REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL CASE NO 683 OF 1975

IP ENTERPRISES LTD ……..……. PLAINTIFF

VERSUS

UNEXIMP LTD……..…….....……. DEFENDANT

JUDGMENT

By a notice of motion filed on 15th January 1976 the defendant applies, pursuant to section 6 of the Arbitration Act (hereinafter referred to as "the Act"), for the proceedings instituted by the plaint filed by the plaintiff on 24th November 1975 to be stayed.

The plaintiff is a limited company incorporated in England. The defendant is a similar body incorporated in Kenya. Paragraphs 3, 4, 5, 6 and 7 of the plaint refer to five contracts between the parties made by exchange of telex messages in 1974 whereby the defendant agreed to sell a total of 700 tons of cottonseed expeller cakes at agreed prices for shipment to designated ports in Europe. Paragraph 9 of the plaint alleges: By a telex message sent by the defendant to the plaintiff on 25th November 1974 the defendant informed the plaintiff, *inter alia*, that it 'may not be able to ship' the 700 tons KUT cottonseed expeller cakes 'during this month'; and, indeed, the defendant failed to ship any of the lots referred to in the foregoing paragraphs either during the agreed months or at all.

In the result the plaintiff had to make purchases elsewhere at higher prices and it alleges that it has sustained a loss of the equivalent in Kenya currency of £5250.

In his supporting affidavit Mr HD Patel, a director of the defendant company, avers that contracts are subject to the terms and conditions of printed agreements or contracts which are sponsored by the Grain and Feed Trade Association of London ("GAFTA") and which contain an arbitration clause (clause 28). It is contended that the dispute which has arisen between the parties must be settled by arbitration in London. Mr Inamdar, for the plaintiff, conceded that if the contracts are subject to GAFTA terms then under section 6(2) (a) and (b) of the Act the Court has no discretion in the matter and the making of an order to stay the proceedings is mandatory as the protocol on arbitration clauses set out in the First Schedule to the Act applies to parties in Kenya and the United Kingdom. Although it is no longer a question of the Court exercising its discretion, the vital importance of this issue to the plaintiff is reflected in paragraph 5 (vi) of the affidavit in reply by Mr JPJ Lakhani, one of its directors, which reads:

By reason of rule 3 of the GAFTA arbitration rules (a photostat copy of which is annexed hereto) any reference to arbitration of the dispute between the parties became time-barred after 'ninety consecutive days of the expiry of the contract time of shipment…" The contract referred to in paragraph 4 of the plaint expired at the end of October 1974 while the contract time of shipment in the case of all other contracts

referred to in the plaint expired at the end of November 1974. Accordingly, if this Court exercises its discretion in favour of granting a stay of this action, the plaintiff will in effect be deprived of any effective remedy in law and will therefore be seriously prejudiced. Paragraph 4 of the same affidavit sets out the plaintiff's contention as follows:

That I do not agree with the statements contained in paragraph 3 of the said affidavit. It is true that at the commencement of the exchange of telex messages which ultimately resulted in the conclusion of the contracts referred to in the plaint, it was envisaged by both parties that any contract entered into would be entered into on the printed form of agreement numbered 6 issued by the Grain & Feed Trade Associations Limited of London (hereinafter referred to as GAFTA). In pursuance of this understanding, shortly after each of the contracts referred to in the plaint was concluded, the plaintiff forwarded to the defendant a contract on the GAFTA printed form (No 6) for the appropriate quantity of goods agreed to be sold but the defendant failed or neglected to execute any of them or to return any of them duly completed to the plaintiff. I therefore say that the parties hereto did not contract on the basis of the GAFTA printed form; accordingly the contracts referred to in the plaint were not subject to any clause relating to arbitration.

A bundle of telex messages exchanged between the parties concerning the contracts referred to in the plaint are annexed to the affidavit (L1). Finally, Mr DV Mistry, the secretary of the defendant company, swore an affidavit in which he averred:

4.That I am informed by the said directors of the defendant company and verily believe that all contracts referred to in the plaint were GAFTA contracts and that in accordance with the custom of the trade and in accordance with the agreement between the parties in respect of each contract, the plaintiff sent to the defendant, after each deal was concluded by telex or telephone, a duly completed GAFTA contract with printed terms including an arbitration clause and that in each case the GAFTA contract was signed by a director of the plaintiff company. True copies of five of such GAFTA contracts made between the plaintiff and the defendant and signed by a director of the plaintiff company are now shown to me and are annexed hereto in a bundle marked Exhibit 'DVM I' that I crave leave to refer to the said GAFTA contracts for their full terms meaning and effect at the hearing of this application. That I am unable to locate one such contract despite search and it appears that it is misplaced in my office.

5.That I do not admit that the defendant failed or neglected to return any of the said GAFTA contracts to the plaintiff. I am informed by the said directors of the defendant company and verily believe that they had signed and returned to the plaintiff two or three such contracts and that in any case it was not necessary to execute or return any one of them to the plaintiff as the contracts were already concluded.

