

(1960) 07 CAL CK 0014

In the Calcutta High Court

Case No : Civil Revision Case No. 1092 of 1960

The Swedish East Asia Co. Ltd.

APPELLANT

Vs

Messes. Khandelwal Brothers (P) Ltd.

RESPONDENT

Date of Decision : 12-07-1960

Acts Referred:

Bills of Lading Act, 1856 — Section 3
Civil Procedure Code, 1908 (CPC) — Order 7 Rule 10, 115
Constitution of India, 1950 — Article 227
Contract Act, 1872 — Section 28

Citation : (1961) 2 ILR (Cal) 1

Hon'ble Judges : Banerjee, J; Amaresh Roy, J

Bench : Division Bench

Advocate : A.K. Mukherjee, N. Roy and Amar Ch. Dutta, for the Appellant; B.C. Mitter, A.K. Sarkar and Rabindra Nath Bhattacharya, for the Respondent

Judgement

Banerjee, J.—This Rule is directed against an order passed by the 8th court of the Subordinate Judge at Alipore, by which a preliminary issue as to whether that court had Jurisdiction to try a suit for recovery of 401 bundles of Mild Steel Plate cuttings alternatively, for recovery of compensation therefor was decided against the Defendants. The Defendant Petitioner No. 1 is a Swedish company, at all material times the charterer of a Motor vessel of the name of "Allobrogia". Defendant No. 2 is the agent of the Defendant No. 1 company.

2. The Plaintiff opposite party No. 1 is an Indian Company and claims to have become the owner of two consignments of cargo, viz., 251 bundles of M.S. Plate cuttings, weighing about 150 tons and 150 bundles weighing about 150 tons of M.S. Plate cuttings. The aforesaid two consignments were shipped in the vessel "Allobrogia" by a company of the name of Khandelwalas limited. It was admitted before us that the description of the shipper, as a German shipper in paragraph 4 of the petition before this Court, was an inadvertent error. The learned Subordinate Judge came to the conclusion that the shipper was an Indian company. We are not sure of that, although, the name indicates that the shipper

may have been an Indian company. The loading of the cargo in the ship was made in the port of Bremen, in West Germany, and the Defendant Petitioner No. 1 agreed to carry the said goods from the port of Bremen to the port of Calcutta. In evidence of the agreement, the Defendant Petitioner No. 1 issued two Bills of lading in respect of the two consignments in suit and the Plaintiff till admittedly became the holder of the said Bills of lading. Each of the Bills contained the following clause:

Jurisdiction?Any dispute arising under this Bill of "lading" to be decided in Sweden according to Swedish "Law".

It is alleged by the Plaintiff opposite party No. 1 that each one of the Plate Cuttings was distinctly marked with oil paint and each bundle was securely bound with metal tags, so that there might be no difficulty in distinguishing them at the port of discharge.

3. The vessel "Allobrogia" admittedly reached the port of Calcutta on April 20, 1956, but the two consignments were not available for delivery to the Plaintiff. On enquiry, through its clearing agent, the Plaintiff came to learn that in the books of the opposite party No. 2, the Commissioners for the Port of Calcutta the said two consignments of cargo were recorded as "not found". Subsequently, however, the Port Commissioners issued to the Plaintiff opposite party No. 1 a certificate in Form B (commonly known as the certificate of not landing) in respect of 239 bundles, out of the consignments covered by the said two Bills of lading, and acknowledged receipt of only 162 bundles out of the same. Still later, the Plaintiff opposite party No. 1 was informed by the opposite party No. 2?Port Commissioners that the said 251 and 150 bundles of M.S. Plate cuttings could be had for delivery from the opposite party No. 2 partly as unmanifested excess cargo and partly as manifested cargo, provided the Plaintiff opposite party No. 1 surrendered the certificate in Form B and undertook to give full discharge receipt for the goods to the opposite party No. 2 and also paid rent for warehousing the goods.

