
(1980) 06 CAL CK 0005
In the Calcutta High Court
Case No : C.R. No. 1721 of 1975

Sevak Service Station

APPELLANT

Vs

Indian Oil Corporation

RESPONDENT

Date of Decision : 26-06-1980

Acts Referred:

Arbitration Act, 1940 — Section 34

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, 115, 75, 76

Citation : 85 CWN 376

Hon'ble Judges : Jyotirmoyee Nag, J

Bench : Single Bench

Advocate : Somnath Chatterjee and Rupen Mitra, for the Appellant; A.C. Bhabra, S.P. Ghosh, Amiya Narayan Mukherji and D.N. Sen, for the Respondent

Judgement

Jyotirmoyee Nag, J.—This Rule is directed against an order dated 18th February, 1975 passed in Misc. Appeal No. 3 of 1973 by the learned Subordinate Judge, Jalpaiguri dismissing the appeal of the petitioner filed against the order passed by the learned Munsif, Jalpaiguri in O.C. Suit No. 24 of 1971 allowing the application for stay made u/s 34 of the Arbitration Act. A dispute arose in respect of the dealership of the petitioner under the opp. party and the petitioner instituted a suit on 8th February, 1971 being O.C. Suit No. 24 of 1971 before the learned Munsif at Jalpaiguri for declaration that the petitioner had vested right to carry on business as dealer of the opp. party corporation and for mandatory injunction restraining the defendant from giving effect to the letter dated 22nd January, 1971 whereby the opp. party revoked the licence and/or terminated the agreement in so far as the petitioner's dealership of petrol and high speed diesel oil is concerned. In the said suit the petitioner filed an application for injunction under Order 39 rules 1 and 2 of the CPC on 8th February, 1971 praying for a temporary mandatory injunction requiring the defendant corporation to perform their part of the contract by supplying the products or a temporary injunction restraining the defendant corporation from doing any act which may affect or interfere with the petitioner's trade as a dealer and from giving effect to the

defendant's letter dated 22nd January, 1971 until the disposal of the suit. A notice was issued on the defendant to show cause within three days from the date of service thereof as to why the plaintiff's petition for temporary injunction should not be allowed. The temporary injunction matter was heard by the learned Munsif in presence of both the parties and the learned Munsif was pleased to grant ad interim injunction against the defendant restraining the corporation from giving effect to the letter dated 22nd January, 1971 till the disposal of the plaintiff's petition for temporary injunction. In this connection, certain dates are very relevant. As already stated, the suit was filed on 8th February, 1971. After receipt of summons the defendant appeared on 5th March, 1971. On 6th March an application was made on behalf of the defendant for time to file an application u/s 34 of the Arbitration Act. The application for injunction was heard on 18th March, 1971 and injunction was granted, on 23.3.71. The defendant's petition dated 6.3.71 praying for time to file a petition u/s 34 of the Arbitration Act was heard and the learned Munsif order that the petition be kept on the record as no order was called for on the said petition, the defendant being at liberty to file such petition according to law. On 8.4.71 an application was made on behalf of the defendant praying for time to file written objection to the application for injunction made on behalf of the plaintiff. Further time was prayed for again by the defendant on 22nd April, 1971. Prior to that on 8.4.71 the defendant filed a petition u/s 34 of the Arbitration Act after serving a copy of the same on the plaintiff. The learned Munsif fixed 8.6.71 for hearing the application u/s 34 of the Arbitration Act. On 6th August, 1971 the defendant filed a written objection supported by an affidavit against the injunction petition filed by the plaintiff. On 29th March, 1973 defendant's petition for stay of the suit u/s 34 of the Arbitration Act was heard and the learned Munsif allowed the application and ordered that the suit be stayed u/s 34 of the Arbitration Act. Against this order the plaintiff went up in appeal and the same was dismissed by the learned Subordinate Judge, Jalpaiguri. Against the said dismissal order the plaintiff-petitioner has come up u/s 115 of the Code of Civil Procedure.

2. It is contended on behalf of the petitioner that the suit should not be stayed at the instance of the defendant inasmuch as the defendant Corporation having taken steps in the suit and submitted to the jurisdiction of the court was debarred from getting any relief by way of stay u/s 34 of the Arbitration Act. The steps taken by the defendant are, as I have already indicated above are that the defendant appeared and participated in the injunction matter on 18th March, 1971 although prior to that on 6th March, 1971 an application was filed on behalf of the defendant for time to file an application u/s 34 of the Arbitration Act. Again on 8th April, 1971 the defendant opp. party made an application for time to file objection to the injunction matter. These two acts on the part of the defendant constituted overt acts showing a plain intention on his part to contest the suit that is, to proceed with the suit and, therefore, it should not be permitted to get stay of the suit u/s 34 of the Arbitration Act. What constitutes taking steps in a suit is explained in a case relied upon by the learned Counsel

appearing for both sides reported in *The State of Uttar Pradesh and Another Vs. Janki Saran Kailash Chandra and Another*, .

