

(1991) 07 BOM CK 0012

In the Bombay High Court

Case No : Notice of Motion No. 82 of 1990 in Suit No. 1990

Onoda Engineering and Consulting Company Limited

APPELLANT

Vs

Project and Equipment Corporation of India Ltd.

RESPONDENT

Date of Decision : 01-07-1991

Acts Referred:

Arbitration Act, 1940 — Section 34

Citation : (1991) 4 BomCR 334

Hon'ble Judges : D.R. Dhanuka, J

Bench : Single Bench

Advocate : Atul Setelwad and Korde, instructed by Little and Co, for the Appellant; K.S. Cooper and S.K. Cooper, instructed by Kanga and Co., for the Respondent

Judgement

D.R. Dhanuka, J.—This is a plaintiff's motion of its own suit filed as a matter of abundant caution during pendency of arbitration proceedings already initiated by it in respect of the same claim. The plaintiffs are seeking stay of this suit u/s 34 of the Arbitration Act, 1940 as a matter of abundant caution in view of its apprehension that in absence of a stay order the pending arbitration proceedings may be affected by operation of section 35 of the Arbitration Act. In alternative, the plaintiffs have sought relief u/s 151 of the CPC to the same effect or at least limited relief as may be moulded by the Court having regard to the fact and circumstances of the case. The plaintiffs are also seeking a clarificatory order from this Court to the effect that the pending arbitration proceedings are not and will not be affected by reason of pendency of the suit in terms of section 35 of the said Act on the ground that right from the beginning the plaintiffs have clarified that they desire to continue with the arbitration proceedings and they have filed this suit only as a matter of abundant caution. In alternative the plaintiffs have sought adjournment of this motion for a reasonable time as ad-interim relief is already operating in favour of the plaintiffs so that the fate of the pending arbitration proceedings becomes known by that time and the Court can thereafter better decide as to what order is to be passed on this motion for stay.

2. It shall be necessary to state the facts and particulars of various proceedings already adopted by the parties in different courts and relating to the same subject matter before the rival contentions having bearing on this notice of motion are examined. The relevant facts are as under :---

(a) On 26th March, 1981, the defendants entered into a contract with PT (Persero Semen Padang known as "PTSP" or "PADANG" for the turnkey execution of a 2000 TPS Cement Plant in Indonesia at Padang. On 30th April, 1981, the defendants entered into an Associateship Agreement with M/s. Walchand Nagar Industries Limited of Bombay. Under the said contract, M/s. Walchand Nagar Industries Limited, described by the parties in the relevant documents as "WIL", agreed to fulfil, perform and discharge on a turnkey basis all obligations and responsibilities of the defendants imposed on the defendants under the above referred contract. The requisite work in relation to the said project remained incomplete and the said project was not commissioned. "PTSP" was not satisfied with the developments at the suit and sought charge in the organisational set up for carrying out the balance of the supervision and commissioning work in relation to execution of project of cement plant referred to hereinabove.

(b) The plaintiffs are a Corporation duly organised and existing under the laws of Japan having its registered office at Tokyo. By a letter dated 6th January, 1986 addressed to the defendants, the plaintiffs made a proposal for extending its services towards commissioning of the plant and machineries supplied by Walchand Nagar Industries for the PTSP Cement Project. By a letter dated 6th January, 1986, the defendants conveyed their acceptance of the said offer. On 6th January, 1986, a memorandum of understanding was executed between the plaintiffs and the defendants in respect of the work of service to be rendered by the plaintiffs in relation to the said project. By Clause V of the said memorandum of understanding, it was recorded as under :---

"Although OEC (meaning thereby the plaintiffs) is being engaged by PEC (meaning thereby the defendants), OEC agree that they will be paid by WIL directly for this assignment".

(c) On 20th March, 1986, a bipartite agreement was executed between the plaintiffs and the defendants in relation to the said transaction, a copy whereof is annexed as Exhibit "F" to the plaint. Article 5 of the said agreement contains the arbitration clause. The said articles reads as under :---

"If any dispute of different of any matter relating to or out of this agreement between the PEC and ONODA does arise and if the same cannot and/or is not settled mutually by negotiation, it shall be referred to arbitration in Singapore, in accordance with the rules of Conciliation and arbitration of the International Chamber of Commerce, Paris. The language of the arbitration proceedings shall be English. Any award made in pursuance thereof shall be final and binding on both the parties".

