1988 CLC 1652 [Karachi] Before Ajmal Mian and Ahmad Ali U. Qureshi, JJ

Messrs TRANSCOMERZ AG--Appellant versus Messrs KOHINOOR TRADING (Pvt.) Ltd. and 2 others--Respondents

High Court Appeal No.31 of 1988, decided on 5th May, 1988.

(a) Arbitration (Protocol and Convention) Act (VI of 1937)-- ---S 3--Words "a submission made in pursuance of an agreement"- Meaning, scope and import of--Such phrase used in S.3 of Act VI of 1937, would signify not merely an agreement to arbitration but submis sion made in pursuance of agreement to arbitration, to which protocol set forth in First Schedule applies. Haji Suleman v. C.Itoh & Co. Ltd. PLD 1962 (W.P) Kar. 447; Owners of Cargo on Board the Merak v. The Merak (Owners) (1965) 2 WLR 250; Russel on the Law of Arbitration, Seventeenth Edn. by Anthony Walton at 79; Messrs V/0 Tractor-export, Moscow v. Messrs Trarapore and Co., Madras and another A IR 1971 SC 1 and Conflict of Laws by Dicey and Morris, 8th Edn. rel.

(b) Arbitration (Protocol and Convention) Act (VI of 1937)-- ---S. 3--Words 'a submission made in pursuance of an agreement', signify not merely an agreement to arbitration but submission made in pursuance of agreement to arbitration to which protocol set forth in First Schedule applies.

(c) Arbitration (Protocol and Convention) Act (VI of 1937)-- ---S. 3--Word 'shall' as used in S.3 of Act VI of 1937--Meaning, scope and import of--Word "shall" in the context cf S.3 of the Act, would convey meaning of the word "may", thereby investing Court with discretion to order staying of proceedings before an arbitrator- Courts would always lean to interpretation of a provision of a statute which could preserve jurisdiction of the Court instead of its ouster.--[Interpretation of statutes].

(d) Interpretation of statutes-- ---Word "shall" would be interchangeable with word "may"--Where context of the relevant provisions of a statute demand, word "shall" could be construed as "may" and vice versa--Court always would lean to interpretation of a provision of a statute which may preserve jurisdiction of the Court instead of its ouster. 1984 CLC 1605 and PLD 1977 Kar. 562 rel.

(e) Arbitration (Protocol and Convention) Act (VI of 1937)---- ---S.3--Law Reforms Ordinance (XII of 1972), S.3--Proper exercise of discretion by Single Judge--Appeal against--Effect--Where Single Judge had exercised his discretion properly by refusing to stay proceedings before Arbitrator, such exercise of discretion would not call for interference in appeal.

Badruddin Vellani for Appellant. Nasim Farooqui for Respondents.

JUDGMENT

AJMAL MIAN, J.-- This High Court Appeal is directed against an order dated 10-12-1987 passed by a learned Single Judge of this Court, in Suit No.748/1986 declining present Appellants' application (Civil Miscellaneous Application No. 361 of 1987) under Section 3 of the Arbitration (Protocol and Convention) Act, 1937 (hereinafter referred to as the Act), and/or under Section 34 of the Arbitration Act, 1940 (hereinafter referred to as the Act of 1940).

2. The brief facts leading to the filing of the above appeal are that the appellant /defendant No.2 have their business offices in Riehen/Basel Chrichonomez 36 Switzerland and have been exporting goods to various countries including Pakistan. Respondent No.2/ defendant No.1 is an

