
(1982) 02 KL CK 0015
In the High Court Of Kerala
Case No : C.M.A. No. 135 of 1981

K.P. Ramakrishnan

APPELLANT

Vs

New India Assurance Co. Ltd., Calicut

RESPONDENT

Date of Decision : 10-02-1982

Acts Referred:

Arbitration Act, 1940 — Section 34

Citation : AIR 1982 Ker 181 : (1985) 58 CompCas 753 : (1982) 1 ILR (Ker) 663

Hon'ble Judges : V. Khalid, J;G. Balagangadharan Nair, J

Bench : Division Bench

Advocate : T.L. Viswanatha Iyer, P.S. Narayan and S.R.D. Prabhu, for the Appellant; T.K.M. Unnithan, for the Respondent

Final Decision : Allowed

Judgement

Khalid, J.—This appeal is directed against the order of the 1st Additional Sub-Judge, Kozhikode in O. P. No. 21 of 1979 filed by the New India Assurance Co. Ltd., (the respondent here) against the appellant, requesting that O. S. 87 of 1979 filed by the appellant against the respondent claiming an amount of Rs. 2,65,000/- as damages be stayed. The appellant carries on business in coir yarn and coir mats. He used to stock these materials in his godowns at Calicut. On 4-5-1977 he insured the stock of coir materials with the respondent under a fire policy, the duration of which policy was to expire at 4 p. m. on 4-5-1978.

There was an accidental fire in the godown on 29-3-78. The appellant reported this matter to the respondent. On receiving this intimation the respondent instructed his surveyor to conduct a survey of the damages. The survey was conducted on 31-3-1978. The survey report was not given till 4-6-1979. The surveyor wanted inspection of additional records to file a report. The appellant made repeated demands on the respondent to settle the claim. The appellant filed his claim on 5-4-1978, and sent several communications to the respondent personally and through his lawyer on 9-10-1978, 27-10-1978. 4-12-1978 and 3-2-1978.

2. Since the claim was not settled nor the amount disputed notified the appellant had to file the suit since a claim against the respondent under the Policy would get barred on the expiry of 12 months from the date of the accident under the agreement. The respondent entered appearance in the suit and filed the Original Petition in question u/s 34 of the Arbitration Act containing a prayer to stay the proceedings in the suit. The said application was filed on the ground that the suit was filed without availing of the arbitration clause under which the parties had agreed to refer disputes arising between them to arbitration before taking other proceedings, for which reason Section 34 of the Arbitration Act was attracted,

3. The appellant's case before the Court below was that he had taken all steps to afford an opportunity to the respondent to notify the dispute, if any, about the amount of loss or damages claimed so as to enable him to seek a reference to an arbitrator under the relevant clause in the agreement. The attitude of the respondent was unhelpful. At no time before the institution of the suit did the respondent indicate the disputed amount. From the conduct of the respondent the appellant felt that the respondent was denying the entire liability. From the records that came into existence subsequent to the institution of the suit it was evident that the respondent was accusing the appellant of fraud and dishonesty and asserting that the accident was a bogus one. Clause 19 of the agreement requires the appellant to institute the suit before the expiry of 12 months from the date of the accident, Hence he had no alternative but to file the suit.

4. The learned counsel for the appellant has assailed the order of the court below with the plea that the conclusions arrived at were on an erroneous approach to the facts of the case, on a misappreciation of the principles of law involved and without proper care to look into the authorities which were referred by him in the order. He also contended that the court below had not properly construed the ambit of Clause 18 of the agreement, nor the nature of the dispute the said clause contemplates, nor the rigour imposed by Clause 19 limiting the time for initiating action. He took us through various authorities in reinforcement of the submissions that the court below had exercised its discretion erroneously and in violation of the settled principles of law governing the case.

5. Before considering the questions of law raised before us it would be useful to refer to the sequence of events that led to the institution of the suit, The agreement between the parties was dated 4-5-1977. The appellant has produced the original of the agreement along with the plaint. This agreement differs in some respects with the copy of the agreement produced by the respondent along with the petition. After scrutinising the two documents we have found that the true copy of the agreement entered into between the parties is the one produced by the appellant along with the plaint and therefore we would discuss the contentions put forward with reference to the clauses in this agreement. The accident took place on 29-3-1978. The respondent was notified about this immediately. The appellant filed the claim on 5-4-1978. He sent a letter on 7-4-1978 to the respondent followed by a letter on 24-7-1978 requesting for

early settlement of the claim. The respondent sent a reply on 26-7-1978 in which the appellant was asked for production of manufacturing records etc. to the surveyor. The appellant wrote again on 29-7-1978 in reply to the letter mentioned above, informing the respondent that all the details asked for had been forwarded to the surveyor. On 18-8-1978 the respondent wrote to the surveyor to expedite the survey report.

