

(1993) 10 CAL CK 0024

In the Calcutta High Court

Case No : Appeal No. 295 of 1993 and Matter No. 2352 of 1992

Boeing Company

APPELLANT

Vs

R.M. Investment and Trading

RESPONDENT

Date of Decision : 14-10-1993

Acts Referred:

Constitution of India, 1950 — Article 11, 136

Criminal Procedure Code, 1973 (CrPC) — Section 435

Citation : 98 CWN 268

Hon'ble Judges : A.M. Bhattacharjee, C.J; Nisith Kumar Batabyal, J

Bench : Division Bench

Advocate : Subrata Roy Chowdhury with Dr. Tapas Kumar Banerjee, Arijit Banerjee and S.N. Pyne, for the Appellant; Somnath Chatterjee with Anindya Mitra, Bhaskar Gupta, Sudipta Sarkar, Abhrajit Mitra, Padam Khaitan and Ratan Tata, N.N. Gopptu, Karuna Shankar Roy, R.N. Majumdar A. Dhar, S. Mandal for AIR India, for the Respondent

Judgement

A.M. Bhattacharjee, J.—Gone are the days when the Courts used to view arbitration with jealous suspicion as it took away the jurisdiction of the Courts of the land. Now that our Courts are so overloaded in their jurisdiction that anything which would affect some amount of load-shedding is generally welcome. The tendency of the modern Courts towards arbitration agreements and awards is to uphold them wherever and whenever possible and to upset them only when the Courts cannot but. The modern approach of the Courts towards arbitration is, to use a Latin maxim, *utromajis valeat qualm pereat*, i.e., to allow them to flourish, as far as possible and not to perish. As pointed out by the Supreme Court in *V/O Tractoroexpored* (A.I.R. 1971 S.C. 1 at page 12) a modern Court shall ordinarily refuse its assistance to a party who has entered into an agreement of which an arbitral clause forms an integral part and then seeks to resile from such contract except for cogent and compelling reasons. The change in approach is appreciably perceptible in later Legislations. While under the Arbitration Act of 1940, the Court is given a discretion to stay or not

to stay a suit in view of an existing arbitration agreement between the parties covering the matters in dispute in the suit, u/s 3 of the Foreign Awards (Recognition and Enforcement) Act of 1961, the Court is under a mandatory obligation to stay a suit in the event of a voluntary operative agreement between the parties. There was an agreement, labelled as "Consultant services Agreement" between the appellant Boeing Company (hereinafter referred to as Boeing) and the respondent R.M. Investment and Trading Company Private Limited (hereinafter referred to as RMI) whereunder RMI was to promote sales of the Commercial Aircrafts of the Boeing to parties within the territory of India. The remuneration payable to RMI by Boeing for rendering its services was to consist of :-

(a) a fixed retainer of 420,000 US (dollars irrespective of sale of aircraft and

(b) 5% of the purchase price of the aircraft in the event of sale of aircraft taking place in terms of the agreement.

2. Admittedly, the fixed, retainer was duly paid by Boeing to RMI. But it is the case of RMI that it was not paid any remuneration at the rate of 5% on the purchase price of two commercial aircrafts sold by Boeing to Air India through the negotiations of RMI has now filed a suit for the recovery of the said amount of remuneration along with incidental reliefs against Boeing. There is also a claim for the said amount on a quantum meruit basis.

3. The Consultant Services Agreement the parties has an arbitration clause in very wide form as will appear from clause 10 of the Agreement which provides that "any controversy or claim arising out of or relating to this agreement, or any breach thereof, which the parties have not been able with due diligence to settle amicably, shall be settled by arbitration conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association". On the strength of the said arbitration clause, Boeing moved an application u/s 3 of the Foreign Awards Act, 1961 for stay of the suit in the Calcutta High Court. The Trial Court has dismissed the application on the ground that the Consultant Services Agreement was not a "Commercial contract" and the transaction between the parties was not a commercial transaction and as such, an application u/s 3 could not lie.

