(1946) 09 BOM CK 0024

Bombay High Court

Case No: O.C.J. Suit No. 886 of 1946

Chimanram Motilal		APPELLANT
	Vs	
Vandravandas Gordhandas		RESPONDENT

Date of Decision: Sept. 16, 1946

Acts Referred:

- Arbitration Act, 1940 - Section 34

Citation: (1947) 49 BOMLR 431

Hon'ble Judges: Bhagwati, J

Bench: Single Bench

Judgement

Bhagwati, J.

This is a notice of motion taken out by the first defendants that the suit and all proceedings therein be stayed. The notice of motion is addressed not only to the plaintiffs but also to defendants Nos. 2, 3, 4 and 5 herein. The plaintiffs are the only persons who have appeared on this notice of motion, contesting the same. Defendants Nos. 2, 3, 4 and 5 have chosen not to appear.

2. The plaintiffs as well as the first defendants are members of the Bombay Bullion Exchange, Ltd. For the delivery No. 18 of February 28, 1946, the plaintiffs had entered into a large number of transactions for the purchase and sale of silver with the first defendants and other merchants as a result of which transactions the plaintiffs were on the whole to take delivery of 4378 silver bars of the said delivery. In accordance with Rule 54(4) of the Rules of Business of the Bullion Exchange a clearance sheet was submitted by the plaintiffs to the clearing house and delivery orders for the 4378 silver bars of the delivery were ultimately handed over by the clearing house to the plaintiffs. One of the delivery orders was a delivery order for 50 silver bars issued by the first defendants. On each of those delivery orders the Bullion Exchange appended a note that the person who took delivery of the silver bars thereunder was bound to pay Rs. 10-5-0 per 100 tolas being the additional import duty announced by the Finance Member in the budget. The plaintiffs

contended that they were not bound to pay the additional Rs. 10-5-0 per 100 tolas and offered to pay to the first defendants the price of 50 bars of silver apart from that additional import duty of Rs. 10-5-0 per 100 tolas. This was the position adopted by the plaintiffs with regard to all the members of the Bullion Exchange from whom they had received the delivery orders through the clearing house. Disputes arose between the parties and apprehending that by reason of their attitude the Bullion Exchange would take disciplinary action against them, the plaintiffs filed on March 7, 1946, a suit inter alia against the Bullion Exchange for various reliefs, one of which was for a declaration that Rule 28 of the Rules of Business of the Bullion Exchange was ultra vires the Bullion Exchange and/or its Board of Directors and/or its Merchants Mandal. Interlocutory proceedings were taken at the instance of the plaintiffs. The notice of motion was heard before Coyajee J. and he granted an injunction inter alia against the Bullion Exchange on certain terms. The matter went before the Appeal Court and on March 28, 1946, the Appeal Court allowed the appeal, dissolving the injunction. The judgment delivered by the Appeal Court proceeded on the basis that the persons who had issued he delivery orders which had ultimately gone to the plaintiffs through the clearing house were not parties to that suit, that the Bullion Exchange would not take any action against the plaintiffs unless and until a default alleged to have been committed by the plaintiffs was reported by the parties concerned to the Bullion Exchange, and that as the position then stood there was no cause of action for any injunction against the Bullion Exchange. It appears that after this decision of the Appeal Court, dissolving the injunction, the plaintiffs thought of filing suits against the several parties as also the Bullion Exchange and the members of the clearing house sub-committee, and the present suit is one of that series.