indenting agent having their offices at Karachi whereas respondent No.l/the plaintiff have their offices at Karachi and have been inter alia importing various kinds of goods including Viscose Staple Fibre. It seems that respondent No.2 booked 85,000 Kg Viscose Staple Fibre Bright Bleached 1.5 D X 38 GDR Origin--First Quality (Annexure 'B' to the Memo of Appeal) as an indenting agent under an indenting order dated 18-5-1986 for respondent No.l. It further seems that respondent No.2 also booked 50,000 Kg of Viscose Staple Fibre as an indenting agent for Messrs Asia Textile Industries Limited under indenting order dated 17-5-1986. The appellant through their confirmation letter dated 20-5-1986 addressed to respondent No. 2 agreed to supply 1,35,000 Kg Viscos Staple Fibre Origin East Germany (Annexure 'C' to the Memo of Appeal). After that respondent No.l opened an irrevocable letter of credit on 15-6-1986 for the aforesaid quantity of 85,000 Kg. The goods were shipped at Hamburg, Federal Republic of Germany on the vessel D1.S. Lanka Abhaya against a clean bill of lading which arrived at Karachi on or about 17-8-1986. It is the case of the appellant that respondent No.1 accepted the delivery of the consignment from the carrier against clean bill of lading without protest and removed the consignment to S.I.T.E. Karachi. After that on 11-8-1986 respondent No.1 sent a telex alleging that the goods were in damaged condition. They got the goods surveyed on 20-8-1986 of which a survey report dated 29-10-1986 was prepared. They also got the samples drawn from the consignment on 23-8-1986 and got the same tested by laboratory through laboratory test report dated 27-10-1986. After that respondent No.1 called upon the appellant to pay the losses. Since there was no response, respondent No.1 filed the Suit No. 748/86 for, the recovery of Rs. 8,40,456 impleading respondent No.2 as the defendant No.1, the appellant and respondent No.3 as defendants 2 and 3 respectively. Respondent No.1 in the aforesaid suit also filed an application for an interlocutory order restraining respondent No. 3 Bank from making payment under the letter of credit upto an amount equal to the amount of the damages claimed in the suit, which application was declined. The appeal against the above interlocutory order, namely, High Court Appeal No.48 of 1987 was dismissed in limine on 20-4-1987 by a Division Bench of this Court. The present appellant, in the above suit before filing of written statement filed the above C.M.A. 361/1987, which was declined as stated hereinabove. The appellants being aggrieved by the above order have filed the present appeal.

3. In support of the above appeal 51r. Badaruddin Vellani learned counsel for the appellants has urged as follows: (i) That the learned Single Judge erred in holding that in order to invoke Section 3 of the Act, it is incumbent that the submis sion to the Arbitration should have been made. (ii) That the learned Single Judge also erred in holding that the word "shall" used in Section 3 of the Act is to be construed as "may" and, therefore, the Court has discretion either to stay or not to stay a suit.

On the other hand Mr. Nasim Farooqui learned counsel for the respondents has vehemently contended as under: (i) That Section 3 of the Act cannot be invoked unless and until submission to arbitration is already made. (ii) That the word "shall" in section 3 is to be construed as may. (iii) That the dispute as to the status of respondent No.1 cannot be resolved without recording evidence, and (iv) That the learned Single Judge has exercised discretion properly in the matter and, therefore, this Court will not interfere with the above discretion.

4. Before dilating upon the above contentions of the learned counsel for the parties, it may be pertinent to observe that the back side of the aforesaid indenting order dated 18-5-1986 (Annexure 'B' to the Memo of the Appeal) issued by respondent No.2 inter alia contained clause 12, which reads as follows:

"In relation to any dispute arising under, oat of/or in respect of this indent the Court of Karachi shall only have jurisdiction to entertain proceedings."

It may also be stated that the confirmation letter dated 20-5-1986 addressed by the appellant to respondent No.2 also contained certain printed conditions on the back side which inter alia included clauses 15 and 16, which read as follows:

"(15) The place of execution of contract for Buyer is Basle. (16) Any controversy arising in connection with this contract has to be settled definitively and according to Swiss Law in a Court of Arbitration; (a) Controversies arising from a contract with a customer abroad according to the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbiters designated according to these Rules. (b) Controversies arising from a contract with a domestic customer of the Civil Court, Basle."