4. Very learned arguments with profusion of precedents have been advanced by the Learned Counsel for the appellant Boeing and the respondent RMI. But it has, however, not been seriously disputed by and on behalf of RMI that if a "Commercial" relationship was created between the parties by and under the Consultant Services Agreement, the application u/s 3 of the Foreign Awards Act would have been maintainable. We will have to look to the provisions of the Agreement in the light of the provisions of the Foreign Awards Act, 1961 and would have to come to our conclusion as to whether any commercial relationship between the parties resulted under the said Agreement."

5. Section 3 of the Foreign Awards Act. 1961 reads as hereunder :--

3. Stay of proceedings in respect of matters to be referred to arbitration - Notwithstanding anything contained in the Arbitration Act. 1940, or in the Code of Civil Procedure, 1908. if any party to an agreement to which Article 11 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 satisfied that the agreement is null and void, inoperative or incapable of being performed or that there is not in fact, any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings.

6. It has not been, as it cannot be, disputed by the parties, in view of the decision of the Supreme Court in *Renusagar Power Co. Ltd.* (A.I. R 1985 S.C. 1156 at 1182) that the conditions required to be fulfilled for the application of Section 3 are :--

(i) there must be an agreement to which Article 11 of the Convention set forth in the Schedule applies:

(ii) a party to that agreement must commence legal proceedings against another party thereto:

(iii) the legal proceedings must be "in respect of any matter agreed to be referred to arbitration" in such agreement;

(iv) the application for stay must be made before filing the written statement or taking any other step in the legal proceedings;

(v) the Court has to be satisfied that the agreement is valid, operative and capable of being performed :

(vi) the Court has to be satisfied that there are disputes between the parties with regard to the matters agreed to be referred:

It has not also been" seriously disputed that the aforesaid conditions have been substantially complied with.

7. It has however, been urged on behalf of RMI that since the expression "foreign award" has been defined in Section 2 of the Foreign Awards Act to be an award on differences between the persons arising out of legal relationship "considered as Commercial under this law in force in India, a suit shall not be stayed u/s 3, even though the conditions mentioned in that Section are apparently satisfied, unless the Court is further satisfied that the parties to the Arbitration Agreement stand in such legal relationship to each other which can be considered as commercial.

8. We thought, and we still think, that the word "Commercial" is a plain English

word and has a plain and simple meaning and that for ascertaining that meaning we need not wade through a mass of precedents, not always speaking in unison. When the Learned Counsel appearing for the parties advanced their arguments for days together to make us understand the denotation or the connotation of the word "commercial" with a plethora of precedents we had to remind ourselves of the classical observation of Vivian Bose J. of the Supreme Court in *The Seksaria Cotton Mills Ltd. Vs. The State of Bombay*, that "it is not till one is learned in the law that subtleties of thought and bewilderment arise at the meaning of plain English words which any ordinary man of average intelligence, not varied in the law, would have no difficulty in understanding". We frankly admit that we have not felt much difficulty in understanding the meaning of the word "Commercial" may be we are not that versed in the law.

9. We have no doubt that the expression "commercial" must be liberally construed. As pointed out by the Supreme Court in *Kotch Navigation* (1989-4 SC 259 at 262) liberal construction is to be given to any expression or phrase used in the Convention or the Foreign Awards Act of 1961 which, however, must be consistent with its literal and grammatical sense. Since the Act is calculated and designed to subserve the cause of facilitating international trade and promotion thereof by providing for speedy settlement of disputes arising in such trade through arbitration. In *Atiabari Tea Co.* (AIR 1961 S.C. 231) Shah J. in his separate but concurring judgement (at 259-260) observed that in the complexities of modern conditions, in the wide sweep of the expression "are included carriage of persons and goods by road, rail, air and waterways, contracts, banking, insurance transactions and the stock exchange and forward markets. Communication of information, supply of energy, postal and telegraph services and many more activities - too numerous to be exhaustively enumerated which would be called commercial intercourse".

