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purpose for which it is required but whether it possesses actual, practical and commercial fitness for that purpose. A building cannot be said to be suitable for the conduct of a business if the neighbourhood or locality in which it is situate is not suitable for that purpose.

For these reasons I am of the opinion that the premises in question have not been let out for residential purposes and are not required *bona fide* by the landlord for occupation as a residence for himself or the members of his family and that the tenant has not built or acquired vacant possession of or been allotted a residence which is suitable to his own requirements. I would accordingly uphold the order of the lower appellate Court and dismiss the petition. There will be no order as to costs.

APPELLATE CIVIL.

Before Tek Chand, J.

THE UNION OF INDIA AND OTHERS,—*Appellants.*

versus

MESSRS. NARAYAN COLD STORAGE, LTD., G. T. ROAD, AMRITSAR,—*Respondents.*

First Appeal from Order No. 102 of 1955.

1957

April, 2nd

Arbitration Act (X of 1940)—Sections 34 and 39—Stay of proceedings—Discretion of Trial Court, when to be interfered with—Principles stated—Suit when not to be stayed—Arbitrator—Whether to be Rhadamanthus in all cases.

Held, that section 34 gives a discretion to the trial Court either to stay the suit or not to stay it though normally the Court would be inclined to give effect to the arbitration agreement, it is pre-eminently a matter for the satisfaction of the trial Court that there is no sufficient reason that the matter should not be referred to the judge of the parties' choice according to the arbitration agreement.

Held further, that where the discretion has been exercised by the trial Court in a manner which cannot be considered to be arbitrary the appellate Court will not interfere with a decision which has been arrived at in the exercise of discretion which is neither unjudicial nor otherwise improper. Such a discretion is not to be interfered with even where the appellate Court might have come after appreciation of the fact to a different conclusion.

Held also, that *prima facie,* it is the duty of the Court to hold the parties to their agreement and to make them present their disputes to the forum of their choice but any order to stay the legal proceedings in a Court of law will not be granted if it can be shown that there is good ground for apprehending that the arbitrator will not act fairly in the matter or that it is for some reason improper that he should.

Held, that it is true that the approach of an arbitrator may not in all cases and under all circumstances be Rhadamanthine in all its vigour and severity but the importance of judicial impartiality on the part of the arbitrator cannot be overstated.

Bristol Corporation v. *John Aird and Co.* (1), relied upon, *Jackson* v. *Barry Ry. Co.* (2), discussed.

Application under section 39 of the Arbitration Act from the order of Shri Radha Kishan, Subordinate Judge, 1st Class, Amritsar, dated the 2nd June, 1955, rejecting the application of the appellant under section 34 of the Act for stay of the suit in the trial Court.

LACHHMAN DASS, Deputy Advocate-General, for the Appellants.

K. L. GOSAIN, K. C. NAYAR and N. N. GOSWAMI, for Respondent.

JUDGMENT

Tek Chand, J.—This is a first appeal under section 39 of the Arbitration Act from the order of the Subordinate Judge, 1st Class, Amritsar rejecting the application of the appellant made **Tek Chand, J.**

(1) 1913 A.C. 241
(2) (1893) 1 Ch. 238

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under section 34 of the Act for stay of the suit in the trial Court. The facts of this case are that the respondents Messrs Narain Cold Storage Limited, Amritsar, instituted a suit for the recovery of Rs. 56,767 as the principal sum and interest relating to the price of potatoes supplied in excess of the contracted quantity. The appellants who were defendants in the trial Court presented an application under section 34 of the Indian Arbitration Act of 1940 alleging that the agreement dated the 19th January, 1951, entered into between the parties provided that a difference or dispute arising between them was referable to the arbitration of the officer sanctioning the contract. It was also alleged that the appellants were willing and ready to make a reference to the arbitrator and that the suit should not proceed in view of the provisions of section 34 of the Act.

Exhibit D. 2 is tender dated the 19th January, 1951, whereby the defendants agreed to supply a quantity of potatoes, it being agreed that the approximate requirements which were to be deemed only as a rough guide were 4,88,400 lbs. at tendered rates. Para 22 Exhibit D. 2, provided:—

> "Any dispute or difference arising in the interpretation or application of the provisions of this contract, settlement of which is not herein-before provided for, shall be referred to the arbitration of the officer sanctioning the contract, whose decision shall be final and binding.
>
> "A demand for arbitration in respect of a claim shall be in writing and made within six months of the date of the termination of the contract and where this provision is not complied with, the

claims shall be deemed to have been waived and absolutely barred."

