

ANDHRA PRADESH HIGH COURT

Bajaj International

Vs.

Indian Tobacco Suppliers

A.A.O. No. 204 of 1977

(Madhava Reddy and Madhusudan Rao, JJ.)

01.09.1977

JUDGMENT

Madhava Reddy, J.

1. This appeal is directed against the order of the Principal Subordinate Judge, Guntur, in I. A No. 1867/76 rejecting the defendant-petitioner's application under Section 34 of the Arbitration Act for the stay of suit O.S. 55/76 on his file.

2. The respondent filed the suit for recovery of damages for breach of trade- agreement, Ex. B-1 dated 27-9-1975 and the finance agreement, Ex. B-2 dated 27-9-1975. The trade agreement was to supply tobacco to the defendants and the Finance Agreement was to advance Rs. 15,00,000/-. According to the plaintiff, the defendant advanced only a sum of Rs. 8,30,000/- and committed a breach of contract by failing to advance the balance of the amount. These two agreements contained a clause under which the disputes arising thereunder had to be referred to an arbitrator.

3. The defendants admit the execution of these two agreements but plead that the agreements were rescinded and two other agreements, Exs. A-11 and A-12 dated 28-1-1976 were executed between the parties under which the obligation to advance the loan was reduced from Rs. 15,00,000/- to Rs. 8,00,000/- and the only agreements subsisting between the Parties were the agreements dated 28-1-1976. The agreement dated 28-1-1976 contains the following clause.

" In case of any disputes or differences shall at any time arise between the parties hereto as to the construction, meaning or effect of this agreement or any clause or thing contained therein or the rights and liabilities of the parties hereunder in relation to the terms of the same shall be referred to a single arbitrator in case the parties agree upon one otherwise to two arbitrators, one to be appointed by each. Party to the dispute and in case of their disagreement and in so far as they disagree, to an umpire in accordance with and subject to the provisions of the Indian Arbitration Act, 1940 or any statutory modification or reenactment thereof in such arbitration in force shall be held in Bombay and not elsewhere and the award or awards in such Arbitration may be made a rule of the High

Court of Judicature or other appropriate Court at Bombay at the instance of either party."

4. Having regard to the arbitration clause, the defendant petitioner pleads that the suit filed by the respondent-plaintiff be stayed under section 34 of the Indian Arbitration Act. The plaintiff opposed this petition *inter alia* on the ground : (1) that the petitioner has taken steps in the proceedings before moving for stay of the suit under Section 34 of the Act and (2) that there is no agreed clause to refer the dispute to arbitration. Both the grounds of opposition were upheld by the Court below and the petition for stay was dismissed. Hence this appeal.

5. The petitioner-defendant having been served with notice of the suit filed on 3-4-1976 entered appearance before the date of hearing and moved the Court by way of an interlocutory application for raising the attachment of certain properties of the 1st defendant. The case was posted to 3-7-1976 for written statement of the defendants.

6. Several adjournments were granted at the request of the defendant- petitioner for filing the written statement and finally time was extended till 3-7-1976 on payment of costs of Rs. 50/- to the plaintiff. Even on that day the defendant-petitioner did not file the written statement. Instead he paid Rs. 50/- and sought further time till 25-9-1976 for filing the written statement on condition of paying costs of Rs. 100/- to the plaintiff. Even on 25-9-1976 the defendant-petitioner did not file the written statement. On that day, instead of filing the written statement, he filed a petition for stay of the proceedings in the suit. The defendant-petitioner thus took steps both in the interlocutory proceedings relating to the attachment before judgment and in the suit itself by seeking adjournments for filing the written statement and paying costs on two occasions. These steps taken by the defendant are certainly steps in the proceedings in the interlocutory proceedings as well as the proceedings in the suit itself.

