

(1984) 11 MAD CK 0024
In the Madras High Court
Case No : O.S. AP. 189 and 190 of 1984

Yeswant Hiralal Veecumsee

APPELLANT

Vs

Usha Kumar Betala and Others

RESPONDENT

Date of Decision : 28-11-1984

Acts Referred:

Arbitration Act, 1940 — Section 34, 39(1)

Citation : AIR 1985 Mad 272 : (1985) 98 LW 146

Hon'ble Judges : Maheswaran, J;Gokulakrishnan, J

Bench : Division Bench

Advocate : V. Sridevan, for the Appellant; S. Gopalaratnam, for Ramani Natarajan, V. Krishnamurthi and R. Muthukumaraswami Kabir, for the Respondent

Judgement

Gokulakrishnan, J.—The applicant in Appln. No. 1420 of 1982 in C.S. 547 of 1982 and 1421 of 1984 in C.S. 577 of 1982 is the

appellant in both the appeals.

2. The short facts of the case are as follows: One Usha Kumari Betala has filed C.S. 547 of 1982 on the file of this Court against the 18th

defendants of whom the appellant herein is the first defendant, for a declaration that the partnership firm Sapphire stands dissolved from 27-7-

1982, and for directing the defendants to render true and proper accounts of the business of the partnership firm Sapphire till the firm is wound up

and also for directing the taking of accounts of the partnership business, determining the valuation of the properties and assets including the

goodwill of the firm Sapphire, determination and distribution of the liabilities to creditors and net proceeds amongst the partners. The 18th

defendant in C.S. 547 of 1982 filed C.S. 577 of 1982, on the file of this Court against 20 defendants, of whom the appellant herein is the second

defendant, for directing the accounts of the dissolved firm Sapphire taken till 27-7-1972, and the shares of the profit and capital of the plaintiff be

paid to him. In this suit plaintiff in C.S. 547 of 1982 is the 19th defendant. In both the suits it is alleged that the appellant and defendants 2 and 3 in

C.S. 547 of 1982 have committed misfeasance and malfeasance and various instances have been catalogued in the complaints regarding the

mismanagement of defendants 1 to 3 in C. S. 547 of 1982, who are defendants 2 to 4 in C.S. 577 of 1982. The respective plaintiffs in both the

suits filed applications 17 for the appointment of a Receiver to take charge of the affairs of the firm Sapphire and its properties viz., three cinema

theatres at No. 614 Mount Road, Madras, (1) Saffire (a Veecumsee theatre), (2) Veecumsee Blue Diamond; and (3) Veecumsees Emerald, and

the properties and other business carried on in the premises. The Receiver application in C.S. 547 of 1982 is Appln. No. 3784 of 1982 17,18

while the Receiver application in C.S. 577 of 1982 is Appln. No. 4177 of 1982. The appellant filed a counter-affidavit in Appln. No. 3704 of

1982, inter alia, alleging that there is a provision in the partnership deed for referring the dispute to arbitration, that without resorting to arbitration

proceedings, the suit filed is not maintainable, that the allegations contained in the complaint are not admitted and that leave may be granted to file a

detailed written statement setting out his defence. In the counter- affidavit filed by the appellant to Appln. No. 4177 of 1982, he has inter alia

alleged, that the partnership deed contains a provision for arbitration, that without resorting to arbitration proceedings the suit filed is not

maintainable, that the allegations contained in the complaint are not admitted and that leave may be granted to file a detailed written statement setting

out his defence.

3. The appellant then filed Appln. No. 1420 of 1982 in C.S. 546 of 1982, praying for the stay of the suit and all proceedings therein in accordance

with S. 34 of the Arbitration Act. A similar petition in Appln. No. 1221 of 1982 was also filed by the appellant in C.S. 577 of 1982. In these

applications, the appellant has referred to clause 19 of the partnership deed dt. 1-11-1969 and submitted that the matter has to be referred to the

Arbitrator. The appellant has further stated that he is ready and willing to have the disputes settled in arbitration proceedings, that he is prepared to

do all within his powers to have the arbitration proceedings commenced and completed expeditiously and that he has always been ready and

willing to assist the Arbitrator by producing all records, accounts, bank statements, correspondence, etc.

