RAMJI DAYAWALA & SONS (P) LTD.

v.

INVEST IMPORT

October 9, 1980

[P. N. SHINGHAL AND D. A. DESAI, JJ.]

Arbitration Act 1940, *S.* 34; *Code of Civil Procedure* 1908, *S.* 15; *Arbitration (Protocol and Convention) Act* 1937, *S.* 3; *& Foreign Awards (Recognition & Enforcement) Act, S.* 3—*Sub-contract between Indian firm and foreign firm—Sub-contract incorporating an agreement to refer disputes to a foreign arbitral tribunal—After execution of agreement Indian firm repudiating the arbitration agreement—Suit for recovery in High Court by Indian firm—Foreign firm contesting that suit to be stayed on account of arbitration clause in the agreement—Single Judge and Division Bench deciding stay of suit necessary—Decision—Whether valid—power of court to stay suit—Exercise of discretion by trial court—Interference by appellate court.*

The appellant (plaintiff), a private limited company, a labour contractor, entered into a sub-contract with the respondent (defendant), a Yugoslavia based company which in turn had entered into a contract with the State Electricity Board for setting up a power station. The sub-contract dated July 10, 1961 between the appellant and the respondent incorporated an agreement to refer all the disputes arising out of the sub-contract to arbitration by the International Chamber of Commerce in Paris with the application of Yugoslav materials and economical law. In carrying out the work undertaken under the sub-contract, the appellant claimed that it carried out some extra work for which it was entitled to recover extra amounts from the respondent, and as the claims were not satisfied or met with by the respondent, the appellant filed a civil suit on the original side of the High Court for recovery of the amount. On a notice of motion taken out by the appellant, the High Court granted an *ad interim exparte* injunction restraining the respondent from withdrawing the money due to it from the State Electricity Board.

Pursuant to service of the aforesaid notice of motion the respondent moved an application under sec. 151 of the Code of Civil Procedure, alleging in the petition for stay that the disputes and differences that arose were in respect of and/or relating to the sub-contract dated July 10, 1961 and in view of the subsisting agreement to refer disputes or differences arising under or out of the sub-contract to arbitration, the suit filed by the appellant should be stayed. The appellant filed a counter-affidavit contending that there was no concluded agreement between the parties to refer all the disputes arising out of the sub-contract to arbitration and alleged that by letter dated July 10, 1961, the very date on which the sub-contract was entered into at Belgrade, the Managing

A Director of the appellant company informed the respondent that he had objected to the arbitration clause in the agreement. It was also averred that a cable was also sent by the Managing Director on reaching Bombay on July 13, 1961 requiring that the clause regarding arbitration be deleted. Second contention was that even if it is held that there is a subsisting arbitration agreement, having regard to all the circumstances of the case, the discretion should not be exercised in favour of the defendant—respondent.

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The Single Judge granted the petition of the respondent and stayed further proceedings in the suit filed by the appellant, and vacated the *ad interim* injunction granted in favour of the appellant.

The appellant preferred two appeals. One against the order of the single Judge granting stay of the suit of the appellant and the other against the order vacating the *ad interim* injunction. A Division Bench of the High Court dismissed both the appeals by a common judgment holding that there was a valid subsisting arbitration agreement between the parties and that it was binding on both. It also held that the claims made by the appellant in the suit arose out of the sub-contract which included the arbitration agreement and, therefore, the appellant must be bound by the bargain undertaken by him. It negatived the appellant's contention that on the facts and circumstances of the case discretionary relief of grant of stay of suit would cause irrepairable hardship and deny justice.

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In appeal to this Court against the order of stay of the suit granted by the High Court, it was contended on behalf of the appellant: (1) there was no concluded arbitration agreement between the parties to refer the disputes arising out of the sub-contract dated July 10, 1961 to arbitration and, therefore, the suit cannot be stayed; (2) even if the Court came to the conclusion that there was such a subsisting arbitration agreement between the parties, prayer for stay having been made under section 51 of the Code of Civil Procedure and/or under section 34 of the Arbitration Act, 1940, read with Section 151 CPC, the Court should not enforce it in its discretionary jurisdiction as it would result in miscarriage of justice; (3) in view of the provisions contained in the Arbitration (Protocol and Convention) Act, 1937 the Court could not invoke its inherent jurisdiction under section 151 CPC and the Special Act would not assist the respondent as the case was not covered by its provisions. It was also contended that the undermentioned circumstances when properly evaluated would unmistakably indicate that the instant case is not a fit case in which the Court should decline to adjudicate upon the dispute brought to it by granting stay in favour of the respondent. (1) The work under the special contract Ext. A dated July 10, 1961 was executed and carried out in India and the whole of the evidence both for and against the appellant in India, (2) the amount claimed in the suit is so disproportionately small in relation to the huge cost of arbitration to be held at Paris in France that forcing the appellant to incur the cost to realise such a small sum would be denial of justice, (3) restrictions on availability of foreign exchange is a relevant consideration, a fact of which the Court can take judicial notice, (4) the Court should not render its assistance by granting stay to one who insists on arbitration not as a matter of principle but with a view to thwarting, stifling or exhausting the other side, and (5) in all cases of arbitration by a foreign arbitral tribunal there is always a rider that in case of hardship or injustice, Courts of the country of the party being forced to go to foreign arbitral tribunal will protect him.

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On behalf of the respondent it was contended that (1) even if the court proceeds on the assumption that the letter and the cable were received, it is not open to the Court to look into the contents of the letter and the cable because the contents were not proved, as the Managing Director of the appellant company who was supposed to have signed the letter and the cable had neither entered the witness box nor filed his affidavit proving the contents thereof, (2) that once the sub-contract was admittedly signed and executed by the Managing Director of the appellant company, subsequent attempt on behalf of the appellant to repudiate a part of the contract would be of no avail and the court cannot give effect to it except if the *novatio* suggested by the appellant was unreservedly accepted and agreed to by the respondent, and (3) when the motion is addressed to the discretion of the court and the court has exercised its discretion, the appellate Court should be slow to interfere with the discretionary order and substitute its own discretion in place of the discretion of the court before which the motion was addressed. A B C

Allowing the appeal,

HELD: 1. Both the learned Single Judge and the Division Bench of the High Court were in error in granting stay of the suit. The stay of the suit granted by the learned Single Judge and affirmed by the Division Bench is vacated. The suit should proceed further from the stage where it was stayed. The trial court would give priority to it and dispose it of as expeditiously as possible. [928G-H] D

2. The sub-contract marked Ext. A had been signed both by the Managing Director of the appellant company as well as on behalf of the respondent company. The third paragraph of Article 12 of sub-contract Ext. A recites an arbitration agreement. The provision is for a reference of disputes arising out of the sub-contract to foreign arbitral tribunal, namely, the International Chamber of Commerce in Paris. Such a clause spells out an arbitration agreement. [908E-F] E

3. (i) The Appellate Bench of the High Court held that the letter and the cable were not received by the respondent. This conclusion is not only contrary to evidence on record but reached in utter disregard of the admission of the Manager of the respondent. [910A-B] F

(ii) The letter and the cable would show that the arbitration agreement to refer disputes to a foreign arbitral tribunal in the draft was not acceptable to the appellant though the other terms were acceptable. The appellant repudiated the arbitration agreement soon after the agreement was signed when the Managing Director of the appellant was in Belgrade and took the follow up action by sending a cable reiterating and repeating the objection immediately after his return to India. After this specific objection with regard to arbitration agreement in the sub-contract, the respondent allowed the appellant to proceed further with the implementation and execution of the sub-contract, without controverting what the appellant had stated in the letter and the cable. This unmistakably shows that the respondent accepted the alteration as suggested by the appellant in that the arbitration agreement was deemed to have been deleted from the sub-contract Ext. A. [910H; 911A-D] G H

4. If the truth of the facts stated in a document is in issue, mere proof of the handwriting and execution of the document would not furnish evidence of the truth of the facts or contents of the document. The truth or otherwise

A of the facts or contents so stated would have to be proved by admissible evidence i.e. by the evidence of those persons who can vouchsafe for the truth of the facts in issue. [912B-C]

In the instant case the utter failure of the respondent to reply to the letter and the cable controverting the averments made therein unmistakably establish the truth of the averments made in the letter. [912E]

B 5. In the facts of a given case acceptance of a suggestion may be *sub silentio* reinforced by the subsequent conduct. The general rule is that an offer is not accepted by mere silence on the part of the offeree. There may, however, be further facts which taken together with the offeree's silence constitute an acceptance. One such case is where a part of the offer was disputed at the negotiation stage and the original offeree communicated that fact to the offerer showing that he understood the offer in a particular sense. This com-
C munication will probably amount to a counter offer in which case it may be that mere silence of the original offerer will constitute his acceptance. [912G-H]

In the instant case, the conclusion is inescapable that there was no concluded arbitration agreement between the parties. [914E]

Halsburys Laws of England 4th Edn. vol. 9 para 251, *R.* v. *Fulhan, Hammersmith and Kensington Rent Tribunal, ex parte Zerek*, [1951] 1 All E. R.
D 482, *Davies* v. *Sweet* (1962) 2 W.L.R. 525, referred to.