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In this case "the officer sanctioning the contract" was AA and QMG/AQMG Area/Brig i/c Adm. Command/AQMG/Q—I Army HQ. The tender was accepted on behalf of the President of India by the General Officer Commanding, East Punjab Area, Jullundur Cantt. In July, 1951, there were movements of military troops in Amritsar area and the plaintiffs were called upon by C.A.S.C., Jullundur Cantonment to sign a declaration to the effect that the plaintiff company would not claim compensation for any excess supply of potatoes over and above the contracted quantity. As the plaintiff-respondent was unwilling to do so the military authorities pressed the view that the contractors were bound to supply any excess quantity on the ground that the quantity mentioned in the tender was only approximate. The contracting firm was also told that in case the demand of the military authorities is not met the provision of clause 11 would be attracted. On this the extra quantity of potatoes over and above the contracted quantity was supplied under protest, the total excess being 819,539 lbs. The plaintiffs instituted the suit claiming the price of the excess quantity supplied at the market rate with interest at six per cent per annum.

On behalf of the defendants an application was submitted under section 34 of the Indian Arbitration Act for staying legal proceedings in view of the presence of an arbitration agreement.

The position which was taken by the plaintiffs to this contention of the defendants was that there was no valid and subsisting agreement between the parties relating to the quantity supplied in excess and even if so, no reference could be made to

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the arbitrator as the period for the said reference had expired. It was also contended that the defendants were never ready or willing to do everything for the proper conduct of the arbitration. The plaintiffs also urged that the officer sanctioning the contract was not only himself a party but he had rejected the claim of the plaintiff, and as arbitrator could not bring to bear on the matter an attitude of strict impartiality. The contractors pleaded that in these circumstances it would not be in the interests of justice, fair play and equity that the dispute should be placed before the arbitrator.

The trial Court framed the following issues:—

(1) Whether there is valid subsisting arbitration agreement between the parties to the suit relating to the matter in dispute ? O. D.

(2) Whether the defendants were ready and willing at the time of the institution of the suit to do everything for the proper conduct of the arbitration ? O. D.

(3) If issues 1 and 2 are proved, should the suit be not stayed ? O. P.

The trial Court by its order held on the first issue that the dispute between the parties was covered by clause 22 of the tender and that there was a valid subsisting arbitration agreement between the parties relating to the matter in dispute. The first issue was, therefore, decided in favour of the defendants. The second issue was also decided in favour of the defendants and it was held that the department was ready and willing to a reference to arbitration.

On the third issue the trial Court held that the plaintiff-respondent had discharged the burden of

showing that there was sufficient reason for not staying the suit and the dispute should not be referred to arbitration. The trial Court very rightly conceded the principle that it was the duty of the Court to uphold the agreement between the parties and to refer them to the forum which they have deliberately selected for reference of their disputes. But it held that there were circumstances in this case which indicated that there was no likelihood of getting substantial justice at the hands of the tribunal of the parties' choice as the plaintiffs' claim which was preferred with the defendants had already been rejected by the sanctioning authority within the meaning of the clause and there was no likelihood of the sanctioning authority changing decision which it has already come to by itself during the course of exchange of correspondence.

The second reason which the trial Court gave for rejecting the application of the appellants under section 34 was that the period of six months to be counted from the date of the termination of the contract, within which the arbitration was to be demanded, had long expired; and neither party had demanded arbitration within this period and there was no occasion for the Court to extend the time under section 37(4) of the Act. In this case neither party had asked the Court to extend time as fixed by the arbitration clause. The trial Court having rejected the application under section 34, the defendants have presented this first appeal from order.

Shri Lachhman Das Kaushal, the Deputy Advocate-General, arguing the appeal has firstly urged that the trial Court in holding that the sanctioning authority had already rejected the plaintiffs' claim was in error. He maintained that

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letters Exhibits P. 1 and P. 2 rejecting the plaintiffs' claim were signed by Lieutenant-Colonel for Assistant Adjutant and Quartermaster General who was not the sanctioning authority. In this case the sanctioning authority was Major-General J. C. Katoch, General Officer Commanding, East Punjab Area and at no stage did Major-General Katoch give expression to the views mentioned in Exhibits P. 1 and P. 2. Alternatively the Deputy Advocate-General contended that the parties chose their own arbitrator and they could not resile from their decision. It was, he argued, never left in doubt as to who the arbitrator was going to be. The plaintiffs with open eyes having agreed to abide by the authority sanctioning the contract, they could not now turn round and say that the arbitrator was not acceptable on the ground of his being the representative of the opposite party.

