(1993) 12 CAL CK 0005

Calcutta High Court

Case No: Suit No. 363 of 1990 and Appeal No. 606 of 1993

AIR India		APPELLANT
	Vs	
R.M. Investment and Trading Co. Pvt. Ltd.		RESPONDENT

Date of Decision: Dec. 21, 1993

Acts Referred:

- Arbitration Act, 1940 - Section 34
- Civil Procedure Code, 1908 (CPC) - Order 6 Rule 17, 10, 34
- Evidence Act, 1872 - Section 115
- Foreign Awards (Recognition and Enforcement) Act, 1961 - Section 3

Citation: (1994) 1 CALLT 453

Hon'ble Judges: Anandamoy Bhattacharjee, C.J; Nisith Kumar Batabyal, J

Bench: Division Bench

Advocate: Subrata Roy Chowdhury, Tapas Banerjee, Arijit Banerjee, S.N. Pyne and N.N. Gooptu, General, Karuna Shankar Roy, R.N. Majumdar, A. Dhar, S. Mondal and Krishnendu Guha, for the Appellant; Anindya Mitra, Sudipta Sarkar, Abhrajit Mitra and Padam Khaitan, for the Respondent

Final Decision: Allowed

Judgement

Anandamoy Bhattacharjee, C.J.

These two appeals involve two questions-(1) whether the trial Court could proceed with the hearing of the application for amendment of the plaint and allow amendments thereof in view of the order staying the suit passed by this Court and (2) whether the amendments allowed by the trial Judge are justified on merits. An affirmative answer to both the questions will entail dismissal of the appeal while a negative answer to any of the questions would require us to allow the appeal and to set aside the impugned order allowing amendments.

2. The suit giving rise to the impugned order under these two appeals has been filed by the respondent R.M. Investment and Trading Company Private Limited (hereinafter referred to as R.M.I.) against the appellant Boeing Company (hereinafter referred to as Boeing) being Suit No. 363 of 1990 in the Original Side of this Court. There was an agreement, labelled as "Consultant Service Agreement," between the appellant Boeing and the respondent R.M.I, whereunder R.M.I, was to promote sales of the commercial aircrafts of the Boeing to parties within the territories of India on condition of certain remuneration payable to R.M.I. by Boeing for rendering its service. A part of the remuneration being the fixed retainer was duly paid by the Boeing to R.M.I., but it was the case of R.M.I, that it was not paid any further remuneration as was payable under the Agreement. R.M.I, has filed the aforesaid suit for the recovery of the unpaid amount of the remuneration along with incidental reliefs against Boeing. There is also a claim for the said amount on a quantum meruit basis.

3. The Consultant Service Agreement between the parties has an Arbitration Clause in a very wide form as will appear from Clause 10 of the Agreement. On the strength of the said Arbitration Clause, Boeing moved an application u/s 3 of the Foreign Awards (Recognition and Enforcement) Act, 1961 for stay of the aforesaid suit. The trial Court has dismissed the application but on appeal, the application has been allowed and the aforesaid suit has been stayed u/s 3 of the Foreign Awards (Recognition and Enforcement) Act, 1961.

4. But while admitting the appeal on 19th April, 1993, it was ordered inter alia that "there shall also be an order of stay of the suit being No. 363 of 1990 (R.M. Investment Trading Co. (P) Ltd. v. Boeing Company) till the hearing of the appeal." The application or amendment of the plaint, which was filed earlier, was nevertheless proceeded with by the trial Court in spite of the aforesaid order of stay of the suit while admitting the appeal. The first question, as already stated, therefore, is whether the trial Court could so proceed in view of the aforesaid order of stay of the suit while admitting the appeal on 19th April, 1993.

