

(1970) 05 CAL CK 0021
Calcutta High Court
Case No: Award No. 269/69

Sundarlal and Sons

APPELLANT

Vs

Basdeo Prasad
Agarwalla

RESPONDENT

Date of Decision: May 12, 1970

Acts Referred:

- Arbitration Act, 1940 - Section 34

Citation: (1973) 1 ILR (Cal) 646

Hon'ble Judges: Ghose, J

Bench: Single Bench

Advocate: A.C. Bhabhra and P.K. Das, for the Appellant; A.K. Basu and Kapur, for the Respondent

Judgement

Ghose, J.

This is an application u/s 34 of the Indian Arbitration Act, inter alia, for stay of the suit being Suit No. 4028 of 1969 (Basdeo Prasad Agarwalla v. Santi Swarup Gupta and Ors.) and all proceedings thereunder including the operation of the order dated November 28, 1969, in the said suit.

2. The Petitioners Nos. 2 to 6 at all material times carried on and still now carry on business under the name and style of Sundar Lal & Sons as dealers and brokers in jute goods. The Petitioners in their said business of Sundar Lal & Sons are members of East India Jute and Hessian Exchange Association. By and under a contract dated May 8, 1969, and bearing No. JG/B 37710, the Respondent No. 1 Basdeo Prasad Agarwalla agreed to sell and deliver to the Petitioner No. 1 and the Petitioner No. 1 agreed to purchase from the Respondent No. 1 3,25,000 yards of jute cotton bagging, 48 inches wide, at the rate of Rs. 1,500 per long ton free alongside export vessel in the port of Calcutta.

3. The said contract was arrived at by exchange of Bought Note and Sold Note by or on behalf of the Petitioner No. 1 and the Respondent No. 1. The said contract was a transferable specific delivery contract for jute goods and was made in the form prescribed by the East India Jute and Hessian Exchange Limited, Calcutta. The said contract, inter alia, provided that:

(a) Arbitration--Bengal Chamber of Commerce and Industry, Calcutta.

(b) Besides the terms and conditions contained in the said contract those of the transferable specific delivery contracts of the East India Jute and Hessian Exchange Limited, Calcutta, for jute goods and subject to the bye-laws for trading in transferable specific delivery contract by the East India Jute and Hessian Exchange Limited, Calcutta, in jute goods for the time being in force would apply to the said contract.

4. The bye-laws of the East India Jute and Hessian Exchange Limited provided for arbitration between the parties in the following terms:

(1) Arbitration of any claims and disputes whether admitted or not arising out of or in relating to all T.S.D. Contracts in raw jute and/or jute goods between members or between members and non-members, under the provisions of these bye-laws, shall be referred to the Tribunal of Arbitration either of the Bengal Chamber of Commerce and Industry or of the Indian Chamber of Commerce, Calcutta, as is agreed in the T.S.D. Contract in accordance with the rules framed by the said Chamber, for the purpose of arbitration by its Tribunal from time to time, provided where in a T.S.D. Contract, the name of the Tribunal of Arbitration of either of the aforesaid two Chambers. for the purpose of reference to arbitration is omitted, such reference shall be made to the Tribunal of Arbitration of the Bengal Chamber of Commerce and Industry, Calcutta, as aforesaid.

5. The terms and conditions of transferable specific delivery contract of the East India Jute and Hessian Exchange Limited, inter alia, provided that:

(a) Payment is to be made in cash in exchange for pucca Delivery Order on sellers, or for Dock Receipt/s or for Mate's Receipt/s (which Dock Receipt/s or Mate's Receipt is/are to be handed by Dock or Ship's officer to the seller's representatives).

(b) The buyers hereby acknowledge that until the sellers have been paid in full or so long as any Railway Receipt/s or Dock or Mate's Receipt/s (whether in sellers' or buyers' names), is or are in possession of the sellers, the goods represented by such Railway Receipt/s, or Dock or Mate's Receipt/s are charged to and at the disposal of the sellers and held in trust by the buyers for the sellers.