4. In the common counter affidavit filed by Ketan A. Shah it is alleged that the appellant was served with suit summons on 26-12-1983, that he

should have filed his written statement on or before 8-1-1984, that the present applications under S. 34 of the Arbitration Act have been filed

beyond the date on which the written statement ought to have been filed and that therefore, the applications for stay have to be dismissed. It has

been further averred in the common counter-affidavit that on 2-2-1984, counsel for the appellant prayed for three weeks" time to file the written

statement, that the time granted by this Honourable Court expired on 23-2-1984 and that the appellant must be held to be debarred from filing the

present applications under S. 34 of the Arbitration Act as he had taken a step in the proceedings by taking time for filing the written statement. In

the counter-affidavit it has been further stated that the appellant in his counter-affidavit filed to Applns. Nos. 3784 and.4177 of 1982, has

undertaken to file a detailed written statement setting out his defence. It has been further alleged in the common counter-affidavit, that clause 19 of

the partnership deed will not apply to a dissolved firm and that in any event, the said clause is very vague. It has also been averred in the counter-

affidavit that the question of mala fides and fraud alleged against the appellant has to be tried only in open court and should not be left to

arbitration. With these allegations, his prayed for the dismissal of the stay applications filed by the appellant under S. 34 of the Arbitration Act.

5. The fifth respondent in Appln. No. 1420 of 1982, who is the 6th respondent in Appln. No. 1421 of 1982, has also filed a common counter-

affidavit opposing the stay petitions filed by the appellant. This counter-affidavit inter alia states that there are allegations of malfeasance,

misfeasance, and fraud against the appellant and as such, the only forum will be the court and not the Arbitrator to try such allegations.

6. R. Sengottuvelan J. after adverting to various decisions cited by the respective counsel, held that the conduct of the appellant clearly amounts to

subjecting himself to the jurisdiction of the court waiting his right under the arbitration clause, that the arbitration clause is vague, that clause 19 of

the partnership deed can be availed of even for settling the dispute of the dissolved partnership and that since the exercise of the power under S.

34 of the Arbitration Act is a discretionary one, it need not be exercised in this case inasmuch as the appellant had come forward with the present

applications for stay after much delay. With these observations, the learned Judge dismissed both the applications. It is as against this order the

present appeals have been filed by Yeshwant H. Veecumsee.

7. Mr. V. Sridevan, learned counsel appearing for the appellant in both the appeal Is after referring to various decisions, which will be considered

"in paragraphs hereunder, submitted that clause 19 of the partnership deed is very specific for referring the matter to arbitration, that the failure to

file an application under S. 34 of the Arbitration Act, within the time allowed for filing the "written statement will not debar the appellant from

coming forward with such an application, that clause 19 of the partnership deed is wide enough to cover the dispute that arose even subsequent to

the dissolution, that the counters filed in the various applications will not in any way debar the appellant from filing an application under S. 34 of the

Arbitration Act, for stay, that the allegations referred to by the learned Judge cannot be considered as step in-aid to the main proceedings and

hence any averment in the counters filed therein cannot be looked into and that there is absolutely no averment of fraud as such against the

appellant herein.

8. Mr. S. Gopalaratnam, learned counsel appearing for" some of the respondents, contended that clause 19 of the partnership deed will not apply

to the dispute of a dissolved firm, that the said clause is vague, that the conduct of the appellant will disentitle him to invoke S. 34 of the Arbitration

Act, for staying the proceedings and that the facts of the case will clearly show that the appellant has accepted the proceedings in the civil Courts

by praying for time to file a written statement. In any event, the learned counsel submitted that such an application is belated and this Court, using

its discretionary power, dismissed such an application.

9. Mr. Kabir, learned counsel appearing for some of the respondents, after adopting the argument of Mr. S. Gopalaratnam contended that the

participation of the appellant interlocutory, application proceedings will disentitle him to invoke the discretionary power of the court tinder S. 34 of

the Arbitration Act and that where misfeasance and malfeasance have been alleged, the court alone can go into the same and not an Arbitrator

who will be appointed under the arbitration clause of partnership deed.

10. Mr. Sundar Anandan, learned counsel appearing for some of the respondents, adopts the arguments of Mr. S. Gopalaratnam and Mr. Kabir.

