
**West Bengal Comprehensive Area Development Corporation and Another
Vs Sasanka Sekhar Banerjee**

F.M.A. No. 111 of 1984

Court: Calcutta High Court

Date of Decision: Feb. 22, 1985

Acts Referred:

Arbitration Act, 1940 " Section 34, 39

Citation: AIR 1985 Cal 290 : 89 CWN 760

Hon'ble Judges: Sudhir Ranjan Roy, J; Anil K. Sen, J

Bench: Division Bench

Advocate: Saktinath Mukherjee and Mrinal Kanti Das, for the Appellant; Bankim Chandra Dutta and Sunderlal Nayak, for the Respondent

Final Decision: Allowed

Judgement

Sudhir Ranjan Roy, J.

An abortive application for stay u/s 34 of the Arbitration Act is the genesis of the instant appeal by the defendants.

2. The defendant No. 1 the West Bengal Comprehensive Area Development Corporation, a statutory body (hereinafter referred to as the

Corporation) invited tenders for construction of "Field channel" at village Upar-Gugui and Mahultaur I and II in the district of Purulia against a

tender notice dated February 29, 1981. The plaintiff, Sasanka Sekhar Banerjee (respondent), a contractor, submitted a tender with all formalities

which was ultimately accepted by the defendant No. 1. A printed contract form was executed by and between the plaintiff and the defendant No.

1 on the 1st day of June, 1981.

3. Clause 25 in the said printed agreement provides for settlement of all disputes arising out of the contract by referring the same to the sole

arbitration of the Executive Vice-Chairman of the Corporation or to an Arbitrator to be appointed by him if he is unable or unwilling to act.

4. A dispute having arisen between the parties over execution of the contract and consequent alleged non-payment of the final bill of the plaintiff

and non-issuance of payment certificates in respect of some of the earlier paid bills, there was exchange of letters between the parties and

ultimately on August 3, 1982 the plaintiff issued a lawyer's notice upon the defendants demanding payment of his alleged dues and issuance of

payment certificates. In the said notice, reference was made to the arbitration clause (Clause 25) in the agreement and the defendants were

allowed time for two months to refer the matter to the sole Arbitrator if they so desired, failing which legal action was proposed.

5. In his reply dated August 9, 1982 to the aforesaid notice the defendant No. 2, the Project Director, made it clear that no dispute having been

raised by them or on their behalf there was no question of their referring the matter to arbitration but in case the plaintiff referred his alleged dispute

to the sole Arbitrator there would be no lack of cooperation on their part and he was duty bound to make available all the relevant records and

evidence as may be required by the Arbitrator.

6. However, without referring the matter to the sole Arbitrator in terms of Clause 25 of the agreement the plaintiff straightway rushed to the Court

of the learned Subordinate Judge and filed Title Suit No. 68 of 1982 against the defendants. In the said suit, the plaintiff prayed for a declaration

that he was entitled to get payment certificates from the defendants for the payments made to him in connection with the work; for mandatory

injunction, directing the defendants to issue the said payment certificates; for a decree for Rs. 1,00,761.00 as per details given in the schedule to

the plaint; for an enquiry under Order 20 Rule 12 of the Code of Civil Procedure, for costs and other reliefs.

7. On receipt of the notice of the suit the defendants, before filing their written statement or taking any other steps filed an application u/s 34 of the

Arbitration Act for stay of the suit and for referring the matter in accordance with the arbitration agreement to the sole Arbitrator. In the said

petition, pointed attention of the learned Subordinate Judge was drawn to the arbitration clause in the agreement viz., Clause 25 and the defendants

also expressed their readiness and willingness to do all things necessary for the proper conduct of the arbitration.

8. The plaintiff filed an objection to the said petition wherein it was alleged that Section 34 of the Arbitration Act had no application to the facts of

the case; that the reliefs sought for by the plaintiff in the suit were outside the scope of the agreement between the parties; that the plaintiff never

violated any of the provisions of the agreement; that the defendants having failed to refer the matter to the sole Arbitrator in spite of an opportunity

given to them, the plaintiff had no other alternative but to file the suit and that being so, the petition u/s 34 of the Arbitration Act filed by the

defendants was liable to be rejected.

9. In their affidavit-in-reply the defendants stated that the disputes raised by the plaintiff in the suit were well covered by the arbitration clause; that

as the defendants did not raise any dispute they had no obligation to seek arbitration. However, the defendants having expressed their readiness

and willingness to participate in the arbitration proceedings, the hearing of the suit should be stayed and the matter should be referred to arbitration.