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.

Taking other steps in the suit proceedings connotes the idea of doing something in aid of the progress of the suit or submitting to the jurisdiction of the court for the purpose of adjudication on the merits of the controversy in the suit.

3. The learned Advocate for the opp. party has further relied upon a decision of this court reported in *Biswanath Rungta Vs. Oriental Industrial Engineering Co. Pvt. Ltd. and Others*, . In that case a question arose as to whether the defendant had taken steps in the proceeding thus disentitling him from asking stay u/s 34 of the Arbitration Act. After the filing of the suit and before a copy of the plaint was served upon the defendant the plaintiff made an application for injunction restraining the defendant No. 1 from operating the bank account with their Allahabad Bank and obtained an order of ad interim injunction. The matter appeared as a New Motion and on 31st May, 1974 after the order of injunction was made absolute, restraining the defendant No. 1, Counsel mentioned on behalf of the petitioner and (defdt.) & prayed for an order that the Allahabad Bank be restrained from allowing the plaintiff from operating the bank account and that was done on 31st May, 1974. From these facts it was argued that the defendant had clearly showed inclination to proceed with the suit by taking steps in the proceeding and hence was disentitled from asking for a stay u/s 34 of the Arbitration Act, 1940. Sabyasachi Mookarji, J. following the principles laid down in *The State of Uttar Pradesh and Another Vs. Janki Saran Kailash Chandra and Another*, cited above, held that in the facts and circumstances of the case, the step taken by the defendant did not show a conduct in aid of the suit or any submission to the jurisdiction of the court for the purpose of adjudication of the controversy in the suit. "The order of injunction having been made in favour of the plaintiff, what the defendant did was to circumscribe it to such an extent that the rights of the parties be protected until the disputes are decided". Therefore, it could not be said that the defendant had taken any step in the proceeding.

4. Mr. Bhabra for the opp. party also cited another decision of a Division Bench of the Allahabad High Court reported in *Shri Ram Shah Vs. Mastan Singh and Others*, . In that case their Lordships held that a party is entitled to claim the benefit of the provisions of section 34 of the Arbitration Act provided he invoked such benefit before (1) filing a written statement, or (2) taking any other steps in the proceedings. Any conduct on the part of the party which is referable to his intention to submit to the jurisdiction of the court in which suits or other legal proceedings have been instituted would amount to abandoning the arbitration agreement and no stay should be granted at the instance of such a party. But before such an application is thrown out, one has to ascertain whether the

unequivocal intention to abandon the arbitration agreement can be attributed to him.

Every ostensible act or step taken by an applicant in the suit or proceedings instituted would not invariably lead to the conclusion that he has forfeited his right to claim stay of the proceedings under the provision of section 34 of the Act. The crucial test for determining whether an act is such a step in the proceedings is to see whether the act displays an unequivocal intention to proceed with the suit and give up the right to have the matter disposed of by arbitration. So long as such categorical inference cannot be drawn, we cannot say that the step taken by the applicant discloses any intention not to press the arbitration agreement. In this context frequently cases have arisen in which defendants have chosen to contest injunction applications filed against them by plaintiffs in the suits instituted by the latter and on those facts the controversy has arisen as to whether the mere contesting of injunction application or filing of objections by the defendants against such application is sufficient to spell out an intention on the part of the defendants to defend themselves in the suit and not to proceed to press the arbitration agreement.

5. Merely filing objections against an injunction application made by the plaintiff in a suit instituted by him cannot be construed as a step in the proceedings by the defendants so as to preclude him from claiming the benefit of section 34 of the Act. In other words, such conduct of the defendant cannot be regarded as conclusive as to his intention not to proceed with the arbitration but to defend himself in the suit itself. This reasoning of Their Lordships of the Allahabad High Court may be acceptable in the context of the provisions of the Arbitration Act which has been amended by the Uttar Pradesh Civil Laws (Reforms and Amendment) Act, 1976. The Explanation is quite clear which reads as follows :--

A mere application for time to file a written statement or a mere contest to an interlocutory application for injunction, appointment of Receiver or the like, shall not amount to taking any steps in the proceedings.