10. In *Fotechand Himmilal* (A.I.R. 1977 S.C. 1825) it has been held by the Supreme Court that any service or activity which in the modern complexities of business would be considered to be a lubricant for the wheels of commerce is "commercial". There is no dispute that the activities of Boeing in selling Aircrafts are evidently commercial. It is the plaintiffs own case that "through the plaintiffs intervention and accords the said Aircrafts were in fact undoubtedly a great source of lubricant for the commercial activities of Boeing

11. Our attention has been drawn to the deliberation which took place at the International level with a view to resolving the conflicting views on the expression "commercial relationship" and the term was defined by the Export Body Uncitral in its Model Law as follows :--

The term "commercial should be given a wide interpretation so as to cover matters arising from all relationship of a commercial nature, whether contractual or not. Relationships of a commercial nature include but are not limited to the following exchange of goods or services; distribution agreement: commercial representation or agency; factoring leasing construction of works: consulting

engineering licensing, investment financing: banking, insurance; exploitation agreement or consession; joint venture and other forms of industrial or business co-operation carriage of goods or passengers by air, sea, rail or road, (emphasis added).

12. So, the rendering of consultancy services or other business cooperation in exchange of pecuniary consideration is undoubtedly a commercial transaction and the parties to such transaction cannot but stand in commercial relationship. According to the ordinary meaning of the term "commercial" any activity or transaction which turns out to be a source of any gain, profit, benefit or advantage to the parties is "commercial". If RMI is rendering services, consultancy or otherwise, to promote the sales of aircrafts belonging to the Boeing in India and as a result Boeing is having the purchase prices and RMI is also receiving pecuniary gain, we are yet to understand why the transaction between Boeing and RMI would not be commercial and why the parties would not be deemed to stand in commercial relationship with each other.

13. It has been strenuously urged on behalf of RMI that services rendered by it to Boeing were personal services or services of a personal nature and as such, could not be regarded as "commercial". RMI is after all is company incorporated under the Companies Act and, therefore, is not a natural person and, that being so, we do not understand how there could be a contract of personal service to be rendered by someone who or which is not a natural person.

14. It has also been vehemently urged on behalf of RMI that services rendered by there were in the nature of services rendered by any retained legal practitioner or medical practitioner and it is not quite appropriate to regard the relationship between the lawyer and the client, or the Doctor and the patient as commercial. The profession of law or medicine, though very dignified, has a good deal of commercial element also though it may not be commerce only, pure and simple. A lawyer in rendering legal services in exchange of remuneration obviously engages in commercial activity and if such services also help the client in conducting the latter's business, then the transaction is also commercial from the point of view of both. If RMI is to receive pecuniary advantage for rendering services to Boeing, and if such services are lubricating the avowed business activity of the Boeing, then we would require much stronger reasons that have been advanced by the Learned Counsel for RMI to persuade us to hold that the activities are not commercial and Boeing and RMI do not stand in commercial relationship.

15. As already indicated, if once it is held, as we do hold, that the transaction between RMI and Boeing is commercial and they do stand in commercial relationship, no other argument of substance could be advanced on behalf of RMI as to why the application for stay u/s 3 of the Foreign Awards Act. 1961 shall not be allowed.

16. We, accordingly, allow the appeal, set aside the judgment of the learned Trial

judge rejecting the application of the appellant for stay u/s 3 of the Foreign Awards Act, allow the application and direct that the suit filed by RMI, giving rise to this appeal, shall stand stayed.

17. In the judgment under appeal certain observations have been made by the learned Judge about Air India and its Chairman Sri Ratan Tata who were not parties to their proceedings before the learned Judge. The observations are wholly uncalled for and irrelevant for the purpose of the determination of the disputes before the learned Judge. Both Air India and its Chairman have filed application before us for expunction of those observations from the judgment under appeal. The observations were not only uncalled for and irrelevant, but also were disparaging to Air India and its Chairman and, for the reasons stated in the accompanying judgment of my learned brother Batabyal, J., I agree that those observations, as noted in the judgment of my learned brother, shall stand expunged. The appeal thus stands allowed and disposed of accordingly but we, however, make no order as to costs.

(A.M. Bhattacharjee, C.J.)

N.K. Batabal, J.