3. This suit was filed on May 15, 1946, against the first defendants who, as I have stated, had issued a delivery order for 50 silver bars which had gone to the plaintiffs through the clearing house and also against the Bullion Exchange and the members of the clearing house sub-committee to whom the disputes between the plaintiffs and the parties who issued delivery orders including the first defendants had been referred by the Bullion Exchange for adjudication. A notice of motion was taken out by the plaintiffs in this suit seeking to restrain the Bullion Exchange who are the second defendants herein and defendants Nos. 3, 4 and 5 who were the members of the clearing house subcommittee from adjudicating the disputes in respect of the delivery of the 50 bars between the plaintiffs and the first defendants and from taking any action against the plaintiffs by way of declaring or posting the plaintiffs as defaulters in exercise of the disciplinary jurisdiction. The notice of motion came on for hearing ultimately before Chagla J. on June 26, 1946, and he dismissed the notice of motion with regard to prayers (b) and (d) of the plaint, adjourning the notice of motion as regards prayer (f) until occasion arose for bringing the same on. Certain directions were given by Chagla J. as regards the filing of the written statement and the further hearing of the suit. It appears, however, that the clearing

house sub-committee which had been appointed by the Bullion Exchange on April 5, 1946, to adjudicate upon the disputes between the plaintiffs and the other parties including the first defendants did not take any further action until August 9, 1946. The sub-committee met on August 9, 1946, and on that day proceeded with the adjudication of those disputes. The plaintiffs appeared without prejudice before the sub-committee. As the first defendants had not applied for holding the auction sale as required by the rules of exchange, the sub-committee could not adjudicate upon the disputes and referred the parties to take steps to have the matter adjudicated by arbitration.

4. After the proceedings before the sub-committee terminated in such manner, the first defendants moved in the matter of arbitration. A letter dated August 10, 1946, was received by the plaintiffs under the signature of the secretary of the Bombay Bullion Exchange, Ltd., stating that the first defendants had appointed Jwalaprasad P. Tiwari, the fifth defendant, as adjudicator to adjudicate the disputes with regard to the 50 bars of silver and requested the" plaintiffs to appoint their arbitrator within 7 days from the receipt of their letter. The plaintiffs by their attorneys'' letter dated August 15, 1946, disputed the right of the first defendants to go to arbitration so long as the present suit was pending. They, however, by their attorneys'' letter dated August 17, 1946, for the sake of greater caution and in order that their case might not go by default appointed one Narandas Pokarmal as their arbitrator without prejudice to their rights and contentions in the suit and reserving their rights and remedies in the matter. The first defendants thereafter on August 28, 1946, took out this notice of motion for stay of the suit by reason of the. arbitration agreement which subsisted between the parties.

5. Mr. Banaji for the plaintiffs has contested this notice of motion on various grounds. He first contended that there was no arbitration agreement between the parties and that therefore there was no question of referring the dispute between the parties to arbitration and staying the proceedings in this suit by reason of any such arbitration agreement. He contended that the first defendants had not complied with all the rules and regulations of the Bombay Bullion Exchange which compliance was a condition precedent to any reference of the disputes to arbitration, that they had not applied to the Bullion Exchange for holding an auction sale in respect of these 50 silver bars and that in the absence of any auction sale held in pursuance of in such application, there could not be any reference to arbitration. This contention of Mr. Banaji however ignores Chat by reason of the very applications which had been signed by both the parties, the plaintiffs and the first defendants, when they became members of the Bombay Bullion Exchange, Ltd., both of them agreed to observe and follow the present rules and regulations and the rules and regulations which might be framed in the future, that Rule 50(1) of the Rules and Regulations of the constitution provided that the difference which may arise in connection, with the transactions in gold, silver or guinea whether ready and/or forward between the members of the Exchange or between a member and

non-member should be referred for decision to the arbitrators mentioned in the panel of arbitrators nominated by the Exchange, that once the delivery order issued by the first defendants was accepted by the plaintiffs, the disputes which thereafter arose between the plaintiffs and the first defendants in the matter of the taking delivery under the delivery order could under the above rule be referred for decision to the arbitrators, and that the observance or non-observance of rules preliminary to the submission of disputes to arbitrators was certainly not a matter which would go to the root of the question. Whether the rules and regulations preliminary to the dispute being referred to arbitration were observed or not, there was certainly a difference which arose in connection with the transaction of gold, silver or guinea, whether ready and/or forward, between the members of the Exchange and that difference could be referred for decision to the arbitrators as provided in Rule 50(1) of the Rules and Regulations of the constitution of the Bullion Exchange. I, therefore, do not accept this contention of Mr. Banaji.

