
(1977) 08 GUJ CK 0030
In the Gujarat High Court

Navjivan Construction Co.

APPELLANT

Vs

Kantilal Gandadal Sanghvi and Others

RESPONDENT

Date of Decision : 16-08-1977

Acts Referred:

Arbitration Act, 1940 — Section 34

Citation : (1978) 19 GLR 357

Hon'ble Judges : N.H. Bhatt, J

Bench : Single Bench

Judgement

N.H. Bhatt, J.—This is an appeal by the original plaintiff-firm of the civil suit no. 772 of 1967 of the City Civil Court at Ahmedabad, being aggrieved by the order passed by the learned Judge staying the said suit as per Section 34 of the Indian Arbitration Act. The plaintiffs suit is for money due under the contract of construction. The first thing that the defendants did on being served with the summons was filing of an application, ex. 9, u/s 34 of the Indian Arbitration Act, praying for the stay of the suit on the ground that there was a clause in the agreement between the parties to refer the differences or disputes to arbitration. The defendants by that application insisted on the suit to be stayed till an award was obtained through arbitration. Had the matter rested there, the situation would not have been as complicated as it has turned out to be. During the pendency of the said application, ex. 9, and before it could be dealt with by the Court after hearing the original plaintiff, the defendants came to be advised to seek the decision of the Court regarding the suit being premature because of the arbitration clause between the parties and consequently liable to be dismissed in limine. The said prayer was sought by filing an application ex. 33 before the Court and the prayer in that application when translated reads as follows:

In violation of Clause 35 of the agreement between the parties, the plaintiff has filed the present suit, which being premature may please be dismissed.

This application seems to have been given on 27-1-69 whereas the application for stay being ex. 9 had come to be presented to the Court on 19-9-67. The

question that arises and in fact arose even before the trial Court also, was whether by filing the application ex. 33, the original defendants could be said to have taken a step in furtherance of the litigation pending before the Court. The trial Court held that this application ex. 33 was given expressly with the stipulation that it was being filed without prejudice to their prayer for stay of the suit u/s 34 of the Arbitration Act and, therefore, could not be said to be a step in aid of the proceedings. To quote the very words of the learned Judge:

As a matter of fact, the said chamber summons is moved under protest inasmuch as she had declared in the said chamber summons that she was not participating in the proceedings. On the contrary, when she moved the said chamber summons it reflects that her intention was to enforce the arbitration clause in the agreement. The true test for determining whether an act is a step in the proceedings within the meaning of this section is not so much the question as to whether it is an application-although that would be a satisfactory test in many cases, but is not the only. But whether the act displays an unequivocal intention to proceed with the suit and to give up the right to have the matter disposed of by arbitration. It is test if applied to the facts of the case before me I feel no doubt whatsoever in my mind to come to the conclusion that when the defendant presented the chamber summons ex. 33 it was given only with a view to enforce the arbitration clause and not with the intention to proceed with the suit and to give up the right to have the matter disposed of by arbitration.

It is the above-mentioned order passed by the learned Judge ultimately staying the suit~ that is called in question by the original plaintiff by filing the present appeal from order.

2. Mr. S.B. Vakil, the learned advocate appearing for the plaintiff appellant did not raise the two first questions that were raised before the trial Court, but he urged that by filing the application ex. 33 the defendants had sought an adjudication of the Court in respect of the very suit. The prayer that has been quoted by me above from Ex. 33 itself makes it clear that the defendants wanted the Court to dismiss the suit on the ground that it was premature. This is a clear indication of what was passing in the minds of the defendants. They invited the Court to decide the case on one of the points arising in the case. It amounts to the defendants invoking the Court's jurisdiction to dismiss the suit on the ground of its being premature. In other words, the defendants wanted to have a chance. If they could get rid of the present suit on a preliminary question raised by them on that application ex. 33, they would very much have it through the Court and get rid of the present suit and if they could not succeed, they kept in reserve their original contention of the matter being required to be adjudicated through arbitration. This ingenious design is written very much large on ex. 33. What impressed the learned trial Judge the most was the harping by the defendants on their original application ex. 9 and their insistence on having the dispute originally settled through arbitration. However, when a defendant seeks the aid of the Court in getting rid of the suit, he clearly invokes the Court's jurisdiction

to deal with the matter. The question and the moot question is: Can a party that surrenders to the jurisdiction of the Court even on a preliminary question going to the root of the matter be said to have taken part in the proceedings? The answer one way or the other would dispose of the only contention advanced before me.

