
(1978) 04 CAL CK 0043
In the Calcutta High Court
Case No : A.F.O.O. No. 463 of 1976

Steel Plant Private Ltd.

APPELLANT

Vs

Swastika Alloy Steel Ltd. and Another

RESPONDENT

Date of Decision : 13-04-1978

Acts Referred:

Arbitration Act, 1940 — Section 34
Civil Procedure Code, 1908 (CPC) — Section 107

Citation : AIR 1978 Cal 386 : (1978) 1 CALLT 171 : (1978) 1 CompLJ 537

Hon'ble Judges : Sankar Prasad Mitra, C.J.; Sudhamay Basu, J

Bench : Division Bench

Advocate : S.B. Mukherji and Bhaskar Gupta, for the Appellant; Anindya Mitra and Ranjit Mitra, for the Respondent

Final Decision : Dismissed

Judgement

Sudhamay Basu, J.—This appeal is against an order dated the 26th of November 1976 passed by Salil K. Roy Chowdhury, J. by which he refused to grant stay on an application made u/s 34 of the Indian Arbitration Act.

2. The relevant facts are as follows :

On the 30th of Aug. 1972 the respondent No. 2, Jain and Associates, placed an order with the appellant, Steel Plant Private Limited for purchase of an electric Arc Furnace at Rs. 11,25,890/- with transformers and other accessories on terms and conditions specified in the order. The order was accompanied by an initial advance of Rs. 80,000/- with a request to send the formal contract in quadruplicate in confirmation of acceptance of the order and starting the work. By a letter dated the 8th of Sept. 1972 the appellant petitioners granted the receipt for a sum of Rs. 80,000/- and recorded that the order had been registered for delivery within thirty months. Formal acceptance was made on the 20th Sept. 1972. On the 7th of Oct. 1972 four copies of acceptance of the order dated the 20th of Sept. 1972 were forwarded by the appellant for signature of respondent No. 2. In or about March, 1973 the respondent No. 2 requested the

appellant to transfer the contract for sale and purchase of the Arc Furnaces in the name of respondent No. 1, Swastika Alloy Steel Limited. After some correspondence the respondent No. 2 authorised transfer of the amount advanced in the name of respondent No. 1 and thereafter the appellant in their books transferred the contract in the name of respondent No. 1. On the 31st of March, 1973 respondent No. 2 paid a further sum of Rs. 1,20,000/- by cheque at Calcutta to the appellant. In Dec. 1973 the respondent No. 1 as required by the appellant, duly signed and forwarded to the former one of the four copies of the acceptance of the order dated the 20th of Sept. 1972 which had been sent to respondent No. 2, In the said letter of 20th Sept. 1972 various terms of contracts were incorporated including the arbitration clause. It may be noted that one Jogindra Kumar Jain, a partner of the firm M/s. Jain Associates, was also a Managing Director of the company Swastika Alloy Steel Limited. The respondent No. 1 by signing acceptance of the order agreed to abide by all the terms and conditions contained in the letter dated the 20th of Sept. 1972. The condition contained in arbitration clause is as follows:

"If at any time any question, dispute or difference whatsoever shall arise between the purchaser and the seller upon any relation to or in connection with the contract, either of the party may give to the other notice in writing of the existing such question, dispute or difference and the same shall be referred to arbitration in Bombay in accordance with the Indian Arbitration Act." It appears that on the 8th of Aug. 1973 the respondent No. 1 paid a further sum of Rs. 2,00,000/- by way of advance. Thereafter disputes arose between the parties as the appellants demanded an increase in the agreed price on account of rise of price by a further sum of Rs. 1,02,000/- which the respondents did not agree to pay. On the 3rd of March, 1975 the respondent No. 1 accepted repudiation of the contract and demanded refund of Rs. 4,00,000/-. On the 14th of March, the respondents filed a suit (being No. 34 of 1975) in this High Court against the appellant for committing breach of the contract and claiming, inter alia, decree for damages and for delivery up and cancellation of the order dated the 20th of Sept. 1972 and a refund of Rs. 4,00,000/-. The writ of summons was served on the appellant at Calcutta on 20th of April 1975. The time to file the written statement was to expire on the 11th of June, 1975

3. Explaining the delay the appellant stated that the appellants contacted their Solicitors at Bombay who after perusing all the papers advised the appellants in the early part of June, 1975 that the suit being filed in breach of the arbitration agreement the application for stay should be made. Thereafter the appellant contacted the Calcutta Solicitors, took their advice, obtained some papers from Bombay and filed an application for stay. On the 3rd of June, 1975 the appellant obtained an ad interim stay of the suit, After directions for affidavits which were filed the matter was adjourned on the 7th of Aug. 1975 and eventually after some adjournments the hearing was concluded on the 25th of Nov. 1976.

