
(1996) 08 KAR CK 0069

In the Karnataka High Court

Case No : CRP No. 3157 and 3158 of 1991

Madhya Pradesh Electricity Board

APPELLANT

Vs

The Manager Vijaya Bank and another

RESPONDENT

Date of Decision : 05-08-1996

Acts Referred:

Arbitration Act, 1940 — Section 34
Constitution of India, 1950 — Article 141

Citation : (1997) ILR (Kar) 1357

Hon'ble Judges : Kumar Rajaratnam, J

Bench : Single Bench

Advocate : Sh. V. Vendanta Iyengar, for the Appellant; Sh. Umesh R. Malimath, for the Respondent

Judgement

Kumar Rajaratnam, J.—The petitioner is the Madhya Pradesh Electricity Board. The petitioner challenges the order passed by the Additional Civil Judge, in Miscellaneous Appeal Nos. 48 and 49 of 1989 arising out of the orders in I.A. Nos. VIII and IV in O.S. Nos. 461 and 635 of 1987 on the file of the Principal Munsif, Hubli.

2. It is stated that a contract was entered into between the petitioner and the second respondent. The contract was on a turn-key basis for completion of a project that was to be handed over to the second respondent. It is also stated that the second respondent having defaulted with respect to certain terms of the contract, the petitioner was obliged to rescind the contract. As per terms of the contract, the second respondent was directed to deposit the amount given by way of Bank Guarantee.

3. The second respondent first approached the Madhya Pradesh Arbitration Tribunal and obtained an injunction against the petitioner from invoking the Bank Guarantee. An expert order was passed by the Tribunal in favour of the second respondent. The petitioner entered appearance and after hearing the petitioner the said order came to be vacated on 30-7-1987. While the matter was pending

before the Madhya Pradesh Arbitration Tribunal, the second respondent having failed to obtain the order before the Tribunal, instituted two suits in the Court of Munsiff at Hubli, in O.S. Nos. 461/87 and 635/87. The second respondent sought a permanent injunction restraining the Bank (first respondent) from paying any amounts to the petitioner under the Bank Guarantee. In the suits at Hubli, the petitioner was not made a party. The second respondent obtained an interim injunction against the petitioner from encashing the Bank Guarantee. The petitioner got wind of the same and filed two applications under Order 1, Rule 10 of the C.P.C. to implead itself as a necessary party to the suit. More importantly the other application was for seeking a stay of the suits u/s 34 of the Arbitration Act since the contract contained a reference to arbitration.

4. The petitioner was impleaded by the Court. However, the application by the petitioner u/s 34 of the Arbitration Act to stay the suits came to be rejected on the ground that the petitioner having voluntarily entered appearance before the Court and having filed objections to the interlocutory application had by its conduct waived its right u/s 34 of the Arbitration Act. Both the Courts below the Trial Court as well as the Appellate court took the view that the petitioner having voluntarily appeared before the Trial Court had waived its right u/s 34 of the Arbitration Act.

5. Section 34 of the Arbitration Act reads as follows :

"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".

A perusal of Section 34 of the Act clearly indicates that a party to the contract 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. Both the Courts below erroneously relied on a Division Bench judgement of this Court reported in *Manjunath V. Jannu Vs. Latha M. Ralkar*, which in turn relied on a judgement of the Calcutta High Court reported in *Subal Chandra Bhur Vs. Md. Ibrahim and Another*, . has since been over-ruled by the Supreme Court in the matter of *Food Corporation of India v. Yadav Engineer & Contractors* AIR 1982 SC 1302 : 1983 Arb. LR 123.

6. In the *Food Corporation of India* case (supra) the Supreme Court expressed the hope that the law laid down on this aspect will put an end to the controversy

of the Courts as to what constitutes a waiver u/s 34 of the Arbitration Act. The Supreme Court in the Food Corporation of India case, in the very opening paragraph, held as follows :

"A fond hope that a decision of this Court with the sanction of Article 141 of the Constitution that the law laid down therein will be the law of the land would put an end to a raging controversy amongst various High Courts stands to some extent rudely shaken when the controversy with a slight variation has again been placed in the lap of this Court".

