CALCUTTA HIGH COURT

Subal Chandra Bhur

Vs

Md. Ibrahim

(Das,J.)

16.02.1943

ORDER

Das, J.

1. This is an application on the part of one Subal Chandra Bhur for stay of Suit No. 12 of 1948 pending in this Court in which he is one of the defendants. The facts leading up to the present application are as follows : By a deed of partnership dated 19th February 1940 three persons namely the petitioner, Khan Bahadur Md. Ibrahim and Musaji Mchamed Dadabhoy agreed to carry on a catering and supply business at the Military and Prisoners of War Camp at Ramgarh to fulfil certain contracts placed by the military authorities with Khan Bahadur Md. Ibrahim. Clause 18 of that deed of partnership provides for arbitration in case of dispute between the partners in the following terms: All disputes which shall arise between the partners or any of them or between any partner or partners and the legal representatives of any other partner or between their respective legal representatives and whether during or after the determination of the partnership and whether in relation to the interpretation of these presents or to any act or omission of any party to the dispute or as to any act which ought to be done by the parties in dispute or any of them or in relation to any other matter whatsoever touching the partnership affairs 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 difference in accordance with and subject to the provisions of theIndian Arbitration Act or any statutory modification thereof.

2. It is alleged by Khan Bahadur, Md. Ibrahim that the military authorities after making several complaints against the management of the business ultimately terminated the contracts with effect from 22nd April 1942. Since then the Prisoners of War Camp has been removed from Ramgarh. No other contract has been offered to the firm and none is to be expected and in the circumstances the partnership automatically came to an end on and from 22nd April 1942. It is the case of Khan Bahadur that the other partners namely the petitioner and Dadabhoy are in possession of the partnership assets except some furniture and they have not furnished any account and that he has been excluded from all knowledge of the affairs of the partnership. The petitioner says that the accounts of the partnership upto July 1941 were duly audited and signed and accepted by all the partners as correct, that subsequent accounts up to December 1941 has also been audited and the audit of the accounts from January 1942 was in course of preparation by the auditors but was interrupted by the conduct of Khan Bahadur and certain criminal

proceedings and that on accounts being taken at least Rs. 28,000 would be found due by Khan Bahadur to his partners.

3. Khan Bahadur's case further is that the military authorities requisitioned the production of the books of accounts and vouchers of the firm before a Military Court of Enquiry in connexion with a case of bribery. Khan Bahadur attempted to comply with the requisition of the military authorities and there was forcible opposition on the part and on behalf of the other partners. There were then two criminal proceedings one by Khan Bahadur and the other by the brother of the petitioner. The books of account were seized by the police and were lodged in the Court of the Sub-Divisional Magistrate at Ranchi. The petitioner replies that Khan Bahadur procured the military authorities to issue the requisition and under the guise of complying therewith he tried to get exclusive possession of the books of account with the object of tampering with them. It appears that during the pendency of the criminal proceedings the four parties thereto namely the three partners and the brother of the petitioner agreed to go to arbitration. An agreement in writing was executed by the four parties and the criminal proceedings were adjourned. This agreement is annexure "B" to Khan Bahadur's affidavit in opposition to the present application. By this agreement, three named persons were appointed arbitrators who were authorised to take all available evidence from the parties and decide the pending criminal cases and adjudicate upon the claim of the firm against Khan Bahadur as well as the other partners on account of any loan or other transaction. There were about 14 sittings but the arbitration ultimately proved to be infructuous. Khan Bahadur says that the arbitration fell through by reason of the conduct of his other partners while the petitioner states that it fell through by reason of the fact that Khan Bahadur refused to proceed with the arbitration and in fact filed a petition to that effect and made it impossible for the arbitrators to go on and in fact caused one of the arbitrators to decline to act any further.