11. We have been taken through the pleadings, various applications filed in these suits and also the decisions. Mr. V. Sridevan mainly, relies upon

the decision reported in Food Corporation of India v. Yadav Engineer and Contractor, . In this decision, the Supreme Court had occasion to

consider as to whether the participation of a party in the interlocutory applications filed in the suit will disentitle him from invoking S. 34 of the

Arbitration Act for staying the suit. The Supreme Court observed as follows (at p. 1309) :-

Giving the expression "taking, any other step in the proceedings such wide connotation as making an application for any purpose in the suit such

as vacating stay, discharge of the receiver or even modifying the interim orders would work hardship and would be inequitable to the party who is

willing to abide by the arbitration agreement and yet he forced to suffer the inequity of ex parte orders. Therefore, the expression taking any other

steps in the proceedings" must be given a narrow meaning in that the step must be taken in the main proceeding of the suit and it must be such step

as would clearly and unambiguously manifest the intention to waive the benefit of the arbitration agreement and to acquiesce in the proceedings.

Each and every step taken in the proceedings cannot come in the way of the party seeking to enforce the arbitration agreement by obtaining stay of

proceedings.

The Supreme Court in this decision referred to another decision rendered in The State of Uttar Pradesh and Another Vs. Janki Saran Kailash

Chandra and Another, . In The State of Uttar Pradesh and Another Vs. Janki Saran Kailash Chandra and Another, the Supreme Court has

observed as follows (at pp. 2075-76) -

To enable a defendant to obtain an order staying the suit, apart from other conditions -mentioned in S. 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. In the present case, the

written statement was indisputably not filed before the application for stay was presented. The question is whether any other step was taken in the proceeding as contemplated by S. 34 and it is this point with which we are directly concerned in the present case. 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 of the merits of the controversy in the suit.

This view taken by the Supreme Court in *The State of Uttar Pradesh and Another Vs. Janki Saran Kailash Chandra and Another*, was approved

by the Supreme Court in . While approving the. Supreme Court held as follows in- : -

The view herein taken not only does not run counter to the view we have taken but in fact clearly supports the view because the pertinent

observation is that taking step in the proceeding which would disentitle a party to obtain a stay of the suit must be doing something in aid of the

progress of the suit or submitting to the jurisdiction of the court for the purpose of adjudication of the merits of the controversy in the suit. In other

words, the step must necessarily manifest the intention of the party to abandon or waive its right to go to arbitration or Acquiesce in the dispute

being decided by court. In fact, the view taken in this case should have quelled the controversy but it continued to figure in one form or the other

and that is why we have dealt with the matter in detail.

After so discussing, the Supreme Court clearly observed in as follows : -

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 under S. 34. It may be clearly emphasized 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 under S. 34 of the Act.

11. In *Shroff Brothers Vs. Bisheswar Dayal Meattle*, , the Calcutta High Court has held that it is well settled that if the applicant makes an

application for extension of time to file his written statement that becomes a step in the proceedings and that also goes against the readiness and

willingness of the petitioner at the time of making the application for stay or at the time of the hearing.

12. In *Indian Oil Corporation Ltd. Vs. Nainsukdas Baldeodas*, , a Bench of this Court dealing with S. 34 of the Arbitration Act, interpreted the

words any time before filing a written statement occurring in that section as to mean that the petition for stay has to be filed before the time fixed

for filing a written statement. The Bench has also observed that if a person had merely entered appearance and asked for time for filing a written

statement, it is admitted and also covered by authorities that he would be deemed to have taken a step in the proceeding, and, therefore, no

application for staying the suit could be filed.

13. Thus, a reading of the above decisions clearly establishes that not all steps taken to contest the interlocutory application will disentitle the

defendant from invoking the right under S. 34 of the Arbitration Act but the step taken in the suit must be such as would display an unequivocal

intention to proceed with the suit and to abandon the benefit of the arbitration agreement. This view is reiterated in *The State of Uttar Pradesh and*

Another Vs. Janki Saran Kailash Chandra and Another, , by stating that "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 of the merits of controversy

in the suit. This view adumbrated in *The State of Uttar Pradesh and Another Vs. Janki Saran Kailash Chandra and Another*, was accepted by the

Supreme Court in *Food Corporation of India v. Yadav Engineer and Contractor*.