6. Mr. Banaji next contended that the first defendants were not at the time when the proceedings were commenced ready and willing to do all things necessary for the proper conduct of the arbitration within the meaning of Section 34 of the Indian Arbitration Act, and therefore the Court should not make an order staying the proceedings in this suit. He urged that long before the institution of this suit on May 15, 1946, the clearing house sub-committee had been appointed by the Bullion Exchange on April 5, 1946, and all the disputes between the plaintiffs and the parties including the first defendants were referred to their adjudication. The first defendants chose to proceed with the reference which was thus made by the Bullion. Exchange to the clearing house subcommittee and prosecuted that remedy of theirs right up to August 9, 1946, even though they had an opportunity, after the institution of this suit on May 15, 1946, to take out proceedings for stay of this suit by reason of the arbitration agreement which subsisted between the parties. He contended that not having done so and having waited up to August 9, 1946, when only the clearing house sub-committee stated that they could not adjudicate the disputes and referred the parties to take steps to have the matter adjudicated by arbitration, it was not now open to the first defendants to take out this notice of motion. He also pointed out that Chagla J. had given directions for the hearing of this suit and had given to the first defendants four weeks'' time within which to file their written statement and that the hearing of the suit was fixed for September 23, 1946, immediately after the decision of suit No. 399 of 1946. He therefore submitted that the first defendants were not entitled to a stay of the suit. As regards the readiness and willingness of the first defendants, at the time when the proceedings were commenced in this suit, to do all things necessary for the proper conduct of the arbitration, it may be pointed out that the Bullion Exchange themselves had appointed the clearing house subcommittee and referred all disputes between the plaintiffs and other parties including the first defendants for their adjudication. It was a domestic tribunal set up by the Bullion Exchange purporting to act within the

powers vested in them under the constitution, and if the first defendants considering themselves bound by the rules and regulations of the Bullion Exchange submitted to the adjudication of the disputes which had arisen between themselves and the plaintiffs, that certainly could not be urged against them in the manner it has been sought to be done. Rightly or wrongly they thought that the disputes between themselves and the plaintiffs were going to be adjudicated upon by a domestic tribunal warranted by the rules and regulations of the Bullion Exchange subject to which the transactions in silver which had passed through the clearing house were effected by all the members of the Bullion Exchange including themselves, and their conduct in having waited up to August 9, 1946, is not such as to visit on them by reason thereof the punishment which would otherwise have been meted out to them by applying to them the provision of Section 34 of the Indian Arbitration Act which disentitle the parties in such circumstances from having a stay of the proceedings. Immediately after the decision was announced by the clearing house sub-committee they moved in the matter of the arbitration without loss of any time and there is nothing in the period which has elapsed between August 10, 1946, and the taking out of this notice of motion on August 28, 1946, which goes in any manner against them. If there is an arbitration agreement between the parties, it is the prima facie right of a party to apply for a stay of proceedings in Court and it is for the party who opposes that application for stay to point out that there are sufficient reasons why the matter should not be referred in accordance with the arbitration agreement. Mere delay of the sort which is pointed out by Mr. Banaji is not such a count against the first defendants as to deprive them of the benefit of the provisions of Section 34 of the Indian Arbitration Act. This contention of Mr. Banaji also fails.

