I.T.C. Ltd. vs George Joseph Fernandez And Anr. on 3 February, 1982

Equivalent citations: AIR1982CAL440, AIR 1982 CALCUTTA 440

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Bench: Sabyasachi Mukharji

JUDGMENT

Sabyasachi Mukharji, J.

1. This is an appeal from a judgment and order passed by Mr. Justice Salil Kumar Roychoudhury on 11th of February, 1981 granting the stay asked for and directing the parties to take immediate steps for initiation of the reference under the arbitration agreement contained in the contract mentioned in the plaint. The judgment was passed on an application under Section 34 of the Arbitration Act, 1'940 for stay of Suit No. 736 of 1978 instituted by I.T.C. Ltd. v. G. J. Fernandez. Before I refer to the relevant averments in the plaint it will be important to understand the background under which this application came to be made. The suit was filed on 29th of September, 1978 by the Charterer, for a declaration that the contract and modifications mentioned in the plaint were void and illegal and a decree for Rs. 39,64,341/- or an enquiry as to what amount was due to the plaintiff. In that suit instituted by I. T. C. Limited there were two defendants namely, G. J. Fernandez who was defendant No. 1 and secondly, Canara Bank, defendant No. 2. George Joseph Fernandez being the defendant No. 1 made an application on 24th of April, 1979. George Joseph Fernandez was the absolute owner of two fishing Trawlers Avemaria I and Ave Maria II registered under Nos. 1567 and 1568 dated the 30th of January, 1974 with the Registrar of Indian Ships, Cochin. The said trawlers were imported by the said petitioner under an import licence No. P/CG/ 2062299 dated 3rd of March, 1971. As good deal of arguments were advanced on the conditions of licence it would be relevant to refer to some of the relevant provisions of the licence. The licence was headed "Industry Processed Food (Fishing)". Under Column No. 2 the description and quality of the goods were indicated as two Nos. of fishing trawlers as per list. The approximate value of CIF was stated to be Rs. 23,55,000/-only. The period of shipment was indicated 12 months the date of issue and revalidated up to 6th of January, 1973. The licence was granted, under Govt of India, Ministry of Commerce and Industry Order No. 17/55 dated 7th of December, 1955 as subsequently amended, issued under the Import and Export Control Act, 1947 and was without prejudice to the application of any other prohibition or regulation affecting the importation of the goods which might be enforced at the time of their arrival. In the instruction columns it was stated that the provision which was inapplicable should be struck off. It was further stated that the licence was issued from file No. CGIII/25/143/71. In column I which was not struck off, indicated as follows: --

"(i) This licence is issued with an initial validity period of twelve/twenty-four months from the date of issue. It will be revalidated at or before the end of the said period of twelve-twenty-four months, for a further period of two-one year(s), upon request provided the licensing authority is satisfied that a firm order has been placed on and accepted by the foreign supplier but shipment could not be effected within the initial validity period of the licence. Normally the validity period will not be extended beyond three years from the date of issue.

(ii) This licence will be subject to the conditions in force relating to the goods covered by the licence, as described in the relevant import Trade Control Policy Book, or any amendment thereof made up to, and including, the date of issue of the licence, unless otherwise specified.

(iii) It is also the condition of this licence that:--

(a) where an irrevocable letter of credit is opened by the holder of licence to finance the import of any goods covered thereby, then the authorised dealer hi foreign exchange through whom the credit is opened shall be deemed to be a joint holder of this licence to the extent of the goods covered by the credit,

(b) The goods imported under this licence will be utilised in the licence holder's factory and that no portion thereof will be sold to or be permitted to be utilised by any other party or pledged with any financier other than Banks authorised to deal in the foreign exchange and Stale Financial Corporation provided that particulars of goods to be pledged are reported by the licensee in advance to the licensing authority.

(c) a half yearly return in the attached pro forma shall be furnished by the licensee to the Director of Statistics, Office of the Chief Controller of Imports & Exports, New Delhi, indicating the actual imports and remittance made against the licence as on 28th February, and 31st August, each year. The return for each half year shall be furnished within a period of 15 days from the close of the half year as indicated."

Clause (d) of Sub-clause (iii) was not printed because it was not applicable. Column (iv) is also not relevant. Clause 3 was as follows:--

"3. The licence shall also be subject to the conditions mentioned in APP 31 to the ITC Hand Book of Rules and Procedure 1970."

Clauses 4 and 5 are also not relevant for our present purpose. The Code of export conditions attached to the import licence in question contained, inter alia, the following clauses:--

"1. The proprietor of the licensee firm shall give a personal guarantee to the effect that the value of the export of fish and fish products during a period of seven years from the date of acquisition of the trawlers will not be less than Rupees 47,10,000/-

(Rupees forty-seven lakhs and ten thousand only) and that the licensee shall become a member of the Marine Products Export Promotion Council, if already not a member and shall continue to be a member during this seven year period and shall send periodical returns to the Council and the Ministry of Foreign Trade and Dy. CCI & E, Ernakulam, giving information regarding export performance. The above exports should be over and above the licensee's present level of exports, and if, and will be in addition to any export obligation the licensee might have given in respect of any other import of capital goods or otherwise".

"6. The licensee shall furnish to the Deputy Chief Controller of Imports and Exports, Ernakulam, before clearance of the goods, imported against this licence, from Customs, the personal guarantee and the Bank Guarantee stipulated in paras 1 and 2 above."

"7. The goods covered by this import licencee shall not under any circumstances be released by the Customs authorities unless the personal guarantee and Bank Guarantee as stipulated in para 6 above has been furnished by the licensee."

It appears that sometimes after the grant of the licence the fishing trawlers were imported from Mexico and were hypothecated to Canara Bank. It appears from the reading of the plaint that the said defendant No. 2 being the present respondent No. 2 was made only a pro forma defendant to the suit. On the 21st of March, 1977 there was a Charterparty Agreement between the owner namely. defendant No. 1, and the petitioner herein and the I. T. C. Limited for letting the trawlers for a term of 2 years from the date of actual delivery on certain terms. As the contentions of the parties turn on the effect of these terms it would be appropriate to refer to some of the terms. In the recital it was stated that this was a Bare Boat Charterparty made on the 21st of March, 1977 between defendant No, I, the proprietor and I. T. C. Limited and it was stipulated that the defendant No. 1 would be described in the agreement as the owner and I. T. C Limited would be described as the Charterer. The recital further went on to observe as follows:--

"3. The owner has undertaken to obtain permission in writing of the Chief Controller of Imports and Exports. Government of India and the No-objection Certificate of the Canara Bank for chartering the trawlers to the Charterers."

"1. The owner shall obtain the permission in writing of the Chief Controller of Imports and Exports, Government of India and the No-objection Certificate from the Canara Bank to charter the trawlers to the charterer. This agreement shall receive from the Chief Controller of Imports and Exports and from the Canara Bank permission and No-objection Certificate respectively."

"2. Within 7 days of the receipt of the approval of the JOCIE or the No-objection Certificate from the Canara Bank whichever is later the owner shall deliver the said trawlers to the Charterer at the Port of Vishakhapatnam for carrying out an inspection of the said trawlers by its Authorised Agents to ascertain the repairs to be carried out to the trawlers for making them fully operational without any

defect whatsoever and also to ascertain the cost of such repairs. Thereafter the Charterer shall undertake the repairs at the cost of the owner and bring them to fully operational condition without any defect including all aspects of refrigeration equipment. The Charterer will then conduct fishing trials to ascertain the actual condition of the trawlers and in case the condition is fully satisfactory according to the Charterer and the owner furnishes to the Charterer all documents certifying seaworthiness and also supplies sufficient proof that all port charges, pilotages and all pre-conditions to the lawful operations of the trawlers have been complied with the Charter hire shall commence on and from the date the fishing trials are ended.

The cost of the repairs as mentioned above shall be borne by the charterer initially who will have the right to set off and adjust the said cost against the first quarterly instalment of the charter hire reserved hereunder and as stipulated hereinafter and if there is any balance left, it will be adjusted against the subsequent monthly instalments in their entirety until the cost of repairs undertaken by the charterers shall be fully set off and adjusted against charter hire reserved hereunder."

