
AIR 1966 Cal 315

Calcutta High Court

Case No: Award Case No. 5 of 1965

Amritraj Kothari

APPELLANT

Vs

Golecha Financiers

RESPONDENT

Date of Decision: March 18, 1965

Acts Referred:

Arbitration Act, 1940 " Section 34, 41#Civil Procedure Code, 1908 (CPC) " Order 12 Rule 6

Citation: AIR 1966 Cal 315

Hon'ble Judges: P.C. Mallick, J

Bench: Single Bench

Advocate: S.K. Ray Choudhary, Md. Taher Ali and D. Bose, for the Appellant; B.N. Sen, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

P.C. Mallick, J.

This is an application for stay of a suit u/s 34 of the Indian Arbitration Act. It is not disputed that the disputes in suit are

covered by the arbitration clause in the contract subsisting between the parties. In fact such disputes have already been referred to arbitration in

terms of the arbitration clause. The contention of the respondent is that the petitioner has taken step in the suit and in consequence the suit is not

liable to be stayed. The facts relevant to the determination of the question may now be shortly stated. The suit was instituted on December 23,

1964. On the same date the plaintiff took out a notice of motion and obtained an interim injunction. The notice was returnable on January 4, 1965.

What happened on January 1, 1965 when the motion was called will appear from paragraph 4 of the affidavit of Sunil Kumar Mitra which reads as

follows:

""On January 1, 1965 the injunction and Receiver matter appeared as "New Motion" before the Hon"ble Mr. Justice S.P. Mitra. When the matter

was called on Mr. B.N. Sen counsel for the respondent instructed by me as the Solicitor for the respondent firm (the same set of counsel and

Solicitor as representing the said respondent firm in the Award Case No. 23 of 1964), placed the facts before the Court and drew attention of the

Court to the relevant paragraphs of the petition and asked for additional interim orders including order for injunction in respect of the petitioner"s

Motor Car being No. WBC 3875 and the undivided interests of the petitioner in the Jodhpur House and also for inventory of the goods in re.spect

of which the order for injunction has already been made. Md. Taller Ali Advocate instructed by Mr. R.N. Mullick Solicitor (who were the

Advocate and Solicitor respectively for the petitioner in the Award Case No. 23 ot 1964) appeared for the petitioner herein and opposed each of

the said prayers. In spite thereof an order was made as follows:

Mr. B.N. Sen counsel for the petitioner submits, Md. Taher Ali counsel for the respondent submits.

The Court - Affidavit in opposition by 11-1-1965, Affidavit in Reply by 18-1-1965 and the Motion is adjourned till 19-1-1965. The injunction is

extended to the Motor Car and house at Jodhpur in terms of the Clause (4) of the Notice of Motion. I was throughout present in Court when the

above submissions were made and order was passed.

2. Two days prior on the 2nd January, 1965 the Solicitor of the petitioner wrote a letter stating that he has received instructions from the petitioner

to enter appearance and defend the suit on his behalf and asked for a copy of the petition and also a copy of the plaint. Correct copy of the plaint

was sent on the 7th day of January. It may be noted that a day before an incomplete copy of the plaint was sent but very properly it was returned

back. On 9th of January, 1965 the defendant entered appearance and intimated this fact to the plaintiffs Solicitor.

3. It is clear from the above facts that the defendant and/or his attorney did the following acts of and relating to the suit-

(1) Appeared by counsel in Court on the 4th January, 1965 when the new motion was called on. He opposed the application for extension of

injunction. The time for filing affidavit in opposition was extended by this order. Under the rules the time within which affidavit in opposition was to

be filed is two days from the date of service. The last date of filing affidavit in opposition having expired, an extension was granted by the Court by

this order. It is not clear from the affidavit or the minutes whether the defendant's counsel actually asked for such extension. It is contended,

however, that the Court never grants extension unless it is asked by the defaulting party.

2. The defendant entered appearance and his Solicitor intimated to the plaintiffs Solicitor that he has received instructions to contest the suit.

4. The question for consideration is whether the acts noted above amount to taking step in the suit so as to debar the defendant from obtaining a

stay of the suit u/s 34 of the Indian Arbitration Act. Taking the second ground first. In my view entering appearance and intimating the plaintiff's

Solicitor that he has received instruction to contest the suit does not amount to taking step in the proceeding and the defendant is not debarred

from making this application for stay either because of having entered appearance or because of his solicitor intimating to the plaintiff's Solicitor

that he has received instruction to enter appearance and to defend the suit.

5. The other ground, however, requires careful consideration. Mr. Ray Chaudhuri. learned counsel appearing in support of the application

submitted that the defendant was compelled to attend Court on January 4, 1965 and had no option but to oppose the application for extension of

injunction to prevent an imminent hazard. He submitted that asking for time to file affidavit in answer to the allegation to the petitions is not taking

step in the proceeding so as to debar the defendant from obtaining an order for stay of the suit. He cited a number of authorities in support of his

contention to be noticed presently.