A perusal of the above-quoted clause 12 of the indenting order and clause 16 of the confirmation letter indicates that they are inconsistent with each other, inasmuch as under the former clause it has been provided that in relation to any dispute arising under out of/or in respect of the indent the Courts of Karachi shall only have jurisdiction to entertain proceedings, whereas under the latter clause the mode of resolving the dispute is according to the Rules of Conciliation and Arbitration of the International Chamber of Commerce. The case of the respondent No.1 is that respondent No.2 had never conveyed the above terms of the confirmation letter to them and that the indent was booked by respondent No.2 on behalf of the appellant in terms of the indenting letter dated 18-5-1986 which contained the above-quoted clause 12. On the other hand the case of the appellant is that they accepted the order from respondent No.2 on the terms and conditions contained on the back side of the aforesaid confirmation letter and were not informed by respondent No.2 as to the terms and co; on which respondent No.2 accepted the indent from No.l It is, therefore, evident that there is controversy as to the factum, whether respondent No.1 had agreed to the above quoted clause 16 which contemplates arbitration by the International of Commerce for resolving any dispute. It is also evident there is also controversy on the question whether respondent No.2 was acting as the agent for the appellant or for respondent No.1 or of both. In this regard Mr.. Nasim Farooqui has referred to the case of Haji Suleman v. C.Itoh and Co. Ltd. reported in P L D 1962 (W.P.) Kar. 447, in which a Division Bench of the erstwhile High Court of West Pakistan at Karachi held that legal position of indent merchant vis-a-vis indentor and foreign suppliers is to be determined on the basis of the terms of the contract. Keeping in view the above back ground of the facts, we may now revert to the submissions of the learned counsel for the parties:

5. Mr. Vellani in support of his above first submission that the learned Single Judge erred in holding that in order to invoke section 3 of the Act, it is incumbent that the submission to the Arbitration should have been made, has referred to section 3 of the Act, which reads as follows:----

"Section 3. Stay of proceedings in respect of matters to be referred to arbitration--Notwithstanding anything contained in the Arbitration Act, 1940, or in the Code of Civil Procedure 1908, if any party to a submission made in pursuance of an agreement to which the Protocol set forth in the First Schedule as modified by the reservation subject to which it was signed by India applies, or any person claiming through or. Under him, commences any legal proceedings in any Court against any oth6r party to the submission or any person claiming through or under him in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time after appearance and before filing a written statement or taking any other steps in the proceedings, apply to the Court to stay the proceedings; and 'the Court, unless satisfied that the agreement for arbitration has become inoperative or cannot proceed, or that there is not in fact any dispute between the

parties with regard to the matter agreed to be referred, shall make an order staying the proceedings."

It was contended by Mr. Vellani that in order to invoke above section 3, it is not necessary that there should be actual submission made to arbitration as the word submission made in the above section carries the same meaning as an Arbitration Agreement. He has further submitted that under the late Arbitration Act, 1899, the word submis sion was used in the sense of an Arbitration Agreement and, therefore, it can be presumed that the legislature has used the above word in the sense in which it was used in the above late Arbitration Act, 1899 and was construed by the Courts. He has referred to the case of Owners of Cargo on Board the Merak v. The Merak (Owners), reported in (1965) 2 W.L.R. Page 250, in which Scarman, J. while delivering the judgment of the Court of Appeal--England and while construing the words "submission to Arbitration" observed as follows:-

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"I see no reason for having to construe "submission to arbitration" as an actual submission of an existing dispute to a particular arbitrator. The Act of 1950 does not say that I must. It makes nonsense-of the protocol so to do. The Act of 1924, which first introduced the subsection, was an Act to give effect to the protocol and there is respectable, though now antiquated authority, namely, the repealed section 27 of the Act of 1889, for giving a wider meaning to "submission" if the context so requires. The term "submission to arbitration" is not now defined by statute, and must, in my opinion, be given a meaning appropriate to its, context. While, no doubt, it is often convenient to use the term to distinguish an actual reference of a particular dispute to arbitration from an "arbitration agreement", it would be wrong so to do in construing this particular subsection. Accordingly, I find myself able to say that the subsection gives effect to the intention of the protocol, the intention clearly being that when there is a business contract 'between parties subject to different contracting states those parties are to be referred to arbitration if they have so agreed, whether their agreement relates to present or future differences."