6. This explanation is wanting in the Arbitration Act so far as West Bengal is concerned. Therefore, not much reliance can be placed upon this decision of the Allahabad High Court in view of the difference in law as it prevails in Uttar Pradesh and in West Bengal. Another reason has been given by their Lordships of the Allahabad High Court in the said case to test as to whether the step taken is a step in the proceeding or not. Their Lordships have referred, to the provisions of Part III of the CPC which relates to incidental proceedings which are dealt with in sections 75 to 78 of the Code and of Part IV which relates to supplemental proceedings which are dealt with in sections 94 and 95 of the Code. Their Lordships have held that incidental proceedings are integral to the suit inasmuch as they are necessary in the taking of the suit to its end, that is, to the making of the decree and supplemental proceedings relate only to the power of the court which may be exercised for preventing the ends of justice being defeated. Within this category attachment, injunction, etc. fall. They do not by themselves

contribute to the advancement or the progress of the suit. They are merely intended to protect the interest of the parties in certain circumstances. It follows that if any step was taken with regard to those supplemental proceedings, it could not be said that it had contributed to the progress of the suit on merits. The test therefore is whether any step, taken by the defendant is related to the advancement of the hearing of the suit or the substantive action or is merely connected with supplemental proceedings the purpose of which is not to decide or proceed or proceed to decide the hearing of the suit on merits.

7. On the other hand, the learned Counsel appearing for the petitioner has relied upon certain decisions viz. the cases reported in AIR 1960 Cal. 306 *Delux Films v. Sukumar and Amritraj Kothari Vs. Golecha Financiers*, and an earlier decision of Mr. Justice S.R. Das reported in AIR 1943 Cal. 84. It is argued on behalf of the petitioner that the decision reported in AIR 1975 Cal. 229 *Subal v. Md. Ibrahim* the judgment of Mr. Justice Sabyasachi Mukherji is distinguishable from the present case inasmuch as in the facts of that case that judgment is apposite. The facts of that case revealed that the defendant had no notice of the plaint nor what was the subject matter of the suit instituted by the plaintiff. The defendant had obtained an order of injunction restraining the plaintiff from withdrawing the money from the Bank concerned. What the defendant wanted in that case was that until the rights were determined by the Court in whichever forum, the money deposited in the Bank be protected. That pointed out to the intention of the defendant that so long as the dispute lasted either in the Court or in arbitration proceeding, each party should be restrained from having the use of the money involved in the dispute. From this it could not be concluded that the defendant did anything in aid of the suit or submitted to the jurisdiction of the Court for purposes of the adjudication of the controversy in the suit. Accordingly, it was held by His Lordship that the defendant had not taken any step in the proceeding which would not as an impediment for the stay of the suit.

8. In the case reported in AIR 1943 484 relied upon by the petitioners, it has been held by His Lordship Mr. Justice S. R. Das that--"In order to constitute a step in the proceedings the act in question should be :--

(a) an application made to the Court either on summons or orally or something in the nature of an application to the Court, (b) such an act as would indicate that the party is acquiescing in the method adopted by the other side of having the disputes decided by the Court.

9. In the said case the defendant applied for time to file affidavit-in-opposition to the application for appointment of a Receiver and also to obtain directions and leave of Court to inspect the books of account and the records. The conduct of the defendant clearly showed that the defendant would proceed to defend the action and would not insist on the right to have the disputes disposed of by arbitration by acting as he did in taking a step in the proceeding. It goes without saying that the conduct of the defendant in that case in applying for leave to inspect the books of account and the records go to show that he had acquiesced in

