

(1983) 12 BOM CK 0029

In the Bombay High Court

Case No : Civil Revision Application No. 775 of 1983

Rameshchandra Ramlal Khandelwal

APPELLANT

Vs

Shankarlal Maganlal Joshi and Others

RESPONDENT

Date of Decision : 14-12-1983

Acts Referred:

Arbitration Act, 1940 — Section 34

Citation : (1984) 2 BomCR 245 : (1984) MhLj 187

Hon'ble Judges : H.H. Kantharia, J

Bench : Single Bench

Advocate : B.J. Rale and R.D. Suvarna, for the Appellant; A.G. Sabnis, for the Respondent

Judgement

H.H. Kantharia, J.—An interesting and important point that arises for consideration in this civil revision application is with regard to the proper construction of section 34 of the Arbitration Act, 1940 (hereinafter referred to as "the Act").

2. The facts leading to this revision application u/s 115 of the CPC are that respondent Nos. 1 and 2 (hereinafter referred to as "plaintiffs") filed Regular Civil Suit No. 417 of 1982 in the Court of the learned Civil Judge (Junior Division), Kalyan against the present petitioner (hereinafter referred to as the "Defendant No. 1") and respondent No. 3 (hereinafter referred to as "Defendant No. 2") for dissolution of their partnership firm and for accounts. The plaintiffs made an application in the said suit under Order 39, Rule 1 of the CPC praying for interim and ad interim reliefs. The Court issued a show cause notice in the matter of the said application and also summons in the suit and both were made returnable on September 14, 1982. Defendant No. 1 was served with a show cause notice along with copies of the plaint and the deed of partnership and the application for interim and ad interim reliefs. The learned advocate appearing on behalf of defendant No. 1 made an application on September 14, 1982 for adjournment to enable him to take instructions from defendant No. 1 for filing

written statement and reply. Adjournment was accordingly granted. Thereafter on October 5, 1982 an application signed by defendant No. 1 and countersigned by his advocate Mr. V.V. Modak was filed to the effect that there was a clause for arbitration in the partnership deed for referring the dispute to an arbitrator and despite that the suit was filed by the plaintiffs which they could not do and hence the dispute be referred to an arbitrator and the suit be stayed. By his order dated November 23, 1982 the learned trial Judge granted the said application of defendant No. 1 and referred the matter for arbitration u/s 34 of the Act and the suit was stayed. Being aggrieved by this order the plaintiffs filed an appeal, being Miscellaneous Civil Appeal No. 4 of 1983 in the District Court at Thane. The learned 2nd Extra Assistant Judge, Thane vide his judgment and order dated August 3, 1983 allowed the said appeal and set aside the order passed by the trial Court with directions that the suit should proceed according to law. Aggrieved by the said judgment and order of the learned Assistant Judge, defendant No. 1 filed the present revision application.

3. On the submissions made at the Bar the only point that arises for my consideration is whether the filing of an application dated September 14, 1982 by defendant No. 1 amounts to taking steps in the aid of the proceeding within the meaning of section 34 of the Act.

4. Section 34 of the Act reads as under :

"34, Whether 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 make an order staying the proceedings."

An analysis of this provision of law indicates that an application to stay proceedings may be made by a defendant at any time before he files written statement or takes any other steps in the proceedings. In our case, admittedly the application dated October 5, 1982 was made for stay of the proceedings before filing the written statement. But the moot question is whether it was filed before defendant No. 1 took any other steps in the aid of the proceedings. The meaning of the words "taking steps" would be doing anything in the aid of the progress of the suit or submitting oneself to the jurisdiction of the Court. The test to find out whether an act is a step in the aid of the proceedings is to see if the act displays an unequivocal intention on the part of a defendant to proceed with the suit in the Court and to give up his right to have the matter disposed of by an arbitrator.

5. Now, the application made on behalf of defendant No. 1 reads as under:

"Before the Court of Civil Judge, Junior Division at Kalyan.

Reg. Suit No. 417 / 82

No. 99

Shankarlal Maganlal Joshi & ors. Plaintiffs. Versus Rameshchandra Khandelwal & Ors. Defendants. Application on behalf of Defendant No. 1

I have today filed my Vakalatnama on behalf of the Defendant in the above suit. In order to enable me to take instruction from the Defendant for filing written statement and reply it is prayed that time may be granted.