He has also referred to a passage from Russell on the Law of Arbitration, Seventeenth Edition by Anthony Walton at page 79, which reads as follows:-

"The words of the section, however, would seem to limit its operation to cases where some sort of "agreement to submit" is followed by an actual "submission" made "pursuant to" it. (Presumably, the word "submission" here bears its natural meaning, of "a submission (written or not) of an actual dispute to the authority of an arbitral tribunal", rather than the statutory meaning which it bore under the 1889 Act and which is now borne by the phrase "arbitration agreement"). Thus the common case, of an agreement to refer which is never followed by a submission because the claimant prefers to sue instead, is apparently outside the section, although the Protocol clearly meant it to be covered: see the French text of Article 4. 'The less common case, of a bare submission of an existing dispute, is probably not covered: for in that case the dispute would not be "in connection with" a contract containing the agreement to refer. The mention of "existing disputes" is probably aimed at cases where an agreement for arbitration on outstanding differences is one term of a general commercial arrangement."

He has also relied upon the minority view in the case of Messrs V/0 Tractor export, Moscow v. Messrs Tarapore and Co., Madras and another, reported in A IR 1971 SC 1. However, he has candidly submitted that the majority view in the above Supreme Court case is against the view canvassed by him at the bar. At this stage it is pertinent to point out that in the above Indian Supreme Court case A, N. Grover, J., who delivered the majority judgment while construing the words "a submission made in pursuance of an agreement" held that it means factual submission. Reliance was also placed on the well-known work of Russell on the Law of Arbitration, Seventeenth Edition. The relevant portion reads as follows:-

"The phraseology which has been employed in the English statute and the Indian enactment for giving effect to the Protocol and the Conventions relating to arbitration is practically the same. In the English Act of 1924 the words used were identical with the words to be found in Section 3 of the Act, namely, "a submission made in pursuance of an agreement". The only change which has been effected in the English Arbitration Act ef 1950 in Section 4 (2) is that the words "to arbitration" have been inserted within the words "submission" and "made". Among the authoritative text-book. writers there has been a good deal of divergence of opinion on the meaning of the above phraseology. In the 8th Edn. of the Conflict of Laws by Dicey and Morris, Rule 182 has been formulated which is based on Section 4 (2) of the English Arbitration Act, 1950. Referring to Section 4 (2) and the meaning of the words "a submission to arbitration made in-pursuance of an agreement to which the protocol applies" the authors are of the view that this condition is satisfied if the parties have agreed to submit present or future disputes to arbitration. The Court is, according to them, under a duty to stay proceedings although no arbitrators have been appointed. The word "submission" must be regarded as synonymous with the term "arbitration agreement" in the Protocol and the term "agreement to which the Protocol applies" is used "to identify the commercial or business contract between the parties". This statement is based on the judgment of Scarman, J., in Owners of Cargo on Board the Merak v. The Merak (Owners), (1965) 2 WLR 250. Even before the pronouncement of this judgment preference for the view which later on came to be expressed by Scarman, J., had been indicated in the 7th Edn. of the same book. (See pages 1075 to 1076). According to the well-known work of Russell on Arbitration, 17th Edn., the English translation of the Protocol is most obscure. This is what has been stated at p.79: "The words of the section, however, would seem to limit its operation to cases where some sort of "agreement to submit is followed by an actual "submission" made "pursuant to" it. (Presumably, the word "submission" here bears its natural meaning, of "a submission (written or not) of an actual dispute to the authority of an arbitral tribunal", rather than the statutory meaning which it bore under the 1889 Act and is now borne by the phrase "arbitration agreement"). Thus the common case, of an agreement to refer which is never followed by a submission because the claimant prefers to sue instead, is apparently outside the section, although the Protocol clearly meant it to be covered; see the French text of Article 4." The English translation of the French text in the 1950 Act has been stated to be a mistranslation. It has been suggested that the Parliament may have enacted not the true text of the Protocol but a very limited interpretation of the false translation. In Halsbury's Laws of England, Third Edn., Cumulative Supplement 1968, Vol. 11, Arbitration, page 2, reference has been made to the decision of Scarman, J., in The Merak which was affirmed on appeal and which has been followed in Unipat A.G. v. Dowty Hydraulic Units, 1967 R.P.C. 401 the statement in the text being that this provision of law applies although no actual submission to arbitration has been made."

