

(1959) 11 RAJ CK 0008
In the Rajasthan High Court
Case No : First Appeal No. 15 of 1956

Joharimal and Others

APPELLANT

Vs

Fatehchand and Others

RESPONDENT

Date of Decision : 21-11-1959

Acts Referred:

Arbitration Act, 1940 — Section 34

Citation : AIR 1960 Raj 67 : (1960) RLW 84

Hon'ble Judges : Sarjoo Prosad, C.J; L.N. Chhangani, J

Bench : Division Bench

Advocate : Chandmal, for the Appellant;

Final Decision : Dismissed

Judgement

Chhangani, J.—This is a defendant's appeal u/s 39(1)(v) of the Indian Arbitration Act (Act No. X of 1940) (hereinafter referred to as the Act), against the order dated 9-3-1956 of the Senior Civil judge Chum, rejecting the application of the defendants u/s 34 of the Act.

2. The plaintiff Fatehchand son of Champalal of Churu instituted a suit in the court of the Civil Judge, Chum on 1-3-1955 against defendant Joharimal and 10 others for recovery of Rs. 32,500/-: Rs. 27,780/11/6 as principal and Rs. 4,719/4/6 as interest. Chainrup and Sohanlal were impleaded as pro forma defendants Nos. 12 and 13. It is not necessary to set out the case of the plaintiff for the disposal of this appeal. The suit was registered on 2-3-1955 and 26-3-1955 was fixed for the settlement of issues. On this date, Shri Vishambhar Dayal and Shri Manoharlal, Advocates presented their Vakalatnama on behalf of Joharimal., defendant No. 1 and appeared for him.

The other defendants could not be served and, therefore, the case was adjourned to 17-5-1955, The plaintiff of course On this date applied for making some clerical amendments in the plaint which were opposed by the defendant Joharimal's counsel, but the objection was overruled and the amendments were

permitted. On 17-5-1955, the Presiding Officer of the court was on leave and nothing substantial happened. The case was adjourned to 20-7-1955. In the meanwhile, on 27-6-1955, Shri Vishambhar Dayal, counsel for the defendant put in an application in the court for orders directing the plaintiff to arrange for inspection by the defendant of the account-books on which the suit was based as also of the original agreement referred to in paragraphs 4 and 5 of the plaint.

It was mentioned that the original agreement had not been produced alone: with the plaint. This application was heard in the presence of Shri Keshav Prasad Gupta, counsel for the plaintiff on the same day and it was ordered that the documents might be inspected on 5-7-1955. However, the inspection of the documents on 5-7-1955 could not be given by the plaintiff and therefore, on 7-7-1955 directions for arranging inspection on 20-7-1955 were issued by the court. On 20-7-1955 Shri Manoharlal stating that he would file Vakalatnama on behalf of the defendant No. 1 requested for an adjournment for filing written statement and Vakalatnama.

It may be pointed out here that Vakalatnama on behalf of Joharimal having already been filed, the inclusion of his name in connection with a promise to file Vakalatnama is evidently an error due to inadvertence. The plaintiff produced account-books and further three more documents and the defendant was directed to inspect them. The case was adjourned to 15-9-1955. In the meanwhile, an application was put in by Shri Vishambhar Dayal on behalf of Joharimal on 25-7-1955 in which it was stated that the inspection of account-books was being carried on and that the inspection revealed a number of irregularities in the maintenance of the books. It was, therefore, prayed that the account-books should be secured and kept in the custody of the court.

3. Later on, however, on 12-8-1955, an application u/s 34 of the Act was presented requesting the court to stay the proceedings in view of an alleged agreement between the parties to get their dispute settled by arbitration. On 16-9-1955, the Presiding Officer of the court was again on leave and Shri Manoharlal again sought an adjournment to file Vakalatnama and written statement on behalf of defendants Nos. 2 to 11 and the case was fixed for 18-11-1955. On the last mentioned date, Shri Manoharlal presented Vakalatnama and again requested for time to file written statement. It was represented that some of the defendants have been residing in Pakistan and it, therefore, became necessary to request for an adjournment and the case was fixed for 27-1-1956 for filing written statement.

