

(1995) 07 DEL CK 0066

In the Delhi High Court

Case No : Interim Application No. 2011 of 1993 and Suit No. 4315 of 1992

Subhash Chander Kathuria

APPELLANT

Vs

Ashoka Alloys Steels Pvt. Ltd. and Others

RESPONDENT

Date of Decision : 11-07-1995

Acts Referred:

Citation : (1995) 59 DLT 355 : (1995) 35 DRJ 319

Hon'ble Judges : R.C. Lahoti, J

Bench : Single Bench

Advocate : G.L. Rawal, Kuljit Rawal, Daljit Singh and M.S. Vinayak, for the Appellant;

Judgement

R.C. Lahoti, J.

(1) This is an application u/s 34 of the Arbitration Act filed by the defendants seeking stay of the suit.

(2) The suit is filed by one Shri Subhash Chander Kathuria impleading Ashok Alloys Steel Pvt.Ltd. as defendant No.1 and its shareholders as other defendants. The company has its factory and principal office at Mashirwala Tehsil Paunta Sahib, Distt. Sirnolur, H.P. Its local office is alleged to be situated at New Delhi. All the other defendants are resident of Chandigarh. The plaintiff is in Delhi. The plaintiff had entered into a contract to purchase all the equity shares of the defendants shareholders so as to transfer the ownership in the company to the plaintiff.

(3) The plaintiff alleges breach of contract on the part of the defendants and has sued for recovery of the amount of Rs.50 lacs paid by the plaintiff to the defendants under the contract and interest thereon. The plaintiff also alleges the agreement to have been vitiated by fraud played upon by the defendants.

(4) According to the defendants, it is the plaintiff who has been guilty of breach of contract. The plaintiff who was supposed to pay Rs.1,75,00,000.00 stopped

payments soon after the initial payments and that created the whole trouble. There was no fraud played. The agreement between the parties contains an arbitration clause which covers the disputes raised by the plaintiff. The defendants have already initiated proceedings for appointment of arbitrator before a competent Court at Chandigarh. They have always been ready and willing to have the disputes settled by the arbitrator and are still ready and willing to do so. The suit, Therefore, deserves to be stayed.

(5) A few events in their chronological order may be noticed here itself as they would be of significance a little later. The agreement between the parties was entered into on 12.9.90 (at Delhi - according to the plaintiff, and at Chandigarh - accordingly to the defendants). On 21st September, 1992 the defendants invoked the arbitration agreement between the parties by giving a notice to the plaintiff stating that disputes had arisen which were liable to be referred to arbitration and the plaintiff should mutually agree for appointment of arbitrator. The notice was served on the plaintiff on 3rd October, 1992. The plaintiffs sent a telegram acknowledging receipt of the defendants' notice but asking for time to take appropriate steps as their lawyer was out of station. On 6.11.92, the defendants filed a petition u/s 20 of the Arbitration Act in the Court "of Senior Sub-Judge, Chandigarh. Just two days before, on 4.11.92 the plaintiffs had filed the present suit at Delhi. The earliest summons was served on defendant No.2 on 24.11.92. Without taking any step in the proceeding, on 15.2.93 application-under Section 34 of the Arbitration Act has been filed by the defendants.

(6) The application has been contested on behalf of the plaintiff by forcefully raising two preliminary objections. It is submitted that the application does not set out the disputes which are sought to be referred to arbitration and so the application does not amount to one u/s 34 of the Arbitration Act. Secondly, there are serious allegations of fraud made by the plaintiffs against the defendants and Therefore the Court would not exercise its discretion in favor of staying the suit.

(7) The first question to be examined is whether the allegation of fraud having been played upon by the defendants on the plaintiff while entering into the contract justifies discretion u/s 34 of the Arbitration Act being exercised against the stay of the suit?

(8) Section 34 of the Arbitration Act reads as under :

34. Power to stay legal proceedings where there is an arbitration agreement- 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 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."

(9) In *Anderson Wright Ltd. Vs. Moran and Company*, , analysing the above said provision their Lordships have laid down the following conditions to be fulfilled in order that a stay u/s 34 of the Arbitration Act may be granted :

"(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 every thing 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 an arbitration in accordance with the arbitration agreement."