4. The Plaintiff opposite party No. 1 expressed its readiness and willingness to comply with the conditions on which delivery of the goods were offered, but ultimately the goods were not delivered to it.

5. Plaintiff opposite party No. 1 alleged that due to mishandling, careless keeping and negligence of the Defendants Petitioners alternatively of the Defendant opposite party No. 2, the Port Commissioners, the consignments must have become loose or displaced or got mixed up and that the Defendants were responsible therefor. The Plaintiff further alleged that on account of the non-delivery of the said 401 bundle of M.S. Plate Cuttings, weighing about 400 tons the Plaintiff suffered damages, valued at Rs. 2,40,000 at the rate of Rs. 600 per ton. On the aforesaid allegation the Plaintiff brought a suit claiming recovery of the 401 bundles or alternatively damage valued at the abovementioned figure.

6. The Defendant Petitioners Nos. 1 and 2 filed separate written statements inter

alia, denying the liability for damages and further disputing the jurisdiction of the trial court to try the suit. On December 18, 1959, the Defendants Petitioners applied before the trial court for the framing of an issue as to the jurisdiction of the trial court to try the said suit and to hear the said issue as a preliminary issue. On March 9, 1959 in clarification of the application, made on December 18, 1959 the Defendants Petitioners filed another petition and therein stated as follows:

(1) That your Petitioners have filed a petition in this case praying for trial of the issue about the court's jurisdiction to try the case as a preliminary issue and the same is fixed for hearing today.

(2) That in further clarification of the said petition your Petitioners beg to submit that the goods in question were shipped at Bremen for carriage to the Port of Calcutta by S.S. "Allobrogia". The Court at both ends, therefore, will have jurisdiction to entertain the suit but by virtue of the clause in the covering Bill of lading, that all disputes relating to the goods would be decided in Sweden in accordance with the Swedish law it was obligatory upon the Plaintiff to file the suit in the Swedish court only.

(3) That in the circumstances the suit as instituted should be stayed by virtue of the said clause in the Bill of lading and the issue about the court's jurisdiction should in your Petitioner's submissions be decided in the light of the said clause.

7. It appears from the contents of the two petitions, herein before referred to, that in order to oust the jurisdiction of the trial court, the Defendant's Petitioners relied on the relevant clauses of the relative Bills of lading and on nothing else. "No suggestion was anywhere made in the said two petitions that the case should be tried before a Swedish Court on the ground of convenience. No ground of convenience was emphasised or referred to within the four corners of the said two petitions.

8. The learned Subordinate Judge answered the issue in the affirmative on two fold ground: (1) There was no authority for the proposition that by agreement the jurisdiction of a court could be taken away, if it otherwise had jurisdiction (2): The Defendants did not produce any material or give any reason as to why the Swedish court and not the trial court at Alipore would be more convenient for the trial of the suit.

9. The propriety of the aforesaid order is being disputed before us at the instance of Defendants Nos. 1 and 2. It was submitted by the learned Counsel for the Petitioners that the Defendant Petitioner No. 1 was a Swedish company having its registered office at Gothenburg in Sweden and was the charterer of the vessel "Allobrogia". The consignments were shipped at Bremen, West Germany, and the shipper was Khandelwalas Limited, the Bills of Lading were signed and issued at Bremen; freight was paid at Bremen; the weight, quantity, volume, contents and value of the goods shipped were issues in the suit and materials therefor were available at Bremen; the officers of Defendant No. 1 and other witnesses to

depose in the suit were residents of Sweden; the tally clerks, at the port of loading were available not in Calcutta but in Bremen; documents intended to be relied upon by the Defendant No. 1, viz., the list of cargoes carried, list of cargoes discharged at different ports, during voyage, and ship's log-books, etc., were available in Sweden. On the aforesaid grounds it was contended that it would be exceedingly convenient for Defendant No. 1 Petitioner if the suit was tried in Sweden and it was further contended that the Plaintiff must be made to seek relief before the forum under the agreement and the hearing of the present suit should be stayed.

