
(1978) 10 MAD CK 0007
In the Madras High Court
Case No : Original Side Appeal No. 53 of 1978

C.D. Gopinath

APPELLANT

Vs

Gordon Woodroffe and Company (Madras) Pvt. Ltd.

RESPONDENT

Date of Decision : 05-10-1978

Acts Referred:

Arbitration Act, 1940 — Section 34

Citation : (1980) ILR (Mad) 184

Hon'ble Judges : Ramanujam, J;Paul, J

Bench : Division Bench

Advocate : S. Govind Swaminathan, for A.C. Muthanna, C. Arumainathan and K.C. Ramamurthy, for the Appellant; S. Chellaswamy, for the Respondent

Final Decision : Dismissed

Judgement

Ramanujam, J.—This appeal is directed against the order of Natarajan, J. in Application No. 3959 of 1977 in Civil Suit No. 450 of 1977

dismissing the Appellants' (first Defendant's) application for stay of the suit u/s 34 of the Arbitration Act.

2. The said suit had been filed by the Respondent (Plaintiff) (i) for a permanent injunction against Defendants 1 and 2 restraining them from taking

over the Clan Line Steamer agency for the ports of Madras, Kakinada and Vizacapatnam and functioning as Clan Line Co-ordinating agents for

Cuddalore, Masulipatnam, Nagapatinam and Trivandrum or acting as agents for the Clan Line Steamers Ltd. London either by themselves or

through their agents and (ii) for a direction to the first Defendant to pay a sum of Rs. 5 lakhs to the Plaintiff towards damages on account of the first

Defendant's breach of the service agreement dated 3rd January, 1975 entered into between the Plaintiff and the first Defendant.

3. The case as put forward in the plaint is briefly as follows:

The Plaintiff company was originally started as a partnership concern in 1868 and later converted into a private limited company in 1924. The

business of the partnership and later of the company consisted of two divisions, manufacturing and trading divisions. The trading division included

its agency business, one among them being steamer agency. The Plaintiff was appointed as Steamer agent of Clan Line Steamers Ltd., U.K.

hereinafter referred to as Clan Lines as early as 1868. Since then the Plaintiff has built up an extensive cargo business. The first Defendant was

appointed as an Assistant of the Plaintiff company and in due course, he came to occupy the position of a Senior Director and Chief Executive of

the company. In 1975, in supersession of his previous service agreement, a fresh agreement was entered into by him with the Plaintiff for a period

of five years. In June, 1974, after the Foreign Exchange Regulation Act of 1973 came into force, all foreign and foreign controlled companies had

to make an application to seek the permission of the Reserve Bank of India to carry on their activities in India. The Plaintiff made such an

application for permission but the Reserve Bank of India replied that it will not be possible to permit the Plaintiff to continue its service agency

activities unless the foreign share holding is reduced to 40 percent. The Plaintiff was corresponding with the Reserve Bank of India for extension of

time for making further representations in the matter. The Plaintiff was preparing alternative schemes for continuing the business with the permission

of the Reserve Bank. The first Defendant was directed to place alternative schemes before the Reserve Bank for continuing the steamer agency.

Instead of making effective representation to the Reserve Bank, the first Defendant unauthorisedly wrote a letter on 13th October, 1977 to the

Reserve Bank stating that the Plaintiff will be giving up its service activities with effect from 1st February 1978. By doing so the first Defendant had

acted against the interest of the Plaintiff. This he did with a view to grab the steamer agency business for himself. The first Defendant also

misrepresented to Clan Line that the Reserve Bank of India has refused to grant permission to the Plaintiff to continue its agency activities and, that

therefore, the Plaintiff had to stop its trading and agency activities from 31st January, 1978 onwards, and based on such misrepresentations Clan

