

**(1975) 09 DEL CK 0014**

**In the Delhi High Court**

**Case No :** Company Appeal No. 422 of 1975 and Civil Petition Appeal No. 74 of 1975

O.P. Gupta

APPELLANT

Vs

Sfflv General Finance (P) Ltd. and Others

RESPONDENT

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**Date of Decision :** 09-09-1975

**Acts Referred:**

**Citation :** (1977) 47 CompCas 279 : (1976) 12 DLT 49 : (1975) 2 ILR Delhi 911 : (1976) RLR 80

**Hon'ble Judges :** D.K. Kapur, J

**Bench :** Single Bench

**Advocate :** H.S. Marwah and Satish Chander, for the Appellant;

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## **Judgement**

D.K. Kapur, J.

(1) This is an application u/s 34 of the Arbitration Act, 1940, moved for staying a petition under Sections 397 and 398 of the Companies Act, 1956, which is pending in this Court. It is stated in this application that Om of the articles of the .company, M/s. Shiv General Finance (P) Ltd. is to the effect that any difference or dispute between the company on the one hand and its members on the other, will be referred to arbitration. It is stated in this application that the subject matter of the petition is an essentially internal dispute between the members of the private limited company and Therefore in the interest of justice such a matter should be referred to arbitration.

(2) I had already dealt with a similar application in another petition under sections 397 and 398 in C. A. 628 of 1972 C. P. 73 of 1972, Shri Surendra Kumar Dhawan and another Vs. Shri R. Vir and others , decided by me on 6th May" 1974. In that case the respondent had also moved for a stay of the petition on the ground that there was a similar arbitration agreement. I overruled the objection and dismissed the petition for stay. There were two grounds on which this decision was given. Firstly, Section 9 of the Companies Act overrules the operation of all articles of a company in respect of the operation of the provisions

of the Act. Secondly, the provisions of Sections 397 and 398, and of Section 434 of the Companies Act dealing with the jurisdiction to wind up a company or to regulate its management, are exclusively the jurisdiction of the court and cannot be referred to arbitration.

(3) In my view, this application does not require much comment or discussion, but the learned counsel for the applicant has cited some judgments in order to urge that this is a case in which proceeding should be stayed. Firstly, reliance is placed on Hickman V. Kent or Romney March Sheep Breeder's Association, 1915 CD 881. Being an English judgment based on a different statute. I do not see how it applies to the present case. Next, the learned counsel for the applicant has relied upon a Division Bench judgment of the Gujarat High Court, Star Trading Corporation Vs. Rajaratana Naranbhai Mills Company Ltd. 41 ComCas 1023. In that case the question before the Court was whether an arbitration clause continued to operate after a company had been ordered to be wound up. The proceedings were a suit instituted by the Official Liquidator after the winding up order had been passed. I do not see the relevancy of that authority for the purpose of determining the question whether the present proceedings should be stayed. Similarly the learned counsel has also cited Nalla Ramudanima v. Nolla Kasi Naidli. A. 1. R. 1945 Mad 26.9 and Faiz Ali V. Mi. AshMf Khatun and others, A. 1. R. 1929 Lah 177. In these two cases, references had been made to arbitration during the pendency of suits, which had led to arbitrators making arbitration awards concerning the validity of a marriage. I do not wish to make any comments on these decisions except to say that what can be referred during the pendency of a suit to arbitration u/s 21 of the Arbitration Act, and the requirements for obtaining a stay of pending legal proceedings u/s 34 of the same Act are completely different.

(4) In the present case. a petition under Sections 397 and 398 is already pending before the Court. This matter can only be decided by this Court and the Companies Act, 1956 has given exclusive jurisdiction and indeed the duty to the Court to protect the interests of shareholders and creditors etc. of Companies. When a creditor or a shareholder moves a petition either for winding up or for the regulation of the affairs of a company, there would have to be very strong circumstance indeed, for the Court to say that it will stay the proceedings or leave the matter to be decided by some arbitrator. I cannot say in what circumstances the Court can be called upon to refrain from proceeding under its statutory powers under Sections 397, 398 or 433 or indeed any other section of the Companies Act. These are proceedings which the Court necessarily has to decide and adjudicate upon.

