

ALLAHABAD HIGH COURT

Shri Ram Shah

Vs.

Mastan Singh

F. A F. O. No. 258 of 1976

(M.N. Shukla and K.C. Agarwal, JJ.)

10.08.1977

JUDGEMENT

M. N. Shukla, J.

1. The question in this appeal is whether the proceedings instituted by the plaintiff respondent by filing a suit in forma pauperis should have been stayed under Section 34 of the Arbitration Act (hereinafter referred as ' the Act'). A few facts leading to the present appeal may be noted as follows :

2. The plaintiff-respondent Mastan Singh made an application for leave to file a suit in forma pauperis against M/s. Hindustan Finance Company, R. N. Grover, and Ram Shah, the latter being the partners of the Company. The relief claimed in the suit was a mandatory injunction requiring the defendants to restore possession of a truck of which they had been forcibly deprived by the defendants. The suit was instituted on 20th Sept, 1975. On 16th Oct. 1975, the plaintiff applied for a temporary injunction. To this application objections were filed by M/s. Hindustan Finance Company and R. N. Grover, Managing Partner, on 12-12-1975. Thereafter on 9-1-1976 Ram Shah defendant applied under Section 34 of the Act praying that the suit be stayed inasmuch as the parties had by means of an agreement decided to have the matters referred to arbitration, the plaintiff Mastan Singh opposed this application on the ground that the respondents Nos. 2 and 3, having filed objections against the application for temporary injunction, were disentitled from applying under Section 34 of the Act. In the plaintiffs objection it was also alleged that the arbitration agreement was not genuine and contained additions and interpolations. The objections found favour with the court below and it held that since the respondents Nos. 2 and 3 had by filing objections against the application for temporary injunction

taken steps in the proceedings in the suit and the arbitration agreement was also suspicious, the application under Section 34 of the Act must be dismissed. The application was in these circumstances rejected and that order has been challenged in this appeal.

3. The short question, therefore, which arises for our consideration is as to whether on these facts the application under Section 34 of the Act was liable to be dismissed. Section 34 of the Act reads :

"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 the 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 party is entitled to claim the benefit of the above provisions, provided he invokes such benefit before :-

- (i) filing a written statement, or
- (ii) taking any other steps in the proceedings.

It is quite clear that if a party chooses to avail himself of the binding effect of an arbitration agreement, he must not submit to the jurisdiction of the court in which the suit or other legal proceedings have been instituted. If he either files a written statement or takes any other steps in the proceedings, his conduct would amount to abandoning the arbitration agreement and it would be referable to his intention to submit to the jurisdiction of the court in which the suit or the other legal proceedings have been instituted.

4. Before, however, an application under Section 34 of the Act can be thrown out on account of any such conduct of the applicant, it has to be carefully ascertained as to whether the unequivocal intention to abandon the arbitration agreement can be attributed to him. Every ostensible act or step taken by an applicant in the suit or proceedings instituted would not invariably lead to the conclusion that he has forfeited his right to claim stay of the proceedings under the provision of Section 34 of the Act. The crucial test for determining whether an act is such a step in the proceedings is to see whether the act displays an unequivocal intention to proceed with the suit and give up the right to have the matter disposed of by arbitration. So long as such categorical inference cannot be drawn, we cannot say that the step taken by the applicant discloses any intention not to press the arbitration agreement. In this context frequently cases have arisen in which defendants have chosen to contest injunction applications filed against them by plaintiffs in the suits instituted by the latter and on those facts the controversy has arisen as to whether the mere contesting of injunction applications or filing of objections by the defendants against such applications is sufficient to spell out an intention on the part of the defendants to defend themselves in the suit and not proceed to press the arbitration agreement. We have carefully pondered over this question and we are of the opinion that merely filing of objections against the injunction application is not inconsistent with the defendant's intention to press the arbitration agreement. In fact, a contrary view is likely to be highly prejudicial to the defendant. Quite often an interim order, which may be granted by a court on *ex parte* hearing, may be extremely prejudicial to the defendant who may be under an imperative necessity first to rescue himself from the operation of the interim order and then to decide upon his next step or strategy against the plaintiff. It would be wholly unrealistic to expect a defendant to let himself suffer all the hardship and submit to the injunction order and hold his breath in peace until he has first made an application under Section 34 of the Act and obtained orders of stay from the court. In most cases such an attitude would be fraught with drastic consequences for the defendants. Thus, in our opinion, merely, filing objections against an injunction application made by the plaintiff in the suit instituted by him cannot be construed as a step in the proceedings by the defendant so as to preclude him from claiming the benefit of Section 34 of the Act. In other words, such conduct of the defendant cannot be regarded as conclusive as to his intention not to proceed with the arbitration but to defend himself in the suit

itself.