(d) On the same day i.e., on 20th March, 1986, a tripartite agreement was executed between the defendant, M/s. Walchand Nagar Industries Limited and the plaintiffs in respect of the same transaction. Article V of the said tripartite agreement provided that all the payments to the plaintiffs towards the various charges stipulated in the bipartite agreement shall be shared between the defendants and Walchand Nagar Industries in the proportion of 37.9% and 62.1% respectively. It was further provided by the said clause that the defendants will open a Letter of Credit in favour of Walchand Nagar Industries whereupon Walchand Nagar Industries shall open a back-to-back Letter of Credit in favour of the plaintiffs subject to the defendants assisting Walchand Nagar Industries in obtaining such clearances from the Government of India/RBI/EMIM Bank, etc., as would be required in that regard.

(e) In paragraph 16 of the plaint, the plaintiffs have stated their version as to why two agreements were executed, namely, a bipartite agreement and a tripartite agreement. According to the plaintiffs, PTSP has made it plain, both to the plaintiffs and the defendants, that PTSP did not with WIL's name featured in any contract executed or approved by it. It appears that only the bipartite agreement was produced by the parties before PTSP who approved the same by endorsing approval on the copy thereof. The tripartite agreement dated 20th March, 1986 did not contain any arbitration clause.

(f) The said transaction became effective from 14th January, 1986. The defendants made some part payment to the plaintiffs. The plaintiffs received certain part payments from Walchand Nagar Industries through a Letter of Credit opened by Walchand Nagar Industries as per details set out in the plaint. According to the plaintiff, large amounts remained outstanding. According to the plaintiffs, the defendants had guaranteed payment of these amounts by sending various telex messages to the plaintiffs. In the plaint it is averred that the primary liability to pay the plaintiffs outstanding claims is of defendants. It is not necessary to examine the merits of the plaintiffs' claim for purpose of deciding the motion for stay of the it. It appears that the plaintiffs submitted its 35 invoices to the defendant as well as to Walchand Nagar Industries. In its letter dated 12th December, 1986 annexed to the plaint, it was stated by the plaintiff that the plaintiff had submitted the said invoices under the above referred tripartite agreement. During the course of correspondence, the defendants contended by its letter dated 9th December, 1986 that Walchand Nagar Industries was liable to settle the claim of the plaintiffs and the defendants were not liable to pay any amount to the plaintiffs. Ultimately the defendants terminated and/or repudiated the said transaction. The plaintiffs are finding fault with defendants and the defendants are finding fault with the plaintiff in connection with the said transaction. It is neither necessary nor possible to adjudicate upon the merits of the controversy.

(g) On 20th December, 1989, the plaintiffs filed this suit against the defendants for recovery of a sum of Japanese Yen 367,706,294 and Indonesian Rupees

3,90,97 inclusive of interest at 18% per annum from 21st September, 1987 till the date of the suit or its rupee equivalent at the date of decree.

2-A. It is necessary to refer to the various proceedings adopted by the plaintiffs in relation to recovery of the same claim which had been made the subject matter of the present suit :---

(a) The very first proceedings which the plaintiffs adopted was to initiate arbitration proceedings under the rules of Conciliation and Arbitration of the International Chamber of Commerce, Paris, in accordance with Clause V of the bipartite agreement dated 20th March, 1986. On 29th April, 1989, the plaintiffs filed their statement of Claim before the International Chamber of Commerce for an award in respect of the same claim which is the subject matter of this suit. The defendants have contended, in the said proceedings that the claim of the plaintiffs are not arbitrable. The Court of arbitration of the International Chamber of Commerce has taken the view that in view of the admitted existence of the arbitration clause, the question as to whether or not the disputes raised are arbitrable should be decided by the arbitrators themselves as contemplated under the rules governing the arbitration. A copy of the order passed by the International Chamber of Commerce in this behalf dated 17th August, 1989 is annexed as Exhibit "D" to the affidavits in support of the notice of motion. The defendants have filed a petition in the High Court of Delhi u/s 33 of the arbitrator Act, 1940 for a declaration that the claims in question made by the plaintiffs herein cannot form the subject matter of an arbitration under the arbitration clause existing in the bipartite agreement and in fact claims arise out of the tripartite agreement which does not contain an arbitrators clause. The defendants filed such objection before the Hon'ble High Court of Delhi some time in the month of September, 1989. The defendants obtained an ex parte order of injunction in the said proceedings staying further proceedings in the arbitration on or about 28th September, 1989. The plaintiffs were served with these proceedings on or about 11th December 1989. By its order dated 12th September, 1990, the High Court of Delhi came to the conclusion that the High Court of Delhi had no jurisdiction to try the said petition. The High Court of Delhi therefore directed that the petition filed by the defendants be returned for being filed by the defendants in any other competent Court. By the said order, the stay of the arbitration proceedings granted earlier by the High Court of Delhi on 20th September, 1989 was vacated. Being aggrieved by the said order, the defendant have filed an appeal before the Division Bench of the Delhi High Court. The said appeal is admitted and is pending. By the interim order passed by the appeal Court, pending arbitration proceedings are not stayed except in respect of passing of the final orders and making of the award.