Clause 3, Clauses 4, 5, 6, 7, 8 and 9 are not relevant for our present purpose. Clause 10 was as follows:-

> "10. (1) The charterer shall pay to the owner for the use and hire of the trawlers Rs. 50,000 per trawler per month from the date of actual delivery and acceptance of each trawler to the charterer at Vishakapatnam, The charter hire shall be payable in advance every month. However the charter hire for the first three months of the charter period in advance at the time the trawlers are delivered to the charterer in accordance with this agreement. The charter hire shall continue to be paid up to and including the date of re-delivery of each trawler to the owner at Vishakapatnam (unless lost/sunk). The charterer will have no right to adjust the charter hire charges against the deposit paid by it to the owner or against any other claims of the charterer, except as provided in this agreement.
>
> (ii) The charterer agrees to keep a deposit of Rs. one lakh per trawler with the owner during the period of the charter. This deposit will be paid by the charterer at the time of taking delivery of each trawler and will not bear any interest and will be adjusted by the charterer towards the charter hire due to the owner against the last two months of the charter period." Clauses 11, 12, 13, 14, 15, 16 and 17 are not relevant for our present purpose. Clause 18 contained the arbitration clause which was as follows:--
>
> "18. Any dispute or difference at any time arising between the parties hereto in respect of the construction meaning or effect or as to the rights and liabilities of the parties aforesaid hereunder or any matter arising out of this Agreement, shall be referred to arbitration in accordance with and subject to the provision of the Indian Arbitration Act, 1940 or any statutory modification or re-enactment thereto for the time being in force and the venue of Arbitration shall be Madras or Calcutta, and not elsewhere and the Award or Awards in such arbitration shall be made a rule of Court

of competent jurisdiction at the instance of either party."

It is the case of the respondent to this appeal being the applicant under Section 34 of the Arbitration Act, and defendant No. 1 to the suit that by 28th of February, 1976 the export obligation in the licence had been fulfilled and guarantee bond was cancelled by the Chief Controller of import and Export. It appears further that on 10th of July, 1977 the trawlers were delivered to the charterer for repairs. On 1st of August, 1977 there was a telex message from the charterer to the owner forwarding the message from the Canara Bank by which the bank signified their non-objection to the vessels being chartered subject to the condition that the bank would have the first charge over the said two trawlers and that payment arising out of the Charter Party Agreement such as advance rent and monthly rental were to be channelled through Canara Bank only and the lease agreement, the copies of which were to be given to the bank and the period of the lease agreement to be intimated. The charterer was agreeable to those terms. Thereafter, repairs commenced. It is not clear from the petition as to the actual date. On the 17th of August, 1977 permission was given by the Chief Controller, Import and Export to charter the two vessels at Rs. 50,000 per month per trawler to I.T.C. for a period of 3 years. It would be appropriate to refer to the letter dated 17th August. 1977 which contained as follows'.-

> "Gentlemen, With reference to your letter No. EEE; F24; 1010 dated 2nd May, 1977 on the above subject. I write to say that it has been decided to allow the charting of the two trawlers imported by you against your licence No. P/CC/2062299 dated 3rd March, 1971 on a charter rental of Rs. 50,000 per month per trawler to Messrs I.T.C. (India) Ltd. Calcutta for a period of three years."

Thereafter, on 30th of September, 1977 the plaintiff took out insurance cover with effect from 30th of September, 1977. Thereafter formal delivery was given for repairs as it appears from the averments made in paragraph 8 of the plaint about which we shall presently refer. On 12th of November, 1977 there was a letter from the owner to the charterer asking for payment of the hire from October 1, 1977. In that letter written in the trade name of the respondent to the appellant dated 12th of November, 1977 it was stated, inter alia, as follows:--

> "The above two trawlers were handed to you for dry-docking and effecting necessary repairs, as early as 10th July, 1977. But, unfortunately there has been undue delay and it is not known when the repairs would be completed.
>
> As you know your Mr. B.P. Singh and our Mr. Fernandez were not in favour of Mr. Sundaram. But in view of the good work done earlier by him in respect of Electronics items, and his assurance that he will do quick work. Mr. Sundaram was accepted for Refrigeration and also Hydraulics' work when Mr. Pernandez was here last, he made it clear to Mr. Sundaram that the whole Refrigeration System should be made perfect on both trawlers including Hydraulics, through capable men, latest by 25th September, 1977. But this work is still to be completed and we do not know when.

> Subsequently we understand, you had engaged Mr. Sundaram for other works also, like Electrical, Electronics, including Auto Pilot, R.T. etc. and for every thing he is looked up to. Unfortunately his men are not regularly present or working, with the result, there is little or no progress.
>
> In view of the fact there has been inordinate delay, you shall make the charter charges, payable to us, which has become effective from 1st October, 1977 for both trawlers, irrespective of when the trawlers will be completely repaired, including the refrigeration and Hydraulic System, or when the same will be sent out to sea for fishing.
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> Also kindly arrange to pay the Port charges with effect from 1st October, 1977 for both trawlers."

2. By a letter dated 22nd November 1977 the owner again asked the charterer to pay the rental of the two vessels from 1st October 1977 and also for depositing Rs. 2,00,000 and it was stated that Mr. Sundaram who was engaged to carry out the refrigeration work at the instance of the charterer had neither the capacity nor the organisational set up even to commence the work in right earnest. In the letter dated 28th of November, 1977 from the charterer to the owner it was informed that the trawlers had been insured for one year from 30th Sept., 1977 to 28th Sept., 1978. On 2nd of Feb., 1978 there was an agreement between the owner and the charterer modifying the Charterparty dated 21st March, 1977 in certain respects. The said agreement dated 2nd of February, 1978 after reciting the past events stated, inter alia, as follows :--

> "Now it is hereby agreed by and, between the parties hereto as follows :--
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> 1. Clause 2 of the Agreement dated 21st March between the parties hereto (hereinafter called the "Original Agreement") will be substituted by the following clause numbered as 2.

The charter hire of the trawlers has commenced from 15th day of January, 1978.

The Charterer has incurred substantial expenses on repairs of the two trawlers which are the subject matter of this agreement. It is strictly understood and agreed between the parties hereto that the owner will bear only Rupees 1,50,000 per trawler of such repair expenses for repairs already carried out up to the date of commencement of the charter hire.

The Charterer will have the right to set off and adjust the abovementioned sum of Rs. 1,50,000 per trawler (i.e. a total of Rs. 3,00,000) against the charter hire reserved hereunder. Such adjustment will commence with effect from the four of the month of the charter and the sum of Rs. 1,50,000 per trawler will be recovered by way of such adjustment in ten equal monthy instalments." It was stipulated that the charter hire was to commence from 15th of January, 1978 and the owner was to bear the repair expenses to the extent of Rupees 1,50,000 for each trawler to be adjusted against rental from the 4th month of the charter in equal monthly instalments and the rental would be Rs.

53,000 per month from the first month of the year and for subsequent months Rs. 52,000 and the deposit of Rs. 100,000 for each trawler to be kept. It appears that by the first week of February, 1978 Rs. 2,00,000 was deposited and hire of Rs. 4,70,000 up to May, 1978 was paid. Our attention was drawn to a portion of the Director's report of the appellant company for the year ending 31st March, 1978 and it would therefore be appropriate to refer to the said relevant extract which has been printed in the Paper Book at page 178. There it was stated, inter alia, as follows:--

> "The company has already established itself as a substantial exporter of Marine Foods. During the course of the year Rs. 3.85 crores worth of Marine foods was exported.
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> The company acquired two Mexican Trawlers and although there were certain initial difficulties in the commissioning of these boats, these have now been overcome. The two Japanese vessels on charter mentioned in the Director's Report for the previous year have now been purchased and with your Company having chartered two more Mexican Vessels, a fleet of 6 large Trawlers is now operating, thus ensuring a firm basis for the procurement of quality raw materials.
>
> A substantial drop in the prices of exportable shrimps during the financial year adversely affected many of the exporters, including your Company. Prices have however now recovered from the low levels that prevailed at the end of 1977 and the Company can once again look forward to improved trading results."

On 18th of July, 1978 there was a letter from the charterer to the owner sending hire up to July, 1978 against adjustment of the repair charges. On 14th Sept. 1978 the letter from the charterer to the owner stated that the charterparty was illegal and in breach of the permission of the Chief Controller of Import and Export and as such was void. It was also stated that the modification was also void and the charterparty had become impossible of performance and asking the trawlers to be taken back. On 16th Sept. 1978 there was a letter from the owner to the charterer confirming a telegram sent on 16th Sept. 1978 and holding the charterer liable under the agreement and objecting to the unilateral termination of the contract and denying the allegations in the charterer's letter dated 14th Sept. 1978. On 29th of Sept. 1978 Suit No. 736 of 1978 was filed by the charterer against the owner which was the subject matter of the said application under Section 34 of the Arbitration Act and is also the subject matter of the present appeal. In paragraph 5 of the plaint it was stated that in or about August, 1977 Canara Bank had intimated that it had no objection to the defendant No. 1 chartering the said trawlers to the plaintiff subject to certain terms and conditions and it was further alleged by the present appellant that all of which were complied with and accepted. It was further stated in the plaint that there was a purported permission granted to the respondent No. 1 to the present appeal by the Chief Controller of Imports and Exports who chartered the trawlers to the plaintiff for a charter rental of Rs. 50,000 per month per trawler for a period of three years. Thereafter, the modifications referred to the charterparty agreement dated 2nd of Feb. 1978 were indicated and it wag described as purported modification. Thereafter, the plaint alleged in paragraphs 10, 11 and 12 as follows:--

"10. The said purported permission dated 18th August, 1977 granted by the Chief Controller of Imports and Exports to the defendant No. 1 for chartering the said trawlers to the plaintiff was given under the said import licence of the defendant No. 1. Such purported permission was given subject to two conditions, namely, that the charter rental would be Rs. 50,000 per month and that the charter would be for a period of 3 years. The said purported agreement dated the 21st March, 1977 was in fact for a period of 2 years with an option to the plaintiff to continue the hiring for a further period of 3 years. The said purported agreement, therefore, was in contravention of and contrary to the terms of the said purported permission and consequently the said import licence. The said purported agreement was or is illegal, against public policy and void.

