

CALCUTTA HIGH COURT

Sarat Kumar Roy

Vs

Corporation of Calcutta

(Woodroffe , J.)

04.01.1907

JUDGMENT

Woodroffe, J.

1. The plaintiffs who are contractors submitted a tender for the construction of certain Municipal buildings. Their tender was accepted and a contract was executed. That contract contained a clause stipulating that all disputes should be referred to arbitration.

2. Disputes arose, and on the 27th June 1906 the plaintiffs wrote to the defendant Corporation stating that, unless their claim was settled within a week it was their intention to bring a suit. After the receipt of this notice the Corporation on two occasions, viz. the 13th July 1906 and the 19th August 1906, called upon the plaintiffs to go to arbitration. Nothing, however, came of this, and on the 11th September 1906 the plaint in this suit was filed, the defendant being served with the summons on the 12th November 1906, and a copy of the plaint being served on the defendant on the 21st November 1906. Then on the 30th November the defendant Corporation took out a summons for an order that they might have further time to file their written statement, and on the same day a letter was sent to the plaintiff's attorney in the following terms: I beg to inform you that before filing the written statement herein an application will be made to the Court for an order for reference to arbitration in terms of the contract herewith and for a stay of all proceedings in this suit.

3. Subsequently the defendant obtained other extensions of time, and eventually on the 15th December gave notice of motion, which is now before me, in which they apply that all further proceedings in this suit be stayed, until an award has been made and that all disputes be referred to arbitration in terms of Clause 20 of the contract.

4. These are the facts.

5. The whole question turns really upon what was done on the 30th November when a summons

was taken out by the defendant Corporation for extension of time to file their written statement, and a letter was sent on the same date informing the plaintiffs that the defendants intended to apply, as they have in fact done now.

6. The plaintiffs have taken two objections to this application. The first is as to the effect of the clause relating to arbitration, which I need not consider here, for I think I must determine this application on the second objection taken, which is that the application is barred under the provisions of Section 19 of the Indian Arbitration Act, according to which the application for stay of proceedings must be made before filing the written statement or taking other steps in the proceedings sought to be stayed.

7. The defendant has not filed any written statement and therefore there is no question here so far as the written statement is concerned. But the section goes on to say that application for stay must be made before the applicant has taken "any other steps in the proceedings," and the question before me is whether the defendant, as alleged, has taken a step in the proceedings within the meaning of Clause 19.

8. What is relied on as a step taken by the defendant is that the defendant applied for extension of time to file his written statement in the suit.

9. Several decisions have been cited to me. Some I think may shortly be disposed of on the ground that the facts were different from those of the present case. Certain of them were upon applications made not to the Court but out of Court by one party to the other. Others dealt with the question how far a party could be said to have taken steps in the proceedings when an application was made by his opponent, but without objection or with his acquiescence. There is no question here that the application relied on was made at the instance of the defendant, and the application is not by one party to another, but is an application by the defendant to the Court. It has been contended firstly that this is not a step in the proceedings at all, and secondly that if it could be considered such a step, at any rate then what was done was accompanied by an expression by the defendant Corporation of their intention to enforce the Corporation's rights to have the matter disposed of by arbitration.

10. As regards the first point it has already been held by the House of Lords in the case of *Ford's Hotel Co. v. Bartlett* (1896) A.C. 1 that the taking out of a summons for extension of time to deliver a defence is taking a step in the proceedings within the meaning of Section 4 of the English Arbitration Act of 1889, which corresponds with Section 19 of the Indian Arbitration Act. That case is sought to be distinguished on the ground that as it is reported there is nothing to show that the defendants in that case had really elected to arbitrate. It is said that this is not so here, and that, therefore, though the case is formally within the decision it is not really and substantially within the spirit of it or in accordance with the spirit or sense of the Arbitration Act. I do not think this is so or that, as I am asked to do, I am at liberty to hold that though the

conclusion of that judgment is generally that an application for extension of time is a "step," yet that the grounds given for that conclusion would except such an application made under the circumstances now before me.

11. Moreover, I may adopt what has been said in that case in the Lower Court by Rigby L.J. (1895) Q.B. 850, 852 who, pointing out that it was the duty of the Court to construe the words of the section, said: We cannot review the proceedings of the legislature and say that something which is clearly within the words used in the section is not within their meaning on the ground that the Legislature ought not to have so provided. The section, no doubt, provides a somewhat drastic remedy for an abuse which existed under the previous legislation on the subject, namely, that after causing much delay a defendant finally sought to compel a reference of the action.

12. Mr. Knight contended in the first place that an application for extension of time is not a step in the proceedings. He has submitted firstly that his client's object was not to file a defence to the suit, but to avoid having to do so and to apply during the extended period to the Court for stay of proceedings and at the same time to place himself in this position that, if it were held by the Court that this suit must proceed, his client would be in a position to defend it. He contends that, if his client had filed a written statement, an objection would have been taken under Section 19 of the Arbitration Act. If on the other hand he did not file a written statement and did not obtain further time to do so, then in the event of the failure of his application for stay of proceedings the case would have been transferred to the undefended list. These difficulties might have been avoided by a prompt application for stay of proceedings before the expiry of the period allowed for filing the written statement. While also it is true that the immediate object was to procure a respite, the ultimate object was (in the event of the application to stay being refused) to file a defence. What was done therefore was a step in the proceedings and was none the less so because in a particular eventuality it would not have been necessary for the party applying to avail himself of the liberty given to file a written statement after the usual time allowed for that purpose.

13. It is nextly contended that, what is to be looked to is not so much the act, which took place, but the intention (as inferred from the circumstances) under which the act was done. It is said that, if the facts disclosed an election to arbitrate and No. (1) abandonment of such election, then what was done is no bar to this application.

14. It does seem upon the materials before me that the Corporation were desirous of having this matter disposed of by arbitration in terms of the contract. I think this does clearly appear from the affidavits and is shown amongst other things by the terms of the letter of the 30th November, the date upon which the summons was taken out which is alleged to be a bar to the present application. That being so, I should like to have been able if I could to have acceded to it. The issue, however, is not whether upon the facts the proper inference to be drawn is that, there was no abandonment of the election to arbitrate. What I have got to see is whether this matter comes

within the terms of Section 19. If effect were given to the contention of the learned Counsel for the defendant the Court might be led into enquiries of a complex and lengthy character for the purpose of ascertaining whether the party had elected to arbitrate and, if so, whether he had abandoned such election. In short in each case it would be necessary to determine with what intention a particular act alleged to be a step in the proceedings was done. I do not think that this was the intention of the Legislature. By Section 19 it was, I think, intended to fix a definite limit a terminus quo from which an application of this nature could not be entertained, viz., the date of the filing of a written statement or taking any steps in the suit. Nor can I find any authority or sound reason for the second ground that, if an act does constitute a step in the proceedings, it is not a bar, if it is done under protest or accompanied by an expression of intention to arbitrate. If this were so, a party might go through most, if not all, of the steps of a suit provided that such step was accompanied by a protest. A party must submit to the judgment of the Court or not, and if his contention is that by reason of the contract of the parties the determination of the dispute is withdrawn from the Court, he should not in any manner, conditionally or otherwise, invite the Court's judgment on it. I must hold therefore that the defendant by taking out a summons on the 30th November 1906 for extension of time to file a written statement, took a step in the proceedings within the meaning of Section 19, and that this application, which was made after that date, is not maintainable under the same section.

15. I must therefore dismiss this application with costs.