(b) On 1st August, 1989, the plaintiffs herein filed Suit No. 2706 of 1989 against Walchand Nagar Industries alone for recovery of the same very amount which is claimed in this suit. The plaintiffs have not impleaded the defendants as party defendants to the said suit, but have explained, in paragraph 35 of the plaint

therein, that the arbitration proceedings adopted by the plaintiffs against the defendants are pending and the plaintiffs shall give credit to the defendants if the plaintiffs received any amount from the defendants. In paragraph 36 of the plaint in the said suit, the plaintiff has further averred that under three contractual arrangement it is liability of Walchand Nagar Industries Limited to pay the amount of the suit claim to the plaintiffs. The said suit is pending.

(c) On 20th December, 1989, the plaintiffs filed this suit against the defendants as a matter of abundant caution and with a view to save limitation as, according to the plaintiffs, the cause of action in respect of the plaintiffs' claim arose on or about 24th December, 1986. In paragraph 3 of the plaint, the plaintiffs have clarified that the plaintiffs do not intend to abandon the arbitration clause or arbitration proceedings. The plaintiffs have further clarified that the plaintiffs are seeking stay of the suit u/s 34 of the Arbitration Act, 1940. In paragraph 3 of the plaint, the plaintiffs have given an undertaking which reads as under :---

".....that in the event of this suit being so stayed and the arbitrators deciding that they have jurisdiction to determine the disputes raised by the plaintiffs, the plaintiffs will abide by whatever decision on merits the arbitrators arrive at (subject to any right to challenge the award on merits by appeal or otherwise) and will not take any steps whatsoever to prosecute the suit if the questions raised in the suit are decided against the plaintiffs on merits in the arbitration proceedings".

3. The learned Counsel for the plaintiff submits that the plaintiffs are compelled to institute the civil suit during the pendency of the arbitration proceedings as a matter of abundant caution and in order to keep its remedy of suit in time although the plaintiffs desire to pursue the pending arbitration proceedings to their local conclusion and the plaintiffs to not desire to abandon the arbitration proceedings. The learned Counsel submits that the possibility of it being held that the disputes and claims are not arbitrable cannot be ruled out although the plaintiffs are reasonably confident of persuading all the appropriate forums to take the view that the claims and disputes in question are arbitrable. The learned Counsel submits that in such an eventuality if the plaintiffs file a civil suit to recover its claim after the decision of the arbitrators or other appropriate forums to the effect that the claims and disputed raised are not arbitrable, the remedy of suit will be time barred and the time spent in infructuous arbitration may not be excluded for computing the period of limitation for the suit. The learned Counsel submits that apprehension of the plaintiffs is borne out by certain judgments of our High Court. The learned Counsel submits that the plaintiffs have been consistent in their conduct throughout by expressly stating in the plaint in Suit No. 2706 of 1989 and this suit that the plaintiffs had already adopted arbitration proceedings in the matter and the plaintiffs shall pursue the same. The learned Counsel submits that it is permissible to a party to file a civil suit as a matter of abundant caution without abandoning the arbitration clause and their rights to enforce the award and the plaintiffs have followed such a course by filing this suit

having regard to well settled law on this subject. The learned Counsel submits that in such an eventuality, neither the suit is affected nor the arbitration proceedings. The learned Counsel submits that in such a situation it is desirable and in the interests of justice that the proceedings in civil suit by stated pending arbitration so as not to leave any scope for argument that the arbitration proceedings have become invalid by reason of the suit having been instituted by the claimant in the arbitration in respect of same very claim.