This is the application Dated 14-9-82.

Sd/- V.V. Modak

Advocate for Defendant No. 1."

Mr. Rele, learned Counsel appearing on behalf of defendant No. 1, urged that a careful reading of this application shows that the learned Advocate who filed it wanted an adjournment to enable him to take instructions from defendant No. 1 and there was no clear intention on the part of defendant No. 1 to file a written statement inasmuch as although September 14, 1982 was the returnable date both for summons to the suit and to show cause to the application for interim relief. Since the matter was at the interim stage, we can safely infer that the intention of defendant No. 1 was to file a reply to the application for interim relief for which he wanted instructions. In other words, Mr. Rele submits that the matter was at the interlocutory stage and the stage of filing written statement had not arrived. Mr. Rele, therefore, urged that the matter could not have been referred to arbitration and as such the impugned judgment and order passed by the learned Assistant Judge was bad in law and should be set aside. Mr. Sabnis, learned Counsel appearing on behalf of the plaintiff, controverted this submission and urged that the intention of defendant No. 1 in making an application for adjournment was very much clear that he wanted to file written statement to the suit on merits and also a reply to the application for interim relief for which his Advocate wanted necessary instructions. Mr. Sabnis further submitted that if the said application was so worded as to say that instruction were necessary from defendant No. 1 to file a reply to the application for interim relief or if the application was so simple to indicate that the learned Advocate appearing on behalf of defendant No. 1 wanted time for taking instructions for whatever purpose his client would have been out of the Court but the application is very much clear that the learned Advocate of defendant No. 1 sought an adjournment to seek instructions from his client for a specific purpose viz. filing written statement as also a reply to the application for interim relief. Mr. Sabnis very vehemently urged that the application in question should be construed in its proper perspective and when that is done there is absolutely no ambiguity that

the learned advocate of defendant No. 1 wanted instructions to file written statement. In other words, according to Mr. Sabnis, a decision was already taken by defendant No. 1 to file a written statement for which his advocate wanted certain instructions which unequivocal intention of defendant No. 1 should be safely inferred and it would mean that he had submitted to the jurisdiction of the Court giving up his right to take the matter to arbitration.

6. With a view to bring home his point; Mr. Rele emphatically relied upon a judgment of the Supreme Court in Food Corporation of India and another v. Yadav Engineer and Contractor. In that case a suit was instituted on June 1, 1981 in the Court of the IIIrd Civil Judge, Class 1, Gwalior in which a notice of motion was taken out purporting to be under Order 39, Rules 1 and 2 read with section 151 of the CPC for an interim injunction restraining the defendants from committing a breach of contract and from interfering with the work of handling and transport of goods of the 1st defendant Corporation by the plaintiff during the pendency of the suit. On the returnable date of the show cause notice with regard to this application for interim relief, the 2nd defendant appearing through the Advocate prayed for time for "reply and arguments to the plaintiff's application for temporary injunction". The request was granted and the matter was adjourned to June 3, 1981 when an application was made on behalf of the 1st defendant inviting the attention of the Court to the subsisting arbitration agreement between the plaintiff and the 1st defendant for referring the dispute to arbitration and stay of the suit was provided in section 34 of the Act. The learned trial Judge granted stay of further proceedings in the suit as prayed on behalf of defendant No. 1. The plaintiff preferred an appeal in the Court of District Judge, Gwalior who dismissed the appeal. Thereafter the plaintiff approached the High Court in revision u/s 115 of the Civil Procedure Code. The High Court held that application for filing reply to a notice of motion for interim injunction is a step taken in the proceedings which would disentitle the party from invoking arbitration agreement. Thus the High Court interfered in revision and set aside the order of the trial Court granting stay and confirmed by the appellate Court and rejected the application for stay of the proceedings in the suit. Hence an appeal was filed in the Supreme Court by special leave. The Supreme Court held that the High Court was in error in interfering with the order made by the trial Court and confirmed in appeal granting stay of the suit. The judgment of the High Court was accordingly set aside and the one made by the trial Court and confirmed in appeal was restored. Mr. Rele invited my attention to the observations of the Supreme Court made in this case as under :---