6. (i) The High Court totally overlooked and ignored the admission of receipt of letter and cable in paragraph 6 of the affidavit. The High Court attached importance to the denial of the receipt of the letter and the cable by the employee of the respondent company in the oral evidence and did not attach importance to the subsequent admission that the manager of respondent
E company must have replied to the letter and the cable. Admission, unless explained, furnishes the best evidence. The High Court overlooked the material evidence, drew impermissible inference and came to the conclusion which on evidence is found utterly unsustainable. [914G-H]

(ii) A finding of fact recorded by the High Court overlooking the incontrovertible evidence which points to the contrary and, therefore, utterly unsus-
F tainable cannot come in the way of this Court reaching a correct conclusion on facts and the examination of the evidence by this Court cannot be impeded by a mere submission that this Court does not interfere with finding of fact. [915A]

7. (i) Both the Courts practically overlooked the basic difference in the approach which the Court will have to adopt if the application is to be treated
G under section 34 of the Arbitration Act, 1940, or one under section 151 C.P.C. In any event, as the motion is at the discretion of the Court and as both the parties have led evidence, the burden of proof would assume secondary importance. [916F]

Michael Golodetz & Ors. v. *Serajuddin and Co.* [1964] 1 S.C.R. 19, referred to.

H (ii) It is well settled that where the trial court has a discretion in the matter, the appellate court would not ordinarily substitute its discretion in place of the discretion exercised by the trial court. It is equally well settled that where the trial court ignoring the relevant evidnce, side tracking the

approach to be adopted in the matter and overlooking various relevant considerations, has exercised its discretion one way, the appellate court keeping in view the fundamental principle can and ought to interfere because when it is said that a matter is within the discretion of the court it is to be exercised according to well established judicial principles, according to reason and fair play, and not according to whim and caprice. [917B-C] A

Craies Statute Law 6th Edn. p. 273 *R.* v. *Wilkes* (770) 4 Barr 2527, referred to. B

8. The Single Judge and the Division Bench completely overlooked the well established principles in granting stay of suit in a case where reliance is placed upon a subsisting arbitration agreement. [917D]

9. When parties by contract agree to arrange for settlement of their disputes by a Judge of their choice, by procedure of arbitration voluntarily agreed upon, ordinarily the court must hold the parties to their bargain. As a corollary, if a party to a subsisting arbitration agreement in breach or violation of the agreement to refer dispute to arbitration approaches the Court, the Court would not lend its assistance to such a party and by staying the suit compel the party in breach to abide by its contract. When the parties have agreed to an arbitration by a foreign arbitral tribunal the case for stay would be stronger than if there was a domestic arbitration agreement. However, it is not an absolute rule. Granting or refusing to grant stay is still a matter within the discretion of the court. How discretion would be exercised in a given case would depend upon various circumstances. [918D-F] D

Bristol Corporation v. *John Aird & Co.* [1913] A.C. 241 at 257 and *Owners of Cargo Ex "Athenee"* v. *Athenee* Llyods' List Law Reports, Easter Sittings 1922, Vol. XI, page 6, referred to.

In the instant case the entire evidence both of the appellant and the respondent is in this country; the contract as a whole was executed and carried out in this country; the claim as a whole arose in this country; the appellant is a company incorporated in this country; and the respondent is having its office in this country; and that the respondent is not motivated by any principle to have the decision of the foreign arbitral tribunal at Paris but the principal object of respondent is merely to make it more difficult, if not impossible, for the appellant to assert the claim. The other vital considerations are, that the cost of arbitration at Paris will be so disproportionately high to the claim involved in adjudication that one would never think of incurring such a huge cost to realise such a small sum claimed, and the restriction on the availability of foreign exchange. The sum total of all these well established circumstances clearly indicate that the instant suit is one in which when discretion is exercised on well settled judicial considerations no court would grant stay and the stay has to be refused. [925B-D] E F G

Michael Golodetz & Ors. v. *Serajuddin & Co.* [1964] 1 S.C.R. 19, *Bristol Corporation* v. *John Aird & Co.* [1913] A.C. 241 at 257, *Owners of Cargo Ex "Athenee"* v. *Athence* Llyods' List Law Reports, Easter Sittings 1922, Vol. XI, page 6, *V/o Tractoroexport, Moscow* v. *M/s. Tarapore & Company and Anr.* [1970] 3 S.C.R. 53 and *The Fehmarn* [1957] 2 All E.R. 707, referred to.

10. Section 3 of the Arbitration (Protocol and Convention) Act, 1937 is in *pari materia* with section 3 of the Foreign Awards (Recognition and Enforcement) Act, 1961. Section 3 of the 1937 Act would only be attracted if there is a submission pursuant to an agreement to that effect. [928B-C] H

A In the instant case while there is an agreement as contemplated by First Schedule to the 1937 Act, there is no submission made in pursuance of such agreement and, therefore the application of the respondent could not have been entertained under section 3 of the 1937 Act. [928D]

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 2407-2408 of 1968.

B From the Judgment and Order dated 1-12-1965 of the Calcutta High Court in Appeal Nos. 110-111/64

P. K. Chatterjee and *P. K. Mukherjee* for the Appellant.

S. C. Majumdar, Arvind Kumar, S. Dasgupta, Mrs. L. Arvind C and *Miss Karabi Banerji* for the Respondent.

The Judgment of the Court was delivered by

DESAI, J.—Protracted, time consuming, exasperating and atrociously expensive court trials impelled an alternative mode of resolution of disputes between the parties : arbitrate — don't litigate. D Arbitration being a mode of resolution of disputes by a judge of the choice of the parties was considered preferable to adjudication of disputes by court. If expeditious, less expensive resolution of disputes by a judge of the choice of the parties was the consumation devoutly to be wished through arbitration, experience shows and this case illustrates that the hope is wholly belied because in the words E of Edmond Davis, J. in *Price* v. *Milner*,(1) these may be disastrous proceedings.

A petty labour contractor in search of its labour charges in a paltry amount of Rs. 4,25,343.00 from a giant foreign engineering and construction company which had undertaken to erect a thermal F power station at Barauni in Bihar State under a contract dated February 27, 1960, with Bihar State Electricity Board, filed a suit in the year 1963 which stands stayed without the slightest progress for the last 17 years and with end nowhere in sight. Plaintiff (appellant herein), a private limited company, a labour contractor, entered into a sub-contract for erecting two complete radiation type G steam boilers as part of Thermal power station at Barauni, with the defendant Invest-Import, a Yugoslavia based company which in turn had entered into a contract with the Bihar State Electricity Board for setting up the power station. Plaintiff sub-contractor, pursuant to the sub-contract dated July 10, 1961, had to supply skilled labour, unskilled labour and apprentice labour, to carry out the erection work H and incidentally to do other things provided in the sub-contract.

(1) [1966] 1 W.L.R. 1235.