4. In *Sujant Singh v. Mohinder Paul* AIR 1964 Punj 395 H.R. Khanna, J., held that the subsisting award and the proceedings relating to enforcement or setting aside thereof were not affected merely by reason of filing of a suit as a matter of abundant caution to save limitation during the pendency of proceedings concerning enforcement of an award. In this case, an award was made on 10th July 1960. The said award was challenged by the alleged judgment debtor under the award on various grounds. During the pendency of the proceedings seeking to set aside the award, the award holder claimant filed a civil suit for the same claim as a matter of abundant caution to prevent the remedy of a suit time barred. The said civil suit was stayed at the instance of the defendant. In paragraph 6 of his judgment, the Hon"ble Mr. Justice Khanna observed as under :---

"It may be that the respondent may have filed the suit in respect of the amounts which were the subject matter of arbitration as a measure of abundant caution so that his claim for recovery of these amounts might not become time barred in case the award was set aside. This would not however go to show that the award in question was invalid and as such was liable to be set aside."

5. In *National Agricultural Cooperative Marketing Federation of India Ltd. Vs. Alimenta S.A.*, , the above referred observations made by the High Court of Punjab were approved by the Supreme Court. I shall occasion to refer to this case in later part of this judgment in a different context.

6. Mr. Setalvad, the learned Counsel for the plaintiffs, submits that the plaintiffs desire to proceed with the pending arbitration proceedings without any reservation and obtain stay of this suit in order to prevent a possible plea being taken on behalf of the defendants that the arbitration proceedings are labiates to be treated as invalid u/s 35 of the Arbitration Act, 1940 in absence of an order of stay of this suit u/s 34 of the said Act. The learned Counsel Mr. Setalvad has invited my attention to the observations of the Hon"ble Supreme Court made in paragraph 27 of the majority judgment of *V.O. Tractoroexport, Moscow Vs. Tarapore and Company and Another*, . The Hon"ble Mr. Justice Grover, speaking for the majority, observed as under :---

"Although it is a moot point whether section 35 of the Arbitration Act, 1940, will be applicable to the present case, *Shiva Jute Baling Limited Vs. Hindley and Company Limited*, , it was assumed that section 35 applied to protocol arbitration), the principle embodied in that section cannot be completely ignored

while considering the question of injunction".

7. The learned Counsel for the plaintiffs submits that the defendants are attempting to defeat the solemn arbitration proceedings justifiably adopted by the plaintiffs by raising technical pleas and by creating all sort of hitches in expeditious completion of the proceedings. I appreciate the predicament of the plaintiffs necessitating filing of civil suit during pendency of arbitration proceedings and their desire to proceed with the arbitration free from any flaw of the type in respect whereof the plaintiffs claim to have certain apprehension. The Court cannot however stretch the provisions of any law just to tackle a particular situation.

8. The plaintiffs have invoked section 34 of the Arbitration Act, 1940. Mr. Setalvad submits that the plaintiffs can also apply for stay of the suit filed by itself if the plaintiffs have filed the suit as a matter of abundant caution, the disputes are arbitrable and the plaintiffs have always been ready and willing to take all necessary steps for proper conduct of arbitration proceedings. Section 34 of the Arbitration Act, 1940 reads as under :---

"Where any party to an arbitration agreement of any person claiming under him commence 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 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 proceeding."

The said section is applicable to foreign arbitration also. In my judgment, the said section can be invoked only by the defendant to a suit and not by the plaintiffs, subject to discretion of the Court and subject to the defendant satisfying each of the requirements prescribed by the said section.

In my view, the plain and simple language of section 34 of the Act leaves no scope for any doubt regarding its meaning to the effect that the defendants to the suit alone can seek stay of the suit before filing of written statement (meaning thereby statement of defence) or taking any other steps in the proceedings. A party who has filed a plaint cannot file a written statement to the suit. Only such a party can take out a proceeding for stay of the suit u/s 35 of the Act who is competent to file statement of defence therein. The aforesaid section must be read as a whole. Each part of the section qualifies, explains and limits the other part of the section and throws light on its meaning. The notice of motion is liable to fail on this short ground alone. The plaintiffs have no locus standi to seek stay of its own suit u/s 34 of the Act. Perhaps the legislature never

contemplated a situation in which the plaintiff might also need stay of its own suit so as to prevent applicability of section 35 of the Act to the pending arbitration proceedings. No Court can re-write the section. If section 34 of the Act as it stands does not take care of all situations, the Court cannot help it and the remedy lies elsewhere.

9. In view of my considered opinion as aforesaid, I refrain from examining the alternate contention raised on behalf of the defendants that the disputes are not arbitrable and all the ingredients of section 34 of the Act are not satisfied in the instant case.

