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**(1997) 01 DEL CK 0049**

**In the Delhi High Court**

**Case No :** Civil Miscellaneous (Main) Appeal No. 259 of 1995

Draupdi Chit Fund Pvt. Ltd.

APPELLANT

Vs

Senior Civil Judge and Others

RESPONDENT

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**Date of Decision :** 01-01-1997

**Acts Referred:**

**Citation :** (1997) 4 AD 621 : (1997) 65 DLT 559

**Hon'ble Judges :** Lokeshwar Prasad, J

**Bench :** Single Bench

**Advocate :** R.K. Gupta, for the Appellant;

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## **Judgement**

Lokeshwar Prasad, J.

(1) The present petition, filed by the petitioner under Article 227 of the Constitution of India, is directed against an order dated the 2nd May, 1995, passed in Suit No. 193/94 - entitled M/s Draupdi Chit Fund Pvt. Ltd. v. Shri R.S. Chaudhary and Others, whereby the learned Civil Judge, while rejecting the application of the respondents, filed by them u/s 34 of the Arbitration Act, 1940 (hereinafter referred to as "the Act"), also dismissed the suit filed by the petitioner/plaintiff.

(2) The facts relevant for the disposal of the present petition, briefly stated, are that the petitioner filed a suit for the recovery of Rs 30,956.66 against respondents 2,3 & 4 in the Court of Senior Civil Judge, Delhi on 27.6.94, which was assigned to the Court of Shri V.K. Gupta, Civil Judge, Delhi for disposal according to law. In the said suit, before the learned Civil Judge, the respondents 2,3 & 4 filed an application u/s 34 of the Act read with Section 151 of the Code of Civil Procedure, 1908 (hereinafter referred to as "the CPC") stating therein that the suit filed by the petitioner was not maintainable as not only an arbitration agreement was there but the Arbitrator had already, on 26.8.94 gave his award. The respondents in the above said application prayed that in view of the above fact, the suit filed by the petitioner, be stayed/dismissed and the petitioner be

directed to take action only under the provisions of the Act. The petitioner filed reply to the said application. The main thrust of the reply filed by the petitioner was that the award referred to by respondents 2,3 & 4 in the above said application related to some other claim and not to the claim of the petitioner in the suit. The learned Civil Judge vide impugned order not only rejected the application of the respondents 2,3 & 4 but also dismissed the suit of the petitioner.

(3) Feeling aggrieved the petitioner has filed the present petition. Notice of the petition was also given to respondents 2,3 & 4. However, no notice of the petition was given to respondent No. 1, who is a proforma party, and as such service of notice on respondent No. 1 was dispensed with by the learned Predecessor of this Court vide order dated 21.11.95.

(4) I have heard the learned Counsel for the petitioner at length and have also carefully gone through the documents/material on record including the records received from the Trial Court. However, I could not have the benefit of the arguments of the learned Counsel for respondents 2, 3 & 4 as none appeared on behalf of the above said respondent on 4.11.96 despite the fact that the case was called out twice i.e. earlier at its turn and later at the end of the list at 2.30 p.m. on that date. The learned Counsel for the petitioner submitted that the learned Civil Judge was not justified in dismissing the suit filed by the petitioner as the award mentioned in the application filed by the respondents 2,3 & 4 u/s 34 of the Act related to some other claim of the petitioner and not to the claim of the petitioner in the present proceedings. He further submitted that after rejecting the application, filed by respondents 2, 3 & 4 u/s 34 of the Act, the learned Civil Judge was not justified in law in dismissing the suit filed by the petitioner and, Therefore, the impugned order, in so far as the same relates to the dismissal of the suit is bad in law and, Therefore, liable to be quashed.

(5) As already stated, respondents 2, 3 & 4 filed an application u/s 34 of the Act. Section 34 of the Act reads as under :

"Where any party to an arbitration agreement or any person claiming under him commences any legal proceedings against any other party to the agreement of any person claiming under him in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time before filing a written statement or taking any other steps in the proceedings, apply to the judicial authority before which the proceedings are pending to stay the proceedings; and if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement 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, such authority may make an order staying the proceedings."