Line, terminated the agency of the Plaintiff with effect from 31st January, 1978 by their letter, dated 19th October, 1977 and informed the Plaintiff

that it had decided to entrust the agency to a firm to be started by the first Defendant. When these matters became known to the other Directors of

the company, representations were made to the Clan Line, to continue the steamer agency as before and to withdraw the letter of termination of

agency already sent to the Plaintiff, but the Clan Line refused to change its stand and revoke the letter of termination of agency. Simultaneously the

services of the first Defendant, who had sent in a notice of retirement with effect from 1st of November, 1977, were terminated by a resolution of

the Board of Directors for his questionable conduct in acting against the interests of the Plaintiff company and acquiring a personal interest adverse

to the company. If the steamer agency business were to be stopped the Plaintiff will suffer huge loss and will also force to terminate the

employment of 300 employees. As the chief executive and as one who should safeguard the interest of the company, the first Defendant owned a

duty to safeguard the interest of the company. But he has committed a breach of trust and violated the terms of the agreement by securing the

agency business of the company for himself by making false representations to clan line that the Reserve Bank of India has refused to permit the

Plaintiff to carry on its agency business in India from 1st February, 1978. Though the Plaintiff apprehended huge loss as a result of the cancellation

of the steamer agency business procured by the first Defendant, it has restricted its claim for damages to Rs. 5,00,000. It has also asked for an

injunction against the Defendants from taking over the agency business from the Plaintiff.

4. As soon as the first Defendant was put on notice of the filing of the said suit, he filed Application No. 3959 of 1977 u/s 34 of the Arbitration Act

for stay of all proceedings in the suit on the ground that the service agreement entered into between the parties provided for settlement of all

disputes arising between them by reference to arbitration. In the affidavit filed in support of that application the first Defendant had stated as

follows. The parties have entered into a service agreement on 3rd January, 1975 and Clause 18 of the agreement lays down that, if any dispute,

difference or question shall arise between the parties touching the true construction, meaning or effect of this agreement or of any clause, matter or

thing herein contained or the rights or liabilities of the said parties hereto or otherwise howsoever in relation to the agreement every such dispute, difference or question shall as and when arise be referred to the arbitration of two independent competent persons in Madras, one to be chosen by the company and the other by the employee or to an umpire to be appointed by the arbitrators in writing before entering on the business of the reference and the award of such two persons or an umpire to be appointed shall be binding, final and conclusive upon the parties. Since the terms of the service agreement clearly provided for settlement of dispute by reference to arbitration, the Plaintiff is not entitled to have the suit tried before the Court. The Defendant is willing to do all things necessary to the proper conduct of the arbitration.

5. The Plaintiff has filed a counter-affidavit to the said application opposing the grant of stay of the suit. The said counter statement was to the following effect. The suit has been filed on the basis that the first Defendant has broken the terms of the service agreement by committing breach of trust fraud and deception. In such circumstances, that is when breach of trust fraud and misrepresentation are alleged against the first Defendant, he is not entitled to have the dispute adjudicated upon by arbitration. Moreover, the first Defendant has repudiated the service agreement and, therefore, he cannot rely upon Clause 18 of that agreement and ask for reference of the dispute to arbitration. Reference to arbitration cannot also be asked for because Clause 18 is not a comprehensive clause and it does not cover all the reliefs claimed in the suit, namely, relief of interim and permanent injunctions and relief of accounting. In any event, the relief of injunction claimed in the suit is beyond the powers of the arbitrator, and the question of damages arising out of breach of trust, fraud and misrepresentation committed is outside the scope of Clause 18. Even, if the arbitration is to go on the arbitrator cannot give the Plaintiff the relief by way of damages as claimed in the suit, and the Plaintiff will be forced to file another suit for recovery of damages even after arbitration Therefore the dispute raised in the suit and the reliefs asked for are beyond the pale of arbitration. Hence the application for stay should not be allowed.

6. Natarajan, J., set down the following three question consideration:

(1) Whether the dispute between the parties is one arising under the terms of

the agreement or outside the terms?

(2) Whether the charges of fraud, breach of trust and misrepresentation levelled by the Plaintiff are matters which can be decided by the arbitrator?

(3) Whether the reliefs asked for by the Plaintiff in the suit are beyond the powers of the arbitrator and can only be granted by the Court?