7. In the matter of this suit the summons had not been served by the plaintiffs up to June 25, 1946, when the notice of motion was disposed of by Chagla J. The plaintiffs'' attorneys therefore on June 26, 1946, sent to the first defendants'' attorneys a consent praecipe for the postponement of the suit as the writ of summons had not been served. The first defendants'' attorneys by their letter of June 26, 1946, returned the consent praecipe duly signed by them unconditionally. Mr. Banaji therefore contended that the first defendants had taken a step in the proceedings and were therefore debarred from making the present application for stay-of the suit, the ground being that by consenting to the postponement of the suit by signing unconditionally the consent praecipe without reserving any right, the first defendants had taken a step in the proceedings. There is no doubt that the application for stay of the proceedings u/s 34 of the Indian Arbitration Act has got to be made by a party before filing a written statement or taking any other step in the proceedings. The written statement has not been filed even though the directions had been given by Chagla J. in that behalf on June 26, 1946. The question to consider in this connection is whether by their signing unconditionally the consent praecipe sent to them by the plaintiffs'' attorneys the first defendants can be said to have

taken a step in the proceedings. In this connection my attention was drawn to a decision in Ives & Barker v. Willans [1894] 2 Ch. 478, 483,484 and the observations of Lindley L.J. therein. In that case the plaintiffs had issued the writ against the defendant the defendant had entered an appearance to the praecipe and by a formal document had required a statement of claim. That was contemporaneous with the entry of the appearance. The defendant had then written a letter to the plaintiffs'' solicitors, saying that he should desire a statement of claim. That was all he had done. He had taken no other steps before he made the application for a stay under the relevant section. The plaintiffs contended that the defendant was too late because he asked for or gave notice that he should require a statement of claim and that was said to be the taking of a step in the proceedings. Lindley L.J. considered the language of the relevant section which is analogous to the section which we have in our Indian Arbitration Act and observed (p. 484):

The authorities shew that a step in the proceedings means something in the nature of an application to the Court, and not mere talk between solicitors or solicitors'' 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.

He observed that the step to be taken must be a step to be taken by the applicant. This case was followed in a decision reported in Zalinoff v. Hammond. [1898] 2. Ch. 92 In that case the plaintiff had given notice of motion for the appointment of a receiver and filed certain affidavits in support of the same. They were answered by the defendant and not until the motion had come on and been ordered to stand over once or twice had given notice of motion to refer to arbitration. It was urged that he had taken a step in the proceedings so as to render his notice of motion to refer to arbitration too late. Stirling J. referred to the observations of Lindley L.J. above quoted and proceeded to observe (p. 94) :

It seems to me that the mere filing of affidavits in defence to a motion for a receiver is not in the nature of an application to the Court, and consequently not a ''step in the proceedings'' within the meaning of the section. By such a step is meant a substantive step taken by a party. It may be that a very limited application to the Court-such as taking out a summons for extension of time-would be enough.

Both these cases came to be considered by Kania J. in Radbone v. Juggilal Kamalapat. (1942) 45 Bom. L.R. 402 The case before Kania J. was very near to the present case before me. In that case the date for filing the written statement was fixed at September 9, 1942. On September 8, 1942, the attorneys of the defendants filed a consent praecipe and got the time within which to file the written statement extended to September 23, 1942. The time so granted was again extended to October 7, 1942, by a consent praecipe filed on September 22, 1942. The written statement was eventually filed on October 30, 1942, by consent of attorneys for the plaintiff. In the meanwhile, on September 24, 1942, the defendants took out a notice

