

(1991) 03 CAL CK 0052
In the Calcutta High Court
Case No : Appeal 458 of 84

Pragati Engineering (P) Ltd. and others	APPELLANT
Vs	
Tamil Nadu Water Supply and Drainage Board	RESPONDENT

Date of Decision : 07-03-1991

Acts Referred:

Arbitration Act, 1940 — Section 13, 33, 34, 8

Citation : AIR 1992 Cal 139 : (1991) 2 CALLT 378

Hon'ble Judges : Prabir Kumar Majumdar, J; Abani Mohan Sinha, J

Bench : Division Bench

Advocate : Mr. S. Tibrewala, for the Appellant; Mr. Jayanta Mitra, for the Respondent

Judgement

Prabir Kumar Majumdar, J.

1. This appeal is against the judgment and order dated 10th September, 1984 passed by a teamed single Judge of this Court staying the Suit No. 697 of 1983 of the appellant under S. 34 of the Arbitration Act, 1940.

2. The suit was filed on the basis of several contracts entered into between the plaintiff and defendant. The appellant/plaintiff had filed a suit against the defendant for price of goods sold and delivered.

3. The respondent made an application under S. 34 of the Arbitration Act, 1940 for staying of the suit filed by the plaintiff/ appellant, inter alia, contending that each of the contracts on the basis of which the suit has been filed contained an arbitration clause and such arbitration agreement covered the subject matter of the suit. It was contended on behalf of the respondent before the Trial Court that each of the said contracts provided that the Project Engineer, special Project Circle, Coimbatore shall be the Arbitrator for any dispute arising out of the transaction. The appellant, however, submitted before the Trial Court that none of the said eight contracts being the subject matter of the suit contained any arbitration clause and in any event the arbitration agreement, if any, did not

cover the subject matter of the suit.

4. The first point urged by the appellant in this appeal was that there was no arbitration agreement between the parties in pursuance of which the matter could be referred to arbitration. According to the appellant, as also has been urged before the Trial Court, purchase orders in the eight different contracts being the subject matter of the suit do not contain any arbitration agreement and hence the disputes between the parties are not covered by any arbitration agreement and as such there is no ground for stay of the suit under S. 34 of the Arbitration Act, 1940.

5. It appears from the facts of the case that the disputes between the parties arose out of eight contracts in respect of each of which a purchase order was issued. In respect of five of such contracts formal "agreements were signed and executed by and between the parties and for the rest of the contracts, namely, in respect of three contracts, no formal agreement was signed. All the contracts between the parties were evidenced by document constituting Tender Notice, Tender, Special Conditions of Contracts, letter of Acceptance, and in respect of five of the said contracts, the Articles of Agreement. It is submitted by the respondent that the appellant submitted its tender enclosing therewith the documents which are at pages 20 to 36 of the paper book. The respondent submits that in other words the conditions contained in the Tender notice, the Tender and Special Conditions of contract form part of the offer of the appellant. It appears to us that this is borne out from the fact that each of the documents mentioned above is signed by or on behalf of the appellant and signature of one of its partner appearing at the bottom of each page of the document. It is submitted by the respondent that the aforesaid offer of the appellant was accepted by and on behalf of the respondent by its letter of acceptance which is at page 33 of the Additional paper book.

The relevant arbitration clause is as follows:

"Arbitration : In case of any dispute or difference between the parties to the contract either during the progress or after the completion of the works or after the determination, abandonment or breach of the contract as to the interpretation of the contract as to any matter or thing arising thereunder except as to the matters left to the sole discretion of the Executive Engineer under Clauses 20, 22, 27(c), 29, 36, 27 and 40 of the Preliminary Specification, or as to the withholding by the Executive Engineer of payment of any bill to which the contract may claim to be entitled, then either party shall forthwith give to the other notice of such dispute or difference and such dispute or differences shall be and is hereby referred to the arbitration of the Superintending Engineer of the nominated circle mentioned in the "Article of Agreement" (hereinafter called the "Arbitrator") and the Award of such arbitrator shall be final and binding on the parties. Provided however that in cases where the Executive Engineer has entered into the contract on behalf of the Governor, the dispute or difference shall, in the first instance be referred to by or through the Executive Engineer to