The contract also provided for employing extra labour force as well as carrying out extra stipulated job for installation, substantial alteration of design etc. as and when desired and directed by the principal contractor, respondent herein. In carrying out the work undertaken under the sub-contract, the plaintiff claims that it carried out some extra work for which it was entitled to recover Rs. 70,000 from the respondent. There were also other claims made by the appellant which were not satisfied or met with by the respondent with the result that the appellant filed suit No. 1359/63 on the original side of the High Court at Calcutta on August 1, 1963, to recover Rs. 4,25,343.00 from the respondent. The split up of the total claim has been set out in the particulars appended to para 16 of the plaint. The appellant also annexed sub-contract between the appellant and the respondent as Annexure 'A' to the plaint. On August 2, 1963, on a notice of motion taken out by the appellant, a learned single judge of the High Court granted an *ad interim ex parte* injunction restraining the respondent from withdrawing the money due to it from the Bihar State Electricity Board.

Pursuant to service of notice of motion taken out by the appellant, on August 8, 1963, the respondent appeared through one Ilija Kostantinovic, Manager of the respondent company posted at its office at 36, Ganesh Chandra Avenue, Calcutta, and moved an application purporting to be under s. 151 of the Code of Civil Procedure, contending, *inter alia*, that the sub-contract between the appellant and the respondent incorporates an agreement to refer all the disputes arising out of the sub-contract to arbitration and, therefore, the suit should be stayed. The clause spelling out agreement to refer disputes to arbitration was reproduced in the petition. It reads as under :

> "Any mutual disputes should be settled in mutual agreement, however, should they fail to reach an agreement in the way, both contracting parties accept the jurisdiction of the Arbitration by the International Chamber of Commerce in Paris with application of Yogoslav materials and economical law".

After setting out the background of disputes between the parties, it was alleged in the petition for stay that in the circumstances set out in the petition, disputes and differences arose between the appellant and the respondent out of or in respect of and/or relating to the sub-contract dated July 10, 1961, and in view of the subsisting agreement to refer disputes or differences arising under or out of the sub-contract between the parties to arbitration, the suit filed by the appellant should be stayed. It was also averred that if the provisions of Arbitration Act did not apply the Court should in

A exercise of its inherent jurisdiction injunct the plaintiff appellant from proceeding with the suit instituted by it. There were further averments praying for vacating *ad interim* injunction granted by the High Court which are no more relevant. The respondent annexed to the petition for stay the sub-contract between the parties dated July 10, 1961, as also some correspondence that had ensued between the B parties.

Appellant filed a counter affidavit sworn by one Bhikhubhai Gourishankar Joshi who described himself as principal officer and constituted attorney of the appellant company controverting the averments made by the respondent in the petition seeking stay of C the suit. The principal contention taken in the counter affidavit was that there was no concluded agreement between the parties to refer all the disputes arising out of the sub-contract to arbitration as contended for and on behalf of the respondent. To substantiate this contention letter dated July 10, 1961, the very date on which the sub-contract was entered into between the appellant and the respon-D dent, sent by the Managing Director of the appellant company as also a telegram sent by the same person on July 13, 1961, were annexed to the counter-affidavit.

Ilija Kostantinovic, Manager of the respondent company at Calcutta filed an affidavit in rejoinder in which there are certain E averments which go to the root of the matter and, therefore, they may better be extracted here. They read as under:

> "5. With reference to the allegations contained in paragraph 4 of the said affidavit, I reiterate the statements contained in paragraphs 3 and 4 of the petition and I deny all allegations, which are contrary thereto and/or inconsistent therewith.
>
> F 6. With further reference to the allegations contained in paragraph 4 of the said affidavit, I say that after entering into the contract dated July 10, 1961, and after executing the same, the respondent purported to send a letter to the petitioner seeking to modify and/or delete the arbitration clause contained in the contract dated July 10, 1961, and also purported to send a cable G to the petitioner. The petitioner never agreed to the modification and/or deletion of the arbitration clause as contained in the said contract or to the alleged arbitration clause suggested by the respondent".

The petition for stay was set down for recording evidence. One H Panich Stojan son of Nikola Panich, Project Manager, Barauni Thermal Project, an employee of the respondent company was examined on behalf of the respondent. No oral evidence was offered

on behalf of the appellant. The learned single judge by his order dated January 10, 1964, granted the petition of the respondent and stayed further proceedings in the suit filed by the appellant. The learned judge also vacated the *ad interim* injunction granted in favour of the appellant. A

The appellant preferred two appeals being Civil Appeal No. 110/64 against the order of the learned single judge granting stay of the suit of the appellant and Civil Appeal No. 111/64 against the order dated February 6, 1964, vacating the interim injunction granted in favour of the appellant. A Division Bench of the High Court disposed of both the appeals by a common judgment dated December 1, 1965, dismissing both the appeals. While dismissing the appeals the division bench held that there was a valid subsisting arbitration agreement between the parties and it was binding on both the parties. It was also held that the claims made by the appellant in the suit arose out of the sub-contract which included arbitration agreement and, therefore, the plaintiff must be bound by the bargain undertaken by him. The contention of the appellant that even if there was a subsisting arbitration agreement, in the facts and circumstances of the case discretionary relief of granting stay of suit would cause irreparable hardship and deny justice to the appellant was negatived. B C D

Appellant then moved an application for a certificate under Article 133(1)(c) of the Constitution. The High Court was of the opinion that the appeals did involve substantial questions of law and the case was a fit one for appeal to the Supreme Court and accordingly granted a certificate under Art. 133(1)(c). Appellant accordingly preferred these two appeals by certificate. E

At the commencement of hearing of the appeals Mr. P. K. Chatterjee, learned counsel who appeared for the appellant stated that by passage of time the prayer for injunction restraining the respondent from recovering its claim from Bihar State Electricity Board had become infructuous and accordingly Civil Appeal No. 2408/68 which was against the order vacating *ad interim* injunction granted by the High Court and the dismissal of the appeal against that order was not pressed. Therefore, Civil Appeal No. 2408/68 would stand dismissed as having not been pressed. F G

Mr. Chatterjee in support of Civil Appeal No. 2407/68 canvassed four contentions before us. They are :

1. There is no concluded arbitration agreement between the parties to refer the disputes arising out of the sub-contract dated July 10, 1961, to arbitration and, therefore, the suit cannot be stayed; H

A 2. Alternatively, even if the Court comes to the conclusion that there is such a subsisting arbitration agreement between the parties, prayer for stay having been made under s. 151 of the Code of Civil Procedure and/or under s. 34 of the Arbitration Act, 1940, read with s. 151, C.P.C., the Court should not enforce it in its discretionary jurisdiction in the
B facts and circumstances of the case as it would result in miscarriage of justice;

3. In view of the provisions contained in Arbitration (Protocol and Convention) Act, 1937, the Court could not invoke its inherent jurisdiction under s. 151, C.P.C. and the
C special Act would not assist the respondent because the present case is not covered by the provisions of the Act;

4. This being a foreign arbitration, s. 34 of the Arbitration Act, 1940, is not attracted and the Court would have no jurisdiction to grant stay of the suit filed by the appellant.

D The first contention is that there is no concluded arbitration agreement betwen the parties to refer the disputes arising out of the sub-contract dated July 10, 1961, to arbitration and in the absence of a mutually agreed arbitration agreement, the respondent is not entitled to a stay of the suit filed by the appellant either under
E s. 34 of the Arbitration Act or under s. 34 read with s. 151 of the Code of Civil Procedure. Undoubtedly, sub-contract marked Ext. A has been signed both by the Managing Director of the appellant company and by one Mr. Petrovije on behalf of the respondent company. Third paragraph of Art. 12 of sub-contract Ext. A recites an arbitration agreement. The provision is for a reference of
F disputes arising out of the sub-contract to foreign arbitral tribunal, namely, the International Chamber of Commerce in Paris. Such a clause has always been interpreted to spell out an arbitration agreement. Respondent contends that admittedly the Managing Director of the appellant company has signed sub-contract Ext. A which incorporates arbitration agreement and the appellant accepted the same and
G entered upon the work entrusted to it under Ext. A and, therefore, it is not now open to it to repudiate a part of the contract which provides for reference of disputes arising out of the sub-contract to arbitration of a foreign arbitral tribunal. Appellant countered by saying that the appellant accepted the principal contract but not the agreement to refer the dispute to foreign arbitral tribunal and that
H there are tell-tale circumstances on record which would convincingly establish that the parties were not *ad idem* with regard to arbitration clause in Ext. A.