On 9-10-78 the appellant wrote to the respondent complaining delay in finalising the matter followed by another letter on 27-10-78 demanding immediate settlement. On 2-11-1978 the respondent replied to the appellant's Advocate informing him that the delay in issuing survey report was due to the delay in submitting the necessary details and that their liability under the policy was strictly subject to the terms and conditions contained therein, with emphasis on Clause 18. This was followed by another letter dated 4-12-1978 by the appellant's counsel informing the respondent that the entire delay was attributable to the inaction of the surveyors, that Clause 18 had no relevance in the context of the case and if it had any relevance it was up to the respondent to take appropriate steps in connection therewith. This was followed again by a lawyer's notice to the respondent on 3-2-1979 calling upon the respondent to settle the claim immediately. Nothing happened and the suit was filed on 26-3-1979.

6. Now we will read Clause 18:--

"18. If any difference arises as to the amount of any loss or damage such difference shall independently of all other questions be referred to the decision of Arbitrator. And it is hereby expressly stipulated and declared that it shall be a condition precedent to any right of action or suit upon this policy that the award by such Arbitrator, Arbitrators or Umpire of the amount of the loss or damage if disputed shall be first obtained."

A close reading of this clause brings out the following essentials to justify request for reference. A reference is contemplated only when a difference arises as to the amount of any loss or damage. Therefore, a request for reference will not be justified when the liability for the damages is denied or when the difference relates to matters other than the amount of loss or damages. In this case the respondents had not at any time before the institution of the suit informed the appellant about a difference about the amount claimed. All that the appellant was told by the respondent was that the surveyors had not submitted their report. From the subsequent conduct as is seen in the petition, the respondent has denied the liability and accused the appellant of having put forward a dishonest and fraudulent claim. It cannot therefore be said that in this case Clause 18 is attracted. The obtaining of an award as a condition precedent to the institution of the suit is only when there is dispute about the amount claimed.

The respondents will be justified in contending that the institution of the suit was premature only if they satisfy that they had alerted the appellant in time about a

difference as to the amount of loss or damage. We have gone through the correspondence that passed between the parties and which we have referred to earlier. In none of the letters sent by the respondents have they stated about the difference as to the amount of the loss or damage claimed. Therefore the last portion of Clause 18 will not come into operation.

7. That takes us to Section 34 of the Arbitration Act which reads :---

"34. Where any party to an arbitration agreement or any person claiming under him commences any legal proceedings against any other party to the agreement or 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." For invoking this Section, the following conditions are necessary. A party to an arbitration agreement or any person claiming under him should commence legal proceedings against any other party to the agreement in respect of any matter agreed to be referred. If this happens the party aggrieved can at any time before the filing of the written statement or taking any other legal steps apply to the court before which the proceedings are pending to stay them. When such an application is made, the authority or court before which the legal proceedings are taken, can in its discretion order stay of the proceedings on being satisfied that no sufficient reasons were made out why the matter agreed should not be referred in accordance with the arbitration agreement and that the applicant was, when the proceedings were commenced, ready and willing to subject himself to arbitration. In this case the appellant and the respondent were parties to an agreement which contained a clause for reference to arbitration. The appellant, a party to the agreement, had instituted the suit. To attract Section 34 the suit should be in respect of a matter agreed to be referred. The suit is for recovery of Rs. 2,65,100/- the insured amount due, compensation for delay in settlement and notice charge. It does not relate to a difference that had arisen between the parties as to the amount of loss or damage claimed, for no such difference existed. The respondent's counsel have not succeeded in satisfying us either that Clause 18 of the agreement is attracted or that the conditions laid down in Section 34 have been satisfied.

8. In reinforcement of our conclusion, we might usefully refer to the averments in the Original Petition filed u/s 34 of the Arbitration Act in paragraph 6 it is stated that the appellant did not give any cause for the fire, "that it was really impossible for fire to break out in a godown of the nature where the insured articles were stocked without sufficient visible reason," that a inatched kucha hut

came into existence in the prohibited proximity of the godown after the policy was issued (Para 7). and that "without obtaining the report of the surveyors and ascertaining the nature and quantum of damages and also the reason for the fire it was not possible for the petitioner to take any steps as contemplated under Clause 18" (para 11). Even at this stage, the respondent could not make out any ground to attract Clause 18.