(6) For deciding the question as to whether the provisions of Section 34 of the Act are attracted, the first question the Court will have to decide is whether there

is a valid "arbitration agreement", covering the question in dispute for the purpose of granting a stay of legal proceedings. Section 34 of the Act corresponds to Section 4 of the (English) Arbitration Act, 1889 and, Therefore, cases under the English Law can be helpful in respect of the cases u/s 34 of the Act. Lord Macmillan in *Heyman and Another v. Darwins Ltd.*, (1942) 1 All. E.R. 337 observed in this regard as follows:

"I venture to think that not enough attention has been directed to the true nature and function of an arbitration clause in a contract. It is quite distinct from the other clauses. The other clauses set out the obligations which the parties undertake towards each other, but the arbitration clause does not impose on one of the parties an obligation in favor of the other. It embodies the agreement of both parties that if any dispute arises with regard to the obligations which the one party has undertaken to the other, such dispute shall be settled by a Tribunal of their own constitution. Moreover, there is this very material difference that, whenever in an ordinary contract the obligations of the parties to each other cannot in general be specifically enforced and breach of them results only in damages, the arbitration clause can be specifically be enforced by the machinery of the Arbitration Act. The appropriate remedy for breach of the agreement to arbitrate is not damages but its enforcement. Moreover, there is the further significant difference that the Courts in England have a discretionary power of dispensation as regards arbitration clauses which they do not possess as regards the other clauses of contracts."

(7) Therefore, in order to have the benefit u/s 34 of the Act, the applicant, in the first place, must satisfy the Court that there is a valid and binding arbitration agreement between the parties to the legal proceedings. In other words it is the duty of the Court while dealing with an application for stay of the suit u/s 34 of the Act to decide first whether there is a binding arbitration agreement between the parties to the suit. It is also to be determined whether the plaintiff is a party to the agreement or not. If he is found not to be a party, then no stay can be granted. In my above views I stand fortified by a decision of the Supreme Court in *Anderson Wright Ltd. Vs. Moran and Company*, wherein their Lordships have made the following observations :

"We are in entire agreement with the view enunciated above. As we have said already, it is incumbent upon the Court when invited to stay a suit u/s 34 of the Arbitration Act to decide first of all whether there is a binding agreement for arbitration between the parties to the suit. So far as the present case is concerned if it is held that the arbitration agreement and the contract containing it were between the parties to the suit, the dispute in the present suit would be one relating to the rights and liabilities of the parties on the basis of the contract itself and would come within the purview of the arbitration clause worded as it is in the widest of terms, in accordance with the principle enunciated by this Court in *A.M.Mair and Company-v. Gordhandass*. If on the other hand it is held that the plaintiff was not a party to the agreement, the application for stay must

necessarily be dismissed."

(8) A submission to arbitration deprives a party of the right conferred on it by law to have the dispute decided by any Court. It is, Therefore, necessary to construe strictly that the plaintiff, by submitting to arbitration, deprived himself of his right of having the dispute decided by the Court.

(9) Before stay is granted u/s 34 of the Act, the applicant must satisfy the Court that he is not. only ready and willing at the hearing of the application but was so at the commencement of the proceedings. He must be ready and willing to do everything necessary for the proper conduct of arbitration. Thus the readiness and willingness on the part of the applicant must exist not only when an application for stay is made but also at the commencement of the legal proceedings ( Food Corporation of India Vs. Thakur Shipping Co. and Others, ). The High Court of Calcutta in case At in Atin Bose Vs. Heavy Engineering Corporation Ltd., has held that an affidavit must be filed to show that as a matter of the fact the applicant was ready and willing to arbitrate both at the commencement of the proceedings and at the date of the hearing.

(10) If the above criterion is applied to the present case, it is noticed that in the application, filed by respondents 2,3 & 4, u/s 34 of the Act, nowhere it is stated that the applicants were ready and willing to arbitrate both at the commencement of the proceedings and at the date of the hearing. There is no affidavit of the respondents/applicants to the above effect accompanying the application. In the absence of the same, in my opinion, the respondents 2, 3 & 4 (applicants in the application u/s 34 of the Act) were not entitled to any relief and the learned Trial Judge was fully justified in dismissing/rejecting the above said application of respondents 2, 3 & 4.

(11) Now coming to the other part of the impugned order, in so far as the same relates to the dismissal of the suit, in the given facts and circumstances of the case, when the application of respondents 2, 3 & 4, was rejected by the learned Civil Judge, the same, in my opinion cannot sustain the test of judicial scrutiny and is liable to be quashed. Accordingly, the petition is allowed and the impugned order in so far as the same relates to the dismissal of the suit (Suit No. 193/94 - entitled M/s. Draupdi Chit Fund Pvt. Ltd. v. Shri R.S. Chawdhary and Others) is set aside and the case is remanded to the learned Trial Judge with the directions that he may proceed further in the matter in accordance with law. In the facts and circumstances of the case the parties are left to bear their own costs.

(12) Nothing stated hereinabove shall amount to expression of any opinion by this Court on the merits of the above mentioned suit, pending in the Court of learned Civil Judge.

(13) Trial Court file be returned and thereafter the file be consigned to record room.