

(1992) 11 KAR CK 0057
In the Karnataka High Court
Case No : C.R.P. No. 2730 of 1990

Managing Director, Karnataka State Co-operative Marketing
Federation Ltd.

APPELLANT

Vs

K. Muniswamy Raju

RESPONDENT

Date of Decision : 12-11-1992

Acts Referred:

Arbitration Act, 1940 — Section 34, 41 (b)

Citation : (1993) ILR (Kar) 666 : (1993) 1 KarLJ 338

Hon'ble Judges : Hanumanthappa, J

Bench : Single Bench

Advocate : K.C. Shivasubramaniam, for the Appellant; G. Subba Rao, for the Respondent

Judgement

Hanumanthappa, J.—The Point that arises for Consideration in this Revision Petition is that when once a reference is ordered u/s 34 of the Arbitration Act, 1940, hereinafter referred to as the Act, before its commencement or pending proceedings before the arbitrator, powers u/s 41(b) of the Act be exercised by the Civil Court?

2. In order to answer this question, it is proper to narrate a few facts and relevant provisions and interpretation of law on the scope of Sections involved.

3. Petitioners herein is a society known as The Karnataka State Co-operative Marketing Federation Ltd. entered into an agreement with respondent-plaintiff viz., K. Muniswamy Raju entrusting the work of construction of Multistoried Building-II in Cunningham Road for a sum of Rs. 1,51,90,453/- under the terms of agreement based on competitive tender. There was a formal agreement entered into on 4.10.84 signed by both the parties. After completing part construction work Muniswamy Raju plaintiff received a sum of Rs.85 lakhs and the remaining part of the work was deferred. For the said remaining work defendant invited tenders. Pursuant to the tender notification dated 29.1.1990 published in Decqan Herald dated 24.2.1990 for the purpose of construction of

M.S.Office, Complex-II, (Read Block), Bangalore. Along with others, Sri. Muniswamy Raju also submitted his tender. At that stage, Muniswamy Raju filed a suit in O.S.No. 2874/ 1990 in the Court of 21st Addl. City Civil Court, Bangalore against the vendor not to entrust tender work to any other contractor pending disposal of the settlement. He also filed I.A.I, under Order 39 Rules 1 and 2 C.P.C.. Defendant put appearance. He opposed I.A.I, and he also filed I.A.II u/s 34 of the Act of 1940. Proceedings in O.S.No.2874/90 was stayed.

4. After hearing both sides on I.As.I and II and also taking into consideration the effect of Clauses 31 and 33 of the Agreement which are extracted hereunder:

"Clause-31:

All disputes between the parties to the contract (other than those for which the contract stipulates the decision of the Employer as final and binding) shall after written notice by either party to the contract to either of them and to the Managing Director of the Employer, Bangalore (hereinafter called as the appointing authority) be referred for adjudication to a sole Arbitrator to be appointed as hereinafter provided,"

Clause-33:

Should any matter pertaining to this contract were to be referred to a Court of law, the Courts in Bangalore City only shall have jurisdiction."

The Trial Court held that the differences between the parties required to be decided by an arbitrator. Hence, made a reference under Article 31 of the agreement and also stayed proceedings by exercise powers conferred u/s 34 of the Act.

5. As far as I.A.I, for injunction is concerned, trial Court held that the same may be considered on merits after taking into consideration the provisions of Section 41(b) of the Act with a further direction that the defendant to file objections if any to I.A.I. Operative portion of the order reads as follows:

"I direct that the suit matter be referred to the Arbitration under Article 31 of the agreement pending arbitration, the suit is hereby stayed u/s 34 of the Arbitration Act.

I.A.I, will be considered on its merits taking into consideration the provisions of Section 41(b) of the Arbitration Act.

The defendant is hereby directed to file objections, if any, to I.A.I. accordingly."