3. The basic principle in this connection is enunciated by the Supreme Court in the case of *The State of Uttar Pradesh and Another Vs. Janki Saran Kailash Chandra and Another*, of the said judgment, the Supreme Court has laid down concisely and clearly the position of law available in such cases and the principle underlying in the following terms:

The legal position with respect to the scope and meaning of Section 34 of the Arbitration Act admits of little doubt, the language of this section being quite plain when a party to an arbitration agreement commences any legal proceedings against any other party to the said agreement with respect to the subject-matter thereof, then the other party is entitled to ask for such proceedings to be stayed so as to enable the arbitration agreement to be carried out. It is, however, to be clearly understood that the mere existence of an arbitration clause in an agreement, does not by itself operate as a bar to a suit in the Court. It does not by itself impose any obligation on the Court to stay the suit or to give any opportunity to the defendant to consider the question of enforcing the arbitration agreement. The right to institute a suit in some court is conferred on a person having a grievance of a civil nature, under the general law.. A party seeking to curtail this general right of suit has to discharge the onus of establishing his right to, do so and the law curtailing such general right has to be strictly complied with. To enable a defendant to obtain an order staying the suit, apart from other conditions mentioned in Section 34 of the Arbitration Act, he is required to present his application praying for stay before filing his written statement or taking any other step in the suit proceedings.

(Emphasis supplied by me).

To put it in the threadbare manner, the defendants relaxed their contention about the stay of the suit, albeit partially. They wanted or rather permitted the Court to deal with the question of the maintainability of the suit and to this extent they expressed the unequivocal desire of theirs to weave an adjudication from the Court. If this is not a step in the proceeding, it is not conceivable to have any other better form of such a step. Insistence on the original application, ex. 9, all throughout was only a clever device to make it appear all throughout that they were insistent on adjudication of their alleged dispute through arbitration. But as Ex. 33 itself shows, they were welcoming the court's decision making them free from the litigation on hand. The only natural outcome of that adjudication would have been the dismissal of the suit and along with it the disappearance of their application ex. 9 u/s 34 of the Act. This was their expectation on their assumption that their contention would be upheld. In my view, this is a clear step in aid of the proceedings, of course couched in a very clever language. But this ingenuous design was almost transparent. To that extent, the prayer for stay of

the suit was sought to be relaxed.

4. In this connection Mrs. Ravirkar, appearing for Mr. V.J. Desai, however, urged that whatever unpleasant situation that had come to be created by ex. 33 had disappeared the moment the defendants filed a purshis not insisting on their application ex. 33. Such unilateral action on the part of the defendants would not change the situation. The law is settled that even if an application for filing written statement is filed in the Court, it is treated as a step in the aid of the proceedings. The application, ex. 33, was on the record from 27-1-69 to 10-10-69 proclaiming the defendants' design to have adjudication at the hands of the Court in derogation of their desire to have the matter settled through arbitration and to have the suit stayed till the award came up. It was a belated wisdom that dawned on the defendants, perhaps because they might have realised the ultimate untenability of their contention about the suit being dismissed on the ground of its being premature.

5. In the above circumstances, the order passed by the learned trial Judge is such us cannot be sustained. The result is that it is set aside. The impugned order is cancelled and the suit is being ordered to be proceeded with by the trial Court in accordance with the procedure laid down by law. The appeal from order is allowed with no order as to costs. In view of the final outcome of the appeal from order, no orders are required to be passed on the civil application which is disposed of with no order as to costs.

As the suit is of the year 1967, almost a decade old, I am sure the trial Court would proceed to deal with it as expeditiously as it is humanly possible.