9. With these facts it is now necessary to refer to the authorities cited before us. In *Anderson Wright Ltd. Vs. Moran and Company*, the Supreme Court has outlined the scope of Section 34 thus in para. 10.

"The question whether the dispute in the suit falls within the arbitration clause really pre-supposes that there is such agreement and involves consideration of two matters, viz., (1) what is the dispute in the suit and (2) what disputes the arbitration clause covers? vide *Per Viscount Simon in Heyman v. Darwins Ltd.* (1942) AC 356." We have already seen that the dispute in the suit is not the same as the dispute that the arbitration clause covers,

10. The powers of the appellate court in interfering with the discretion exercised by the original court u/s 34 are outlined by the Supreme Court in *The Printers (Mysore) Private Ltd. Vs. Pothan Joseph,)*. In para 7 the Supreme Court has said that the power to stay legal proceedings is discretionary and so a party to an arbitration agreement cannot claim it as a matter of right; that it is inexpedient to lay down any inflexible rules which should govern the exercise of the discretion u/s 34 and that each case should depend upon its facts. The Supreme Court has cautioned against a liberal interference with the exercise of the discretion exercised by the trial court in paragraph 9. If the appellate court is satisfied that the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court exercising discretion.

11. Now let us examine whether the court below had exercised its discretion properly in this case. The depute that the parties agreed to be arbitrated under Clause 18 was a difference "as to the amount of loss or damage". From the correspondence between the parties and from the averments in the Original petition, we do not find that the respondents had at any time notified to the appellant a difference in the amount claimed by the appellant. What we find is a denial of total liability and a veiled accusation of fraud, dishonesty and negligence on the part of the appellant. Was the respondent under these circumstances justified in invoking Section 34 of the Arbitration Act is the question that falls for decision at our hands,

12. The earliest case to which we were referee to by the learned counsel for the appellant is the one reported in *London and North Western and Great Western Joint Railway Companies v. J. H. Billington Limited* 1899 AC 79 at p. 81. In this case the House of Lords was considering the effect of a clause in a Railways Act which read that

"Any difference arising under this section shall be determined by an arbitrator to be appointed by the Board of Trade at the instance of either party."

Section 5 of the Railways Act empowered the Railway Company to charge a reasonable sum by way of addition to the tonnage rate for services rendered to a trader. It was the difference that arises under this Section that was allowed to be determined by the arbitrator. In 1895 the General Manager of the Railway Company informed the traders that four days would be allowed free of charge to enable them to release each wagon and that siding rents would be charged at the rate of 8 pence per day for every wagon not so released and remaining on the Company's premises. The Company brought an action against one of the traders. The defence was that the court had no jurisdiction because of the arbitration clause. The county court judge dismissed the action since he had no jurisdiction because of the arbitration clause. The Railway Company appealed and the decision was reversed. The defendant appealed to the court of appeal. There was another action brought by the Railway Company under similar circumstances which also reached the court of appeal. The court of appeal disposed of both the appeals and upheld the defence that since a difference had arisen between the parties the jurisdiction of the court was completely ousted. The matter reached the House of Lords on further appeal, in one of the cases in which alone the trader had not raised a dispute as to the reasonableness of the charges claimed. In the other case the Railway Company did not challenge the decision of the court of appeal since in that the trader had raised a dispute as to the reasonableness of the charge, to attract the arbitration clause. Lord Halsbury L. C. in his speech held that since the learned county court judge had entered a finding of fact no difference as to the reasonableness of the charges had been raised in the case and which finding of fact was binding, the appeal had to be allowed. In so doing he observed as follows :

"The question which has been argued apparently before the Court of Appeal is a question no doubt of very great and serious importance both to the traders and to the railway companies; but. My Lords, so far as I am concerned, I propose to give no opinion upon the true construction of the statute, except this; that a condition precedent to the invocation of the arbitrator on whatever grounds is that a difference between the parties should have arisen; and I think that must mean a difference of opinion before the action is launched either by formal plaint in the county court or by writ in the superior Courts. Any contention that the parties could, when they are sued for the price of the services, raise then for the first time the question whether or not the charges were reasonable and that therefore they have a right to go to an arbitrator, seems to me to be absolutely untenable,"

Lord Ludlow in his speech, while concurring with the Lord Chancellor, emphasised as to the time at which the difference contemplated in the Section should have arisen, in the following passage :