10. The arguments advanced before us, were not advanced before the trial court. We are, in the first place, reluctant to consider the arguments, for the first time, in exercise of our revisional jurisdiction either u/s 115, Code of Civil Procedure, or under Article 227 of the Constitution.

11. In the next place, the learned Counsel for the Petitioners, frankly conceded that the Alipore Subordinate Judge's court had undoubted jurisdiction to try the suit because part of the cause of action arose within the jurisdiction of that court. What the learned Counsel for the Petitioners contended for was that the trial court, in exercise of its jurisdiction, acted with material irregularity inasmuch as it failed to advert to material points of facts and law and as a result thereof failed to exercise its discretion in favour of staying the suit.

12. This argument is misconceived on several grounds. Firstly, the issue which the trial court was asked to determine was not whether the suit was to be stayed but whether the court below had jurisdiction to try the suit. In the next place, the Petitioners relied on a clause in the Bills of lading and contended that the Swedish court was the agreed forum for determination of the disputes between the parties, and that it was obligatory on the Plaintiff, under the said clause, to file the suit in the appropriate Swedish court. The ground of convenience which might have inclined the trial court to stay the hearing of the suit and to relegate the Plaintiff to seek relief before the forum agreed upon, was not substantiated before the trial court and therefore no question of exercise of any wrong discretion by that court arises for our consideration.

13. The law on the point has been re-stated by this Court in recent times and we propose to refer to a few of them:

(A) *Motabhai Gulabdas and Co. v. Mahalvxmi Cotton Mills Ltd.* (1952) 91 C.L.J. 1 in which Bachawat, J., observed:

(i) It is well settled that individuals by private consent cannot confer jurisdiction upon a court which it does not possess by the ordinary law. Individuals cannot also by agreement divest a court of a jurisdiction which it possesses under the ordinary law. In spite of such covenant the court, therefore, retains its jurisdiction to try the suit, if it has such jurisdiction under the ordinary law.

(ii) It is also well settled that such covenant does not contravene the provisions

of Section 28 of the Indian contract act, if the chosen court has jurisdiction to try the suit under the ordinary law because the restriction is only partial and the Plaintiff is not restricted absolutely from enforcing his rights by the usual legal proceeding in the ordinary tribunal.

When the chosen court has no jurisdiction in the matter under the ordinary law, the covenant will not give it such jurisdiction and in such case the covenant contravenes Section 28 of the contract act and is unlawful.

(iii) The Court can and should in an appropriate case enforce such a covenant where it is lawful. The courts have enforced the covenant by an injunction restraining the prosecution of a suit instituted in a court other than the chosen forum in breach of the covenant and also by returning the plaint under Order 7, Rule 10 of the Code of Civil Procedure, for presentation to the chosen tribunal.

(B) Messrs. Lloyds Triestino Societa in Triesta and Ors. v. Messrs. Lakshminaryan Ramniwas (1959) A.I.B. Cal. 669 in which G.K. Mitter, J. re-stated the law as follows:

(i) Mr. Deb also relied on a judgment of the Bombay High Court in the case of *Marittima Italiana Steamship Co. v. Burior Framroze Rustomji*, ILR Bom. 278 where the facts were somewhat similar to those in the instant case and Clause 27 of the bill of lading in that case was in the following terms:

All applications for indemnity of damage, shortage, deterioration, loss of goods shipped shall be submitted for amicable settlement to the Agency of the company at the port of discharge. Failing such an amicable understanding either the shipper or the consignee, desiring to proceed against the company in court of law, can do so before the Judicial Authority in Genoa, Naples, Cagliari or Venice, in case of a dispute for not more than Liras 500; and only before the Judicial Authority in Genoa for sums over that amount the shipper and the receiver or any other person interested in the cargo expressly renouncing the competence of any other judicial authority.