the Superintending Engineer of the Circle in which the work lies and his decision thereon obtained before referring such dispute or difference to arbitration under this clause. Progress of the work shall not be suspended or delayed on account of the reference of any dispute or difference to the Superintending Engineer of the Circle in which the work lies or to arbitration under this clause. The decision of Executive Engineer or the Superintending Engineer of the Circle in which the work lies, as the case may be on such dispute or difference shall be conclusive until reversed by the Superintending Engineer or the arbitration. Either party may within a period which shall be fixed by the arbitrator file before the Arbitrator a statement of the case and also all the documents relating to or having a bearing on the case. The Arbitrator shall see that the Award is passed, if reasonably possible, within a period of four months from the date of his entering upon the reference but if any extension of that period is considered by him to be necessary, either suo motu or on the application of either party to the reference the parties hereby agree and time to time consider reasonable necessary and any such extension shall forthwith be communicated by him in writing to each of the parties hereto. The Arbitrator shall not be bound to observe the ordinary rules of procedure applicable to trials before judicial tribunals nor to hear or receive formal evidence but may pass an award on the documents or statements of the case filed by both the parties and/or on personal inspection. The arbitrator shall have power to view the subject matter of the dispute with or without the parties or their agents. The arbitrator shall also have power to open up review and revise any certificate, decision, requisition or notice save in regard to the matters expressly expected and to determine all matters in dispute which shall be submitted to him and of which notice shall have been given as aforesaid in the same manner as if no such certificate, opinion, decision, requisition or notice had been given. Upon every and any such reference the costs of and incidental to the reference and Award respectively shall be in the discretion of the arbitration subject to the condition that the amount of such costs to be awarded to either party shall not in respect of a monetary claim exceed the percentage set out below of any such Award irrespective of the actual fees, costs and expenses incurred by either party, provided that where a monetary claim is disallowed in full, the said percentage shall be calculated on the amount of the claim. The arbitrator may determine the amount of the costs to be awarded or direct the same to be taxed as between solicitor and client or as party and party and shall direct by whom and to whom and in what manner the same shall be borne and paid.

The percentage above referred to in this Clause or 5 per cent on any such monetary Award which does not Exceed Rs. 10,000. 3 per cent on the next Rs. 40,000/- or any part thereof, 2 per cent on the next Rs. 50,000/- or any part thereof and 1 per cent on any excess over Rs. 1,00,000/-.

Provided that Government shall not be liable to any claim in respect of any such dispute or difference until the liability and the amount thereto shall have been referred to and decided by the arbitrator."

6. The Tender Notice, inter alia, contained a term being Clause No. 29 which is at page 25 of the additional paper book. It reads as follows:

"Arbitration: Project Engineer, Special Project Circle, Coimbatore, shall be the Arbitrator for any dispute arising out of this transaction."

Clause 7 of the said Tender Notice reads:

"The preliminary specification and other specification of TNDSS relevant to this work will apply to the present contract. All specification of the ISS relevant to their work will apply in the present contract."

7. It is submitted by respondent that the Superintendent Engineer of the Special Project Circle is designated as Project Engineer.

8. In respect of five purchase orders particulars whereof are set out in the Paper Book at page 59, formal Articles of Agreement were executed. The said formal agreements were in similar term and it is, inter alia, stated in each of the agreements, that the Arbitrator for fulfilling the duties set forth in the arbitration clause of the Standard Preliminary Specification shall be Project Engineer, Special Project Circle, Coimbatore. It is also provided in each of the said agreement, that said condition shall be read and construed as forming part of this agreement and the parties hereto will respectively abide by and submit themselves to the conditions and stipulation and perform the agreement on their part respectively. These are clauses 2 and 4 of the formal agreement.

9. It will appear from the documents mentioned above, namely, Tender Notice, Tender, Special Conditions of contract etc., there is a reference to "MDSS or TNDSS". MDSS stands for Madras Delayed Standard Specifications, and TNDSS Tamil Nadu Delayed Standard Specifications. It seems the Madras Delayed Standard Specifications is now known as Tamil Nadu Delayed Standard Specifications presumably, after the name of however, the said documents form part of the contract and appellant signed each one of them and accepted the same.