(10) A good number of authorities have been cited at the bar by the learned counsel for the parties. Having gone through all of them I am of the opinion that it would suffice to notice only a few of them and they would be referred to at their appropriate places.

(11) *Russell on Arbitration* (1982 Edn) states at page 187 :

"In a case where fraud is charged, the court will in general refuse to send the dispute to arbitration if the party charged with the fraud desires a public inquiry. But where the objection to arbitration is by the party charge ing the fraud, the court will not necessarily accede to it and will never do so unless a prima facie case of fraud is proved."

(12) In *Muthavarpu Venkateswara Rao Vs. N. Subbarao*, , is a Division Bench decision of Andhra Pradesh High Court on Section 34 of the Arbitration Act dealing with the question when the allegations of fraud made by a party would persuade the court in declining a prayer for stay u/s 34 of the Act. Having reviewed and discussed the case law available on the point and having taken into consideration the leading authorities of *Russell Vs Russell* (1880) 14 Ch. D 471, *Minifie Vs The Railway Passengers Assurance Co.* 44 LTs 52; *Barnes Vs Young*'s (1898) 1. Ch 414 and *Russell on the law of Arbitration*, Jaggannadha Rao, J. (as his Lordship then was) speaking for the Division Bench succinctly summed up the principles of law as under :

"IN an application for stay u/s 34 of the Arbitration Act, 1940 in a case involving allegations of fraud the person against whom fraud is alleged has an option to have the matter decided by the civil court to vindicate his conduct in a regular trial in the civil court. If the party charged is the plaintiff against whom such allegations have been made the plaintiff is equally entitled to have the matter decided by the civil court."

" HOWEVER, a plaintiff who charges fraud against the defendants cannot insist on a trial in court unless the plaintiff makes out a prima facie case that the defendants has played fraud. Cases involving allegations of professional/ occupational negligence, impropriety or dishonesty shade into one another and the above principles applicable to cases of allegations of fraud equally apply to such cases. "

(13) I find myself in respectful agreement with the view so taken. I have also taken into consideration the other case cited at the bar and I am firmly of the opinion that two principles laid down herein above by the Division Bench of the Andhra Pradesh High Court have correctly summed up and stated the position of law. Russell VS. Russell (supra) was cited with approval before the Supreme Court in Abdul Kadir Shamsuddin Bubere Vs. Madhav Prabhakar Oak, .

(14) In Budhu Lal Vs Jagan Nath Air 1949 All 70, Murlimal Vs Banarsidas & Sons Air 1935 Sind 62, the two Divisions Benches have held that to be entitled to refusal of stay, the allegations of fraud must be substantial and bonafide. There must be some foundation for such a charge. Otherwise there will be a tendency to allege fraud in any case in which a party to an arbitration clause wishes to avoid arbitration.

(15) In Basantlal Jagatramka Vs. Dominion of India, , it was held by the Division Bench :-

"WHERE the whole existence of a contract is challenged on the ground of fraud, an arbitrator is not a suitable tribunal to decide such a question and where such an allegation is made the suit in which this question of fraud is raised should not be stayed. This rule, however, can have no application where there is no allegation of fraud and all that is said is that as a result of a misrepresentation is said is that as a result of a misrepresentation possibly fraudulent the party entered into the contract."

(16) In Firm Jowahir Singh-Sunder Singh VS. Fleming Shaw and Co. Ltd. Amritsar & Karachi, Air 1937 Lahore 851, the Division Bench has said :-

"IF allegations of fraud and coercion go to the very root of the agreement to refer to arbitration, or if they relate to matters outside the scope of the submission, the only forum to decided that matter is the Civil Court. In either of these cases S.19 will ex necessitate rei be inapplicable. If on the other hand, misrepresentation, fraud or coercion is alleged to have been committed in reference to matters which are sought to be proved in proof or disproof of the contentions of the parties relating to a dispute which has been, or can be, validly referred to arbitration in accordance with the original agreement, this will not necessarily be a ground for declining to stay the suit.