To recall, sub-contract Ext. A was signed by the parties in Belgrade on July 10, 1961. Managing Director of the appellant was in Belgrade on that day. On that very day Managing Director sent a letter from Belgrade itself addressed to the respondent at Belgrade, relevant portion of which may be extracted : A

"10th July 1961 B

"I have signed the contract of Barauni Thermal Power Station work with you.

I have objected to the clause of Arbitration put in there in agreement which was deleted from our revised draft of agreement sent to you in advance. C

Arbitration clause will be acceptable to us if only arbitration to be done in India, according to the rules and regulations and procedure of our country".

This letter was handed in to the respondent on the same day on which Ext. A was signed and accepted by the parties and it would imply D that it must be soon after the signing ceremony was over. Further, the Managing Director of the appellant immediately on landing in Bombay on July 13, 1961, sent a cable to the respondent which reads as under :

"Reached safely Bombay (stop) Reference to our letter of E 10th July 1961 regarding Arbitration clause to be deleted from the contract document".

Three things emerge from a conjoint reading of the letter and the cable that before sub-contract Ext. A was signed by the parties at Belgrade, a draft of the intended sub-contract was sent by the F respondent to the appellant for its approval and the Managing Director of the appellant had raised a limited objection to the arbitration clause. On behalf of the appellant it was suggested that there would be no objection to the arbitration clause if arbitration was to be done in India. But as the original draft submitted on behalf of the respondent suggested arbitration by a foreign arbitral tribunal G stationed in Paris, the same was objected to on behalf of the appellant and its amendment was sought. Undoubtedly, Managing Director of appellant signed Ext. A which incorporated the arbitration agreement as extracted herein-before. But the letter referred to herein was handed in presumably soon after the signing ceremony of sub-contract Ext. A was over and was followed by the cable which not H only referred to letter dated July 10, 1961, but also reiterated and repeated the objection to the arbitration clause.

A At one stage of the proceeding the respondent adopted a position that neither the letter nor the cable were received by it and they are not genuine documents. The appellate Bench of the High Court held that the letter and the cable were not received by the respondent. This conclusion is not only contrary to evidence on record but is reached in utter disregard of the admission of the B Manager of the respondent. Ilija Kostantinovic, Manager of the respondent company stationed at Calcutta filed an affidavit in rejoinder. The admissions are spelt out in paragraphs 5 and 6 of the affidavit which are extracted hereinabove. In para 6 it is in terms admitted that the appellant purported to send a letter to the respondent seeking to modify and/or delete the arbitration clause contained in C the contract dated July 10, 1961, and also purported to send a telegram to the respondent. He further proceeded to state that the respondent never agreed to the modification and/or deletion of the arbitration clause. This unambiguous admission unmistakably shows that the letter and the cable were received by the respondent. Of course, again at a later stage when Panich Stojan, Project Manager D of the respondent entered the witness box to give evidence in support of the application for stay he was asked at Question No. 13 whether he had any knowledge about the letter sent by the appellant on July 10, 1961, relating to the arbitration clause contained in the agreement. The answer was that the deponent had not received any E letter in his department. To question No. 16 about the cable, the answer was that the respondent had not received any cable also. In cross-examination when he was confronted with the averments in paragraph 6 of the affidavit of Ilija Kostantinovic, a nebulous answer was given that Mr. Kostantinovic must have replied to the letter and the telegram. And he admitted that Mr. Kostantinovic was the F Manager of the branch office of the respondent company at Calcutta. Now, one employee, viz., the Manager of the respondent company stationed at Calcutta in terms admitted the receipt of the letter and the cable while the witness who claimed to be present at the signing ceremony of the sub-contract Ext. A was emphatic that the cable and the letter were not received and gave an explanation with G regard to the averments of the affidavit which only show that truth was otherwise. In the face of uncontroverted and unambiguous admission in the affidavit of the Manager of the respondent company one can without fear of contradiction assert that the letter and the cable were received by the respondent. The letter and the cable would show that the arbitration agreement to refer disputes to a foreign arbitral H in the draft was not acceptable to the appellant though the other terms were acceptable. The appellant repudiated the arbitration agreement soon after the agreement was signed when the Managing

Director of the appellant was in Belgrade and took the follow up action by sending a cable reiterating and repeating the objection immediately after his return to India. A

Now, once it is admitted and established that the letter and the cable were received by the respondent, ordinarily if the contents of the letter and cable are not acceptable to respondent, a reply to that effect is naturally expected. Contention is that respondent accepted the change in arbitration clause proposed by the appellant *sub silentio* coupled with the subsequent conduct. It is a fact that the respondent did not write back saying that if the arbitration agreement was not acceptable to the appellant the sub-contract would not be acceptable as a whole to the respondent. On the contrary, after a specific objection only with regard to arbitration agreement in the sub-contract Ext. A' by the appellant, the respondent allowed the appellant to proceed further with the implementation and execution of the sub-contract, without controverting what the appellant had stated in the letter and the cable. This would unmistakably show that the respondent accepted the alteration as suggested by the appellant in that the arbitration agreement was deemed to have been deleted from the sub-contract Ext. A. Add to this the circumstance that a petty labour contractor could not have been expected to or was not likely to agree to arbitration by a foreign arbitral tribunal stationed in Paris because it would be beyond its reach to seek relief by arbitration in a foreign country. B C D E

Incidentally it was urged by Mr. Majumdar that even if the court proceeds on the assumption that the letter and the cable were received, it is not open to this Court to look into the contents of the letter and the cable because the contents are not proved as the Managing Director of the appellant company who is supposed to have signed the letter and the cable has neither entered the witness box nor filed his affidavit proving the contents thereof. Reliance was placed on *Judah* v. *Isolyne Bose*,(1). In that case a letter and two telegrams were tendered in evidence and it was observed that the contents of the letter and the telegram were not the evidence of the facts stated therein. The question in that case was whether the testatrix was so seriously ill as would result in impairment of her testamentary capacity. To substantiate the degree of illness, a letter and two telegrams written by a nurse were tendered in evidence. The question was whether in the absence of any independent evidence about the testamentary capacity of the testatrix the contents of the letter could be utilised to prove want of testamentary capacity. F G H

(1) AIR 1945 P.C. 174.

A Obviously, in these circumstances the Privy Council observed that the fact that a letter and two telegrams were sent by itself would not prove the truth of the contents of the letter and, therefore, the contents of the letter bearing on the question of lack of testamentary capacity would not be substantive evidence. Undoubtedly, mere proof of the handwriting of a document would not tantamount to
B proof of all the contents or the facts stated in the document. If the truth of the facts stated in a document is in issue mere proof of the handwriting and execution of the document would not furnish evidence of the truth of the facts or contents of the document. The truth or otherwise of the facts or contents so stated would have to be proved by admissible evidence, i.e. by the evidence of those persons
C who can vouch safe for the truth of the facts in issue. But in this case Bhikhubhai Gourishankar Joshi who filed an affidavit on behalf of the appellant has referred to the averments in the letter and the cable. He is a principal officer and constituted attorney of the appellant company. Once the receipt of the letter and the cable are
D admitted or proved coupled with the fact that even after the dispute arose and before the suit was filed, in the correspondence that ensued between the parties, the respondent did not make any overt or covert reference to the arbitration agreement and utter failure of the respondent to reply to the letter and the cable controverting the averments made therein would unmistakably establish the truth of
E the averments made in the letter. What is the effect of averments is a different question altogether but the averments contained in the letter and the cable are satisfactorily proved.