11. Alternatively, or in any event, the said purported agreement dated 21st March, 1977 was contingent contract, the future events on which the contract was contingent being the receipt of the no-objection certificate from the Canara Bank (the defendant No. 2 herein) and the permission of the Chief Controller of Imports and Exports for chartering the trawlers to the plaintiff on the terms and conditions as agreed between the plaintiff and the defendant No. 1. The purported permission of the Chief Controller of Imports and Exports did not approve of or give permission in the said purported agreement dated 21st March, 1977 but purported to approve of or give permission for different forms or an agreement containing different terms; and as such, no permission, rated or otherwise was at all given for the said purported agreement dated 21st March, 1977. In the premises as aforesaid the said agreement was in violation of the provisions of the Imports and Ex-ports (Control) Act 1947 and was and/or became illegal, void and inoperative.

12. The purported modification agreement dated 2nd February, 1978, which, inter alia, provided that the charter rental would be Rs. 53,000, in the first month of the year beginning 15th January, 1978 and Rs. 52,000 per month for the subsequent months, was also in contravention of the said purported permission dated 18th August, 1977 of the Chief Controller of Imports and Exports and consequently in contravention of the said purported licence according to the allegations in the plaint. There was no or no valid permission for the said modification agreement and as such the same was in violation of the provisions of the said Act, as much illegal, against public policy and void.

In paragraphs 14 and 15 it was stated as follows:--

"14. Further, the plaintiff states that after various tests, trials and repair works made on the trawlers it was found in or obout August, 1978, that there are several inherent and latent defects in the refrigeration system of the said trawlers, which is an essential part of such trawlers and which such defects were not discoverable by ordinary diligence at the time of entering into the said purported agreement dated 21st March, 1977 or at the time of said purported modification thereof. Those defects

are such that without changing the entire refrigeration system and/or without incurring expenses which would be prohibitory, unreasonable and/or prohibitory, it is not possible to remove or rectify the same. The trawlers could not and cannot be made fully operational and free from any defects whatsoever, by making repairs as contemplated by the said purported agreement and the modification thereof. The particulars of some such defects are given in a schedule annexed hereto and marked "C". The plaintiff craves leave to treat the said schedule as a part of this plaint.

15. Further and/or in any event the plaintiff states that the plaintiff and the defendant No. 1, entered into the said purported agreement dated 21st March, 1'977 and the purported modification thereof dated 2nd February, 1978 on the basis of essential and fundamental assumption that the trawlers could be made fully operational and free from all defects by effecting repairs so contemplated thereby. Such assumption was mistaken and not true and was subsequently discovered to be so mistaken. In the premises the said purported agreement modified as aforesaid was and is void."

After setting out the other facts as we have mentioned hereinbefore it was claimed that the charterer being the respondent No. 1 to this appeal was bound to pay the compensation for all the advantages which it had received under the said purported agreement dated 21st of March, 1977 and the purported modification thereof and the costs, charges and expenses which the plaintiff has incurred on the said trawlers. It was further alleged that such compensation incurred on the said trawlers was assessed at Rs. 39,64,341 the particulars whereof were given in Schedule 'D'. The said Annexure 'D' was comprised of the following:--

Annexure 'D' Ave Maria I Ave Maria II Total

1.

Chatter Hire 2,94,000 2,94000 5,88,000

2. Deposit 1,00,000 1,00,000 2,00,000

3. Payment against Spares 6,000 67,000 1,35,000(?)

4. Expensesup to 31st August. 1978.

1598295 15,04,518 30,41,341 19,98,295 19,66,048 39,84,341 It was further claimed in the alternative in paragraph 19 that in supplying the said trawlers the defendant No. 1 committed a fundamental breach of the said purported agreement dated 31st March, 1977 and the purported modification thereof which went to the root and affected the very substance of the same and which made performance thereof impossible. Such a breach on the part of the said respondent it was further alleged had produced a situation fundamentally different from which the parties could not have reasonably contemplated when the said agreement and the modifications were entered into. The plaintiff, it was further alleged, had not been able to obtain any benefit out of the said trawlers

and the appellant being the plaintiff never was nor was bound by any obligation under the said purported agreement dated 21st March, 1977 and the purported modification thereof and was entitled to and had duly rescinded the same and the plaintiff had in the premises suffered loss and damages which the respondent No. 1 was bound to compensate. It was alleged that such loss and damages were assessed reasonably at Rs. 39,64,341. For this purpose also reference was made to the particulars mentioned in the said schedule. In the further alternative, it was claimed that the plaintiff was entitled to recover the said sum of Rs, 39,64,341 as per particulars given in the Schedule 'D' as money paid to and/or on account of the respondent No. 1 and expenses so incurred. Thereafter, the plaintiff claimed, inter alia, a declaration that the said purported agreement dated 21st March, 1977 and the purported modification thereof dated 2nd of February, 1978 were and are illegal, against public policy and void; for a decree for Rupees 39,64.341-00 as per particulars mentioned in Schedule 'D' or alternatively an enquiry. There was also an enquiry claimed in the further alternative. A letter was written to the charterer by Mr. Sampat Kumar, Advocate for the respondent No. 1 on 9th of Oct., 1978. There was letter prior thereto on the 27th of September, 1978 from the Charterer to Mr. A. N. Huskar, Chairman ITC Limited making the grievance of the unilateral repudiation by the ITC Limited of the contract to charter fishing trawlers. The other relevant letters to which we must refer is the letter dated 23rd of Nov., 1978 nominating one Mr. K. S. Venkataraman, I.C.S., retired Judge of the High Court at Madras as the Arbitrator of the respondent No. 1. This letter was written on behalf of the character being the respondent No. 1 herein. On the 12th of Dec., 1978 I.T.C. Limited replied that this suit had been filed on 29th of Sept., 1978 as indicated before it was not in a position to participate in the arbitration. On the l'2th of March, 1981 a letter was written by the respondent No. 1 to I.T.C. Limited which is as follows:--

> Dear Sirs.
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> Whereas by the Bare Boat Charter Party Agreement dated 21st March, 1977 between G. J. Fernandez, Proprietor. Esmario Export Enterprises, Kanand, Quilon, Kerala State and M/s. I. T. C. Limited, Virginia House, 37, Chowringhee, Calcutta-700071, as modified by the agreement dated the 2nd February, 1978 between the said two parties it was agreed inter alia that any dispute, difference at any time arising between the parties hereto in respect of the construction, meaning or effect or as to the rights and liabilities of the parties aforesaid hereunder or any other matter arising out of the agreement shall be referred to arbitration in accordance with and subject to the Indian Arbitration Act, 1940 and the venue of the arbitration shall be in Madras or at Calcutta and not elsewhere.
>
> 2. Whereas the dispute have arisen between the said parties arising out of the said agreement.

Now, therefore, I.G.J. Fernandez hereby nominate and appoint Mr. K. S. Venkataraman, I.C.S. Retired Judge of Madras High Court, 'O H M' Prithivi Avenue Madras-600018 as the arbitrator to hear and determine the dispute aforesaid in accordance with the provisions of the said agreement. I call upon you to concur on the said appointment of Mr. K. S. Venkataraman as such Arbitrator.

Please send the reply immediately."

Thereafter, an application was moved under Section 34 of the Arbitration Act for the stay of suit by ITC Limited, the present appellant, on 24th of April, 1979 and after affidavits the matter ultimately was disposed of by the judgment and order of the learned trial Judge dated 11th of February, 1981 as mentioned hereinbefore.