10. After perusal of the said documents it would appear that first part consist of conditions which have been termed as Preliminary Specification and Clause 73 thereof is a Clause for Arbitration. In terms of Clause 73 of the MDSS, the dispute and differences between the parties are to be referred to the Arbitration of Superintending Engineer of the Nominated, Circle, mentioned in the Articles of Agreement. By clause 20 of the Tender Notice (Additional Paper Book Page 25) and Clause 2 of the Articles of Agreement (Additional Paper Book page 39) the Superintending Engineer of the Nominated Circle has been specified as a Project Engineer, Special Project Circle, Coimbatore. Therefore, it appears that the Arbitration Clause referred to in the Tender Notice and the Articles of Agreement and also Arbitration Clause in Clause 73 of MDSS are on similar terms. It has been submitted on behalf of the appellant that this Arbitration Agreement is vague and uncertain or is unworkable. We are unable to accept this submission

of agreement. The Arbitration Clause referred to above is clear in terms and therefore, and there does not appear any ambiguity or Uncertainty in the Arbitration Clause. We, therefore, hold that the documents forming part of the contract between the parties contained Arbitration Agreement between the parties and the parties by executing the documents or acting thereon accepted the said Arbitration Agreement between the parties.

11. It has" next been contended on behalf of the appellant that Clause 73 of MDSS (Additional Paper Book pages (5 and 16) excluded from the jurisdiction of the Arbitrator the matters left to the sole discretion of the Executive Engineer under Clauses 20,22, 27(c), 29, 36, 37 and 40 of the Preliminary Specifications. We have already referred to above, that the Preliminary Specifications contained clauses 1 to 73. It is Submitted by the appellant that the Arbitrator will have no jurisdiction to decide any dispute covered by the excepted clauses.

12. It is submitted by the respondent that the disputes as disclosed in the plaint filed by the appellant are such that they do not fall within any of the said Clauses referred to by the appellant. It is further submitted on behalf of the respondent that in respect of the matters for which the Executive Engineers" decision has been made final will not form part of the disputes between the parties as disclosed in the plaint in the suit. It is also submitted on behalf of the respondent that in any event, the Arbitration Clause being of a wide amplitude, any dispute or differences between the parties to the contract as to the interpretation of the contract or as to any matter or thing arising thereunder, the Arbitrator will have jurisdiction to decide such disputes, including the question as to whether a particular disputes falls within the excepted clauses or not. The respondent has relied on a decision of the Supreme Court, in the case of Renusagar Power Co. Ltd. Vs. General Electric Company and Another, .

13. The appellants" case as appearing from the plaint, shortly, is that the respondent invited tender for Cast Iron-flanged Pipes and the respondent accepted the tender submitted by the appellant. According to the appellant, each consignment before the despatch was inspected and accepted by DGS&D on behalf of the petitioner and certificate was granted in respect thereof. At the request of the respondent the appellant paid to the DOS & D at Calcutta certain sum as inspection charges of the Pipes and the Pipes duly reached destination and were received by or on behalf of the defendant and were accepted by the defendant on account of the first order. The plaintiff duly submitted its bill to the defendant. The appellant, therefore, claims the amount stated in the plaint under the first order. Against the second order, the appellant supplied diverse goods to the respondent and the respondent accepted the same. The appellant submitted its bill and claimed the amount as stated in the plaint. Similarly under the third order the plaintiff/appellant supplied diverse goods and respondent accepted the same and the appellant raised claims as stated in the plaint under the order. The appellant also made claims for similar transaction under the fourth and fifth respectively. The suit has been filed against the respondent claiming a decree for

Rs. 19,31,099.88 p. further loss of damages as stated in the plaint and other reliefs.

