

ALL INDIA REPORTER 1977 KERALA 108
BALAKRISHNA ERADI AND
NARENDRAJ, JJ.

The District Manager Food Corporation of India, Calicut,
Petitioner v. Mardestine Compania, Naviera represented by their
Agents M/s. South India Corporation (Agencies) Pvt. Ltd.,
Respondent.

C.M.A. No. 14 of 1975, D/- 31-1-1977.

(A) Foreign Awards (Recognition and Enforcement) Act
(1964), S. 3 - Stay of legal proceedings - Meaning of word
'Submission' - Actual submission to arbitration before
institution of suit necessary to attract S. 3. AIR 1971 SC 1, Folll
(Para 2)

(B) Foreign Awards (Recognition and Enforcement) Act (1964)
(as amended by Act XLVII of 1973), S. 3 - Stay of legal
proceedings - Effect of amendment - Affects substantive rights
- Only prospective application - Suits already instituted
cannot be stayed.

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BALAKRISHNA ERADI, J:- This appeal has been filed by
the Food Corporation of India against the order dated 8th
November, 1974 passed by the Subordinate Judge, Kozhikode, staying
the suit O.S. No. 177 of 1969 on his file under S. 3 of the
Foreign Awards (Recognition and Enforcement) Act - Act XLV of
1961 - (hereinafter referred to as the Act). That is a suit
brought by the Food Corporation of India against a shipping
company represented by its local agents for recovery of damages

for alleged shortlanding of cargo consigned under a bill of lading dated 19th October, 1968. Shortly after the institution of the suit, the defendant filed I.A. No. 41 of 1970 praying that the suit should be stayed under S. 34 of the Arbitration Act of 1940 on the ground that there is a clause in the charter party agreement providing that any dispute arising under the said agreement shall be settled by arbitration in London. Though it was S. 34 of the Arbitration Act that was relied on in the application for stay, ultimately when the said matter came on for hearing before the lower court the parties seem to have proceeded on the basis that it is only S. 3 of the Act that would apply to the case.

It is on that same footing that the case has been argued before us. The lower court has stayed the suit by applying the provisions of S. 3 of the Act as they now stand after the enactment of the Foreign Awards (Recognition and Enforcement) Amendment Act, 1973 (hereinafter referred to as the Amending Act). Counsel appearing for the appellant contends before us that inasmuch as this suit was instituted in 1969 and the application for stay was also filed early in 1970 long prior to the enactment of the Amending Act referred to above which came into force only on 26th November, 1973, the court below ought to have disposed of the matter on the basis of the unamended provision of S. 3 since the provisions of the Amending Act have not been given retrospective effect by the Parliament. It is further contended by the appellant that on the basis of the

provisions of S. 3 as they stood on the date of the institution of the suit, the plaintiff is entitled to maintain the suit in the court of competent jurisdiction in India and cannot be compelled to take recourse to the highly expensive and cumbersome process of an arbitration to be carried out in London.

2. After hearing both sides we have come to the conclusion that the aforesaid contentions raised by the appellant are sound and have to be upheld. Section 3 of the Act as it stood on the date of the institution of the suit was in the following terms:-

"Stay of proceedings in respect of matters to be referred to arbitration.- Notwithstanding anything contained in the Arbitration Act, 1940, or in the Civil P.C. 1908, if any party to a submission made in pursuance of an agreement to which the Convention set forth in the Schedule applies, or any person claiming through or under him commences any legal proceedings in any Court against any other party to the submission or any person claiming through or under him in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time after appearance and before filing a written statement or taking any other step in the proceedings, apply to the Court to stay the proceedings and the Court, unless satisfied that the agreement is null and void, inoperative or incapable of being performed or that

there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order ~~agreed-to-be~~ staying the proceedings."

This section would get attracted only if prior to the date of the institution of the suit there had already been a submission to arbitration made in pursuance of an arbitration agreement to which the convention set forth in the schedule was applicable. In *Tractoro Export, Moscow v. Tarapore & Co.* (AIR 1971 S.C. 1) the Supreme Court had occasion to consider the meaning of the expression 'submission' occurring in the above section and it was held that the said expression connotes an actual submission or completed reference to arbitration and that it does not mean a mere agreement to refer or an arbitral clause. In other words, the applicability of the section is confined to cases where prior to the date of the institution of the suit there had been an actual submission of the dispute to arbitration or a completed reference of the dispute to arbitration. Admittedly, in this case, there was neither an actual submission of the dispute to arbitration by either of the parties nor a completed reference of the matter to arbitration prior to the date of the institution of the suit or even up till now. Hence the provisions of S. 3 of the Act, as they originally stood, were not attracted to the present case and the suit was not liable to be stayed on the basis of the said section.