6. Aggrieved by the second part of the order passed by the trial Court, defendant has preferred this Revision Petition.

7. Sri. K.C. Shivasubramaniam, learned Counsel for the petitioner contends that when once a reference has been made and proceedings have been stayed, to grant interim relief alone exercising powers u/s 41-B of the Act will not arise. According to him, when once suit is stayed, for all practical purposes, it has to be

construed that the same is the resultant of rendering the suit dead for all practical purposes. He also submits that grant of interim relief u/s 41(b) will arise only when the arbitration proceedings either commenced or pending and not when reference is made. In order to substantiate this contention, Sri. Shivasubramaniam placed reliance on *Renusagar Power Co. Ltd. Vs. General Electric Company and Another*, wherein it is held as follows;

"(F) Foreign Awards (Recognition and Enforcement) Act (45 of 1961), Section 3 - Stay under - Grant of, resulting in rendering suit dead for all practical purposes - No ground for refusing stay - When conditions u/s 3 are satisfied Court must grant stay. (Arbitration Act (1940), Section 34)"

Where Supreme Court considered the scope of Section 33 of the Act and Section 3 of the Foreign Awards Act, at paragraphs 58 and 59, wherein it is held as follows:

"58. It was next contended by Counsel for Renusagar that a stay, if granted as sought by G.E.C. in a petition u/s 3, it would render Renusagar's suit dead for all practical purpose and there will be nothing left to be decided in the suit either because the suit is stayed indefinitely or alternatively because the decision on the issue would operate as *res judicata* in the suit, and, therefore, no relief of stay should be granted which will have such effect merely on a *prima facie* view or a *pro tanto* finding on the issue of arbitrability of the claims. In support counsel relied upon a decision of the Allahabad High Court in *Strauss and Co. Ltd. Vs. Raghubar Dayal and Others*, a case arising under the earlier Indian Arbitration Act 1899 - where that High Court has expressed the view that "a stay order u/s 19 of the Arbitration Act, when the arbitration has in fact taken place, is sufficient finally to dispose of the suit". In other words, the contention was that a Section 3 petition could not be a proper stage to decide the issue of arbitrability of the claims but the same should be decided in the suit when it will be finally tried. If regard be had to the provisions of Section 3 as well as the legal position arising under decided cases, the contention will be found to be devoid of any substance. It may be that a stay of the suit either u/s 3 of the Foreign Awards Act or u/s 34 of the Arbitration Act, 1940 may have the effect of finally disposing of the suit for all practical purposes as pointed out by the Allahabad High Court. But that is no reason why the relief of stay should be refused by the Court if the concerned legal provision requires the Court to do so. Here we are concerned with Section 3 which makes it obligatory upon the Court to stay the legal proceedings if the conditions of the Section are satisfied and what is more the Section itself requires that before any stay is granted the Court should be satisfied that the arbitration agreement is valid, operative and capable of being performed and that there are disputes between the parties with regard to the matters agreed to be referred to arbitration (conditions (v) and (vi) mentioned earlier). In other words, the Section itself indicates that the proper stage at which the Court has to be fully satisfied about these conditions is before granting the relief of stay in a Section 3 petition and there is no question of the Court

getting satisfied about these conditions on any prima facie view or a pro tanto finding thereon. Parties have to put their entire material before the Court on these issues (whichever may be raised) and the Court has to record its finding thereon after considering such material.