5. The view that we have been inclined to take with regard to the interpretation of Section 34 of the Act appears to be in conformity with the Explanation (2) added to Section 34 by the Uttar Pradesh Civil Laws (Reforms and Amendment) Act, 1976. The Explanation reads as follows :

"A mere application for time to file a written statement or a mere contest to an interlocutory application for injunction, appointment of Receiver or the like, shall not amount to taking any steps in the proceedings."

What was, therefore, not very clear in the terminology of Section 34 formerly has been made explicit by the addition of Explanation (2). Now there remains no room for doubt that merely contesting an interlocutory application for injunction, or for the appointment of Receiver or the like, does not amount to taking any steps so as to exclude the applicability of Section 34 of the Act.

6. There is yet another useful test which may be formulated in order to determine as to whether a defendant has taken a step in the proceedings so as to deprive him of the benefit of Section 34 of the Act. A look at the language of Section 141 of the Civil P. C. points to a division of "proceeding" into two categories. A suit after all is merely a species of the generic term "proceedings". Section 141 of the Civil P. C. provides that the procedure provided in the Code with regard to suits shall be followed in all proceedings in any Court of civil jurisdiction. Part III of the Code relates to incidental proceedings and Part VI relates to "supplemental proceedings". Incidental proceedings are dealt with in Sections 75 to 78 of the Code, and the supplemental proceedings are dealt with in Sections 94 and 95 of the Code. Sections 75 to 78 deal with the power of the Court to issue Commission, letter of request, and commission issued by foreign Courts. The nomenclature given to these proceedings is "Incidental proceedings" as they are integral to the suit inasmuch as they are necessary in the taking of the suit to its fruition, that is, its ultimate decision and the making of a decree, on the other hand, the proceedings in part III of the Code are described as supplemental proceedings because they relate only to the powers of the Court which may be exercised for preventing the ends of justice being defeated. Attachment, injunction etc. fall within the category of supplemental proceedings. They do not by themselves contribute to the advancement or the

progress of the suit. They are merely intended to protect the interest of the parties in certain circumstances. It follows that if any step is taken with regard to these supplemental proceedings, it cannot be said that it has contributed to the progress of the suit on merits, that is, the progress of substantive proceedings. On the other hand, if steps are taken in the incidental proceedings covered by part III of the Code comprised of Sections 75 to 78, that would be a step in the substantive proceedings themselves. The test, therefore, is whether any step, taken by the defendant is related to the advancement of the hearing of the suit or the substantive action or is merely connected with supplemental proceedings the purpose of which is not to decide or proceed or proceed to decide the hearing of the suit on merits. To borrow the language of their Lordships of the Supreme Court in *State of Uttar Pradesh v. M/s. Janki Saran Kailash Chandra* (at p. 2076) :

"Taking other steps in the suit proceedings connotes the idea of doing something in aid of 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."

Applying the above tests to the facts of the present case, we are of the opinion that the respondents by merely filing objection to the injunction application moved by the plaintiff, could not be said to have taken a step in the proceedings so as to disentitle them from the benefit of Section 34 of the Act. The learned Civil Judge, therefore, acted illegally in dismissing the application under Section 34 of the Act. We are supported in the view that we have taken by a Division Bench decision of the Bombay High Court in *Anandkumar v. Kamaladevi*² and a Division Bench decision of the Madhya Pradesh High Court in *Sansarchand v. State of M. P.*³ We are also in respectful agreement with the view of a learned single Judge of this Court in *Queens College Kanetra v. Collector Varanasi*⁴ Although the facts of that case were different, yet the dictum laid down by the learned single Judge was correct and is fully applicable to the instant case also.

7. We find it difficult to endorse the order of the Court below even on the second ground on which it is based. The learned Judge did not refer to any evidence with regard to the alleged fraud which might have vitiated the

arbitration agreement. The finding on that ground is very perfunctory and cannot be sustained. If there was any evidence to substantiate this allegation, the court below should have gone into it and if, *prima facie* satisfied that there was a fraud it should have recorded a categorical finding on that point and in that event surely it would have been a fit case to be tried by the arbitrator. The case has, therefore, to be sent back to the lower court for a fresh decision on this ground as well. The court below shall afford opportunity to the parties to adduce evidence to substantiate the allegation of fraud.

8. For these reasons we set aside the order of the court below and allow the appeal with costs and remand the case for a fresh decision on the application under Section 34 of the Act.

Appeal allowed.

Cases Referred.

1. (AIR 1973 SC 2071)
2. AIR 1971 Bom 231
3. AIR 1961 Mad Pra 322
4. AIR 1974 All 431