

(1976) 08 RAJ CK 0013
In the Rajasthan High Court
Case No : Civil Appeal No. 6 of 1976

State Bank of Bikaner and Jaipur

APPELLANT

Vs

Devaki Narain Bhatia

RESPONDENT

Date of Decision : 11-08-1976

Acts Referred:

Arbitration Act, 1940 — Section 34, 39

Citation : AIR 1977 Raj 76 : (1976) RLW 446

Hon'ble Judges : P.D. Kudal, J;A.P. Sen, J

Bench : Division Bench

Advocate : M.M. Vyas, for the Appellant; A.K. Bhandari, for the Respondent

Final Decision : Dismissed

Judgement

Kudal, J.—This is an appeal against the order of the learned Addl. District Judge No. 2, Jaipur City dated October 11, 1975.

2. The facts of the case, relevant for the disposal of this appeal, are that the plaintiff Devaki Nandan Bhatia entered into an agreement with the appellant for construction of a building. An agreement was executed between the parties which also contained a clause, i.e. Clause 16, for referring all the disputes arising under the agreement to arbitration. The plaintiff has brought this suit for the recovery of Rs. 58,699/-against the defendant appellant Bank on March 1, 1973. The defendant-appellant, on receipt of the summons of the suit, filed an application u/s 34 of the Indian Arbitration Act, 1940 on April 27, 1973 for staying the proceedings.

3. The learned lower Court after considering the contentions of the respective parties rejected the application on October 11, 1975 holding that it is not a fit case which could be stayed, u/s 34 of the Indian Arbitration Act. The defendant-appellant feeling aggrieved against the decision of the learned Addl. District Judge has filed the present appeal on January 13, 1976.

4. It was contended on behalf of the defendant-appellant that the learned Addl.

District Judge has erred in law in not staying the suit under the provisions of Section 34 of the Indian Arbitration Act. It was further contended that the defendant-appellant was always ready and willing to do all things necessary for the proper conduct of the arbitration upto the stage of filing the application u/s 34 of the Indian Arbitration Act. It was also contended that the default was always on the part of the plaintiff, and as such, the suit filed by him deserves to be stayed. It was further contended that the learned Addl. District Judge has tried to make out a new case for the plaintiff. It was contended that in the plaint, the plaintiff did not make a mention of any extra work done by him beyond the scope and terms of the agreement, and as such, the learned Addl. District Judge erred in law in refusing to stay the suit on that ground. It was further contended that u/s 34 of the Indian Arbitration Act step to refer the matter to the arbitration has to be initiated by the party concerned. In the present case, the plaintiff-respondent was the aggrieved party, and as such, steps ought to have been taken by him, and the facts on record clearly establish that the plaintiff-respondent did not take any steps to refer the matter to the arbitration. It was, therefore, contended that the order of the learned Addl. District Judge has been vitiated, and under such circumstances, the appeal filed by the defendant-appellant should be allowed, and the suit filed by the plaintiff-respondent should be stayed.

5. On behalf of the plaintiff-respondent, it was contended that an application u/s 34 of the Indian Arbitration Act should have been accompanied by an affidavit. In the instant case, the defendant-appellant did not file any affidavit, and as such, the application u/s 34 of the Indian Arbitration Act deserved to be rejected on this ground alone. It was further contended that the application u/s 34 of the Indian Arbitration Act did not contain any facts justifying the stay of the suit. The defendant-appellant has only reproduced the wordings of Section 34 of the Indian Arbitration Act, and has not given any details justifying an inference that the defendant-appellant was always ready and willing to refer the dispute to arbitration upto the stage of filing the application u/s 34 of the Indian Arbitration Act. It was further contended that defendant-appellant only wanted to refer the issues to their architect, but did not take steps to refer the issue to the arbitrator as mentioned in Clause 16 of the agreement. It was also contended that the plaintiff-respondent wanted for an amicable settlement a pretty long time, and the claim was getting barred by time, the plaintiff-respondent was left with no other option, but to file the suit. It was also contended that the plaintiff-respondent had to file the suit in view of the categorical denial by the defendant-appellant by his letter of July 5, 1972. It was further contended by the plaintiff-respondent that there is a specific mention in the plaint for the extra work done by him besides the terms of the agreement.

6. The respective contentions of the learned counsel for the parties have been considered and the record of the case carefully perused. It is true that the defendant appellant did not file any affidavit in support of the application u/s 34 of the Indian Arbitration Act. The application u/s 34 of the Indian Arbitration Act

also does not contain the various facts which could establish the fact that the defendant-appellant was always ready and willing to refer the dispute to the arbitration, and was prepared to do all in his power for this purpose upto the stage of filing the application. The learned counsel for the defendant-appellant has relied on L. Charan Das Vs. L. Gur Saran Das Kapur, in which it has been held as under:

"The language of Section 34 contemplates that on an application being made for stay of the suit the Court should look at the plaint and see for itself whether the arbitration clause applied to the dispute and, if it did, whether the nature of the dispute was such that the ends of justice would be better met by the decision of the Court than by that of a private forum. The language of Section 34 clearly implies that the arbitration clause should be respected and it is only when a clear case has been made out by the plaintiff and if difficult questions of law are likely to arise, such as would inevitably entail a special case being prepared and reference to the Court made by an arbitrator that the Court should enter upon an enquiry and decision of the case."