7. Notwithstanding the fervent hope of the Supreme Court the controversy still persists even to this day in this Court. In the light of the law laid down by the Supreme Court, there was hardly any scope for the Courts below to have declined to stay the suits filed by the second defendant.

8. In The Food Corporation of India case (supra) the Supreme Court at paragraph (9) has stated as to what constitutes "taking any other step in the proceedings u/s 34 of the Arbitration Act.

At paragraph (9) the Supreme Court held as follows :

"Apart from filing written statement, what other step did the Legislature contemplated as being taken in the proceedings which would disentitle the party to the suit from obtaining stay of the proceedings which would have the effect of enforcing the arbitration agreement ? General words "taking any other steps in the proceedings" just follow the specific expression "filing a written statement" and both are used for achieving the same purpose. Therefore, the latter general expression must be construed ejusdem generis with the specific expression just proceeding to bring out the ambit of the latter. Expression "written statement" is a term of specific connotation ordinarily signifying a reply to the plaint filed by the plaintiff. Therefore, the expression "written statement" in Section 34 signifies a specific thing, namely, filing an answer on merits to the plaint filed by the plaintiff. This specific word is followed by general words "taking any other steps in the proceedings". The principle of ejusdem generis must help in finding out the import of the general words because it is a well established rule in the construction of statutes that general terms following particular ones apply to such persons or things as are ejusdem generis with these comprehended in the language of the Legislature. In Ashbury Railway Carriage & Iron Co. v. Riche (1875) LR 7 HL 653, the question of construction of the objection of a Company : "to carry on business of mechanical engineers and general contractors", came in for consideration and it was said that the generality of the expression "general contractors" was limited to the previous words "mechanical engineers" on the principle of ejusdem generis. Filing of the written statement would disentitle the party from seeking enforcement of arbitration agreement by obtaining stay of proceedings because it is such an act on behalf of the party entitled to enforce the arbitration agreement which would disclose unequivocal intention of the party to give up the benefit of the arbitration agreement and accept the method in

preference to the one set out in the arbitration agreement to the one adopted by the other party by filing the suit and get the dispute adjudicated upon by the machinery of the Court. If this is the underlying intendment in providing that application for stay of the proceedings must be filed before the filing of the written statement, the same conclusion must follow when instead of filing the written statement, the party has taken some other step in the proceedings. That, some other step must indisputably be such step as would manifestly display an unequivocal intention to proceed with the suit and to give up the right to have the matter disposed of by arbitration. Each and every step taken in the proceedings cannot come in the way of the party seeking to enforce the arbitration agreement by obtaining stay of proceedings but the step taken by the party must be such step as would clearly and unmistakably indicate an intention on the part of such party to give up the benefit of arbitration agreement and to acquiesce in the proceedings commenced against the party and to get the dispute resolved by the Court. A step taken in the suit which would disentitle the party from obtaining stay of proceedings must be such step as would display an unequivocal intention to proceed with the suit and to abandon the benefit of the arbitration agreement or the right to get the dispute resolved by arbitration".

9. In the case of M/s. Sadhu Singh Ghuman Vs. Food Corporation of India and others, , the Supreme Court had an occasion to deal with the same proposition at paragraph (6) wherein the Court dealt with what constitutes a step in the proceeding which would disentitle the defendant from invoking Section 34 of the Arbitration Act. While dealing with this, the Supreme Court held at paragraphs (6), (7) and (8) as under :

"6. Section 34 of the Arbitration Act has received the consideration of this Court in The State of Uttar Pradesh and Another Vs. Janki Saran Kailash Chandra and Another, , (ii) Food Corporation of India v. Yadav Engineer (Supra), and more recently in General Electric Co. Vs. Renusagar Power Co., . It may be noted that the expression "a step in the proceeding" which would disentitle the defendant from invoking Section 34 of the Arbitration Act is not every step taken by him in the suit. It should be a step to abandon the right to have the suit stayed. It should be a step in aid of the progress of the suit. The step must have been consciously taken with a view to submit to the jurisdiction of the Court for the purpose of adjudicating the controversy on the merits. In General Electric Co. (Supra) case this Court, after considering the previous decisions observed (at pp. 155-56) :