2-A. After setting out the letters the learned Judge observed that the letters indicated that the transaction was given effect to and acted upon by the parties and the parties understood what was the agreement and what were the terms. The learned Judge thereafter referred to the averments made in the plaint the substance of which we have set out hereinbefore. The learned Judge observ-, ed that the pleadings required for fundamental breach, mistake and illegality had been pleaded by artful drafting filing the plaint through competent lawyers on legal advice. The learned Judge came to the conclusion that there was no basis for the cause of action in the plaint and of the alleged discovery of mistakes as to the essential conditions that is, the refrigeration system being defective was a patent defect and also illegality, modification, frustration, lack of consideration and impossibility of performance of the contract were all afterthoughts. The learned Judge observed several authorities that was cited before him. A submission was made that these questions could not be gone into in an application under Section 34 nor were these questions capable to be decided on affidavits and where the learned Judge doubted the bona fides of the statements then the matter should have been tried on evidence. The learned Judge thereafter made a categorical finding that in the instant case there was no mistake and in any event there was no question of mutual mistake on the date of the agreement as the fact that the refrigeration system of the said two trawlers needed repairs was known to both the parties and the appellant had undertaken to get the said repairs done at the cost of the petitioner through their nominated repairer about whose competency the respondent No. 1 had doubts. Thereafter, the learned Judge held that there was no question of any mistake at any time of the contract or at any time alleged by the appellant in the plaint. The learned Judge further went on to hold that chartering out a vessel was not contemplated and was not within the operation of Appendix 31 of the hand book and the relevant clauses which were applicable to the present case namely, Clause 5 being one of the conditions regarding the use or disposal of the imported goods stated as follows:--

> "Import licences issued to actual users shall be subject to the condition that the licensee shall use the material imported thereunder only for the purpose for which the licence has been issued and no portion thereof shall be sold, disposed of or utilised in any other manner without the written permission of the licensing authority."

Condition 8 was as follows:--

> (8) C.G./HKP Licences, i.e. those issued 'o actual users for import of capital goods, machinery, heavy electrical plant or machine tools shall be subject to the following conditions inter alia:--

(a) the goods imported under the licence shall be utilised in the licence holder's factory at the address shown in the application against which the licence is issued, and for the purpose for which the licence is issued; and that no portion thereof shall be sold to or be permitted to be utilised by any other party or pledged with any financier other than Banks authorised to deal in the foreign exchange and State Financial Corporation, provided that particulars of goods to be pledged are reported by the licensee in advance to the licensing authority.

(b) The import of spare parts against this licence shall be governed by the provisions of paragraph 152 of the Import Trade Control Hand Book, of Rules and procedure in force at the time of shipment of the goods,

(e) The goods covered by this licence shall be used only for the manufacture of..... (name of end product(s) and for the capacity licensed under the Industries (Dev, & Reg.) Act, 1951 or approved by Government.

(d) a half yearly return in the prescribed pro forma shall be furnished by the licensee to the Director of Statistics, Office of the Chief Controller of Imports & Exports, New Delhi, indicating the actual imports and remittance made against the licence as on 28th February and 31st August each year. The return for each half year shall be furnished within a period of 15 days from the close of the half year as indicated." The learned Judge was of the view that the provision appeared to be applicable to raw materials used for manufacturing purposes and also for the transfer, mortgage, sale etc. of plant and machinery, it could be hardly said to apply to charterparty in respect of vessels which were imported for the purpose of deep sea fishing and in fact the same was used accordingly by the charterer and there was no question of any transfer affecting the ownership of the respondent in the licence in any way. Further, the learned Judge held that permission was in fact obtained, it was duly granted and as the modification of the charter party had not affected the essential conditions it was not necessary to obtain further permission. In the premises, the learned Judge was of the view that there was no question of any illegality or any mutual mistake. He referred to several decisions to which attention has been drawn and he thereafter observed that if the validity of the contract was challenged the Court might go into it which might incidentally affect the question of the contract containing the arbitration clause in an application under Section 34 of the Arbitration Act for stay of the suit. Therefore, having regard to the principles laid down by the Supreme Court in the case of Anderson Wright Ltd. v. Moran & Co. that the Court could go into the question of the validity of the contract which contained an arbitration clause whether the arbitration clause was valid or not. He, therefore, considered that question and having regard to all the facts he characterised the averments made as afterthoughts and the alleged difference on the question of fundamental breach, if any, according to the learned Judge, was fully covered by the arbitration clause as these related to the breach of the terms of the contract and was within the jurisdiction of the arbitrator within the wide arbitration clause in the present case. He, therefore, was unable to

accept the submission that there was no valid arbitration agreement. Therefore the conditions for the fulfilment of stay under Section 34 of the Arbitration Act, according to the learned Judge had been fulfilled. He, therefore, granted a stay of the suit and directed the parties to take immediate steps for reference of the disputes to the arbitration.

3. It is the propriety and the correctness of the said decision of the learned Judge which are under challenge in this appeal before us.

4. In support of this appeal it was urged on behalf of the appellant that in order to decide whether stay under Section 34 of the Arbitration Act should be granted or not it was necessary for the Court to consider whether the case as pleaded or the issues as raised in the plaint were within the ambit of the arbitration clause to be adjudicated by the arbitrator and for this purpose the Court must confine itself to the pleadings in the suit and not embark upon the examination of the question whether the case pleaded was correct or genuine or not. It was, secondly, urged that where the issue arose as to whether the contract was void ab initio, and as such the same was not arbitrable, then whether that issue should be decided in a suit or in an application was a matter of procedure and the Court must exercise its discretion properly, having regard to the magnitude and the nature of the evidence required to adjudicate the question. It was submitted that in the instant case it should not have been decided on affidavits in the application because it was urged that the issue as to mistake should not be disposed of summarily, in the facts and circumstances of the case it was better to decide the same in the suit and the issues involved in the suit should not have been decided piecemeal. It was, thirdly, urged that in view of the nature of the pleadings the plea of illegality of the contract as raised in the instant case was not a pure question of law because it involved the adjudication of the facts whether the parties had agreed to obtain the permission. Therefore, in view of the nature of the pleadings and the letters between the parties it was submitted that the question as to mistake which went to the root of the contract or as to illegality involved in this case could not. and should not havo been decided in this manner. In the premises, it was urged that in exercising his discretion in the manner he has done the learned Judge had proceeded erroneously. It was, further, submitted in support of this appeal that if the suit was stayed and the parties were directed to go before the arbitrator the claim of the plaintiff might be considered to be barred by law of limitation and if that was so then, this was a factor which should be taken into consideration in exercising the discretion of this Court even at the appellate stage in the matter of grant of stay under Section 34 of the Arbitration Act. It was, lastly, urged that the learned Judge overemphasised and was mistaken in taking a wrong view of the conduct of the plaintiff and basing his judgment on hypothesis that the plaintiff had pleaded the case in the manner it had done in order to avoid the jurisdiction of the arbitrator within the arbitration clause. It was, then, urged that the mistake which was pleaded in the facts and in the circumstances of the case was a mistake of such magnitude and was a mutual mistake which went at the root of the contract and made the contract void,

5. Before we consider these contentions our attention was drawn to certain authorities dealing with the question as to how should the Court approach an application under Section 34 of the Arbitration Act, in the facts and in the circumstances of this case. Reliance was placed on behalf of the respondent as well as on behalf of the appellant to the decision of the learned single Judge at that

time of this Court in the case of Khusiram v. Hanutmal (1949) 53 Cal WN 505 where it was held that where an application was made under Section 34 of the Indian Arbitration Act for stay of a suit and an issue was sought to be raised as to the formation, existence or validity of the contract containing the arbitration clause, the Court was not bound to refuse the stay but might in its discretion on the application for stay decide the issue as to existence or the validity of the arbitration agreement even though it might involve incidentally a decision as to the validity or existence of the parent contract. Our attention was drawn to the observations of the learned Judge at page 509 of the report where the learned Judge has set out the issues and one of the issues, inter alia, was that the parties were not ad idem and as such there was no contract and there was no arbitration clause. It was, further, pleaded in that case that the contract was void by reason of mutual mistake as to a fact essential thereto. Dealing with this contention at page 513 of the report after reference to several authorities the learned Judge observed that the Court had the power to decide on the application for stay whether an arbitration agreement subsisted for it was the subsistence of the arbitration agreement which alone could give jurisdiction to the arbitrator. Our attention was drawn on the observations dealing with the question as to in what manner the Court should dispose of such a contention. It was submitted that it was held by the learned Judge in that case that whether in a particular case the issue should be decided on affidavit evidence or should be relegated to a suit or the issue should be decided on trial on evidence, must depend upon the facts and the circumstances of a particular case, and must be adjudicated in the background of that particular case. It was open, accordins to the learned Judge, to also consider the case as pleaded and find out whether the issues as to formation of the contract had been raised bona fide or merely to avoid the contract. In the facts and circumstances of the case the learned Judge examined the application and refused to grant stay. Our attention was drawn to the observations of this Court in the decision in the case of General Enterprises v. Jardine Handerson Ltd., where sitting singly I had held that stay should not be granted. In that case Jardine Handerson Ltd., a registered company carried on the business of rendering advisory and technical services for remuneration to various other companies regarding the letters' Provident Fund, Pension Fund, Gratuity etc. M who was 'an actuary by qualification was an assistant and a whole time employee of the company. M represented that he needed assistance of an independent agent and at his instance an agreement was entered into between the company and General Enterprises under which the latter agreed to work as agent on commission. There was an arbitration clause in the contract for reference of dispute if any, to the Bengal Chamber of Commerce and Industry. Subsequently the agreement was terminated. There was some dispute about payment of commission. The company refused to pay on the ground that the firm of General enterprises was consisting of the wife and daughter of M and one named lender partner. The contract, it was urged was obtained by fraud. The company filed a suit for a declaration that the contract was void. The General Enterprises referred the dispute to arbitration of Bengal Chamber and Commerce. It also filed an application in the Court under Section 34 of the Act for stay of the suit. In those circumstances, it was held that stay of suit should not be granted. At page 412 I had discussed the several authorities and at page 415 referring to the decision of Khusiram Banarsi Lal (supra) I had observed that the Court in its discretion in a particular case might decide in Section 34 application as to the existence of the contract. More or less similar view was expressed by Mr. Justice S. K. Roychowdhury in the case of Union of India v. Naresh Chand, where at pages 309 and 310 the learned Judge reiterated more or less the same principles.