4. In these circumstances Khan Bahadur on 5th January 1948 filed suit No. 12 of 1943 against his other partners namely the petitioner and Dadabhoy for a declaration that the partnership stood dissolved on 22nd April 1942, for a declaration of the respective shares of the partners, for accounts, for appointment of a receiver and other incidental reliefs. On 7th January 1943 Khan Bahadur applied for and obtained leave to serve notice of motion for appointment of a receiver and for an injunction returnable on 11th January 1948 and also obtained ex parte an interim injunction restraining the defendants from parting with the assets or any books and records relating to the partnership and from taking out of the custody of the Sub-Divisional Magistrate of Ranchi or any other officer there any of the books and records deposited with him. On 11th January 1948 the motion appeared on the list for hearing. What happened on that day in relation to the motion will appear from the Court minutes of that date as recorded by the Assistant Registrar which is as follows:
Monday the 11th January '43. Before The Hon'ble Mr. Justice Das : Khan Br. Md. Ibrahim v. Subal Ch. Dhar and Anr. Mr. H.C. Majumdar mentions for adjournment.
The Court : Adjourned for three weeks, Affidavit in opposition within a fortnight. Reply by Saturday following : Interim order to continue. Liberty to either parties to take inspection of the books and documents at the office of the S.D.O., Ranchi, on two days notice to one another's Solicitors.

5. Mr. Majumdar appeared for the defendant Subal. On 22nd January 1943 Subal one of the partners and one of the defendants in that suit No. 12 of 1943 took out the present notice of

motion for stay of that suit under the provisions of Section 34, Arbitration Act, 1940. The petition refers to the deed of partnership and the arbitration clause therein contained and complains that Khan Bahadur has filed the suit in violation of the arbitration agreement in order to delay the auditing of the accounts and thereby to delay the payment of the large amount due by him and he states that serious disputes have arisen between the partners and such disputes should be referred to arbitration in terms of the agreement between the parties. He avers that he is and was at the time of the commencement of the proceedings ready and willing to go to arbitration.

6. The arbitration clause is extremely wide in its terms. It is also rather peculiar having regard to the fact that there are three parties to the deed of partnership. It provides for reference of the disputes to a single arbitrator in case the parties agree upon one, [otherwise to two arbitrators one to be appointed by each party to the difference. In this case there are three parties to the agreement and there may conceivably be three parties to the difference that may arise. If in such circumstances the parties do not agree to a single arbitrator then the alter, native provision for appointment of two arbitrators, one by each of the parties to the difference would obviously be inappropriate and unworkable and I had doubts whether in such circumstances and in the exercise of my discretion I should stay the suit and drive the parties to an arbitration which will inevitably be infructuous. Mr. S.N. Banerjee argued that the arbitration cannot be infructuous because under Section 8 of the Act, the Court will appoint an arbitrator on the application of any party after giving the requisite notice. I do not agree with Mr. Banerjee that Section 8 could have any application to the present arbitration agreement. This arbitration agreement cannot be construed as an agreement to refer the disputes to a single arbitrator simpliciter so as to attract the operation of Section 8 of the Act. Reference to a single arbitrator is conditional on all the parties agreeing to do so and there is an alternative mode of appointment of two arbitrators. To construe this arbitration agreement as an unconditional agreement to refer to one arbitrator is to cancel the alternative provision altogether and will amount to making a new contract for the parties, which is obviously not permissible.

7. Mr. Banerjee then refers to In re *Babaldas Khemchand*[1] and contends that the possibility that the arbitration may become infructuous has no bearing on the question whether the suit should be stayed and he submits that this very possibility may make the parties to take up a reasonable attitude in the arbitration proceedings. He further points out that in this case the disputes are between Khan Bahadur on the one hand and the petitioner and Dadabhoy on the other. Therefore there are, in point of fact, only two parties to the difference and there can be no difficulty in applying the alternative provision of appointment of two arbitrators, one by each of the parties to the difference. Mr. Barwell concedes that although there may be three parties to the agreement they may be so-grouped that there will be only two parties to any disputes that may arise and that the alternative provision for appointment of two arbitrators may easily be applicable. Mr. Barwell further concedes that in the present case Khan Bahadur is on one side and the other partners on the other side that there are only two parties to the disputes. Subject to his other points, with which I shall deal later on, Mr. Barwell does not contend that in these circumstances the arbitration agreement will be inapplicable or unworkable in the facts and circumstances of this case. This relieves me of the duty of pursuing this point any further.