10. I do not propose to consider the effect of not granting of stay u/s 34 of the Act on the pending arbitration proceedings and the applicability or non-applicability of section 35 of the Act thereto. Section 35 of the Arbitration Act, 1940 reads as under :--

"35. (1) No reference nor award shall be rendered invalid by reason only of the commencement of legal proceedings upon the subject matter of the reference, but when legal proceedings upon the whole of the subject-matter of the reference have been commenced between all the parties to the reference and a notice thereof has been given to the arbitrators or umpire, all further proceedings in a pending reference shall, unless a stay of proceedings is granted u/s 34, be invalid.

(2) In this section the expression "parties to the reference" includes any persons claiming under any of the parties and litigating under the same title."

11. To some extent, Mr. Setalvad appears to be supported by following observations of the Supreme Court in paragraph 11 of its judgment in the case of National Agricultural Co-operative Marketing Federation of India Ltd. (supra), wherein the Supreme Court observed as under:--

"It is well settled that in particular facts and circumstances if a party files a suit to save limitation the same would not vitiate the award or make the award bad u/s 35 of the Arbitration Act. Reference in this connection may be made to the observations of the Punjab and Haryana High Court in Sujant Singh v. Mohinder Paul, AIR 1964 Punjab, 395."

Having regard to the complexities of the matter and the pendency of proceedings before the High Court of Delhi as well as the Arbitrators, I would prefer to keep all aspects of applicability or non-applicability of section 35 of the Act to the pending arbitration open.

12. Mr. Setalbad, the learned Counsel for the plaintiffs, has also relied on the judgment of Mr. Justice Key in the case of Weir v. Johnson, 1882 Weekly Notes, 159. In this case, the motion taken out by the plaintiff to refer the suit to arbitration was refused in view of the finding of the Court that the plaintiffs had not satisfied the requirements prescribed by Common Law Procedure Act, 1854. In my judgment, this case is of no assistance for deciding this notice of motion.

13. Having regard to the judgment of the Supreme court in the case of Ramji Dayawala and Sons (P) Ltd. Vs. Invest Import, , I hold Court has power to grant stay of the suit u/s 151 of the CPC where the application is not maintainable u/s 34 of the Arbitration Act. As a matter of fact, in this case, the applicant had invoked section 151 of the Code for obtaining stay of the suit instead of section 34 of the Arbitration Act, presumably because it was considered not clear as to whether section 34 of the Arbitration Act, 1940 would apply when the agreement provides for referring the disputes to a foreign arbitral Court. A contractor had filed a civil suit against a foreign engineering company to recover a sum of Rs. 4,25,343/-. The High Court granted stay of the said suit and vacated the injunction restraining the foreign party from proceeding with the arbitration. In appeal, the Supreme Court exercising inherent power granted an injunction restraining the arbitration proceedings and vacated the order for stay. The Supreme Court held that it was not necessary for the purpose of the said case to decide as to whether section 34 of the Arbitration Act will not be applicable where the agreement to refer a dispute to a foreign arbitral tribunal.

14. The plaintiffs are not clear as to whether the amount are receivable by the plaintiffs from Walchand Nagar Industries or from the defendants. The plaintiffs are not clear as to whether the amount is receivable any the plaintiffs under the tripartite agreement or under the bipartite agreement. After considering the totality of the facts and circumstances of the case and without expressing any opinion on the merits of the arbitration proceedings or on the merits of the plaintiffs' claim in either of the two suits one way or another, I feel that this case is not a fit one for exercise of inherent jurisdiction. I accordingly decline to exercise inherent jurisdiction.

15. If the arbitration proceedings were not pending, one would have thought of issuing directions for peremptory hearing of both the suits pending in this Court and also for impleading of the defendants in the suit filed by the plaintiffs against Walchand Nagar Industries Limited as an additional defendant and directed trial of two suits together. However, I do not wish to pre-empt the issue as to the validity of arbitration proceedings and it may well turn out that the arbitration proceedings are valid notwithstanding my refusal to grant stay. I have left all these question open to be considered by the appropriate Court at the appropriate time.

16. Accordingly the notice of motion fails. The notice of motion is dismissed with no order as to costs.

17. Ad-interim order by this Court shall continue to be in force for a period of six weeks from today. The plaintiffs shall serve at least one week's notice on the Advocates for the defendants before moving the higher Court.