59. It may be stated that though Section 34 of the Arbitration Act, 1940 confers a discretion upon the Court in the matter of granting stay of legal proceedings where there is an arbitration agreement, it cannot be disputed that before granting the stay the Court has to satisfy itself that arbitration agreement exists factually and legally and that the disputes between the parties are in regard to the matters agreed to be referred to arbitration (these aspects fall within the phrase "if satisfied that there is no reason why the matter should not be referred" occurring therein) and decided cases have taken the view that the Court must satisfy itself about these matters before the stay order is issued. In other words, Court u/s 34 must finally decide these issues before granting stay. In *Bhagwandas Atmasing Vs. Atmasing Jessasing*, on a consideration of the scheme underlying sub-sections 32, 33 and 34 of the Arbitration Act the Bombay High Court has taken the view that the defendant who applies for stay u/s 34 has to say that there is an arbitration agreement; that if the plaintiff says that there is no agreement then the issue arises between the parties and there is nothing in Section 34 to prevent the Court from deciding that issue to enable it to pass an order under that Section, The same position u/s 4(1) of the English Arbitration Act, 1950 has been affirmed in a judgment of the Court of Appeal in England in *Modern Building Wales Ltd. v. Limmer and Trinidad Co. Ltd.* (1975) 2 All.ER 549. The Court of Appeal held that where a party claimed that proceedings should be stayed because there was an arbitration agreement in force the Court was under a duty to construe the terms of the contract in order to decide whether there was a valid arbitration clause and that question had to be determined at an interlocutory stage because it had to be done before the defendant took any step in the action. In *Anderson Wright Ltd. Vs. Moran and Company*, the respondent (Moran & Co.) sold certain goods to the appellant under a number of similar contracts, which contained a wide arbitration clause. Respondent, however, described himself as broker when signing the contracts. The appellants wanted to claim damages from the respondent for non-delivery of the goods under the contract notes and desired to refer the same to the arbitration. To prevent this arbitration the respondent filed a suit for a declaration that he was not a party to the said contracts he having signed the same as broker and that he had incurred no liability thereunder and he further prayed for the consequential relief of an injunction restraining the appellant from claiming damages in respect of the said contracts. The appellant applied for the stay of the suit u/s 34 of the Arbitration Act. Learned trial judge granted stay of the suit, The Appellate Bench of the High Court took the view that the only matter in dispute between the parties was whether the respondent was a party to the contract or not and that this dispute was outside the scope of the arbitration agreement but no opinion was expressed on the question whether there was a binding arbitration agreement between the

parties (which was the only issue in the suit, the relief on merits being consequential) since that would, in the opinion of the Appellate Court, create a bar of res judicata against one or the other party. This, Court, however, held that it was incumbent upon a Court, when invited to stay a suit u/s 34 of the Arbitration Act, to decide first of all whether there is a binding arbitration agreement between the parties or not. At page-870 (of SCR): (at P-57 of AIR) of the Report the Court has observed thus:

"In this case it certainly is not admitted that the respondent was a party to the contract. In fact, that is the subject-matter of controversy in the suit itself. But, as has been said already, the question having been raised in this application u/s 34 of the Arbitration Act, the Court has undoubted jurisdiction to decide it for the purpose of finding as to whether or not there is a binding arbitration agreement between the parties to the suit."

The Court actually sent the case back for a decision of that question with a direction that if the Court came to a conclusion that the respondent was, in fact, a party to the contracts, the suit shall be stayed and the appellant would be allowed to proceed by way of arbitration but, if on the other hand, the finding was adverse to the appellant the application for stay will be dismissed. Counsel for Renusagar pointed out that the suit did not merely raise the issue that the respondent was not a party to the contract-notes and that therefore, there was no arbitration agreement between the parties but also claimed relief on merits, namely, an injunction restraining the appellant from claiming damages in respect of the said contracts and, therefore, the direction to stay the suit in case the finding on the main issue went against the respondent, had some meaning but in the instant case before us no relief on merits has been claimed by Renusagar in its suit which merely raises the issue of arbitrability of the claims. In our view, this distinction is neither valid nor relevant to the question under consideration. Not valid because the only issue which the suit (filed by Moran & Co.) raised was whether there was binding arbitration agreement between the parties or not and an adverse decision thereon in a Section 34 application would have had the effect of disposing of the suit for all practical purposes, the consequential relief automatically falling to the ground along with such adverse decision. Not relevant because the question at issue is whether a Section 34 application is proper stage for deciding such issue though it may have the effect of the issue becoming res judicata in the suit, What is of significance is that the decision of this Court does show that notwithstanding the fact that a finding on the issue that the respondent was a party to the contracts would have operated as res judicata in the respondents suit, the Court directed that issue to be decided in Section 34 petition for stay. In deciding the question u/s 34 in this manner the Court expressed its entire agreement with the view enunciated by Mr. Justice S.R. Das in *Khushiram v. Hantumal* (1949) 53 Cal 518 that where on an application made u/s 34 of the Arbitration Act for stay of a suit, an issue is raised as to the formation, existence or validity of the contract containing the arbitration clause, the Court is not bound to refuse a stay but may in its discretion, on the

application for stay, decide the issue as to the existence or validity of the arbitration agreement even though it may involve incidentally a decision as to the validity or existence of the parent contract. If this is the position u/s 34 of the Arbitration Act which confers discretionary power upon the Court a fortiori the Court acting u/s 3 of the Foreign Awards Act must decide such issues at that stage when the grant of stay is obligatory."