8. Mr. Barwell has opposed this application on a variety of grounds. He contends that the petitioner has taken a step in the proceedings and has thereby precluded himself from obtaining an order for stay of the suit. He draws my attention to the events that happened on 11th January

1948 and he relies on the minutes of that day which I have already set out in extenso. Mr. Barwell says that the minutes clearly show, and I agree with him in this view, that learned Counsel for the petitioner appeared and applied for and obtained time to file his client's affidavit in opposition to the application for appointment of a receiver, and also applied for and obtained directions and leave from this Court to inspect the books of account and records. Mr. Barwell contends that by doing these things the petitioner has taken steps in the proceedings within the meaning of Section 31, Arbitration Act. He has referred me to several cases namely *Ford's Hotel Co. v. Bartlett*[2] *County Theatres & Hotel Ltd. v. Knowles*[3] *Richardson v. Le Maitre*[4] *Ochs v. Ochs Brothers*[5] *and Sarat Kumar Roy v. Corporation of Calcutta*[6] In the first and last of the above cases, it was held that the taking out of a summons and obtaining an order extending the time to deliver pleadings is taking a step in the proceedings. This is quite obvious, for such an act clearly indicates that the defendant intends to go on with the suit rather than go to arbitration. In the other three cases, it was held that attending on summons for direction under Order 30 of the Rules of the Supreme Court amounts to taking a step in the proceedings because on such a summons directions are given on both parties and therefore such a summons may be treated as a separate application by both parties. It is quite intelligible, therefore, that attending on such a summons is taking a step in the proceedings.

9. In Ives & *Barker v. Willans*[7] Lindley L.J. defines a step in the proceedings as follows:Authorities show that a step in the proceedings means something in the nature of an application to the Court, and not mere talk between solicitors and solicitors clerks, nor the writing of letters, but the taking of some steps, such as taking out a summons or something of that kind, which is in the technical sense a step in the proceedings.

10. In Karnani Industrial Bank v. Satya Niranjan Shaw it has been held by our Court on appeal that a formal summons is not essentially necessary and an oral application to Court for extension of time to file written statement may be sufficient to constitute a step in the proceedings.

11. In Ford's *Hotel Co. v. Bartlett*[8] where the defendant took out a summons and obtained an order for further time to deliver his defence, Lord Halsbury L. C. while declining to give any definition of what "a step in the proceedings" may be, held that what was done by the defendant in that case was certainly taking a step in the proceedings. In that very case Lord Shand at p. 6 laid down the test in the words following:The proceeding of presenting such a summons and supporting it before the master was unquestionably judicial and implied a statement to the effect that the appellants were to defend the action. It was on that representation only that the order of Court was obtained. Having regard to the provisions of the arbitration statute this appears to me to have been in effect an abandonment of the proposal to have the subject of the cause disposed of by arbitration.
12. To like effect are the observations of Ridley, J. in *Austin & Whitley Ltd. v. S. Bowley & Son*[9] where the learned Judge expressed himself as follows:
In my opinion what is intended by a step in the proceedings is some step which indicates an intention on the part of a party to the proceedings that he desires that the action should proceed and has no desire that the matter should be referred to arbitration.

13. In Bhowanidas Ramgovind v. Pannachand Luchmipat J. observes as follows: Moreover, to apply for a copy of the plaint is merely to seek information in order that the defendant may ascertain the nature of the plaintiff's claim. In so doing the defendant does not, and is not to be

deemed to, indicate his acquiescence in the course adopted by the plaintiff for the purpose of settling his dispute which has arisen, for until he is made aware of the plaintiff's cause of action he is not in a position to elect whether he will proceed by way of arbitration or will assent to the litigation which has been commenced against him.

14. Again at p. 461 learned Judge says thus:
Any act in the nature of an application to the Court which indicates that a party is willing that the suit should proceed, in my opinion, would be a step in the proceedings within Section 19, Arbitration Act.

