ORIGINAL CIVIL.

Before Panckridge J.

1940

Mar. 4.

TOLARAM CHAMPALAL

v.

JEWANRAM GANGARAM.*

Arbitration—*War clause in contract—Cancellation by seller—Stay of suit—Readiness and willingness—Indian Arbitration Act (IX of 1899), s. 19.*

The plaintiffs were the buyers of twenty-one cases of piece-goods of Japanese manufacture, the shipment being expressed to be "June-July, 1939". Clause 6 of the contract provided *inter alia* as follows :—

"Should the goods or any portion of the same not have been shipped owing to war * * * * then the contract shall be rescinded for such goods or portion thereof and the sellers shall not be responsible for any such non-fulfilment of the contract, in the event of the manufacturer experiencing any difficulty in making the goods such as Government putting control on the output or stopping exports, *etc.*, directly or indirectly on account of war, the contract would be considered as cancelled unconditionally with respect to the entire lot or to the portion remaining unshipped as the case may be."

The defendants failed to deliver nineteen cases of the goods contracted for and purported to cancel the contract for such undelivered goods under cl. 6 mentioned above. Thereupon, the plaintiffs sued for damages for non-delivery and the defendants applied for stay of suit under s. 19 of the Indian Arbitration Act.

The contract provided for arbitration of any dispute regarding the contract, at the seller's option, by the Bengal Chamber of Commerce or two European or two Japanese merchants, one to be named by each party.

Held that, in the circumstances, cancellation by the defendant did not put an end to the contract for all purposes and the defendants had the right to apply for an order for stay of suit.

Hirji Mulji v. *Cheong Yue Steamship Company, Limited* (1); *Harinagar Sugar Mills, Ltd.* v. *Skoda (India), Ltd.* (2) and *Toller* v. *Law Accident Insurance Society, Ltd.* (3) distinguished.

Held, also, that as the question whether the state of things then existing in the Far East was war within the meaning of cl. 6 was a difficult question of law and quite unsuited for decision by laymen, and that as the defendants are entitled to have the matter referred to the arbitration of two Japanese

* *Re* arbitration and *re* Suit No. 156 of 1940.

(1) [1926] A. C. 497. (2) (1936) 41 C. W. N. 563.
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merchants, a course which would cause considerable embarrasment to the arbitrators, the discretion of the Court ought to be exercised against the defendants and stay should be refused.

Edward Grey and Co. v. *Tolme and Runge* (1) followed.

APPLICATION BY THE DEFENDANTS FOR STAY OF SUIT. The facts of the case appear fully from the judgment.

Khaitan for the applicants. Cancellation of the contract merely relieves the defendants from delivering the goods, but it does not wipe out the right to go to arbitration in disputes arising out of the contract. *Harinagar Sugar Mills, Ltd.* v. *Skoda (India), Ltd.* (2); *Toller* v. *Law Accident Insurance Society, Ltd.* (3). So long as the defendants are ready and willing to refer a dispute to arbitration, a suit should be stayed. Clearly the question whether the defendants were entitled to cancel the contract was such as could be referred to arbitration under the contract. *Parry* v. *Liverpool Malt Company* (4); *Renshaw* v. *Queen Anne Mansions Company* (5). In this case the Court should exercise its discretion in favour of the defendants. *Jones* v. *Birch Brothers, Limited* (6).

Sudhir Ray and *Sethia* for the respondents. The question whether the contract is dead or alive is not a dispute arising out of the contract. In any event, it is a question of considerable legal difficulty and the Court should exercise its discretion against the decision of such a question by laymen. *Edward Grey and Co.* v. *Tolme and Runge* (1). And in this case, the defendants have the right to refer the matter to two Japanese merchants who would not be in a position to judge the situation impartially.

Lastly this is a case where due to the frustration clause the whole contract is at an end and with it goes the arbitration clause. *Hirji Mulji* v. *Cheong Yue Steamship Company, Limited* (7).