of motion for stay of the suit on the ground that the contract sued upon contained an arbitration clause. It was urged before Kania J. that the attorneys of the defendants having filed consent praecipes and got the time to file the:-written statement extended, the defendants had taken steps in the proceedings, and therefore they were not entitled to the benefit of Section 34 of the Indian Arbitration Act. Kania J. discussed both the eases cited above by me and he also discussed the case which had been relied upon by the plaintiff there, reported in Sarat Kumar Roy v. Corporation of Calcutta. I.L.R.(1907) Cal. 443 He came to the conclusion that according to the reported decisions a mere exchange of letters does not amount to taking a step in the proceedings, while according to the observations of Lindley L.J. anything done in the nature of an application is considered as taking a step in the proceedings. Applying the same rule, he said that it was clear that in the ease before him the defendants'' attorneys did not merely write to the plaintiff''s attorneys to obtain their consent but a further step was taken, viz. the consent praecipes were filed with the Prothonotary. As the Prothonotary has jurisdiction under the High Court Rules to grant an extension of time, he made the orders granting time on the praecipes. The filing of the praecipes under the circumstances therefore amounted to consent applications to the Prothonotary for extensions of time which were granted. These were steps taken in the proceedings by the defendants although with the consent of the plaintiff. It is significant to observe that the learned Judge in that case took the filing of the consent praecipe by the defendants with the Prothonotary as steps taken in the proceedings by the defendants and did not consider the consent of the plaintiff to those praecipes as of any materiality. The case before me is a converse case. The plaintiffs'' attorneys here sent to the first defendants'' attorneys a consent praecipe to obtain the consent of the first defendants and their attorneys to the postponement of the suit. The step which was taken in the proceedings was a step taken by the plaintiffs and their attorneys. No doubt the first defendants and their attorneys gave their consent. The consent praecipes were, however, after obtaining the consent of the first defendants and their attorneys, filed with the Prothonotary by the plaintiffs'' attorneys, and if at all any person could be said to have taken any steps in the proceedings here they were the plaintiffs and their attorneys and certainly not the first defendants and their attorneys. This is the distinguishing feature between the case before Kania J. and the case before me. As was observed by Lindley L.J. the step is meant to be a substantive step taken by the party. I do not see anything in the circumstances of this case to warrant the submission of Mr. Banaji that in doing what they did, viz. signing the consent praecipe though unconditionally the first defendants and their attorneys took any step in the proceedings such as to disentitle them to the benefit of the provisions of Section 34 of the Indian Arbitration Act.

8. Mr. Banaji next contended that the determination whether Rule 28 of the Rules of Business of the Bullion Exchange was ultra vires the Bullion Exchange and/or its Board of Directors and/or its Merchants Mandal involved a complicated question of

law and as such in the exercise of the discretion vested in the Court u/s 34 of the Indian Arbitration Act, the Court should not stay the proceedings in this suit According to the authorities, arbitrators are competent to determine points of law as well as questions on the construction of the agreement, and merely because questions of law might arise in the course of arbitration it cannot be said that the Court should refuse to make an order staying the proceedings. There are, however, questions of law and questions of law, and the Court certainly has the discretion, when it feels that the questions of law which would fall to be determined by the arbitrators are such as would rather not be left to be determined by them, not to make an order staying the proceedings in the exercise of the discretion which is vested in it, I do not want to go into the cases where this has been determined by the Courts. A reference only to Raneegunge Coal Association, Ltd. v. Tata Iron and Steel Co., Ltd. 31 Bom. L.R. 21 and Tolaram Champalal v. Jewanram Gangaram [1940] 2 Cal. 26 would suffice. In my opinion a tribunal of even the most important merchants in the trade such as is named in the panel of arbitrators by the Bullion Exchange, even though in particular cases it may be advised by lawyers in that behalf, would not be a satisfactory body to determine whether a particular rule such as Rule 28 which is impeached here is ultra vires the Bullion Exchange. To use the words of Panckridge J. in Tolaram Champalal v. Jewanram Gangaram the question which the arbitrators dealing with this matter in the event of the suit being stayed would have to decide would be a difficult question of law and quite unsuited for decision by laymen.