"Having thus critically examined both on principle and precedent the meaning to be given to the expression "taking steps in the proceedings", we are clearly of the view that unless the step alleged to have been taken by the party seeking to enforce arbitration agreement is such as would display an unequivocal intention to proceed with the suit and acquiesce in the method of resolution of dispute adopted by the other party, namely, filing of the suit and thereby indicate that it has abandoned its right under the arbitration agreement to get the dispute

resolved by arbitration, any other step would not disentitle the party from seeking relief u/s 34. It may be clearly emphasised that contesting the application for interim injunction or for appointment of a receiver or for interim relief by itself without anything more would not constitute such step as would disentitle the party to an order u/s 34 of the Act."

In reply Mr. Sabnis urged this ruling of the Supreme Court is distinguishable inasmuch as in the said matter the proceedings were only at the interim stage and the orders were passed at the time of hearing the arguments on the plaintiff's application for temporary injunction. In further submission of Mr. Sabnis if those were the facts of our case he would not have proceeded with the matter even for a moment but so long as our case in concerned, defendant No. 1 had made an application for filing written statement to the suit which makes the whole difference. I agree with Mr. Sabnis.

7. Mr. Sabnis took me through a judgment of this Court in *Edward Radbone v. Juggilal Kamalapat*, 45 Bom.L.R. 402 in which it was held :

"In a suit filed in a Court, an application made successfully by the defendant by consent precipe to extend the time for filing his written statement is tantamount to taking steps in the proceedings, and disentitles him to ask for stay of the suit u/s 34 of the Indian Arbitration Act, 1940."

While finding support from this judgment Mr. Sabnis submitted that in the present case also adjournment was sought by defendant No. 1 for filing written statement. Mr. Sabnis thereafter relied upon another judgment of this Court in (C.R. Application No. 347/67 decided on April 01, 1970 by D.B. Padhye, J.,)³, in which the facts were that the plaintiff filed a suit for ejectment against his tenant. The agreement of lease contained a clause that a dispute between the parties shall be decided by arbitration. In accordance with summons Counsel for defendant prayed for adjournment to enable him to file a written statement. On the next date the defendant applied that the suit should be stayed in view of the provisions of section 34 of the Arbitration Act. The Court stayed the suit. This order was affirmed in appeal. The plaintiff moved the High Court in revision. It was pointed out that on the first day when the lawyer appeared no Vakalatnama was filed by him and, therefore, prayer for adjournment by him should not come in the way of praying for stay of the suit. Before the suit was filed the plaintiff had given a notice to the defendant terminating his tenancy and the defendant had stated that the matter would have to be referred to an arbitrator in accordance with the arbitration clause in the agreement of lease. On these facts it was held :---

"that Counsel must be deemed to have prayed for an adjournment under instructions from the defendant and his prayer for adjournment amounted to "taking any other steps" in the proceedings within the meaning of section 34 of the Arbitration Act. The fact that Vakalatnama was not filed at the time of praying for adjournment was irrelevant in view of the fact that the lawyer was

acting under instructions of the defendant."

It was further held :

"When a party in answer to summons appears before the Court or where the Counsel for the defendant appears on the date of hearing, he must be presumed to have instructions from the client and when he asks for time for filing the written statement, the party intends to proceed with the suit and to defend it by a written statement ."

It was again observed :

"The party is bound to be aware of the arbitration clause in the agreement and if he wants to avail of the arbitration clause, then he would certainly instruct his Counsel about such an arbitration clause and instruct him either to make an application u/s 34, but would never instruct him to take time to file a written statement, it must be taken to be on the instructions of the client and once such time for filing the written statement is asked then that would amount to taking a step in the proceedings and the right to have the matter referred to arbitration must be taken to have been waived."

