
(1967) 11 RAJ CK 0002

In the Rajasthan High Court

Case No : Civil Miscellaneous Appeal No. 67 of 1967

Bhanwarlal and Another

APPELLANT

Vs

Insaf Ali and Another

RESPONDENT

Date of Decision : 21-11-1967

Acts Referred:

Arbitration Act, 1940 — Section 34
Evidence Act, 1872 — Section 114

Citation : AIR 1968 Raj 187 : (1968) RLW 237

Hon'ble Judges : D.S. Dave, C.J; Kan Singh, J

Bench : Division Bench

Advocate : S.K. Jindal, for the Appellant;

Final Decision : Dismissed

Judgement

Kan Singh, J.—This is an appeal by defendants-appellants u/s 39 of the Arbitration Act against an order of the District Judge, Bikaner, dated 8-9-67 whereby the learned District Judge dismissed the three identical applications filed by the defendants-appellants for staying the suit filed against them by the plaintiffs-respondents in accordance with Section 34 of the Arbitration Act. The facts relevant for the purposes of disposing this appeal are briefly these:

2. Plaintiff-respondent Insaf Ali through his next friend filed a suit against the defendants-appellants for realising Rs. 12,342,50 paise. The plaint was presented in the court of the learned District Judge on 26-7-67 and 25-8-67 was fixed for the filing of the written statement. Summonses were issued by the Court on 5-8-67 and they were served on the defendants on 13-8-67. On 25-8-67, that is, the date of hearing fixed for the filing of the written statement one Shri Sampatlal, Advocate appeared for the defendants and asked for an adjournment for filing the written statement Accordingly, the learned District Judge adjourned the case to 4-9-67. On this date three applications were moved on behalf of the defendants u/s 34 of the Arbitration Act for staying the proceedings as the agreement between the parties provided for arbitration.

On 8-9-67, an affidavit was produced by the defendant purporting to show that he was ill on 25-8-67 and, therefore, he could not instruct the advocate properly. The learned District Judge heard the arguments and he dismissed the applications under Section 34 on 8-9-67. The learned, District Judge held that as on 25-8-67 the adjournment was sought on behalf of the defendants for filing the written statements it amounted to taking a step in the proceedings which, according to the learned Judge, disentitled the defendant from making a prayer for staying the suit. The learned District Judge placed reliance on *Daulat Ram Rala Ram Vs. State of Punjab*, and came to the conclusion that a prayer for extension of time to put in a written statement indicated a desire on the part of the defendant to contest the suit on merits in Court and displayed an intention to abandon the right to have the matter disposed of by arbitration. The sole point that falls for consideration in the present appeal, therefore, is whether the learned District Judge was right in holding that the prayer for adjournment made on behalf of the defendants on 25-8-67 for filing the written statement was tantamount to taking a step in the proceedings as would disentitle the defendants from getting the suit stayed u/s 34 of the Arbitration Act.

3. We have heard learned counsel for the appellants and in our view the appeal has no substance. The legal position has been elucidated in two bench decisions of this Court in *Chitra Prakash Film Exchange Ltd, v. Moti Lal* ILR 1953 Raj 1021 and *Johari Mal v. Fatehchand* ILR 1960)Raj 383 : (AIR 1960 Rai 67) To the first case one of us was a party. It was held in that case that the obtaining of an adjournment for filing written statement amounts to taking such a step in the proceeding as is contemplated by Section 34 of the Arbitration Act. Learned counsel for the appellants wanted to distinguish that case by showing that in that case two adjournments were sought and, therefore, whatever was laid down in that case did not conclude the matter. We have gone through the case carefully and are satisfied that the number of the adjournments was not the essence of the matter and the fate of the case turned on the consideration of the question whether seeking an adjournment by a defendant for filing a written statement would amount to taking a step in the proceeding as contemplated by Section 34 of the Arbitration Act.

4. In the second case the learned Judges again explained as to what is a step in the proceedings within the meaning of Section 34. Changani J., observed that in order to constitute a "step in the proceedings", the step must be of such a nature, as to lead the court to the conclusion that the party preferred to have his right determined by the civil court rather than by the domestic forum upon which the parties might have agreed. The learned Judge added that the test, however, should be objective and not subjective. Then, he pointed out as to how the matter has to be approached and in doing so he laid down that prima facie an application for time to file a written statement should raise a presumption that the defendant had actual or constructive knowledge of his right and that he acquiesced in the method of the suit adopted by the plaintiff. The learned Judge, however, made it clear that the presumption was not absolutely irrefutable and

could be rebutted by showing that even constructive knowledge could not be imputed to the defendant. The learned Judge then indicated that it was not possible to enumerate exhaustively the circumstances in which the presumption can be rebutted and each case should be considered on its own facts and circumstances. The learned Chief Justice who made certain observations of his own In his concurring judgment said that what constitutes a step in the proceedings so as to deprive a party of his right to go to arbitration within the meaning of Section 34 of the Act, will depend upon the facts and circumstances of each case. He pointed out that the salutary rule appears to be that where a party has consciously submitted to jurisdiction of the court with full knowledge of the nature of the cause of action on which the suit against him is founded, the step so taken would deprive him of the right to go to the private forum agreed upon between him and his opponent under any arbitration clause.

5. We are in thorough agreement with the views expressed in these two cases. The matter whether the party has taken any step within the meaning of Section 34 by seeking an adjournment for filing a written statement will have to be decided in the light of the facts and circumstances of each case, but one has to start with a presumption that seeking of an adjournment by a defendant for the purpose of filing a written statement was a step as contemplated by Section 34 of the Arbitration Act. We have to see whether in the present case the appellants have been able to rebut that presumption by cogent evidence to the contrary.

6. Now whether the learned Advocate who made the request for adjournment was aware of the existence of the arbitration _ clause on which reliance was placed subsequently, was nothing but a question of fact and there is nothing to show on this record that the learned Advocate was not so aware of the existence of the arbitration clause. Shri Jindal submitted that the Vakalatnama produced by the Advocate showed that it was given to him on 25-8-67 only, that is, on the date of hearing and from this he wanted to suggest that the Advocate could not be aware of all the relevant facts bearing on the question of arbitration. In the absence of any affidavit of the Advocate we are unable to hold that the presumption arising from the seeking of an adjournment for filing the written statement was rebutted in the present case. The other circumstance that the learned counsel tried to urge was that the defendant was ill on that day. That will not, in our opinion, be sufficient for showing that there was no intention for proceeding with the case in the Court when an adjournment was sought for the purpose of filing the written statement. It is not a case where a request merely for an adjournment without anything more was made but the perusal of the order sheet shows that the request was made for adjourning the case to enable the party to file the written statement. In view of these circumstances we are unable to hold that the learned District Judge was in error in taking the view that he did.

7. The appeal, as we have already observed, has no force and is hereby dismissed. As respondents have not chosen to appear before us, there will be no order

as to costs.