Rangnekar, J., refused to grant the stay applied for but on appeal Kemp, A.C.J., and Murphy, J., took a different view and held that the learned Judge had not properly exercised his discretion. With regard to Section 28 of the Indian Contract Act their Lordships observed that it was certainly void to the extent that it sought to oust the jurisdiction of the court which would otherwise be competent to try the suit and this was apparent from the use of the expression to the extent at the end of the first paragraph of the section. Their Lordships repelled the contention that the clause referred to in the agreement was wholly void.

(ii) On behalf of the Respondent the following contentions were raised in opposition to the application. First that u/s 28 of the Contract Act such a clause was void and ought not to be given effect to. Needless to say that this contention cannot be supported in view of what I have said above. The second point urged

was that it was not quite clear and there was no sufficient evidence before the court that there are courts of competent jurisdiction functioning either at Genoa or at Trieste which can entertain the Plaintiff's claim herein against the Defendant. It was argued that the averment in the petition that there are competent courts at Genoa and at Trieste is only verified by an assistant of Turner Morrison and Co. who is neither a lawyer nor a person sufficiently conversant with the Italian legal system to be able to make such an assertion. There certainly is some force behind this contention but what the Respondent does in his affidavit in opposition is not to deny that there are such courts but to state that he does not admit that there are such courts. In the affidavit in reply the said assistant Leonard Wilfred Balcombe reiterates what he has stated in the petition. Although it is true that the Plaintiff might have filed an affidavit from some one who would be expected to be more conversant with such facts I cannot disregard the affidavit which is verified as true to the knowledge of the deponent Leonard Wilfred Balcombe, The third point urged by learned Counsel for the Respondent is that it has not been shown that it would be more convenient to have a suit of this nature tried in Italy because according to learned Counsel the bills of lading u/s 3 of the Bills of Lading Act are conclusive evidence of the statements as to weight, description of the goods, etc. The clearly would be so unless there were clauses like Clause 3 and Clause 7 already referred to. If, therefore, the shipping company or the steamer company denies that goods of the weight or the number of the packages mentioned in the Bills of Lading were actually shipped, an issue would arise on these questions of fact. As I have already said, the only evidence available at Calcutta would relate to the number of packages and the weight of the goods landed. How many witnesses the steamship company will examine I do not know but it is apparent that quite a few witnesses who are not at Calcutta but probably available either at Genoa or Trieste will have to be called. I cannot take the view that Calcutta would be the more convenient situs for the decision of the suit.

(C) The aforesaid judgment of G.K. Mitter, J., was upheld in appeal by Lahiri, C.J. and Bachawat, J., and the case is Lakhinarayan Ramniwas Vs. Lloyd Triestino Societa Per Azinni Di Navigaziene Sede in Triesta and Others, in which Lahiri, C.J. and Bachawat, J., delivering the judgment observed:

Parties cannot by a private agreement, whether such agreement has been entered into in India or outside India, take away a jurisdiction which is vested in this Court to try the suit just as the parties could not by such agreement confer upon it jurisdiction to try a case which it had otherwise no jurisdiction to try. Clause 31 of the contract remains valid as a contractual stipulation, but it cannot be pleaded as a bar to the jurisdiction of the court. When the attention of the court in which the suit is instituted is drawn to a contractual stipulation of this kind, the court may in the exercise of its discretion stay its hands and refuse to try the suit until the competent judicial authority to whose decision the parties have agreed to submit their disputes has pronounced its decision. The court acts upon the principle that in general the court will compel the parties to abide by

their contracts. Instead of driving the Defendant to a separate suit to enforce the covenant, the court may for the purpose of preventing multiplicity of litigation enforce the contract summarily on an application made to it in the suit instituted before it. The prima facie leaning of the court is that the contract should be enforced and the parties should be kept to their bargain. Subject to this prima facie leaning, the discretion of the court is guided by considerations of justice. The balance of convenience, the nature of the claim and of the defence, the history of the case, the proper law which governs the contract, the connection of the dispute with the several countries and the facilities for obtaining even-handed justice from the foreign Tribunal are all material and relevant considerations. If on a consideration of all the circumstances of the case the court comes to the conclusions that it will be unjust or unfair to stay the suit the court may refuse to grant the stay asked for.

