
(1924) 12 CAL CK 0033
In the Calcutta High Court

Bhowanidas-Ramgobind

APPELLANT

Vs

Pannachand-Luchmipat and Another

RESPONDENT

Date of Decision : 15-12-1924

Acts Referred:

Arbitration Act, 1940 — Section 19

Citation : AIR 1925 Cal 801

Hon'ble Judges : Page, J

Bench : Division Bench

Judgement

Page, J.—This is an application by the first defendant for leave to enter an appearance, and for a stay of the proceedings pending a reference to arbitration of the matters in dispute in this suit. In the plaint this defendant is described as "Pannachand Luchmipat, a mercantile firm carrying on business at 33, Armenian Street, in the town of Calcutta as well as at 2, Turner Road, Chitpore." The defendant alleges that this firm has never been served with a writ of summons in the suit. The onus of proving the service is upon the plaintiff. The plaintiff alleges that the summons was duly served on two occasions by substituted service. As regards the first alleged service there is evidence that in June 1924 the plaintiff's gomasta went with the Sheriff's peon to No. 33, Armenian Street, in order to serve the defendant there: that he failed to effect personal service, and that after calling upon the defendant three times to accept service a copy of the summons was affixed to the outer door of 33, Armenian Street, by the Sheriff's peon. In my opinion, such a mode of service does not comply with the requirements of Order V, Rule 17. I had occasion recently to state what in my opinion those requirements were, and I need not repeat them: Baldeodas Lohia Vs. Subkarandas Goenka, . It was not enough in the circumstances that the plaintiff, in order to become entitled to take advantage of the provisions for substituted service, should have called once, twice or any number of times at 33, Armenian Street. A plaintiff must use reasonable diligence to ascertain the whereabouts of the defendant, and where, as in this case the defendant according to the plaintiff, resided both at 33, Armenian Street, and at 2, Turner

Road, Chitpore, the plaintiff cannot be held to have used reasonable diligence to discover the defendant's whereabouts if he did not make enquiries for the defendant at both of those places. No attempt, however, has been made at any time to serve the defendant at 2, Turner Road, Chitpore and, in my opinion the first alleged service does not constitute a valid service of the writ of summons. As regards the second alleged service, that is, at 102, Clive Street, it is stated that Atmaram, the plaintiff's gomasta, on the 16th September in company with the Sheriff's peon attempted to serve the writ of summons upon the defendant personally at 102, Clive Street. The defendant does not dispute that 102, Clive Street, is a place where Pannachand Luchmipat was sometimes to be found, or that the offices of the Jute Baler's Association of which he is a member were there located. Assuming, however, against the defendant's contention, that the defendant was in fact found at 102, Clive Street by Atmaram and the peon on that day, and that the writ of summons was then and there offered to him for acceptance, and also that he refused the service thereof, in my opinion, the second alleged service is inadequate because; after the defendant had refused to accept the service, all that was done was that the peon affixed a copy of the summons on the outer door of 102, Clive Street. Mr. Khaitan contended that to affix a copy of the summons on the outer door of premises in which a defendant is found and where the defendant has refused to accept service is a sufficient compliance with the provisions of Order 5, E. 17, but it is to be observed that in order duly to effect substituted service it is necessary for "the proper officer to affix the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain," and except for a statement by the Sheriff's peon (who, I am satisfied, was not in a position to know the fact) to the effect that "102, Clive Street is where the said firm is located," there is no evidence that 102, Clive Street was where the defendant ordinarily resided or carried on business or personally worked for gain. Further, not only does it appear from two memoranda annexed to Atmaram's affidavit that this defendant purported to carry on business at 33, Armenian Street, with a head office at 2, Turner Road, Chitpore, but an application having been made on the 9th July 1924 by the plaintiff for leave to effect substituted service the plaintiff stated that "for greater safety your petitioners have been informed that the defendant firm was carrying on business at 2, Turner Road, in Chitpore in the suburbs of Calcutta, in the jurisdiction of the District Judge's Court, Alipore and that your petitioners submit that a fresh summons be issued under the seal of the Hon"ble Court." No attempt has been made, however, as I have said, to effect personal service at this address. In these circumstances I hold that the necessary preliminary steps were not taken to justify the plaintiff in effecting service by a mode of substituted service. I, therefore, granted the defendant, leave to enter an appearance. The defendant thereupon filed his warrant of attorney and entered an appearance, and on the plaintiff consenting that the second part of the plaintiff's motion should be heard forthwith the defendant applied that all further proceedings in the suit should be stayed pending a reference of the matters in