(1) (1914) 31 T. L. R. 137.
(2) (1936) 41 C. W. N. 563, 564.
(3) [1936] 2 All. E. R. 952.
(4) [1900] 1 Q. B. 339, 344.
(5) [1897] 1 Q. B. 662.
(6) [1933] 2 K. B. 597.
(7) [1926] A. C. 497.

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PANCKRIDGE J. This is an application on the part of the defendants for an order staying the suit under the provisions of s. 19 of the Indian Arbitration Act.

The claim is one for damages said to have been occasioned by the failure of the defendants to deliver nineteen cases out of twenty-one cases of piece-goods which the defendants had sold to the plaintiffs under a contract in writing, dated December 29, 1938.

The shipment under the contract was expressed to be "June-July 1939, *via* Rangoon."

It is common ground that the piece-goods in question were to be of Japanese manufacture.

On September 21, 1939, the defendants wrote to the plaintiffs as follows:—

> We have been informed by our supplier's representative that on account of the very unsettled international situation they are unable to give definite information as regards the shipment of the goods relating to the contract above-mentioned. We draw attention to cl. 6 of the contract and make it clear that we are not in any way liable for the late or non-arrival of the goods.

The plaintiffs replied on September 22, by a letter, in which they observed:—

> The present international situation was not created in the month of August and hence we fail to understand why the goods were not shipped in August.

On October 24, 1939, the defendants informed the plaintiffs that the goods had not yet been delivered and that the manufacturers were asking for a further extension of a month which meant that shipment should be made in November, 1939. The letter ends:—

> If we do not receive your confirmation of the required extension within 48 hours, we shall understand that you cancel the above goods, which please note.

The plaintiffs, on October 28, wrote accepting November shipment with the usual late allowance, but apparently this acceptance was conditional on

the defendants furnishing a satisfactory explanation of the delay, for, three days later, the plaintiffs write a letter which ends as follows:—

> Please note that owing to your failure to supply the goods, we had to sustain a loss of about Rs. 2,000 and we shall look to you for the said loss. If we do not receive any satisfactory reply from you immediately, we shall be forced to do the needful in the matter as will be advised by our lawyer.

On December 7, 1939, the plaintiffs wrote to enquire by what vessel the goods had been shipped in November. This elicited no reply and on January 3, 1940, the plaintiffs' solicitors called on the defendants to deliver within 48 hours.

On January 11, the defendants' solicitors replied stating that, as the plaintiffs had refused to agree to the extension of the time for shipment as requested, the contract stood cancelled, and that there was no liability on the part of the defendants to pay any damage.

The suit was filed on January 22, 1940, and notice of the present application was taken out on February, 15.

The arbitration clause is in the following terms:—

> In the event of any dispute between the parties as to damage, difference, inferiority, short quantity or measure or weight or defect or amount of allowance or any dispute in question arising between the parties hereto regarding this contract, or the goods subject of this contract, it shall at the option of the sellers be referred to the Bengal Chamber of Commerce or two European or Japanese merchants, one to be named by each party.

It is evident from the correspondence that the defendants are seeking to justify their failure to perform the contract by relying on cl. 6. Clause 6 is as follows:—

> Should the goods or any portion of the same not have been shipped owing to war, Government control, suppliers and/or producers stopping payments or being prevented by accidents to or the destruction of works from preparing same or any other causes beyond human control or should they be destroyed or rendered unmerchantable in course of transit or from any cause whatsoever should fail to reach their destination after being shipped, then the contract shall be rescinded for such goods or portion thereof and the sellers shall not be responsible for any such non-fulfilment of the contract; in the event of the manufacturers experiencing any difficulties in making the goods

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such as Government putting control on the output or stopping exports, *etc.*, directly or indirectly on account of war, the contract will be considered as cancelled unconditionally with respect to the entire lot or to the portion remaining unshipped as the case may be.