(d) *Serajuddin and Co. v. Michael Golodeiz* (1959) 3 C.W.N. 717 deciding on the enforcibility of a foreign arbitration and the powers of an appellate court to interfere with the discretion of the trial court in not staying the suit, P.N. Mookerjee and Law, JJ. observed:

Where the discretion has been exercised on a consideration of all relevant materials and circumstances and in accordance with sound judicial principles and no injustice has been done or is likely to result from the trial court's order, no question of interference arises even if the appellate court does not agree with the trial court's actual exercise of discretion or conclusion on the point and might have decided differently if the original discretion had lain with it. * * * Where, however, the trial court has not considered- all the relevant materials or has proceeded on assumptions, not borne out or justified by records or has applied wrong legal principles leading to an unjust order, it is not only the right and in the power of the appellate court * * * to interfere with the same and set matters aright by undoing the mischief and injustice, occasioned by the trial court's order, otherwise, there will be no point in providing for an appeal in matters of discretion and such a provision would be wholly nugatory and its whole purpose would be frustrated * * * this power of interference should not be exercised lightly, or except for preventing gross mischief or miscarriage of justice, but subject to that, the appellate court's power in this behalf is wide ample and unrestricted and may and always should be exercised to relieve the aggrieved party,

(ii) The parties are prima facie bound by the arbitration clause and, normally, they should be asked to keep to their bargain and the suit should be stayed but that places no insurmountable bar in the way of the party, seeking to avoid arbitration and maintain the suit. It only casts upon him the onus undoubtedly, a heavy one of satisfying the court that there is sufficient reason why the matter in dispute should not be referred to arbitration, but that onus can certainly be discharged in a proper case.

(iii) In the instant case before us, it is clear from the affidavits and the nature of

the disputes between the parties and the facts and circumstances, referred to hereinbefore, that practically speaking, the whole of the evidence, necessary for determining the disputes between the parties would be in India and no part of it would be in America. At any rate, no part of it can be produced in America without considerable difficulty and loss of time and money. Particularly also, it is now the admitted position that the Indian Law of Contract or, in other words, the Indian Contract Act, would govern the rights and obligations of the parties in regard to the disputed contract. It appears further that one of the questions which may require some serious consideration is that difficult question of the Indian Law of frustration of contract, which as held by the Supreme Court in the case of *Satyabrata Ghose v. Messrs. Mugneeram Bungur and Co.* (1954) S. C. A. 187 is, in some respects, at least materially different from the English Law on the point (vide in this connection *Messrs-Mungneeram Bangur and Co. v. Sardar Gurbachan Singh F.A*, No. 226 of 1952, decided on January 28, 1959) (since reported in *Mugneeram Bangur and Co. Vs. Gurbachan Singh*,) and which, in spite of the said pronouncement of the Supreme Court is yet to be settled in all its manifold aspects and still retains its complexities from various points of view particularly, in the matter of its application. In the above context, we do not think that the stipulated foreign arbitration in the instant case?and we shall duly explain this term "foreign arbitration" hereinafter to justify its use here, would be a safe or convenient forum for the decision, a just and proper decision, of the disputes between the parties, and, to compel the Appellant to seek its remedy there would be practically a denial of justice to it, as pleaded by it inter alia in para-10(a) of its affidavit in opposition, and, accordingly, there is no sufficient reason for referring them (the disputes) to the said arbitration and staying the suit. There is, on the other hand, sufficient, reason for not referring the disputes between the parties to the said arbitration notwithstanding their agreements to the contrary. We would, accordingly, allow this appeal, set aside the order of the learned Judge and reject the Defendants application for stay.