It was also mentioned in the proceedings that the plaintiff should submit his reply to the defendants' application dated 12-8-1955 filed u/s 34 of the Act. On 27-1-1956 Shri Manoharlal, Advocate, again presented a written application requesting for time to file written statement. In this application, it was stated that Hansraj defendant who is acquainted with the matter arising out of the suit was at Kishanganj (Behar) and on account of Satyagarh there, he could not go to Churu. The other defendants were in Pakistan and they also could not go to

Churu.

In support of this, a telegram received from Shri Hansraj was also placed on record. On this application, the case was adjourned to 8-3-1956 for filing written statement and arguments on the application dated 12-8-1955. On 8-3-1956, the plaintiff put in a detailed reply mentioning the various steps taken by the defendant in the proceedings and opposed the application for stay, and the same was dismissed on 9-3-1956. Hence, this appeal by the defendants.

4. It appears that the trial court treated this application as one on behalf of Joharimal alone, and the case with regard to the other defendants in this connection does not appear to have been considered. As nobody appeared on behalf of the plaintiff-respondent, we heard Shri Chandmal, advocate for the defendant-appellants only.

5. In challenging the decision of the lower court, Shri Chandmal has raised the following contentions:

1. An application for time to file written statement or any other similar step should not be treated as a matter of law "a step in the proceeding" in terms of Section 34 of the Act. In order that the presentation of an application may be such a step, the application must be of such a nature as to lead the court to the conclusion that the party prefers to have his rights and liabilities determined by the court rather than by the domestic forum upon which the parties might have agreed. It must display an unequivocal intention to proceed with the suit and to abandon the right to have the matter disposed of by arbitration.

As nobody was representing the plaintiff-respondent, Shri Chandmal placed a number of authorities irrespective of the consideration whether they supported his contention or not.

On the view propounded by him, Shri Chandmal argued that the various applications presented on behalf of the defendant Joharimal having been made in ignorance of his rights under the arbitration clause, they could not be taken to have unequivocally expressed their intention to elect against the arbitration clause so as to bar the hearing of the application for stay of proceedings.

2. In the alternative, he contended that the other defendants adopted the application of Joharimal u/s 34 and that at that time, when the application was filed, the other defendants had not taken any step whatsoever. It was, therefore, submitted that the application was a good application so far as other defendants were concerned and the trial court seriously erred in rejecting the application in these circumstances.

6. At the outset, we may notice the decision of this Court in *Chitra Prakash Film Exchange Ltd. v. Motilal ILR (1953) Kai 1021*. It was observed in that case that practically all the High Courts are unanimous that an application by the defendant for adjournment for the purpose of filing a written statement itself amounts to taking step in the proceedings. *Roop Kishore Vs. United Provinces*

Government, was cited with approval, which contained the observation that in some cases, such an application may not be a step in the proceedings. The learned Judges also referred to the case of *Premnath v. Amba Prasad* AIR 1941 Lah 64, where an application for adjournment was not treated as a step in the proceedings. On the ground that the defendant had not received a copy of the plaint along with the summons and pointed as one instance contemplated in *Roop Kishore Vs. United Provinces Government*, *Shri Chandmal* does not dispute the correctness of this decision.

He, however, contends that the precise question raised by him regarding the necessity of determining the step in proceedings by a reference to the tests indicated above was not specifically discussed and determined in this case. He points out that the Court having held that some applications for adjournment for filing written statements may not amount to requisite steps in terms of Section 34 of the Act, the decision does not debar the consideration and adjudication of his contention-based upon the test indicated above.

7. The point is of importance and in view of the expanding commercial activities and the increasing practice in the commercial world of entering into agreements for reference of disputes to arbitration and of incorporating arbitration clauses in general agreements, we examined a number of English and Indian cases including those cited by *Shri Chandmal* to find out a workable, if not a theoretically, perfect and scientific definition of the expression, "step in proceedings" occurring in Section 34 of the Act and for finding out the ratio for determining it.