Likewise, High Court of Kerala in the case of P.K. Thresia and Others Vs. The Government of the State of Kerala and Another, while interpreting scope of Section 41(b) competency of Civil Court to grant interim injunction held as follows;

"In view of Section 41(b) and Item 4 in the Second Schedule, Civil Court is competent to grant interim injunctions even when no proceedings are pending in Court provided arbitration has commenced and arbitration proceedings are pending before the arbitrator."

Another Decision of High Court of Kerala in the case of Baby Paul Vs. Hindustan Paper Corporation Ltd. and Another, holding that:

"Arbitration proceedings do not commence from the stage of arbitration agreement but only on the arbitrator getting authority to arbitrate and act in that Behalf."

Reliance on this Decision is for the purpose that arbitration proceedings are said to be commenced. The last Decision which the learned Counsel for the petitioner placed reliance is the one decided by Supreme Court in the case of H.M. Kamaluddin Ansari and Co. Vs. Union of India (UOI) and Others, to explain the scope of Section 41 (a) and (b) and the relevant discussion at para-18, which is extracted hereunder;

"18. Clause (a) of Section 41 makes only the procedural rules of the CPC applicable to the proceedings in Court under the Arbitration Act. This Clause does not authorise the Court to pass an order of injunction. The power is conferred by Clause (b) of Section 41. The source of power, therefore, cannot be traced to Clause (a). If the contention of Shri Kacker is accepted, the appeals would lie under Sections 96, 100 or 104 of the C.P.C. but the Arbitration Act itself provides for appeal u/s 39, Besides, if Clause (a) of Section 41 gave wide powers to pass an order of injunction, Clause (b) of Section 41 would become otiose."

8. For the reasons given above, Sri. Shivasubramaniam submits that Petition be allowed.

9. From the above discussion, it is clear that when once a Reference is made and proceedings before the Civil Court stayed for all practical purposes, whatever the powers Civil Courts had, came to be suspended by virtue of stay granted. But to consider the request for granting interim injunction, will arise only when the arbitration proceedings commenced or pending and not otherwise as in the instant case where just a reference has been made and proceedings has to

commence. The second part of the order of the trial Court runs counter to requirement of Section 41(b) of the act and re-institute the counter to Section 34 and 41(b) of the Act and contrary to the interpretation given by both the High Court of Kerala and Supreme Court in the Decisions referred to above. Sections 33, 34 and 41(b) of the Act reads as follows:

"33. Arbitration agreement or award to be contested by application - Any party to an arbitration agreement or any person claiming under him desiring to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either determined shall apply to the Court and the Court shall decide the question on affidavits.

Provided that where the Court deems it just and expedient, it may set down the application for hearing on other evidence also, and it may pass such orders for discovery and particulars as it may do in a suit."

"34. Power to stay legal proceedings where there is an arbitration agreement - 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."

"41(b) - Procedure and powers of Court; the Court shall have, for the purpose of, and in relation to, arbitration proceedings, the same power of making orders in respect of any of the matters set out in the Second Schedule as it has for the purpose of, and in relation to, any proceedings before the Court:

Provided that nothing in Clause (b) shall be taken to prejudice any power which may be vested in an arbitrator or umpire for making orders with respect to any of such matters."

Hence, latter portion of the order of the trial Court ordering that I.A.I will be considered on its merits taking into consideration the provisions of Section 41(b) of the Arbitration Act is correct and defendant is hereby directed to file objections if any to I.A.I,

10. All other contentions are left open. It is made clear that the parties to the proceedings would desire to seek any interim order, they are at liberty to seek for a relief only after commencement or pending consideration of the proceedings as required u/s 41(b) of the Act. With these observations, C.R.P. is disposed of.