the "method adopted by the other side of having the dispute decided by the Court". The other cases relied upon by the learned Counsel for the petitioner as already observed earlier are reported in *Deluxe Film Distributors Ltd. Vs. Sukumar Kumar*, both these decisions are decisions of Mr. Justice P.C. Mallick. From the facts in *Amritraj Kotheri's* (AIR 1966 Cal. 15) case it will be seen that the plaintiff instituted a suit in breach of arbitration agreement and obtained injunction against the defendant and subsequently applied for extension of injunction. The defendant appeared and, his Counsel prayed for time to contest the injunction matter and to take some other step through his Solicitor for the purpose of putting in affidavit-in-opposition to the injunction application made on behalf of the plaintiff. Mr. Justice P.C. Mallick relying upon the decision reported in *Subal Chandra Bhur Vs. Md. Ibrahim and Another*, and also on his previous decision reported in AIR 1960 206 held that the conduct of the defendant amounted to taking steps in the suit. It was not necessary for him to do so inasmuch as he could have made an application before the Court U/s 41B of the Arbitration Act which includes the power to vacate an order of injunction obtained or to remove a Receiver. The Arbitration Act is Act self complete Act and, therefore, whatever remedies may be prayed for, may be made available to the defendant in the arbitration proceedings itself and also by making an application before the Court in respect of interlocutory matters. Had such powers not been given to the Court under certain urgent circumstances the defendant would have to approach the Court before which the suit is pending for necessary directions and for interlocutory orders to safe guard his interest. I am inclined to follow the decisions of this Court reported in *Subal Chandra Bhur Vs. Md. Ibrahim and Another*, , *Deluxe Film Distributors Ltd. Vs. Sukumar Kumar*, . The decision reported in *Brij Gopal Binani and Others Vs. Sreelal Binani and Others*, was cited by the learned Counsel appearing on behalf of the opp. party to meet the proposition that the conduct of the parties after the application had been made for stay of the suit should not be relied upon in considering whether any steps have been taken in the proceeding so as to disentitle the applicant from obtaining a stay u/s 34 of the Arbitration Act. On the 28th of March, 1971 and 8th of April, 1971. The defendant filed an application for time to file objection in respect of the injunction granted by the Court. This step taken on the 8th of April, 1971 has been characterised by the petitioner as step taken in aid of the proceeding disentitling the defendant from getting leave for stay u/s 34 of the Arbitration Act. Even if this last conduct on the part of the defendant be ignored. The defendant's conduct in contesting the injunction matter earlier would constitute to my mind a step in the aid of the suit as this relief we have been available to the defendant had he made an application before the Court under the relevant provisions of the Arbitration Act.

10. Upon the prayer of the Counsel of the opp. party for further hearing of the matter an opportunity for further hearing was given to both sides. Mr. Bhabra appearing for the opp. parties had cited two new cases reported in *Arjun Singh Vs. Mohindra Kumar and Others*, and AIR 1961 Mad 322 (*K.S. Vankaterama* and

Co. v. State of Madras) and he made further submissions which were already made earlier at the time of the hearing of this matter. So far as the case cited by the Counsel for the opp. parties, reported in Arjun Singh Vs. Mohindra Kumar and Others, is concerned, I do not think that that has any bearing on the question at issue in the present case.

11. It may, however, be pointed out that the principles laid down in AIR 1973 Supreme Court page 2071 have to be kept in mind in judging whether a particular act of the party is a step in aid of the suit or whether it gives an indication that the defendants intends to submit to the jurisdiction of the Court and contest the suit.

12. In the instant case the injunction prayed for by the plaintiff in the suit was in respect of a letter dated 22.1.71 so that the defendant Corporation may be restrained from giving effect to the said letter. The letter on 22nd January, 1971 is to the effect that the agreement between the parties dated 17.11.69 would stand determined on the expiry of thirty days from receipt of the notice, that is to say, that the duration of the agreement would expire on 22.6.71 instead of remaining in force for five years as it was agreed upon between the parties that the agreement would remain in force until determined by the other party on giving three months notice in writing to the other side. The application under Order 39 Rules 1 and 2 of the CPC by the plaintiff-petitioner was for issue of a temporary mandatory injunction requiring defendant-Corporation to perform their part of contract or a temporary injunction restraining the defendant-Corporation from doing any act which may effect or interfere with the petitioner's right and from giving effect to the defendant's letter dated 22.1.71 till the disposal of the Rule. This application was filed on the 8th of February, 1971 and was opposed by the defendants on the 18th of March, 1971 when the learned Munsif Jalpaiguri heard the lawyers of both the sides, considered the petition and also the affidavits filed by them and the materials on record and granted an ad interim order of injunction for a limited period and also ordered that the defendant be restrained from giving effect to its letter dated 22.1.71 till the disposal of the plaintiff's petition for temporary injunction filed on 8th of February, 1971, was heard. As I have already observed in the earlier portion of my judgment that this letter is the subject matter of the suit filed by the plaintiff and by opposing the application for grant of injunction the defendants gave clear indication that they intended to contest the suit or in any event they had submitted to the jurisdiction of the Court for having the matter adjudicated upon between the parties. Accordingly, I have no hesitation in holding that the defendants being aware of the subject-matter of the suit had participated in the proceedings relating to injunction and as such are not entitled to the stay as prayed for by them u/s 34 of the Indian Arbitration Act.

This Rule is accordingly made absolute with costs being assessed at 10 gold mohurs.