14. In *Shroff Brothers Vs. Bisheswar Dayal Meattle*, , the Calcutta High Court has held as follows -

In dealing with an application under S. 34, the Court had 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.....The discretion has to

be exercised having regard to the peculiar facts in each case. It cannot be categorised into definite sets of facts or circumstancesOne of the

facts is that if there is a delay making the application, in that event the court would refuse to exercise its discretion in favour of the stay.

In this connection, we can usefully refer to the passage in Russel's Arbitration, 18th Edn. page 154, which is as follows"-

Without actually taking a step in the proceeding a party wanting to stay should apply promptly, if he does not, that is a ground on -which the

discretion can be exercised against him.

15. With the above-said principle in view, let us now look into the facts of the present case. O.S.A. 189 of 1984 arises out of the order. in AppIn.

No. 1420 of 1984 in C. S. 547 of 1982. That suit was filed on 14-9-1982 and on the very same day I.A. 3784 of 1982 was filed for appointment

of Receiver. The appellant filed his counter in Nov. 1982. In this counter, the appellant wanted the leave of the court to file a detailed written

statement setting out his defence. It is only on 28-3-1984, Appln. No. 1420 of 1984 under S. 34 of the Arbitration Act was filed. O. S. A. 180 of

1984 arises out of application No. 1421 of 1984 in C.S. 577 of 1982. C.S. 577of 1982 was filed on 10-10-1982. In November 1982 Appin.

No. 4177 of 1982 for appointment of Receiver was filed. On 1412-1982, Applns. Nos. 4766 to 4769 of 1982 were filed for various reliefs. In

Jan. 1983, counter-affidavit was filed for Applns. Nos. 4766 to 4769 of 1982. Only in January 1984 counter was filed for Appln. No. 4177 of

1982. In this suit (C.S. 577 of 1982), the suit summons were served on 26-12-1983. On 2-21984, the learned single Judge of this Court passed

the following order :

Instead of disposing these applications the suits themselves can be disposed of. The defendants are directed to file written statement within three

weeks. Suits are to be posted along with the applications on 7-3-1984. Since all parties are represented by counsel before Courts parties are

permitted to serve the plaint on the counsel excepting those who are not represented. Those who are represented can be served through court.

Thus, it is seen, that the suits were posted for final hearing on 7-3-1984. It is only on 28-3-1984, Applns. Nos. 1420 and 1421 of 1984, were

filed under S. 34 of the Arbitration Act. In the counter filed in Appln, 4177 of

1982, the appellant had in unequivocal terms wanted the leave of this court to file a detailed written statement setting out his defence.

16. Mr. V. Sridevan, learned counsel appearing for the appellant in this connection pointed out para 4 of the very same counter affidavit wherein the appellant has stated that the suit is not maintainable since there is a provision for arbitration in the partnership agreement. In our view, the conduct, of the appellant in keeping quiet without promptly applying for stay under S. 34 of the Arbitration Act clearly spells out that he had submitted himself to the jurisdiction of the Court for resolving the dispute between the partners. A passing reference regarding the clause in the partnership deed for referring the dispute to arbitration cannot have any effect in view of the specific prayer in paragraph 13 of the counter-affidavit filed in Appln. No. 4177 of 1982 to the effect that leave may be granted to file a detailed written statement setting out the defence. This prayer is definitely a step taken in the main suit and this will disentitle the appellant from getting the stay, which is a discretionary relief. Further, the appellant in his counter affidavit filed in Applns. Nos. 4766 to 4769 of 1982, has specifically stated as follows -

I crave leave of this Honourable Court to reserve my right to file a detailed written statement setting out my defence as and when the suit summons are served on me.

In para 8 of the very same counter-affidavit, the appellant has stated thus -

I respectfully submit that the entire matter has to be decided only in the trial in the above suit and therefore the other applications are all unnecessary and are not maintainable.

These averments also clearly spell out that the appellant is aware of the suit even prior to the serving of the summons on him, that he submits to the jurisdiction of the civil Court by undertaking to file a written statement, that he wants the, entire matter to be decided only in the trial of the above suit and that he wants to file a detailed written statement setting out his defence when the suit summons are served on him. In this connection we can usefully refer to S. 34 of the Arbitration Act which runs thus :

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 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 may make an order, staying the proceedings.