It was, however, contended that once sub-contract Ext. A was admittedly signed and executed by the Managing Director of the
F appellant company, subsequent attempt on behalf of the appellant to repudiate a part of the contract would be of no avail and the court cannot give effect to it except if the novatio suggested by the appellant is unreservedly accepted and agreed to by the respondent. In the facts of a given case acceptance of a suggestion may be *sub silentio* reinforced by the subsequent conduct. True it is that the
G general rule is that an offer is not accepted by mere silence on the part of the offeree. There may, however, be further facts which taken together with the offeree's silence constitute an acceptance. One such case is where a part of the offer was disputed at the negotiation stage and the original offeree communicated that fact to the offerer showing that he understood the offer in a particular
H sense. This communication will probably amount to a counter offer in which case it may be that mere silence of the original offerer will constitute his acceptance (see Halsbury's Laws of England, 4th Edn.,

Vol. 9, para 251). Where there is a mistake as to terms of a document as in this case, amendment to the draft was suggested and a counter offer was made, the signatory to the original contract is not estopped by his signature from denying that he intended to make an offer in the terms set out in the document ; to wit, the letter and the cable (*Ibid.* para 295). It can, therefore, be stated that where the contract is in a number of parts it is essential to the validity of the contract that the contracting party should either have assented to or taken to have assented to the same thing in the same sense or as it is sometimes put, there should be consensus *ad idem*. And from this it follows that a party may be taken to have assented if he has so conducted himself as to be estopped from denying that he has so assented (*Ibid*, para 288). Even apart from this, it would still be open to the party contending novatio to prove that he had not accepted a part of the original agreement though it has signed the agreement containing that part. It would in this connection be advantageous to refer to *R.* v. *Fulhan, Hammersmith* and *Kensington Rent Tribunal, ex parte Zerek,*(1) wherein an oral agreement was entered into between the landlord and a tenant for lease of unfurnished premises at weekly rent of 35s. The landlord subsequently refused to grant the tenant possession unless he agreed to hire his furniture to the landlord for one year at a rental of £12 and to execute a document certifying, *inter alia*, that the letting was a furnished letting at a rent of 35s. a week. The tenant signed the document and entered into possession. Later the tenant applied to a rent tribunal to fix a reasonable rent for the premises as an unfurnished dwelling house under the Landlord and Tenant (Rent Control) Act, 1949. The tribunal accepted the tenant's evidence that the premises were originally let unfurnished and came to the conclusion that the document signed by the tenant did not constitute a valid agreement and did not modify or replace the earlier oral agreement and that the premises were not *bona fide* let furnished. The tribunal reduced the rent to 15s. a week. On an application by the landlord for an order of certiorary, motion for certiorary was refused and in so doing the subsequent written agreement was ignored and the previous oral agreement was accepted as genuine and binding. It would, therefore, be inappropriate to say that because the appellant has signed the sub-contract, every part of it is accepted by him even though there is convincing evidence pointing to the contrary. It was, however, said that a subsequent negotiation

(1) [1951] 1 All E.R. 482.

A or a repudiation of part of the contract cannot in any manner affect the concluded agreement. Reliance was placed on *Davies* v. *Sweet*(1) the pertinent observation at p. 529 being as under:

> "If there was originally a concluded bargain between the parties, this could only be got rid of by either (a) a mutual
> B agreement to call off the sale, or (b) an agreement for a variation of the terms of the original contract. The mere fact that there have been negotiations which prove to be abortive and do not result in an enforceable agreement does not destroy the original contract: see *Perry* v. *Suffields Ltd.* (1916) 2 Ch. 187. C.A."

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If on the evidence in this case it can be held that the sub-contract Ext. A was a concluded contract in respect of all clauses of it including the arbitration agreement, a subsequent repudiation of a part of it by a party to the contract cannot affect the concluded agreement. But as clearly pointed out hereinbefore an amendement
D was suggested to the draft of the intended contract and immediately after the signing ceremony a letter pointing out that that part in respect of which amendment was sought and not carried out was not acceptable and it was followed by a cable it would indicate that the parties were not consensus *ad idem* with regard to a severable portion of contract and there was thus lack of mutuality on the
E question of arbitration agreement. Therefore, the conclusion is inescapable that there was no concluded arbitration agreement between the parties. The High Court rejected the contention of the appellant holding that when the Managing Director of the appellant signed the contract at Belgrade on July 10, 1961, the sub-contract contained the arbitration agreement and his signature was only less
F than half an inch away from the arbitration clause and that he has not entered the witness box and offered himself for cross-examination and that the respondent's contention that the letter and the cable were not received appeared to be acceptable. The High Court totally overlooked and ignored the admission of receipt of letter and cable in paragraph 6 of the affidavit of Ilija Kostantinovic. The
G High Court attached importance to the denial of the receipt of the letter and the cable by Mr. Panich Stojan in his oral evidence and did not attach importance to his subsequent admission that Mr. Kostantinovic must have replied to the letter and the cable. Admission, unless explained, furnishes the best evidence. With respect,
H the High Court overlooked the material evidence, drew impermissible inference and came to the conclusion which on evidence we find

(1) [1962] 2 W.L.R. 525.

utterly unsustainable. A finding of fact recorded by the High Court overlooking the incontrovertible evidence which points to the contrary and, therefore, utterly unsustainable cannot come in the way of this Court reaching a correct conclusion on facts and the examination of the evidence by this Court cannot be impeded by mere submission that this Court does not interfere with finding of fact. A

Assuming we are not right in reaching the conclusion that there was no concluded arbitration agreement between the parties and that the concurrent finding of fact recorded by the learned single judge and the division bench of the High Court in Letters Patent Appeal are binding on us, we may now examine the contention of law whether in the facts and circumstances of this case the High Court was right in exercising its discretion in favour of the respondent by granting stay of the suit filed by the appellant. B C

If the application for stay filed by the respondent purported to be under s. 34 of the Arbitration Act, by a catena of decisions it is well settled that granting of stay of the suit is within the discretion of the Court. The expression 'such authority may make an order staying the proceedings' clearly indicates that the Court has a discretion whether to grant the stay and thereby compel the parties to abide by the contract or the Court may refuse to lend its assistance by undertaking to adjudicate the dispute by refusing the stay. If the application is under s. 151, C.P.C., undoubtedly the Court will still have a discretion in exercise of its inherent jurisdiction to grant stay of the suit or refuse the same but the approach of the Court would be different. If s. 34 of the Arbitration Act, 1940, is attracted, ordinarily the approach of the Court would be to see that people are held to their bargain. Therefore, the party who in breach of arbitration agreement institutes an action before the Court, the burden would be on such party to prove why the stay should be refused. On the other hand, if the application is under s. 151, C.P.C., invoking inherent jurisdiction of the Court to grant stay, the burden will be on the party seeking stay to establish facts for exercise of discretion in favour of such party. In the present case respondent who moved an application for stay of suit instituted by the appellant founded its request for stay on shifting sands in that at one stage it was stated that the application was under s. 34 of the Arbitration Act, at other stage it was stated that it was under s. 151, C.P.C., and before us it was stated that it is under s. 3 of the Arbitration (Protocol and Convention) Act, 1937, or under the Foreign Awards (Recognition and Enforcement) Act, 1961. In the notice of motion taken out for stay of the suit by the respondent D E F G H

A it was stated that the application purports to be under s. 151, C.P.C. There is no reference to s. 34 of the Arbitration Act, 1940, in the body of the petition or in the affidavit annexed to the petition. On the contrary, it was stated in para 16 of the petition that if Arbitration Act, 1940 does not apply to the arbitration agreement relied upon by the respondent, the Court may in exercise of its inherent B jurisdiction restrain the appellant from proceeding with the suit. Learned single judge appears to have treated the application to be under s. 34 of the Arbitration Act, because in the last paragraph of his order he has stated that the Arbitration Act applies even if the arbitration agreement provides for reference to a foreign arbitral tribunal. So saying, stay was granted which would imply that the C learned judge treated the application to be one under s. 34 of the Arbitration Act. While dealing with the contention of the appellant that in view of the fact that arbitration agreement refers to arbitration by a foreign arbitral tribunal, Arbitration Act, 1940, is not attracted, the Division Bench has assumed as was done in *Michael Golodetz & Ors.* v. *Serajuddin & Co.*,[1] that the Arbitration Act, D 1940, invests in Court in India with authority to stay a legal proceeding commenced by a party to an agreement against any other party thereto in respect of any matter agreed to be referred,, even when the agreement is to submit it to a foreign arbitral tribunal. It further, however, held that even if s. 34 is not attracted, the Court can in E exercise of the inherent jurisdiction for doing justice between the parties, stay further proceeding of the suit which would imply that the Court exercised its jurisdiction under s. 151, C.P.C. Both the Courts practically overlooked the basic difference in the approach which the Court will have to adopt if the application is to be treated under s. 34 of the Arbitration Act, 1940, or one under s. 151, C.P.C. F In any event, as the motion is at the discretion of the Court and as both the parties have led evidence, the burden of proof would assume secondary importance.