"There is, however, one matter about which I do desire to say a word, and that is

this -- because I entirely concur with my noble and learned friend on the Woolsack -- that this difference is a difference which ought to have arisen before action brought, and that it is too late afterwards to raise a difference which can be brought within the meaning of this section. It is sufficient for the purpose of this case to say that it is concluded by the finding of the county court judge. As I understand that finding (and it is final), it is that there was no difference existing between the parties at the time the action was brought. I think this appeal should be allowed." This decision highlights (1) that the ouster of jurisdiction for the court comes into existence only when a difference arises (2) this difference ought to have arisen before action is brought and cannot be one raised after the action is brought.

13. The effect of this decision fell to be considered by the Bombay High Court in *Dawoodbhai Abdulkader Vs. Abdulkader Ismailji*,). In a chamber summons taken by the defendant for an order that all proceedings in the suit may be stayed in order to enable the parties to refer the matter to an arbitrator, Wadia J. was considering the scope of the agreement between the parties which provided that "any dispute or difference arising between the partners in regard to the construction of any of the articles contained in the agreement or to any division, act or things relating to the said partnerships or the affairs thereof shall be referred to arbitration". Noticing the principle laid down by the House of Lords, it was held that there must be a point of difference or dispute between the parties for the decision of the arbitrator. A mere failure to pay is not necessarily a difference nor the fact that a party could not or would not pay does not in itself amount to a dispute unless the party who chooses not to pay raises a point of controversy regarding the basis of payment or the time or manner of payment. A Division Bench of the Calcutta High Court in *Ladha Singh v. Joyti prosad* AIR 1940 Cal 1051 also had occasion to consider a similar question. The indenture of lease in that case contained an arbitration clause which provided as follows :

"If any question, difference or dispute shall arise between the parties here to or any person, persons or corporation claiming under them respectively concerning the rents and royalties hereby reserved or the measurements of any coal got or left in the demised mines or touching the construction of any clause herein contained or the rights, duties or liabilities of the parties hereunder or in any other way touching or arising out of these presents, the same shall be referred to the determination of two arbitrators one to be appointed by each party....."

After discussing the facts of the case the Bench (Mitter J.) held that :

"On the facts we hold that there is nothing on the records of this case to show that there was any difference between them before the suit was instituted, and when the matter was pending in the lower court there was no indication on what points the parties were at difference at any stage."

(Para 107)

The Division Bench considered the decision reported in (1899) AC 79 and

observed as follows after quoting from the speech of Lord Halsbury L. C.

"the noble Lord then drew an analogy from an arbitration out of Court. He said that before the arbitrator could enter upon the reference, it must be shown that a difference had arisen between the parties before the submission and that the arbitrator would have jurisdiction only to adjudicate upon the particular difference which had arisen before the submission. If fresh differences arise after the arbitrator had entered upon the reference, he, the arbitrator, cannot adjudicate upon them without a fresh submission. Lord Ludlow made the following observation :

"One matter on which I desire to say a word is this, that this difference is a difference which ought to have arisen before action brought and that it is too late afterwards to raise a difference which can be brought within the meaning of the Section."

The action commenced before the County Court Judge was held to be maintainable by the House of Lords. The principle so formulated has applied in India where the application is for stay of the action either under para 18 of Schedule 2, Civil P. C., or u/s 19, Arbitration Act) 83 Bom LR 51....."

(Para 108)

A slightly discordant note was struck by Roulatt J. in L. & N. W. Ry. v. Jones (1915) 2 KB 35 to this effect namely, if there is a difference, there is necessity for arbitration; and it matters little whether the difference had arisen before or after the suit had been filed. This observation was noticed by Mitter J. who declined to rely on it holding that it was obiter and reliance on it would in effect deprive the ordinary civil court of its judicial functions. Latifur Rahman J. in a concurring judgment observed :

"It appears to be clear that what the parties really intended was that their disputes and difference should be decided by persons of their own choice who should proceed in accordance with any statutory provision relating to arbitration including arbitration under Schedule 2, Civil P. C..... So far as can be gathered none did arise until after the filing of the suit. In terms of the lease the defendant was liable to pay certain royalty. He failed to do so and the plaintiff instituted a suit for the recovery thereof. It cannot be contended that this amounted to dispute and difference. It was after the institution of the suit that the defendant filed an application purporting to be u/s 19, Arbitration Act, for the stay of proceedings, which of course has no application."