4. The learned Judge held that there was a concluded contract between the

parties which contained an arbitration clause as set out in para 9 of the petition which has already been quoted above. The learned Judge was not satisfied that the appellants were ready and willing to do all things necessary for arbitration either at the commencement or on the date of hearing of the suit. Secondly the balance of convenience appeared to him to be in favour of the suit being proceeded with. The learned judge was also not satisfied with the explanation for delay in filing the application. He, therefore, rejected the petition.

5. The short point for consideration is the propriety of the decision by the court below in refusing to stay the proceedings of the suit u/s 34 of the Indian Arbitration Act. Decades ago, the Supreme Court laid down in *Anderson Wright Ltd. Vs. Moran and Company*, the necessary condition for granting a stay, The four well known conditions are : (1) The proceeding must have been commenced by a party to an arbitration agreement against any other party to the agreement; (2) the legal proceeding which is sought to be stayed must be in respect of a matter agreed to be referred; (3) the applicant for stay must be a party to the legal proceeding and he must have taken no step in the proceeding after appearance. It is also necessary that he should satisfy the Court 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; and (4) the Court must be satisfied that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the arbitration agreement.

6. Argument raised against the decision of the trial Court concerned mainly the last two conditions. Mr. Mukherjee asserted that a party may apply for a stay under S, 34 of the Indian Arbitration Act at any time before filing the written statement or before taking any step in the proceeding. In this connection he cited the case of *Shroff Brothers Vs. Bisheswar Dayal Meatle*, in which Section K. Roy Chowdhury, J. held a view that application for stay must be made within the time fixed for filing the written statement. Mr. Mukherjee cited a number of decisions both English and Indian to emphasise that it was only after taking steps in the proceeding or submitting to jurisdiction that a person was disentitled from asking for a stay. The decisions cited by him included *Union of India (UOI) Vs. Hans Raj Gupta and Co.*, , *Babulal Singhanian Vs. Pirudan Ojha*, . In the case of *The State of Uttar Pradesh and Another Vs. Janki Saran Kailash Chandra and Another*, the Supreme Court held that taking other steps connotes the idea of "doing something in aid of progress of the suit or submitting to jurisdiction of the Court for the purpose of adjudication of the merits of the controversy in the suit." It would be academic to consider the decision reported in *Shroff Brothers Vs. Bisheswar Dayal Meatle*, as His Lordship Mr. Justice Roy Chowdhury himself stated in the instant order under appeal (page 160) "It is true that as a broad proposition it cannot be laid down that no application under S, 34 can be maintained after the expiry of the time to file the written statement....." There is no doubt that participation in the proceedings and acquiescence in jurisdiction have been held to be fatal to an application for stay. Although not argued at the Bar it seems the well known principles laying stress on context have scope for

application in this connection. The two well known principles are the rule of *Noscitur a Sociis* and the rule of *Ejusdem Generis*. According to the former where two or more words which are susceptible of analogous meanings are coupled together they are to be used in their cognate sense. The second principle noted above which flows from the former, enjoins that the general word which follows particular specific words of the same nature itself takes its meaning from them and is presumed to be restricted to the same genus as these words" (see Maxwell 12th Edition 297). In other words the general expression is to read as comprehending only things of the same kind as that designated by the preceding expression. Applying the principle to the present case the word "written statement" in Section 34 of the Arbitration Act may be read as of the same kind as designated by the expression "steps in the proceeding" which follows. The written statement, therefore, may be looked upon as a special form of "steps in the proceeding."

But the rigidity of seeking a limit of time with reference to written statement, regarding which Roy Chowdhury, J. himself has relaxed his earlier view, is different from the broad question of delay. Without actually taking a step in the proceedings a party wanting a stay has to apply promptly and if he does not, that is a ground on which discretion can be exercised against him. (See Elizabeth H (1962) 1 Lloyds Rep. 172 and Russel on Arbitration (18th edition) page 154),