A reading of S. 34 of the Arbitration Act makes it clear that the applicant to the stay proceedings must 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 enquiry by the arbitration. In the affidavit filed

in support of Appln. No. 1421 of 1984, the appellant has, no doubt, stated that he is prepared to do all within his power to have the arbitration

proceedings commenced. and completed expeditiously and that he has always been ready and willing to assist the Arbitrator by producing all

records, accounts, bank statements, correspondence, etc. But, in the counter-affidavit filed in Appln. No. 4177 of 1982, no such undertaking was

given except praying the leave of the court to file a detailed written statement. This conduct of the appellant, in our opinion, will clearly spell out that

the appellant has agreed to submit to the jurisdiction of the civil court to decide the dispute in question.

17. Mr. Kabir, learned counsel appearing for respondents 5 to 11 and 13 to 17 in O. S.A. 189 of 1984, and for respondents 6 to 12 and 14 to

18 in O.S.A. 190 of 1984, also submits that there are allegations of misfeasance and malfeasance against the appellant and as such, the civil court

alone can go into the matter and it is not fit matter to use the discretion of the court under S. 34 of the Arbitration Act to stay the suit. In R.

Rajagopalachariar v. K. Venkatachalam (1983) 1 MLJ 411, a learned single Judge of this Court has observed as follows - -

There is one other matter which may now be adverted to in the plaint, the appellant had stated that the respondent had not acted in the best

interest of the partnership and had manipulated records and the accounts and hid also secreted the income and profits and converted them into

valuable assets. Apart from praying for a decree for rendition of accounts and for payment of the amounts found due on such account taking, the appellant had also prayed for the appointment of a Receiver to take charge of the assets and the business of the dissolved firm. In the light of the serious charges of dishonesty and want of good faith levelled against the respondent and the nature of the reliefs prayed for, the matter is such as not to be left to arbitrators for a decision.

In Halsbury's Laws of England, Vol. 35, para 172, the law is stated as under -

..... A stay of proceedings will usually be refused if charges of fraud or dishonesty or of want of good faith are made in good faith by one partner against the other, or if questions of law are likely to arise which are more fit for the court than to lay Tribunal, or if the action claims dissolution on a ground expressly within

the discretion-of the Court or if the attempted reference is made vexatiously".

Similarly, in Russell on Arbitration, 19th Edn. at page 208 it has been stated as follows-

However, the court has a discretion to refuse a stay. This discretion must be exercised upon the facts involved, but when a dissolution is claimed, the facts involved are very apt to be such as to call for refusal. This has led to the opinion of the Court in Joplin v. Posblathamita (1889) 61 L. T.

629 that a question of dissolution was not a suitable one to be left to arbitrators to decide.

The reliefs. prayed for and the circumstances under which the appellant was obliged to pray for these reliefs are so apt as to justify the refusal of

stay under S. 34 of the Act as prayed for by the respondent. The court below was therefore in error in proceeding to stay further proceedings in

the suit on the ground that there was a valid agreement to refer the dispute to arbitration and also that the disputes to this case would fall within the

scope of Clause 15 in Ex. B. 1. Under these circumstances, the order of the court below cannot be sustained. The result is, the civil miscellaneous

appeal is allowed with costs.

In Raja Picture Palace, Rajahmundry and Others Vs. Marina Jagga Rao, a Bench of the Andhra Pradesh High Court has observed as follows-

Where the suit was filed for declaration that the expulsion of the plaintiff from the partnership firm was illegal, void, inoperative and unenforceable,

the court would not exercise its discretion to order stay of the legal proceedings under S. 34 of the Arbitration Act, when the defendant played

fraud on the plaintiff and got introduced the clause relating to the expulsion of a partner, plaintiff and the clause relating to the reference to

arbitration without knowledge and consent of the plaintiff and the plaintiff would never have agreed to such clauses when the other partners belong

to or members of one family.... The discretion given to the court to stay or not to stay legal proceedings is a judicial discretion intended to be

exercised to further the ends of justice. The discretion given to the court is no doubt spacious in its sweep. It is neither possible nor desirable to lay

down any rigid rules or precise limitation under which the court may reach

the satisfaction required under S. 34 not to stay the proceedings.