5. In support of the impugned order allowing amendments of the plaint during the operation of the order of stay, it has been urged on behalf of the respondent R.M.I. that a stay of the suit does not prevent the Court from passing interlocutory orders including an order of the amendment of the plaint. In support of the contention, reliance has been placed on the decisions of the Bombay High Court in Senaji Kapur Chand v. Pannaji Devi Chand (AIR 1922 Bom 276) of the Allahabad High Court in Smt. Kulsumum Nisan Vs. Mohammad Farooq and Others, and of the Mysore High Court in Baburao Vithalrao v. Kadarappa (AIR 1974 Mys 1963) but all these decisions relate to an order of stay u/s 10 of the CPC whereunder what is stayed is not the entire suit but only the trial thereof. A suit commences with the presentation of the plaint, but the trial of the suit begins at a much later stage. Therefore, when the whole of the suit is not stayed, but what is stayed is only the trial of the suit, an

interlocutory order, not amounting to the trial of the suit, may be permissible. But, as already noted, what was stayed by us while admitting the appeal by our order dated April 19, 1993 was not merely the trial of the suit but the suit itself. The aforesaid decisions, therefore, may not help us in determining the question involved.

6. Reliance has also been placed on behalf of the respondent R.M.I, on a Division Bench decision of the Calcutta High Court in Mitsui Bussan Kaisha, Ltd. Vs. Hogarth Shipping Co. Ltd., where a suit was stayed u/s 19 of the earlier Arbitration Act of 1899, corresponding to Section 34 of the present Act, and the matter was then referred to arbitration. But during the arbitration proceedings the name of the plaintiff was found to be wrong and an application was made to the Court to correct the mistake in the plaintiff''s name and the Court ordered the substitution of the correct name. The decision is no authority on the question as to whether such amendment could be made after the suit was stayed. The arbitration proceedings resulted in an award which was challenged on the ground, inter alia, that the suit as a result of the amendment became a new suit and therefore, the Arbitrator had no longer any jurisdiction to proceed with the arbitration which was ordered before the plaint was amended. This contention was squarely negatived and it was held that the award could not be assailed on any such ground as the suit did not become a new suit but remained the old one. But, to repeat, the question whether any interlocutory order by way of amendment of the plaint can at all be passed after the suit is stayed, did not arise for consideration even remotely and Sanderson CJ. clearly pointed out (at page 724) that I am not concerned to say whether the status taken by the plaintiff''s advisers to amend the cause title of the suit were necessary or correct.

7. Reliance has also been placed on behalf of the respondent R.M.I, on a single-Judge decision of the Bombay High Court in Vashdev Bheroomal Pamnai Vs. M. Bipinkumar and Co., which relates to an order of stay of suit u/s 34 of the Arbitration Act. The learned trial Judge in that case, while staying the suit u/s 34 of the Arbitration Act, also stayed the operation of the ad-interim temporary injunction granted by him earlier. The stay of the suit obviously could not operate as a stay of the ad-interim order of injunction already granted and the learned trial Judge was, therefore, obviously wrong in his view that while staying the suit he was also to stay the ad-interim injunction already granted. The order of stay of suit u/s 34 of the Arbitration Act is a discretionary order and the learned Judge, having already granted, such an injunction, ought to have excluded the final hearing of the application for injunction from the operation of the order of stay. All that was decided in that case was that while ordering the stay of the suit, the learned trial Judge ought not to have stayed the order of injunction already granted, but ought to have excluded the same from the operation of the stay and the order of the learned Judge was accordingly set aside. This decision also, therefore, may not help us in determining the question as to whether, after a suit has been stayed in its entirety,

the plaint of the suit can still be allowed to be amended.

8. A single-Judge decision of the Madhya Pradesh High Court in State of Madhya Pradesh v. Harsh Mood Products (AIR 1989 MP 13)1 however, appears to have categorically ruled that "the moment an application u/s 34 is filed in a pending suit, further progress thereof is automatically arrested and the trial Court''s power to'' act under C.P.C. is suspended till decision is rendered on the application. Until a decision is rendered on the application for stay of the suit and Court exercises its jurisdiction u/s 34 one way or the other, nothing moves; the Civil Court cannot allow, by passing any order therein under the provisions of the C.P.C. the right accrued to the applicant under the Act cannot be defeated. There can be no escape route for the Civil Court to do> anything also under any other law, even under the Code of Civil Procedure, before disposing of the said application, one way or the other. To keep the application pending and doing something else by refusing to exercise its'' jurisdiction one way or the other u/s 34 is not legally permissible. This position is made clear by Section 41 itself which requires a Civil Court to follow first the provisions of the Act and the Court is mandated to act "subject to the provisions of the Act."

