

IND 11981

REPUBLIC OF INDIA CASE NOTE

Treaties—effect in municipal law—1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards—jurisdiction—the law of India

M/s. V/O TRACTOREXPORT, MOSCOW v. M/s. TARAPORE AND CO., MADRAS. 58 A.I.R., S.C. 1 Pt. 685, Jan. 1971.)

Supreme Court of India.

Plaintiff, an Indian company, sought an interim injunction restraining defendant, a Russian firm, from participating in arbitral proceedings in Moscow relative to a controversy over the sale of certain excavating machinery to plaintiff. The principal lines of development of the case indicated that the original contract was concluded in 1965 and that plaintiff opened a letter of credit with the Bank of India in favor of the defendant. After some of the machinery began to arrive in 1966, plaintiff complained to defendant about certain defects therein. Thereafter, the rupee was devalued, and defendant demanded an increase in the letter of credit to cover this change. Plaintiff brought suit for breach of contract and sought to enjoin payments on the letter of credit. The parties reached some agreement about the matter in August, 1966, and plaintiff withdrew the suit. But the following year, plaintiff reinstated the suit for breach of contract and the request for an injunction on payments on the letter of credit as well as on certain devaluation drafts. In November, 1967, defendant began an arbitral proceeding in Moscow in pursuance of an arbitration clause in the contract. Defendant also sought to stay the suit in Madras, arguing that the dispute should have been submitted first to arbitration in Moscow, and invoking Section 3 of the Foreign Awards (Recognition and Enforcement) Act 1961 (XLV, 1961, cited by the court), the law implementing the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (330 U.N. Treaty Series 38). Section 3 provides:

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 Convention set forth in the Schedule applies, or any person claiming through or under him commences any legal proceedings in any Court against any other 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 step in the proceedings, apply to the Court to stay the proceedings, and the Court unless satisfied that the agreement is null and void, inoperative or incapable of being performed 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. (58 A.I.R., S.C. 1, 5.)

In January, 1968, plaintiff filed the application for an interim injunction against defendant's continuing the arbitration proceeding in Moscow. Defendant's application for a stay was dismissed by the lower court and

plaintiff's application for the interim injunction was granted. The defendant appealed against both orders. The Supreme Court dismissed the appeals.

The Supreme Court was faced at the outset with the question of whether there was a conflict between the language of Section 3 and that of Article II(3) of the Convention, which latter provided:

The Court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed. (*Ibid.*)

Essentially, it was a matter of whether the statement, "a submission made in pursuance of an agreement," as used in Section 3, meant, as contended by appellant, that "whenever there is an arbitration agreement or an arbitral clause in a commercial contract of the nature mentioned in the Convention the Court is bound to stay the suit provided the other conditions laid down in Section 3 are satisfied"; or, as contended by respondent, it meant "an actual submission of the disputes to the arbitral tribunal." (*Ibid.* 4.) Respondent's contention would bar appellant's motion for a stay because respondent's action had been commenced before the initiation of the arbitral proceeding.

After examining the background of the 1961 Act and earlier Indian and English legislation for the implementation of international arbitral agreements, Justice Grover said:

We do not consider that it would be right to speculate about the reasons which prevailed with the Parliament in enacting Sec. 3 of the Act in the language in which it has been done. It is abundantly clear that the Parliament did not employ language which would indicate an unequivocal intention that in the presence of an agreement to refer to an arbitral clause in a commercial contract, the provisions for granting stay under the section would immediately become applicable irrespective of an actual submission or a completed reference. As it was open to the legislature to deviate from the terms of the Protocol [1923 Geneva Protocol on Arbitration Clauses] and the Convention [1927 Geneva Convention on the Execution of Foreign Arbitral Awards] it appears to have given only a limited effect to the provisions of the 1958 Convention. A clear deviation from the rigid and strict rule that the courts must stay a suit whenever an international commercial arbitration as contemplated by the Protocol and the Conventions, was to take place, is to be found in Sec. 3. It is of a nature which is common to all provisions relating to stay in English and Indian arbitration laws, the provisions being that the application to the court for stay of the suit must be made by a party before filing a written statement or taking any other step in the proceedings. If the condition is not fulfilled, no stay can be granted. It cannot thus be said that Sec. 3 of the Act or similar provisions in the prior Act of 1937 or the English Statutes were enacted to give effect in its entirety to the strict rule contained in the Protocol and the Conventions. (*Ibid.* 10.)

With regard to the issuance of the injunction against the arbitration proceeding, defendant had urged that as neither it nor the Foreign Trade Arbitration Commission of the U.S.S.R. Chamber of Commerce was subject

to the jurisdiction of Indian courts, this order had no effect. In the alternative, appellant argued that as respondent had violated the contract by not submitting the dispute to arbitration in Moscow, respondent was not now entitled to injunctive relief. The court said:

Ordinarily, a party which has entered into a contract of which an arbitral clause forms an integral part should not receive the assistance of the Court when it seeks to resile from it. But in the present case a suit is being tried in the Courts of this country which, for the reasons already stated, cannot be stayed under Section 3 of the Act in the absence of an actual submission of the disputes to the arbitral tribunal at Moscow prior to the institution of the suit. The only proper course to follow is to restrain the Russian Firm which has gone to the Moscow Tribunal for adjudication of the disputes from getting the matter decided by the tribunal so long as the suit here is pending and has not been disposed of.

30. In this context, we cannot also ignore what has been represented during the arguments. The current restrictions imposed by the Government of India on the availability of foreign exchange of which judicial notice can be taken will make it virtually impossible for the Indian Firm to take its witnesses to Moscow for examination before the Arbitral tribunal and to otherwise properly conduct the proceedings there. Thus, the proceedings before that tribunal are likely to be in effect *ex parte*. The High Court was, therefore, right in exercising discretion in the matter of granting an interim injunction in favour of the Indian Firm. (*Ibid.* 12.)

Justice Ramaswami filed a dissenting opinion.