10. The learned Subordinate Judge, Purulia, by his order dated 17-8-83 rejected the application filed by the defendants u/s 34 of the Arbitration

Act, on the following grounds : --

(1) That the reliefs sought for in the suit or at any event, the substantive reliefs were outside the purview of the arbitration clause.

(2) That in the lawyer's notice dated August 3, 1982 the plaintiff gave the defendants an opportunity to refer the dispute to arbitration within two

months, but the defendants did not avail themselves of the said opportunity indicating thereby that the defendants had no dispute to raise before the

Arbitrator.

(3) That there was no existing dispute between the parties which the defendants were ready and willing to refer to arbitration at the time the suit

was filed.

(4) That the defendants having made serious allegations against the plaintiff touching his reputation and character no discretion could be exercised

by the Court in the matter of staying the proceedings of the suit.

11. Mr. Shaktinath Mukherjee, the learned Advocate, appearing on behalf of the appellants (defendants) contended that the learned Subordinate

Judge fell into errors in holding that the disputes raised by the plaintiff in the suit were outside the scope of the arbitration clause in the agreement.

The main relief sought for by the plaintiff, according to him, is a decree for money which very much arises out of the contract between the parties

and the other dispute relating to payment certificates is born out of the main dispute as the plaint itself will show. Mr. Mukherjee further contended

that even assuming that the relief sought for relating to payment certificates is outside the scope of the arbitration clause, it is only an insignificant

part of the relief and refusal to stay the proceedings of the suit on that account was absolutely unjustified and uncalled for.

According to him, the learned Subordinate Judge was wrong in holding that the relief relating to payment certificates was a substantive part of the

relief. Regarding the agreement, Mr. Mukherjee contended that it having nowhere been alleged by the plaintiff that the agreement between the

parties is tainted by fraud, the arbitration clause in the said agreement should have been implemented and given effect to and the proceedings in the

suit ought to have been stayed in view of the clear and unambiguous provision of Section 34 of the Arbitration Act. Mr. Mukherjee further

contended that according to the recitals in the plaint itself, a dispute existed between the parties on the date of the filing of the suit relating to proper

execution of the contract and in all fairness the plaintiff should have referred the matter to the arbitration of the sole Arbitrator. The defendants had

no obligation to do so. Since no dispute was raised by them.

12. Mr. Dutt appearing on behalf of the respondents strongly contested the points thus raised by Mr. Mukherjee. According to him, the learned

Subordinate Judge was quite justified in rejecting the application for stay u/s 34 of the Arbitration Act, because the disputes that the respondent

has raised in the suit are not covered by the arbitration clause and that the applicant also failed to satisfy the Court that they had at all material times

and were at the commencement of the proceeding ready and willing to do everything necessary for the proper conduct of the arbitration. He

further contended that the appellants having made a charge of fraud against the respondent in the matter of execution of the contract the respondent

could very well resist the transfer of the decision from the trial Court to the Arbitrator and demand a public trial. Lastly, it was Mr. Dutt's

submission that the trial Court having refused to stay the legal proceeding instituted by the respondent in exercise of its judicial discretion, this Court

will be reluctant to substitute its discretion for that of the trial Court and reverse the impugned order.

13. We may now proceed to consider the merits of the rival contentions of the parties.

14. One of the relevant points at issue here is whether the reliefs claimed by the respondent in the suit are covered by the arbitration clause in the

agreement. The learned trial Court has answered the point in the negative. Since a dispute not covered by the arbitration clause cannot be referred

to arbitration, it may be useful to consider what, is the real dispute in the suit and whether the said dispute is covered by the arbitration clause.

15. The reliefs which the respondent as plaintiff has claimed in Title Suit No. 68 of 1982 are:--

(i) Declaration that the plaintiff is entitled to get the payment certificates;

(ii) Mandatory injunction directing the defendants to issue the payment certificates;

(iii) a decree for Rs. 1,00,761.00 and (iv) Damages.

16. The arbitration clause in the agreement, namely, Clause 25 provides as follows :--

Except where otherwise provided in the contract all questions and disputes relating to the meaning of the specification, designs, drawings and

quality of workmanship or materials used on the work or as to any other questions, claim, right, matter or thing, whatsoever, in any way arising out

of or relating to the contract, designs drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the

works, or the execution or failure to execute the same, whether arising during the progress of the work, or after the, completion or the

abandonment thereof shall be referred to the sole arbitration of the Executive Vice-Chairman of the C.A.D.C. Should the Executive Vice-

Chairman for any reason be unwilling or unable to act, as such arbitrator, such questions and disputes shall be referred to an arbitrator to be

appointed by the Executive Vice-Chairman. The award of the arbitrator shall be final, conclusive and binding on all parties to this contract".

