Supreme Court of India
Michael Golodetz And Others vs Serajuddin & Company on 12 December, 1962
Equivalent citations: 1963 AIR 1044, 1964 SCR (1) 19
Author: S C.
Bench: Shah, J.C.

PETITIONER:
MICHAEL GOLODETZ AND OTHERS

Vs.

RESPONDENT:
SERAJUDDIN & COMPANY

DATE OF JUDGMENT:
12/12/1962

BENCH:
SHAH, J.C.
BENCH:
SHAH, J.C.
GAJENDRAGADKAR, P.B.
WANCHOO, K.N.
GUPTA, K.C. DAS

CITATION:
1963 AIR 1044 1964 SCR (1) 19
CITATOR INFO :
E 1975 SC 469 (8)
RF 1981 SC2085 (19,23,25,26)

ACT:
Arbitration-Contract to supply goods between an Indian Firm and a Foreign Firm --Arbitration clause to refer disputes to a foreign Tribunal--The foreign Firm refers the dispute to a foreign Tribunal-- The Indian Firm files a suit in the High Court-Cancellation of the Contract-Injunction to restrain the other party from proceeding with arbitration-Petition in the High Court to stay suit-power of court to entertain the Suit-Exercise of discretion-Arbitration Act, 1940 (X of 1940) s. 34.

HEADNOTE:
The appellants are a firm carrying on business in the United States of America. The respondents are an Indian Firm. These two firms entered into a contract in writing by which the appellant agreed to buy certain goods from the respondents. An arbitration clause in the contract provided that disputes arising out of the contract are to be settled by arbitration in New York according to the rules of the

American Arbitration Association. Disputes having arisen the appellants referred them to arbitration. The respondents thereupon filed a suit on the Original side of the Calcutta High Court for the cancellation of the contract and for the issue of a perpetual injunction restraining the appellants from taking steps in purported enforcement of the contract. The appellants then filed a petition before the same High Court for the stay of that suit under s. 34 of the Arbitration Act, 1940. This petition was heard by a Single Judge who held that the remedy of the party aggrieved by manner in which the proceedings are conducted by foreign Tribunal was to contest the proceedings according to the law applicable to the tribunal and that the respondents have not shown sufficient reasons for not granting stay. In appeal under the Letters Patent the order was set aside and the appellants appealed with special leave.

The main question before this Court was whether the Court of first instance has or has not exercised its discretion properly in granting stay.

Held, that a clause in a commercial contract between merchants residing in different countries to go to arbitration is

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an integral part of the contract on the faith of which the contract is entered into, but that does not preclude the court having territorial jurisdiction from entertaining a suit at the instance of one of the parties to the contract even in breach of the covenant. The court ordinarily requires the parties to resort for resolving disputes arising under a contract to the tribunal contemplated by them at the time of the contract. The court may in such cases refuse its assistance in a proper case when the party seeking it is without sufficient reason resiling from the bargain. It is for the court having regard to all the circumstances to arrive at a conclusion whether sufficient reasons are made out for refusing to grant stay. Whether the circumstances in a given case make out sufficient reasons for refusing to stay a suit is essentially a question of fact.

In the present case all the evidence of the parties was in India, and the current restrictions imposed by the Government of India on the availability of foreign exchange, made it impossible for the respondents to carry their witnesses to New York for examination before the arbitrator. The proceeding before the arbitrator would in effect be ex parte. The High Court was therefore right in its conclusion, on a review of the balance of convenience, that stay should not be granted.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 493 of 1960. Appeal by special leave from the judgment and order dated April 29,1959, of the Calcutta High Court in Appeal from Original Order No. 177 of 1958.

S. T. Desai, D. N. Mukherjee and B. N. Ghosh, for the appellants.

C. K. Daphtary, Solicitor General of India, S. K. Kapur and P. C. Chatterjee, for the respondent.

1962. December 12. The judgment of the Court was delivered by SHAH,J.-The appellants are a firm carrying on business as importers in the name and style of "M.

Golodetz & Company" at 120, Wall Street, New York in the United States of America. The respondents are a firm carrying on business, among others as exporters of manganese ore and their principal office of business is at Bentinck Street in the town of Calcutta. By a contract in writing dated July 5, 1955 the respondents agreed to sell and the appellants agreed to buy 25,000 tons of manganese ore on the terms and conditions set out therein. The contract contained the following arbitration clause :

> "Arbitration : Any dispute arising out of the contract is to be settled by arbitration in New York according to the rules of the American Arbitration Association."

