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(1949) 07 CAL CK 0027

Calcutta High Court

Case No: Appeal from Original Order No. 50 of 1947

U.K. Banerji

APPELLANT

Vs

Governor General of  
India in Council

RESPONDENT

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Date of Decision: July 26, 1949

Final Decision: Allowed

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### Judgement

Chunder, J.

This is an appeal by the Plaintiff, a contractor under the East Indian Railway Company, against an order of the Subordinate Judge, Asansol, staying a suit brought by him for damages for breach of contract for an amount of Rs. 44,045, u/s 34 of the Indian Arbitration Act (X of 1940). The Plaintiff filed the suit on October 1, 1945. On November 9, 1945, summons was ordered to be issued, as Order No. 2 in the order-sheet shows, on the Defendants fixing December 11, 1945, "for ascertaining contest," i.e., whether the East Indian Railway would contest the suit or not. It appears that on that day one Mr. Karuna Bhushan Mustaphi, an advocate practicing in the courts at Asansol, appeared under a properly executed power or vakalatnama granted on behalf of the railway, signed by the General Manager of the East Indian Railway and formally applied for time to file written statement. Defendant No. 2 is the General Manager, East Indian Railway and order No. 3 says: Defendant No. 2 appears and applies for time to file written statement. To December 20, 1945, for written statement.

2. It appears that subsequently an application was filed u/s 34 of the Indian Arbitration Act for staying the suit in view of an arbitration clause in the agreement between the Plaintiff contractor and the Defendant railway company. On behalf of the Plaintiff, it was contended that, as the Defendant had taken step to proceed with the suit, he had no further right to apply u/s 34 of the Act. The Subordinate Judge negative this contention and stayed the suit and referred the same to arbitration.

3. Mr. Bose appearing on behalf of the railway company contends that, as an order staying a suit u/s 34 of the Arbitration Act is a discretionary order, this Court should not interfere with the exercise of discretion by the Subordinate Judge. The short reply to this is that the law allows an appeal u/s 39(F) of the Act "or staying or refusing to stay legal proceedings "where there is an arbitration-agreement". It is incumbent upon this Court to see whether the discretion has been properly exercised or not. Where discretion is given to a court, it has to be judicially exercised, which means according to proper legal principles. If Section 34 of the Act gave no right, because taking a step in the proceeding, to obtain a stay of the suit, the Subordinate Judge would not exercise a judicial discretion in acting contrary to law and staying the suit.

4. It has been urged by Dr. Sen Gupta that really there was no arbitration-agreement. The contract between the Plaintiff and the Defendant railway company was entered into on August 15, 1944 and Ex. B, which is the contract, begins thus:

I.U.K. Banerji, agree to carry out work on supply of...in accordance with the terms of the East Indian Railway Standard Specifications and General Conditions of Contract (1940 Ed.) and any Special Instructions and Conditions set forth herein a copy of which is in my possession.

5. Then in Note 2 certain Special Instructions and Conditions are given referring to paras. 68, 69, 76, 72, 73, 74 and 75 in the book of general condition of contract and standard specification, etc. (1940, Ed.). The book "General Conditions of Contract" (1940 Ed.) has got two parts; paras. 1 to 65 deal with general conditions and paras. 66 onwards deal with special conditions, etc. The Plaintiff entered into the contract subject to the provisions contained in that book of Standard Specifications and Conditions. If, by special provisions mentioned in the contract, only certain special conditions were given effect to, but all the general conditions were left intact, it cannot be urged that, by this act, the Plaintiff did not agree to reference to arbitration, which is in para. 65, which is the portion dealing with general conditions. Paragraph 65 is binding between the parties to the contract and the Plaintiff entered into the contract subject to the agreement for arbitration. The contention urged by Dr. Sen Gupta must, therefore, fail.

6. The next argument of Dr. Sen Gupta is that, in view of the application made by the duly empowered advocate of the railway company for adjournment to file written statement, the railway company is no longer entitled to pray for stay of the suit in accordance with the terms of Section 34 of the Act. Section 34 says that a party may--

at any time before filing a written statement or taking any other step in the proceedings apply to the judicial authority before whom the proceedings are pending to stay the proceedings.