7. The next point urged by Mr. Mukherjee was that possibility of a claim being barred by limitation is not a valid consideration for stay u/s 34 of the Arbitration Act. He strongly relied on a decision of the Division Bench of this court consisting of the Chief Justice, S. P. Mitra and S. K. Mukherji, J. reported in (1971) 75 Cal WN 767. In that decision S. K. Mukherji, J. observed that possibility of the claim being barred by limitation is not a relevant consideration, His Lordship observed that "in a proper case the time spent in prosecuting the suit will be excluded and it will be for the arbitrator to decide whether such time ought to be excluded u/s 14 of the Limitation Act just as it will be for the arbitrator to decide whether the claim is barred by limitation. The court in which the suit is prosecuted may and ought to pronounce in a proper case that the suit was prosecuted in good faith and with due diligence. A party before the arbitrator is therefore placed in the same position as regards the defence of limitation as he will be, before a court of law..... In the view I have taken, I must further hold that the prosecution of a claim being barred by limitation before an arbitrator is not a relevant consideration for the exercise of discretion u/s 34 of the Arbitration Act." Mukherji, J. expressly disagreed with the views of Chagla, C. J., in the case of *Purshottamdas Hassaram Sabnani Vs. Impex (India) Ltd.*, viz. that the time spent in arbitration proceedings can be excluded in computing the period of limitation in a suit subsequently brought on the same cause of action u/s 37(5) of the Arbitration Act but not u/s 14(1) of the Limitation Act. But it appears that in a later case reported in *The Commissioner of Sales Tax, U.P., Lucknow Vs. Parson Tools and Plants, Kanpur*, while dealing with the U. P. Sales Tax Act, the Supreme Court approved of the views of Chagla, C. J. and observed that "what

the learned Judge said about the inapplicability of Section 14, Limitation Act in the context of Section 37(5) of the Arbitration Act holds good with added force with reference to Section 10(3-B) of the Sales Tax Act."

It is to be noted that in *Tona Jute Mills Co. Ltd. v. Bilas Roy and Co.* Bachawat J. refused to stay a suit with the observation.

"I have also taken into account the fact that if arbitration proceedings are commenced now the claim will be barred by limitation."

In the case of *Union of India v. Sitaram Shankar Lal*** S. P. Mitra, J., as he then was followed the judgment of Bachawat, J., and observed that

"In any event it would be improper to compel the respondent to go to arbitration at this stage inasmuch as the respondent may be faced with the possibility of his claim being held to be barred by limitation."

Again in *Shalimar Paints Ltd. Vs. Omprokash Singhania*, A. N. Sen, J. relying on the said precedents held that it cannot be contended to be an absolute principle of law that whenever there is any possibility of the claim being barred, the court should refuse to exercise its discretion to stay the suit but the possibility of a claim being barred, if referred to arbitration, on the stay of the suit is relevant and material consideration in exercising the discretion conferred in the court u/s 34 of the Arbitration Act. Mukherji, J. of course considered the said decisions but, inter alia, considered that more often than not, by the time an application u/s 34 of the Arbitration Act and almost always an appeal from order made on such application, is disposed of, claim if referred to arbitration, is barred by limitation for no fault or laches of either party. It will be noticed that the appeal was dismissed in that case on the ground that there was no readiness and willingness to make an application u/s 34 of the Arbitration Act. Moreover my Lord the Chief Justice delivering a separate judgment observed in that case.

"It seems to me that the possibility of a claim being barred by limitation before an arbitrator, is not ordinarily a relevant consideration in exercising the Court's discretion u/s 34 of the Arbitration Act especially in view of the provisions of Section 37(1) of the Act, but there may be cases in which the Court may have to take this factor as well into consideration. For instance, if the Court finds that the respondent in an application for stay is falsely denying the existence of the arbitration agreement but the application is being heard after expiry of the period of limitation due to the laches of the petitioner the Court may refuse to stay the suit. In fact, I was faced with a similar situation in *State of Punjab v. Khandelwal Bros. P. Limited* (Suit No. 1704 of 1971 Award No. 171 of 1962) and I had to refuse the application for stay."

It was expressly said that there may be cases in which the court may have to take the possibility of claim being barred by limitation into consideration. There was therefore, substance in the contention of Mr. Mitra, the learned counsel, appearing to oppose the appeal that the observation of Mukherji, J, may not be

regarded as more than obiter and that too not shared by the other member of the Division Bench. In view of the uniform decisions of this Court referred to above and the nature of decisions we are not persuaded that the said views of Mukherji, J. may be held to have made a departure in the law in this respect.