controversy therein. The suit is brought to recover damages for the alleged failure of this defendant to deliver a large quantity of hessian cloth pursuant to two contracts of sale dated 15th September 1923 and the 5th October 1923. It was a term of each of the said contracts that " any dispute whatsoever arising on or out of this contract shall be referred to arbitration, under the rules of the Bengal Chamber of Commerce applicable for the time being, for decision and such decision shall be accepted as final and binding on both parties to this contract. The award may, at the instance of either party and without notice to either of them, be made a rule of the High Court of Judicature at Fort William in Bengal." Admittedly the claim in this suit is within the ambit of the arbitration clause, but the plaintiff resists the defendant's application that the proceedings herein should be stayed on the ground that the defendant has taken a step in the proceedings, and, having regard to Section 19 of the Arbitration Act (IX of 1899) the Court has no jurisdiction to stay the suit. By Section 19 it is provided that " where any party to a submission to which this Act applies or any person claiming under him commences any legal proceedings against any other party to the submission or any person claiming under him in respect of any matter agreed to be referred a party to such legal proceedings may at any time after appearance and before filing a written statement or taking any other steps in the proceedings apply to the Court to stay the proceedings and the Court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings." The defendant not having been served did not enter an appearance as directed in the summons, and the suit was placed in the undefended list. On the 1st December the defendant's attorney wrote to the plaintiff's attorney:

Dear Sir,

An order has this day been made directing our client to make an application for leave to enter an appearance herein. We shall be obliged if you will send us a copy of the plaint, and the affidavit of service at once on the usual terms.

Yours faithfully, A.N. MITTER & BASU.

2. The plaintiff contends that the defendant has taken a step in the proceedings (i) by applying for a copy of the plaint and (ii) by making an application for leave to enter an appearance. With respect to the first alleged step it is enough to state that I agree with the view expressed by Lindley, L. J., as to the meaning of Section 4 of the English Arbitration Act, 1889, which is couched in language almost identical with that to be found in Section 19 of the Indian Arbitration Act. His Lordship observed that " 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 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." Ives and Barker v. Willans [1894] 2 Ch. 478. Moreover, to apply for a copy of the plaint is merely to seek information in order that the defendant may ascertain the nature of the plaintiff's claim. In so doing the defendant does not, and is not to be deemed to, indicate his acquiescence in the course adopted by the plaintiff for the purpose of settling the dispute which has arisen, for until he is made aware of the plaintiff's cause of action he is not in a position to elect whether he will proceed by way of arbitration or will assent to the litigation which has been commenced against him. As regards the second ground which the plaintiff urges in support of his contention it is well to bear in mind that an agreement to refer a dispute to arbitration does not oust the jurisdiction of the Court. Notwithstanding such an agreement at Common Law the parties or any of them are at liberty to invoke the assistance of the Court to settle the controversy which has arisen, and the Court is bound to entertain the suit. The only remedy at Common Law open to a party to the agreement is to seek damages for the breach of the agreement to refer the matter to arbitration. But this remedy would usually be found to be nugatory for under the circumstances the plaintiff would not be able to prove more than nominal damages. Of course, the parties to such an agreement either before or after action is brought are at liberty to settle the dispute by submitting the subject-matter thereof to arbitration and obtaining an award thereon. But in the absence of such an award the Common Law right of the parties or any of them to have recourse to the Court for the purpose of settling the dispute remains unaffected by an agreement to refer the matter to arbitration; see *Doleman & Sons v. Ossett Corporation* (1912) 3 KB. 257. u/s 19 of the Arbitration Act, however, upon the fulfilment of the conditions therein provided, the Court in its discretion may stay the proceedings in the suit pending a reference to arbitration. Now, I am satisfied that the defendant is and at all material times has been, ready and willing to refer to arbitration the matters in dispute in the suit, and, in my opinion, there is no sufficient reason why the matters should not be referred in accordance with the submission. But in order to conform to the provisions of Section 19 the defendant must apply to the Court "after appearance and before filing a written statement or taking any other step in the proceedings." Now, in my opinion, to move the Court for leave to enter an appearance is, for certain purposes, to take a step in the proceedings. For example, a party taking such a step would be deemed to have waived any irregularity in the service of the writ to which he applies for leave to appear: see *Fry v. Moore* (1889) 23 Q.B.D. 395, *Re Orr-Ewing*, *Orr-Ewing v. Orr-Ewing* (1882) 22 Ch. D. 456. *Harris v. Taylor* (1916) 2 K.B. 580. The question which I have to determine is whether such an application is a step in the proceedings within Section 19 of the Arbitration Act. Now, I apprehend that the intention of the Legislature in enacting Section 19 was that in a proper case the Court should give effect to the agreement for arbitration into which the parties had entered. It was not, however, intended that a party should lie by and after having wasted time and money in litigation should apply for a stay of the proceedings in order that the dispute should be settled by arbitration. "The intention of the Legislature