17. Now, the main relief for which the respondent has started the legal proceeding, is the recovery of a certain sum of money, being the amount of

his unpaid final bill and there is no dispute that this is covered by the arbitration clause.

18. Referring to the dispute relating to payment certificates, in respect of the previously paid bills of the respondent and the reliefs consequential

thereto, it has been contended by Mr. Dutt that such a dispute is not covered by the arbitration agreement and hence there can be no reference to

arbitration of the disputes raised in the suit or a part thereof because that would result in splitting up of the action which again would be a ground

for refusing stay. It, however, seems to be well settled as decided by the Nagpur High Court in Sheodatta v. Prakash Distributors, AIR 1954 Nag

289 that where only a small portion of the relief claims is not within the scope of the arbitration clause, it is not a sufficient reason for refusing to

stay proceedings where the main subject of the action is within the arbitration clause.

19. There being no dispute about the soundness of the above proposition, the question that really arises for our consideration is whether the claim

relating to the payment certificates forms the main subject of the action or a small and insignificant part thereof.

20. Having carefully considered the rival contentions of the parties on the point and after having gone through the plaint in Title Suit No. 68 of 1982

we are of the view that the claim relating to the payment certificates is only an insignificant part of the main subject of the action, viz., the claim in

respect of the last and final bill of the respondent. Paragraph 13 of the plaint will show that the payment certificates for 1980-81 and 1981-82

were asked for with the sole object of getting the Income Tax and Sales tax clearance certificates for obtaining other works, but the defendants did

not oblige the plaintiff. Indisputably, there cropped up a dispute between the parties regarding the proper execution of the contractual work by the

plaintiff, the defendants having taken the stand that the plaintiff had obtained over payment without completing the work in accordance with the

agreement and as such further claims put forward were not at all genuine or bona fide. That being so, the only reason behind non-supply of the

payment certificates to the plaintiff in respect of the bills already paid must have been the alleged non-execution of the work in accordance with the

contractual terms. This shows that the plaintiffs claims in of the suit regarding the payment certificates flows from the main dispute namely the

alleged non-execution of the work according to the terms of the contract. Mr. Mukherjee, the learned Advocate appearing on behalf of the

appellants was, therefore, right in submitting that the dispute regarding the payment -certificates is born out of the main dispute and is an

insignificant part thereof. We are, accordingly, not inclined to accept the contention of Mr. Dutt, the learned Advocate appearing for the

respondent (plaintiff) that the suit filed by his client being Title Suit No. 68 of 1982, covers matters beyond the subject-matter of the agreement. It

need not be emphasized that the plaintiff respondent will be entitled to the payment of his last and final bill if he is found to have executed the work

properly and the issue of payment certificates will follow as a matter of course. That being so, inclusion of certain reliefs in the suit regarding non-

issue of payment certificates, do not necessarily enlarge the scope of the suit and take it out of the arbitration clause.

21. The next point that was urged by Mr. Dutt appearing on behalf of the respondent is that the appellants not being ready and willing to go to

arbitration at the time the suit was instituted, the requirement of Section 34 of the Arbitration Act was not satisfied. It may be recalled in this

connection that one of the main conditions for stay of a legal proceedings u/s 34 of the Arbitration Act is that the petitioner u/s 34 must be ready

and willing at the time when the proceedings were commenced to do all things necessary to the proper conduct of the arbitration and continue to

be so at the time of the filing of the application u/s 34 of the Arbitration Act. A duty is cast upon the applicant for stay to plead and show his

readiness and willingness as above, though in the absence of such averments the Court is not precluded to infer readiness and willingness from the

other material facts and circumstances of the case.

22. In the instant case, the plaintiff served a Lawyer's notice upon the defendants dated August 3, 1982. The penultimate paragraph of the said

notice is as follows : --

Further as per Clause 25 of the tender, if you want to refer the matter to the sole arbitrator for arbitration you may do so within two months from

the receipt of this notice with intimation to my client, failing which it will be deemed that you are not agreeable to arbitration and in a such case my

client will have no other alternative but to take appropriate legal steps in the Court of law for realisation of his dues.