7. These words used in the section are merely reproduced from old Section 19 of the previous Arbitration Act of 1899 and are in slightly modified form of what appeared in para. 18 of Schedule II of the Code of Civil Procedure. As there are some differences, it is not necessary to refer to the decisions under para. 18 of the Second Schedule to the Code of Civil Procedure, but the question of "taking any other steps in the proceeding" had many times come up before the Courts, both here and elsewhere, for interpretation, both under the old Act and also under the new Act. It would appear that the courts in India have followed and accepted two well known English decisions: the decision in *Ford's Hotel Company Limited v. Bartlett* (1896) A.C. 1 and the decision of Lindley L.J. in *Ives and Barker v. Williams* (1896) 2 Ch. 478, 489. The former decision was followed by Woodroffe J. in *Sarat Kumar Roy v. Corporation of Calcutta* ILR (1907) Cal. 443 and the latter decision by Page J. in *Bhowanidas Ramgobind v. Pannachand Luchmipat* ILR (1924) Cal. 453. It is unnecessary to dilate at great length on the decisions, in view of the fact that this matter had been before this Court on several occasions. A party has to move the court for staying the suit before filing the written statement or taking any other steps in the proceedings; other steps will necessarily be ejusdem, generic with the written statement, i.e., they must be such steps as would show an unequivocal desire to allow the suit to proceed. If what was done by the party showed such a desire then it has been held that it is immaterial whether there was a further statement that he did not want the suit to proceed or that at the time of making the application he had not a copy of the agreement before him in which the arbitration clause appeared (*Parker Gaines and Co. Limited v. Turpin* (1918) 1 K.B. 358., or whether the application for extension of time to file written statement is a written application or a verbal application, etc. *Karnani Industrial Bank Ltd. v. Satya Niranjan Shaw* (1924) 28 C.W.N. 771 these are immaterial for the purpose of decision. In the present case, there can be no doubt that in asking for time to file the written statement, there is an unequivocal desire shown to allow the suit to proceed; if the suit is not to proceed, then no question of filing written statement can arise.

8. It has been contended by Mr. Bose that the act of the advocate Mr. Mustapha was without instructions and contrary to the same; he was not authorised to make any such application for time to file written statement on behalf of the railway company. In *Sarat Kumar Roy v. Corporation of Calcutta* (supra), an observation was made by Woodroffe J", at p. 447:

There is no question here that the application relied on was made at the instance of the Defendant and the application is not by one party to another, but is an application by the Defendant to the court.

9. Obviously, Woodroffe J. had in view the decision in *Ives and Barker v. Williams* (supra), to which we have previously referred. In explaining what is a step in the proceedings, Lindley L.J. had explained at p. 484 that--

it is something of the nature of an application to court and not merely a talk between solicitor and solicitor's clerks nor the writing of letters, but taking out a summons or something of the kind.

10. Woodroffe J. has not expressly referred to this decision, but a perusal of the passage side by side with what has been said by Lindley L.J. will make the reference clear.

11. It has been urged by Mr. Bose, on the basis of this, that if the act is not at the instance of the Defendant, i.e., an act which he had specifically authorised, then the Defendant cannot lose the benefit of the provisions of Section 34 of the Indian Arbitration Act by the step which his lawyer had taken. It appears from the vakalatnama given to the advocate, Mr. Mustaphi, from the evidence of the letter from the Law Officer, Ex. A and from the depositions of the Law Officer, P.C. Mitra and of the advocate, Mr. Mustaphi that Mr. Mustaphi was asked on December 8, 1945, to enter appearance to the suit on or before December 11, 1945, the date mentioned in the summons. He was given no special instructions, nor was his authority restricted in anyway; he was left free to exercise his own general discretion and to act according to his standing instructions. Mr. Mustaphi has, in his evidence, said that in the present case he had no definite instructions to apply for time to file written statement, but he further mentions that his standing instruction was:

We have definite instructions to apply for lengthy adjournments to file written statement.

12. It would appear from the proceedings of the court that Mr. Mustaphi actually applied for a month's adjournment, though the court did not grant him more than ten days. Under the circumstances, the argument that this was not at the instance of the Defendant and Mr. Mustaphi acted without authority cannot be for a moment entertained. This was the only reason for which the Subordinate Judge considered that the step taken by Mr. Mustaphi, being in excess of his authority and due to his mistake, the suit should be stayed u/s 34 of the Act. It is clear that Mr. Mustaphi acted under the standing instructions; when no restriction was put on his action and when no fresh instructions were given to him contrary to the powers given by the vakalatnama his act was with authority and at the instance of the Defendants and the order of the Subordinate Judge cannot stand.

13. Under the circumstances, this appeal is allowed. The order of the Subordinate Judge is set aside and the case is sent back to him; the suit will now proceed in his Court according to law.

14. The Respondents will pay the costs of this appeal to the Appellant.

P.N. Mitra J.

15. I agree.