(17) In the light of the above said principles let the facts of the case at hand be examined. A perusal of the plaint shows that the contract between the parties is admitted but according to the plaintiff (vide para 5 of the plaint) there were false

representations and persuasions made by the defendants which if not made the plaintiff would not have entered into the contract and parted with the amount of Rs. 50.01 lakhs at the stage of the agreement.

(18) I have carefully perused the several so- called false representations and persuasions made by the defendants, according to the plaintiff. Firstly, there is a distinction between a misrepresentation and a fraud. A case of misrepresentation is not a case of fraud. If not all, most of the false representations set out in the plaint and attributed to the defendants are such as to which the plaintiffs could have made enquiries of their own and by exercise of sheer reasonable diligence, they could have known the correct state of affairs of the defendants company, howsoever held out and falsely projected by the defendants. It would not be a case of fraud. On the plaintiffs own showing throughout the transaction they were assisted by qualified chartered accountants who were also present during negotiations between the parties. It has to be kept in view that the defendants were parting away with the entire equity capital of the company in favor of the plaintiff so as to transfer the ownership of the company solely because the defendants were in financial stringency and hence not in a position to run the company. In this background, the sordid financial affairs of the company would not amount to misrepresentation or fraud having been played upon the plaintiffs.

(19) The allegations of fraud are against the defendants. Primarily they have the option to have the matter decided by the civil court. They wishes to have the matter adjudicated upon by the arbitrator. If the applicability of S.34 of the Arbitration Act is attracted the plaintiffs cannot in the facts and circumstances of the case force upon the defendants a trial by civil court to the exclusion of the arbitration clause.

(20) The next question is : (i) whether it is necessary that the applications u/s 34 Arbitration Act must as a rule catalogue the disputes arising between the parties (ii) if yes, whether the application in the present case satisfied the requirement; . and (iii) if not, what is the effect?

(21) The ingredients of Section 34 as stated by their Lordships of the Supreme Court are to be found mentioned in para 9 hereinabove. It is not a requirement of Section 34 that the disputes arising or having arisen between the parties should be mentioned or enumerated in the application u/s 34. No provision of law and no rule of pleadings has been brought to the notice of the court in support of the contention of the learned counsel for the plaintiff that an application u/s 34 .is liable to be rejected if it fails to set out the disputes arising between the parties. Several decisions available on the point and relied on by the learned counsel for the petitioner also do not refer to any such provision or rule. It appears that as Section 34 requires only such legal proceedings to be stayed as relate to any matter agreed to be referred and one of the conditions precedent to the exercise of discretion u/s 34 is the existence of readiness and willingness to do all things necessary to the proper conduct of the Arbitration on the part of the party seeking stay, from these two ingredients of Section 34 the

rule on which the submission of the learned counsel for the petitioner is based have developed. There cannot be a stay of the legal proceedings unless they relate to any matter agreed to be referred. Statement of disputes in the application would enable the court forming an opinion whether the disputes so set out fall within the purview of the arbitration clause. So also readiness and willingness on the part of the party seeking stay may not be spelled out unless the party knows what are the disputes and permits the court a peep into his mind by setting out the disputes in the application.

(22) The learned counsel for the petitioner placed reliance on the following decisions:

(i) Chiranjiv Lal and Others Vs. The Tropical Insurance Co. Ltd., Bharat Construction Co. Ltd. Vs. Union of India (UOI), Dwarka Nath Kapur VS. Rameshwar Nath & Ors. (1966) 68 Plr 9 (iv) Manohar Lal VS. Moti Lal 1974 (76) Plr 251 (v) Pearl Hosiery Mill VS. Uoi Air 1974 Delhi 64

(23) I have carefully perused the above said rulings. In my opinion M/s.Pearl Hosiery Mill's case sums up the law precisely correctly. Having considered the views of Delhi and Punjab High Courts, D.K. Kapur, J. has said :