The reference to this clause and to the international situation, when regard is had to the place of origin of the goods, indicates that the defendants will maintain that the goods have not been shipped owing to war, within the meaning of the clause.

The plaintiffs have, among other things, called attention to the use of the term "cancellation" by the defendants, and they say that the defendants should not be permitted to take up the position that the contract has been cancelled, and at the same time invoke the provisions of the arbitration clause in it. On that point I am not in agreement with the submissions made on the plaintiffs' behalf. By using the word "cancellation", I think the defendants mean no more than that, owing to the events which have happened, they have been relieved of their liability to deliver the goods. They do not mean that the contract has come to an end for all purposes as is the case when a contract is rendered void by frustration.

An example of such a state of things is to be found in *Hirji Mulji* v. *Cheong Yue Steamship Company, Limited* (1) where a steamship, the subject matter of a charter-party, was requisitioned by the Government before the date of the charter-party coming into operation. There it was held that the adventure having been frustrated by the action of the Government, the charter-party came to an end for all purposes, including the purpose of the arbitration clause.

I have been referred to a case in which I dealt with a somewhat similar contention, *Harinagar Sugar Mills, Ltd.* v. *Skoda (India), Ltd.* (2) and finally to an authority of great weight, *Toller* v. *Law Accident Insurance Society, Ltd.* (3).

(1) [1926] A. C. 497. (2) (1936) 41 C. W. N. 563.
(3) [1936] 2 All. E. R. 952.

It has also been suggested that the defendants have not been ready and willing to do all things necessary for the proper conduct of the arbitration, within the meaning of s. 19. The only grounds for such a contention are their denial of liability and their statement that the contract has been cancelled.

I think that these facts are quite insufficient to deprive them of the right which they would normally have to apply for, and obtain, an order for stay.

I have been referred to decisions of the Court of Appeal, which show that in the large majority of cases the Court will not exercise its discretion to refuse to grant an application such as this one.

I certainly should have made the order asked for but for the decision of the Court of Appeal in *Edward Grey and Co.*. v. *Tolme and Runge* (1). In that case there was a contract for the sale of goods to be shipped to Hamburg. There were provisions in the contract that, in the event of Germany being involved in war with England, the contract should be deemed to be closed, and that if war should prevent shipment, any party should be entitled to go to arbitration.

Before the contracts were performed, war broke out between England and Germany with the result that the sellers were unable to ship the sugar. The buyers thereupon brought an action for a declaration that the contracts were suspended or dissolved and an injunction restraining the defendants from proceeding to arbitration. The defendants thereupon applied for a stay order under s. 4 of the Arbitration Act, 1889, which Scrutton J., in his discretion, refused. An appeal against his decision was unsuccessful.

The question there was a question of law as to the construction of the contracts. Now it seems to me that if Scrutton J. was right in holding that the

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point was not one which should be decided by arbitration, the sort of consideration which induced him so to hold applies with even greater force to the present case, because one of the questions, which the tribunal dealing with this matter will have to decide, is whether the state of things now existing in the Far East is war, within the meaning of cl. 6. This is a difficult question of law and appears to me quite unsuited for decision by laymen.

Moreover I observe that, under the terms of the arbitration clause, the defendants are entitled to have the matter referred to the decision of two Japanese merchants, and I feel that, if the defendants were to take that course, the decision would cause considerable embarrassment to those responsible for it. That is a special circumstance in this case which I think I am entitled to take into consideration.

Having regard, therefore, to the decision in *Edward Grey and Co.* v. *Tolme and Runge (supra)*, to the nature of this dispute, and to the terms of this particular arbitration clause, I am of opinion that I should exercise my discretion against the defendants.

The consequence is that this application is dismissed with costs.

Application dismissed.

Attorneys for plaintiffs: *K. K. Dutt & Co.*

Attorneys for defendants: *Khaitan & Co.*

S. M.