

(1923) 08 MAD CK 0004
In the Madras High Court

Anglo Persian Oil, Co, Ltd.

APPELLANT

Vs

P. S. Panchapakesa Ayyar

RESPONDENT

Date of Decision : 20-08-1923

Acts Referred:

Arbitration Act, 1940 — Section 19

Citation : 76 Ind. Cas. 1011 : (1923) 18 LW 752

Hon'ble Judges : Walter Sales Schwabe, C.J.;Krishnan, J

Bench : Division Bench

Judgement

Walter Sales Schwabe, C.J.—This is an interlocutory appeal from the order of ज़िमारसवामी सास्त्रिार, J., refusing to stay an action on an

application made under the Arbitration act, the suit being on a contract which contains an arbitration clause referring any question or dispute which

may arise under the contract to two European merchants resident in Mad and in the event of their disagreeing to an umpire chosen by the

arbitrators before commencing the reference.

2. The view expressed by the learned Judge in his judgment is that as the defendants had been threatened with legal proceedings for a considerable

time and had not then called the attention of the plaintiffs to the arbitration clause or said that they were willing to refer to arbitration and objected

to the litigation, that is a ground for refusing to stay on an application on the part of the defendants after the action was brought. I do not agree. The

re is no authority in support of the proposition which has been adduced before us and I am satisfied that the reason is that there is no such authority

and I see no ground on principle for so holding. The law provides that if there is a submission for a reference to arbitration, and a party chooses to

bring his suit, the other party can then decide whether or not he will remain before the Court, which he indicates by taking some step in the action, or whether he will avail himself of his contractual rights to have the dispute referred to arbitration. If he had misled the plaintiff in some way into bringing the suit, it might be a good ground for punishing him in costs; and if the misleading had been definite enough to amount to a particular statement that he would not apply to have the matter referred to arbitration and would submit to the jurisdiction of the Court, it might even amount to an estoppel, so as to prevent him from making an application thereafter. But I, can see nothing of the kind in this case.

3. The question then remains as to whether or not this is a case where the discretion of the Court u/s 19 of the Arbitration Act should be exercised

in favour of the defendants by referring to arbitration or whether this is a case which should be kept before the Court. In that matter the learned

Judge has not exercised any discretion out on appeal as we are disagreeing with the grounds which he has given, it is open to the unsuccessful

party to ask us to exercise the discretion which he could have asked the learned Judge to exercise there. We, therefore, consider it for ourselves.

As I understand the principle in -England and here, the Court, where there is a submission to arbitration in order to refuse to stay the proceedings

must be satisfied that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the submission, that is,

really saying in other words that the onus is on the party resisting the application for stay to show some sufficient reason why in the particular case

the parties should be relieved from the obligation which they have contracted, namely, that their case should go before the arbitrators selected by

them and not before the ordinary tribunals of the land There are some well defined instances where a Court almost invariably refuses to stay such

as a case where there are serious allegations of fraud, There are cases where the point involved is a novel or difficult point of law, which the Court

is satisfied is bound to come back by way of a special case to it to decide, or where it comes to the conclusion that the sending of the case to the

arbitrators will involve a waste of time and expense.

4. Having considered this case, I am not satisfied that this case is a case which it is not proper to refer to arbitration. From several aspects of the

case, it is clear that evidence will have to be gone into, unless the arbitrators are persons who have knowledge of their own, so as to make it

unnecessary to have the whole evidence before them, The actual point of construction, as I understand it, is not a point which seems in any way;

beyond the powers of a commercial man to grapple with. If at any time there is a really, difficult point of law in which the opinion of the Court is

required, there is ample provision in the Arbitration Act for taking the opinion of the Court

5. In these circumstances, this order is wrong and the appeal i must be allowed with costs here and the action stayed, The costs of the application

before the learned Judge will follow the event of the arbitration. (Certified for the Counsel in the motion before the learned Judge)

Krishnan, J.

6. This case is governed by Section 19 of the Indian Arbitration Act of 1899. Under that section the Court should refer in accordance with the

arbitration clause, in the contract a case like this to arbitrators" unless it is satisfied that there is a sufficient reason why it should not do so. The

section puts the burden upon the person who seeks to get the stay refused to show good reason for taking such action. The learned Judge in his

judgment has given two reasons for refusing the stay in this matter and for going on with the suit in Court. He says that there is no sufficient

indication in the correspondence nor even in the replies to the lawyer's notices threatening legal proceedings, that the defendants were ready and

willing to have the matter arbitrated upon. Apparently this refers to the last clause of Section 19 which lays down as one of the conditions for the

exercise of the discretion under the section that the applicant was at the time when the proceedings were commenced, and thereafter ready and

willing to do, all things necessary for the proper conduct of the arbitration. The mere fact that in the replies to letters sent, by the opposite side

threatening legel proceedings the defendant company did not write back to say ""No, you cannot take legal proceedings against me"" is no ground

for holding that they were not ready and willing to submit to arbitration, if it becomes necessary to do so. The plaintiff in this case never asked the

defendant to nominate his arbitrators, or do anything in connection, with the arbitration in this case. If he had done so and if the defendant had

refused to agree, it might well be said that he was not ready and willing to do all things necessary, for the proper conduct of the arbitration. I am

unable to accept the learned Judge's view, that in this case there is any indication either in the correspondence or in the reply to the law-year's

notices that the defendant was not ready and willing to have an arbitration.

7. The other ground taken by the learned Judge is that already a heavy stamp fee has been paid for the case and that it would be a waste of money

if the case is now sent to the arbitrators. That is a matter which the defendant could not have helped. If the plaintiff knowing full well that he was

bound by the arbitration clause rushed, into Court and spent money in Court-fee, that could not in any way affect the defendant's right to apply for

stay u/s 19, for all that he has to do under the section is to apply to the Court, before filing his written Statement to stay the suit. The expense of

paying the Court-fee would have" been incurred already in every case and it cannot well be treated as a good ground for refusing to stay the case.

These are the two grounds upon which the learned Judge had based his order refusing the stay. The respondent before us has taken another

ground as well in support of the order of the learned Judge. He contends that the question which has to be dealt within the present dispute being

the construction of a written contract between the parties, it is a matter more fit for the Court to dispose of, than for the arbitrators and that,

therefore, the Court should retain the case on its own file and not refer it to the arbitrators. As regards that point the learned Chief Justice has fully

dealt with it and I need hardly go over the same grounds as I agree with him in what he has said on the point. The learned Judge has not put the

case on that ground at all so that we cannot say that he exercised his discretion on such a ground as that We are, therefore, free to exercise our

own discretion on this point and in exercising that discretion I am satisfied that this is a fit case for staying the action and for sending it to arbitrators

as the construction of the document as well as the facts to be found in the case seem to be. more fit for two European merchants who are familiar

with oil contracts to deal with, than for the Court.

8. In these circumstances, I agree with the learned Chief Justice that this appeal must be allowed and that the stay applied" for should" be ordered.

I agree also" as to the order about costs proposed by, the learned Chief Justice.