As regards paragraph 5, in none of the annexed contracts are the acknowledgement slips signed by or on behalf of the defendant but the last telex on page 36 of annexure L 1 claims that one contract for 136 tons was signed. It reads:

Fuerst Bham

Un/410 L and P Enterprises Ltd Birmingham 17th December 1974 Reference YTX16/12. There is no default on our part as the time of negotiations referred to by you a clear understanding was made between us that the goods will be shipped if and when they were delivered to us. For this reason we have not signed any contracts except for 136 tons which also were signed on the same understanding but having come to realise your attitude we refrained from signing any other contracts.

Mr Ramesh Shah for the defendant agreed that the only issue was whether the contracts were GAFTA contracts or not. He relied heavily on the references to GAFTA terms in the telexes. He submitted that the reference to "extension of shipment" and "default" on page 36 of annexure L 1 by implication invoked clauses 9 and 24 of the printed form. It is not in dispute that on 16th December 1974 the plaintiff sent a telex declaring that the contracts were in default. Mr Shah contends that the arbitration clause became operative from that date. As regards the failure of the defendant to sign the acknowledgment slips, he relies on the following passage from *Russell on Arbitration* (18th Edn) page 40:

But it is not necessary that it should be a formal agreement, or that the terms should all be contained in one document. All that is necessary is that the parties should agree in writing to submit present or future differences to arbitration, and such an agreement may be found in correspondence consisting of a number of letters.

1. Two trading firms were in the habit of contracting by cable for the sale of goods. The custom was for the buyers to send to the sellers, after the deal had been concluded by cable, a numbered contract form, with printed terms including an arbitration clause and having a printed form of acceptance (to be signed by the sellers) attached to it. After such a deal had been concluded by cable, the buyers sent the usual form to the sellers, who did not complete the form of acceptance but did refer to the contract by number in subsequent cables which impliedly acknowledged its existence. The Court of Appeal held the contention that there was no submission within the Acts to be unarguable: *Frank Fehr & Co v Kassam Jivraj & Co Ltd* (1949) 82 LIL Rep 673.

He claimed that that case is on all fours with the present case. Mr Inamdar distinguished it on the ground that there the sellers had sent a cable referring to and recognising the existence of a printed form of contract which to their knowledge contained an arbitration clause. See per Lord Greene MR at page 678:

On 21st January, that is, after receipt of the cable which I mentioned asking for the name of the steamer, this is what the sellers cabled back:

Regarding contract 83619 booked space still unknown steamer.

Then there is some reference to some suggested future business.

That cable refers in terms to the particular document which had been sent out by the buyers to the sellers under cover of their letter of 29th November 1947. The number is referred to, but the cable is obviously an answer, or purports to be an answer, to the buyers' request for information about the vessel, and it states that the booked space was 'still unknown steamer'. That is quite clearly, combined with the cable to which it was an answer, a reference to the obligation contained in the printed document to declare the steamer within seven days, as mentioned in clause 11. It is not suggested that that cable was not signed by the sellers… It refers to a printed document, namely, contract 83619, containing the arbitration clause. There is no reservation, no suggestion that the sender of the cable is regarding that as anything but a binding contract in existence, and his signature required by the Arbitration Act. It is perfectly true that if we were concerned with section 4 of the Sale of Goods Act 1893, it would be necessary to say: 'Well, here is a note or memorandum signed by the party to be charged', in this case the sellers. That, it seems to me, has got nothing to do with the case. We here have to construe a cable – not even a letter as necessarily concise and short, and something which must be construed in the light of what is possible to put in a cable, and the intention of the parties and the meaning of the expressions they use must be interpreted in relation to the manner of their correspondence which, in this case, was by cable.

This, to my mind, is a perfectly clear written and signed recognition, acceptance and incorporation of document 83619 which they had received and which was before them, and from which they must have obtained the number 83619 in order to be able to refer to it. They refer to one of the obligations contained in that, namely, the obligation to communicate the name of the steamer.

Stopping there, it appears to me that whether or not there was a pre-existing contract at any time to be found on the face of cabled communications, here is a written, signed agreement, within the meaning of the section, being as I have said, an unqualified recognition of the existence of a valid contract between the parties. That, in my opinion, is sufficient to provide the necessary written agreement to submission, as the section requires.

Here, Mr Inamdar submitted, the last telex message shows that the defendant had deliberately refrained from signing the printed forms as it would have deprived it of the right to ship the goods only if and when they were delivered to it by its suppliers in Tanzania. If it had signed or acknowledged the GAFTA printed forms it would have been precluded from relying on this conditional obligation. The last telex

shows that the parties were not *ad idem* on the incorporation of GAFTA terms. It refers to their attitude throughout from the receipt of the forms for signature.

In other respects the contracts were concluded on the exchange of telex messages regarding the quality, price, date of shipment and destination of the goods. I do not agree with Mr Shah's further submission that if the GAFTA terms were not made applicable then there was no contract between the parties. I think that the original intention that the contracts should be reduced to GAFTA form was frustrated by the deliberate omission of the defendant to sign the forms. I do not see how the plaintiff's one-sided references to GAFTA terms in the earlier telexes can give rise to an implication that the defendant has accepted them. The last telex is to the contrary effect. For the above reasons, the application for a stay of proceedings is dismissed with costs.

Motion dismissed with costs.

Dated at Mombasa this 15th day of October 1976

D.J. SHERIDAN

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JUDGE