8. It may be mentioned at this stage that Section 4 of the English Arbitration Act of 1889 corresponds with Section 34 of the Act and, therefore, cases under the English law can be usefully considered in interpreting Section 34 of the Act. The leading English case is *Ives and Barker v. Willans* 1896 Ch 478. The facts of this case were that the plaintiffs issued a writ against the defendant; the defendant entered an appearance to the praecipe, and by a formal document, he required a statement of claim. That was contemporaneous with the entry of the appearance. Then, he wrote a letter to the plaintiffs' solicitors, saying that he should desire a statement of claim. It was argued in that case that requiring a statement of claim amounted to taking a step in the proceedings. Repelling this argument, the learned Law Lord. Lord Lindley observed as follows:

"That he knew what the contract was I do not doubt but he did not know from the writ what the particular breaches were in respect of which the plaintiffs were suing him, and, until he did not know that, at all events, how was he to form an opinion as to whether it would be desirable to apply for an order or not? He had not the materials before him in the matter and, it appears to me, therefore, that we should be doing an, injustice to a defendant if we said that he must apply under the section for an order to refer before he knows what the plaintiff is suing him for. Quite apart from the case not being within the words, therefore, it is not within the spirit or the sense of the Act."

The learned Law Lord then defined the step in the proceedings in the following terms :

"The authorities show that a step in the proceedings means something in the nature of an application to the court, and not mere the 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."

The decision in the case is indeed unchallengeable and has never been challenged. But the general observations made in the case are, however, capable of varying interpretations and contained the seed for subsequent controversies. In fact, on their basis, submissions were made to interpret Section 4 as Incorporating the principle of election.

9. In a later case. *Ford's Hotel Co. Ltd. v. Barlett* 1896 AC 1, Lord Halsbury L. C., held in very general terms that taking out a summons for time to deliver defence amounts to a step in the proceedings. The other Law Lords agreed with him. Lord Shand while agreeing with the decision of Lord Halsbury, made further observations to the following effect:

"The proceeding of presenting such a summons and supporting it before the matter was unquestionably judicial and implied a statement to the effect that the appellants were to defend their action. Having regard to the provisions of the Arbitration statute, this appears to me to have been in effect an abandonment of the proposal to have the subject of the cause disposed of by arbitration."

10. In a later case, *Parker Gaines and Co Ltd. v. Turpin* 1918 1 KB 358 1894 2 Ch. 478 was cited to show that the spirit and sense of Section 4 of the Arbitration Act, 1899 is the principle of election and to support a contention that until a party has before him information enabling him to elect between trial before a court of law and trial before an arbitrator, he cannot be said to take a step. The contention was repelled with the following observations of Lawrence J. :

"He has cited 1894 2 Ch 478 in support of the contention. In my view, that case does not help him. There what was unknown was the Subject-matter of the action and. therefore, the defendant could not know whether a Court of law or an arbitrator was the more suitable tribunal. The Court of Appeal held that a mere request for a statement of claim was not a step in the proceedings. That is easily intelligible."

11. A review of English cases shows that, though the principles for determining a step in proceedings may have been stated in wider and liberal terms, yet cases have been objectively examined and an application for time to deliver pleadings has been generally taken as a step in proceedings.

12. Reviewing the Indian cases, we find that there is a large number of cases where the test formulated with reference to abandonment of right to get the matter decided by arbitration has either been rejected or not discussed, and

applications for time to file written statements have been taken as steps in proceedings. For a typical case, we may refer to the case of *Sarat Kumar Roy v. Corporation of Calcutta* ILR 34 Cal 443.

13. In that case, the defendant took out a summons for an order that they might have further time to file a written statement and on the same day, a letter was sent to the plaintiffs' attorney that an application will be made to the court for an order for reference to arbitration. It was argued before Woodroffe J. that the step, if any, having been accompanied by an expression by the defendant of his intention to enforce the rights to have the matter disposed of by arbitration, it was not a step u/s 19 of the old Arbitration Act. This contention was overruled. The following observations in this judgment are worth quoting:

"The issue, however, is not whether upon the facts the proper inference to be drawn is that there was no abandonment of the election to arbitrate. What I have got to see is whether this matter comes within the terms of Section 19. If effect were given to the contention of the learned counsel for the defendant, the Court might be led into enquiries of a complex and lengthy character for the purpose of ascertaining whether the party had elected to arbitrate and, if so, whether he had abandoned such election.... I do not think that this was the intention of the Legislature."