"..... thus a step in the proceeding which would disentitle the defendant from invoking Section 34 of the Arbitration Act should be a step in aid of the progress of the suit or submission to the jurisdiction of the Court for the purpose of adjudication of the merits of the controversy in the suit. The step must be such as to manifest the intention of the party unequivocally to abandon the right under the arbitration agreement and instead to opt to have the dispute resolved on merits in the suit. The step must be such as to indicate an election or

affirmation in favour of the suit in the place of the arbitration. The election or affirmation may be by express choice or by necessary implication by acquiescence. The broad and general right of a person to seek redressal of his grievances in a Court of law is subject to the right of the parties to have the disputes settled by a Forum of mutual choice. Neither right is insubstantial and nor right can be allowed to be defeated by any manner of technicality. The right to have the dispute adjudicated by a Civil Court cannot be allowed to be defeated by vague or amorphous mis-called agreements to refer to "arbitration". On the other hand, if the agreement to refer to arbitration is established, the right to have the dispute settled by arbitration cannot be allowed to be defeated on technical grounds".

7. In the application filed by the defendants in this case, they only sought a direction to the plaintiff to produce the original agreement and other documents so that they may file written statement. It was not stated that they would file the written statement. They never took any other step submitting to the jurisdiction of the Court to decide the case on merits. The right to have the dispute settled by arbitration has been conferred and by agreement of parties and that right should not be deprived of by technical pleas. The Court must go into the circumstances and intention of the party in the step taken. The Court must examine whether the party has abandoned his right under the agreement. In the light of these principles and looking to the substance of the application dated January 5, 1985, we cannot form an opinion that the defendants have abandoned their right to have the suit stayed and took a step in the suit to file the written statement".

10. Let us now get back to the Division Bench judgement of this Court in *M. V. Jannu v. L. M. Raikar* (supra). This Court took an unduly technical view of the matter and held that the expression "proceedings" in Section 34 would also cover the interlocutory applications. The Division Bench judgement reported in *Manjunath V. Jannu Vs. Latha M. Raikar*, is as follows :

"The expression used in Section 34 is not "suit" but "proceedings". Even if it is construed that an interlocutory application of the nature in question is not an integral part of the suit, it is undoubtedly a proceeding in the suit, the expression "proceedings" not only covers the suit but also covers the interlocutory applications filed in the suit.

The act of the defendant in voluntarily appearing in the suit and specifically seeking time to file objections to the application filed by the plaintiff for an order of temporary injunction, even though such time was sought on an oral application, amounted to taking any other steps in the suit for the progress of the suit. Therefore, it amounted to giving up his right to have the dispute settled in accordance with the arbitration agreement through an Arbitration and submitting to the jurisdiction of the Court have the dispute involved in the suit adjudicated by the Court".

The Division Bench decision of this Court would undoubtedly be binding on me. However, the view taken by the Division Bench was based on the ruling reported in *Subal Chandral v. Md. Ibrahim* (supra). The Calcutta High Court judgement came up for consideration before the Supreme Court in the Food Corporation case. The question was whether contest by the defendant of an interlocutory application or filing of an application for setting aside an expert interim injunction would disentitle the defendant from seeking protection u/s 34 of the Arbitration Act. The Supreme Court was pleased to hold as follows :

"General words "taking any other steps in the proceedings" just follow the specific expression "filing a written statement" and both are used for achieving the same purpose. Therefore, the latter general expression must be construed ejusdem generis with the specific provision just proceeding to bring out the ambit of the latter. Therefore, unless the step alleged to have been taken by the party seeking to enforce arbitration agreement is such as would display an unequivocal intention to proceed with the suit and acquiesce in the method of resolution of dispute adopted by the other party, namely, filing of the suit and thereby 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".

11. The Supreme Court in the said judgement had overruled the Calcutta High Court judgement reported in *Subal Chandra Bhur Vs. Md. Ibrahim and Another*, . The Division Bench judgement of the Karnataka High Court was based on the Calcutta High Court judgement, reported in *Subal Chandra Bhur Vs. Md. Ibrahim and Another*, . Unfortunately the judgement of the Supreme court reported in AIR 1982 SC 1302, was not brought to the notice of the Karnataka High Court when the Division Bench delivered the judgement. In these circumstances one has necessarily to hold that the judgement rendered by the Division Bench being contrary to the view of the Supreme Court is no longer good law.