23. This notice was replied to by the defendant No. 2 on 7/9-8-82. The last paragraph of the reply is relevant for our purpose and the material

portion thereof is as follows: --

In any event, if your client so desires he may raise the dispute and refer the matter to the sole arbitration of the Executive Vice-Chairman of the

C.A.D.C. which does not require me to be agreeable as wrongly stated by you. This is the responsibility of your client and cannot be shifted to

myself under any plea. However, I make it clear that if any dispute is raised by you before the sole arbitrator I am duty bound to make myself

available with all relevant documents and evidence if and when required or desired by the sole arbitrator".

24. It is clear from the above that even prior to the institution of the legal proceeding by the respondent, the appellants were ready and willing to do

all things necessary to the proper conduct of the arbitration.

25. Even in their stay petition u/s 34 the defendants made it clear that they were ready and willing to do all things necessary for the proper conduct

of the arbitration.

26. It is, therefore, clear that at all material times, the defendants had the requisite readiness and willingness as contemplated by Section 34 of the

Arbitration Act.

27. A dispute having arisen between the parties, the respondent before resorting to legal proceedings should have referred the dispute to the sole

arbitrator in terms of the arbitration Clause in the agreement. He could not, in our view, take advantage of the fact that the defendants did not take

any steps to refer the matter as such particularly when the conduct of the defendants both prior to the institution of the suit and subsequent thereto

clearly shows that they were ready and willing to do everything necessary for the proper conduct of the arbitration.

28. In Food Corporation of India Vs. Thakur Shipping Co. and Others, it has been held that an applicant for stay of legal proceedings u/s 34 of

the Arbitration Act must satisfy the Court not only that he is but also was at the commencement of the proceedings ready and willing to do

everything necessary for the proper conduct of the arbitration. The readiness and willingness must exist not only when an application for stay is

made but also at the commencement of the legal proceedings.

29. This test, in our view, is fully satisfied in the instant case.

The learned Trial Court in his impugned order has observed that the application for stay does not contain any allegation about existence of any

dispute or difference between the parties, which the petitioner was ready and willing to refer to arbitration. He has also observed that ""it has rightly

been contended by the learned lawyer for the plaintiff that his arbitration but the defendants having failed to do so; such inaction on the part of the

defendants signify unwillingness or want of readiness to go to arbitration"".

30. While making these observations, several facts in our view, were overlooked by the learned trial Court. He failed to notice from the

correspondence filed that a pre-suit dispute existed between the parties over the proper execution of the work by the plaintiff, the defendants

having taken the positive stand that the field channel that the plaintiff had excavated was short by 1221 Rft, in reply to the plaintiffs claim that he

having completed the execution of the work, should be paid his final bill.

31. It need not be emphasized that a dispute implies assertion of a right by one party and repudiation thereof by another. Here also the plaintiff

claimed that he had executed the work completely whereas the defendants asserted that it was not so completed. There being a valid arbitration

clause binding on both the parties, the plaintiff could not ignore the same and start a legal proceeding over disputes covered by the arbitration

clause. Under the arbitration clause, the party raising the disputes could make the reference, so that the plaintiff himself could make the reference to

the Arbitrator specified in the arbitration clause itself without the intervention of the defendants. As a matter of fact, the plaintiff by claiming that he

had completed the work and the defendants having repudiated the claim a dispute was raised and it was for the plaintiff as such to refer the matter

to arbitration the defendants at all stages having expressed their readiness and willingness to do everything necessary for the proper conduct of the

arbitration as already referred to earlier.

32. Coming to the next point urged by Mr. Dutt that the defendant No. 2 having made serious allegations of fraud against the respondent he is

entitled to claim a public trial without being compelled to go to arbitration, it appears that the defendant No. 2, the Project Director, wrote a letter

to the plaintiff dated July 29, 1982 alleging as hereunder: --

It also appears from the report of Sri Kallol Sarkar that you obtained dominion over 1320 bags of cement as per recommendation of Sri S. N.

Boral, the then J.T.O. (Eng.) in excess of your requirement and as such, you are directed to return 440 bags of cement to the Corporation within

seven days from the receipt of this letter which according to Kallol Sarkar you obtained in excess of your requirement in reference to the work

done by you. It will be deemed on your failure to return the excess cement drawn by you on the recommendation of J.T.O. (Eng.) Sri S. N. Boral,

that you committed criminal breach of trust in respect of abovementioned quantity of cement which was entrusted to you for the work of the

project or alternatively over which you obtained dominion and committed criminal breach of trust.