14. It, therefore, appears that the appellant supplied the goods to the respondent in terms of the aforesaid agreement entered into between the parties and/or purchase orders and the appellant's case as appearing from the plaint is that the appellant is entitled to the price for goods sold delivered by the appellant to the respondent after due adjustment. Therefore, it appears in our view that so called excepted matters as envisaged in the said clauses referred to by the appellant do not have any bearing on the subject matter of the plaint. In any event, as has been contended by the respondent before us, the Arbitration Clause as referred to in the document mentioned above is so wide in its amplitude that Arbitrator will have jurisdiction to decide the disputes arising out of or in relation to the agreement between the parties including the question as to whether particular dispute falls within the excepted clause or not. We accept such contentions of the respondent and we hold that the Arbitration Clause is wide enough to embrace within its fold the disputes raised in the plaint and the Arbitrator does have the jurisdiction to decide the issue of arbitrability of the claims being the subject matter of the suit?

15. It has next been contended on behalf of the appellant that there is no dispute between the parties which is referable to the arbitration. According to the appellant, the claim in the suit is for price of goods sold and delivered and at no stage did the respondent raise any dispute that the claims were not payable. It is contended on behalf of the appellant that mere non-payment cannot be a dispute referable to the arbitration.

16. It is contended on behalf of the respondent that this contention of the appellant is not correct. The respondent by its Advocate's letter dated 2nd August, 1983 in reply to the Advocates notice on behalf of the appellant clearly indicated that the respondent had denied and disputed its liability to make payment of the claim of appellant. It is the contention on behalf of the respondent that it is not merely a case of withholding payment but a case where the respondent had clearly disputed and denied and is still denying the liability to make payment on the ground that the goods sold were not of agreed specification and that the appellant committed diverse breaches of the terms and conditions of the agreements by and between the parties. The respondent's said letter is at page 102 of the Paper Book. The respondent had made a specific denial of its liability and also alleged that it had no liability to make payment on the ground of appellant's committing certain breaches of the terms and conditions of the agreement. This, in our view, constitutes a dispute between the parties which should be decided by the Arbitrator if such dispute is within the coverage of the arbitration agreement. We have already indicated above, that any disputes relating to or arising out of the contract would come under the purview of the Arbitration Agreement as contained in the document referred to above.

17. The next submission of the appellant is that the writ of summons was served upon the respondent on 21st December, 1983 and since the respondent allowed the time to file the written statement to expire before making an application u/s 34 of the Arbitration Act on 24th February, 1984, the respondent is not entitled to apply for stay of the present suit filed by the appellant. The appellant has referred to various decisions of various High Courts as also a few decisions of the Supreme Court. These decisions are Steel Plant Private Ltd. Vs. Swastika Alloy Steel Ltd. and Another, , Indian Oil Corporation Ltd. Vs. Nainsukdas Baldeodas, , AIR 1978 SC 608 and Bhag Mal Vs. Ch. Parbhu Ram and Others, .

Section 34 of the Arbitration is set out below:

"34. Power to stay legal proceedings where there is an arbitration agreement. -- Where any party to an arbitration agreement or any person claiming under him commences any legal proceedings against any other party to the agreement or any person claiming under him in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time before filing a written statement or taking any other steps in the proceedings, apply to the judicial authority before which the proceedings are pending to stay the proceedings; and if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of arbitration, such authority may make an order staying the proceedings."

18. The following conditions are set fourth in Section 34 of the Arbitration Act.

(a) Whether the plaintiff in the suit and the person making an application for stay of the suit are parties to the Arbitration Agreement.

(b) Whether the suit or, legal proceedings commenced by the plaintiff are in respect of any matter agreed to be referred, i.e., whether the arbitration agreement between the parties covered the disputes raised by the plaintiff in the suit;

(c) Whether the person who is applying for stay has, before the application u/s 34 of the Arbitration Act, filed a written statement in the suit or has taken any other steps in the proceedings;

(d) Whether the person applying for stay was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary for the proper conduct of the arbitration;

(e) Whether there is any other sufficient reason why the matter should not be referred to arbitration in accordance with the arbitration agreement.