6. Therefore, bearing the aforesaid principles in mind it is necessary to examine whether the allegations as pleaded really avoided the contract or in other words, whether there was any pleading of such latent defect which caused mutual mistake which made the contract void ab initio. In order to appreciate the principles which should be applied in examining the pleadings in this case reliance was placed on the observations in Anson's Law of Contract, 24th Edition and our attention was drawn to page 276 where the learned editor has given instances as to what kind of mistakes avoid the contract. In the examples inter alia in clauses (c) and (d) at page 276 of the book the editor has observed that (c) mistake as to the quality of the thing contracted for and (d) a false and fundamental assumption going to the root of the contract, avoid the contract. At page 280 the learned editor has referred to the decision in the case of Bell v. Lever Bros., 1932 AC 161 to which we shall refer independently later. Our attention was also drawn to the observations as to the mistake as to quality which does not generally avoid the contract and where several examples were indicated. It would be desirable first to refer to the enunciation of the principles on this aspect to the observations in the case of Bell v. Lever Bros. Ltd., 1932 AC 161. There one L. Company which held more than 99% of the share capital of the N Company agreed with one. B that he should be in the service of L Company for a term of years during which he should act as chairman of the board of directors of N Company at a salary of 8,000L a year. They made a similar agreement with an S that he should be vica-chairman of the board at a salary be of 6000L a year. While acting as chairman and vice-chaiman respectively B and S entered on their own account into secret speculations in cocoa, a commodity in which N Company dealt, of such Character, as on the finding of the jury In answer to a specific question, would have justified L Company in terminating the agreement of service and the N Company in dismissing them from their offices of chairman and vice-chairman, Subsequently the N Company became amalgamated with another company and it became necessary to cancel the appointments of B and S as chairman and vice-chairman. Being unaware of the aforesaid breaches of duty by B and S the L Company agreed to pay to B 30,000L & to S 20,000L as compensation for terminating their services, B and S agreed to accept these sums and they were duly paid. The jury, in answer to a further specific question, found that the L Company if they have been aware of the breaches of duty by B and S would have terminated their agreement and B and S would have been dismissed from their offices without any compensation. The action in which the jury so found was brought in the first instance by the L Company alone and N Company joined in the course of proceedings as co-plaintiffs against B and S claiming rescission of the compensation agreements and re-payment of the sums paid thereunder on the ground of fraudulent misrepresentation and alternatively, as the House construed the points of claim, on the ground of unilateral mistake induced by fraud, but not on the ground of mutual mistake innocently made by the defendants so far as they were concerned. There was a specific alternative claim that the agreements of settlement and the payments under them were made under a mistake of fact. The jury negatived the charges of fraud and found that at the time of negotiating the compensation agreements B and S had not in mind their breaches of duty, Wright, J., was of the opinion on the construction of the points of claim that an issue based upon an allegation of mutual mistake was thereby raised and the Court of Appeal being of the opinion that if the issue was not raised the pleadings would be treated as amended in order to raise it, held that the compensation agreements were void having been made under a common mistake as to the legal relation between the parties and each party believing it, contrary to the truth, that one was entitled to claim and the other was bound to pay compensation. The Court of Appeal further held that such a case had not been raised before Wright, J., and each of the

defendants owed a duty to the plaintiff to disclose their breaches of duty and their non-disclosure invalidated the compensation agreement. The defendants appealed. It was held first by Lord Blanesburgh, with special reference to the course of the trial and the circumstances of the case, that any amendment of their pleadings to enable the plaintiffs to raise the case of mutual mistake implying good faith on the part of the defendants could not without injustices to them be allowed after an action based exclusively on fraud had failed and accordingly the issue was not open to the plaintiffs in the House of Lords. But on the footing that the points of claim were amended so as to raise them which it was held by Lord Blanesburgh, Lord Atkin and Lord Thankerton (Viscount Hailsham and Lord Warrington of Clyffe dissenting), that the action failed, as to mutual mistake on the ground that the mutual mistake related only not to the subject-matter, but to the quality of the service contracts; as to unilateral mistake, on the ground that the defendants under this contract, of service with the L Company owed no duty to them to disclose the impugned transactions. In this connection it may be instructive to refer to the observations of Lord Atkin at page 217 where the learned Lord had observed that the rules dealing with the effect of mistake on contracts appeared to be established with reasonable clearness and has stated certain instances but at page 218 it was observed by the learned Judge that mistake as to quality of the thing contracted for raised more difficult questions. It was observed that in such a case the mistake would not affect assent unless it was a mistake of both parties and was as to the existence of some quality which made the thing without the quality essentially different from the thing as it was believed to be. Of course it may appear that the parties contracted that the article should possess the quality which one or other or both have mistakenly believed it to possess. But in such a case there was a contract and the enquiry was a different one, being whether the contract as to quality amounted to a condition or a warranty, a different branch of law. His Lordship referred that the principles to be applied were to be found in two cases, and the first one was the case of Kennedy v. Panama etc. Royal Mail Co., (1867) 2 QB 580. The next case was the decision in the case of Smith v. Hughes, (1871) 2 QB 597. It is not necessary to set out in extenso the observations made from the said two decisions which were referred to by Lord Atkin. Then the learned Judge applied these principles to the facts of that cage as found by the jury and came to the decision as we have indicated before. Reliance was placed on the observations of Lord Thankerton at pages 232 onwards. There at page 234 Lord Thankerton had given example that where a horse was bought under a belief that it was sound and if the purchaser was induced to buy by a fraudulent representation as to the horse's soundness the contract might be rescinded. If it was induced by an honest misrepresentation as to the soundness though it may be clear that both vendor and purchaser thought that they were dealings about a sound horse and were in error, yet the purchaser should pay the whole price unless there was a warranty. His Lordship referred to the phrase used "underlying assumption by the parties", as applying in the subject-matter of a contract in the case of Kennedy's case namely, (1867) 2 QB 580 that was applied to the subject-matter of the contract and it might be too widely interpreted to include something which one of the parties had not necessarily in mind at the time of the contract. According to Lord Thankerton this phrase could only properly relate to something which both parties must necessarily had accepted in their mind as an essential and integral element of the subject-matter. In this connection we would do well to refer to the observations of the Privy Council in the case of Sheikh Brothers Ltd. v. Arnold Julius Ochsner, 1957 AC 136 where at page 146 their Lordships of the Judicial Committee reiterated that on behalf of the appellant two points were urged namely, (1) that the mistake was not as to a matter of fact essential to the agreement and (2) that even if the licence in question with which the Judicial

Committee was involved was void under Section 20 of the Indian Contract Act, Section 56 thereof was also applicable and therefore on that finding on the fact of the arbitrators with which the members of the Judicial Committee were concerned that the appellant did not know but the respondents might with reasonable diligence might have known of the impossibility, compensation was payable under the third paragraph of Section 56. The Judicial Committee was of the view that having regard to the nature of the contract before their Lordships that it was a kind of joint adventure and as to the provisions in particular of clauses 3 (c), 4 (a), 5, 6 and 11, the Judicial Committee was of the opinion that this was the very basis of the contract that the sisal area should be capable of producing an average of 50 tons a month throughout the terra of the licence. In that background the Judicial Committee was of the view that in that case the mistake was as to a matter of fact essential to the agreement,