As regards the first question, the learned Judge held that though the service agreement provides for settlement of all disputes arising between the

parties in respect of matters contained in the agreement, it is difficult to accept the contention of the first Defendant that the dispute raised by the

Plaintiff in the suit is one which can be brought within the ambit of the dispute contemplated in Clause 18 of the agreement, as the dispute is not

with reference to the construction of any clause in the agreement or the rights and liabilities of the parties with reference to matters incorporated in

the agreement. On the second question the learned trial Judge held that as the Plaintiff had alleged that the first Defendant who was holding office

of fiduciary nature under the Plaintiff had actually and deliberately forsaken the interests of the company to gain a personal benefit by committing a

breach of trust fraud and deception, that the said charges are too serious and complicated to be considered and determined by an arbitrator that

the parties could never have contemplated that in such a situation the dispute should be referred only to arbitration for settlement and not to a court

for adjudication, and that in these circumstances the Court will not exercise the power of staying the suit On the third question the learned Judge

held that having regard to the fact that the Plaintiff had asked for the reliefs by way of injunction as well as damages and those reliefs cannot be

granted by an arbitrator that even, if the dispute is referred to an arbitrator the matter will have to come again to the Court for other reliefs and in

such a case, no useful purpose would be served by making a reference to arbitration. In this view the application for stay has been dismissed by

the learned Judge. Aggrieved against the said order of Natarajan, J., refusing to grant stay of the suit, the first Defendant has filed this appeal.

7. Before dealing the rival contentions of parties, it is useful to refer to the legal principles governing the grant of stay by the Court u/s 34 of the

Arbitration Act, hereinafter referred to as the Act. It is by now well-established that whether or not the Court shall exercise the power given to it

u/s 34 of the Act by staying the suit is entirely in the discretion of the Court and stay of suit cannot be claimed as a matter of right by a party. Once the discretion has been judicially exercised by the trial Court it will not readily be interfered with in appeal even though the appellate court may feel that if the discretion has vested with it, its conclusion might have been different. It is only in cases where the trial Court in exercising discretion had acted improperly, unreasonably or capriciously or has ignored relevant facts or has not adopted judicial approach, the appellate Court can interfere with the trial Court's discretion.

8. Though there are no inflexible rules governing the exercise of the said discretion, the principles on which the discretion is to be exercised can be culled out from various judicial precedents. They are: (i) Where parties have agreed to refer a dispute to arbitration and one of them, notwithstanding that agreement, files a suit to have the dispute determined by the Court, the prima facie leaning of the Court is to stay the action, leave the Plaintiff to the tribunal to which he has agreed. (ii) The fact that a party, who has agreed to, refer the dispute to arbitration desires to obtain in connection with those disputes, relief which is beyond the powers of the arbitrator to afford is not a conclusive reason for the Court to refuse stay the action in which such reliefs is claimed. (iii) Where the parties had agreed to submit a dispute to arbitration, the fact that a reference would entail more expense than would be necessary, if the matters came before the Court is not sufficient reason for not granting stay. (iv) The fact that the arbitration agreement includes but a small part of the matters covered by the suit, may be sufficient reason for refusing the stay. (v) The fact that the dispute involves a charge of fraud or a charge against the character of one of the parties may in some cases, be sufficient to induce the Court to refuse to stay the proceeding, unless there is an express stipulation that questions involving fraud also should be referred to arbitration.

The party against whom the charge is made will have the option to go either before the arbitrator or before the Court. However, if the objection to arbitration is by the party alleging the fraud the court will not necessarily accede to it, unless a prima facie case of fraud is established by him. (vi) If the dispute involves serious and complicated questions of law which call for a decision of the Court, then the Court will be justified in refusing the

stay.

9. Mr. Govind Swaminathan, learned Counsel for the Appellant submits that the learned Judge had not exercised his discretion properly and

judicially and that the reasons given by him for dismissing the application for stay could not legally be sustained. According to him the learned Judge

is not right in holding that the dispute raised in the suit is not one which will come under the terms of the agreement, that the charge of fraud, breach

of trust and misrepresentation levelled by the Plaintiff against the first Defendant are all matters which cannot be decided by the arbitrator and that

some of the reliefs claimed by the Plaintiff in this suit cannot be granted by the arbitrator. It is contended by the learned Counsel that Clause 18 of

the service agreement is very wide in its amplitude and therefore, any dispute arising out of or in relation to the said agreement will have to be

decided only by reference to arbitration, that it is not the law that in every case where fraud, breach of trust and misrepresentation are alleged by

one party against the other, they have to be gone into only in the suit and not by the arbitrator, that, if a Plaintiff alleges fraud, breach of trust and

misrepresentation against the Defendant, the Defendant can choose the forum, but not the Plaintiff and that the Plaintiff making charges of fraud,

breach of trust and misrepresentation has to make out a prima facie case if he wants to get over the arbitration clause to which he was a party. It is

also contended that the main relief which is claimed in the plaint being one for damages for breach of the terms of an agreement, the arbitrator can

very well grant that relief and that the arbitration clause cannot be got over merely, because some minor or incidental reliefs are claimed in the plaint

along with the relief by way of damages.