Your failure to return the excess money drawn by you in conspiracy with Sri S. N. Boral will lead to the presumption that you fraudulently and

dishonestly obtained excess payment of Rs. 33,596.04 paise in conspiracy with the J.T.O. (Eng.) Sri S. N. Boral by making a misrepresentation

regarding the volume of work done by you and thereby cheated the Corporation"".

33. By referring to a decision reported in Sudhansu Bhattacharjee Vs. Ruplekha Pictures, the learned Subordinate Judge observed that the

defendant No. 2 having made allegations serious in nature putting the reputation and character of the plaintiff at stake there must be an open trial in

Court and the matter should not be referred to arbitration.

34. Mr. Dutt, appearing on behalf of the respondent, also submitted that in the instant case the allegations of fraud, misappropriation etc. by the

defendant No. 2 against the plaintiff respondent are serious in nature involving the professional reputation of his client and that being so, the Court

should be reluctant to send the dispute to arbitration. In this connection Mr. Dutt referred to various English and Indian decisions including a

decision of the Supreme Court reported in Abdul Kadir Shamsuddin Bubere Vs. Madhav Prabhakar Oak, .

35. In Abdul Kadir Shamsuddin Bubere Vs. Madhav Prabhakar Oak, , the Supreme Court observed in paragraph 17 of the judgment that ""there

is no dispute that where serious allegations of fraud are made against a party and the party who is charged with fraud desires that the matter should

be tried in open Court, that should be a sufficient cause for the Court not to order an arbitration agreement to be filed and not to make the

reference"".

36. Reference was also made to Turner v. Fenton reported in (1982) 1 All ER 8 (Ch.D.) where it has been held that where a professional man's

reputation would be at stake in an arbitration then, even though actual dishonesty might not be alleged against him, the Court would exercise its

discretion by allowing the legal action to proceed.

37. The next case referred to by Mr. Dutt is the Division Bench decision of this Court in Nitya Kumar Chatterjee Vs. Sukhendu Chandra, , there,

in view of seriousness of the charges of fraudulent conduct on the part of the defendants, it was held that the matter should be tried in Court as

arbitration is not the most suitable method of determining the question raised between the parties.

38. Similar view of the matter has also been taken by another Division Bench of this Court in Babulal Singhanian Vs. Pirudan Ojha, .

39. The matter has been summarised very succinctly in Russell on the Law of Arbitration (Twentieth Edition) at page 186 :

Where there is an agreement to submit future disputes to arbitration, and the dispute involving a charge of fraud arises under it, the Court is

expressly empowered to order that the agreement has ceased to have effect and to refuse to stay an action brought in breach of the agreement"".

40. Mr. Saktinath Mukherjee, appearing on behalf of the appellants while agreeing with the above legal position, contended that though the law on

the point is well settled, fraud, in the instant case is not a question to be gone into by the arbitrator, the real point at issue being the completion of

work according to the agreement and the main question for determination by the arbitrator would be the actual length of the channel excavated by

the plaintiff and whether it has been executed in terms of the agreement. He also submitted that at the pre suit stage the plaintiff himself was

agreeable to refer the matter to arbitration and never insisted for a trial in open Court.

41. Here, as we have seen, that in his lawyer's notice to the defendants dated August 3, 1982 the plaintiff left it open for the defendants to refer

the matter to arbitration as per Clause 25 of the agreement. In the said notice, it was not his case that in view of the allegation of fraud made

against him he was not willing to have the matter referred to arbitration. Similarly, in his written objection against the petition u/s 34 of the

Arbitration Act the plaintiff never contended that no stay of the legal proceeding could be granted by the Court in view of the serious allegations of

fraud etc. made against him by the defendant No. 2.

42. Thus, at all stages before the institution of the legal proceeding, the plaintiff never insisted that the matter should be tried in open Court. For the

first time, he referred to the allegations of fraud made against him by the defendant No. 2 in paragraph 17 of the plaint.

43. However, mere allegation of fraud unconnected with the real point at issue will, in our view, not operate as a bar to the stay of the legal

proceeding. According to us, the most vital question for consideration in such matters would be whether in deciding the real dispute between the

parties it would be necessary for the arbitrator to enter into the allegation of fraud involving the reputation of a professional man. If it is necessary

for the arbitrator to enter into such question for determining the real point at issue between the parties, the Court will be reluctant to allow the

matter to go to arbitration and at public trial would be more appropriate.