The learned Judge held that in so far as no dispute had arisen before the institution of the suit, the application for stay was not in order and the allegation of fraud etc, did not indicate a difference as contemplated in the agreement in that case. We are in respectful agreement with the principle laid down by the House of Lords in the Billington case 1899AC 79 and approved by the Division Bench in the Calcutta case.

14. S. R. Das, J. (as he then was) had occasion to consider the identical question in Governor-General in Council Vs. Associated Live-stock Farm (India) Ltd.,), The learned Judge considered the scope of Section 34 of the Arb. Act and the contractual stipulations between the parties in that case and held, virtually disagreeing with the Division Bench in Latha Singh Bedi Vs. Raja Sree Sree Jyoti Prosad Singha Deo Bahadur, that refusal of stay in cases where & dispute had arisen after the institution of the suit will not always be in order. The learned Judge referred to (1899) AC 79 and observed that in that case the House of Lords was concerned with the wider question of the maintainability of the suit in the county court and the narrow question about the application for stay arose in that case incidentally. It was further observed that the decision in that case was based entirely on the findings of fact by the county court. The learned Judge was of the view that the observations of Rowlatt J. in (1915) 2 K. B. 35 were not obiter. This is how the learned Judge understood the Division Bench ruling of the Calcutta High Court :

"21. Mitter J. applied the decision in (1899) AC 79 which was a case governed by a special statute to a case under the Indian Arbitration Act. The special statute took away the jurisdiction of the court completely in respect of certain disputes and left no discretion to the Court. A private arbitration agreement does not oust the jurisdiction of the Court in the same sense but the Arbitration Act gives a discretion to the Court to exercise jurisdiction or not to do so. The position appears to be fundamentally different.....If, however, this principle is at all applicable to a case of private arbitration agreement under the Arbitration Act, I do not see why the Court should not apply the whole of that principle as explained by me, namely, stay the action when there are disputes within the meaning of the arbitration agreement and where the party applying for stay is not precluded from raising it even if he did not raise it before action and refuse a stay only when there is no dispute or when a party by reason of agreement express or implied is precluded from raising it, As I have said a mere omission to raise dispute before action from which an agreement cannot be inferred is no ground for precluding a party from raising it and is no justification for the Court assuming jurisdiction to decide questions in respect of which its jurisdiction is ousted by statute. Likewise a mere omission to raise disputes before action, without more, ought not by itself to be any ground for refusing a stay under the Arbitration Act." and also held thus regarding the scope of application for stay :

"22. In my judgment the contention that in order to succeed in an application for stay u/s 34, Arbitration Act, 1940, the applicant must show that disputes arose before suit and that he must fail otherwise is, in principle, quite untenable and unsound and may, in practice, encourage a plaintiff to rush to Court without giving an opportunity to the defendant to raise the disputes before suit and deprive the defendant of the valuable right of arbitration and thereby cause great hardship and inconvenience to the defendant which cannot be compensated by awarding costs."

With almost respect we are constrained to disagree with the principle of law so widely put by the learned Judge and we maintain our agreement with the Division Bench in *Ladha Singh Bedi Vs. Raja Sree Sree Jyoti Prosad Singha Deo Bahadur*, on the high authority of the House of Lords. We do not see a distinction between a statutory ouster and a contractual ouster of the jurisdiction of ordinary court. If, for the statutory ouster to be effective, the dispute should have arisen before the action, more so should it be for the contractual ouster, for, in the former the parties have no voice while in the latter they are *ad idem*. The only care to be taken is to see that the party has not rushed to court with a pre-emptive action. However, we do not feel called upon to decide in this case the question whether an application for stay should necessarily fail in all cases where a dispute in terms of the agreement between the parties arises after the institution of the suit, even when the court feels satisfied that the plaintiff had rushed to court without giving the other side an opportunity to raise a difference; and we feel this question will have to be examined in an appropriate case. In the case on hand, as already shown, a difference as contemplated in Clause 18 did not arise even after the institution of the suit. To sum up, we hold that no dispute had arisen as contemplated in Clause 18 to invoke the arbitration clause contained therein.

15. What then remains is the question whether the discretion exercised by the court below in ordering stay was proper. The court below noticed Clause 18 of the policy and held "that the suit is instituted when limitation is about to expire", but still made the following observation in support of his conclusion that the suit is liable to be stayed :

"A claim in a fire insurance policy identical to Clause 19 of the present policy has been considered in the decision reported in *Kerala Electrical and Allied Engineering Co. Ltd. Vs. Canara Bank and Others*, and it has been held that the plaintiff is not limited as to the time within which he may bring a suit. The restriction is on the time during which the Company will accept liability for loss. "If that be so. the contention of the learned advocate for the petitioner has to be accepted and the suit is liable to be stayed."