Between September 1956 and August 1957 the respondents supplied 5478 tons of manganese ore. Disputes having arisen between the parties about the liability of the respondents to ship the balance of the goods not delivered, the appellants referred them on or about January 15, 1958 to the arbitration of the American Arbitration Association and claimed compensation on the plea that the respondents had unlawfully made default in shipping the balance of the goods agreed to be sold. On February 2, 1958 the respondents commenced an action on the original side of the High Court of Calcutta claiming a decree that the written contract dated July 5, 1955 be adjudged void and delivered up and cancelled, that a perpetual injunction be issued restraining the appellants, their servants and agents from taking steps in purported enforcement of the said contract and that a declaration (if necessary) be made that the said contract stands discharged and that the parties have no rights and obligations thereunder. It was the case of the respondents that the appellants had accepted manganese ore shipped till August 1957 in full satisfaction of their liability and that the contract was discharged and the rights and liabilities of the parties thereunder came to an end. In the alternative the respondents pleaded that the appellants had repudiated the contract or had committed breaches thereof and on that account also the contract stood discharged or had become void or voidable at their option and that they had avoided the same. In the further alternative they pleaded that the contract had become impossible of further performance and that the same stood frustrated or discharged and they were exempted from further performance thereof. The appellants thereupon petitioned the High Court of Calcutta for an order that the proceedings in suit No. 194 of 1958 commenced by the respondents be stayed by an order under s. 34 of the Arbitration Act X of 1940. and that an injunction be issued restraining the respondents, their agents and servants from proceeding with the hearing of the suit. Ray, J, who heard the petition held that to the agreement to submit the disputes to arbitration to a foreign arbitral body s. 34 of the Indian Arbitration Act, 1940,

applied that the remedy of the party aggrieved by the manner in which the proceedings are conducted, or by the award was to contest the arbitration proceeding and the award in the foreign tribunal, according to the law applicable thereto, and that there was no sufficient reason for not staying the action filed in breach of the agreement to refer the disputes arising under the contract to arbitration. In appeal under the Letters Patent against the order, the High Court held that the Court of first instance had not exercised its discretion properly for it had failed to take into consideration certain important circumstances emerging from the evidence, viz. that all the evidence regarding the contract and the disputes was in India, that there were on account of the restrictions imposed by the Government of India special difficulties in securing foreign exchange for producing evidence before a foreign arbitration tribunal, that it would be impossible for the respondents to produce their evidence and there-

fore the foreign arbitration tribunal "would Dot be a safe and convenient forum for a just and proper decision of the disputes between the parties." The learned judges also observed that it was conceded by the Advocate General appearing on behalf of the appellants that the entire matter would be governed by the Indian laws, the Indian Arbitration Act and the Indian Contract Act and on that account also the discretion of the Court to refuse to stay the suit should be exercised. The High Court accordingly reversed the judgment of Ray, J., and vacated the order passed by him. Against that order, with special leave, this appeal is preferred. We will assume for the purpose of this appeal that s. 34 of the Arbitration Act, 1940 invests a Court in India with authority to stay a legal proceeding commenced by a party to an arbitration agreement against any other party thereto in respect of any matter agreed to be referred, even when the agreement is to submit it to a foreign arbitration tribunal. Where a party to an arbitration agreement commences an action for determination of a matter agreed to be referred under an arbitration agreement the Court normally favours stay of the action leaving the plaintiff to resort to the tribunal chosen by the parties for adjudication. The Court in such a case is unwilling to countenance, unless there are sufficient reasons, breach of the solemn obligation to seek resort to the tribunal selected by him, if the other party thereto still remains ready and willing to do all things necessary for the proper conduct of the arbitration This rule applies to arbitrations by tribunals, foreign as well as domestic. The power enunciated by s. 34 of the Arbitration Act is inherent in the Court : the Court insists, unless sufficient reason to the contrary is made out, upon compelling the parties to abide by the entire bargain, for not to do so would be to allow a party to the contract to approbate and reprobate, and this consideration may be stronger in cases where there is an agreement to submit the dispute arising under the contract to a foreign arbitral tribunal. A clause in a commercial transaction between merchants residing in different countries to go to arbitration is an integral part of the transaction, on the faith of which the contract is entered into, but that does not preclude the Court having territorial jurisdiction from entertaining a suit at the instance of one of the parties to the contract, even in breach of the covenant for arbitration. The Court may in such a case refuse its assistance in a proper case, when the party seeking it is without sufficient reason resiling from the bargain. When the Court refuses to stay the suit it declines to hold a party to his bargain, because of special reasons which make it inequitable to do so. The Court ordinarily requires the parties to resort for resolving disputes arising under a contract to the tribunal contemplated by them at the time of' the contract. That is not because the Court regards itself bound to abdicate its jurisdiction in respect of disputes within its cognizance, it merely seeks to promote the sanctity of contracts, and