14. Before we close examination of the case law on the point we desire to refer to an English decision *The Fehmarn* (1958) 1 All. E. R. 333 which was referred to with approval by P.N. Mookerjee J., in *Serajuddin and Co. Vs. Michael Golodetz and Others*, but was distinguished on fact by Bachawat, J., in the case reported in *Lakhinarayan Ramniwas Vs. Lloyd Triestino Societa Per Azinni Di Navigaziene Sede in Trieste and Others*, . In that case a cargo was loaded at a Russian port by a Russian shipper on board *The Fehmarn*, a ship owned by a German Company. The cargo was, by the terms of the Bill of lading, shipped in apparent good order and condition and was to be delivered at the port of London, in like order and condition. An English company Purchased the cargo and became the holders of the bill of lading, thereby agreeing to be bound by its terms, which Included stipulations that all questions and disputes should be determined according to Russian Law and judged in?U.S.S.R. The cargo owners alleged that at the port of London the cargo was found to be three tons short and contaminated. The ship was surveyed in London, the cargo owners and the ship

owners being represented at the survey. The ship was a frequent visitor to England and the cargo owners asked the ship owners to give security for their claim, and threatened to arrest the ship when it next come to England, if security was not given. The ship owners were willing to submit the dispute to a private arbitrator but objected to giving security." The cargo owners then issued a writ against the ship owners claiming damages for breach of the contract of carriage evidenced by the Bill of lading. On appeal against the dismissal of a motion by the ship owners to set aside the writ for want of jurisdiction, alternatively to stay the proceedings, on the ground that by the contract the parties had agreed that all disputes arising under it should be judged in the U.S.S.R. Lord Denning observed in course of his judgment:

The next question is whether the action ought to be stayed because of the provision in the Bill of lading that all disputes are to be judged by the Russian Courts. I do not regard this provision as equal to an arbitration clause, but I do say that the English Courts are in charge of their own proceedings: and one of the rules which they apply is that a stipulation that all disputes should be judged by the tribunals of a particular country is not absolutely binding. Such a stipulation is a matter to which the courts of this country will pay much regard and to which they will normally give effect, but it is subject to the overriding principle that no one by his private stipulation can oust these- courts of their jurisdiction in a matter that properly belongs to them. I would ask myself therefore: is this dispute a matter which properly belongs to the courts of this country? Here are English importers, the cargo owners, who when they take delivery of goods in England, find them contaminated. The goods are surveyed by surveyors on both sides, with the result that the English cargo owners make a claim against the German ship owners. The vessel is a frequent visitor to this country. In order to be sure that their claim, if substantiated, is paid by the ship owners, the English cargo owners are entitled by the procedure of our Courts of Admiralty to arrest the ship whenever she comes here in order to have security for their claim. There seems to me to be no doubt that such a dispute is one that properly belongs for its determination to the courts of this country. But still the question remains: ought these courts in their discretion to stay this action?

It has been said by counsel for the ship owners that this contract is governed by Russian Law and should be judged by the Russian Courts, who know that law, and that the disputes may involve evidence from witnesses in Russia about the conditions of the goods on shipment. Then why, says counsel, should not it be Judged in Russia as the condition says? I do not regard the choice of law in the contract as decisive. I prefer to look to see with what country the dispute is more closely concerned. Here the Russian element in dispute seems to be comparatively small. The dispute is between the German owners of the ship and the English owners of the cargo. It depends on evidence here as to the condition of the goods when they arrived here in Loudon and on evidence of the ship, which is a frequent visitor to London.