6. The Petitioner No. 1 gave shipping instructions to the Respondent No. 1 for placing the said 325 bales of jute goods alongside S. Sf. Jaladhir owned by the Scindia Steam Navigation Company Ltd. Pursuant to the said instructions the Respondent No. 1 placed the said goods alongside the said vessel. The said Scindia

Steam Navigation Company Ltd. took possession of the said goods and issued three Mate's Receipts in respect of the said goods. The said Mate's Receipts along with the bills for the price of the said goods were tendered to the Petitioner No. 1 by the Respondent No. 1 on October 21, 1969, and then again on October 22 and 23, 1969. At the request of the Petitioner No. 1, the Respondent No. 1 again presented the said Mate's Receipts on October 27, 1969, at the Canning Street office of the Petitioner No. 1. The Petitioner No. 1 did not pay the price of the said goods but wrongfully retained the said Mate's Receipts. Without paying the price for the said goods and/or the said Mate's Receipts the Petitioner No. 1 got the Bills of Lading issued to him by the carrier Scindia Steam Navigation Company Ltd. and negotiated the said Bills of Lading. Particulars of the said Mate's Receipts and Bills of Lading are set out hereunder:

Mate's Receipt No. 9337 dated October 11, 1969, for 200 bales shipped to the Defendant No. 10. Bill of Lading No. HST 23 was issued in exchange for the said Mate's Receipts per S.S. JALADHIR.

Mate's Receipt No. 11836 dated October 12, 1969, for 72 bales shipped to the Defendant No. 9. Bill of Lading No. HST 24 was issued in exchange for the said Mate's Receipt per S.S. JALADHIR.

Mate's Receipt No. 11836 dated October 12, 1969, for 53 bales shipped to the Defendant No. 9. Bill of Lading No. HST 25 was issued in exchange for the said Mate's Receipt per S.S. JALADHIR.

	Marks
(i) 53 bales--Mate's Receipt No. 11836 dated 12.10.69	Made in India PremchandSunderlal & Son 944 SOLINA 48. in. 32 oz. USDA Specification Bagging 150 yards Houston 5550/5602
(ii) 72 bales--Mate's Receipt No. 11835 dated 12.10.69	Made in India PremchandSunderlal & Son 944 SOLINA 48. in. 32 oz. USDA Specification Bagging 150 Yards Houston 8478-85,49

(iii) 200 bales--Mate's Receipt No.
9337 dated 11.10.69

Made in India
Premchand
921
C.B.B.C.
48. in. 32 oz.
USDA
Specification
Bagging
150 yards
Houston
2225-2424

7. The said Bills of Lading were negotiated thereafter by the Petitioner No. 1 through Bank of Baroda in favour of Irving Trust Co., a corporation incorporated under the laws of U.S.A. and carrying on business at 110 West 40th Street, New York, and Costal Bag and Bagging Corporation, a corporation incorporated under the laws of U.S.A. and carrying on business at Houston, Texas. The Respondent No. 1 requested the Scindia Steam Navigation Company Ltd. on October 28, 1969, not to issue the Bills of Lading to the Petitioner No. 1, but Bills of Lading, prior to that request, had been issued to the Petitioner No. 1 and had been negotiated as aforesaid by the Petitioner No. 1.

8. Thereupon the Respondent No. 1 instituted the aforesaid suit in this Court against the partners of the said Sundar Lal and Son, the said Sunder Lal and Son, the carrier of the said goods, Scindia Steam Navigation Company Ltd., the bank through which the said Bills of Lading were issued, namely the Bank of Baroda, and the transferees or endorsees of the said Bills of Lading the said Irving Trust Company and Costal Bag and Bagging Corporation, inter alia, for a declaration that the Plaintiff was the owner of the said 325 bales of jute cotton bagging cloth and delivery of the said goods to the Plaintiff, alternatively Rs. 65,290-19 P. being the value of the said goods, alternatively, further damages for adjudging the said Bills of Lading to be void and for delivery and cancellation of the same and for injunction restraining the Defendants from dealing with the said goods or giving the delivery of the same to anybody except to the Respondent No. 1 and injunction restraining the Defendants from negotiating or dealing, with the Bills of Lading in the said suit. One Solina Inc and M.S. Mahed and Company Inc. were also made parties as their names appeared on the Bills of Lading for giving notice to them on the arrival of the goods in U.S.A. The claims in the plaint have been made on the basis that no property in the goods had passed to the Petitioner No. 1 inasmuch as price for the said goods were not

