
(1969) 09 MAD CK 0043
In the Madras High Court

Astrotito Compania Naviour S.A. Power of Attorney Agent,
Shaw Wallace and Company Ltd.

APPELLANT

Vs

Boots S.A. by Agents South India Corporation (Agencies)
Private Ltd.

RESPONDENT

Date of Decision : 22-09-1969

Acts Referred:

Arbitration Act, 1940 — Section 34

Citation : (1970) 83 LW 14 : (1970) 1 MLJ 398

Hon'ble Judges : K.S. Palaniswamy, J;K.S. Palaniswami, J

Bench : Division Bench

Judgement

K.S. Palaniswamy, J.—The defendants, a Private Limited Company, have taken out this application u/s 34 of the Arbitration Act, 1940, for stay of all proceedings in the suit. The suit is to recover Rs. 1,63,282-12 on the allegation that the said amount was payable in respect of the use of the plaintiff's vessel "s.s. Stavros," as per charter party dated 17th May, 1968 entered into between the plaintiffs and the defendants at New York, United States of America. Pending the suit, the plaintiffs applied in Application No. 1523 of 1968 for the issue of a temporary injunction restraining the defendants from removing their tanker from the Madras Harbour. Ismail, J., before whom that came up for orders, issued an interim injunction on 2nd August, 1968. The defendants took out Application No. 1564 of 1968 praying that the interim injunction may be vacated and that the bank guarantee of the First National City Bank, Madras, to the tune of Rs. 1,65,000, may be accepted. In view of the undertaking, the learned Judge vacated the interim injunction subject to the furnishing of the security. The defendants have taken out this application alleging inter alia that they had to apply to the Court for raising the interim injunction, as on account of the injunction they were put to a recurring loss of about Rs. 18,500 every day, that as per the charter party the dispute between the parties has to be referred to three persons at New York, one to be appointed by each of the parties and the third to be chosen by those two persons, that there is dispute between the

parties, that the defendants are ready and willing to abide by the terms of the arbitration clause in the charter party and that, therefore, this Court has no jurisdiction to try the suit, as the matter has to be referred to arbitration.

2. The plaintiffs oppose this application contending that it is not maintainable inasmuch as the defendants have taken part in the proceedings. They also contend that balance of convenience does not call for stay of the proceedings.

3. Where any party to an arbitration agreement or any person claiming under him commences any legal proceedings against any other party to the agreement or any person claiming under him in respect of any matter agreed to be referred, the party against whom such a proceeding is instituted is given right to apply to the authority for stay of the proceedings. Section 34, which deals with that matter inter alia stated that such application may be made " at any time before filing a written statement or taking any other steps in the proceedings." In the instant case, the defendants have not filed the written statement. But they took out Application No. 1564 of 1968 to vacate the interim injunction and offered to furnish security. The question is whether the filing of this application would amount to " taking a step in the proceeding " within the meaning of Section 34. At page 369 of Volume I of Halsbury's Laws of England it is observed:

The applicant must have taken no step in the proceeding after appearance. The party who makes any application whatsoever to the Court, even though merely an application for time, takes a step in the proceeding.

4. What would amount to " taking step in the proceeding " arose for consideration in a number of cases both English and Indian. In *Ives and Barker v. Williams*"(1894) 2 Ch. 478 . Lindley, L.J., observed:

The authorities show that a step in the proceedings means something in the nature of an application to the Court and not a mere talk between the solicitor or solicitor's clerks, nor the writing of letters but the taking of some steps such as taking out a summons or something of that kind which is in the technical sense a step in the proceedings.

5. In *Ford's Hotel Co. v. Bartett* (1896) A.C. 1 , the defendant took out summons for extension of time to file written statement. That was held to be a step in the proceedings. In *County Theatres and Hotels Ltd. v. Knowles* (1902) 1 K.B. 480, the defendant attended the Chambers of the Master on the hearing of a summons for direction taken out by the plaintiffs and an order was passed that the plaintiff and defendant should make discovery of their respective documents. This was held to be a step in the proceedings. In *Oche Dros* (1909) 2 Ch. 121, the plaintiff had taken out summons before the Master for certain directions. The defendants attended the hearing before the Master when the Master proposed to treat as a summons for an account and the defendants gave an undertaking to furnish an account as a term of the summons standing over. The Court held this to be a step in the proceeding. In *Richardson v. Le Maitre* (1902) 2 Ch. 222, the defendants appeared before the Master on a summons taken out by the plaintiff

for certain directions and in his presence an order was passed. It was held to be a step in the proceeding.

6. In *Jailal & Co. v. Gopi Ram Bhotika* AIR 1920 Cal. 685, the defendant appeared before the Court and asked the Court to direct the plaintiff to give security for costs. That was held to be taking a step in the proceedings. In *The Karnani Industrial Bank Ltd. Vs. Satya Niranjan Shaw and Others*, , it was held that it would amount to taking a step in the proceeding even if an oral request is made asking for time for filing written statement. In *Sabal Chandra v. Md. Ibrahim* ILR (1943) 2 Cal. 298, the defendant appeared by Counsel in an application filed by the plaintiff for the appointment of a Receiver and obtained an adjournment. That was held to be taking step in the proceedings. In *P. Gannu Rao Vs. P. Thiagaraja Rao and Another*, , the defendant applied for an adjournment for filing counter affidavit and also moved the Court to modify an order of interim injunction issued against him. It was held that those were steps in the proceedings disentitling the defendant from asking for stay u/s 34 of the Arbitration Act.

7. On behalf of the defendants it is contended that the defendants had to take out Application No. 1564 of 1968 to vacate the interim injunction inasmuch as they were put to heavy loss of about Rs. 18,500 per day on account of the injunction, and that having regard to that peculiar circumstance, it should be held that the defendants did not voluntarily take part in the proceedings. I am unable to accept this argument. Whatever may be the circumstances under which the defendants took out application in this suit with a prayer to vacate the interim injunction on offer to accept security, the fact is clear that they took steps in the proceedings within the meaning of Section 34 and are, therefore, disentitled to ask for stay of the suit.

8. In the view which I have taken above it is unnecessary to consider the question whether Section 34 of the Arbitration Act applies to foreign arbitration or not. In the result, the application fails and is dismissed with costs.