"IN the judgments mentioned earlier i.e. Punjab and Delhi judgments reference has been made to the necessity for stating the exact difference and exact dispute-in the application itself and in fact reference has been made to the judgment of Grover, J. in Dwarka Nath Kapur v. Rameshwar Nath (1966) 68 PLr 91 where it was held that if the difference or dispute is not specified in the application under S.34 then the application should be rejected in limine. I do not go so far. I feel the court can in its discretion allow the applicant to specify the matter to be referred to arbitration even if not initially clearly stated in the application for stay. However, the party applying for stay should ordinarily be able to state in the application for stay the exact reasons why stay of the suit is prayed for. I am hence prepared to agree to the view that the difference or dispute should be quite obvious to the Court when deciding the question of stay and when it is not obvious that there is such a dispute or difference or where such dispute or difference does not fall within the scope of the arbitration clause then the stay has to be refused."

(24) I find myself in respectful agreement with the view so taken. It is not the requirement of Section 34 that the disputes arising for decision should be detailed and stated in the application itself. This requirement has been developed by judicial precedents as a guiding governing the discretion of the court. The objects are two fold. Firstly, if the disputes are stated, the court hearing the application u/s 34 would be in a position to form an opinion whether the disputes raised fall within the purview of the arbitration clause and Therefore, would it be worthwhile to stay the suit. If the disputes do not fall within the purview of the arbitration clause it would be an exercise in futility to stay the suit. Secondly, such statement would enable determination of readiness and willingness to

participate in the arbitration proceedings in so far as the stay application is concerned. Willingness of a person to participate in arbitration may not be spelled out if he has not yet made up his mind on what the disputes are.

(25) I.A. 2011/94 u/s 34 of the Arbitration Act vide para 8 states that the claim in suit is in respect of matters agreed to be referred to arbitration as it arises out of the agreement dated 12.11.1990 and covered by the arbitration agreement between the parties.

(26) Para 5 of the application refers to the notice dated 21.9.92 issued by the defendants invoking the arbitration agreement between the parties. Therein the names of the arbitrators were also suggested. A notice was served on the plaintiff. The application has to be read in the light of the contents of the notice which is on record and therein the several disputes are stated.

(27) Having served the notice on the plaintiff the defendants initiated Court proceedings under the Arbitration Act. The present suit has been filed by the plaintiffs apprehending and anticipating initiation of such proceedings by the defendants. It will not be too much to say that this suit was filed post haste on service of defendants' notice on the plaintiff to pre-empt the arbitration.

(28) Para 8 of the application reads as under :-

"THE claim in suit is in respect of matters agreed to be referred to arbitration as it arises out of the agreement dated 12th October, 1990 and is covered by the arbitration agreement between the parties. The averment made in the application implies that the dispute canvassed in the plaint arises out of the agreement between the parties and is covered by arbitration clause.

(29) Para 9 of the application states :

THE defendants are and have at all relevant times been ready and willing to refer the disputes to arbitration and to do all things necessary to the proper conduct of arbitration. There is no reason of cause, why the matters in suit be not referred to arbitration in accordance with the arbitration agreement. In fact the defendants have already on 6th November, 1992 filed a petition u/s 20 of the Arbitration Act in the Court of Senior Sub- Judge, Chandigarh for filing of the arbitration agreement in Court and for reference of the disputes to arbitration." There is a reference to application u/s 20 Arbitration Act, already filed at Chandigarh, wherein the disputes must have been stated.

(30) To sum up, it is neither a statutory nor a mandatory requirement of law that the application u/s 34 Arbitration Act must catalogue the disputes arising between the parties. Such a statement of disputes merely assists the Court in spelling out readiness and willingness on the part of applicant for proper conduct of arbitration and is a relevant factor for exercising the discretion as to stay. Mere non- statement of disputes in so many words would not render the application bad ipso facto. The Court would exercise its discretion u/s 34 on a totality of the facts and circumstances of each case.

(31) The application u/s 34 filed by defendants satisfy the requirements of the provision. The application deserves to be allowed looking to the conduct of the parties.

(32) is No-2011/93 is allowed. Suit is directed to be stayed u/s 34 of the Arbitration Act, 1940.