which was England. Litigation was instituted in the Bombay High Court. It travelled up to the Supreme Court. In spite of the forum clause the proceedings in India were sought to be continued on the ground that it was the natural forum. The Supreme Court elucidated the principles as follows:

24. From the above discussion the following principles emerge:

1) In exercising discretion to grant an anti-suit injunction the court must be satisfied of the following aspects:

a) the defendant, against whom injunction is sought, is amenable to the personal jurisdiction of the court;

b) if the injunction is declined, the ends of justice will be defeated and injustice will be perpetuated; and

c) the principle of comity - respect for the court in which the commencement or continuance or action/proceeding is sought to be restrained - must be borne in mind.

2) In a case where more forums than one are available, the court in exercise of its discretion to grant anti-suit injunction will examine as to which is the appropriate forum (forum conveniens) having regard to the convenience of the parties and may grant anti-suit injunction in regard to proceedings which are oppressive or vexatious or in a forum non-conveniens.

3) Where jurisdiction of a court is invoked on the basis of jurisdiction clause in a contract, the recitals therein in regard to exclusive or non-exclusive jurisdiction of the court of choice of the parties are not determinative but are relevant factors and

when a question arises as to the nature of jurisdiction agreed to between the parties the court has to decide the same on a true interpretation of the contract on the facts and in the circumstances of each case.

4) A court of natural jurisdiction will not normally grant anti-suit injunction against a defendant before it where parties have agreed to submit to the exclusive jurisdiction of a court including a foreign court, a forum of their choice in regard to the commencement or continuance of proceedings in the court of choice, save in an exceptional case for good and sufficient reasons, with a view to prevent injustice in circumstances such as which permit a contracting party to be relieved of the burden of the contract; or since the date of the contract the circumstances or subsequent events have made it impossible for the party seeking injunction to prosecute the case in the court of choice because the essence of the jurisdiction of the court does not exist or because of a vis major or force majeure and the like.

5) Where parties have agreed, under a non-exclusive jurisdiction clause, to approach a neutral foreign forum and be governed by the law applicable to it for the resolution of their disputes arising under the contract, ordinarily no anti-suit injunction will be granted in regard to proceedings in such a forum conveniens and favoured forum as it shall be presumed that the parties have thought over their convenience and all other relevant factors before submitting to the non-exclusive jurisdiction of the court of their choice which cannot be treated just as an alternative forum.

6) A party to the contract containing jurisdiction clause cannot normally be prevented from approaching the court of choice of the parties as it would amount to aiding breach of the contract; yet when one of the parties to the jurisdiction clause approaches the court of choice in which exclusive or nonexclusive jurisdiction is created, the proceedings in that court cannot per se be treated as vexatious or oppressive not can the court be said to be forum non-conveneins.

7) The burden of establishing that the forum of choice is a forum non-conveniens or the proceedings therein are oppressive or vexatious would be on the party so contending to aver and prove the same.

26. A plain reading of this clause shows that the parties have agreed that their contract will be governed by and be construed in accordance with English law and they have also agreed to submit to the non-exclusive jurisdiction of English courts (without reference to English conflict of law rules). We have already observed above that recitals in regard to submission to exclusive or non-exclusive jurisdiction of a court of choice in an agreement are not determinative. However, as both the parties proceeded on the basis that they meant non-exclusive jurisdiction of the English courts, on the facts of this case, the court is relieved of the interpretation of the jurisdiction clause. Normally, the court will give effect to the intention of the parties as expressed in the agreement entered into by them except when strong reasons

justify disregard of the contractual obligations of the parties. In Donhue case although the parties to the agreement stipulated to submit to the exclusive jurisdiction of the English courts, the House of Lords found that it would not be in the interests of justice to hold the parties to their contract as in that case strong reasons were shown by the respondent. It was felt necessary that a single trial of all the claims of the parties by one forum would be appropriate and as all the parties to the New York proceedings were not parties to the agreement stipulating exclusive jurisdiction of the English court and as all the claims before the New York court did not arise out of the said contract so they could not have been tried in the English court. It was urged that in the circumstances parallel proceedings - one in England and another in New York - would have to go on which might result in inconsistent decisions. Those facts were considered as strong reasons to decline to grant anti-suit injunction though the parties had agreed to the exclusive jurisdiction of the English court. In contrast, in SABAH case even though GOP filed the suit first in the court of natural jurisdiction and sought anti-suit injunction against SABAH restraining them from proceeding with the action brought by them in the English court, the Court of Appeal found that the non-exclusive jurisdiction clause in the agreement of guarantee executed by GOP was binding on them. The action of GOP in filing the suit earlier in the court of natural jurisdiction was held to be clearly in breach of earlier in the court of natural jurisdiction was held to be clearly in breach of contract and in the context of the non-exclusive jurisdiction clause, oppressive and vexatious unless GOP could show strong reasons as to why parallel proceeding would be justified. The only ground urged for continuance of proceeding in Pakistan court was that it was a convenient forum which was considered not strong enough for GOP to disregard the contractual obligation of submission to the jurisdiction of the English court for resolution of disputes. The Court of Appeal upheld the anti-suit injunction granted by the learned Judge at the first instance as also the order declining to stay the English suit.