paid and thus neither the Petitioner No. 1 nor any of the parties who had dealt with the Bill of Lading and were indorsees to the Bills of Lading in respect of the said goods acquired any title to the said goods and were guilty of converting the said goods.

9. This application has been made for the stay of the said suit.

10. After instituting the suit the Plaintiff obtained an injunction restraining the Defendants Nos. 7 to 12 from dealing with or disposing of or negotiating either the said Bills of Lading or the said goods. The order of injunction was passed by this Court on November 20, 1969. On December 2, 1969, the present application was moved before me and the said ex parte order of injunction was passed by me in the interlocutory application in the suit was recalled and the following order was made:

Upon the Petitioners depositing a sum of Rs. 65,000 in cash with M/s. P.D. Himatsingka & Co., Solicitors, for the Petitioners on account of the claim of the Plaintiff Basdeo Prasad Agarwalla in Suit No. 4146 of 1969 (Basdeo Prasad Agarwalla and Ors. v. Santi Swamp Gupta & ors). filed in this Court the interim order made on November 28, 1969, shall stand vacated. M/s. P. D. Himatsingka & Company will inform Mr. L. P. Agarwalla immediately upon receipt of the said money and hold the same free from lien and subject to further order of the Court. M/s! P. D. Himatsingka & Company will invest the said sum with the United Commercial Bank in a short term fixed deposit account for 91 days renewable for successive periods of 91 days until further order. The order dated 28.11.69, passed in the said interlocutory application, shall subject to the order made on this application in terms of prayer (a) of the petition continue till 12.12.69. The motion to appear in the list as a new motion on 12-12.69. All parties to act on a signed copy of the minutes on the usual undertaking of the Applicant's Solicitors to complete the order.

11. Mr. Amiya Kumar Basu appearing on behalf of the Petitioners submits that after the said order dated December 2, 1969, was passed, the money in terms of the said order was deposited with M/s. P. D. Himatsingka & Company by the Petitioners and thus the Defendants Nos. 7 to 12 are no longer interested in the suit because the goods have been duly delivered to the endorsees of the Bills of Lading. The only dispute that remained in the suit is the dispute between the Plaintiff and the Defendants Nos. 1 to 6, that is, the parties to the arbitration agreement with regard to the question of passing of property in the said goods. Mr. Basu relied on the case of Juggernath Augurwallah v. E. A. Smith and Company and Anr. ILR 33 Cal. 547 wherein it was held that although the Mate's Receipts stand in the name of the buyer, the seller had an interest in the said Mate's Receipt and entitled to hold the said document as security for payment of the price of the said goods notwithstanding the special clause in the contract between the parties in the following terms:

Terms of payment cash on delivery of Mate's Receipts, Dock Receipts or as provided in clauses 8, 9 and 11. Should the said receipts or warrants be retained by the buyer for examination, they shall remain the property of the sellers and be held by the buyers in trust for and at the absolute disposal of the sellers until payment has been made in cash in terms of this contract and if payment be made by cheque until such cheque has been cashed.

12. According to Mr. Basu, the said term is almost the same as the relevant term in the instant case and thus the property in the goods passed all right although the Respondent No/1 was entitled to hold the documents including the Mate's Receipt as the security for the due payment of the price by the buyer.