9. We may note here that this was also one of the main arguments advanced by the learned counsel appearing for the appellant Boeing and he has urged that once an application was filed u/s 3 of the Foreign Awards Act, 1961, the further progress in the suit was automatically arrested and that the Court could not, until a decision was rendered on the application for stay, exercise any other power. The learned counsel has seriously urged that the non-obstante clause appearing at the beginning of Section 3 of the Foreign Awards Act in respect of the CPC fortifies the position further that no provision of the Code, including the provisions relating to amendment of pleadings can be invoked until the application u/s 3 was finally disposed of. We do not think that we need go so far in disposing of the present appeal where we are only concerned with the question as to whether rights of the parties and the powers of the trial Court to amend the plaint could at all be invoked when the Appellate Court has granted a stay in respect of the suit itself. The relevant portion of our order dated 19th April, 1993 granting the order of stay may now be quoted which runs thus :-

"There shall also be an order of stay of the suit being No. 363 of 1990 (R.M. Investment Trading Co. (P) Ltd v. Boeing Company) till the hearing of the appeal."

10. It has been repeatedly urged by the learned counsel appearing for the respondent R.M.I, that even after an order of stay of the suit is passed, the Court is competent to pass interlocutory orders in the said suit. It is true that a Court, even though it has passed the order staying the suit, can in a proper case pass necessary interlocutory orders. Because the stay is, as pointed out in Halsbury''s Laws of England (4th Edition, Volume 37, paragraph 438), "always potentially capable of being removed unlike the dismissal or discontinuance of an action." But the

question before us is quite different as the order staying the suit has been passed by the Appellate Court and thus could not be removed or otherwise affected by the trial Court. As pointed out by the Supreme Court in Mulraj Vs. Murti Raghonathji Maharaj, , when a stay order addressed to a subordinate Court is passed by the higher Court, "as soon as the subordinate Court has knowledge of it, it must stay hands if it does not do so it acts illegally ..... as soon as the Court has knowledge of it, it must stay its hands and further proceedings are illegal." That being so, in view of the order dated 19th April, 1993 passed by this Court staying the suit in question till the hearing of the appeal, the trial Court did no longer have any jurisdiction to proceed in respect of the suit in any way whatsoever. We are, therefore, clearly of opinion that the learned trial Judge had no jurisdiction to proceed with the hearing of the amendment application and to allow amendments of the plaint. The impugned order must, therefore, be set aside as being without jurisdiction.

11. It has been urged on behalf of the respondent R.M.I, that the appellant Boeing, not having objected to the competence of the trial Court to proceed with the application for amendment, and having participated therein without objection, cannot now be allowed to assail the impugned order on this ground. If, as pointed out by the Supreme Court in Mulraj (supra), any further proceeding by the Court after it has come to know of a stay order, is illegal, and without jurisdiction, then no amount of participation, even amounting to consent or acquiescence, can clothe the Court with jurisdiction where it has none and preclude any of the parties from raising the question when both of them were, as here, labouring under a mistake of law. When the jurisdiction of a Court or Tribunal is dependent on the existence of a certain position in law, any representation by one party to another about the position in law cannot confer jurisdiction on the Court or the Tribunal where it has none. This position is too well-settled to require any citation, but even then reference may be made to the five-Judge Bench decision of the Supreme Court in Sales Tax Officer, Banaras and Others Vs. Kanhaiya Lal Mukundlal Saraf, .

12. It has also been urged at one stage on behalf of R.M.I, that while the appeal, in which" the order of stay was passed, was being admitted, we did not pass any specific order staying the hearing of the amendment application also. We did not do so as we thought that after we were granting stay of the suit itself, it was not necessary to pass any specific order in respect of any interlocutory proceeding in the suit. And we said that it would be for the learned trial Judge to decide as to whether he can still proceed with the amendment matter notwithstanding the stay. And even assuming that our refusal to pass any specific order of stay in respect of the interlocutory proceeding was apt to create a wrong impression in the mind of the parties, it is well-settled that no estoppel against the parties can arise out of the wrongful act of Court.

13. This being our view as to the competence of the Court to proceed with the hearing of the application for amendment, we need not advert to the other question involved, namely, whether the amendments were justified on merits.

We accordingly allow both the appeals and set aside the impugned order under appeal allowing amendments of the plaint.

There will be no order as to costs.

N.K. Batabyal, J.

I agree.