In *The Printers (Mysore) Private Ltd. Vs. Pothan Joseph*, , the Supreme Court has observed as follows (at p. 1159) -

On the other hand if fraud or dishonesty is alleged against a party it may be open to the party whose character is impeached to claim that it should

be given an opportunity to vindicate its character in an open trial before the Court rather than before the domestic tribunal, and in a proper case the

Court may consider that fact as relevant for deciding whether -stay should be granted or not" If there has been a long delay in making an

application for stay and the said delay may reasonably be attributed to the fact that the parties may have abandoned the arbitration agreement the

Court may consider the delay as a relevant fact in deciding whether stay should be granted or not. Similarly, if complicated questions of law or

constitutional issues arise in the decision of the dispute and the court is satisfied that it would be inexpedient to leave the decision of such complex

issues to the arbitrator, it may, in a proper case, refuse to grant stay on that ground indeed, in such a case the arbitrator can and may state a special

case for the opinion of the Court under S. 13(b) of the Act. Thus, the question as to whether legal proceedings should be stayed under S. 34 must

always be decided by the court in a judicial manner having regard to the relevant facts and circumstances of each case.

In *Nitya Kumar Chatterjee Vs. Sukhendu Chandra*, a Bench of the Calcutta High Court has observed as follows (at p. 13 1) -

Mr. Mukherjee next challenged as untenable the conclusion of the learned Judge

that when grave charges of fraud, misappropriation and unfair conduct of the partner are alleged, such matters should conveniently be dealt with by a court instead of by an arbitrator. It was said that the averments of fraud are only general allegations instead of being a specific as is required. We have considered the pleadings and we find that the allegations cannot be said to be not specific as is required in pleadings. Sub-clauses (b)(c)(e)(f) and (g) of para 9 of the plaint at least appear to be sufficiently specific allegations of fraudulent conduct which has to be established in evidence during trial".

Proceeding further, the Bench observed that the case before them alleges grave charges of fraudulent conduct on the part of the defendant and as

such they consider it desirable that the matter should have a trial in court as arbitration is not the most suitable method of determining the question

raised between the parties. In *N.C. Padmanabhan and Others Vs. S. Srinivasan, , Ramamurthi.J* has held that disputes involving grave charges of

fraud and misappropriation are matters too serious to be tried by the Arbitrator and in such cases stay of suit must be refused. In *Sudhansu*

Bhattacharjee Vs. Ruplekha Pictures, , a Bench of the Calcutta High Court has held as follows-

The jurisdiction under S. 34 is only discretionary, because the section only says that the Court may make an order -staying the proceedings".

Where the affidavit of the applicant is charging the opposite party with having manufactured a false statement of accounts and with trying to use it

as a genuine document in a court of law and further with having made false entries in that account which he was putting forward as true, these

allegations clearly put the character of the opposite party in issue and put him on his defence against serious charges. The applicant by making

allegations of a serious character, has put the reputation and the character of the opposite party at stake and in such circumstances, the court will

allow him an opportunity to have his character vindicated at a public trial and not send him to a private tribunal with all the disadvantages incidental

thereto. The case is one where the- discretion should not be exercised in favour of staying the proceedings but should be exercised in favour of

refusing stay.

In *C. D. Gopinath v. Cordon Woodroffe and Co. (Madras) Pvt. Ltd. (1979) 92*

MLW 531, a Bench of our High Court has held as follows-

It is by now well-established that whether or not the Court shall exercise the power given to it under S. 34 of the Arbitration Act, by staying the

suit is entirely -in the discretion of the court and stay of suit cannot be claimed as a matter of right by a party. Once the discretion has been

judicially exercised by the trial court it will not readily be interfered with in appeal even though the Appellate court may feel that if the discretion has

vested with it, its conclusion might have been different. It is only in cases where the trial court in exercising discretion had acted improperly,

unreasonably or capriciously or has ignored relevant facts or has not adopted judicial. approach, the appellate court can interfere with the trial

court's discretion.....Though

there is no inflexible rules governing the exercise of the said discretion, the principles on which the discretion is to be exercised can be culled out

from various judicial precedents. They are- (1) Where parties have agreed to refer a dispute to arbitration and one of them notwithstanding that