9. This, however, is not the only objection to the granting of the application of the first defendants. There is a further objection and it is this. The suit as against the Bullion Exchange and the clearing house sub-committee even though the interim relief has been refused by Chagla J. has not yet ended. As regards defendants Nos. 3, 4 and 5 the members of the clearing house sub-committee, it may be stated that they have already divested themselves of whatever jurisdiction they had in the matter of the adjudication of the disputes between the plaintiffs and the first defendants, they having stated that the parties should go to arbitrators. As regards the second defendants, the Bullion Exchange, however, the suit does survive and the point for determination, so far as they are concerned, would certainly be whether Rule 28 of the Rules of Business is ultra vires the Bullion Exchange. If the first defendants had been the only parties to this suit, it would have been possible to say that the question for determination of the arbitrators being whether the first defendants were liable to the plaintiffs in the amount claimed the matter was a fit one to be referred to arbitration in spite of its involving the determination of various questions including the construction of the rules, the ultra vires character thereof, etc. In so far, however, as the second defendants the Bullion Exchange are parties to this suit and the determination of the ultra vires character of Rule 28 will have to be made by the Court, as the hearing of the suit will not certainly be stayed so far as they are concerned, the determination of the questions between the plaintiffs and

the first defendants by the arbitrators might involve a conflict of decisions between them on the one hand and the Court on the other, a result which cannot be looked at with any complacence by any Court of law. As the plaint is framed it is necessary for the determination of the liability of the first defendants to the plaintiffs as claimed herein to determine whether r. 28 is valid and binding on the plaintiffs or being ultra vires the Bullion Exchange is one which they are entitled to set at naught, or treat as not subsisting. If Rule 28 was binding on the plaintiffs, they would be out of Court and there would be no liability of the first defendants to them. If it is not binding on them on the ground alleged by them in the plaint, the result would certainly be that the first defendants were guilty of default and would be liable to the plaintiffs. These are the prima facie considerations as appearing from the plaint which would go to show that the determination of the ultra vires or otherwise character of Rule 28 is an essential part of this case, and that would have to be determined by the arbitrators before arriving at the conclusion one way or the other whether the first defendants are liable to the plaintiffs or not. The Court would also not be in a position to brush aside this determination when the matter came on for hearing before it. The suit would be stayed only so far as the first defendants are concerned; it would go on so far as the second defendants are concerned. "When the Court comes to determine these questions as between the plaintiff and the second defendants, the Bullion Exchange, it might come to a conclusion which is not the conclusion which he arbitrators came to and there might be a possibility of conflicting decisions being given on this question by the arbitrators and the Court. It is therefore that in the exercise of my discretion u/s 34 of the Indian Arbitration Act, I feel that I should not stay the proceedings in this suit even though I am against Mr. Banaji on the other points which I have referred to earlier in the course of this judgment. The judgment of the Appeal Court in suit No. 399 of 1946 does not touch this aspect of the ease at all. The Appeal Court decided the appeal before it in favour of the Bullion Exchange mainly on the ground that the parties who would move the Bullion Exchange in the matter of the exercise of its disciplinary jurisdiction against the plaintiffs were not there, and whatever the decision was arrived at in that suit, would certainly not be binding on those parties in their absence. That defect is sought to be remedied in this suit by bringing in the first defendants as party defendants to the suit along with the second defendants, the Bullion Exchange. Whatever be the merits of the conduct of the plaintiffs from the business or the commercial point of view, I have got to construe the provisions of Section 34 of the Indian Arbitration Act. In so far as I envisage this possibility of conflicting decisions by the arbitrators and by the Court, I do not think it fit in the exercise of my discretion to stay the proceedings in this suit.

10. I may observe in passing that even though the point as to the arbitrator named by the first defendants, viz. defendant No. 5, being interested was taken in the affidavits, Mr. Banaji wisely did not press that point before me. If it were necessary, I would say that it is covered by the decision in Smith, Coney and Barrett v. Becker

Gray & Co. [1946] 2 Ch. 86 and the observations of Phillimore L.J. at p. 102 therein.

11. Under the circumstances, the notice of motion will be dismissed. The costs of the plaintiffs and the first defendants of the notice of motion will be costs in the cause. Costs will be taxed.