31. This judgment followed two earlier decisions of the Supreme Court in the cases V.O. Tractoroexport, Moscow Vs. Tarapore and Company and Another, and Oil and Natural Gas Commission Vs. Western Company of North America, These two decisions are important for laying down the principle that an injunction can be issued against a foreign party provided that party is amenable to the jurisdiction of the court. It is quite true that in the latter case the Supreme Court issued an injunction against an American company from proceeding with a litigation in the United States but the facts show that this company had submitted to the jurisdiction of the Indian Courts.

32. Therefore I would very humbly try to pronounce the legal principles that evolve from all these authorities.

33. A plaintiff may become entitled to sue in more than one international jurisdictions. He has a right to avail of the advantage in suing in a particular

jurisdiction. A defendant has a corresponding right of not being sued in a place where litigation is likely to be vexatious or oppressive to him. The court is called upon to adjudicate the issue. It may be the Court where the defendant wants the litigation to proceed. It would have to consider issuing an injunction restraining the other party from proceeding in a foreign court. It may be the foreign court also. In that case it would have to stay its proceedings permanently to relegate the parties to the forum of the defendant. In considering the issue the natural forum is very important, that is, the court where the litigation would most naturally have been instituted. In other words, the place, having the closest connection with the case. A foreign court is presumed to be competent to evaluate these relative advantages and disadvantages of a party. An anti suit injunction is not granted against a foreigner not within the jurisdiction of the court and not amenable to its jurisdiction. Furthermore, if a forum has been agreed upon by the parties, the court will sparingly interfere on the presumption that the parties were the best judge of their convenience and inconvenience. The court should be extremely cautious in passing orders in this area as they have the potentiality of interfering with the jurisdiction of a foreign court.

34. On the above facts, I am quite convinced that the United Kingdom has a.much closer connection with the agreement than India. There is no evidence to suggest that the contract was executed in Kolkata. On the contrary there is compelling evidence, that is the agreement and the correspondence between the parties, to suggest that it was executed in the United Kingdom. The vessel was to be delivered from a yard in that country. The agreement stipulated that the contract was to be governed by English law.The arbitration was to be held in London according to the arbitration laws of that country. Therefore the natural forum is without question England. In addition to that it is the forum of choice. There is no evidence that the chosen forum would be vexatious or oppressive for the plaintiffs. So following the Modi Entertainment network case, this court is reluctant to grant an injunction.

35. Furthermore, there is no case like forgery of an arbitration agreement as in the case of Albon and Naza Motors so as to warrant issuing an anti suit and anti arbitration injunction. Since the validity of the arbitration is not disputed, the arbitrator is competent to adjudicate the controversies.

36. Moreover, there is a difficulty in principle. An injunction can only be issued against a foreigner who is amenable to the jurisdiction of this court. A foreigner may be amenable if he has submitted to the jurisdiction of this court or has assets within its jurisdiction. Mr. Bimal Kumar Chatterjee, learned Senior advocate appearing for the first defendant flatly submitted that his client was not submitting to the jurisdiction of this court. Neither do they have any assets within jurisdiction. In fact the House of Lords in the case of Airbus Industries GIE vs Patel and ors reported in 1998 (2) AER 257 observed that an order of injunction granted by an Indian court could not be enforced by the Indian Court since the defendants were British

subjects, in spite of the fact that the cause of action had arisen substantially in India. The House Lords could not issue the injunction as that country had no connection with the case.

37. Yet the High Court of Justice of England and Wales has issued an injunction against the plaintiffs, who are foreign to that country.

38. But it can firmly be said that on the above authorities the English arbitration and the English action have to proceed. Any subsisting injunction by our Court restraining the parties to proceed in that country is discharged, subject to the condition below. Whilst all these proceedings were being undertaken, the first defendant has appointed their appointed arbitrator as the sole arbitrator or that arbitrator has been appointed as sole arbitrator in the absence of the plaintiffs appointing an arbitrator. If he is allowed to be sole arbitrator, that would deprive the plaintiffs of appointing their arbitrator, which is against the normal working of the arbitration clause. Therefore the injunction on arbitration can only be discharged if the first defendant allows the plaintiffs to appoint their arbitrator or the parties agree to a sole arbitrator in terms of the arbitration clause. Otherwise, the arbitration would become vexatious and oppressive for the plaintiffs. If such an opportunity is provided then, and then only, automatically the existing injunction will stand vacated.

39. I would only like to add that section 45 of the Arbitration and Conciliation Act, 1996 does not say that a party has to make an application. It says that a mere request for reference to arbitration would do. I would treat the affidavit in opposition of the first defendant and the submissions of their learned counsel as a request for the purposes of that section. This application is disposed of with the above order. Urgent certified photocopy of this judgment/ order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.