Mr. Kundan Lal Gosain has drawn my attention to Exhibit P. 2 which is a letter from Headquarter, East Punjab Area, Jullundur Cantonment, dated the 6th February, 1952, addressed to the plaintiffs by an officer who has signed it for IC ADM. In this letter the plaintiff is informed that the quantity of potatoes drawn by the army during the currency of the contract was in order and covered under the contract and, therefore, the claim for compensation had not been accepted. Exhibit P. 1 is a letter dated the 7th July, 1953, from Headquarters, East Punjab Area, Jullundur Cantonment, addressed to the plaintiff and is signed by an officer Lieut. Col. for AA and QMG. The letter proceeds to mention *inter alia*.—

> "Your case for ex-gratia payment in respect of potatoes supplied in excess of the appropriate quantities shown in schedule (IAFZ-2121), has been reconsidered by

this Headquarter. It is, however, regretted that the contention advanced by you cannot be acceded to for the following reasons :—

* * * *

* * * *

Mr. Kundan Lal Gosain on the strength of the above documents refutes the contention of the Deputy Advocate-General and has argued that the sanctioning authority has dealt with this matter in Exhibits P. 2 and P. 1. He maintains that the opinion expressed therein regardless of the signatory is that of the sanctioning authority. He says that the whole matter was decided by the sanctioning authority. The dispute had been reconsidered as indicated in the letter Exhibit P. 1 by the Headquarters and the Assistant Adjutant and Quartermaster-General is one of the sanctioning authorities.

Mr. Lachhman Dass has cited a Single Bench decision of Madras High Court in *Kovur Parvathamma* v. *Kovur Subbamma and another* (1), the facts of which bear no analogy to this case. The reference in that case was revoked on the ground that the plaintiff was an illiterate woman and the law threw around such persons a special cloak for their protection, the *obiter dictum* however was that if the parties with full knowledge of the facts, select an arbitrator who has to perform other duties which will not permit of his being an impartial person in the ordinary sense of the words, the Court will not release them from the bargain upon which they have agreed. In this case at the time of the conclusion of the contract it

(1) A.I.R. 1935 Mad. 349

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was not within the contemplation of either party that at a future stage a demand would be made on the contractor to supply large quantities of potatoes which were almost double the quantity which was mentioned in the tender, that there would be a protest and that protest would be turned down by the Headquarters. The general principle enunciated above requiring the parties to adhere to the forum of their choice will not hold good. The other authority relied upon by the Deputy Advocate-General *Messrs Mc. Kenzies, Ltd.* v. *Messrs Sulleman and Company* (1), is also inapplicable. In that case it was held that the fact that the Chief Engineer of one of the parties to the contract, who was nominated as arbitrator in the contract had a duty to which the works in respect of which contract was given and might already have formed an opinion upon the matters in dispute was not enough, in the absence of any evidence that he would not act fairly, to prevent him from being the proper person to decide the dispute. In this case Mr. Gosain argues that the dispute had arisen, the very contention which had to be examined and adjudicated upon had already been considered by the Headquarters and the sanctioning authority could not be expected to reverse the decision of the Headquarters.

In *Jackson* v. *Barry Ry Company* (2), a decision of the Court of appeal relied upon by Mr. Lachhman Das, the facts were distinguishable. In that case a contractor who had undertaken the contract of a dock for the defendant-company had agreed to refer the dispute to the Company's engineer as arbitrator. After the dispute had been referred to the engineer he wrote a letter representing his former view which was against the contention of the contractor. Kekewich,

(1) A.I.R. 1933 Sindh 75
(2) (1893) 1 Ch. 238

J., held that the last letter showed that the engineer had finally made up his mind on the point, and was, therefore, disqualified to act as arbitrator, and granted an injunction. The matter was then taken in appeal and Lindley and Bowen, L. JJ., (dissentient Smith, L.J.), allowed the appeal. At page 248 Bowen, L.J., observed :—

> "I should agree with my Brother Kekewich's judgment, if I thought the letter of the 2nd of August amounted to an intimation that the contractor would not be patiently listened to and receive at the last an honest decision. Where I differ from my Brother Kekewich is, that he seems to me not to have made sufficient allowance for the very special character which by the contract this arbitrator had to fulfil, and to have required from the engineer of the company who must necessarily be a somewhat biassed person, but, by whose decision, nevertheless (fairly given), the parties had contracted to be bound—the icy impartiality of a Rhadamanthus."

I do not think that the above dicta having regard to the peculiar facts of a particular case can be adopted in every arbitration case. It is true that the approach of an arbitrator may not in all cases and under all circumstances be Rhadamanthine in all its rigour and severity but the importance of judicial impartiality on the part of the arbitrator cannot be overstated. Bowen, L.J., at page 249 of the report said:—

> "I differ with reluctance from my brother Kekewich, with whose views as to the importance of judicial impartiality I

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entirely coincide, regarding them only as not quite applicable to this special case, in which it was part of the very bargain that the scales of justice in the case of a dispute need not be held in a neutral or wholly indifferent hand."