16. We fail to appreciate the correctness of this observation and fail to understand how the court below sought support from *Kerala Electrical and Allied Engineering Co. Ltd. Vs. Canara Bank and Others*, to allow the application for stay. The question raised in that case was whether the stipulation in a contract that the right to be enforced under the contract would not continue beyond the shorter period agreed would offend Section 28 of the Contract Act. In that case a condition in a Bank guarantee that the rights thereunder accruing to a party would be forfeited or released if he did not sue within a time limit specified in the guarantee, was held not to offend Section 28. In other words, the time limit in the guarantee being shorter than the period of limitation under the Limitation Act was held to prevail and to bind the contracting parties. The observation of the learned Judge that "it has been held that the plaintiff is not limited as to the time

limit within which he may bring a suit" does not appear to follow from the principles stated by the Division Bench. What the Division Bench held was that the terms of the contract in that case indicated an "extinction of the right of the plaintiff under the contract and a discharge of the defendants from liability", and "so, a condition in a contract that the rights thereunder accruing to a party will be forfeited or released if he does not sue within a time limit specified there will not offend Section 28". This decision in fact supports the appellant before us in that it alerted him about the need to file the suit on the eve of the expiration of the 12 months period stipulated in Clause 19 to meet the possible defence that the light to sue had been extinguished if the suit had been filed beyond the agreed period. At this stage it will be useful to extract Clause 19 :

"19. In no case whatever shall the Company be liable for any loss or damage after the expiration of twelve months from the happening of the loss or damage unless claim is the subject of pending action or arbitration."

In view of this clause the appellant was perfectly justified in rushing to the court with the suit.

17. The learned Judge then repelled the contention of the appellant before us that no dispute of the amount of loss or damage has arisen before the institution of the suit in the following words :

"It is an admitted fact that the respondent has submitted the claim form on 5-4-1978 showing the market value of the goods destroyed. The petitioner has not accepted the quantum of damages as the market value of the goods destroyed according to the particulars furnished by the respondent. This circumstance would indicate that there is dispute arisen as to the amount of damages between the petitioner and the respondent warranting reference to the decision of an arbitrator....in view of the averment in paras 11 and 14 of the petition, respondent cannot set up a case that the petitioner was not ready and willing to do everything necessary for the proper conduct of the arbitration on the date of suit. There is no sufficient reason why the difference as to the amount of damages should not be referred to an arbitrator according to Clause 18 of the policy."

We have no hesitation to hold that the above observation is as a result of an incorrect reading of Clause 18, of the correspondence between the parties and the pleadings. The learned Judge should have realised that the denial of liability was different from a dispute about the difference in the amount claimed. The materials on record show that the respondent disclaimed the entire liability and accused the appellant of fraud and dishonesty. At no stage did the respondent inform the appellant about a dispute of the amount claimed. This is so even after the institution of the suit. To say that under these circumstances Clause 18 is attracted is to close one's eyes to the terms of the agreement. In our view the court below was not right in holding that the circumstances warranting a reference to arbitrator as contained in Clause 18 existed in the case prior to the

institution of the suit. As already indicated, the pleadings in the case far from showing a dispute about the amount contained a denial of honesty on the part of the appellant and an accusation of fraud and dishonesty on the part of the appellant. In such cases, an open trial in a suit has to be preferred to an arbitrator as is seen from the following observation of the Supreme Court in *The Printers (Mysore) Private Ltd. Vs. Pothan Joseph*, :

"On the other hand, if fraud or dishonesty is alleged against a party it may be open to the party whose character is impeached to claim that it should be given an opportunity to vindicate its character in an open trial before the court rather than before the domestic tribunal, and in a proper case the court may consider that fact as relevant for deciding whether stay should be granted or not." (p. 1159)

18. For the foregoing reasons we hold that the court below did not exercise the discretion vested in it u/s 34 of the Act properly. The dispute between the parties had necessarily therefore to be decided in the suit. In the result, we set aside the order passed by the court below and allow this appeal with costs.

The respondent's counsel makes an oral application for leave to appeal to the Supreme Court. We do not find any substantial question of law of general importance involved in this appeal, that needs to be decided by the Supreme Court, Leave refused.