10. The arbitration clause contained in the service agreement in the following terms:

If any dispute, difference or question shall arise between the parties hereto touching the true construction, meaning or effect of this Agreement or of

any clause, matter or thing therein contained or the rights or liabilities of the said parties hereto, or otherwise howsoever in relation to the premises

every such dispute, difference or question shall as and when the same shall arise, be referred to the arbitration of two independent competent

persons in Madras, one to be chosen by the Company and the other by the

Employee or to an umpire to be appointed by the arbitrators in writing before entering on the business of the reference and the award of such two persons or any umpire to be appointed as aforesaid shall be deemed to be a submission to arbitration within the meaning of the Indian Arbitration Act, No. IX of 1899 or any modification or re-enactment thereof for the time being in force.

11. The learned Counsel for the Appellant refers to paragraph 24 of the plaint wherein the Plaintiff seeks a decree for Rs. 5 lakhs against the first

Defendant as damages suffered by him consequent upon the first Defendant's breach of the service agreement dated 3rd January, 1975, and

contents that the claim for damages for breach of a contract should be taken to be a dispute arising out of the agreement, or in connection

therewith, that the learned trial Judge is in error in taking the view that questions relating to breach of contract are beyond the reach of the

arbitration clause contained in an agreement, relying on *Gaya Electric Supply Co. Ltd. Vs. The State of Bihar*, and that the said decision of the

Supreme Court was rendered with reference to the arbitration clause contained in the contract before them which was of a very restricted nature.

The learned Counsel refers to the decision in *Majet Subbiah & Co. v. Tetey Whitely* AIR 1923 Mad. 693 as supporting his stand. In that case the

contract contained the following arbitration clause:

Should any dispute arise as to the interpretation of this contract or any matter in connection therewith or with the carrying out thereof the same shall

be submitted to arbitration.

It was contended that the said arbitration clause will not take in a claim for damages for breach of the contract. Schwere, C.J., speaking for the

Bench observed:

Reference to arbitration under similar clauses in respect of breaches of contract is of daily occurrence in England. As far as my knowledge goes,

no one ever ventured to suggest to the Court there that there, was no power to refer in matters of breach of contract, the real reason being that it is

only in respect of breaches of contract that references arise. There may be questions of interpretation of contract not involving a breach, which

would also be covered, but these must be very rare.

After holding that a claim for breach of contract will come under the arbitration clause, the Court in that case proceeded to say that except in two cases, where either by reason of the fact that there are charges of fraud, or by reason of the Court coming to the conclusion that in arbitration complete justice cannot be obtained between the parties or for some other proper cause that the matter should be kept in Court rather than be referred to arbitration, the Court will normally exercise the power u/s 34 of the Arbitration Act and stay the action. A perusal of the decision in Gaya Electric Supply Co. Ltd. Vs. The State of Bihar, which has been referred to by the learned trial Judge indicates that it was rendered with reference to the scope of the arbitration clause considered by them in that case, which we find to be of a very restricted scope. Therefore, it should be confined to the facts of the case and cannot be taken as laying down that in all cases, questions relating to breach of contract will not fall under the arbitration clause contained in the contract. The question whether a dispute relating to breach of contract will be covered by an arbitration clause will have to be decided with reference to the terms of the arbitration clause. Clause 10 of the service agreement provides for settlement of disputes between the parties by arbitration in respect of matters contained in the agreement or other disputes arising therefrom. According to the learned trial Judge the claim for damages in this case is not based on the breach of service agreement, but on the basis of a breach of Clause 2 therein by the first Defendant, who was in a fiduciary capacity committing a breach of trust, fraud and misrepresentation and thus acting against the interest of the company with a view to benefit himself. Clause 2 of the service agreement says that the first Defendant shall be just, true and faithful to the company in the performance and carrying out of his duties and shall use his best endeavours to ensure the advancement and prosperity of the business of the company and shall in all things carry out, obey and fulfil all such reasonable instructions and directions as shall from time to time be given by the company or any person or persons authorised by the company. This clause provides that the first Defendant as an employee should act truly, honestly, justly and faithfully in carrying out his duties. Though a breach of the service agreement by the first Defendant not taking up the employment as agreed or failing to perform his duties as an employee may come under the arbitration clause referred to above, the claim that the