15. It seems to me that these authorities establish that in order to constitute a step in the proceedings the act in question must be : (a) an application made to the Court either on summons as in Ford's Hotel Co. v. Bartlett (1896) 1896 A.C. 1(Supra) or Sarat Kumar Roy v. Corporation of Calcutta ('07) 34 Cal. 443(Supra) or orally as in Karnani Industrial Bank v. Satya Niranjan Shaw ('24) or something in the nature of an application to the Court, e. g., attending on summons for directions as in County Theatres & Hotel Ltd. v. Knowles (1902) 1 K.B. 480(Supra), Richardson v. Le Maitre (1903) 2 Ch. 222(Supra), Ochs v. Ochs Brothers (1909) 2 Ch. 12(Supra) and (b) such an act as would indicate that the party is acquiescing in the method adopted by the other side of having the disputes decided by the Court. Applying now the test deducible from the authorities referred to above to the facts of the present case, I am satisfied that when the petitioner by his counsel applied to Court for obtaining time to file his affidavit in opposition and for leave to have inspection of the books and records he acquiesced in the method adopted by the plaintiff for having the disputes decided by the Court and not by arbitration and that he was quite content that the disputes should be fought in Court. This conduct, to my mind, clearly implies a statement to the effect that the defendant would proceed to defend the action and would not insist on the right to have the disputes disposed of by arbitration. I am fortified in this view by the petitioner's own statement in para. 4 of his affidavit in reply, which is as follows:With reference to the statements contained in para. 3 of the said affidavit I say that the notice of motion for the application for appointment of a receiver in suit No. 12 of 1943 was short served on me and all my papers relating to the suit being at Ranchi I could not place the same before my lawyer or counsel on 11th January 1943. I could not therefore be advised by nay lawyer what I should properly do in that connection but immediately after the receipt of the papers from Ranchi in the course of the week I was advised to make the present application and took out the notice of motion herein on 22nd January 1943, that is before the expiry of the fortnight's time to file affidavit in opposition from the said 11th January 1943.

16. This paragraph clearly indicates, to my mind, that on 11th January 1943 when learned Counsel appeared and obtained time he could not have and had not in his mind the arbitration clause or the import thereof. Such being the state of his mind, the application for time to file the affidavit in opposition to the application for the appointment of a receiver and for leave to inspect documents cannot possibly be referable to any intention to go to arbitration or to any objection to the filing of the suit but only indicates that the petitioner was anxious to oppose that application although it had been made in a suit and that there was no objection that the plaintiff had filed a suit instead of going to arbitration. In these circumstances by acting as he did he was undoubtedly taking a step in the proceeding, may be in ignorance of the existence of the arbitration clause. The fact that he was unaware of the arbitration agreement does not make his act any the less a step in the proceedings if in fact and in law it was a step : *Parker Gaines & Co.*

Ltd. v. Turpin[10] I should here refer to the case in Zalinoff v. Hammond[11] cited by Mr. Banerjee where it was held that the filing of an affidavit in opposition to a motion for appointment of a receiver in a partnership action was not taking a step in the proceedings. In that case, presumably the affidavit was filed in the office. At any rate, it does not appear that any application was made to the Court for time to file the affidavit. It is true that the motion for appointment of a receiver stood adjourned from time to time but it does not appear that it was ever adjourned at the instance of the defendant. From the reported argument of counsel, it appears that the only act which was relied upon by him as a step wag the mere filing of the affidavit in opposition. It is inconceivable that if the defendant in that suit had applied to the Court and obtained time to file his affidavit such an act would not have been relied upon also as constituting a step in the proceedings. There was nothing in that case in the nature of an application to the Court such as is mentioned by Lindly L.J. in the case referred to by me. Mr. Banerjee has also, relied upon *Joylall & Co. v. Gopiram Bhotica*[12] where it was held that opposing an application for injunction restraining the arbitration proceedings and preferring an appeal from the order granting the injunction was not a step in the proceedings. Again this case is distinguishable having regard to the nature of the suit and the nature of the application that was opposed. It is quite intelligible when one remembers the test mentioned above. The act done by the defendant in that case only indicated that he was anxious to go to arbitration because he opposed an application for restraining him from going on with arbitration. Such opposition, to my mind, does not indicate any intention on his part to proceed with the suit or to abandon arbitration.

