ALLAHABAD HIGH COURT

Union of India

Vs.

Hans Raj Gupta

F.A.F.O. No. 293 of 1950, from order of Civil Judge, Dehradun
(Agarwala and Beg, JJ.)

23.08.1950. 30.08.1956

JUDGMENT

Beg, J.

1. This is an appeal under Section 39 of the Arbitration Act. It arises out of an application filed by the defendant-appellant under Section 34, Arbitration Act, for the stay of a suit. The suit in question was filed by M/S Hans Raj Gupta and Co., on 1-2-1950 against two defendants. The first defendant was the Union of India, the appellant in the present appeal, and the second defendant was one Sri Mahesh Chandra Gupta. Defendant No. 2 did not put in appearance, and the suit proceeded ex parte against him. In the suit, the plaintiff claimed a decree for Rs. 2,28,397/14/5 against defendant no. 1 on the ground that there was a contract entered into between defendant No. 1 and defendant No. 2 by virtue of which defendant No. 2 undertook to supply fire-wood to defendant No. 1. The plaintiff claimed to be the assignee of the interest of defendant No. 2, and hence entitled to the amount claimed. It may be mentioned that in the plaint itself there was a definite and clear reference to the terms of the contract entered into between defendant No. 1 and defendant No. 2. The allegations in paras 7 and 8 of the plaint would further indicate that there was also a reference in the plaint to the fact that there was an arbitration clause in this contract. The plaint also indicated that previous to this suit there had arisen a dispute between the parties about the amount payable under the contract, that the said dispute was referred to the arbitrator constituted under the arbitration clause, and that, under the award given by the arbitrator, the amount claimed in the present suit was adjudicated as due to the plaintiff. The present suit was filed to recover the same amount.

2. In this suit, 4-4-1950, was fixed for filing a written statement by the defendant. On that date, an application was filed on behalf of defendant No. 1, the Union of India, in which it was said that as the papers had to go from one quarter to another, and it generally took time, so it was prayed that at least two months' time may be given to the defendant. The time asked for was allowed. After the expiry of two months, on 5-6-1950 a second application was again filed by defendant No. 1 saying :

> "It is submitted that the matter as alleged by the plaintiff relates to a period of five years. Due to the change of the staff owing to the partition of the country the papers are not easily available and are being collected. It is, therefore, requested that at least one month's time may kindly be allowed for doing the needful."

This application was also allowed. After the expiry of that time, however, the defendant No. 1, instead of filing a written statement, filed an application for stay under Section 34, Arbitration Act. This application for stay was rejected by the learned Civil Judge of Dehradun by his order dated 23-8-1950. Aggrieved with the said order the defendant No. 1 has filed this appeal. We have heard the learned counsel for the appellant, and after giving our consideration to the matter, we are of opinion that there is no substance in this appeal. The sole question that has been debated before us is whether the two applications for adjustment given by defendant No. 1 on 4-4-1950 and 5-6-1950 constitute a step in the proceedings of the case under Section 34 of the Arbitration Act (Act X of 1940). Section 34 of the said Act provides as follows :

> "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."

According to the words used in para 18 of the Second Schedule of the Code of Civil Procedure the application for stay was to be made "at the earliest opportunity and in all cases where the issues are settled at or before such settlement". According to the corresponding Section 4(1) of the English Act of 1950, an application for stay of proceedings must be made "at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings." Thus both under the Indian Arbitration Act as well as under the corresponding English Act, the words used are "steps in the proceedings" and not steps in the suit.

3. Under Section 34, Arbitration Act, any party seeking a stay of the proceedings should apply to the court "at any time before filing a written statement or taking any other steps in the proceedings." In the present case the two aforementioned applications were made before the filing of the written statement. The question for determination, therefore, is whether they were filed before defendant No. 1 had taken "any other steps in the proceedings." The words "other steps in the proceedings" are words of a general character. They are words of a wide import, and would embrace within their amplitude a large variety of acts. Any application by a party

