
(2000) 08 AHC CK 0121
In the Allahabad High Court
Case No : F.A.F.O. No. 388 of 1999

Durrani Oriental Carpets and another	APPELLANT
Vs	
Obeetee Ltd. Co.	RESPONDENT

Date of Decision : 04-08-2000

Acts Referred:

Arbitration Act, 1940 — Section 34

Citation : (2000) 3 AWC 2575

Hon'ble Judges : Sudhir Narain, J; Krishna Kumar, J

Bench : Division Bench

Advocate : D.M. Tripathi and R.K. Ojha, for the Appellant;

Final Decision : Dismissed

Judgement

Sudhir Narain, J.—This appeal is directed against the order of the Civil Judge (Senior Division), Mirzapur dated 17.3.1999 rejecting the application of the appellants for stay of the suit u/s 34 of the Arbitration Act. 1940.

2. Briefly stated the facts are that respondent is a registered company. It carries on its business of manufacture and export of hand knotted woollen carpets under the name and style of Obeetee Ltd. The defendant-appellant No. 1 is a partnership firm and appellant No. 2 is one of the partners. They entered into an agreement on 10.8.1988. Under the said agreement, it was provided that the respondent shall sell to the appellants all the raw materials for the manufacture of its floor coverings on the price mutually agreed between the parties from time to time. The floor coverings, after manufacture, shall be utilised by the appellants for the execution of the orders given by the respondent. There were other clauses in the agreement. Clause No. 13 was an arbitration clause which reads as under :

"13. In the event of any dispute(s) between the parties hereto in relation to the terms of this agreement, or in relation to the floor coverings covered by this agreement, or in relation to the Interpretation of any of these terms, the said

dispute(s) shall be referred for the arbitration and, for that, each party shall be entitled to appoint one Arbitrator under the Arbitration Act, 1940 and the decision of the Arbitrators shall be final and binding on the parties hereto.

3. The parties, however, changed some of the terms of the agreement in March, 1990. The respondent claimed certain amount as due against the appellants and a-legal notice was issued to the appellants on 29.7.1994 demanding the amount. The appellants sent a reply dated 30.9.1994 denying its liability. The respondent again sent a notice dated 19.10.1994 indicating that the amount be paid and the matter be settled.

4. As the appellants neither paid the amount nor settled the matter, the plaintiff-respondent filed suit on July 14, 1995 for recovery of a sum of Rs. 5,69,600.32. The appellants. In the said suit, filed an application u/s 34 of the Arbitration Act, 1940 for stay of the proceedings in the suit on the ground that there was an arbitration clause between the parties providing that in case of dispute between the parties, the matter shall be referred to the arbitrator and in view of the said arbitration agreement the matter has to be decided by an arbitrator and the proceedings in the suit be stayed. The appellants also filed written statement in the suit on 17.1.1997. The respondent filed objection to the application filed by the appellant for stay of the proceedings of the suit. The Court below rejected the application on 17.3.1999 on the finding that the parties have entered into another agreement in the year 1990 and, therefore, the original contract did not survive particularly in regard to the arbitration clause. This order has been challenged before this Court,

5. The learned counsel for the appellants contended that the transactions between the parties were going on as per agreement on the works order issued for each transaction but as there was some difficulty, some of the terms of the agreement were changed. The arbitration clause in the agreement still survived. The arbitration clause referred to above was in relation to the terms of the agreement dated August 10, 1988. Admittedly, the parties entered into another agreement, the result of which was change in the terms of agreement. The defendant-appellants themselves filed a photostat copy of the said agreement (Paper No. 21C) and the terms of the said agreement were incorporated in the letter dated 27.3.1994 (Paper No. 16C-9). In view of the change in the nature of terms of agreement and change of the pattern of transaction between the parties, the previous agreement dated August 10, 1988 to refer the matter to the arbitrator cannot be enforced.

6. In this case, the appellants are otherwise not entitled to any discretion from the Court for stay of the proceedings of the suit. The plaintiff-respondent had given legal notice dated 29.7.1994 to settle the matter and pay the amount. The appellant sent the reply dated 30.9.1994 and did not ask for settlement of the dispute by arbitration. The plaintiff again gave a notice on 19.10.1994 and when the defendant-appellants did not respond, it had to file suit for recovery of the amount after paying heavy court fee. The respondent in paragraphs 14 and 17 of

the plaintiff asserted these facts. In paragraph 17 of the plaint, it has been categorically stated that the defendant refused to make settlement and to negotiate the outstanding balance against them even after the legal notice of demand and reminders were served upon them. The appellants have filed written statement and they have not specifically denied the fact that they had received the notice and in the reply to the notice they never expressed their intention for settlement of dispute through arbitration.

7. Section 34 of the Arbitration Act provides that an applicant seeking for stay of proceedings of the suit must specify that he was at the time when the proceedings commenced and still remains ready and willing to do all things necessary to the proper conduct of arbitration, the Court may make an order staying the proceedings of the suit. In *N. C. Padmanabhan and others v. S. Srinivasan*, AIR 1967 Mad 201, the Court did not stay the proceedings of the suit on the ground that when the plaintiffs sent notice, the defendant in his reply did not indicate his intention to refer the matter to arbitration. The words "at the time when the proceedings commenced" u/s 34 must cover the entire period both before commencement of the suit and thereafter. It was observed :

"I have no hesitation in holding that the averment extracted above does not satisfy the requirements of Section 34. A party who invokes Section 34 must specifically allege that he was, not only, at the commencement of the suit quite ready and willing to have the dispute resolved by arbitration proceedings, but that he is throughout ready and willing for such arbitration and do everything necessary for the proper and successful conduct of the arbitration proceedings. The readiness and willingness to do everything necessary for the proper conduct of the arbitration proceedings should cover the entire period both before the commencement of the suit and thereafter. The readiness of the defendant should not be a matter of implication but there should be a clear, unambiguous and specific averment to that effect in an affidavit filed by the applicant for the stay of the suit."

8. In *Shalimar Paints Ltd. Vs. Omprokash Singhania*, referring to the various correspondence between the parties prior to filing of the suit, the Court rejected the prayer to stay the proceedings of the suit with the following observation :

"It does not appear from the facts and circumstances of the case that the applicant was ready and willing at the commencement of the proceedings to do everything necessary for the proper conduct of the arbitration. It is to be noted that no suggestion was ever made by the petitioner in any of the correspondence carried on between the parties that the disputes should be referred to arbitration for adjudication in accordance with the provisions contained in the arbitration clause. The plaintiff had made various demands and had sent letters of demands even through its solicitors."

9. Sometimes. It may not itself be a ground to reject the application but it has to be examined on facts of each of the cases. It is the discretion of the Court to

stay proceedings of the suit u/s 34 of the Arbitration Act. The appellate court would be slow to interfere with the exercise of discretion of the Court below unless it is shown to be arbitrary or based on certain unjustified grounds. In Uttar Pradesh Co-operative Federation Ltd. Vs. Sunder Brothers of Delhi, . It was held that where the discretion vested in the Court u/s 34 has been exercised by the lower court, the appellate court would normally be not justified in interfering with the exercise of the discretion under appeal solely on the ground that it had considered the matter at the trial stage and it may have come to a contrary conclusion.

10. For the reasons stated above we do not find any merit in the appeal and it is accordingly dismissed.