14. For other cases of this type, we may mention *Fleming Shaw and Co. v. Haji Yusif Ellias* AIR 1917 Sind 12, *The Karnani Industrial Bank Ltd. Vs. Satya Niranjan Shaw and Others*, *Murlimal Santram v. Banarsidas and Sons* AIR 1935 Sind 62, *United Provinces Government Vs. Sri Har Nath, Union of India (UOI) Vs. Girish Chandra and Others*, and *Abdul Quddoos Dost Mohammad Momin v. Abdul Gani Abdul Rahman*, AIR 1954 Nag 332.

15. There are, however, some cases which recognize some test for determining a step in the proceedings. In *Subal Chandra Bhur Vs. Md. Ibrahim and Another*, S. R. Das J. as he was then, after reviewing English and Indian authorities, concluded that in order to constitute a step, in the proceedings, the act in question must be: (a) an application made to the Court either on summons as in (1896) A. C. 1 or ILR 34 Cal 443 or orally as in 28 Cal WN 771: *The Karnani Industrial Bank Ltd. Vs. Satya Niranjan Shaw and Others*, or some thing in the nature of an application to the Court, e. g., attending on summons for directions, and, (b) such an act as would indicate that the party is acquiescing in the method adopted by the other side of having the disputes decided by the Court.

16. Applying the above test and in this connection dealing with the affidavit in opposition to the application for the appointment of receiver and for leave to inspect documents, the learned Judge observed that they cannot refer to any intention to go to arbitration or to any objection to the filing of the suit, but only indicates that the petitioner was anxious to oppose that application, although that had been made in the suit and there was no objection that the plaintiff had filed a suit instead of going to arbitration. The learned Judge further observed

that the fact that he was unaware of the arbitration agreement does not make his act any the less a step in the proceedings if in fact and in law it was a step.

17. In *Nuruddin Abdulhusein Vs. Abu Ahmed Abdul Jalli, Tendolkar J.* after discussing authorities, adopted a test to the effect, whether the act displays an unequivocal intention to proceed with the suit and to have the suit disposed of by arbitration. At a later stage, the learned Judge observed that a consent praecipe for extension of time to put in a written statement undoubtedly indicates a desire to contest the suit on the merits, and to my mind obviously displays an unequivocal intention to abandon the right to have the matter disposed of by arbitration.

These two authorities, therefore, though supporting the advocate for the appellant to some extent, in his contention for necessity of applying some test, cannot help him in dealing with a case of an application for time to file a written statement, as an application for adjournment will generally be a step on "consideration of the manner in which the test has been "applied.

18. Lastly, we may refer to a few cases which have not only recognized the test but have further engrafted certain exceptions to the rule that an application for time to file written statement is a step in the proceedings. AIR 1941 Lah 64 points out one exception that an application for time to file written statement will not be a step, if the defendant had not received a copy of the plaint before applying for extension. Support for such an exception can also be derived from the observations in a Division Bench judgment of the Allahabad High Court in *Union of India (UOI) Vs. Hans Raj Gupta and Co.,*

The learned Judges no doubt observed that the test fixed by the Legislature is an objective one and not a subjective one and that if a step has been taken, then even ignorance of arbitration clause or participation in proceedings under protest would not be of any avail, but the learned Judges all the same observed that, all that is necessary is that a party against whom the bar against stay is set up should have been apprised of the contents of the plaint so as to have knowledge of the facts that might attract the arbitration clause or bring it into play.

19. Another exception to the rule has been recognized in *Punjab State v. Moji Ram, (S) AIR 1957 Punj 223.* The learned Judges after discussing the cases pointed out whether a particular application to a Court amounts to a step in the proceedings depends on circumstances of each case and no particular test can be laid down to determine it and applying the test, It was held that when time to file written statement is requested by a counsel, who had no authority from the defendant, cannot be considered a step in the proceedings.

20. Yet the third exception has been recognized in *State of Himachal Pradesh v. Lalchand Shahi, AIR 1953 Him-Pra 75,* where a counsel without being fully instructed sought time for adjournment and it was held that this did not amount to a step in the proceedings.

21. The above review of the Indian cases shows that recently, there has been a tendency to interpret Section 34 in favour of the defendants and the rigour of the rule has been softened by the recognition of the three exceptions noted above.

22. Approaching the matter on principle, it must be realised that an agreement to have the matter decided by arbitration creates a right in favour of the parties and due respect for that right implies that it should be recognized until it is abandoned on account of express abandonment or waiver or acquiescence, of course, the test for determining abandonment or waiver being an objective one.