indicating that he has participated in the proceedings of the case or has contributed to its further progress, or any act by a party showing that he has acquiesced in the jurisdiction of the court would constitute a step in the legal proceedings.
Once such a step is taken, it is not possible for a party to retrace its steps. The intention of the Legislature appears to be that a party desiring to oust the jurisdiction of the ordinary courts, and seeking a resort to the domestic forum should do so at the earliest possible opportunity. The principle itself is a salutary one. It might have been incorporated in the Indian Law for multifarious reasons. The object might have been to save parties from incurring any unnecessary costs in litigation. It might also be to save any waste of time of the court in applying its mind to orders which might subsequently prove to be futile and unnecessary. Whatever the purpose of the Legislature might have been, the section makes it quite clear that a party seeking to avail itself of the provisions of stay under this section should clarify its position at the earliest possible opportunity so as to leave no manner of doubt that it wishes to have a resort to arbitration proceedings. If party hesitates in the matter by allowing the suit to progress, it should be taken to have abdicated its claim to have the matter decided by the domestic forum and to have thereby forfeited any right that it might have to claim a stay on that ground. The application that would constitute a step in the proceedings might be a written application or an oral one, but once the act is construed to be a step in the proceedings, the court will thereafter refuse to stay the suit on the ground that the stage fixed by law for making such an application has already passed. It is also significant that the test fixed by the Legislature is an objective one, and not a subjective one. If a step in the proceedings of the case has been taken at the instance of a party, then, in view of the stringent provisions of the section, it is not open to the party to say that, in spite of it, its intention was to apply for stay at some future stage. Even the ignorance of arbitration clause or participation in proceedings under protest would not be of any avail, if the party has actually done an act which can be construed to be a step in the legal proceedings. Any such conduct on the part of a party operates as if it were an estoppel against the said party, and it is not open to it to resile from the said position subsequently on the ground that step was taken by it in ignorance or under protest. All that appears to be necessary is that a party against whom the bar against stay is set up should have been apprised of the contents of the plaint so as to have knowledge of the facts that might attract the arbitration clause or bring it into play. Any laches on its part, and any association by the said party in the proceedings of the case thereafter would constitute a waiver of his claim for stay.

4. The facts of the present case may now be examined in the light of the propositions postulated above. It is admitted before us that 4-4-1950, was fixed for the filing of the written statement. When the defendant appeared on that date he did nothing to indicate that he wanted that the matter should be taken out of the jurisdiction of the court and be entrusted into the hands of the arbitrators, nor did he say in his application that he was not aware of what the case against him was. On the other hand, the application would indicate that he was making preparations to defend the case. He stated in the application itself that as the papers had to go from one quarter to another, and that generally took time, an adjournment of two months was necessary for the

purpose. A copy of the plaint had already been served on defendant No. 1, who was, therefore, fully aware of the case of the plaintiff. The date itself was fixed for filing the written statement. It is, therefore, obvious that the intention of taking time at that stage was no other than to enable the defendant to make preparations in respect of the purpose for which the date was fixed i. e. for filing the written statement. Two months' time was granted to the applicant for the purpose.
After the expiry of the said period of two months, he filed another application. In this application again he stated that owing to the partition, there had been a change of staff, that all the papers which the defendant wanted to collect were not easily available, and that it was requested that one month's time be allowed for doing the needful. This application again indicated that the defendant was trying to collect materials for the preparation of the case. The word 'needful' could only have reference to the purpose for which that particular date was fixed. This date being an adjourned date was also fixed for the same purpose, i. e. for the filing of written statement. He was again allowed one month's time for the purpose. After the said period of one month had expired, the application for stay under Section 34, Arbitration Act was filed. We are of opinion that, taking into consideration the provisions of Section 34 of the Arbitration Act, this application was filed at too late a stage, as the defendant had already taken more than one step in the proceedings.

5. In *Union of India v. Girish Chandra*[1] which is a single Judge decision of the Allahabad High Court, it was held that an adjournment granted at the instance of a party for the purpose of filing a written statement should be considered to be a step in the proceedings. In this case two previous Bench decisions of the Allahabad High Court reported in *U. P. Government v. Sri Har Nath*[2] and *Roop Kishore v. United Provinces Government, Lucknow*[3], were referred to and relied upon. To the same effect is the view taken in a Full Bench decision of the Calcutta High Court reported in *Sadhan Kumar v. Sunil Kumar* [4]No doubt in the present case the application of the defendants did not say in so many words that time was being taken to file a written statement, but, as we have already observed, the circumstances of the case irresistibly lead to the same conclusion.