15. With the judgment of Lord Denning, Hodson, and Morris, L.JJ., concurred.

16. The opinion expressed in the several decisions of this Court, viz., 91 C.L.J. 1, 1959 Cal. 669, Lakhinarayan Ramniwas Vs. Lloyd Triestino Societa Per Azinni Di Navigaziene Sede in Triesta and Others, and Serajuddin and Co. Vs. Michael Golodetz and Others, in no way conflicts with the opinion expressed by Lord Denning in (1958) 1 All E.R. 333. Bachawat, J., who distinguished Lord Denning's judgment in A.I.R.. 1960 Cal. 155 also observed that there was only a "prima facie leaning of the court that the contract between the parties should be enforced. But subject to the prima facie leaning, the discretion of the court is guided by consideration of justice, balance of convenience, nature of the claim and defence, the history of the case, the proper law which governs the contract, the connection of the disputes with the several countries and the facilities for obtaining even-handed justice from the foreign tribunals. We find no reason to differ from the test laid down by Bachawat, J., but subject to this qualification that in such a context, the choice of the law as laid down in the contract, is not a consideration of decisive weight, if all other circumstances incline the court against staying the suit.

17. Bearing in mind the above legal proposition we propose to examine the arguments about injustice and inconvenience advanced on behalf of the Petitioner in this Court. We make it clear, however, that we do so with a great deal of reluctance, because no material in support of this argument was produced before the court below.

18. We have herein before set out in detail the nature of that inconvenience and injustice apprehended. We do not, however, find how the trial of the dispute in a Swedish Court will be either convenient or just. The consignments were shipped not at Sweden but at Bremen, in West Germany. The shipper also did not belong to Sweden. The Bill of lading was signed and issued at Bremen. Freight was paid at Bremen. Tally clerk and other witnesses of loading were all at Bremen. There is no knowing that the ship was a Swedish ship and the Petitioner could not satisfy us that the ship belonged to Sweden. Therefore, the best evidence of the particulars of loading is available at Bremen and not in Sweden. The entire evidence of the unloading is available in Calcutta. The case has greater connection with Bremen and Calcutta and its connection with Sweden is not of much consequence, in the context of the present case. No body has asked for trial of the case at Bremen and as a matter of fact nobody can ask for that in the facts of the instant case. Then again, the fact that the documents of the Defendant No. 1 are in Sweden is a matter of no great effect because such documents can always be brought down to Alipore. To some of them, for example, to the ship's Log Book, the Commercial Documents Evidence Act, 1939, will apply and there will arise a presumption as to their genuineness, making it easy for the Defendant No. 1 to prove them before any Indian Court. Then again the Plaintiff's documents are all in Calcutta and so also the documents of Defendants No. 3, the Commissioners for the Port of Calcutta

which was no party to the agreement for the trial of the dispute in Sweden.

19. The remaining circumstances is that the witnesses of Defendant No. 1 are in Sweden but this circumstance has been over emphasised by Defendants Nos. 1 and 2. Not all their witnesses are in Sweden-?the witnesses of loading are certainly outside Sweden, they being men of Bremen.

20. The instant case is not the type of the case reported in 91 C.L.J. 1 or Lakhinarayan Ramniwas Vs. Lloyd Triestino Societa Per Azinni Di Navigaziene Sede in Triesta and Others, . We are not ourselves satisfied with the grounds urged before us, in so far as they are grounds of justice and convenience. If we were to exercise our discretion in the matter, as the trial court we would not have hesitated in exercising that discretion against the Petitioner.

21. But there is no question of exercising our discretion in this matter and substituting that for the discretion exercised by the court below unless we are satisfied that the court below exercised its discretion either perversely or misdirected itself on materials point of law and fact and thus refused to exercise a discretion vested in it and failed to advert to such points of fact and law as were essential for the proper disposal of the case. In our opinion the court below did nothing of the kind. It correctly appreciated the law and applied the same to the facts of the instant case. So far as the appreciation of facts concerning injustice and inconvenience are concerned, there is no question of the trial court having had misdirected itself, because those grounds were not even urged before the trial court. We are ourselves of the opinion that there is little substance in the grievance against the apprehended injustice and inconvenience, if the case be tried before the court of the subordinate Judge at Alipore..

22. We do not think that in this case we should interfere in the exercise of our powers in revision. The Rule is, therefore, discharged with costs.

Amaresh Roy, J.

23. I agree.