The important question is whether the Court was justified in the facts and circumstances of the case in exercising its discretion G in favour of the respondent. Before examining this aspect, a minor contention raised by Mr. Majumdar that when the motion is addressed to the discretion of the Court and the Court has exercised its discretion one way, the appellate Court should be slow to interfere with the discretionary order and substitute its own discretion in place of the discretion of the Court before which the motion was H addressed and as in this case both the learned single judge and the

(1) [1964] 1 S.C.R. 19.

appellate bench have exercised the discretion in favour of the respondent, in exercise of its extra-ordinary jurisdiction this Court should not interfere with the same, may be disposed of. It is well settled that where the trial court has a discretion in the matter, the appellate court would not ordinarily substitute its discretion in place of the discretion exercised by the trial court. But it is equally well settled that where the trial court ignoring the relevant evidence, side tracking the approach to be adopted in the matter and overlooking various relevant considerations, has exercised its discretion one way, the appellate court keeping in view the fundamental principle can and ought to interfere because when it is said that a matter is within the discretion of the court it is to be exercised according to well established judicial principles, according to reason and fairplay, and not according to him and caprice. 'Discretion', said Lord Mansfield in *R.* v. *Wilkes,* 'when applied to a court of justice, means sound discretion guided by law. It must be governed by rule, not by humour; it must not be arbitrary, vague, and fanciful, but legal and regular' (see Craies on Statute Law, 6th End., p. 273). In the course of this judgment we would be constrained to point out that both the learned single judge and the judges of the Division Bench completely overlooked the well established principles in granting stay of suit in a case where reliance is placed upon a subsisting arbitration agreement.

Mr. Chatterjee, learned counsel for the appellant deduced the following circumstances from the evidence on record which, when properly evaluated, would unmistakably indicate that this is not a fit case in which the Court should decline to adjudicate upon the dispute brought before it by granting stay in favour of the respondent :

(i) The entire main contract including the work of erecting the boilers entrusted to the appellant under the sub-contract Ext. A, dated July 10, 1961, was executed and carried out in India and the whole of the evidence both for and against the appellant is in India;

(ii) The amount claimed in the suit is so disproportionately small in relation to the huge cost of arbitration to be held at Paris in France that forcing the appellant to incur the costs to realise a small sum would be denial of justice;

(iii) Restrictions on availability of foreign exchange is a relevant consideration, a fact of which Court can take judicial notice;

(iv) The Court should not lend its assistance by granting the stay to one who insists on arbitration not as a matter of

A principle but with a view to thwarting, stifling or exhausting the other side;

(v) In all cases of arbitration by a foreign arbitral tribunal there is always a rider that in case of hardship or injustice Courts of the country of the party being forced to go to foreign arbitral tribunal will protect him.

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We would analyse and examine each one of the circumstances hereinabove extracted separately and evaluate their cumulative impact on exercise of the judicial discretion one way or the other. While so doing the observations of the learned single judge and learned judges of the Division Bench in granting stay of suit must receive serious consideration.

C

When parties by contract agree to arrange for settlement of their disputes by a judge of their choice, by procedure of arbitration voluntarily agreed upon, ordinarily the Court must hold the parties to their bargain. As a corollary, if a party to a subsisting arbitration agreement in breach or violation of the agreement to refer dispute to arbitration approaches the Court, the Court would not lend its assistance to such a party and by staying the suit compel the party in breach to abide by its contract. When the parties have agreed to an arbitration by a foreign arbitral tribunal the case for stay would be stronger than if there was a domestic arbitration agreement. This proceeds on the assumption that parties not only sought and agreed upon the forum for resolution of dispute but also the law according to which the dispute would be resolved. However, this is not an absolute rule. Granting or refusing to grant stay is still a matter within the discretion of the Court. How discretion would be exercised in a given case would depend upon various circumstances. But to grant stay of the suit is still a matter within the discretion of the Court. *In Bristol Corporation* v. *John Aird & Co.*,(1) Moulton, L.J. observed as under :

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> "But, my Lords, it must be remembered that these arbitration clauses must be taken to have been inserted with due regard to the existing law of the land, and the law of the land as applicable to them is, as I have said, that it does not prevent the parties coming to the Court, but only gives to the Court the power to refuse its assistance in proper cases. Therefore, to say that if we refuse to stay an action we are not carrying out the bargain between the parties does not fairly describe the position. We are carrying out the bargain between the parties,

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(1) [1913] A.C. 241 at 257.

because that bargain to substitute for the Courts of the land a domestic tribunal was a bargain into which was written, by reason of the existing legislation, the condition that it should only be enforced if the Court thought it a proper case for its being so enforced". A

In *Owners of Cargo Ex "Athenee"* v. *Athenee*,(1) the Court of Appeal affirmed the extracted passage from Lord Moulton's judgment. In that case the action was brought by the receivers of a part cargo of onions, which it was alleged were damaged in course of carriage from Alexandria to Hull, and the President of the Admiralty Division declined to stay the action. The Court of Appeal in the appeal at the instance of the defendants declined to interfere with the order refusing the stay on the ground that the balance of convenience and the substantial advantage which the plaintiffs have by suing in U.K. (and which they lose by not being able to proceed in rem against this ship) and many other advantages such as in respect of proof of loss, a matter which any commercial tribunal would wish should be decided, if possible, having regard to the evidence obtained at the time by inspection of the vessel and so on, and in these circumstances the arbitration clause in the contract was not given effect to. B C D

Reverting to the circumstances relied upon by the appellant which are likely to influence the discretion of the Court, the first submission is that the whole of the principal contract including the sub-contract was carried out in India and the whole of the evidence both of the appellant and the respondent is in India and that this is a relevant circumstance which must influence the judicial verdict. Appellant has itemised his different claims in the plaint. Broadly stated, it claims payment for extra work, difference between agreed charges and the revised charges, loss incurred on account of non-performance of a part of the contract by the respondent, etc. In respect of most of the claims the appellant will have to examine the men incharge of the work, strength of labour force supplied by it and this evidence would certainly be in India. Respondent had set up its office at Calcutta and this office was functioning even when the suit was instituted. Looking to the various heads of claim by the appellant and the correspondence between the parties prior to the suit it is safe to conclude that the evidence of the respondent would also be in India. Of course, as a remote possibility some highly placed officers may have to be examined by the respondent who may be in Yugoslavia. Mr. Majumdar learned counsel for the respondents, however, urged that the respondent has closed its office and all the books and E F G H

(1) Llyods' List Law Reports, Easter Sittings 1922, Vol. XI, page 6.

A relevant documents have been taken to Belgrade and, therefore, it is now too late in the day to say that the evidence of the respondent is also in India. The Court is required to consider the situation as on the date of institution of the suit and unquestionably on the date of institution of the suit office of the respondent at 36, Ganesh Chandra Avenue, Calcutta, was functioning and within 7-8 days of the institu-
B tion of the suit respondent appeared in the suit through Ilija Kostantinovic, Manager of the respondent stationed at Calcutta. Neither in the main petition for stay nor in the affidavit in rejoinder it was anywhere stated that the evidence of the respondent was not in India. It was, however, urged that nearly a decade has rolled by and that this Court should take into consideration the change in circumstances
C on account of the passage of time for which respondent is in no way responsible. Reliance was placed on *Pasupuleti Venkateswarlu* v. *The Motor & General Traders.*(1) In that case an action was brought by the landlord for recovering possession of certain premises from the tenant. When the matter was pending in the High Court, evidence
D was tendered to point out that since the institution of the action in the trial court the landlord has recovered another accommodation and that if the subsequent development is taken into consideration landlord has no present need of the accommodation in possession of the tenant. The High Court admitted evidence on this point and took into consideration the fact that the landlord has since the institution
E of the suit obtained possession of another accommodation and on this finding non-suited the appellant. An objection was taken on behalf of the landlord before this Court that the High Court was in error in taking into consideration subsequent events and this contention was negatived. In the very nature of action for eviction on the ground of personal requirement, the Court has not only to be satisfied
F that the requirement was present at the date of institution of the action but continued to exist at the time of decree and has to mould the decree accordingly. Even if subsequent events as have a bearing on the contention canvassed before the Court have to be taken into consideration, there is no material on record to show that the respondent has closed its office at Calcutta and that the documents and
G books of accounts which may have to be tendered in evidence have been taken to Yugoslavia. Save this, Mr. Majumdar could not controvert the fact that the entire evidence both of the appellant and the respondent which may be relevant for resolution of the dispute involved in the suit is in this country, India. In *Athenee* (supra) case the fact that the evidence was in U.K. was considered as very
H relevant consideration for refusal to stay the suit. In *Michael*

(1) [1975] 3 S.C.R. 1958.

