

(1998) 06 GUJ CK 0016
In the Gujarat High Court
Case No : Appeal from Order No. 55 of 1985

Jayant Mulchand Shah

APPELLANT

Vs

Elsen Und Metall Aktiengesells and Others

RESPONDENT

Date of Decision : 23-06-1998

Acts Referred:

Arbitration Act, 1940 — Section 34

Citation : AIR 1998 Guj 271 : (1998) 3 GLR 2379

Hon'ble Judges : M.S. Parikh, J

Bench : Single Bench

Advocate : Aspi Kapadia, for S.B. Vakil, for the Appellant; Lata Parasnani, for H.J. Tolani, for the Respondent

Judgement

M.S. Parikh, J.—The appellants herein are the plaintiffs in the Special Civil Suit No. 64 of 1982. This respondents herein are respectively

defendants Nos. 1, 2, 3, 4 and 5 in the said suit. They are referred to as the plaintiffs and the defendants in this judgment. The plaintiffs have filed

the aforesaid suit in the Court of the learned Civil Judge (S.D.) Kachchh at Bhuj for recovering the amount of freight they paid for transportation of

4,000 M.T. salt and for recovering damages representing mainly the value of the salt.

2. The defendant No. 2 gave an application Exh. 58 (also appearing as Exh. 53D in the typed copy of the order in question) for obtaining stay of

the proceedings of the suit by virtue of Section 34 of the Arbitration Act, 1940 ("the Act" for short). The defendant No. 2 contended that it carried

on the business as Sea Carrier and the Ship Owner. However, as per the case of the plaintiffs, the defendant No. 2 entered into an agreement with

the first defendant to purchase the Vessel "M. V. Oba" and defendant No. 2 was

at all the relevant point of time in control and management of the said vessel. According to the case of defendant No. 2, defendant Nos. 1, 3 and 5 were unnecessarily joined as parties to the suit with an ulterior motive with a view to prolonging the matter in dispute between the parties and with a view to get out of the ambit of the arbitration clause in the agreement between the plaintiffs and defendant No. 2 through its agent defendant No. 3. It is the case of defendant No. 2 that the vessel "M. V. Oba" was placed at Kandla Port in seaworthy condition with all certificates valid for the purpose of loading the cargo and according to the plaintiffs' allegation, the cargo of salt was loaded. It is further the case of defendant No. 2 that after completing loading, it was the responsibility of the plaintiffs to pay the balance amount of freight and other dues in accordance with the respective clauses of the contract between the parties represented by fixture note. According to the defendant No. 2, the contract between the plaintiffs and defendant No. 2 was contained in the fixture note dated 5th December, 1981 and it contained Clause 13 which reads as under :

Any dispute arising under this fixture note is to be settled as per and in accordance with the Indian Arbitration Act in Bombay.

3. According to the defendant No. 2, the entire suit was based on the fixture note dated 5th December, 1981 and that the defendant No. 2 was

ever ready and willing to abide by the arbitration clause and to take all the necessary steps for the proper conduct of the arbitration under the said

clause. Defendant No. 2 accordingly did not want to submit to the jurisdiction of the Court in the aforesaid suit and prayed for its stay u/s 34 of the

Act.

4. The plaintiffs resisted the application as per their reply Exh. 73. While denying the allegations made in the application, they contended that the

vessel "M. V. Oba" was not in seaworthy condition and, therefore, it did not undertake the journey for its destination to Mombasa where the

goods in question were to be delivered. Since the vessel in question was not in seaworthy condition, it was noticed by the plaintiffs that the material

facts with regard to such condition of the vessel in question were suppressed from the plaintiffs. It was on account of such condition of the vessel in

question that the plaintiffs were required to file the suit against the defendants

including defendant No. 1 who was the owner of the vessel, although not a party to the contract in question between the plaintiffs and defendant No. 2 through defendant No. 3. It was also contended by the plaintiff that the application could not be granted as the other defendants had taken steps for participating in the proceedings of the suit. The plaintiffs finally contended that the discretion vested in the Court u/s 34 could not be exercised for grant of stay as the application was no bona fide moved and as there would be multiplicity of proceedings inasmuch as there would be arbitration proceedings as between the plaintiffs and defendant No. 2 through defendant No. 3 on one hand and the suit proceedings as between the plaintiffs and defendant No. 1 and/or defendant No. 1 and other defendants on the other hand. It was finally contended on behalf of the plaintiffs that the application moved by the defendant No. 2 was not bona fide and was given only with a view to prolonging the proceedings of the suit.

5. The learned trial Judge, by his impugned order dated 19th October, 1983, stayed the proceedings of the suit exercising his discretion u/s 34 of the Act and the said order is subjected to challenge in this Appeal From Order by the plaintiffs.