19. Section 34 of the Arbitration Act enjoins the party applying for stay to make the application at any time before filing a written statement or taking any other steps in the proceedings. It appears that this section stipulates that the

application for stay must be made before actual filing of the written statement or taking any other step in the proceedings. If the interpretation sought to be given by the appellant is accepted then, as it appears to us, that it will result in the reading words in the Section which are not in fact in the Section. The respondent, has, however, referred to a Bench decision of this Court in the case of Shroff Brothers v. Bisheswar Dayal, an unreported judgment Appeal No. 58 of 1974. The judgment was delivered on September 12, 1979. The Division Bench referring to the Supreme Court decision in the case of The State of Uttar Pradesh and Another Vs. Janki Saran Kailash Chandra and Another, has expressed the view that the Supreme Court has not laid down any rule of law that whenever such a period would have elapsed in between the commencement of the legal proceeding and final hearing of the said matter the delay in disposing of the same should always be taken into consideration. The Division Bench negated this contention that once the time to file written statement in suit is allowed to expire, the appellant for stay cannot maintain the application. The Court observed that what was necessary was that the application must have been made before filing of the written statement and the section in clear term required that it must be the actual filing of the written statement, and not before the time of filing of the written statement had expired. It may be true that delay in filing an application for stay of the suit may have some bearing on the discretion to be used by the Court in the matter of staying the suit u/s 34 of the Arbitration Act, 1940. It is not in dispute that relief u/s 34 of the Arbitration Act is discretionary and in using the discretion of the Court may consider the question of delay. But that itself does not lead to this conclusion that the application for stay of the suit should have been made before the time for filing the written statement under the rules of our Court had expired. We, therefore, do not accept the contention of the appellant that the application for stay of the suit u/s 34 of the Arbitration Act should have been filed before the time for filing written statement had expired. We are in respectful agreement with the view taken by Division Bench of this Court in the unreported case of Shroff Brothers (supra) that the expression "at any time before the filing of a written statement" must mean, "before actually filing the same" and not "before the expiry of the time to file the same".

20. The appellant has next submitted that the respondent had taken steps in the proceedings and as such its application for stay u/s 34 of the Arbitration Act is not maintainable. It is submitted by the appellant that as no written statement by the respondent was filed within time, the suit appeared in the list of undefended suits. When the suit was so appearing in the list of undefended suits and was called on for hearing, the respondent appeared and asked for adjournment of the suit, thereby the respondent has taken a step in the proceeding within the meaning of Section 34 of the Arbitration Act. It is the contention of the respondent that the respondent asked for adjournment in the suit specifically for the purpose of taking out an application u/s 34 of the Arbitration Act which fact has been recorded in the order itself which would appear at page 97 of the Paper Book.

21. The law on this point has now been settled by the Supreme Court in a few later decision of the Supreme Court, *The State of Uttar Pradesh and Another Vs. Janki Saran Kailash Chandra and Another*, AIR 1982 SC 1302 *Food Corporation of India v. Jadav Engineer; General Electric Co. Vs. Renusagar Power Co.*, and a recent decision of the Supreme Court in *M/s. Sadhu Singh Ghuman Vs. Food Corporation of India and others*, .

22. It has been held by the Supreme Court in *General Electric v. Renusagar Power Company* (supra) that a step in the proceeding which would disentitle the defendant from invoking Section 34 of the Arbitration Act should be a step in aid of the progress of the suit or submission to the jurisdiction of the Court for the purpose of adjudication of the merits of the controversy in the suit. The step must be such as to manifest the intention of the party unequivocally to abandon the right under the arbitration agreement and instead to opt to have the dispute resolved on merits in the suit. The step must be such as to indicate an election or affirmation in favour of the suit in the place of the arbitration. The election or affirmation may be by express choice or by necessary implication by acquiescence.

23. It will thus appear from the fact that the respondent had asked for adjournment of the suit not with the intention unequivocally to abandon the light under the arbitration agreement and instead to opt to have the dispute resolved on merits in the suit. It was clearly recorded in the order itself granting adjournment of the suit that the adjournment was sought for the purpose of taking out an application u/s 34 of the Arbitration Act. Therefore, this point need not detain us any further. We hold that the respondent has not taken any step in the proceeding within the meaning of Section 34 of the Arbitration Act.