first Defendant while performing his duties had acted fraudulently and dishonestly and caused thereby loss or damage to the company cannot be taken to come under the arbitration clause. The relief of damages claimed on the basis that the first Defendant has committed fraud, breach of trust and deception while conducting the affairs of the company as its employee will not flow from the service agreement, but only flows from the general law. Thus, while the dispute arising out of the non-performance of employee's duties may be a matter for arbitration, a fraudulent performance of his duties cannot be a matter for arbitration. It is for this reason the learned trial Judge has taken the view that the dispute arising out of the fraud alleged to have been committed by the first Defendant while performing His duties will not fall within Clause 18 of the service agreement, as such a dispute would not have been contemplated by the parties as one referable to arbitration and we entirely agree with that view. Suppose an employee, while performing his duties commits a breach of trust and criminal misappropriation and the employer files a suit for recovery of the amount misappropriated, can that suit be stayed on the basis that his service agreement contained an arbitration clause. The answer can only be in the negative. The position is not different here. The Plaintiff claims damages for the loss or damage it had suffered by the alleged fraudulent and dishonest conduct of the first Defendant while carrying on his duties. In *Gauri Shankar and Sons Vs. Union of India (UOI) (General Manager, E.I. Rly., Calcutta)*, it has been held that where resort to arbitration was to be made only in the event of a dispute arising under or out of or in connection with the contract, it would not have been the intention of the parties that, if one of them committed a tort for example, defamation, the dispute relating to compensation for that tort should fall within the purview of the arbitration clause. This is quite consistent with our view. In our opinion, therefore, the learned trial Judge is right in his view that having regard to the basis on which the claim for damages is made, the claim cannot be said to be a matter agreed to be referred to arbitration. As the damages claimed arises out of the general law and not under the terms of the service agreement, it has rightly been held to fall outside the arbitration clause.

12. On the question as to whether when grave charges of fraud, breach of trust and misrepresentation are levelled by one party against the other, a

stay u/s 34 can be ordered, the learned trial Judge has held that in such cases the proper thing for the Court is to have the suit on its file and not to leave those matters to be decided by the arbitrators. Mr. S. Govind Swaminathan, learned Counsel for the Appellant would say that, if the Plaintiff makes an allegation of fraud, breach of trust and misrepresentation, etc., against a Defendant, it is open to the Defendant to say that the matter should be decided in open court, but it is not open to the Plaintiff who makes the allegations to say that the charges have to be gone into only by the civil Court. According to the learned Counsel, if that were to be so, every party to the agreement will make an allegation of fraud, breach of trust, etc., against the Defendant with a view to get over the arbitration clause and to have the dispute tried before the Court, and therefore, the Plaintiff, who makes the allegation of fraud, etc., cannot ignore the arbitration clause and claim an option to have the disputes decided before the Court. The learned Counsel refers to the decision in Raymon Engineering Works Ltd. Vs. Union of India (UOI), in support of his plea that when a Plaintiff alleges fraud against the Defendant, who however desires to have the dispute tried by the arbitrators, the suit should be stayed u/s 34. In that case a claim was made for various sums by the Plaintiff against the Defendant, Union of India in respect of certain contracts which contained valid and subsisting arbitration agreements. The Defendant filed an application for a stay of the said suit. The Plaintiff had alleged fraud, coercion and undue influence against the Defendant. The Court held that when a party against whom an allegation of fraud is made wants the matter to be decided by arbitration, the Court should not normally stay the suit.