7. Bearing the principles enunciated in those decisions we have to deal with the contentions urged in support of this appeal. We agree with the submission on behalf of the appellant that in determining in an application whether the matter is arbitrable or not within the arbitration clause agreed between the parties the Court should confine itself to the pleadings and not embark upon the examination of the question whether the case pleaded was correct or genuine 'or not. It was submitted that in view of the principles enunciated in the several decisions which we have set out hereinbefore rightly that where an issue arose as to whether the contract which contained the arbitration clause was arbitrable or not, whether that issue decided in a suit or application was a matter of procedure and the Court must exercise the discretion in this matter properly. Having regard to the facts and circumstances in this case and the pleadings and the annexures to the pleadings in the suit and the admitted documents, in our opinion, in the facts and in the circumstances of this case, it cannot be said that the Court erred in exercising its discretion to decide the controversy whether the contract being void the arbitration clause was void, in the application, without evidence and on the basis of pleadings only. Such a procedure is warranted by the decisions in appropriate cases which we have noted hereinbefore and in the facts and circumstances of the case, in our opinion, the learned Judge was not in error in exercising his discretion nor it was exercised improperly. It was submitted that the issue as to mistake should not have been disposed of summarily in this case, we are unable to accept this submission. In this case there are certain facts which are apparent from the pleadings and the documents namely, (1) the charterer had inspection of the trawlers, (2)' both the parties knew that the trawlers and its refrigeration system required extensive repairs and provisions had been made for the same in the charter party agreement and thereafter, (3) repair works were done and expenses were incurred and such repairs were done under the supervision and investigation of the charterer namely, the plaintiff appellant in this case and thereafter, (4) there was modification of the charter party agreement as pleaded as we have noted hereinbefore. Lastly, the so called latent defects which the plaintiff in the suit and the charterer in this case is alleged to have discovered were inter alia, defective hydraulic drive, defective power generator, defective cooling coil system, other components of the refrigeration system required major repairs and design changes involving 'prohibitive expenses', refrigeration system not capable of achieving 20P in the fish hold due to the system running under vacuum at 20F by reason of inherent defects in the design and causing damage to the system due to suction of brine water into the system. There is no allegation and no proof during the long period that preceded the institution of the suit as to what actually were the defects which could not be repaired

or which made the trawlers different from what the parties had agreed to take. We have to bear this in the background of the fact that the plaintiff charterer was used to using trawlers and they had technical advised and inspection before. Indeed in this background when there was nothing else in view of the statement in the annual report of the charterer company for the year ended 31st March, 1978 which specifically referred to 'two Mexican Trawlers' and that they had certain initial defects and these had been overcome, in our opinion, the learned Judge was not wrong in coming to the conclusion that the mistake as pleaded as to quality of the goods was not a mistake of such a nature as to make the thing contracted for something different. As was observed by Lord At-kin in the case of Bell v. Lever Bros., (1932 AC 1611 (supra) that though mistake as to quality of the thing contracted for raised difficult question, the mistake would not affect the assent of the parties unless it was a mistake of both the parties and was as to the existence of some quality which made the thing without the quality essentially different from the thing as it was believed to be. In this case confining ourselves even to the pleadings specially the averments made in paragraphs 14 and 15 in conjunction with the other paragraphs and the fact that that prohibitive cost which should have been normally borne by the owner such defect could be cured, in our opinion, the learned Judge was not in error in holding that there was no case of mutual mistake of such a type as to quality of thing contracted for which could have avoided the parent contract which contained in the arbitration clause. It is true that in doing so the learned Judge has incidentally referred to certain conduct of the parties and perhaps it is also true that in an application under Section 34 of the Arbitration Act," the court should confine itself to the pleadings, but the pleadings must be construed in the background of the totality of the facts and circumstances of the case as apparent from the pleadings, admitted documents and admitted conduct of the parties. Having viewed from that point of view in the light of the principles as referred to in the several decisions and authorities which we have set out hereinbefore in our opinion the learned Judge was not in error in holding that there was no mutual mistake whereby the contract could be avoided. If that is so, then apart from the question of illegality, which we would presently deal with, the other points raised were disputes under the contract or claims under the contract and as such arbitrable. In this connection the pleadings indicated that the plaintiff itself has proceeded on an alternative basis, that the plaintiff has suffered damages for the defects in the machinery and that goes to show that the matters agitated by the plaintiff were matters under the contract and not about the matters as to the existence of the contract. It was submitted that the plaintiff had pleaded certain latent defects and the plaintiff had also pleaded that the plaintiff proceeded on certain basis and as such the plaintiff should be given an opportunity at the trial of the suit to prove the allegations made in this respect and these allegations should not have been summarily rejected. It is true that the learned Judge at places has used language to indicate that the case of the plaintiff was untrue. It may not have been quite appropriate to do so because whether there were such defects which entitled the plaintiff to claim damages or compensation from the owner for defective supply or for the defects in the trawlers, would be matter which should have been best left to the arbirtrators and should not have been prejudged but for our present purpose we must hold that the averments made in the pleadings in the background of the facts and circumstances of the case and the admitted documents do not make out a case of such a mutual mistake as to the quality of the thing contracted for which affected the assent of the parties. If that is so, then it could not be said that even if these defects were there, these defects would not make the contract a contract for a thing for which the parties did not bargain. As there is no case of fraudulent misrepresentation there is no scope of any allegation oi mutual mistake or mistake of the

plaintiff. The case is not a case for breach of warranty. In that view of the matter, we are of the opinion that the learned Judge was right in so far as he held that the matters were arbitrable apart from the question of illegality of the contract. Before we conclude, we have to observe that the learned advocate for the owner Mr. Bhabra has submitted before the learned trial Judge that the events pleaded in paragraph 15 of the plaint referred to mistake on account of future events. It was submitted that this was a wrong reading upon which the learned Judge proceeded because what was pleaded was that latent defects were made patent or became apparent in subsequent times. It was not a case of mistake as to future events. It is possible that a latent defect might become apparent subsequently and in such a case it could not be said that it was a pleading of mistake as to future events. But in this case we need not proceed on that basis. We have taken the pleadings in the totality and have considered the basis of the pleadings in paragraphs 14 and 15 of the plaint and we are of the opinion that there was no case of any pleading of mutual mistake of such a nature as to quality which could legitimately be said to have affected the assent of the parties to the formation of the contract,

8. The next aspect of the matter that was urged before us and urged before the learned trial Judge that the contract was illegal in view of the provisions of the conditions of licence as contained in Appendix 31 of the Hand Book referred to. Now Clause 5 of Appendix 31 deals with the conditions regarding use and disposal we have set out hereinbefore.

Now, in this case the learned trial Judge has held that chartering out of a vessel was not contemplated in the expression 'sold or disposed or utilised'. Therefore, Appendix 31 would not be applicable and in view of Clause 8 he was further of the opinion that it applied to raw materials used for the manufacturing purpose and also for transfer, mortgage and sale etc, of the plants and machinery. It is not necessary in the facts of this case for our purpose to decide this controversy. By letter dated 17th of August, 1977 as appearing at page 34 issued by the controller such permission for chartering out of the vessel was indeed given. We have set out the conditions. It was submitted that grant of such permission was illegal and in any case the subsequent modification of the agreement as pleaded here was without permission. We are unable to agree. It is significant in this aspect to bear in mind that condition No. 1 of the Code of Export Conditions attached to the import licence of the owner in the instant case which we have set out hereinbefore, imposes certain obligations and those obligations had been fulfilled by the owner in this case. One of the obligations imposed was that the proprietor of the licensee should give a personal guarantee to the effect that the value of the export of fish and fish products during the period of 7 years from the date of acquisition of the trawlers would not be less than Rs. 47,10,000/-. The owner before the date of entering in the char-terparty agreement had already fulfilled that obligation. He had exported goods not less than Rs. 47,10,000/-. The conditions, further, imposed that the licensee should become a member of the marine products of the export council and there should be certain other obligations. Now, these obligations had been fulfilled, on the other hand, reliance was placed on these conditions on behalf of the appellant to highlight the submission that these obligations along with the other conditions which we have set out hereinbefore indicated that the permission to import these trawlers and the licence to import the trawlers was granted for actual user by the licensee and not for hiring out and/or chartering out vessels in the manner purported to be done. In other words, the licence was actual user's licence. We are unable to accept. The very conditions which indicated that it could not

be dealt in such manner except without the permission of the Chief Controller and prohibition of certain sale or transfer in certain contingencies indicated that there was no absolute bar as such but it could be only done with the permission. Admittedly in this case in the original charterparty agreement there was permission by the letter or communication dated 17th of August, 1977 and the subsequent modification in our opinion, were not such which affected in view of the fact that the owner of the license had fulfilled the obligations imposed upon him in the manner indicated, before, the entering into the agreement and therefore there has been no non-compliance with the provisions of the Control Act. We are, therefore, unable to agree with the appellant that in the charterparty agreement or the modification thereof there was such illegality which made the contract void. The finding of the learned Judge that the contract was not illegal as such therefore meets with our concurrence.