8. Mr. Mukherjee further argued that when there, was a valid contract referring disputes to arbitration the onus lay on the plaintiff to show that stay should not be granted. He relied in this connection on Halsbury's Volume 2, Article 56 and the decision in AIR 1935 Sind 62 and AIR 1940 Lah 180. The principle invoked by Mr. Mukherjee is well established and was not disputed by other side. Mr. Mukherjee then called in question the propriety of the lower court relying on the decision of Michael Golodetz and Others Vs. Serajuddin and Company, on the ground that the facts in that case were entirely different. He added that balance of convenience was not a valid consideration. No doubt the arbitration in that case was to take place in New York but the Supreme Court took into consideration the convenience of the parties and other circumstances. It is to be noted notwithstanding the sanctity of the contract the jurisdiction of the court to try the suit remains undisputed. The Court is not obliged to grant stay merely because the parties agreed to submit their dispute under a contract to arbitration. Equitable considerations may certainly weigh with the court in exercising the discretion.

9. A principle which is well settled and supported by decisions both in England and in India is that the power conferred upon the court to stay the legal proceedings is entirely a matter of discretion. It is further well settled that the discretion must be exercised judicially. It is difficult and inexpedient to lay down any inflexible rules which should govern the exercise of the said discretion. It is not possible to lay down any formula or test the automatic application of which will help to solve the problem of the exercise of judicial discretion. At the same time when discretion has been so exercised it will not be interfered with readily. The fact that the appellate court would have taken a different view if the decision had rested with them would not justify interference with the trial court's exercise of discretion. In other words, it is not ordinarily open to the appellate court to substitute its own exercise of discretion for that of the trial court Judge. Reference may be made for the aforesaid proposition to the case of Charles Osenthon and Company v. Johnston, 1942 AC 130; Evans v. Bartlam, 1937 AC 473; Russell on Arbitration 8th Edition, page 150, The Printers (Mysore) Private Ltd. Vs. Pothan Joseph, .

10. It will be noticed that the learned trial court was not, inter alia, satisfied that the appellants were ready and willing to do all things necessary for the arbitration either at the commencement or on the date of hearing of the suit. He noted the delay in making the application and the reference and also the possibility of the claim being barred by limitation. The conduct of the petitioners who had an advance of Rs. 4 lakhs from the plaintiff in trying to delay matters obviously weighed with the learned Judge. The explanation which the petitioner

gave viz. that after the service of writ of summons they contacted their Bombay Solicitors who after perusal of the papers in the early part of June, 1975 advised them to make an application for stay and that the petitioners' representative at Calcutta contacted the Solicitors at Calcutta and after taking their advice had to bring some papers from Bombay before they could file the application--lacks particulars. Nothing is said definitely as to when the Bombay Solicitors were contacted and when the latter advised or when the advice of the Calcutta Solicitors was obtained or what were the papers brought from Bombay, who were the persons involved, what were the correspondence in the matter. Nothing is stated clearly. In fact Mr. Mukherjee appearing on behalf of the appellants at one stage sought to fill up the lacuna by filing an additional affidavit before us. After some anxious consideration, while we are unable to say that there is no force in some of the contentions of Mr. Mukherjee such as, when he made submissions about the question of onus and while we even concede that if we had been in the trial court we might have taken a contrary decision, all the same, it will not be proper for us to substitute our own discretion for that of the trial court. We cannot say that the discretion exercised was capricious or arbitrary or such that the same requires to be interfered with. It is an established principle that a party wanting to stay the proceedings should apply promptly and if it does not the same affords a ground on which the discretion is liable to be exercised by the court against him. It is also equally established that application for stay must show not only that he is now but also he was at the time of the commencement of the proceedings ready and willing to do everything necessary for the proper conduct of the arbitration. Mr. Mitra addressed us at length on this aspect of the matter on which the lower court attached some importance. Not only the application for stay was made actually after the time for filing the written statement expired but although a very heavy amount was involved the petitioners took no steps to refer the matter to arbitration. Mr. Mitra submitted that their conduct was consistent with the absence of a genuine desire to proceed with the proceedings. There was no single overt act which would show that the petitioners were genuinely eager to settle the dispute by taking recourse to legal proceedings. It cannot be said that there is no substance in those submissions of Mr. Mitra. It is true that mere delay in proceeding with the arbitration is not necessarily a bar to a stay being granted on the application of a party guilty of delay but it cannot be said that the question of delay cannot be a consideration for exercise of the discretion in the matter of stay. It will be noted that in the case of *The State of Uttar Pradesh and Another Vs. Janki Saran Kailash Chandra and Another*, to which our attention was drawn by Mr. Mitra the Supreme Court took into view the long delay involved in that case after the institution of the suit and the fact that the suit was for a very heavy amount. The said two factors are very much present in the present case.

The appeal, therefore, fails and is dismissed with costs.

Sankar Prasad Mitra, C.J.

11. I agree.