agreement, files a suit to

have the dispute determined by the Court, the prima facie leaning of the court is to stay the action and leave the plaintiff to the tribunal to which he

has agreed. (2) The fact that a party who has agreed to refer the dispute to arbitration desires to obtain in connection with these disputes, relief

which is beyond the powers of the arbitrator to afford is not a conclusive reason for the court to refuse to stay the action in which such relief is

claimed (3) Where the parties had agreed to submit a dispute to arbitration the fact that a reference would entail more expense than would be

necessary, if the matters came before the court, is not sufficient reason for not granting stay. (4) The fact that the arbitration agreement includes but

a small part of the matters covered by the suit may be a sufficient reason for, refusing the stay. (5) The fact that the dispute involves charge of fraud

or a charge against the character of one of the parties may in some cases, be sufficient to induce the court to refuse to stay the proceedings unless

there is an express stipulation that question involving fraud also should be referred to arbitration. The party against whom the charge is made will

have the option to go either before the arbitrator or before the court. However, if the objection to arbitration is by the party alleging the fraud the

Court will not necessarily accede to it, unless a prima facie case of fraud is established by him, (6) If the dispute involves serious and complicated

questions of law which call for a decision of the court, then the court will be justified in refusing the stay.

18. In the light of the above-said principles enunciated by various decisions, we can now usefully refer to the plaint allegations, which are more or

less common in both the suits C. S. 547 and 577 of 1982. It has been specifically alleged in para 7 of the plaint in C. S. 547 of 1982, and para 8

of the plaint of C. S. 577 of 1982 that defendants 1 to 3 in C. S. 547 of 1982, who are defendants 2 to 4 in C. S. 577 of 1982, are mortgaging

the properties of the firm Sapphire without the knowledge, consent and authority of the other partners of the firm, which will constitute an abuse of

power, that no proper balance sheet drawn because of the several acts of misfeasance committed by the parties in management, that the auditors

of the firm refused to certify the balance sheet of the firm, that defendants 1 to 3 in C. S. 547 of 1982 have neglected to meet the liabilities of the

firm like Income Tax, property tax, municipal tax, and other liabilities due to the distributors etc. that the theatre has not been properly maintained,

that a portion of the building has been let out to a firm called "Dev Veecumbsee" who is using the premises for the purpose of manufacturing

bimetal strips using hazardous chemicals, which are dangerous to the public and safety to the cinema-goers and the theatre building, that nearly

rupees four lakhs is due from the firm Dev Veecumbsee towards rent, that these rents have not been collected thereby constituting serious

mismanagement on the part of the defendants 1 to 3 in C. S. 547 of 1982, that the refreshment stall, which can be let out for Rs. 10,000 per

month, has been let out only for Rs. 1000 per week after refusing to accept the offer of Rs. 10,000 per month made by M/s. S. B. Enterprises and

that serious misfeasance and malfeasance have been committed by defendants 1 to 3 in C. S. 547 of 1982 in utter disregard of the terms of the

partnership deed and also the, law of partnership. Thus, we find that serious allegations have been made against defendants 1 to 3 in C. S. 547 of

1982, regarding their way of management of the firm and as such, their reputation is put at stake. In such circumstances, as rightly held in

Sudhansu Bhattacharjee Vs. Ruplekha Pictures, , which has been extracted in paragraphs (supra), the court will allow them an opportunity to

have their character vindicated at a public trial and not send them to a private tribunal with all the disadvantages incidental thereto. In C. D.

Gopinath v. Cordon Woodroffe and Co (Madras) Pvt. Ltd., (1979) 92 MLW 531, which has been extracted in paragraphs (supra), it has been

made clear by a Bench of our High Court that if there is an allegation against the character of one of the parties that may induce the court to refuse

to stay the proceedings. The said decision clearly holds that the power given to the courts under S. 34 of the Arbitration Act to stay the suit is a

discretionary one and the same cannot be claimed as a matter of right by party. In the light of the allegations made against defendants 1 to 3 in C.

S. 547 of 1982, which we have extracted (supra), we are of the view that this is a fit matter to be tried by a civil court rather than by an Arbitrator.