13. In the said case of Juggernath Augurwallah v. E. A. Smith and Anr. (Supra) the Plaintiff sold goods to the Defendant for shipment abroad on, inter alia, the term mentioned above. Under the buyer's instructions the goods were placed alongside the export vessel and were subsequently shipped. Mate's Receipts were, made over to the buyer for examination together with the bill in respect of the price of the said goods. The buyer without paying for the goods got Bills of Lading issued to him in exchange for Mate's Receipts and, thereafter, pledged the said Bills of Lading with the bank. The bank gave credit to the buyer for the full amount of the bills of exchange drawn against the goods represented by the Bill of Lading. It was held in the facts and circumstances of the said case that the goods were unconditionally appropriated to the contract by the seller by placing them alongside the vessel and such appropriation was assented to by the buyer. The Plaintiff seller's claim to the property in the. said goods was negatived. According to Mr. Basu, by reason of the ratio of the said case, the property in the goods in the instant case passed to the Defendants Nos. 1 to 6. Hence, the Plaintiff's claim against the Defendants Nos. 7 to 12 is untenable and so the suit ought to be stayed..

14. Mr. Basu further submits that, if the suit be not stayed, at any point of time subsequently the Plaintiff may amend the plaint and incorporate claim for price of the goods.

15. It is common case that there is an arbitration agreement between, the Plaintiff and the Defendants Nos. 1 to 6 in the suit. It is also" admitted that the subject-matter of the suit covers matters agreed to be referred to arbitration by the said arbitration agreement. The Bengal Chamber of Commerce and Industries is the appointed Arbitrator in the instant case. The parties claiming the stay of the suit arc parties to the arbitration agreement. It cannot be said also that the Defendants Nos. 1 to 6 were not or still now is not ready and willing at the commencement of the suit to do all that was necessary to do for the proper conduct of the arbitration. None of the Defendants has filed written statement. Mr. Bhabhra submits that on two grounds this application should be rejected. The said grounds are: (i) In the suit Mr. Bhabhra had to join as the party Defendants not only the Petitioner No. 1 and its partners but also the carrier, the banker, the endorsees of the Bills of Lading as well

as the persons to whom notices of arrival of the goods at the port of destination have to be served. In fact, the Plaintiff has joined the Defendants Nos. 7 to 12 in the suit as persons who have dealt with or will deal with the Bills of Lading and/or the goods covered by the Bills of Lading. The arbitration agreement is only as between the Plaintiff and the Defendants Nos. 1 to 6. There is no arbitration agreement between the Plaintiff and the Defendants Nos. 7 to 12. The subject-matter of the suit as against the said Defendants Nos. 7 to 12 are not matters agreed to be referred to arbitration. Therefore, in any event the suit as against the Defendants Nos. 7 to 12 cannot be stayed.

16. The facts which will, have to be gone into in this suit against the Defendants Nos. 7 to 12 are the same as arise for adjudication as between the Plaintiff and the Defendants Nos. 1 to 6 and are same as matters agreed to be referred. Thus, if the suit as against the Defendants 1 to 6 be stayed and the disputes between the Plaintiff and the said Defendants be referred to arbitration, then two different Tribunals of competent jurisdiction shall have to go into the same questions of facts and law: by the Court in the suit as between the Plaintiff and the Defendants Nos. 7 to 12, and by the Tribunal of arbitration as between the Plaintiff and the Defendants Nos. 1 to 6. There will thus be the possibility and risk of conflicting decisions on identical issues by two Courts of competent jurisdiction. Hence,, the suit should not be stayed.,

17. Mr. Bhabhra relied on the case of [Bajrang Electric Steel Co. Private Ltd. Vs. Commissioners for the Port of Calcutta and Others](#), . In the said case it was held by P. B. Mukharji J. (as his Lordship then was) that a suit filed against the four different Defendants of whom one only was a party to an arbitration agreement, to refer the matters involved in the suit to arbitration, could not be stayed on the application of that Defendant inasmuch as the suit against the other Defendants, who were not parties to the arbitration agreement and with whom there could not be any arbitration, could not be stayed. Mr. Bhabhra also relied on the case of Asiatic Shipping (sic) stayed as against the guarantor Defendant and it should not be stayed as against the other Defendants inasmuch as there was possibility of conflicting decision by the forums.