Saeeduzzaman, J. in the case of Akbar Cotton Mills Ltd. v. Messrs Ves Ojuanojo Objedinenije Tech/Amesh Export and another reported in 1984 C LC 1005 followed the above majority decision of the Indian Supreme Court and held that the word 'submission' used in section 3 of the Act means actual submission and pointed out that the Indian Supreme Court in a subsequent case, namely, Ramji Dayawala Sons (P) Ltd. v. Invest Import 1982 PSC 12 (SC of India) followed the above majority view. We are also inclined to concur with the above view rind in our view the use of the words "a submission made in pursuance of an agreement" signifies not merely an Agreement to Arbitration but a submission made in pursuance of an agreement to arbitration, to which the protocol set forth in the first schedule applies. It must, therefore follow that the view taken by the learned Single Judge in the present case seems to be in consonance with law.

6. As regards the second submission of Mr. Vellani that the learned Single Judge also erred in holding that the word 'shall' used in Section 3 of the Act is to be construed as 'may' and, therefore, the Court has discretion

either to stay or not to stay a suit, it may be observed that he has referred to the case of Societe Anonyme Hersent v. United Towing Co. Ltd. and another, reported in The Weekly Law Reports, 1962 Volume 1, page 61 in which Karminski, J. while construing section 4 (2) of the Arbitration Act, 1950 which relates to the protocol set out in the First Schedule held that the Court had no jurisdiction to refuse a stay where, as in the case, the arbitration clause was governed by protocol. However, a contrary view was taken by Fakhruddin G. Fbrahim, J in the case of Messrs Pakistan Insurance Corporation, Karachi v. P.T. Indones Oriental Lines and 4 others reported in P 1. D 1977 Karachi 562. It is true that under section 3 of the Act it has been provided that unless the Court is satisfied that the agreement for arbitration has become inoperative or cannot proceed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, it shall make an order staying the proceedings. It has, therefore, been contended by Mr. Vellani that the word 'shall' leaves no discretion with the Court as to the stay of the suit if the conditions contained in Section 3 of the Act are fulfilled. It cannot be denied that the word 'shall' is interchangeable with the word 'may' and therefore if the context of the relevant provision of a statute demands the word 'shall' can be construed as 'may' and vice versa. In the Present case we are inclined to agree with the view taken in the above Karachi case of 1977 (Pakistan Insurance Corporation, Karachi v. P.T. Indones Oriental Lines and 4 others) that the word, "shall" in context of section 3 of the Act conveys the meaning of the word 'may' and, therefore, the Court has discretion. We may observe that the Court always leans to an interpretation of a provision of a statute which may preserve the jurisdiction of the Court instead of ouster.

7. We are inclined to agree with Mr. Nasim Farooqui that the learned Single Judge in the instant case has exercised discretion properly and, therefore, it does not call for interference by this Court particularly, keeping in view the factum that, whether respondent No.1 had agreed to the above-quoted clause 16 of the confirmation letter is itself in doubt at this stage and cannot be resolved without evidence:
8. We, therefore, find that the above appeal has no merits and therefore it is dismissed but there will be no order as to costs.

A.A./T-31/K Appeal dismissed.