9. In aid of the proposition that the contract was illegal our attention was drawn to the provisions of Import and Export Control Act, 1947 after its amendment as a result of the decision of the Supreme Court which made breach of the condition of licence leviable to penalty and as such the contract in this case according to the appellant is illegal. Our attention was in this connection drawn to the observations of the Supreme Court in the case of Mannalal v. Kedar Nath, where the Chief Justice Ray observed that negative, prohibitory and exclusive words were indicated of the legislative intent when the statute wag mandatory. Anything done in breach of it would therefore, it was submitted be illegal. Though we respectfully agree with the principle enunciated but in the facts and circumstances of the case this principle will have no application. Several other authorities were referred to about the illegality of the contract by the learned trial Judge. In the view we have taken it is not necessary to deal with those authorities.

10. Another aspect argued before us which was not argued before the learned trial Judge was that even if we hold that the matters which are the subject matter of this suit are arbitrable We should exercise our discretion against staying the suit, because it was submitted, that if the parties were now relegated to arbitration the claim before the arbitrators might now become barred by laws of limitation. In this connection our attention Was drawn to the provisions of Sub-section (3) of Section 37 of the Arbitration Act and it was contended that an arbitration should be deemed to have commenced when one party to the arbitration agreement served on the other party a notice requiring the appointment of an arbitrator or where the arbitration agreement provided that the reference should be to the person named or designated in the agreement requiring that the difference would be submitted to the persons so named or designated. Therefore, on the one hand it was urged that the claim would become barred by limitation if the matters were now referred to arbitration and on the other hand it was submitted that it would not be so barred. In order to appreciate this controversy it would be necessary to bear in mind certain dates. The alleged discovery of mistake upon the basis of which or the cause of action upon the basis of which this suit had been filed is alleged to have arisen in August, 1978. The suit in question was filed in Sept. 1978. After filing of the suit the application under Section 34 was filed and a stay of the proceedings of the suit was granted pending the disposal of the said application. The judgment of the learned trial Judge granting the stay and allowing the application under Section 34 was delivered on the 11th of February, 1981. Thereupon, an application was moved in the Division Bench for grant of interim stay of the said order and the stay had continued until disposal of this appeal. The appeal was filed

on the 27th ol March, 1981. On behalf of the respondent it was contended that in any event there was no question of the arbitration proceedings being barred in this case because there was a stay and on this ground under apart from Section 14 of the Limitation Act, the principle of which would be applicable to the proceedings in arbitration, no question of limitation would arise, it was, further, contended that in any event even up to the date of the judgment of the learned trial Judge, according to the plaintiff/appellant the claim in the arbitration proceedings had not become barred. If thereafter, they chose to proceed in this suit and not referred their claim to arbitration then it was the plaintiff's choice and it would not be fair, according to the respondent, to seek the discretion in their favour on that ground. The main question which has to be borne in mind on this aspect is whether the claim would become barred by limitation or not. In this connection our attention was drawn to some of the decisions which have dealt with this question and it would be necessary to refer to the same. In the case of Union of India v. P. K. Agarwalla (1971) 75 Cal WN 767 the Division Bench of this Court consisting of Mr. Justice Sankar Prasad Mitra, as the learned Chief Justice then was, and Mr. Justice Sisir Kumar Mukerjea had occasion to consider this question. There the contract contained an arbitration agreement. It was held by the Division Bench that in so far as claim was ex-contractu the claim was clearly within the ambit of the arbitration clause. In so far as claim under Section 70 of the Contract Act, the transactions out of which the claim arose were entered into by reason of the contract and were referable to the contract. In any event there was sufficiently close connection in that case, according to the Division Bench, between the claims under Section 70 of the Contract Act and the transactions covered by the contract to bring the claim within the arbitration clause. Merely by pleading that the claim arose under the quantum meruit or under Section 70 of the Contract Act, a party could not avoid arbitration. The other question which the Court dealt with we are not concerned in this case and we need not refer to this aspect. It was, further, held by the Division Bench that Section 14 of the Limitation Act was applicable to arbitration. In the context of the arbitration proceedings initiated after a suit had been stayed under Section 34 of the Arbitration Act, the section should be construed to mean that in computing the period of limitation in proceedings before an arbitrator the time during which the plaintiff had been prosecuting with due diligence another civil proceeding whether in a court of first instance or in a court of appeal against the defendant should be excluded, where the proceeding was founded upon the same cause of action and was prosecuted in good faith in a court which from defect of jurisdiction or other cause of like nature was unable to entertain. It was further observed that readiness and willingness to make an application was by itself not evidence of readiness and willingness 10 do all things necessary for the proper conduct of the arbitration, far less of the readiness and willingness to do so at the time when the proceedings commenced. To hold that whenever an application was made under Section 34 the Court might presume that the defendant was ready and willing to do all things necessary to the conduct of arbitration at the time when the proceedings commenced, an inference which would make the provisions of Section 34 superfluous and meaningless. Mr. Justice Mukherjea expressed the view that a suit which was stayed under Section 34 of the Arbitration Act was a suit which the Court was unable to entertain not from defect of jurisdiction but from 'a cause of like nature'. The jurisdiction of the Court was not ousted by arbitration agreement but the Court by reason of the arbitration agreement declined to exercise jurisdiction. If Section 14 of the Limitation Act applied to arbitration the question whether a claim before the arbitrator was barred or was likely to be barred could not be a relevant consideration in exercising discretion under Section 34 of the Arbitration Act, 1940. In a proper case time spent in

prosecuting the suit would be excluded and it would be for the arbitrator to decide whether such time ought to be excluded under Section 14 of the Limitation Act just as would be for the arbitrator to decide whether the claim was barred by limitation. A party before the arbitrator was therefore placed in the same position as regards the defence of limitation as he would be before a court of law. Mr. Justice Sankar Prasad Mitra, as His Lordship then was, did not quite express any opinion on this aspect of the matter but observed that the possibility of a claim being barred by limitation before an arbitrator, was not ordinarily a relevant consideration in exercising the discretion of the court under Section 34 of the Arbitration Act specially in view of Section 37(1) of the Act but there may be cases in which the Court might have to consider this factor as well and take that into consideration. Mr. Justice S. K. Mukherjea referred to the decision of Mr. Justice A.N. Sen as His Lordship then was in the case of Shalimar Paints Ltd. v. Omprakash, , The learned Judge after reliving on certain precedents had expressed the view that it could not be contended that it would be a principle of law, that whenever there was any possibility of the claim being barred the Court should refuse to exercise its discretion to stay the suit, but the possibility of a claim being barred if referred to arbitration on stay of the suit was a relevant and material consideration in exercising the discretion conferred on the Court under Section 34 of the Arbitration Act. Whether such possibility amounted to a sufficient reason for refusing to stay the suit was a question depending upon the facts of each case. Upon these, Mr. Justice S. P. Mitra as His Lordship then was construed the two decisions of the Judicial Committee in the case of Ramdutt Ramkissen v. E. D, Sassoon & Co., AIR 1929 PC 103 and came to the conclusion that Section 14 of the Limitation Act was applicable to arbitration and expressed his view. Thereafter Mr. Justice S. P. Mitra expressed his view in the manner indicated before. The question again cropped up before this Court in the case of Steel Plant Pvt. Ltd. v. Swastika Alloy Steel Ltd., . There the Division Bench consisting of Chief Justice Sankar Prasad Mitra and Mr. Justice Sudhamay Basu expressed the view that the principle regarding grant of stay of proceedings was that without actually taking a step in the proceedings a party wanting a stay had to apply promptly and if he did not that was a ground on which discretion to grant the stay would be exercised against Mm. The Court also expressed the view that the Court was not obliged to grant stay merely because the parties agreed to submit their disputes under a contract to arbitration. Equitable consideration such as the possibility of claim being barred by limitation might certainly weigh with the Court in exercising the discretion. Grant of stay was entirely a matter of discretion which might be exercised judicially. No inflexible rules could be laid down to govern exercise of such discretion. At the same time when the discretion had been so exercised it should not be readily interfered with. The fact that the appellate Court would have taken a different view would not by itself justify the appellate court to interfere with the discretion of the trial court. The Court also observed that the party desiring stay of proceedings must show that he was and still is ready and willing to do everything necessary for the conduct of the arbitration since the dispute arose and that he should have applied for stay with all promptitude. It is true that mere delay in proceeding with the arbitration was not necessarily a bar to a siad being granted on the application of a party guilty of delay but it could not be said that the question of delay could not be a consideration for exercise of discretion in the matter of stay. But if the applicant seeking stay of proceedings was found to be not ready and willing to submit the dispute to arbitration and heavy amount was involved in the dispute, the stay of suit was rightly rejected. The Court considered the judgment of the Division Bench in the case to which we have just referred. Mr. Justice Sudhamay Basu referred to the observation of Mr. Justice S.K. Mukherjea that the possibility of the claim being barred by limitation

was not a relevant consideration. Mr. Justice Basu in that case had agreed with the views expressed by Chief Justice Chagla in the case of Purushottam Das v. Impex (India) Ltd. . Mr. Justice Sudhamay Basu was of the view that the observations of Mr. Justice Mukherjea were obiter and were not shared by the other learned Judge of the Division Bench. Mr. Justice Basu further held that Mr. Justice Mukherjea should not be construed to have expressed any view which is a departure from law as laid down in several decisions to which the learned Judge referred. Apparently Chief Justice S.P. Mitra agreed with this view.