7. Reliance was also placed on Daulat Ram Rala Ram Vs. State of Punjab, wherein it was held as under:

"Silence of a party before the proceedings are started is not of any serious consequence. Not resorting to arbitration or taking up a plea in support of the same, on being threatened with a suit, would not disentitle the party to take a stand on the arbitration clause as a bar to the suit. The choice whether the party would like the matter to be referred or determined by the Court is to be made after the proceedings are instituted and not when the same are contemplated or threatened. It is only then that he is to make up his mind and act accordingly."

8. On behalf of the plaintiff-respondent reliance was placed on Governor-General in Council Vs. Associated Live-stock Farm (India) Ltd., wherein it was held as under:--

"The legal proceedings which are sought to be stayed must be in respect of matters which the parties have agreed to refer, that is to say, which come within the terms of the arbitration agreement. If a party brings an action in respect of any matter not agreed to be referred the Court has no jurisdiction at all to stay the proceedings and the Court will refuse a stay. Further the Court will exercise its discretion and refuse to stay the action in cases where a substantial part of the disputes does not fall within the arbitration agreement and cannot be conveniently separated. It is, however, not sufficient to induce the Court not to stay the action to show that only a small part of the disputes is outside the arbitration clause. In order to arrive at a conclusion as to whether the action is in respect of matters agreed to be referred, the Court has to examine the arbitration clause and ascertain its ambit and scope. It takes two to make a dispute. If one party bases his claim outside the contracts but the other bases his defence on the contracts the resulting disputes certainly arise out of the

contracts."

9. In *The Printers (Mysore) Private Ltd. Vs. Pothan Joseph*, it was held as under:

"The power to stay legal proceedings u/s 34 is discretionary, and so a party to an arbitration agreement against whom legal proceedings have been commenced cannot, by relying on the arbitration agreement, claim the stay of legal proceedings instituted in a court, as a matter of right. However, the discretion vested in the Court must be properly and judicially exercised. Ordinarily the court would direct the parties to go before the tribunal of their choice and stay the legal proceedings instituted before it by one of them. It would be difficult, and it is indeed inexpedient, to lay down any inflexible rules which should govern the exercise of the said discretion."

"It is ordinarily not open to the appellate court to substitute its own exercise of discretion for that of the trial Judge; but if it appears to the appellate court that in exercising its discretion the trial court has acted unreasonably or capriciously or has ignored relevant facts and has adopted an unjudicial approach then it would certainly be open to the appellate court--and in many cases it may be its duty--to interfere with the trial court's exercise of discretion. In cases falling under this class the exercise of discretion by the trial court is in law wrongful and improper and that would certainly justify and call for interference from the appellate court."

10. In *Shalimar Paints Ltd. Vs. Omprokash Singhania*, it was held as under.

"The possibility of a claim being barred if referred to arbitration on a stay of the suit, is a relevant and material consideration in exercising the discretion conferred on the court u/s 34 of the Act. But it cannot be contended to be the absolute principle of law that stay of suit must necessarily be refused as a matter of course, whenever there is any possibility of the claim being barred by limitation, if the suits stayed and the disputes are referred to arbitration. Whether such a possibility of the claim being barred amounts to a sufficient reason for refusing to stay the suit, is a question which depends on facts of each case.

The petitioner prayed for the stay of the suit instituted by the respondent, and contended that the suit was instituted without any reference to arbitration as provided in the agreement between them. The respondent contended that if the suit was stayed and dispute referred to arbitration, then his claim would be barred by limitation.

Held, that if there was a possibility of the claim in the suit being barred if referred to arbitration, stay of suit could be refused. Stay could not be refused as a matter of course in every case but it depends on facts of each case. In the instant case, the respondent had instituted the suit under the mistaken impression that the dispute was not covered by the arbitration clause in the agreement. However, the petitioner had made no attempt to refer the matter to

arbitration. Hence If the suit was stayed and dispute referred to arbitration, the claim of the respondent would be barred and therefore, the suit could not be stayed."

11. In *Middle East Trading Co. Vs. The New National Mills Ltd.*, it was held as under:

"Where the defendant asks for the stay of suit u/s 34, it is incumbent " upon him to aver all the requirements of the section which are necessary In order to obtain stay of the suit. One of the necessary conditions to be fulfilled before a stay could be granted u/s 34 is that the applicant for stay must be a party to the legal proceeding and he must have taken no steps in the proceeding after appearance. It is also necessary that he should satisfy not only that he is but also was at the commencement of the proceedings ready and willing to do everything necessary for the proper conduct of the arbitration. Such an averment is all the more necessary in a case, where even though plaintiffs had given notice to the defendants of their intention to take legal steps the defendants did not reply nor stated that the dispute between them should be referred to arbitration."