44. Similar observation has been made in Russell on the Law of Arbitration (Twentieth Edition) p. 187 that ""the Court will consider whether the

charges of fraud are raised in such a way that the arbitrator, if the matter goes to arbitration, will have to deal with them"".

45. In the instant case, it was rightly pointed out by Mr. Mukherjee that fraud is not a question to be gone into by the arbitrator, the real point at

issue being the completion of work according to agreement. As a matter of fact, the defendants allegedly found on actual measurement of the

channel that it was short by 1221 Rft. than the agreed length. So, the only question that the sole arbitrator would be required to go into, in case the

matter is referred to arbitration, is whether the length of the channel excavated by the plaintiff is in accordance with the terms of the agreement. If

the finding is in the affirmative, the plaintiff will be entitled to full payment of his bill as well as the payment certificates in respect of the previously

paid bills and in case the question is answered in the negative the result would be otherwise. Thus, merely because, the defendant No. 2 has made

certain allegations of fraud, misappropriation etc. against the plaintiff that will not take the matter out of the arbitration clause.

46. Furthermore, the plaintiff before the institution of the suit having virtually agreed to have the dispute decided by the sole arbitrator as agreed

upon by the parties and not having raised any issue in his written objection to the stay petition filed by the defendant No. 1 that in view of the

allegations of fraud made against him he would like to have the matter tried in a court of law, cannot now urge that the matter should not go to

arbitration of the sole arbitrator.

47. In the circumstances above, we are not inclined to hold in agreement with the learned Subordinate Judge that in view of the allegations of fraud,

misappropriation etc. made by the defendant No. 2 against the plaintiff there cannot be any stay of the legal proceeding u/s 34 of the Arbitration

Act .

48. The last point that was urged by Mr. Dutt, appearing on behalf of the respondent, was that the trial court having acted in exercise of the

discretion and refused to stay the legal proceeding, the appeal court will be very slow to interfere with such discretion excepting where the

discretion has not been exercised judicially. In this connection, he referred us to the decision of the Supreme Court in The Printers (Mysore)

Private Ltd. Vs. Pothan Joseph, . At page 1159 of the report the Supreme Court has observed that ""where the discretion vested in the Court u/s

34 has been exercised by the trial Court, the appeal Court should be slow to interfere with the exercise of the said discretion. In dealing with the

matter raised before it at the appellate stage the appeal Court would normally not to be justified in interfering with the exercise of the discretion

under the appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the

discretion has been exercised by the trial Court reasonably and in a judicial manner, the fact that the appeal court would have taken a different

view may not justify interference with the trial court's exercise of discretion".

49. Significantly, this decision was also cited by Mr. Saktinath Mukherjee, appearing on behalf of the appellants.

50. In our view, the trial Court in the instant case had failed to exercise its judicial discretion in accordance with law when it ignored many relevant

facts. He failed to consider that the main dispute between the parties was within the terms of the arbitration clause; he also overlooked or failed to

appreciate certain correspondences between the parties which make it more than clear that the defendants at all material times were ready and

willing to do all that was necessary for the proper conduct of the arbitration. Though under the arbitration clause the plaintiff was to make the

reference, from the failure of the defendants to refer the matter to arbitration he wrongly inferred that they were not ready and willing to refer the

matter to arbitration. Similarly, he did not care to consider whether it would be at all necessary for the arbitrator to go into the question of fraud for

determination of the real question in controversy between the parties. He also overlooked the fact that the plaintiff never claimed a public trial on

account of the allegation of fraud, misappropriation etc., rather he was insisting for referring the matter to arbitration.

51. Thus, the learned Subordinate Judge having failed to exercise judicial discretion in the matter and having rather arbitrarily refused to stay the

legal proceeding, the impugned order passed by him refusing to stay the legal proceeding u/s 34 of the Arbitration Act cannot be sustained.

52. The appeal accordingly succeeds and is allowed on contest.

53. The impugned order of the learned Court below dated August 17, 1983 is hereby set aside.

54. We allow the application filed by the defendants u/s 34 of the Arbitration Act and stay all proceedings in Title Suit No. 68 of 1982 of the

Court of the Subordinate Judge, Purulia.

55. The matter should now go to arbitration in terms of the arbitration clause in the agreement.

56. The appeal and the stay application are thus disposed of.

57. No order is made for costs.

58. No formal decree need be drawn up.

59. Let this order be communicated to the Court below without delay.

Anil K. Sen, J.

60. I agree.