13. In Pramada Prasad Mukharjee Vs. Sagarmal Agarwala and Others, it was observed that when a suit is independent of the contract, the allegation of fraud in the plaint is enough to oust the jurisdiction of the arbitrators and stay should be refused and even, if the contract be admitted and the application arising on the breach of the contract be repudiated on the ground of fraud, stay should be refused if a prima facie case of fraud is made out. In Abdul Kadir v. Madhav Prabhakar AIR 1972 S.C. 406 the Supreme Court held that where serious allegations of fraud are made against a party and the party, who is charged with fraud desires that the matter should be tried in open Court, that would be a sufficient cause for

the court not to order the arbitration agreement to be tiled and to make a reference. In *N.C. Padmanabhan and Others Vs. S. Srinivasan*, it has

been held that when grave charges of fraud and misappropriation are alleged in the plaint, they are all matters too serious to be tried by an

arbitrator. In *Nitya Kumar Chatterjee Vs. Sukhendu Chandra*, it was held that where grave charges of fraudulent conduct on the part of the

Defendant are alleged, it is desirable that the matter should have trial in Court as arbitration will not be the most suitable method of determining the

question raised between the parties, even, if the party charged with fraud does not want a public trial, but the party charging the fraud so wants.

14. The learned Counsel for the Appellant places strong reliance on the decision in *Russell v. Russell* (1800) 14 Ch. D. 471. In that case a deed of

partnership between A and B provided that, if the business should not be conducted to the satisfaction of B, he should have the power to give

notice to A to determine the partnership. The said partnership deed also contained an arbitration clause providing that any dispute in relation to the

partnership should be referred to arbitration. B having given notice to A for the partnership to be determined, A brought an action against B

alleging various charges of fraud and claiming that the notice should be declared void. B moved that the matters in action should be referred to

arbitration. It was held that in case where fraud was alleged the Court would in general refuse to send the dispute to arbitration, if the party

charged with the fraud desired a public enquiry, but where the objection to arbitration was by the party charging the fraud, the Court would not

necessarily accede to it, and would never do so unless a prima facie case of fraud was proved. *Jessel M.R.*, observed at page 476:

I now come to the first ground, where personal fraud is in issue. Though, I quite agree it is within the discretion of the Court to say, where one of

the two parties desires, it, that a dispute shall not be referred to arbitration, yet I must consider for a moment which of the two parties does desire

to exclude arbitration. Does the party charging the fraud desire it, or the party charged with the fraud desires it, I can perfectly understand the

Court saying "'I will not refer your character against your Will to a private arbitration.'" It seems to me in that case, it is almost a matter of course to

refuse to reference, but I by no means think the same consideration follows when the publicity is desired by the person charging the fraud. His

character is not at stake, and the other side may say. The very object that I have in desiring the arbitration is that the matter shall not become

public. It is very easy for you to trump up a charge of fraud against me, and damage my character, by an investigation in public. There is very old

and familiar proverb about throwing plenty of mud, which applies very much to those charges made by members of the same family, or members

of the same partnership, against one another in public. It must be an injury, as a rule, to the person charged with fraud to have it published and I

must say that I am by no means satisfied that the mere desire of the person charging the fraud is sufficient reason for the Court refusing to send the

case to arbitration.

The ratio of the above decision appears to be that where an allegations of fraud are made in an action in respect of which stay is being sought,

those allegations are factors which the Court takes into consideration in exercising the discretion, that it was normally the practice, if party charged

with fraud desired public and open trial in Courts to refuse to grant stay even where the stay was otherwise merited. It is true, as submitted by Mr.

S. Govind Swaminathan for the Appellant, that the said decision lays down that where the Plaintiff alleges fraud against the Defendant, he must

establish a prima facie case before he seeks to avoid the arbitration clause and wants to continue the action in a civil Court notwithstanding the

arbitration clause.

15. The question then is whether the Plaintiff in this case has made out a prima facie case in relation to the charges of fraud breach of trust and

misrepresentation. The Plaintiff's specific case in the plaint is that the first Defendant (Appellant) who stood in a fiduciary capacity with reference to

the Plaintiff, with a view to secure a personal advantage to himself, had misrepresented the facts to the principals, Clan Line Steamers Ltd., and

procured the cancellation of the Plaintiff's agency and got the agency for himself, and that this clearly amounted to breach of trust. In this case it is

not in dispute that on the day when the first Defendant was offered the Clan Line agency by the Principal he was an employee of the Plaintiff and

that the cancellation of the Plaintiff's agency was based on the representations made by the first Defendant to the principal, It is also the case of the