(5) The learned counsel for the applicant submits that by the application he does not mean that the proceedings u/s 397 and 398 should not be decided by this Court but he means that the questions to be decided should be referred to an arbitrator. I fail to understand how the provision of Section 34 can be attached for this purpose; the object of Section 34 is to enable a party to a legal

proceeding who is also a party to arbitration agreement, to move the court to request a stay of proceedings so that the matter can be adjudicated upon by an arbitrator in accordance with the arbitration agreement. As the present case is a case in which the petitioner is seeking protection against the oppression of the majority or mismanagement of the Company and is seeking orders from the Court to protect his interest, it would be entirely useless to direct that this matter shall be referred to some arbitrator to be appointed by the parties. Such an arbitrator would have no powers and could not pass any order either u/s 402 or 403. The appointment of such an arbitrator would be a complete waste of time as he would be unable to pass any orders at all in the case. The learned counsel for the applicant states that the Court should refrain from proceeding in this matter till the arbitrator has given his award and then the Court can act in accordance with the award of that arbitrator. The learned counsel for the applicant interrupts me to say that this is not what he meant; what he meant was that points of difference should be referred to the arbitrator only for giving an award, and then the award will be considered by the Court under Sections 397 and 398, so as to determine what order should be passed u/s 402. It is only necessary to refer to Section 34 to see how incorrect and erroneous such a submission is. Section 34 of the Arbitration Act only allows for the staying of a suit or other legal proceeding so that a reference of the disputes can be made to an arbitrator. It does not allow for a case in which a partial reference is to be made to an arbitrator. It is well-settled by a series of decisions, that the power to stay is entirely discretionary. It is for the Court to decide whether the matter before it should be referred to arbitration for adjudication. If it is found that the arbitrator cannot deal with the matter because of an impediment in the law, then obviously the Court is empowered to refuse to stay those proceedings. I may only refer to *Dwarka Nath Kapur Vs. Rameshwar Nath and others*, 1966 P. Lr 91, where a similar question was argued under the Partnership Act. The learned Judge held that as the jurisdiction to dissolve a partnership on just and equitable grounds was only with the Court u/s 44(g) of the Partnership Act, the Court should not refer the matter to arbitration. Certain other decisions viz. *Jopun V. Postlethwaite* (1889) 61 L. T. 629 and *Olyer V. Hillier*. (1959) 2 All. E. R. 220 were relied upon for this view. I fully agree, that no arbitrator can possibly give relief to the petitioner under Sections 397 and 398 and will be unable to pass any order u/s 402 or 403 of the Companies Act. An order of stay in these proceedings will be tantamount to dismissing the petition, in my view, the application has been moved merely for the purpose of denying the petitioner all possible relief from this Court, and in that sense is a vexatious proceeding.

(6) I must also refer to Section 9(b) of the Companies Act, 1956, which states that any provision in any memorandum, article, or agreement to the extent that it is repugnant to the Act will be void. In view of the fact that the learned counsel for the applicant relies on an article of the company which is inconsistent with the provisions of Sections 397 and 398, I would hold that the article regarding arbitration would be void. He also states that the subject-matter of the present

petition cannot be tried by this Court but has to be referred to arbitration, before it can be proceeded with. I find an obvious repugnancy between Article 43 of the Articles and Sections 397 and 398 of the Companies Act, 1956. This repugnancy can be resolved in one or two ways, either the article is wholly void by reason of Section 9(b) of the Act, or the article does not apply when proceedings for winding up a Company or a petition u/s 397 or 398 are moved in the Court. In either case, the article cannot be called into play for the purpose of staying the present proceedings. The application is accordingly rejected with costs. The costs I assess at Rs. 100.00 .