12. In *U. P. Co-operative Federation Ltd. v. Sundar Bros. Delhi*. AIR 1867 SC 249, it was held as under:

"Where the discretion vested in the Court u/s 34 has been exercised by the lower Court, the appellate Court would be slow to interfere with the exercise of their discretion. In dealing with the matter raised before it at the appellate stage the appellate Court would normally not be justified in interfering with the exercise of the discretion under appeal solely on the ground that if it had considered the matter at the trial stage it may have come to a contrary conclusion. If the discretion has been exercised by the trial Court reasonably and in a judicial manner the fact that the appellate Court would have taken a different view may not justify such interference with the trial Court's exercise of discretion. If it appears to the appellate Court that in exercising its discretion the trial Court has acted unreasonably or capriciously or has ignored relevant facts, then it would be open to the appellate Court to interfere with the trial Court's exercise of discretion."

13. In *Union of India v. Thekedar Bhojraj* RLV 1960 532 it was held as under:--

"Where the suit has been filed with certain prayers and reliefs and on a definite cause of action, and the plaintiff says that some of the matters in dispute fall outside the ambit of the arbitration clause, it was necessary for the defendant to satisfy the Court that all the matters in dispute were so covered before any order could be passed u/s 34 of the Arbitration Act.

The use of the past tense "was" and the present tense "still remains" go to indicate that both before and after the commencement of the proceedings the party applying for stay must have shown his willingness and readiness to go to arbitration and the Court should be satisfied on that point. After all the Court has

to exercise its judicial discretion in the matter, and it is for the Court to be satisfied about the conduct of the defendant. It is not enough to say that after the commencement of the proceedings the defendant has come forward and filed an application for stay of proceedings before filing any written statement or taking any other steps in the case."

14. In *Shroff Brothers Vs. Bisheswar Dayal Meattle*, it was held as under:

" "In dealing with an application u/s 34, the Court has to exercise its discretion either to grant stay or refuse it, taking into consideration the entire facts and circumstances of the case and the conduct of the parties up to the date of the hearing of the application."

15. In *Halsbury's Laws of England*, Vol. II, Page 291, para 564, the following observations have been made:

"The applicant must satisfy the Court not only that he is, but also that he was at the commencement of the proceedings, ready and willing to do everything necessary for the proper conduct of the arbitration. He must also file an affidavit to this effect in support of his application for a stay, and unless the Court is satisfied on the point the application to stay must be dismissed. A party may be "ready and willing" within the meaning of this condition notwithstanding his intention to contend before the arbitrator that the time for arbitration limited in the arbitration agreement has expired."

16. The basic contention of the defendant-appellant is that by his letter dated May 2, 1972, a categorical offer for referring the matter to the arbitration was made. It was further contended that the plaintiff-respondent in the reply dated May 10, 1972 did not refer to the question of arbitration at all; and as such, the defendant-appellant was always ready and willing to refer the matter to arbitration while the plaintiff-respondent was not.

17. This is true that in the reply dated May 10, 1972 the plaintiff-respondent has not referred about the dispute being referred to arbitration, but in the letter dated July 5, 1972, the defendant appellant did not insist on the dispute being referred to arbitration. It appears that the defendant-appellant was always keen to get the matter decided in terms of the recommendations of their architect. The arbitration Clause 16 of the agreement refers to the arbitration of the Chief Executive Engineer, or his nominee. The matter was never referred to him, or to his nominee. Apart from this, the plaint also contains averments to certain construction works which were executed by the plaintiff besides the terms of the agreement. The suit was also filed when the period of limitation for filing this suit was about to expire, From the conduct of the parties right from the beginning when the dispute arose upto the date of the filing of the application u/s 34 of the Arbitration Act, it appears that none of them was ready and willing to refer the matter to the arbitration and to do all that was necessary for that purpose. Under these circumstances, it cannot be said that the learned lower Court has erred in rejecting the application for stay filed by the defendant-appellant.

18. A discretion is vested in the learned lower Court to refuse the stay of the suit on an application u/s 34 of the Indian Arbitration Act having been made after taking into consideration all the relevant facts upto the filing of the application. It cannot be, thus, said that the discretion vested in the learned lower Court has been exercised capriciously or arbitrarily. A Court of appeal shall not ordinarily interfere with the exercise of such a discretion unless it is established that the discretion so vested in the learned lower Court has been exercised arbitrarily or capriciously.

19. Having given our most anxious consideration to the entire facts on record and to the respective contentions of the learned counsel for the parties, we have no hesitation in holding that the defendant-applicant has failed to make out a case for staying the proceedings, u/s 34 of the Indian Arbitration Act. Under these circumstances, the appeal having no force, is hereby dismissed. Looking to the facts and circumstances of the case, the parties are left to bear their own costs.