Tek Chand, J. The question that may well be posed in this case is that after the Headquarters had reconsidered the plaintiff's case for payment in respect of potatoes supplied in excess of the approximate quantities shown in the schedule and had come to conclusion that the claim of the contractor could not be allowed, will it not be difficult for the arbitrator who is "officer sanctioning the contract" or "AA and QMG / AQMG Area/Brig i/c Adm. Command/ AQMG/Q-1. Army HQ." to lay aside not merely his preconceived opinions, but the reconsidered decision of the Headquarters and to keep an open mind as to the matters upon which he would be called upon to adjudicate. Will he not on the other hand be prone to reassert and commit to writing in the award the previously reconsidered decision of the Headquarters. It will perhaps be overstraining the independence and impartiality of an arbitrator placed in such an unenviable predicament to expect him to approach the issues requiring his adjudication completely free from any bias. Section 34 of the Act gave a discretion to the trial Court either to stay the suit or not to stay it, though normally the Court would be inclined to give effect to the arbitration agreement, it is pre-eminently a matter for the satisfaction of the trial Court, that there is no sufficient reason that the matter should not be referred to the judge of the parties' choice according to the arbitration agreement. Where the discretion has been exercised by the trial Court in a manner which cannot be considered to be arbitrary, the appellate Court would not interfere with a decision, which has been arrived at in the

exercise of discretion, which is neither unjudicial, nor otherwise improper. Such a discretion is not to be interfered with even where the appellate Court might have come after appreciation of the fact to a different conclusion,—*vide Chandanmull Jhaleria and others* v. *Clive Mills Company Limited, and others* (1). There is no denying the legal principle that it is the prima facie duty of the Court to hold the parties to their agreement and to make them present their disputes to the forum of their choice but any order to stay the legal proceedings in a Court of law will not be granted if it can be shown that there is good ground for apprehending that the arbitrator will not act fairly in the matter, or that it is for some reason improper that he should arbitrate on the dispute,—*vide* Halsbury's Laws of England, Volume 2, page 26, para 61. Lord Atkinson's observation in *Bristol Corporation* v. *John Aird and Company* (2), are particularly helpful:—

> "Whether it be wise or unwise, prudent or the contrary, he has stipulated that a person who is a servant of the person with whom he contracts shall be the judge to decide upon matters upon which necessarily that arbitrator has himself formed opinions. But though the contractor is bound by that contract, still he has a right to demand that, notwithstanding those pre-formed views of the engineer, that gentleman shall listen to argument and determine the matter submitted to him as fairly as he can as an honest man; and if it be shewn in fact that there is any reasonable prospect that he will be so biassed as to be likely not to decide fairly upon those

(1) A.I.R. 1948 Cal. 257 (D.B.)
(2) 1913 A.C. 241, at pp. 247 and 248

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matters, then the contractor is allowed to escape from his bargain and to have the matters in dispute tried by one of the ordinary tribunals of the land. But I think he has more than that right. If, without any fault of his own, the engineer has put himself in such a position that it is not fitting or decorous or proper that he should act as arbitrator in any one or more of those disputes, the contractor has the right to appeal to a Court of law * * * *"

One of the main questions that will arise in this case will be as to the interpretation of the terms of the agreement and as to whether an approximate quantity of potatoes weighing about 488,400 lbs. can in the circumstances of the contract be deemed to extend to 819,539 lbs. It is a matter which it will be proper to leave for adjudication to a Court of law than to an arbitrator. The view of Kapur, J., in *Union of India* v. *Din Dayal* (1), was to the same effect. At this stage I will not be justified in expressing any opinion on matters which will arise for adjudication when the questions in dispute are determined on merits.

For the reasons discussed above I cannot hold that the lower Court exercised its discretion improperly or capriciously. The appeal fails and is dismissed. In the circumstances of the case there will be no order as to costs.

APPELLATE CIVIL.

Before Tek Chand, J.

FIRM GANGA RAM-KISHORE CHAND,—(*Judgment-debtors*) *Appellants.*

versus

FIRM JAI RAM-BHAGAT RAM,—(*Decree-holders*) Respondents.

Execution First Appeal No. 151 of 1956.

1957

April, 3rd

Code of Civil Procedure (*V of 1908*)—*Section 60*(*1*)(*ccc*)—*Object and intent of*—*Three storeyed house*—*Two upper*

(1) A.I.R. 1952 Pb. 368