24. The next submission of the appellant is that the respondent was not ready and willing at the time when the proceedings were commenced to do all things necessary for the proper conduct of the arbitration. This, in our view, will not be borne out by the facts of the case. By a notice dated 5th July, 1982 the appellant's Advocate demanded payment from the respondent as required u/s 63 of the Tamil Nadu Water Supply and Drainage Board Act, 1970. By a letter dated 2nd August, 1983 the respondent's Advocate replied to the said notice denying liability and contending that the agreements or contracts were covered by the arbitration clause and accordingly all disputes should be referred to the Project Engineer, Special Project Circle, Coimbatore whose decision shall be final and binding on the parties. On 21st December, 1983, the writ of summons was served upon the respondent and on 4th January, 1984 the disputes in respect of the five contracts were referred to the arbitration by the respondent. This will appear at page 59 of the Paper Book and the said letter dated 2nd August, 1983 will appear at page 104 of the Paper Book. On 11th January, 1984 copy of the arbitration petition filed on behalf of the respondent with direction to file counter-affidavit by the appellant were forwarded by the Arbitrator to the Appellant (page 75 of the paper book.) On 26th January, 1984 the time to file the written

statement by the respondent had expired. On 28th January, 1984 the respondent entered appearance in the suit. Similarly, on 6th February, 1984 the respondent also referred dispute under two other contracts or arbitration and filed arbitration petition before the Arbitrator had similarly forwarded copy of the Arbitration petition together with direction for filing counter-affidavit to the appellant, (page 7 of the Paper Book). The appellant filed an application u/s 33 of the Arbitration Act on 9th February, 1984 and the Court passed an ad interim order of injunction restraining the respondent from giving effect to the arbitration clause or acting in pursuance thereof. In the meantime this suit filed by the appellant appeared in the list of undefended suit and the respondent appeared in the suit on 20th February, 1984 when the said undefended suit was called for hearing and the respondent asked for adjournment for a week to enable the respondent to take out an application u/s 34 of the Arbitration Act. The respondent filed present application u/s 34 of the Arbitration Act on 24th February, 1984.

25. From the facts as noted above, it cannot be said that the respondent was not ready and willing at the time when the proceedings were commenced, to do all things necessary for proper conduct of the arbitration, nor can it be said that the respondent at the time when the proceedings were commenced is still not ready and willing to do all things necessary for proper conduct of the arbitration.

26. At the baz few decisions were cited, The State of Uttar Pradesh and Another Vs. Janki Saran Kailash Chandra and Another, and State of Punjab Vs. Geeta Iron and Brass Works Ltd., . We need not discuss the ratio laid down in these decisions as there is no quarrel to that. We have already indicated, that on the facts it cannot be said that the respondent has not been ready and willing to go to the arbitration.

27. The appellant has next submitted that there is sufficient reason why the matter should not be referred to arbitration. It has been urged on behalf of the appellant that the respondent has alleged cheating and fraudulent conduct on the part of the appellant and the appellant wants to have such allegations of moral turpitude decided openly in a court of law, rather than in the private forum of an arbitration. It is also the submission on behalf of the appellant that there is enough evidence that the appointed Arbitrator in terms of the agreement would be biased and the appellant would not get a fair trial if the matters are adjudicated upon by him. On the allegation of fraud, the reliance has been placed by the appellant on a letter dated 21st August, 1981 which is at page 103 of the Paper Book, where the respondent has stated that the firm has cheated this Government organisation to the tune of Rs. 3,00,000/-.

28. In our view, from such allegation it cannot be inferred that a case of fraud would be an issue in the arbitration proceedings. Whether the appellant would be entitled to its just dues as alleged by the appellant for the transaction the appellant had with the respondent or not, we think that this allegation of fraud would not be a vital issue or any issue at all in the arbitration proceedings. Mere allegations of fraud unconnected with the real point at issue should not operate

as a bar to the stay of the legal proceedings. It has been observed by Russell on the Law of Arbitration 20th Edn. at page 87 "The court will consider whether charges of fraud are raised in such a way that the Arbitrator, if the matter goes to the arbitration, will have to deal with them." Some decisions from the bar also have been cited on this point. They are, *Basantlal Jagatramka Vs. Dominion of India*, , AIR 1962 SC 407 , *Arvind Exports Private Ltd. Vs. Kamani Engineering Corporation Ltd.*, and *West Bengal Comprehensive Area Development Corporation and Another Vs. Sasanka Sekhar Banerjee*, .