23. On principle and judicial authority, we consider that the following propositions may be easily deduced:

(1) An application for time to file written statement or any other similar application should not be treated as a matter of law a step in the proceedings. In order to constitute a "step", it must be of such a nature as to lead the Court to the conclusion that the party prefers to have his rights and liabilities determined by the Civil Court rather than by the domestic forum upon which the parties might have agreed. It must display an unequivocal intention to proceed with the suit and to abandon the right to have the matter disposed of by arbitration.

(2) The test, however, should not be subjective and a party cannot be entitled to say that he had no actual knowledge of the right under the arbitration agreement and that in fact he did not intend to give up his right. On the other hand, the test must be objective and a person shall be deemed to have taken a step u/s 34 of the Act, if it can be held that he could have actual or constructive knowledge of his right in the event of exercising due diligence and that in spite of that he participated in the proceedings of the Court.

(3) Prima facie, an application for time to file written statement should raise a presumption that the defendant had actual or constructive knowledge of his right and that he acquiesced in the method adopted by the plaintiff. The presumption, however, is not absolutely irrefutable and can be rebutted by showing that even constructive knowledge cannot be imputed to the defendant. It is, however, not proper and fair to lay down that the presumption can be rebutted only on the ground that the defendants did not receive the copy of the plaint. In rare and exceptional cases, St may be rebutted by other circumstances, such as appearance of a Government counsel without getting instructions in a particular case to appear. It is not desirable to enumerate the exhaustive list of the circumstances and to make generalization and each case should be considered on its own facts and circumstances.

24. Let us judge, in the light of the above principles, the instant case.

25. The court below has referred to the following two steps having been taken by Joharimal:

(a) Request for adjournment of time on 20-7-1955 by Shri Manoharlal, and

(b) An application dated 27-6-55 for permission to arrange inspection of certain documents.

Mr. Chandmal pointed out to us the evident error in the order dated 20-7-1955 and wanted us to hold that request for adjournment should not be treated to have been made on behalf of Joharimal. In our opinion, this interpretation of the proceedings of 20-7-1955 cannot be accepted, and we have no hesitation in holding that there was a request on his behalf also for an adjournment.

The defendant had received the copy of the plaint. His attention had already been drawn to the agreement containing the arbitration clause and in spite of that, there was prayer for adjournment of time for filing written statement. Assuming that this particular step may be satisfactorily explained, still there are some more steps which though not referred to in the order of the trial court have come to our notice. The application dated 25-7-1955 of Shri Vishambhar Dayal on behalf of Joharimal stating that certain documents have been inspected and requesting the Court to secure them and keep them under custody, leaves no doubt that on an objective application of the test, the defendant must be deemed to have given up his right. Similarly, a request for time by an application dated 27-1-1956, though made after the application for stay, did not indicate any desire to reserve the right. Indeed, the steps taken by Joharimal are too many and certainly fall within the terms of "step" u/s 34 of the Act. The contention of Mr. Chandmal with regard to Joharimal cannot be accepted.

26. Regarding the alternative contention on the basis of the adoption of the application, we may observe that the lower Court did not treat the application of Joharimal as having been, adopted by other defendants. There is nothing on record to indicate that the other defendants had adopted the application of Joharimal. On the other hand, after they joined the proceedings, there appears to be an unconditional request on their behalf for time to file written statement without any reference to the application dated 12-8-1955 filed by Joharimal vide the proceedings of this date. In the circumstances, we are unable to hold that the other defendants are free to avail of the provisions of Section 34 of the Act. In our opinion, the trial Judge was right in dismissing the application.

27. In the result, there is no force in this appeal. It is hereby dismissed accordingly. As the respondents made no appearance in spite of service, we pass no order as to costs.

Sarjoo Prosad, C.J.

28. I agree to the order proposed. 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, as my brother Chhangani has rightly pointed out, upon the facts and circumstances of each case. The salutary rule appears to be that where a party has consciously submitted to the 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. On the facts of this case so clearly set out in the judgment of my learned brother, I have no doubt that the defendants have lost the right to claim arbitration. The appeal, therefore, fails and has to be dismissed.

BY THE COURT : The appeal is hereby dismissed. No order as to costs.