

(1970) 04 CAL CK 0013

Calcutta High Court

Case No: Matter No. 21 of 1969

Bengal Linn (Industrial Furnace)
Ltd.

APPELLANT

Vs

R.G. Keshwani and Company
Private Ltd.

RESPONDENT

Date of Decision: April 20, 1970

Acts Referred:

- Arbitration Act, 1940 - Section 34
- Companies Act, 1956 - Section 434

Citation: (1971) 2 ILR (Cal) 38

Hon'ble Judges: Ghose, J

Bench: Single Bench

Advocate: R.C. Deb, R.C. Nag and B.K. Bachawat, for the Appellant; Manotosh Mookerjee and N.N. Butt, for the Respondent

Judgement

Ghose, J.

This is an application u/s 34 of the Indian Arbitration Act for the stay of the Suit No. 2595 of 1968 and all proceedings relating thereto and arising thereunder. The suit was filed by the Plaintiff who is the Respondent in the present application for the recovery of a sum of Rs. 73,590-79 P. on account of balance of commissions for the years 1966 and 1967 payable- by the Defendant to the Plaintiff, alternatively, for an enquiry into compensation as to such sum payable by the Defendant to the Plaintiff and a decree for such sum as would be found due upon such enquiry and for other relief♦s.

2. The Defendant is a company incorporated under the Companies Act, 1956, as a public limited company. Since the incorporation of the Defendant company the Plaintiff had been acting as the sole selling agent of the Defendant's products on the terms and conditions contained in the agreement dated March 30, 1966. The

Plaintiff from time to time sent to the Defendant its statement in respect of the commission earned by him in the year 1966. For the years 1966 and 1967 a sum of Rs. 73,590-79 P. became due and payable by the Defendant to the Plaintiff on account of commission due upto the month of October 1967, after adjusting the payments made by the Defendant from time to time. After serving notice u/s 434 of the Companies Act, 1956, the Plaintiff filed an application for compulsory winding up of the Defendant company under the provisions of the Indian Companies Act. The Defendant made an application for stay of the said winding up proceedings. In the said application of the Defendant for stay of the winding up petition an order was made by the Company Court on June 17, 1968, inter alia, to the following effect, to wit:

Upon the applicant furnishing security to the satisfaction" of the Registrar, Original Side, for a sum of Rs. 70,000-00 within 6 weeks from the date of the order and upon E.G. Stief, a Director of the applicant, undertaking to this Court through counsel not to deal with or dispose of or encumber immovable property of the applicant or its fixed assets except strictly in the usual course of business, the Company Petition No. 42 of 1968 and all proceedings thereunder should remain permanently stayed and the petitioning creditor would be at liberty to institute a suit for recovery of its dues if any.

3. In pursuance of the said order the security for the said sum of Rs, 70,000 was duly furnished by the Defendant and the application for winding up, namely, the Company Petition No. 42 of 1968, was permanently stayed. Thereafter, the Plaintiff filed the above suit mentioned above for recovery of the said sum and for relief mentioned in the plaint.

4. The contract between the parties dated March 30, 1966, in respect of the sole selling agency contained an arbitration clause. The said clause provides as follows:

In the event of any disputes or differences arising between the contracting parties and touching any matter or thing contained in the agreement or the construction or application of this contract or any part of clauses of this agreement or any action, matter or thing to be done hereunder or in anywise relating to this agreement whether such dispute or difference arises during the continuance of this agreement or upon or after termination of the same such dispute or difference shall be referred to the arbitration of such one Arbitrator at Calcutta, if the parties agree upon one or otherwise of two Arbitrators at Calcutta, one to be chosen by each party to this dispute or difference and to an umpire appointed by them in accordance with and subject to the provision of the Arbitration Act, 1940, or any statutory modifications or substitute thereof and all provisions of the Act so far as they are applicable shall apply to every reference hereunder subject to the aforesaid only the High Court at Calcutta shall have jurisdiction in respect of any difference or dispute between the principals and the agent.

On the basis of the said arbitration agreement the present application has been made by the Petitioner for the stay of the said suit u/s 34 of the Indian Arbitration Act. In the instant case, it is true that there is a valid and binding agreement between the parties and the suit is in respect of matters agreed to be referred under the arbitration agreement. It is also true that the Petitioner has not taken any step in the proceedings and was at the commencement of the suit ready and willing to go to arbitration. Notwithstanding the aforesaid facts, in my view, in the instant case the Court in its discretion should not grant a stay of the suit for the reasons stated hereinafter. It is true that a winding up proceeding cannot be stayed u/s 34 of the Arbitration Act, but when the application for stay of the winding up proceedings of the Company Petition No. 42 of 1968 was heard and disposed of by the Company Court, the Company Court granted stay of the winding up proceedings on conditions that the Defendant company would furnish security to the extent of a sum of Rs. 70,000 and the Petitioner in the winding up petition would be entitled to institute a suit for the recovery of his claims against the Defendant company. In the bond executed in pursuance of the stay order by the Defendant company, it has been clearly stated that the security would remain until the disposal of the suit and by way of security for the Plaintiff's claim in the suit. It was further stipulated in the bond by the Defendant company that in case the proposed suit was not filed by the Petitioner in the winding up proceedings within six weeks from the date of furnishing the security by the Defendant company, the Defendant company would be at liberty to apply for withdrawal of the security or, if the proposed suit mentioned in the stay order granting stay of the Company Petition No. 42 of 1968 was dismissed, the Defendant company would be entitled to withdraw the security furnished by it. In my view, therefore, it was in the contemplation of the parties and the Court while making the order dated June 17, 1968, that the petitioning creditor in the winding up proceedings in the Company Petition No. 42 of 1968 would have to file a suit if the petitioning creditor wanted to recover its claim from the Respondent in the winding up petition. In that view of the matter, I am of opinion that there are sufficient grounds why this suit should not be stayed. In the instant case, for reasons aforesaid this application must fail and is dismissed. Costs in this application will be costs in the suit.

5. The operation of the order shall remain stayed for three weeks.