3. By the Amending Act - Act XLVII of 1973 a new section was substituted in the place of the old S. 3. The new provision reads:-

"3. Stay of proceedings in respect of matters to be referred to arbitration: Notwithstanding anything contained in the Arbitration Act, 1940, or in the Civil P.C., 1908, if any party to an agreement to which Article II of 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 agreement or any person claiming through or under him in respect of any matter agreed to be referred to arbitration in such agreement, any party to such legal proceedings may, at any time after appearance and before filing a written statement or taking any other step in the proceedings, apply to the Court to stay the proceedings and the Court, unless void, inoperative or incapable of being performed or that there is not, in fact, any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings."

There is no doubt that a substantial change has been brought about in the content and effect of the section by reason of the amendment. The section as it now stands virtually prohibits a party to an agreement to which Art. II of the Convention set forth in the Schedule applies or any person claiming through or under him from agitating before the courts in India disputes concerning matters agreed to India

referred to arbitration under such agreements by providing that if any such legal proceedings are commenced by any party to the agreement or persons claiming through him against any other party to the agreement such proceedings should be stayed unless the court is satisfied that the arbitration agreement ^{is} either null and void or inoperative or incapable of being performed, etc.

The right to institute a suit and to proceed with the same in the ordinary civil courts of the land is a very valuable civil right and any interference with such vested right by statute would ordinarily be regarded as only prospective in nature unless there be clear indication given by the Legislature of a contrary intention. The Amending Act does not contain any indication that Parliament intended to give retrospective effect to the new provision incorporated in S. 3. ~~of the Act~~ Hence when the new section was substituted in the place of the pre-existing S. 3 of the Act the said new provision can be applied only prospectively since it deals not merely with matters that are procedural in nature, but also with substantive and vested rights. Further, going by the wording of the new S. 3 also, it can have application only to suits that are commenced after the coming into force of the said section, because the section opens with the wording (omitting the unnecessary words "if any party to an agreement commences any legal proceedings in any court against any other party to the agreement"). We have, therefore, no hesitation in holding that S. 3 of the Amending Act has no application

to the present case inasmuch as the suit was instituted in 1969 long prior to the commencement of the said Act and even the application for stay was also filed by the defendant in the year 1970. We hold that the court below was in error in dealing with the application on the basis that S. 3 of the Act as substituted by Act XLVII of 1973 was applicable to the case. In the light of the conclusion already expressed by us that under S. 3 of the Act as it stood prior to the amendment which alone was applicable to the case the suit is not liable to be stayed, the order of the court below allowing the defendant's application for staying the suit cannot be sustained.

4. We accordingly allow this appeal, set aside the order of the lower court and dismiss I.A. No. 41 of 1970. Since the suit is one of 1969 and it has already been pending for nearly eight years the lower court is directed to dispose of the same within a period not exceeding three months from today. The appellant will get the costs of this appeal from the respondent. The parties will bear their own costs in the lower court.

which case the arbitration clause remains effective and can be enforced. In the present case if the averments made by the plaintiff be ultimately found to be true, there would be no contract in the eye of law and as such no agreement or arbitration clause would survive as part of such a contract.

3. Stay of Legal Proceedings and New York Convention :

- (i) Stay of legal proceedings under Section 3 of the Foreign Awards (Recognition & Enforcement) Act 1961;
- (ii) Whether actual submission to arbitration before institution of suit is necessary to attract Section 3 of 1961 Act
- (iii) Retrospective effect of the Foreign Awards (Recognition & Enforcement Amendment) Act, 1973

Held : The Amendment Act 1973 does not contain any indication that Parliament intended to give retrospective effect to the new provision incorporated in Section 3. New Provision can be applied only prospectively since it deals not merely with matters that are procedural in nature but also with substantive and vested rights to commence legal proceedings in any court. Amendment Act 1973 can have application only to suits that are commenced after coming into force of the new provision.