18. Mr. Bhabhra also relied on the case of Taunton Collins v. Cromie Anr. [1964] 2 All E.R. 332. In the said case, the Plaintiff engaged contractors to build him a house and also employed an architect to supervise the construction. The building contract contained arbitration clause as follows, to wit:

In case any dispute or difference shall arise between the employer or the architect on his behalf and the contractor...such dispute or difference shall be and is hereby referred to the arbitration and final decision of a person to be appointed....

This was the contract between the owner and the contractors. The architect was not a party to this contract. After the house had been built the Plaintiff, the owner,

found it to be unsatisfactory and filed an action against the architect as well as the contractors for damages. The contractors applied for stay of the proceeding u/s 4 of the English Arbitration Act, 1950. The said application for stay was dismissed by the trial Judge. The Appeal Court held that the discretion was rightly exercised by the trial Judge in dismissing the application for stay. In course of his judgment Lord Denning M.R. observed:

The other authority is Halifax Overseas Freighters Ltd. v. Rasno Export (The Pine Hill case) before McNair J. It was a shipping case. There was an arbitration clause in a charter party, but no arbitration clause in the Bills of Lading. There was a claim for general average contribution. The ship-owners brought an action against the Bill of Lading holder and the charterers. The charterers, relying on the arbitration clause, applied to stay the proceedings against them. McNair J. held that they should not be stayed. Everything should be dealt with in the one action. He pointed out that there was the risk of inconsistent findings of fact; that there were difficult questions of law (sic)

19. That observation applies on all fours to the facts of the instant case. Mr. Kapoor in reply contended that the subject-matter of the suit as between the Plaintiff and the Defendants Nos. 7 to 12 was only a fractional part of the dispute between the parties and thus the entire suit should be stayed. In any event, the major part of the suit involving the disputes between the Plaintiff and the Defendants Nos. 1 to 6 should be stayed. Mr. Bhabhra relied on Ives and Barker v. Willans [1894] 2 Ch. 478 (479) and relied on the observations of Lindley J. which is as follows:

It is said that inasmuch as you cannot refer the whole action there is no power to refer any part of it. It is all or none, and the case which was referred to of Turnock v. Sartoris, it is said, goes to support that view. Now, the matters which are to be referred under the 4th section are matters which are agreed to be referred, and if matters which are agreed to be referred are mixed up in an action with matters not agreed to be referred there is no reason why the 4th section should not be applied to those matters which have been agreed to be referred leaving the action to go on as to the other matters. But, I quite see that if the matters agreed to be referred were not the main matters in dispute but were of a subordinate and trifling nature, and if the matters not agreed to be referred were the main matters in dispute, it would be very inconvenient, to say the least of it, to refer that small part and let the action go on as to the large part.

20. Mr. Kapoor relied on a case: W. Bruce Ltd. v. J. Strong [1951] 2 K.B. 447. In the said case it was observed by Singleton J. as follows:

The goods which were the subject of the contract were passed from hand to hand. A complaint was made by the ultimate purchasers and some time afterwards proceedings were started by them and they are the Plaintiffs in the action. The Defendants brought in a third party, and the third party brought in a fourth party. It

was said at one time that it was a good reason why the Master and the Judge should refuse to stay the action against the fifth party that "there were proceedings by and against other parties. I am satisfied that that of itself is not sufficient to deprive those who rely upon an arbitration clause of their right to have the dispute determined by arbitration. They had chosen for themselves a forum and prima facie a duty is cast upon the Court to act upon that agreement.

21. Mr. Kapoor also relied on *Hayutmal Boid v. Khusiram Benarsilal* ILR (1949) 1 Cal. 199 (210). Mr. Kapoor relied on the observation of Das J. (as his Lordship then was) which is as follows:

If the suit is partly within and partly outside the arbitration clause and if the two parts are severable the Court undoubtedly has jurisdiction to stay the suit in respect of that part which is within the arbitration agreement.