6. In *Ford's Hotel Co., Ltd v. Bartlett*[5], Lord Halsbury L. C. pointed out that :

> "The intention of the legislature in giving effect to the contract of the parties, and saying that one of them should be entitled to make an application to insist that the matter should be referred according to the original agreement, was that they should at once and before any further proceedings were taken, specify the terminus a quo and that if an application to stay proceedings was made under these circumstances, then that the Court should enforce the contractual obligation to go to arbitration."

7. In Halsbury's Laws of England (third edition) Vol. 2, para 58 the law on the point is stated as follows :

> "The applicant must have taken no step in the proceedings after appearance. A step is taken in proceedings by a party notwithstanding his ignorance at the time of the existence of the arbitration clause.

A party who makes any application whatsoever to the court, even though it be merely an application for time, takes a step in the proceedings." Following the above statement of law it was held in *Fleming Shaw and Co. v. Haji Yusif Ellias6*

[1] AIR 1953 Allahabad 149 [3] AIR 1945 Allahabad 24 [5]1896 A. C. 1
[2] AIR- 1949 All 611 [4] AIR 1948 Calcutta 59. [6] AIR 1917 Sind 12

> "Any application whatsoever to the Court, even though it be merely an application for time, is a 'step in the proceedings' within the meaning of Section 19 of the Arbitration Act, irrespective of the intention with which the application is made.
> Even a mere, acquiescence in a proceeding initiated by the other party and in an order made on his separate application amounts to a step in the proceedings."

In the present case, however, as already observed, the intention of giving the application for adjournment appears to be to prepare for defense.

8. On behalf of the appellant, a number of cases have been relied upon, but we are of opinion that they are distinguishable on facts. Our attention was drawn to *Ives and Barker v. Williams*[7] In that case, the defence counsel had applied for a copy of the statement of claim to be supplied to him. This act on the part of the defendant was not considered to be a step in the proceedings. The reason for it is obvious. Until a defendant is aware of the contents of the plaint and the case of the plaintiff, he would not be in a position to determine what further step he should take. It cannot be said in the present case that the defendant was not aware of the case of the plaintiff. The plaint had already been filed. A perusal of the plaint filed in the present case would indicate that it stated not only the cause of action of the plaintiff, but also made an explicit reference to the arbitration clause in the said agreement. In fact, as already stated, according to the plaintiff's case, there had already been an arbitration according to the terms of the arbitration clause, and the suit itself was filed to enforce the award given by the arbitrator. Under the circumstances, in the present case, at any rate, it cannot be said on behalf of the defendant that he was either unaware of the nature of the claim or even of the fact that there was an arbitration clause in the agreement relied on by the parties. If, therefore, he wanted to invoke the said clause, he should have done at its very inception, and there can be no justification for putting off the matter.

9. The next case relied upon by the learned counsel for the appellant is reported in *Lane v. Herman*[8] In that case it was held that a notification by a party to the appropriate officer of the court that the case be put in the counsel's list is not a step in the proceedings. The following observations were made in that case :

> "All that is necessary to be done for a case to be put into the counsel's list is for one party to notify the appropriate officer of the Court that he intends to appear by counsel. If that is done, the case is automatically put into counsel's list, unless there are special circumstances, in which case an informal application is made to a practice master. It cannot be said that the defendant has taken a step which is a step in the proceedings."

A mere intimation by a party that he proposes to be represented by counsel in a case

[7] 91894-2 Ch 478

[8] 1939-3 All England Reporter 353

may not constitute a step in the proceedings of the case. Such an act might be of a purely ministerial type and might not even involve the intervention of the Court. Further, if followed by an application for stay, such an act might be construed to be merely a step preparatory to or necessary for stay. In other words, in such circumstances such an act would be a part and parcel of the act directed not towards the further advancement of proceedings, but towards the arrest of their further progress. Under the above circumstances, this case also appears to be distinguishable on facts.

10. For the above reasons, we are of opinion that there is no substance in this appeal. The appeal is, accordingly, dismissed with costs. The stay order is discharged.

Appeal dismissed.