6. What is meant by "step in the proceeding" which debars the defendant from making an application for getting order for stay under S. 34 of the

Indian Arbitration Act? In the case of Subal Chandra Bhur Vs. Md. Ibrahim and Another, Das J. after review of all authorities made the following

observations at p. 487:

It seems to me that these authorities establish that in order to constitute a step in the proceedings the act in question must be (a) an application

made to the Court either on summons as in (1896) AC 1 or ILR1907 34 Cal 443 or orally as in (1924) 28 Cal WN 771 or something in the

nature of an application to the Court e.g. attending on summons for directions as in (1909) 2 Ch. 121 and (b) such an act as would indicate that

the party is acquiescing in the method adopted by the other side of having the disputes decided by the Court. Applying now the test deducible from

the authorities referred to above to the facts of the present case, I am satisfied that when the petitioner by his counsel applied to Court for obtaining

time to file his affidavit in opposition and for leave to have inspection of the books and records he acquiesced in the method adopted by the

plaintiff for having the disputes decided by the Court and not by arbitration and that he was quite content that the disputes should be fought in

Court. This conduct, to my mind, clearly implies a statement to the effect that the defendant would proceed to defend the action and would not

insist on the right to have the disputes disposed of by arbitration

In the case of Nuruddin Abdulhusein Vs. Abu Ahmed Abdul Jalli, Tendolkar J. made the following observations:

In my opinion the true test for determining whether an act is a step in the proceeding is not so much the question as to whether it has an

application--although of course that would be a satisfactory test in many cases--but whether the act displays an unequivocal intention to proceed

with the suit and to give up the right to have the matter disposed of by arbitration.

In the Bombay case cited above, the question was whether the act of filing a warrant of attorney to contest the application was taking step in the

proceeding. Before expressing his opinion as stated above Tendolkar J. cited the decision of Das J. in Subal Chandra's case with approval. In the

case of Deluxe Film Distributors Ltd. Vs. Sukumar Kumar, I held that the oral application for extension of time to file an affidavit in interlocutory

injunction amounts to taking step in the proceeding. In paragraph 8 in the said report I made the following observations:

What is meant by taking step in the proceedings" has been the subject matter of innumerable judicial decisions. In the case of Bhowanidas-

Ramgobind Vs. Pannachand-Luchmipat and Another, J. held that

"the expression taking any other step in the proceedings means doing anything in aid of the progress of the suit or submitting to the jurisdiction of

the Court."

In the case of Ives and Barker v. Willans, reported in (1894) 2 Ch. 478 it was held that a notice in writing requiring a statement of claim to be

delivered after appearance in a suit is not "taking a step in the proceedings". Lindley L. J. makes the following observations at p. 484:

"Before a man can make up his mind as to which of the alternatives he will take, he ought to know what the alternatives are, and ought to be in a

position to exercise some kind of judgment in the matter, and if we were to hold that the defendant ought to have applied before, we should be

saying that he should make his application in ignorance of material facts.

The authorities show that a step in the proceedings means something in the nature of an application to the Court, and not mere talk between

solicitors or solicitor's clerks, nor the writing of letters, but the taking of some step, such as taking out a summons or something of that kind,

which is in the technical sense, a step in the proceedings."

Mr. Chatterjee strongly relied on this authority. But in the instant case the defendant was not in ignorance of the material facts and the attorney

made an oral application to the Court for extension of time. I apprehend that if the test laid down by Lindley L.J., is applied to the instant case, the

application must fail.

Then again in paragraph 10 I made the following observations:

In my judgment tiling written statement in the suit and filing affidavit in opposition to an application for judgment on admission under Order 12 Rule

6 or filing an affidavit in opposition to an application for summary judgment under Ch. XIII A of the Rules stand on the same footing. They indicate

the defendant's intention to submit to the jurisdiction of the Court, for adjudication of the claim in the suit itself, implying thereby that he gave up his

right to have the dispute adjusted by arbitration. If as I hold filing written statement and filing an affidavit in opposition to this class of application

viz., under Order 12 Rule 6 or under Ch. XIII A of the Rules indicated above stand on the same footing, application for extension of time to file

written statement or application for extension of time to file such affidavit must also be treated on the same footing. The Appeal Court in the case

reported in The Karnani Industrial Bank Ltd. Vs. Satya Niranjana Shaw and Others, has laid down that oral application for extension of time to file

written statement amounts to taking step in the proceedings. It must be held on the same ground that oral application for extension of time in an

application for judgment on admission also amounts to taking step in the proceedings so as to disentitle the defendant from making an application

for stay u/s 34 of the Indian Arbitration Act.

I cited the decision of Justice Das in Subal Chandra's case, AIR 1943 Cal 484 and following that decision I held that an application for extension

of time to file affidavit in interlocutory matters amounted to taking step in the proceeding. In paragraph 10 the concluding portion of which has been

cited above I expressed an opinion that a distinction can be made between an application under Order 12 Rule 6 and an application for

appointment of Receiver or for injunction, Mr. Ray Choudhury learned counsel appearing in support of this application relied on this observation

of mine and submitted that such being the distinction the Courts should not treat an application under Order 12 Rule 6 on the same footing as

application for the appointment of Receiver or injunction. But I am apt to think that no such distinction was possible as indicated above. The

observation on which Mr. Ray Chaudhury relies was not necessary for the purpose of the application. Having regard to my finding that no

distinction could be made between the two for the purpose of an application for stay, there was no point in making that distinction on which Mr.