Plaintiff in the plaint that the first Defendant was specifically asked by the Board

of Directors to put forward alternative proposals before the Reserve Bank of India and M/s Gordon Woodroffe Company, London, who were the major shareholders in the Plaintiff company, but the first Defendant had not discussed with the Reserve Bank or with the major shareholders about the feasibility of carrying out the alternative proposals. In the suit no written statement has yet been filed. Therefore we have to proceed only on the basis of the allegations made in the plaint to find out whether the allegations made therein make out a prima facie case in relation to the allegations of fraud, breach of trust and misrepresentation levelled against the first Defendant. The minutes of the meeting of the Board of Directors held on 3rd December 1977 seem to indicate that the Plaintiff bona fide proceeded on the basis that the first Defendant is guilty of fraud, breach of trust and misrepresentation. The correspondence between the Plaintiff and the first Defendant and the correspondence between the first Defendant and one Mr. E.C. Sosnow, who represented the major shareholders in London clearly indicate that the first Defendant procured the agency for himself after the principals, Clan Line Steamers expressed their desire to terminate the agency of the Plaintiff. It is not in dispute that it is only after the first Defendant met the Principal. Clan Line Steamers and on hearing his representations as to what is happening in India in relation to the agency business done by the Plaintiff, the Principal has thought of cancelling the Plaintiff's agency and giving it to the firm to be constituted by the first Defendant. We do not know as to what were the representations made by the first Defendant to the principals which resulted in the cancellation of the Plaintiff's agency and in the transfer of the agency in favour of the first Defendant. As already stated, at this stage we have to proceed only on the basis of the allegations made in the plaint. Having regard to the above admitted facts the Plaintiff cannot be said to have made the allegation of fraud breach of trust and misrepresentation in a. reckless manner. Having regard to the circumstances under which the cancellation of the Plaintiff's agency and the transfer of the agency in favour of the first Defendant had occurred, it is but natural for the Plaintiff to entertain a belief that it is the first Defendant who procured the cancellation of the Plaintiff's agency and got a transfer of the same in his favour by making misrepresentations to the Principals with a view to

obtain a benefit for himself, and that conduct of the first Defendant amounted to fraud and breach of trust. Though the decisions referred to above have stated that there should be a prima facie proof in support of the allegations of fraud, breach of trust, etc., that we are of the view that the proper test is to see whether the allegations have been made recklessly with a view to take the dispute out of the arbitration clause and if that is not the case, the Court should ordinarily exercise its discretion by refusing the stay. However, since we are of the view that the allegations of fraud, breach of trust and misrepresentations have been made by the Plaintiff bona fide and not recklessly, the trial Judge has exercised his discretion u/s 34 of the Arbitration Act properly in refusing to stay the suit. Even if the Plaintiff has to make out a prima facie case of fraud, breach of trust and misrepresentation with a view to enable him to continue the suit filed by him as has been held in some of the above decisions, we are of the view that in this case, even on the facts admitted by the first Defendant in the various documents filed before the Court by consent of parties, the Plaintiff should be taken to have established a prima facie case.

16. It is not disputed that in view of the stand taken by the Reserve Bank that foreign share holding should be brought within 40 per cent so as to enable the Plaintiff to carry on the agency business in India, the first Defendant went to U.K. for a discussion with Mr. Sosnow, representing the major shareholders in U.K. and that Mr. Sosnow instructed the first Defendant to have a discussion with the Principals, Clan Line Steamers, that the first Defendant accordingly went and had a discussion with the Principal and that after the discussion he went and told Mr. Sosnow that the Principal had decided to terminate the Plaintiff's agency and to grant the agency in his favour. This shows that the decision to cancel the Plaintiff's agency and to transfer the agency to the first Defendant was taken by the Principal as a result of the discussion the first Defendant had with the former. By procuring the agency in his favour the first Defendant has acted against the interest of the company and this will be prima facie a breach of trust. So long as it is not possible to know at this stage as to what were the representations made by the first Defendant to the principals on behalf of the Plaintiff it has to be taken prima facie that the cancellation of the Plaintiff's agency was on the basis that the Reserve Bank of India has

prevented the company from carrying on the agency business. Whether these are true representations or whether they are misrepresentations have all to be gone into in detail at the trial. But so long as the representation has resulted in the cancellation of the Plaintiff's agency and the transfer of the same agency to the first Defendant it can prima facie be presumed that the representations made by the first Defendant were against the interest of the Plaintiff and for securing a personal benefit to himself. It can, therefore, be taken that then is prima facie proof of misrepresentation and breach of trust alleged against the first Defendant in the plaint.