11. In this connection, our attention was also drawn to certain observations of the Full Bench of the Lahore High Court in the case of Bhai Jai Kishen Singh v. Peoples Bank of Northern India, AIR 1944 Lah 136 where the insolvency petition by the petitioner was dismissed on the ground that the act of insolvency alleged to have been committed by the debtor did not fall within Section 6 of the Provincial Insolvency Act. Therefore, the time in prosecuting the petition, according to the Court, could not be excluded in computing the period of limitation for a subsequent execution petition by the creditor against the debtor firstly because the reliefs in the insolvency petition and the execution application could not be said to be the same and secondly because the insolvent cy petition could not be said to have been dismissed by the insolvency Court as a result of its inability to entertain for "defect of jurisdiction or any other cause of a like nature". The Full Bench of the Lahore High Court, further, observed that the words "or other cause of like nature" in S. 14 of the Limitation Act must be read so as to convey the possibility of something ejusdem generis or analogous with the preceding words relating to the defect of jurisdiction. If these words were read along with the expression "is unable to entertain" they would denote that the defect must be of such character so as to make it impossible for a Court to entertain the suit or application either in its inception or at all events as to prevent it from 'deciding it on merit. It was not possible to give an exhaustive list of defects that these words might be taken to cover. But they were such as have got to be decided before the merits of the case could be gone into and they did not necessitate an examination of the merits of the case which might fall within the purview of these words. If on the other hand, the Court had to go into the merits before the case can be dismissed the defect would not come within the ambit of these words. Illustrations of such defects which were covered by the words "or other cause of like nature" in Section 14 might be found in cases where a suit had failed because it was brought without proper leave or because no notice under Section 80 of the Civil P. C. was given or because of non-production of the Collector's certificate required by Section 6 of the Pension Act. These would go to show that although the Court had jurisdiction to decide them, it was unable to entertain them on account of technical defect and it was not possible for the Court to proceed and consider it on their merits. It would follow that if a plaint or a petition did not disclose cause of action it would have to be rejected but the time spent in its prosecution could not be excluded under Section 14. Thus if on the facts the relief asked for by a plaintiff or a petitioner was found by the Courts to have been misconceived either because it was not warranted by the facts mentioned therein or because the facts stated in the plaint or the petition did not disclose a good and complete cause of action and the plaint or petition was consequently dismissed or rejected, the provisions contained in S, 14 could not be of any help. Our attention was also drawn to the observations of the Supreme Court in the case of S.T. Commissioner, U.P. v. Parson Tools & Plants, Kanpur, where in the context of a particular statute viz., Sales Tax Act which provided for a particular period of limitation for certain proceedings, and as U was not provided, according to the Supreme Court, that the principles of

Section 14 of Limitation Act would be applicable to those Tribunals these principles of these provisions would not be applicable. The Supreme Court further observed that if the legislature in a special statute prescribed a certain period of limitation for filing a particular application thereunder and provided in clear terms that such period on sufficient cause being shown, might be extended to the maximum only up to a specified time limit and no further, then the tribunal concerned had no jurisdiction to treat within the period of limitation an application filed before it beyond such maximum time limit specified in the statute by excluding the time spent in prosecuting in good faith and with due diligence any prior proceeding on the analogy of Section 14(2) of the Limitation Act. Where the legislature clearly declared its intent in the scheme and language of a statute, it was the duty of the Court to give effect to the same without scanning its wisdom or policy and without engrafting, adding or implying anything which was not congenial to or consistent with such expressed intent of the law-giver, more so if the statute was a taxing statute. Reliance was also placed on certain observations of the Supreme Court in the case of Gurdit Singh v. Munsha Singh, where the Supreme Court after Retting out the terms of Section 14 observed at page 648 as follows:--

> "16. It would be noticed that three important conditions have to be satisfied before the section can be pressed into service. These three conditions are --(1) that the plaintiff must have prosecuted the earlier civil proceedings with due diligence; (2) the former proceeding must have been prosecuted in good faith in a court which from defect of jurisdiction or other cause of a like nature was unable to entertain it and (3) the earlier proceeding and the later proceeding must be based on the same cause of action,
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> 17. Now the words "or other cause of a like nature" which follow the words "defect of jurisdiction" in the above quoted provision are very important Their scope has to be determined according to the rule of ejusdem generis. According to that rule, they take their colour from the preceding words "defect of jurisdiction1' which means that the defect must have been of an analogous character barring the court from entertaining the previous suit. A Full Bench of the Lahore High court consisting of Harries C. J., Abdur Rahman, J. and Mahajan, J. (as he then was) expressed a similar view in Bhai Jai Kishan Singh v. People Bank of Northern India, (AIR 1944 Lah 136) (FB) (supra).
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> 18. In the instant cases, it is not denied by the plaintiffs that the Court which tried the previous suits was not precluded from entertaining them because of any defect of jurisdiction. We have, therefore, only to see whether the said court was unable to entertain the former suits on account of any defect of an analogous character. Even a most liberal approach to the question does not impel us to hold that the court trying the earlier suits was unable to entertain them on any ground analogous to the defect of jurisdiction. In Dwarkanath v. Atul Chandra, ILR 46 Cal 870 : (AIR 1919 Cal 381) where the court trying the previous suit had refused to entertain a claim for rent because it was premature, it was held that in a subsequent suit for the aforesaid rent, the plaintiff could not rely upon the provisions of Section 14(1) of the Limitation Act and say that the time did not run against him while those proceedings were being

> prosecuted. Again in Pattabhiramayya v. Narayan Rao, it was held that the fact that the previous suit was dismissed as the plaintiff had no cause of action was not a ground which was covered by Section 14(1). Thus it could not be held that the court which tried the previous suits but eventually threw them out as premature suffered from inability or incapacity to entertain the suits on the ground of lack of jurisdiction or any other defect of the like character. Accordingly the exclusion of the period from Dec. 18, 1945 to Aug. 3, 1951 sought by the appellants cannot be legitimately allowed to them while computing the period of limitation."

12. In this case the parties could not go on with the suit because in appropriate cases under the well established legal principles the Courts bind the parties to their bargain when they have made lawful agreement for arbitration. They are not allowed to proceed in a Court of law. Therefore, in a sense they have no jurisdiction to proceed. So taking a proper view of the provision of the section on the basis of eiusdem generis, the suit did not suffer from lack of jurisdiction as such but is not competent to be proceeded because of reasons analogous to that. In our opinion, therefore, provision of Section 14 of the Limitation Act would be attracted and we find in this case that there already has been reference to the arbitration before any period of limitation in terms of the arbitration agreement though that reference was made by the respondent namely, the owner of the trawlers. The preference of the claims by the parties or the concurrence or application to that appointment or application to the Court or preference of counter claim by the present appellant could not thereafter take place because of the order of injunction issued by this Court. That order of injunction still continues. We must however make a note of the statement made by Mr. Bhabra on behalf of the respondent that his client would not take the plea of limitation before the arbitrators in the arbitration proceedings. That statement of the respondent No. 1 is hereby recorded. In that view of the matter, in our opinion, in the facts and in the circumstances of the case and in view of the principles embodied in Section 14 of the Limitation Act there is no ground for not exercising our discretion in favour of the respondent under Section 34 of the Arbitration Act on the plea that claim of the appellant might now become barred before the arbitration proceedings. Whether however, in the arbitration the appellant will succeed on this point would depend upon what view the arbitrator or the arbitrators would take about the conduct of the appellant. We however make it quite clear that we are not expressing our concurrence in any observations made by the learned trial Judge which might indicate that in filing this suit or in prosecuting the same up to this stage the appellant was not bona fide or had acted improperly or not diligently,

13. For the reasons aforesaid we do not find any ground for not exercising the discretion granting the stay under Section 34 of the Arbitration Act which the learned Judge thought it proper and has exercised his discretion on proper grounds.

14. In the premises, this appeal fails and is accordingly dismissed. The costs of this appeal will be cost in the arbitration proceedings.

15. Interim order that was then during the pendency of the appeal will continue for a fortnight.

C.K. Banerji, J.

16. I agree.