Ray Chaudhury relies. I did not lay down in that judgment expressly or by implication that the appointment of Receiver does not amount to taking

step in the proceeding on the ground that the defendant was compelled to come before the court to ward off an imminent hazard I merely pointed

out that logically the two may not belong to the same category--one indicating an intention to submit to the jurisdiction of the court voluntarily and

the other indicating no such voluntary intention to submit to the jurisdiction of the Court. That was all, but that had nothing to do with the decision

that was clearly stated in the said judgment. Mr. Ray Chaudhury very strongly relies on the decision of the Madhya Pradesh High Court in the case

of Sansarchand Deshraj Vs. State of M.P. and Others, I find the following observations:

If the provisions of Clause (b) of Section 41 of the Arbitration Act and paragraph 4 of Schedule II thereof are seen, it will be clear that even when

the proceedings have been stayed u/s 34, the Court has for the purpose of and in relation to arbitration proceedings the same power of making

orders in respect of any of the matters set out in Schedule II as it has for the purpose of, and in relation to, any proceedings before the Court.

Further, para 4 of Schedule II of the Act clearly mentions the power to grant interim injunction or to appoint a receiver. See Budhu Lal Vs. Jagan

Nath .

Thus it is clear that when a party asks for interim relief by way of an appointment of a receiver or by issue of an injunction, that is no ground for

refusing stay of the suit. To ask the Court to vacate the injunction order passed by it and to request that proceedings in the suit may be stayed u/s

34 of the Act are not self-contradictory or inconsistent steps. It is clear that the interlocutory application for the appointment of a receiver or for

granting of an injunction does not necessarily amount to a proceeding in the suit. Further, mere filing of a reply to any such application does not in

our view indicate that there is in effect abandonment of the proposal to have the subject of the cause disposed of by arbitration.

This is an authority undoubtedly in support of the proposition put forward by Mr. Ray Chaudhury. I notice, however, no Calcutta decisions have

been referred to or relied on in support of the judgment. In particular the judgment of S.R. Das J. in Subal Chandra Bhur Vs. Md. Ibrahim and

Another, has not been noticed at all. Nor has it been noticed that the decision in Subal Chandra Bhur Vs. Md. Ibrahim and Another, has been

followed by the Madras High Court as well as the Bombay High Court. On the other hand Justice Tendolkar cited with approval the decision of

Justice Das and this fact has been ignored. I respectfully differ from the decision of the Madhya Pradesh High Court and the reason given

therefore. It is difficult to make a distinction between filing a written statement in suit and filing an opposition to an interlocutory application in that

suit--both of them are ""taking step in the suit"". Filing an affidavit in an interlocutory application is as much taking a step in the proceeding as filing a

written statement or filing an affidavit In opposition to an application under Order 12 Rule 6. Interlocutory proceeding is a proceeding in the suit

itself and any step taken in the proceeding is a step taken in the suit. Arbitration Act empowers the Court to pass suitable interim orders in respect

to matters agreed to be adjusted by arbitration. The aggrieved party may come before the Court for interlocutory deed pending adjustments of

disputes by arbitration. In such a case when a party institutes a suit in breach of the arbitration agreement the suit is liable to be stayed on the

application of the defendant in that behalf. If in such a suit the plaintiff wrongfully obtains an interim order in the suit itself the defendant cannot

contest the interlocutory application, because by so contesting the application he would be taking step in the proceeding thereby debarring himself

from taking advantage of the private arbitral tribunal. The aggrieved defendant is not however without a remedy. In such a case he is empowered

to apply under the Arbitration Act itself to have the hazard if any, removed. I respectfully differ from the Madhya Pradesh High Court in their view

that provision in the Arbitration Act for interim relief indicates that taking part in such interlocutory application does not amount to taking step in the

proceedings. In my judgment it indicates just the reverse. The machinery has been provided in the Arbitration Act itself to give interlocutory relief

by way of appointing a Receiver or by injunction. In my judgment the power given in the Act includes the power to remove the receiver or vacate

injunction if wrongfully passed in a suit stayed by the court.

7. In the instant case the defendant did appear by Counsel and opposed the application for extension of injunction in Court when on January 4,

1965 the motion was called on and the court thought fit to make an order in spite of the opposition of the defendant's Counsel. Secondly, the time

to file an affidavit in opposition having expired the defendant having defaulted to file the affidavit within time the Court extended the time to file the

affidavit must be deemed to have been made at the instance of the Counsel for the defendant. In my judgment these are steps in the proceedings

and the petitioner having taken such steps is debarred from getting a stay of the suit u/s 34 of the Indian Arbitration Act.

8. For reasons stated above the application fails and is dismissed. Costs costs in the suit. The interim stay will stand vacated after a month from this

date.

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