7. In *Hawara Oil Mills v. Kishanlal Mills*¹, Satyanarayana Raju, J. (as he then was) held :

" Where a particular application to Court amounts to a step in proceedings depends upon the circumstances of each case and no absolute test can be laid for determining it. The expression " Steps in the proceedings" in Section 34 of the Arbitration Act means something in the nature of an application to the Court and this must be after the defendant knows what the plaintiff is suing him for. The provisions of the Civil Procedure Code require that a copy of the plaint should be attached to the summons and when the plaint, copy is served on the defendant, the defendant is in a position to make up his mind as to whether it would be desirable to apply for any order for stay. If the suit summons were served upon the defendant and he was apprised of the suit claim, it cannot be said that he was not in a position to make up his mind as to which of the alternatives he would take, whether to defend the suit or to apply for stay. If thereafter he makes an application for time to file a written statement, it must necessarily amount to a step in the proceedings."

8. In *Pitchers Ltd. v. Plaza (Queens-bury) Ltd*², appearing before the Master and asking for leave to defend was held to be a step in the proceedings. In *Gannu Rao v. Thiagaraja Rao*³ it was held that if something is done by the party concerned which is in the nature of

¹(1958) 2 An WR 425

³(1948) 2 Mad LJ 606

²(1940) 1 All England Reporter 151

an application to the Court, it must necessarily come under the category of 'step in the proceedings' within the meaning of Section 34 of the Arbitration Act. In *Sadhan Kumar v. Sunil Kumar*⁴ the filing of an application for time is held tantamount to taking other steps in the proceedings as provided in Section 34. In that case the defendant applied for time for filing the written statement and that was construed as taking a step in the proceeding disentitling the petitioner from applying for stay of the proceedings under Section 34 of the Act. A request for time for filing the written statement may be made orally or in writing. In either case as held in *Abdul Quddos v. Abdul Gani*⁵, that constitutes a step in the proceeding. Further, in the instant case, the petitioner had not only sought time for filing the written statement but having failed to file the written statement on the adjourned dates of hearing also paid costs on two occasions to the plaintiff and sought further time for filing the written statement. He also filed a written application for vacating the order of attachment before judgment. Whether the party takes any step in the suit or in an interlocutory proceeding in the suit, both in our opinion constitute a step in the proceeding disentitling him to move for stay of the legal proceedings in the suit. In *Amritraj v. Golcha Financiers*⁶, where the plaintiff while filing a suit simultaneously applied for an *ex parte* interim injunction and the defendant entering appearance opposed the extension of an injunction and also took time for filing an affidavit in opposition was held to have taken a step in the proceeding and consequently disentitled to apply under Section 34 of the Act for stay of the suit. In that case Mallick. J., observed (at p. 318 Para 6) :

" It is difficult to make a distinction between filing a written statement in suit and filing an opposition to an interlocutory application in that suit - both of them are " taking step in the suit."Filing an affidavit in an interlocutory application is as much taking a step in the proceeding as tiling a written statement or filing an affidavit in opposition to an application under Order 12 Rule 6. Interlocutory " proceeding is a proceeding in the suit itself and any step taken in the proceeding is a step taken in the suit....."

9. We find ourselves in agreement with this view. The Arbitration Act envisages that any person seeking to take advantage of the arbitration clause stipulated under an agreement should do so at the earliest point of time after the notice of the suit is served and he is made aware of the claim against him which obviously envisages the service of a copy of the plaint. In the instant case, the defendant who has taken time for filing the written statement on several occasions and who has also filed an application for vacating the order of attachment before judgment must be held to have taken steps in the proceedings and consequently disentitled to seek the stay of the proceedings in the suit under Section 34 of the Act.

10. In the view we had taken on the first contention, we deem it unnecessary to express any opinion on the other contention raised by the defendant- petitioner.

11. In our view the learned Subordinate Judge was right in dismissing the defendant's application for stay of the suit. This appeal therefore fails and is accordingly dismissed

⁴ AIR 1948 Cal 59

⁶ AIR 1966 Cal 315

⁵ AIR 1954 Nag 332

with costs.

Appeal dismissed.