18. I have the privilege of going through the judgment above rendered by the Hon'ble Chief Justice. I fully agree with the views taken by him on the main question involved in this appeal, namely, whether the suit at the instance of the respondent, R M. Investment & Trading Co. Pvt. Ltd. is liable to be stayed u/s 3 of the Foreign Awards (Recognition and Enforcement) Act. 1961. I would like to add the following" on another incidental aspect arising out of the appeal which according to Air India and Mr. Ratan N. Tata, Ex-Chairman of Air India (who were not parties to the suit) is necessary for remedying a flagrant abuse by the Learned Trial Judge of his power by passing comments upon a matter not relevant to the controversy before him and which are unwarranted or are likely to harm or prejudice them. The question is whether certain observations in the judgment of the learned Trial judge are liable to be expunged being irrelevant, disparaging, damaging and scurrilous, as alleged by Air India and Mr. Ratan N. Tata, from the judgment.

19. The limited question which fell for determination in the Trial Court was whether there was any case for staying the suit u/s 3 of the Act referred to above. During the pendency of the hearing RMI took out a Notice of Motion for a direction upon Air India and Mr. Ratan N. Tata to produce certain documents. Both Air India and Mr. Ratan N. Tata appeared through their Learned Counsel to oppose the Notice of Motion. Ultimately, RMI Trading Company Pvt. Ltd. did not press the Notice of Motion. So the entire matter relating to the prayer for a direction upon Air India and Mr. Ratan N. Tata for production of certain documents, in pursuance of the Notice of Motion fizzled out. But no formal order was passed by the Learned Trial judge in this connection. It is crystal clear from the above outline of facts and circumstances that issue of production of papers

by Air India and Mr. Ratan N. Tata went completely out of focus when the Notice of Motion was not passed and the centre-stage was occupied by the raging controversy whether the suit was liable to be stayed u/s 3 of the Act referred to above.

20. The observation in respect of which the Air India and Mr. Ratan N. Tata are feeling aggrieved have been shown in pink colour at pages 399, 402, 403, 405 and 406 of Volume - III of Parts I and II of the Paper Book. The relevant portion are quote below :-

(a) The likelihood of existence of such a policy is itself in question as it is very strange that the Government of India and/or Air India would have framed policy for purchase/sale of 2 or 3 Aircrafts in question only.

The authenticity of the letter off Mr. Ratan Tata is itself in question as the copy of the letter which was produced before the Court is without any reference number and without any office seal. The Court is reasonably apprehensive about the existence of such policy and particularly the letter in question.

(at page 399)

(b) this Court is reasonably apprehensive about what payment Air India has in fact made to Boeing. Air India being a Government of India Company, the money paid for purchase of Aircrafts, are in effect public money. In disbursing payment of such money the Air India is accountable to this Court and every citizen at large. On a true interpretation of Fundamental rights granted by the Constitution, disbursement of public money should be done with public knowledge. Air India should have brought specific details before this Court".

(at page 402)

The fact however raises the question as to why full payment was made when (sic) according to Air India, a policy existed which (sic) prohibited payment of 5% commission.

II would be reasonably expected that Air India should be paying 95% of the value of Aircrafts as the 5% commission is not payable according to the policy, mentioned in a letter dated 30th April 1987.

If it is the policy of Air India of Government of India not to pay the commission and/or remuneration of 5% the said amount is a savings of the public exchequer. Air India is a Trustee of such savings and every citizen is a beneficiary. It is clear violation of natural justice if such knowledge is denied and/or withheld from the real beneficiaries of the money.

(at pages 402 and 403)

In the instant case, it appears that no such procedure has been followed by the Government of Air India and the socalled policy is merely a statement coming from the non-executive chairman, Mr. Tata, on whose words Boeing have totally

relied.

(at page 403)

(c) In response to subpoena issued on 13th August, 1992. it was reasonably expected that Air India being a Government Company, would act bonafide and it was expected to place all the facts and documents before the Court. There should not have been any secret so far as payment of public money is concerned.

(at page 405)

(d) The letter of Boeing dated 28th April, Mr. Ratan Tata's letter dated 30th April, Boeing's letter dated 1st May, 1987, Air India's letter of August, 1987, and Government of India's clarification on policy, it appears to me that the whole matter and various issues require investigation and enquiry in a proper trial. There exists sufficient smoke of doubt with regard to existence of the policy referred to in Mr. Tata's letter of 30th April, 1987. Non-payment of RMI's commission by Boeing and agreeing to extend the date of execution of formal contract with Air India without the knowledge of RMI, and full payment by Air India to Boeing as discussed above are also matters of probe.