29. We have indicated above that in the instant case the dispute between the parties are as to whether the appellant supplied goods of the contractual specification and whether the appellants had in fact supplied the quantity of materials as has been alleged by the appellant, and whether there is any justification for the respondent to deny its liability in the transaction. In our view, there is hardly any scope in deciding such dispute for the Arbitrator to go into any question of fraud. We have also indicated above that the respondent has disputed or denied its liability, inter alia, contending that the appellant had not supplied the goods of contract specification and the appellant committed breaches of various terms and conditions of the agreement. If the appellant succeeds in establishing that it supplied the goods in accordance with the terms and conditions of the contract and the respondent accepted the same without any objection or demur, then the appellant may ask for an award in its favour. In deciding such dispute the Arbitrator need not have to go into the question of fraud. Merely because the respondent had made certain allegation of cheating or misappropriation against the appellant as would appear from the said letter dated 21st August, 1981 that itself will not, in our view, take the matter out of the arbitration clause. There must be a prima facie case of fraud to the satisfaction of the Court before the party opposing stay of the suit ask the court to have the issue decided at the trial of the suit and not the arbitration proceedings.

30. Regarding allegation of bias, in our view, the appellant has not been able to give particulars of any bias and nor the appellant had indicated as to how the Arbitrator is likely to be biased.

31. The Supreme Court in the case of *International Airports Authority of India Vs. K.D. Bali and Anr*, has observed that apprehension of bias must be judged from a healthy, reasonable and average point of view. It is not every suspicion felt by a party which must lead to the conclusion that the authority hearing the proceedings is biased, or would likely to be biased. It is also settled view of- law, that the. party alleging bias against an arbitrator must show that the selected arbitrator is likely to be biased or has sufficient reason to suspect that the arbitrator will act unfairly. In the instant case, nothing has been indicated to the satisfaction of the Court that the selected arbitrator will act improperly nor has it been shown that the selected arbitrator had acted improperly or there is any reason to suspect that he Would act improperly. It is alleged by the appellant

that the Arbitrator being an Officer of the respondent is likely to be biased. It has been held by the several decisions of Court which we need not refer to, that where the parties entered into a contract with their eyes open and knew that the nominated arbitrator is an employee of one of the parties, none of the parties to the agreement should be allowed to allege that such nominated arbitrator being an officer of one of the parties to the contract would be biased or is likely to be biased. We have also referred to the decision of the Supreme Court in International Airports Authority of India Vs. K.D. Bali and Anr, . We, therefore, do not accept this contention of the appellant and we reject such contention.

32. At the end of the hearing, the respondent has also made an attempt to argue, feeble in our view, that matter of stay of suit u/s 34 of the Arbitration Act is matter of discretion and the trial Court has not exercised its discretion properly. It is well settled view that it is ordinarily not open to the appellate court to substitute its own exercise of discretion for that of the trial Judge. The appellate court can only interfere with the discretion exercised by the trial Court if the appellate Court finds that the trial Court has acted unreasonably or capriciously or has ignored the relevant facts or has adopted an unmusical approach. We do not find any material to hold that the Court of first instance used its discretion unreasonably or arbitrarily. We reject this contention of the appellant.

33. We held that no sufficient ground has been made out in this appeal to justify interference with the judgment and order of the Court of first instance. We, therefore, dismiss this appeal with cost. We affirm the judgment and order of the court of first instance dated 10th Sept. 1984 staying the Suit No. 697 of 1983 of the appellant u/s 34 of the Arbitration Act, 1940. Interim order, if any, is vacated.

Abani Mohan Sinha, J.

34.I agree.

35. Appeal dismissed.