6. It has been submitted on behalf of the plaintiffs-appellants that the substance of the suit was for obtaining back the amount of freight paid by the plaintiffs and for obtaining the damages including the value of the goods loaded or consignment to Mombasa. Since it was noticed by the plaintiffs that the vessel in question was not in seaworthy condition and did not go beyond the limits of anchorage from the Kandla Port, there has been specific ground in the Appeal From Order reading as ""there are allegations of fraud and misrepresentation and the suit ought not to have been stayed"". Since the plaintiffs had an occasion to suffer the loss of freight as particularised in the suit as well as on account of the loss of goods due to unseaworthiness of the vessel in question, the plaintiffs were required to join the other parties, defendant No. 1 in particular. The submissions which have been noted above have been reiterated by the learned Advocate appearing on behalf of the appellants-plaintiffs in this appeal.

7. Ms. Lata Parasnani, learned Advocate appearing for respondent No. 5 has supported the impugned order but mainly contended that the defendant No. 5 for whom she appears was not at all concerned with any of the

claims in the suit inasmuch as the defendant No. 5 acted only as the Custom and Ship Clearance Agents and they were not concerned in any manner with regard to the transshipment of the goods in question as reflected by the contract between the plaintiffs and defendant No. 2 through defendant No. 3. According to her, defendant No. 5 had an occasion to move an application Exh. 46 in the Trial Court for deleting defendant No. 5 as having unnecessarily been joined in the suit. Said application is pending for determination. She, however, contends that simply because some of the defendants had participated in the proceedings of interim injunction application and/or in the proceedings of getting themselves deleted from suit, it cannot be said that they participated in the proceedings of the suit. From the stand-point, she made a reference to the decision of the Hon"ble Supreme Court in the case of the Food Corporation of India and others v. Yadav Engineer and Contractor AIR 1982 SC 1302 : 1983 Arb. LR 123, where it has been ruled that the general words ""taking any other steps in the proceedings"" appearing in Section 34 of the Act just follow the specific expression ""filing a written statement"" and, therefore, any step alleged to have been taken by the party seeking to enforce the arbitration agreement must be such as would display unequivocal intention to proceed with the suit and acquiesce in the method of resolution of dispute adopted by the concerned party, namely, filing of the suit and thereby must indicate that it has abandoned its right under the arbitration agreement to get the dispute resolved by arbitration; any other step would not disentitle the party from seeking relief u/s 34 of the Act. Thus, contesting application for interim injunction or for appointment of receiver or for interim relief by itself without anything more would not constitute such step as would disentitle the party to the relief u/s 34 of the Act. However, in the present appeal, the question is whether the arbitration clause quoted above would cover the disputes raised in the suit.

8. Rest of the respondents (other defendants) have not appeared to resist the present Appeal From Order. In fact, their conduct will be displayed from the following order which was required to be made by this Court (Coram : R. Balia, J.) on 3rd April, 1998.

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9. In my opinion, the learned trial Judge has committed an error of law in not

considering the substance of the suit while dealing with the arbitration clause in question. It might be noted that the arbitration clause is not as wide as would include within its sweep challenge to the contract itself including the arbitration clause. It deals with the disputes arising under the fixture note containing the contract in question. It does not deal with the disputes which would arise as a result of either fraud or misrepresentation on the part of either of the parties to the contract. Thus, vital part of the matter clearly appears to have escaped the attention of the learned trial Judge. It is a settled proposition of law that if the point in dispute is whether the contract in question containing the arbitration clause was ever entered into at all or was void ab initio, illegal, or obtained (for example) by fraud, duress or undue influence, the clause does not apply and the stay will be refused. This proposition of law as appearing in Halsbury's Laws of England, 3rd Edn., Vol. 2, Page 24, para 56 has been quoted with approval by the Hon'ble Supreme Court in the case of Khardah Company Ltd. Vs. Raymon and Co. (India) Private Ltd., .

10. It might be noted that simply because the contesting defendants raised the dispute with regard to the plaintiffs having committed breach of not paying balance amount of freight, it cannot be said that the nature of the suit or the substance of the suit would get altered or changed. The dispute sought to be raised by the contesting defendants might be under the contract represented by the fixture note in question.

However, when the plaintiffs contended about the seaworthiness of the vessel in question, resulting in vessel having not undertaken its journey at all on account of its unseaworthiness, the claim of return of amount of freight paid by the plaintiffs, as well as the claim of damages would obviously be the result of suppression of the facts with regard to the unseaworthiness of the vessel in question. That being the nature and substance of the suit, the disputes arising in that respect would hardly have been referred to the arbitration as per clause of fixture note reproduced hereinafter.

11. The result is that this appeal deserves to be allowed. The order impugned in this Appeal From Order is hereby set aside. Special Civil Suit No.

64 of 1982 pending before the Trial Court shall proceed further in accordance with law.

(Rest of the Judgment is not material for the Reports).

12. Appeal allowed.