22. In the instant case, the claim as framed in the suit is the claim based on conversion of the Plaintiff's goods by the Defendants Nos. 1 to 10 and possibility of conversion as against the Defendants Nos. 11 and 12. Therefore, the subject-matter of the suit as between the Plaintiff and the Defendants Nos. 1 to 6 is the same as between the Plaintiff and the Defendants Nos. 7 to 12, and the same facts are involved for adjudication as between the Plaintiff and all the Defendants. The subject-matter of the suit as between the Plaintiff and the Defendants Nos. 1 to 6 and as between the Plaintiff and the Defendants Nos. 7 to 12 are not severable or different. In my view, therefore, there is possibility of conflicting decisions by two Tribunals of competent jurisdiction if the suit as between the Defendants Nos. 1 to 6 be stayed. The suit as between the Plaintiff and the Defendants Nos. 7 to 12 cannot be stayed. The said part of the suit is of equal magnitude and importance. Thus, the ratio decidendi of the cases cited by Mr. Kapoor do not apply to the facts of the instant case. In my opinion, the Court must always prevent the risk of possibility of conflicting decisions on identical questions by two Tribunals of competent jurisdiction.

23. For the aforesaid reason I am of the view that discretion should not be exercised in favour of stay of the suit in the instant case.

24. At the present moment in deciding whether stay, should be granted u/s 34 of the Arbitration Act, in the instant application, I am not concerned with the merit of the case as laid in the plaint: [Sk. Ahamad Hossain Vs. Tittagarh Paper Mills Co. Ltd. and Others](#), [Gaya Electric Supply Co. Ltd. Vs. The State of Bihar](#), and [Bengal Jute Mill Co. Ltd. Vs. Lalchand Dugar](#), .

25. The "second ground" urged by Mr. Bhabhra for refusing the stay is that the Defendant No. 1 took step in the proceeding by applying for variation of the order of injunction. The Defendant No. 1 took the benefit of the order dated December 2, 1969, modifying the interim order, acted upon the said order, deposited the money with his Solicitors and got the interim injunction vacated.

26. Mr. Bhabhra cited the case of Subal Chandra Bhur v. Md. Ibrahim and Anr. AIR 1943 Cal. 48. But, in that case, the Applicant for stay u/s 34 of the Arbitration Act made an application in the suit itself for vacating all the ex parte orders. The Defendant appeared in the interlocutory application for appointment of Receiver in the said suit and obtained directions for time to file affidavit-in-opposition to the said application. The Defendant also obtained leave from the Court to inspect the books of accounts and records. The conduct on the part of the Defendant was held in that case to be unequivocal expression of intention to proceed to defend the action and not to insist upon arbitration. Mr. Bhabhra also relied on the case reported of Astrotito Compania Naviour S. A. Power of Attorney Agent Shaw Wallace and Company Ltd. v. Messrs. Boots S. A. by Agents South India Corporation (Agencies) Ltd. [1970] M.L.J. 398. In the said case, the Defendant before filing written statement made an application for vacating the interim injunction passed against them in the suit and offered to furnish security. That was held to be a step taken in the proceedings by the Defendants.

27. In the instant case, however, the Defendants Nos. 1 to 6 never made any application, in the suit itself. The said Defendants have made an application u/s 34 of the Indian Arbitration Act for stay of the suit including stay of the operation of the ad interim order dated November 28, 1969, passed by me in the suit. In the application, for stay I passed order on December 2, 1969, and modified the said order dated November 28, 1969. The Defendants Nos. 1 to 6 deposited the money in terms of the said order made in this application. Thus, the aforesaid decisions are of no assistance to Mr. Bhabhra. In my opinion, no step has been taken by the said Defendants in the proceedings and this contention of Mr. Bhabhra should fail.

28. For the reasons stated above I am of the view that, in the instant case, there are sufficient reasons why the matters involved in the suit should not be referred. This application must fail and is dismissed. Costs cost in the suit.

29. The sum held as money deposited with M/s. P. D. Himatsingka & Company under my order dated-December 2, 1969, shall continue to be held by M/s. P.D. Himatsingka & Company until the disposal of the suit.

30. Operation of this order Will remain stayed for 10 days.

31. Certified for two counsel as against respective clients.