(at page 406)

21. It appears from page 322 of Volume - III of the Paper Book referred to above that Air India appearing through its Learned Counsel, the learned Advocate General of West Bengal on 19th April, 1993, when the appeal was filed by the Boeing Co. sought the leave of the Court and prayed for expurgation of the disparaging comments complained of from the judgment and order appealed against, this Court granted the leave to Air India to file an affidavit. From Page 418 of the said volume, it appears that a similar prayer was made by Mr. Ratan N. Tata through the Learned Counsel, the Advocate General of West Bengal for self-same purpose and leave was granted by the Court.

22. The Learned Advocate General of West Bengal, Mr. N.N. Gooptu has submitted that the impugned observations in the body of the judgment are not only irrelevant but also disparaging, insinuatory, scurrilous and completely unwarranted and hence the same may be expunged from the record. In support of his contention, the Learned Counsel has referred to the principles laid down in the following cases :-

- i) Dr. Raghubir Sharan Vs. The State of Bihar,
- ii) The State of Uttar Pradesh Vs. Mohammad Naim,
- iii) Niranjana Patnaik Vs. Sashibhusan Kar and Another,
- iv) AIR 1986 SC 1080 (Advocate General of Bihar vs High Court of Judicature at Patna)
- v) A.M. Mathur Vs. Pramod Kumar Gupta,

23. The Learned Counsel for R.M.I. Mr. Anindya Mitra opposing the learned Advocate General has submitted that in Niranjana Patnaik's case there was an application under Article 136 of the Constitution of India and in Dr. Raghubir Saran's case, the Court was moved u/s 435 of the Cr. P.C. as it then was. He has further submitted that in Nairn's case, there was an application u/s 561A of the old Cr. P.C. According to the Learned Counsel, the cases cited by the learned Advocate General can be distinguished. The Learned Counsel for the RMI has submitted on the basis of the principles laid down in *In Re: G. Vasantha Pai*, that a Division Bench cannot expunge any portion of the decision of a Single Bench as both are the decisions of the High Court. This view it has been pointed out by the learned Advocate General, has been overruled by the decisions in *The State of Uttar Pradesh Vs. Mohammad Naim*, . The Learned Counsel for RMI has also referred to the principles laid down in AIR 1963 Mys. 326 (*In re : Baiyamma*). It has been submitted by the learned. Advocate General of West Bengal that this decision is not an authority on the point in issue in our case. In our view, that is the correct position for reasons discussed below.

24. It may not be irrelevant to reiterate once more the context in which the learned Trial Court was adjudicating into the dispute. The very limited question was whether the suit was liable to be stayed u/s 3 of the Act referred to above. Certainly the learned Court was not called upon at that stage to enter into the merits of the contentions of the parties. And we say, with due respect, the learned Trial Court completely over-looked this. The adventures into this speculative zone whether there was any apprehension about the propriety of the payment Air India had made to Boeing or why full payment was made by Air India or whether Air India kept something in secret so far as payment of public money was concerned or whether the full payment by Air India to Boeing required a probe or not etc. are completely irrelevant and un-called for so far as the limited question which fell for consideration before the learned Trial Court was concerned. Therefore, without any hesitation it can be said that the impugned observations are completely irrelevant and unconnected the main question in issue before the learned Trial court. The next question is whether that alone is sufficient for expunging the impugned observations of the learned Trial Court.

25. In *Dr. Raghubir Saxena's* case (supra), in paragraph 6 of the reported judgment, the proper scope of inherent powers of the Court under the Cr. P.C. was considered in depth. Held, "but occasions do arise when a particular Judge, without any justification, may cast aspersions on a witness or any other person not before him affecting the character of such witness or person. Such remarks may affect the reputation or even the career of such person. In my experience I find such cases are very rare. But if it happens, I agree with the Full Bench of the Bombay High Court that the Appellate Court in a suitable case"; may judicially correct the observations of the lower court by pointing out that the observations of the lower court by pointing out that the observations of the lower court by pointing out that the observations made by that Court were not Justified or were

without any foundation or were wholly wrong or improper. This can be done under its inherent power preserved u/s 561A of the Code of Criminal Procedure. But that power must be exercised only in exceptional cases where the interest of the party concerned would irrevocably suffer".

