
(1991) 01 KL CK 0027
In the High Court Of Kerala
Case No : M.F.A. No. 865 of 1989

P.C. Joy and Company

APPELLANT

Vs

United India Insurance Co. Ltd. and Another

RESPONDENT

Date of Decision : 07-01-1991

Acts Referred:

Arbitration Act, 1940 — Section 34

Citation : (1991) 72 CompCas 494 : (1991) 2 ILR (Ker) 37

Hon'ble Judges : U.L. Bhat, J;D.J. Jagannadha Raju, J

Bench : Division Bench

Advocate : V. Giri and M. Mohammed Navaz, for the Appellant; C.M. Devan, J.B. Koshi, Sibi Mathew and A.A. Mohammed Nazir, for the Respondent

Final Decision : Allowed

Judgement

Bhat, J.—Exhibit A-1 is the agreement entered into between the second plaintiff and the defendant regarding the transport of goods. One of the consignments entrusted by the second plaintiff to the defendant was either damaged or lost. Since the goods were insured, the insurer made up the loss. Thereafter, the insurer and the insured together filed the suit against the defendant seeking recovery of damages, The suit stood posted for appearance on April 2, 1988. On that day, there was no sitting of the court and the suit stood adjourned to July 12, 1988. On July 12, 1988, the defendant's advocate asked for time. The court adjourned the suit to September 9, 1988, for filing the written statement. Meanwhile, on August 9, 1988, the defendant filed an application u/s 34 of the Arbitration Act, 1940 (for short "the Act"), seeking stay of the proceedings on the ground that exhibit A-1 contains an arbitration clause and the dispute should be decided by an arbitrator. This application was resisted by the plaintiffs on the ground that the defendant had specifically asked for adjournment for filing the written statement which amounts to "taking any other steps in the proceedings" and, therefore, Section 34 of the Act cannot be invoked. The lower court held that on behalf the defendant time was specifically asked for filing written

statement and that indicated an unequivocal intention to give up the remedy under the arbitration clause and subject himself to the jurisdiction of civil court and accordingly dismissed the application. Hence this appeal.

2. There is no dispute that exhibit A-1 agreement contains an arbitration clause. Section 34 of the Arbitration Act states, inter alia, that :

"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."

3. Admittedly, defendant did not file written statement. The controversy is whether he had "taken any other steps in the proceedings". According to the lower court, and this reasoning is supported by learned counsel for the respondents, defendant's counsel had specifically asked for adjournment for filing written statement and that amounts to "taking any other steps in the proceedings", and the intention to give up the remedy by way of arbitration. Our attention has been invited to the following decisions of the Supreme Court, namely, *The State of Uttar Pradesh and Another Vs. Janki Saran Kailash Chandra and Another*, *Food Corporation of India v. Yadav Engineer and Contractor* AIR 1982 SC 1302 , *General Electric Co. Vs. Renusagar Power Co.*, ; *Rachappa Gurudappa Bijapur Vs. Gurudiddappa Nurandappa and Others*, and *M/s. Sadhu Singh Ghuman Vs. Food Corporation of India and others*, .

4. There can be no dispute regarding the legal principles governing a matter like this. 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. The step must be such as would clearly and unambiguously manifest an intention to waive the benefit of the arbitration agreement and to proceed with the suit. Prima facie, an application for time to file the written statement should raise a presumption that the defendant had actual or constructive knowledge of his right and that he acquiesced in the method adopted by the plaintiff. The presumption, however, is not absolutely irrefutable and can be rebutted by showing that even constructive knowledge cannot be imputed to the defendant. The election or affirmation in favour of the suit in the place of arbitration 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 neither 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.

5. In paragraph 10 of the impugned order, the lower court has stated thus :

"The suit is filed on February 11, 1988, and it was posted to April 2, 1988, for the appearance of the defendant. On that day, the defendant prayed for time for filing the written statement and it was adjourned to September 9, 1988. . . . According to learned counsel for the respondents, the request made by the defendants on April 2, 1988, for time to file the written statement amounts to taking any other steps in the suit as contemplated u/s 34 of the Arbitration Act. . . . The principle laid down in the above said decision *The State of Uttar Pradesh and Another Vs. Janki Saran Kailash Chandra and Another*, is directly applicable to the facts of the case. ... In view of the decision in *The State of Uttar Pradesh and Another Vs. Janki Saran Kailash Chandra and Another*, it has to be found that the defendant in this case while requesting for time for filing the written statement participated in the proceedings and he has taken "any other steps" as provided u/s 34 of the Act."

6. We find that the document on which the above conclusion rests is the B-diary. The B-diary shows that there was no sitting of the court on April 2, 1988, and there was an automatic adjournment to July 12, 1988. Therefore, the statement in paragraph 10 quoted above that on April 2, 1988, the defendant's counsel specifically asked for time for filing written statement cannot be correct. Learned counsel for the respondents would suggest that the mistake was only in mentioning the date and the court was obviously referring to what transpired in the court on July 12, 1988. The B-diary indicates what took place on July 12, 1988, in the following manner :

"Defendant's side asked for time. Adjourned to September 9, 1988, for written statement."

7. The above order only indicates that the defendant's counsel asked for time, but does not indicate that he asked for time for filing the written statement. It is true that the court adjourned the suit for the purpose of filing the written statement, but the order does not indicate that it was done specifically at the request of the defendant. In these circumstances, the lower court was in error in taking the view that the defendant specifically asked for an adjournment for filing the written statement. The defendant's counsel merely asked for an adjournment without indicating for what purpose he wanted an adjournment. That may be for any purpose such as taking further instructions from the party, collecting materials or documents, studying the agreement, to obtain a copy of the agreement (which had not been filed along with the plaint) referred to in the

plaint in order to take an appropriate decision whether to submit to the jurisdiction of the civil court or press for the appointment of an arbitrator or for any other relevant reason. A mere request for time to some other day would not indicate that the defendant gave up his right to demand a decision of the dispute by arbitration and was prepared to submit to the jurisdiction of the civil court. In these circumstances, the lower court was in error in holding that defendant had taken any step in the proceedings as contemplated u/s 34 of the Arbitration Act and stay cannot be ordered. The correct view is that he had not taken any step in the proceedings and did not give up his right to demand an arbitration.

Hence, we set aside the impugned order and pass an order staying the proceedings u/s 34 of the Arbitration Act. The appeal is, thus, allowed, but without costs.