Golodetz & Ors. (Supra) the fact that all the evidence of the parties was in India was accepted by this Court as a relevant consideration for refusing to stay the suit. A

The next circumstance relied upon is that the cost of arbitration to be held at Paris would be so disproportionately high to the amount claimed in the suit that forcing the appellant to go to arbitration would be denial of justice. This is self-evident. The claim in the suit is Rs. 4,25,343. Now, just contemplate taking witnesses and books of accounts to Paris for leading evidence before the International Chamber of Commerce. The cost would certainly be disproportionately high. One need not go into the mathematical calculations for this obvious and self-evident proposition. B C

The next circumstances relied upon is restriction on availability of foreign exchange as a relevant consideration. If witnesses are required to be taken to Paris, if lawyers are to be engaged in Paris and if documents are to be sent to Paris, all this would require foreign exchange. Foreign exchange is a scarce and controlled commodity. It can be obtained for prescribed purpose. Both in the case of *Michael Golodetz* (Supra) and in *V/O Tractoroexport, Moscow* v. *M/s. Tarapore & Company and Anr.*(1), this Court held that restriction on availability of foreign exchange is a relevant consideration which should enter into judicial verdict for exercising the discretion one way or the other. The High Court in this connection observed that if the Managing Director of the appellant company could obtain foreign exchange for going to Belgrade to sign the contract, why should it be assumed that he would not get foreign exchange this time too to plead his cause — a cause which owes its existence to the grant of foreign exchange in 1961? This casual approach is none-too-convincing. Foreign exchange for a visit for few days cannot be equated with heavy requirement of foreign exchange for engaging counsel, taking witnesses and transporting documents from India to Paris so as to substantiate a claim of Rs. 4,25,343. And the judicial approach is not whether the appellant would get necessary foreign exchange but the approach is should this valuable national asset of foreign exchange be frittered away for resolving a petty matter which can be conveniently resolved even in this country. D E F G

The next circumstance canvassed is that the Court should not lend its assistance by granting the stay of the suit to one who insists on arbitration not as a matter of principle but with a view to thwarting, stifling or exhausting the other side. Respondent insists that H

(1) [1970] 3 S.C.R. 53.

A by staying the suit the appellant should be forced to go to arbitration if it desires to vindicate its claim. Is this approach dictated by some principle or was the respondent aware of the fact that looking to the quantum of claim the appellant would not undertake the hazarduous and expensive adventure of going to foreign arbitration tribunal stationed at Paris and that thereby the respondent would be able to
B thwart or stifle the claim of the appellant? If the relief to be granted is discretionary, the approach of each party persuading the Court to exercise the discretion one way or the other would be a vital and relevant consideration. The respondent has anyhow either to appear before the Court in India or a foreign arbitral tribunal in Paris.
C The respondent is from Yugoslavia. Apart from this, the respondent has an office at Calcutta and the responsible officer like a Manager was stationed at Calcutta. The correspondence between the parties prior to the institution of the suit shows that the relevant documents were in India on the basis of which certain replies were given by the respondent to the claims advanced on behalf of the appellant.
D But once the suit was filed, the respondent insists that arbitration agreement should be given full effect. Having regard to all the circumstances of the case it appears crystal clear that the respondent is motivated to seek stay neither to vindicate any principle nor to hold the appellant to the bargain but to force the appellant to go to Paris incurring disproportionately heavy cost or to give up the
E claim. In *Michael Golodetz* (Supra) the fact that arbitration in New York would proceed *ex parte* was viewed with disfavour and stay was refused. Similarly, in *The Fehmarn*(1), the principal object of the defendant was not to achieve a trial in Russia but merely make it more difficult to the plaintiffs to assert their claim, was emphasised while refusing stay. In such a situation if there are other weighty
F circumstances which indicate that the Court should not lend its assistance to the respondent by staying the suit, this aspect of the approach of the respondent would reinforce the conclusion.

The next circumstance urged is that even where parties have
G agreed to refer a dispute to foreign arbitral tribunal it is always subject to a rider that the agreement is subject to the law of the land, viz., that it does not prevent the parties from coming to the court but only gives to the Court the power to refuse its assistance in appropriate cases. And enforcing the agreement would work hardship or injustice, the Court would take it into consideration
H before holding the parties to their bargain. In *The Fehmarn*, a cargo was loaded at a Russian port by a Russian shipper on board

(1) [1957] 2 All E.R. 707.

the Fehmarn, a ship owned by a German Company. The cargo was, by terms of the bill of lading, shipped in apparent good order and condition and was to be delivered at the port of London in like order and condition. The plaintiffs, an English company, purchased the cargo and became the holders of the bill of lading, thereby agreeing to be bound by its terms, one of which was that all questions and disputes should be determined in the U.S.S.R. At the Port of London the cargo was discovered, according to the plaintiff, to be contaminated and the damage was surveyed. The plaintiffs issued a writ claiming against the defendants damages for breach of the contract evidenced by the bill of lading. The only matter for evidence, so far as the plaintiffs' case was concerned, that did not arise in England was the condition of the goods when shipped, as regards which the bill of lading contained the statement mentioned above. The defendants moved to set aside the writ for want of jurisdiction on the ground that by the contract the parties had agreed that all disputes arising under it should be judged in the U.S.S.R. and contended alternatively that all proceedings should be stayed. Willmer, J. in Admirality Division, held that where there is a provision in the contract providing that disputes are to be referred to a foreign tribunal *prima facie* the court will stay the proceedings instituted in England in breach of such agreement and will only allow them to proceed when satisfied that it is just and proper to do so. That according to the Court was the principle. After further holding that the matter is in the discretion of the Court, stay was refused on the ground that the plaintiffs were persons domiciled in England, the claim arose in England, the damage sued for was discovered in England, the cargo was surveyed in England, and the damage was ascertained after the survey. The fact that the entire evidence was in England was emphasised as a relevant consideration. The Court also observed that from the correspondence one is left with the suspicion that the principal object of the defendants was not to achieve a trial in Russia, but merely to make it more difficult for the plaintiffs to assert their claim. On all these considerations stay was refused. And this decision was affirmed by the Court of Appeal in *The Fehmarn*(1) Denning, L. J., observed that the dispute is more closely connected with England than with Russia. We cannot resist the temptation to point out that the fact situation in the case before us is almost similar, if not identical, to the one in *The Fehmarn* (Supra).

The last circumstance relied upon is that in all cases of arbitration by a foreign arbitral tribunal there is always a rider that in

(1) [1958] 1 All E.R. 333.