The above points were considered by the Kerala High Court in the case, *The District Manager, Food Corporation of India, Calicut, Petitioner. Vs. Mardestine Compania, Naviera* representing their agents, *M/s. South India Corporation (Agencies) Pvt. Ltd.*, Respondent (AIR 1977 Kerala 108). The facts of the case briefly were that the petitioner brought a suit for recovery of damages for shortlanding of cargo against respondent. Shortly after the institution of the suit, the respondent filed a suit praying that the suit be stayed under Section 34 of the Arbitration Act 1940 on the ground that there is a clause in the charter party agreement providing that any dispute arising under the agreement shall be settled by arbitration in London. Though it was Section 34 of the Arbitration Act that was relied on in the application for stay, ultimately when the matter came up for hearing before the lower court, the parties seem to have proceeded on the basis that it is

only Section 3 of the Foreign Awards (Recognition and Enforcement) Act 1961 which would apply to the case. The lower court stayed the suit by applying the provision of Section 3 of the Amendment Act 1973. The petitioner filed an appeal against the order of the lower court. It contended that since the suit was instituted in 1969 and the application for stay was also filed early in 1970 long prior to the enactment of the amended Act which came into force only on 26th November, 1973, the court below ought to have disposed of the matter on the basis of the unamended provisions of Section 3 of 1961 Act since the provisions of the Amending Act 1973 have not been given retrospective effect by Parliament. The petitioner further contended that on the basis of the provisions of Section 3 as they stood on the date of the institution of the suit, the petitioner is entitled to maintain the suit in Indian Courts and cannot be compelled to take recourse to the highly expensive and cumbersome process of an arbitration to be carried out in London.

The Kerala High Court observed that Section 3 of the 1961 Act would get attracted only if prior to the date of the institution of the suit there had already been a submission to arbitration made in pursuance of an arbitration agreement to which the convention set forth in the schedule was applicable. In *Tractoro Export, Moscow, V. Tarapore & Co.*, (AIR 1971 S.C. 1) the Supreme Court had occasion to consider the meaning of the expression 'submission' occurring in the section and it was held that the said expression connotes an actual submission or completed reference to arbitration and that it does not mean a mere agreement to refer or an arbitral clause. In other words, the applicability of the Section is confined to cases where prior to the date of institution of the suit there has been an actual submission of the dispute to arbitration or a completed reference of the dispute to arbitration. The High Court held that there was neither an actual submission of the dispute to arbitration by either of the parties nor a completed reference of the matter to arbitration prior to the date of the institution of the suit or even up till then. Hence the provisions of S. 3 of the Act, as they originally stood, were not attracted by the present case and the suit was not liable to be stayed on the basis of the said section.

The High Court further held that there is no doubt that a substantial change has been brought about in the content and effect of the section 3 by reason of the amendment. The section as it now stands virtually prohibits a party to an agreement to which Art II of the Convention set forth in the Schedule applies or any person claiming through or under him from agitating before the courts in India disputes concerning matters agreed to be referred to arbitration under such agreements, it has provided in addition that if any such legal proceedings are commenced by any party to the agreement or persons claiming through him against any other party to the agreement such proceedings should be stayed unless the court is satisfied that the arbitration agreement is either null and void or inoperative or incapable of being performed, etc. The right to institute a suit and to proceed with the same in the ordinary civil courts of the land is a very valuable civil right and any interference with such a right vested by statute would ordinarily be regarded as only prospective in nature unless there be clear indication given by the Legislature of a contrary intention. The Amending Act does not contain any indication that Parliament intended to give retrospective effect to the new provision incorporated in Section 3. Hence when the new section was substituted in the place of the pre-existing S. 3 of the Act the said new provision can be applied only prospectively since it deals not merely with matters that are procedural in nature, but also with substantive and vested rights. Further going by the working of the new S. 3 also, it can have application only to suits that are commenced after the coming into force of the said section, because the section opens with the wording "if any party to an agreement.....commences any legal proceedings in any court against any other party to the agreement....."

The High Court further held that S. 3 of the Amending Act has no application to the present case inasmuch as the suit was instituted in 1969 long prior to the commencement of the said Act and even the application for stay was also filed by the defendant in the year 1970.