19. Further, it is clear from the facts narrated above that even though the appellant was aware of the filing of the suit very much earlier to the filing

of the present applications under S. 34 of the Arbitration Act, yet, he did not come forward with such an application immediately. Even in the

counter-affidavit filed in Applns. Nos. 3784 and 4177 of 1982, the appellant has specifically come forward with an averment to the effect that he

wants the leave of the Court to file a detailed written statement setting out his defence. Further, in the common counter-affidavit filed in Applns.

Nos. 4766 to 4769 of 1982, the appellant has in an unequivocal term prayed for the leave of the court to file a detailed written statement setting

out his defence as and when the suit summons are served on him. He has also averred in that counter-affidavit that the matter has to be decided

only in the trial of the suit and that therefore the other applications are all unnecessary and are not maintainable. From the above-said facts it is

clear that the appellant has not come forward with any averment at the earliest stage informing the Court that he is ready and willing to settle the

disputes in arbitration proceedings, that he is prepared to do all within his power to have the arbitration proceedings commenced and completed

expeditiously and that he is always ready and willing to assist the Arbitrator by producing all records, accounts, bank statements, correspondence

etc. On the other hand, as stated above, he has specifically averred that the entire matter has to be decided only in the trial of the above suit.

Failure to opt for the arbitration clause at the earliest stage and consistently pleading that the entire matter has to be decided only at the trial of the

suit, clearly makes out that the appellant opted for the civil court and has acquiesced himself for such civil court proceedings. The averments mentioned in paras (supra) must be taken as a step taken by the appellant in the main proceedings of the suit and they clearly and unambiguously manifest the intention of the appellant to waive the benefit of the arbitration agreement and establish the acquiescence of the appellant in the proceedings before the court. The failure of the appellant to come forward at the earliest stage offering to assist any arbitration proceedings will definitely disentitle him to obtain stay of the suit under S. 34 of the Arbitration Act. In Food Corporation of India Vs. Thakur Shipping Co. and Others, the Supreme Court has held that an applicant for stay of legal proceedings under S. 34 of the Arbitration Act must satisfy the court that not only 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. Thus, the readiness and willingness must exist not only when an application for stay is made but also at the commencement of the legal proceedings. The Supreme Court proceeding further held thus (at p. 472)-

It is thus quite clear on the authorities and from the terms of S. 34 that the readiness and willingness must exist not only when an application for stay is made but also at the commencement of the legal proceedings. From the conduct of the first defendant in either of these two suits the trial court found that they were not ready and willing to go to arbitration at the time when the suits were instituted.

Even in the present case, from the facts narrated above it is clear that the appellant did not express his readiness and willingness for going to an arbitration at the commencement of the legal proceedings. In Food Corporation of India Vs. Thakur Shipping Co. and Others, , the Supreme Court is of the view that unless the discretionary power vested in the trial court is found to be used arbitrarily or perversely, the appellate authority will not interfere with such a discretionary order passed by the trial court. The learned single Judge, both on the conduct and also on the delay committed by the appellant in coming forward with such applications for stay under S. 34 of the Arbitration Act, correctly refused to use his discretion. We do not find any arbitrariness or perverseness in the order of the learned single Judge of this court. In such circumstances, we cannot

interfere lightly with the discretionary order. In this case, there is delay on the part of the appellant to come forward with applications under S. 34

of the Arbitration Act, that he has not satisfied the court at the commencement of the proceedings that he is ready and willing to do everything

necessary for the proper conduct of the . arbitration and that the conduct of the appellant, which we have discussed in paragraphs (supra), will

definitely disentitle him to obtain stay of the suit under S. 34 of the Arbitration Act.

20. From the foregoing discussions we hold that there are no merits in both the appeals and accordingly both the appeals are dismissed with costs.

Costs one set After the judgment was pronounced, Mr. G. Narasimhalu, learned counsel appearing for the appellant in both the appeals prayed for

oral leave to file an appeal to the Supreme Court. We have discussed in our judgment that the learned single Judge has correctly used his discretion

in refusing to stay the suits under S. 34 of the Arbitration Act. We ourselves have discussed the facts of the case and held that the facts clearly

establish that this is a fit case for going to the civil court, rather than before an arbitrator. In these circumstances, we do not think that any

substantial question of law of general importance is involved in these appeals which needs to be decided by the Supreme Court. Hence, the oral

leave prayed for is refused.

21. Appeals dismissed.