Mr. Sabnis submitted that the facts of our case are more favourable to his client as compared to the facts of the above case inasmuch as in our case the learned advocate had even filed his Vakalatnama as against no Vakalatnama filed on behalf of the defendant in that case and time was taken to take instructions to file written statement. Therefore, further submitted Mr. Sabnis, from the facts of our case it should be held without any hesitation that the defendant had sought an adjournment with a view to aid the proceedings in the suit by filing written statement. And the last authority on which Mr. Sabnis relied is of the Supreme Court in *The State of Uttar Pradesh and Another Vs. Janki Saran Kailash Chandra and Another*, . In that case the Counsel filed an appearance slip in the Court and also put in a formal application praying for one month's time for the purpose of filing written statement. This prayer was granted. Thereafter an application was made that the matter be referred to arbitration and the suit be stayed. The trial Court held that the dispute was subject to arbitration clause and since the State of Uttar Pradesh had not taken any steps in the suit proceedings and had also not filed a written statement the suit was liable to be stayed and accordingly it was stayed. On an appeal by the plaintiff to the High Court it was held that action of the District Government Counsel in applying for time to file written statement amounted to taking step in the proceedings within the meaning of section 34 of the Arbitration Act. On this view the defendant was held not entitled to claim that the suit should be stayed and the appeal was accordingly allowed and the order of the trial Court of stay was set aside. The matter was then taken to the Supreme Court in appeal and we may usefully quote some of the observations made by the Supreme Court in the said case as under :---

"The District Government Counsel in the present case was thus fully empowered to appear and act for and on behalf of the Government and also to make

applications on its behalf. If the said Counsel wanted time for the purpose of having fuller instructions, he could have asked for it specifically, for he was not a layman ignorant about the legal position but a professional lawyer retained by the Government for the purpose of acting and pleading on behalf of the Government as a recognised agent. He, however, chose instead to ask for time specifically for filing written statement and this act he purported to do on behalf of the State Government which he was fully empowered to do. The State took benefit of his appearance and his successful prayer for adjournment of the case by one month for the purpose of filing the written statement."

"Indeed in the present case the District Government Counsel also filed in the Court the usual appearance slip. If he wanted time for further consultations, he could and should have specifically made a prayer to that effect."

"The argument that the trial Court's discretion has been erroneously reversed by the High Court is equally devoid of merit. If the appellant's application was for adjournment for the purpose of filing written statement, then there is no question of any exercise of discretion by the trial Court. Discretion with regard to stay u/s 34 of the Arbitration Act is to be exercised only when an application under that section is otherwise competent."

The appeal was accordingly dismissed with costs. It is pertinent to note here that this ruling was referred to by the Supreme Court in the case of Food Corporation of India, but as submitted by Mr. Sabnis, the law was not altered.

8. Now, in our case, in view of the law laid down by the Supreme Court and this Court as stated hereinabove, I am of the opinion that defendant No. 1 through his Advocate on September 14, 1982 sought an adjournment with a view to file written statement for which the Advocate wanted instructions from defendant No. 1. I am, therefore, in agreement with the submissions made by Mr. Sabnis that the application dated September 14, 1982 indicated unequivocal intention of defendant No. 1 to contest the suit on merits for which he wanted to file written statement. The decision to file written statement was already taken when Mr. Modak appeared on behalf of defendant No. 1 and filed his Vakalatnama and because he wanted instructions for the purpose of filing written statement that he asked for time. Therefore, from these facts and circumstances it can be safely concluded that defendant No. 1 submitted to the jurisdiction of the Court giving up the right to arbitration. Just because an application for interim relief was also made returnable on September 14, 1982 that the application made on behalf of defendant No. 1 incorporated an averment that instructions were necessary for filing reply to the said application for interim relief. As submitted by Mr. Sabnis if it was a matter of hearing only an application interim relief for which defendant No. 1 wanted time there was no case for his clients. But the application for adjournment makes it crystal clear that in addition to filing a reply to the interim relief application defendant No. 1 also desired to file written statement. Once having taken a decision to file written statement it cannot lie in the mouth of defendant No. 1 to say that he had not submitted to the jurisdiction of the Court,

giving up his right to take the dispute to arbitration. In view of this position in law and regard being had to the facts and circumstances of our case I am more that convinced that defendant No. 1 did have an unequivocal intention to submit himself to the jurisdiction of the Court and as such the impugned judgment and order passed by the learned Assistant Judge. Thane, in Civil Miscellaneous Appeal No. 4 of 1983, does not suffer from any infirmity.

9. In the result, I find no substance in this revision application. It stands rejected. Rule is accordingly discharged with costs.

Mr. Rele orally applies for leave to appeal to Supreme Court. I do Not think this is a fit case in which leave should be granted. Application rejected.