17. As regards the allegation of fraud, it is true, there is no specific act of fraud referred to in the plaint. But the plaint allegations are to the effect that the first Defendant acted dis-honestly in procuring a benefit for himself. In Clause (2) of the service agreement the first Defendant has agreed to be just, true and faithful to the company in the performance of and carrying out his duties and shall use his best endeavours to ensure the advancement and prosperity of the business of the company. The plaint alleges a breach of the contractual obligation in Clause (2) of the service agreement, that is to be just, true and faithful to the company. The allegation of breach of an obligation to be just, true and faithful to the company will imply also an allegation of dis-honesty or fraud. On the facts of this case the allegation of being unfaithful is of such a character that it will involve an allegation of dishonesty or of fraud, or of breach of trust. In fact in *Redford v. Hair* (1971) 2 All. E.R. 1089 it was held that an allegation of a breach of a contractual obligation contained in an agreement to be just and faithful, will imply also an allegation of dis-honesty, that it is difficult to allege a breach of an obligation to be just and faithful without implying also an allegation of dis-honesty, and that an allegation of unfaithfulness or of dis-honesty can be equated to an allegation of fraud. In our view, therefore, even, if a prima facie case of fraud, etc., is to be made out by the Plaintiff for continuing the suit, in this case it has been so made out and, therefore, the stay of the suit has rightly been refused.

18. In the suit the Plaintiff has also claimed the relief of permanent injunction restraining the Defendants from taking over and carrying on the Clan Line agency business. Such a relief cannot be granted by the arbitrators. Apart from this, the Plaintiff also claims in paragraph 21(A) of the plaint

that under law and equity the first Defendant is bound to account to the Plaintiff in respect of all the commission and benefits accrued to the first

and second Defendants from the said agency. This claim, does not flow from the service agreement but flows from the general law of agency, and

as such that relief also cannot be granted by the arbitrators. Fridman in his book on the law of Agency Fourth edition says at Page 138 that apart

from the duties which are implied by the law into the agency agreement such as duty to perform the work with due care and skill, duty to account,

etc., there are others which stem from the fact that the agency relationship is one of trust.... These duties are equitable in character and may be

lumped together under the general principle, namely that the agent must not let his own personal interest conflict with the obligations he owes to his

principal. Any relief claimed on the basis of such a general principle cannot come under the arbitration clause referred to above.

19. Mr. S. Govind Swaminathan would say that the company was informed then and there of whatever the first Defendant did with regard to the

Clan Line agency and, there is, therefore, no question of the first Defendant entering into a secret and clandestine transaction with the principals,

the Clan Lines. Even assuming that the company and its major shareholders were made aware of what was happening between the first Defendant

and the Clan Lines, unless the company for which the first Defendant has been acting has consented to the Clan Lines transferring its agency in

favour of the first Defendant, the company is entitled to invoke the principle of equity and ask for accounting if the first Defendant had in fact made

a private, personal, profit out of the performance of his duties as a director who stands in a fiduciary capacity as regards the company. We,

therefore, hold that the reliefs of injunction and accounting claimed by the Plaintiff in the suit cannot be granted by the arbitrator as they are covered

by the arbitration clause.

20. Even assuming that a prima facie case of fraud had not been established by the Plaintiff, in this case, the position comes to this. Out of the three

substantial reliefs, damages for breach of contract, permanent injunction and accounting, the first will be covered by the arbitration clause and the

other two will be outside that clause. In such a case it is not just and proper to split up the action by referring the matter relating to breach of

contract alone for arbitration and leaving the other matters for a decision by the Court.

21. In the light of the above discussion, we see no justification for interfering with the order passed by Natarajan, J., as we feel that he has

exercised the discretion u/s 34 of the Arbitration Act judiciously and properly.

22. The Original, Side Appeal therefore fails and is dismissed. There will, however, be no order as to costs.

23. Before parting, we may however, add that the observations made above are only for purpose of these interlocutory proceedings, and they

cannot be taken to be conclusive and the trial Court has to deal with the charge of fraud, breach of trust and misrepresentation at the trial on merits

on the basis of the evidence let in and without reference to our observations in this appeal.