A case of hardship or injustice Courts of the country of the party being forced to go to foreign arbitral tribunal will protect him. Ordinarily, the Court where the cause of action has arisen would try to resolve the dispute brought before it from the cause of action arising out of its jurisdiction. If parties have agreed to another mode of resolution of dispute, the Court may hold the parties to their bargain but B when the Court is deprived of the jurisdiction by an agreement between the parties and if the Court is called upon to enforce it, the matter will still be within the discretion of the Court. As was stated in *Bristol Corporation* (Supra) case when the Court refused to stay an action it cannot be said that the Court is not carrying C out the bargain between the parties because that does not fairly describe the position. The Court is carrying out the bargain between the parties because the bargain to substitute for the Courts of the land a domestic tribunal was bargain into which was written, by reason of the existing legislation, the condition that it should only be enforced if the Court thought it a proper case for its being so D enforced. And that is where the discretion of the Court creeps in. Further, Russel on Arbitration, 19th Edn., p. 194, neatly sums up the relevant considerations for granting or refusing stay. It reads :

> "The principles established by the authorities can, I think, be summarised as follows : (1) Where plaintiffs sue in England E in breach of an agreement to refer disputes to a foreign Court, and the defendants apply for a stay, the English court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not. (2) the discretion should be exercised by granting a stay unless strong cause for not doing so is shown. (3) The burden F of proving such strong cause is on the plaintiffs. (4) In exercising its discretion the court should take into account all the circumstances of the particular case. (5) In particular, but without prejudice to (4), the following matters, where they arise, may properly be regarded :— (a) In what country the evidence on the issues of fact is situated, or more readily G available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts. (b) Whether the law of the foreign court applies and, if so, whether it differs from English law in any material respects. (c) With what country either party is connected, and how closely. (d) Whether the defendants genuinely desire trial in the foreign H country, or are only seeking procedural advantages. (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would : (i) be deprived of security for their

claim; (ii) be unable to enforce any judgment obtained; (iii) be faced with a time-bar not applicable in England; or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial". A

To sum up, the entire evidence both of the apppellant and the respondent is in this country; the contract as a whole was executed and carried out in this country; the claim as a whole arose in this country; the appellant is a company incorporated in this country and the respondent is having its office in this country; and that the respondent is not motivated by any principle to have the decision of the foreign arbitral tribunal at Paris but the principal object of the respondent is merely to make it more difficult, if not impossible, for the appellant to assert the claim. Add to this two other vital considerations, viz., that the cost of arbitration at Paris will be so disproportionately high to the claim involved in adjudication that one would never think of incurring such a huge cost to realise such a small sum claimed, and the restriction on the availability of foreign exchange, another vital relevant consideration. The sum total of all these well established circumstances clearly indicate that this was a suit in which when discretion is exercised on well settled judicial considerations no court would grant stay and the stay has to be refused. B C D

And now to the approach of the appellate Bench of the High Court relevant to the point. Says the Court : E

> "Here is a contract solemnly entered into between the appellant, an Indian company, and the respondent, a Yugoslav company, in aid of another contract entered into between the latter and the State of Bihar through its Electricity Board for erection of a thermal power station at Barauni. What a valuable possession for the nation such thermal power station means is plain to be seen. We do not, Yugoslavs do, know the know-how, of erecting a thermal power station. Hence they are here on the role of collaborators to help us make such an invaluable acquisition. And to get it built the authorities spare from their none too adequate resources the requisite foreign exchange for the appellant's managing director, Lalbhai, in order to enable him to proceed to Belgrade with a view to signing the contract, which he does, his signature being "only one centimetre away" from the contract's arbitration clause". F G

Does it call for any comment or analysis that the division bench completely misdirected itself while examining the question of granting discretionary relief one way or the other? Does it disclose exercise H

A of discretion on sound judicial principles or the Court is carried away by the considerations wholly extraneous and irrelevant? Yugoslavs did not undertake construction of thermal power station actuated by any altruistic motive but guided by sound business considerations. One who comes here to earn by going into business need not be put on a pedestal. The High Court overlooked the global competition B for obtaining international contracts and it is not a philanthropic motive. The extracted passage clearly indicates an approach not dictated by sound judicial principles but considerations wholly extraneous to the issue under discussion. It is in these circumstances that this Court is constrained to interfere with the discretionary relief granted in this case. C

The next contention is that in view of the provisions contained in Arbitration (Protocol and Convention) Act, 1937, ('1937 Act' for short), the Court could not invoke its inherent jurisdiction under s. 151, C.P.C., and the special Act would not assist the respondent because the present case is not covered by the provisions of the Act. D Mr. Majumdar urged that the 1937 Act was enacted to give effect to the protocol on arbitration clause set forth in the First Schedule and to the convention on the execution of foreign arbitral awards set forth in the Second Schedule as India was a signatory to the protocol. Mr. Majumdar urged that even if the application for stay is not entertainable under s. 34 of the Arbitration Act on the ground E that this is a foreign arbitration to which Arbitration Act, 1940, will not apply, nor could he invoke inherent jurisdiction of the Court under s. 151 of the Code of Civil Procedure, yet the application is maintainable under s. 3 of the 1937 Act. Section reads as under:

> "3. Notwithstanding anything contained in the Arbitration F Act X of 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 proceeding in any court against any other party to the sub- G mission or any person claiming through or under him in respect of any matter agreed to be referred, any party to such legal proceeding 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 or arbitration has become inopera- H tive 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".

India and Yugoslavia have ratified the protocol. The question, however, is whether s. 3 is attracted in this case. The important expression in s. 3 to be noted is : "if any party to a submission made in pursuance of an arbitration 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". This expression postulates 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 and a submission made in pursuance of such agreement. Now, both India and Yugoslavia have ratified the protocol modified by the reservation subject to which it was signed by India. It may be assumed that arbitration agreement between the parties to this appeal is governed by the 1937 Act. Section 3 is, however, not attracted merely where an agreement as set forth in the First Schedule is subsisting between the parties but the next step ought to have been taken before proceedings can be stayed in exercise of the power conferred by s. 3, viz., submission made in pursuance of such an agreement. A reference to s. 3 of the Foreign Awards (Recognition & Enforcement) Act, 1961, ('1961 Act' for short), prior to its amendment by the Amending Act of 1973 and a decision of this Court interpreting the expression : "if any party to a submission made in pursuance of an agreement to which" would clearly establish that mere existence of an agreement as envisaged by the First Schedule would not attract s. 3 of the 1937 Act but it would only be attracted where there is a submission pursuant to that agreement. Section 3 of the 1961 Act prior to its amendment in 1973 read as under :

> "3. Stay of proceedings in respect of matter to be referred to arbitration : Notwithstanding anything contained in the Arbitration Act X of 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 or 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 is null and void inoperative or incapable of being performed or that there is not in fact any dispute between the parties with regards to the matter agreed to be referred, shall make an order staying the proceedings".

A This section came in for interpretation in *V/O Tractoro-Export, Moscow*. Interpreting this section this Court held as under :

> "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".

B

Section 3 of 1937 Act is in *pari materia* with s. 3 of 1961 Act. It, therefore, becomes crystal clear that s. 3 of the 1937 Act would only be attracted if there is a submission pursuant to an agreement to that effect. In fact, the decision in *V/O Tractoro-export, Moscow,* C (Supra) made it necessary for the Parliament to amend s. 3 of the 1961 Act. In this case we are concerned with s. 3 of the 1937 Act which is not amended. It must, therefore, receive the same interpretation which an identical provision received at the hands of this Court. Viewed from that angle, in this case while there is an agreement as contemplated by First Schedule to 1937 Act, there D is no submission made in pursuance of such agreement and, therefore, the application of the respondent could not have been entertained under s. 3 of the 1937 Act. As far as the 1961 Act is concerned, Mr. Majumdar conceded that Yugoslavia has not ratified the protocol pursuant to which 1961 Act was enacted and, therefore, the respondent cannot maintain its application under s. 3 of the 1961 Act.

E

The last submission is that this being an arbitration agreement to refer a dispute to a foreign arbitral tribunal, s. 34 of the Arbitration Act would not be applicable and hence the application of the respondent for stay of the suit is not maintainable. It is not necessary to examine this contention on its merits because we have assumed F for the purpose of this appeal that s. 34 of the 1940 Act would be attracted even where the agreement is to refer a dispute to a foreign arbitral tribunal.

Having examined the matter from all angles it is clear that both the learned single judge and the division bench of the High Court were in error in granting stay of the suit in this matter and, therefore, G Civil Appeal No. 2407 of 1968 is allowed and the stay of suit granted by the learned single judge and affirmed by the division bench of the Calcutta High Court is vacated. The suit should accordingly proceed further from the stage where it was stayed. As the suit is a very old one, we hope the trial court would give priority to it and dispose it of as expeditiously as possible. The H appeal is allowed with costs throughout.

N.V.K. *Appeal allowed.*