for that purpose stays the Suit. The jurisdiction of the Court to try the suit remains undisputed : but the discretion of the Court is on grounds of equity interposed. The Court is therefore not obliged to grant stay merely because the parties have even under a commercial contract agreed to submit their dispute in a matter to an arbitration tribunal in a foreign country. It is for the Court, having regard to all the circumstances, to arrive at a conclusion whether sufficient reasons are made out for refusing to grant stay. Whether the circumstances in a given case make out sufficient reasons for refusing to stay a suit is essentially a question of fact. In the present case the circumstances, in our judgment, are somewhat peculiar. The appellants in their petition for stay averred that the petition was bona fide, and was filed at the earliest possible opportunity, that the appellants were ready and willing to do all things necessary for the proper conduct of the arbitration proceeding and there was no sufficient reason why the matters in respect of which the suit had been filed could not be referred to arbitration in accordance with the arbitration agreement. The respondents by their counter-affidavit contended that the entire evidence regarding the subject-matter of the suit and all the witnesses in connection therewith were in India and that no part of the evidence regarding any of the aforesaid matters was in New York. They also submitted that the proper law applicable to the contract dated July 5, 1955 was the Indian law and that the Indian law of Contracts would govern the rights and obligations of the parties. They also contended that the suit raised difficult questions of law applicable to the contract, and on that account also they should not be required to submit the dispute to adjudication by lay-men. It was also submitted that the arbitration clause even if it was binding on the respondents firm contemplated a foreign arbitration i.e. the arbitration was to be held in New York and any award, that might be made would be a foreign award, the arbitrators not being subject to the control of the Courts in India and therefore the provisions of the Arbitration Act including s. 34 would not be availed of by the appellants. By their counter-affidavit the appellants did not challenge the assertion made by the respondents that all the evidence in connection with the dispute was in India and that no part of the evidence was in New York. The constituted attorney of the appellants in paragraph 11 of his counter-affidavit merely affirmed that "'there is no sufficient reason why the matters in respect of which the said suit has been filed should not be referred to arbitration in accordance with the arbitration clause in the said agreement. I deny that there is any valid and/or sufficient reason why the said disputes which are the subject-matter of the said suit should not be so referred to arbitration. I further say that it would be a cause of injustice to the petitioners to permit the respondents, subsequent to the conclusion of a contract to pick and to choose as whim or prejudice may dictate which clauses are binding and which are "inoperative." He further stated in paragraph 12 I do not admit that evidence with regard to matters mentioned in the said paragraph (10(a) of the res- pondent's affidavit) is necessary or cannot be given before the arbitrators as alleged. In particular, deny that if arbitration is held in terms of the agreement as deliberately concluded by and between the parties there will be any denial of justice as alleged or at all. I do not admit that it will be necessary or that it will not be possible for the respondent to send any representative or to take any witness to New York as alleged. On the other hand, if the suit is not stayed, the petitioners will be greatly prejudiced and will suffer hardship."

The High Court addressed itself to the question, whether the pleas raised by the respondents constituted sufficient reason within the meaning of the Arbitration Act, and pointed out, and in our judgment it was right in so doing, that the statement made in the affidavit of the respondent had remained practically unchallenged, that all the evidence in the case relating to the disputes was in

India and that was a strong ground for not exercising the discretion in favour of the appellants. It must be observed that having regard to the severe restrictions imposed in the matter of providing foreign exchange to individual citizens it would be impossible for the respondents to take their witnesses to New York and to attend before the arbitrators at the arbitration proceeding to defend the case against them and the proceeding before the arbitrators would in effect be ex parte. That would result in injustice to the respondents. Undoubtedly the appellants would be put to some inconvenience if they are required to defend the suit filed against them in India, but the High Court has considered the balance of inconvenience and the other circumstances and has come to the conclusion, and in our judgment that conclusion is right, that the facts established make out 'sufficient reason' for not granting stay.

It was urged by counsel for the appellants that the High Court for reasons which were not adequate interfered with the order which was within the discretion of the trial judge and on that account the order must be set aside. But the High Court has pointed out that Ray, J., 'did not give full, proper and adequate consideration to all the circumstances and failed to apply his mind to the relevant affidavits' from which it emerged that all the evidence relating to the dispute was in India and that he did not express his views on the diverse contentions raised and remained content to observe that he was not in a position to decide the questions raised thereby and granted stay because he did not find any compelling reasons for exercising the discretion against the appellants. This criticism of the High Court appears not to be unjustified. The High Court was therefore competent on the view expressed in interfering with the discretion.

The two Courts below have differed on the question as to the law applicable to the contract. Ray, J., held that the contract was governed by the American law. In appeal Mr. S. Choudhry appearing for the appellants propounded that view, but the Advocate-General of Bengal who followed him conceded (as observed by the High Court) that the "entire matter would be governed by the Indian law, the matter of arbitration by the Indian Arbitration Act, and the other matters under the aforesaid contract by the Indian Contract Act, x x x x x so far as the rights and obligations under the disputed contract are concerned, the parties must now be taken to have accepted the Indian Contract Act as the relevant law for their determination." Counsel for the appellants say that no such concession was made before the High Court by the Advocate-General, and the observations made in the judgment were the result of some misconception. Counsel relies in support of this submission upon an affidavit sworn by one Surhid Mohan Sanyal constituted attorney of the appellants filed in this Court on the day on which special leave to appeal was granted. Apart from the circumstance that the affidavit is couched in terms which are vague, and the denial is not sworn on matters within the personal knowledge of the deponent, it is a somewhat singular circumstance, that Sanyal who swore the affidavit relied upon, did not when he swore an affidavit in support of the petition for certificate under Art. 133 of the Constitution before the High Court, make any such assertion. But on the view expressed by us, we deem it advisable not to express any opinion on the question as to the law applicable to the contract. It will be for the Court trying the suit to deal with that question, and to decide the suit. The appeal therefore fails and is dismissed with costs.

Appeal dismissed.