12. The Supreme Court in *Rachappa Gurudappa Bijapur Vs. Gurudiddappa Nurandappa and Others*, , on the question of taking any other steps in the proceedings has held as follows :

"Thus, Section 34 requires that an application for stay of legal proceedings must be filed before the filing of the written statement or taking any other step in the proceedings. In order to be entitled to stay u/s 34 of the Act, it is imperative to find out whether "any other step in the proceedings" have been taken before making an application for stay apart from the written statement. "Some other step" mentioned in the section must indisputably be such step as would manifestly display an unequivocal intention to proceed with the suit and to give up the right to have the matter disposed of by arbitration. The expression "taking any other steps in the proceedings" does not mean that every step in the proceedings would come in the way of enforcement of the arbitration agreement".

13. This aspect once again came up for consideration in *M/s. Sadhu Singh*

Ghuman v. Food Corporation & Ors. (supra) the Supreme Court was pleased to hold as follows :

"The expression a step in the proceeding which would disentitle a defendant from invoking Section 34 of the Act, is not every step taken by him in the suit. It should be a step to abandon his right to have suit stayed. It should be a step in the aid of the progress of the suit. The step must have been consciously taken with a view to submit to the jurisdiction of the Court for the purposes of adjudicating the controversy on merits".

14. In the light of the law laid down by the Supreme Court let us examine the facts of this case. The second respondent in the first instance sought to refer the matter before the Madhya Pradesh Arbitration Tribunal as provided for in the contract. An interlocutory application was filed by the second respondent and the second respondent was able to obtain an expert order in his favour. The petitioner entered appearance and the interim order was vacated by the Tribunal on 30-7-1987. Having not been successful in obtaining interim orders before the Tribunal, the second respondent during the pendency of the reference to the arbitration instituted two original suits in the Court of Munsiff at Hubli O.S. Nos. 461 of 1987 and 635 of 1987 for a permanent injunction restraining the first respondent from paying any amount to the petitioner under the bank Guarantee. The petitioner was not even made a party. It is in these circumstances the petitioner sought to implead himself in the suit. Another application was made u/s 34 of the Arbitration Act to stay the suit. The said application filed by the petitioner came to be rejected on the ground that the petitioner had voluntarily appeared before the Court below and filed objections to the interlocutory applications. It is in these circumstances, the Court below held that the petitioner had waived his rights u/s 34 of the Arbitration Act. The Trial Court relying on a Division Bench judgement of this Court in M. V. Jannu v. Mrs. L. M. Raikar (supra), held that the petitioner had submitted to the jurisdiction of the Civil Court. As stated earlier the Division Bench judgement of this Court was based on a review taken by the High Court of Calcutta, reported in Subal Chandra Bhur Vs. Md. Ibrahim and Another, . The said judgement of the Calcutta High Court was overruled by the Supreme Court in the Food Corporation case reported in AIR 1982 SC 1302.

15. It is clear that the contest by the petitioner on an interlocutory application for setting aside an expert interim injunction does not disentitle the petitioner from seeking the protection u/s 34 of the Arbitration Act.

16. The Supreme Court in the Food Corporation case had nurtured a fond hope that the decision of the Supreme Court with the sanction of Article 141 of the Constitution of India will be the law of the land and that the law as enunciated by the Supreme Court would put an end to a raging controversy on this aspect. I hope in view of the law laid down by the Supreme Court there would be no scope for any controversy on this aspect hereafter.

17. In the facts and in the circumstances of the case the orders of the learned Munsiff, Hubli, dated 24th October, 1987 in O.S. Nos. 461 of 1987 and 635 of 1987 in I.A. Nos. VIII and VI are set aside. Consequently, the Civil Revision Petitions are allowed and there shall be a stay of all further proceedings in O.S. Nos. 461 and 635 of 1987 on the file of the Principal Munsiff, Hubli, pending disposal of the proceedings before the Arbitration Tribunal.

Both the Civil Revision Petitions are accordingly allowed.

18. Revision Petitions allowed.