in giving effect to the contract of the parties and saying that one of them should be entitled to make an application to insist that the matter should be referred according to the original agreement was that they should at once and before any proceedings were taken specify the terminus a quo and that if an application to stay proceedings was made under those circumstances then the Court should enforce the contractual obligation to go to arbitration. That seems to me a very wise provision that costs should not be thrown away in beginning to litigate," per Lord Halsbury, Lord Chancellor, *Ford's Hotel Co. v. Bartlett* (1896) A.C. 1. Any act in the nature of an application to the Court which indicates that a party is willing that the suit should proceed, in my opinion, would be a step in the proceedings within Section 19 of the Indian Arbitration Act. The intention of the party is to be gathered from the nature of application which is made, and if, having regard to the form of the application, the Court is of opinion that a step has been taken it will so hold, notwithstanding that the party may in truth and in fact have no such intention, or that the application is coupled with a protest that the party desires that the matters in dispute should be referred to arbitration; see *Lucas Ralli v. Noor Mahomed* (1906) 31 Bom. 236, *Sarat Kumar Roy v. Corporation of Calcutta* (1907) 34 Cal. 446, *Austin & Whiteley, Ltd. v. Bowley (S.) & Son* (1913) 108 L.T. 921. Applying this test to the motion before the Court I am clearly of opinion that the defendant's application for leave to enter an appearance was not a step in the proceedings within Section 19 of the Arbitration Act. It is not a reasonable deduction from such conduct that the defendant intends to resist the suit on the merits. It is equally reasonable to infer therefrom that he intends thereafter to make a preliminary objection to the matter being made the subject of litigation at all. Nay more, the language used in the section leads me to the same conclusion, for it is therein expressly provided that the party making an application under the section for a stay of the proceedings must before so doing have entered an appearance. It is not reasonable to suppose that the Legislature intended that a party should be held to have taken a step in the proceedings within Section 19 of the Arbitration Act merely because he has made an application which, if granted will place him en train for fulfilling a condition precedent to an application to stay being duly made in accordance with the provisions of the section. In my opinion, the defendant's application must succeed, and the proceedings in the suit will be stayed in order that the matters in dispute therein may be referred to arbitration pursuant to the agreement entered into between the parties. Liberty to apply. The defendants are to have their taxed costs of this motion in any event.