26. In *Md Naim's case* (supra) it was held that it is a principle of cardinal importance in the administration of justice that the proper freedom and independence of Judges and Magistrates must be maintained and they must be allowed to perform their functions freely and fearlessly and without any undue interference by anybody even by the Supreme Court. At the same time it is equally necessary that in expressing their opinion Judges and Magistrate must be guided by considerations of justice, fair play and restraint. Further held that, it is not infrequent that sweeping generalisations defeat the very purpose for which they are made. It has been judicially recognised that in the matter of making disparaging remarks against persons or authorities whose conduct comes into consideration before Court of law in cases to be decided by them, it is relevant to be considered (a) whether the party whose conduct is in question is before the Court or has an opportunity of explaining or defending himself, (b) whether there is evidence on record bearing on that conduct justifying the remarks, and (c) whether it is necessary for the decision of the case, as an integral part thereof, to animadvert on that conduct. The learned Judges in this case overruled the principles laid down in *The State of Bombay Vs. Nilkanth Shripad Bhavse and Another*, holding that the High Court can in the exercise of its inherent jurisdiction expunge remarks made by it or by a lower court, if it is necessary to do so to prevent abuse of the process of the Court or otherwise to secure the ends of justice. The jurisdiction is, however, of an exceptional nature and has to be exercised in exceptional cases only.

27. In *Niranjan Patnaik's case* (supra), in paragraph 23 of the reported decision it has been held as follows :-

It is, therefore, settled law that harsh or disparaging remarks are not to be made against persons and authorities whose conduct comes into consideration before court of law unless it is really necessary for the decision of the case, as an integral part thereof to animadvert on that conduct.

28. In *Advocate General of Bihar's case* (supra), the Court held that the remarks made by the learned Judge against the Advocate General of Bihar who was not a party were not justified and could have been avoided and hence the Court expunged the impugned remarks in the judgement.

29. In *Mathur's case* (supra) in paragraph 14 it has been held by their Lordships as follows :-

The Judges Bench is a seat of power. Not only to judges have power to make binding decisions, their decisions legitimate the use of power by other officials. The judges have the absolute and unchallengable control of the Court do in. But they cannot misuse their authority by intemperate comments, undignified banter

or scathing criticism of Counsel, parties or witnesses. We concede that the Court has the inherent power to act freely upon its own conviction on any matter coming before it for adjudication, but it is a general principle of the highest importance to the proper administration of justice that derogatory remarks ought not to be made against persons or authorities whose conduct comes into consideration unless it is absolutely necessary for the decision of the cases to animadvert on their conduct. (Sec. (i) R.K. Lakshmanan Vs. A.K. Srinivasan and Another, ; (ii) Niranjan Patnaik Vs. Sashibhusan Kar and Another,

It is clear from above that the golden thread which is going through the string of decisions mentioned above is that the High Court has enough power to expunge damaging, disparaging, scurrilous and unwarranted remarks passed by Judges or Magistrates under the inherent powers of the Court. In the case at hand the learned Trial Judge passed the impugned comments which were not only irrelevant but also did not form the integral part of the judgment as the limited issue which had called for decision had absolutely nothing to do with the matters of the comments. The comments about the propriety of the financial transactions made by Air India and the insinuation regarding the suppression of material documents, the existence of a "smoke of doubt about the policy referred to in Mr. Tata's letter dated 30th April, 1987, requiring a probe about secretive disbursement of public money were, to say the least, damaging and disparaging and scurrilous remarked and were completely unwarranted. Hence this is a fit case where the High Court can exercise its inherent power to expunge the offending remarks. We regret to note that the observations made and aspersions cast on the conduct of Mr. Tata and Air India were not only without jurisdiction but were wholly and utterly unjustified and unwarranted. We, therefore, uphold the contention of the learned Advocate General of West Bengal appearing for Air India and Mr. Ratan N. Tata and expunge the impugned remarks in the order of the learned Trial Judge.