17. Mr. Banerjee has also argued that the question of taking steps can only arise after proceedings had been commenced. He says that the writ of summons in the suit had not been served until 15th January 1943 and no copy of the plaint had been served and therefore proceedings had not commenced at the time when the alleged step had been taken and he relies on *Prem Nath Pran Nath v. Amba Parshad*[13] I find some difficulty in appreciating the reasoning in that case. The actual decision in that case can be well supported by applying the test I have mentioned above and I respectfully suggest that in arriving at the decision it was not necessary to go to the length of holding that proceedings had not commenced. If, on the same reasoning, I were to hold that proceedings had not commenced in this case because the writ of summons had not yet been served then it would be difficult to explain how an application for receiver could be made or how the Court could make an interim order in proceedings which had not commenced. With great respect, the reasoning of that case does not appeal to me and I would rather support the decision by applying the test laid down in the cases I have mentioned. In these circumstances and for the reasons stated above, in my opinion, the petitioner by doing what he did on 11th January 1943 acquiesced in the filing of the suit and evinced the intention to fight it out. He therefore took a step in the proceedings and consequently he is not entitled to any order for stay of the suit. This is sufficient to dispose of the present application but certain other points have been argued before me and it is right that I should express my views thereon.

18. Mr. Barwell drew my attention to the plaint and the affidavit in opposition. He pointed out that the partnership is admitted, the respective shares of the parties are admitted and the fact of the termination of the partnership business is admitted. He says that these are the facts constituting the cause of action, and under Section 42 there is bound to be a decree for accounts and therefore there is no issue between the parties and there is no dispute which can attract the operation of the arbitration clause. This, in my opinion, is not the correct way to look at the matter. In a partnership action the accounts are as much the subject-matter of the suit as anything

else. Because, ordinarily he Court passes a decree for accounts and the accounts are not usually taken by the Court itself but are taken by an officer of the Court, it does not follow that the accounts are outside the suit. The matter is dealt with in compartments as it were. That there are serious disputes between the parties on the question of accounts cannot be disputed and, if in spite of such disputes, I were to give effect to Mr. Barwell's contention I would have to hold that there can be no stay of any partnership action where there are no issues on the pleadings as to parties or shares or date of termination of business, a proposition which cannot for a moment be accepted.

19. Mr. Barwell next argued that the partnership came to an end on 22nd April 1942 and yet none of the partners thought fit to take advantage of the arbitration clause. This interim conduct, in his view, establishes two things, viz., (1) that the parties have waived the arbitration clause and (2) that none of them was ready and willing to go to arbitration. The plea of waiver is nowhere raised in the affidavit of opposition nor has the petitioner's averment of readiness and willingness to go to arbitration been denied. Further, the, readiness and willingness required by Section 84 of the Act has to exist at the commencement of the legal proceedings and has to continue up to the date of the application for stay. Mere inaction prior to the commencement of the legal proceedings cannot, in my opinion, be construed as want of readiness and willingness to go to arbitration at the commencement of the legal proceedings. The more important thing to my mind is the application for time to file affidavit in opposition to the receiver application. I have already held that such act amounts to taking a step in the proceedings for the reason that it indicates an intention on the part of the petitioner to go on with the suit and on a parity of reasoning I am bound to hold that that application for time is also evidence of the want of readiness and willingness to go to arbitration and I consequently hold against the petitioner on this ground also.

20. The last point argued by Mr. Barwell is that the parties had already gone to arbitration which proved infructuous and they should not be compelled to go to another arbitration which would in all probability also prove abortive. That arbitration cannot, in my opinion, be regarded as an arbitration under Clause 18 of the deed of partnership, for the parties were different, the principal subject-matter of reference was the pending criminal cases and the mode of appointment of arbitrators, three in number, by common assent, was not in accordance with this clause. In view of all the circumstances I am unable to say that the disputes which are the subject-matter of this suit were referred to arbitration in terms of the arbitration clause in the deed of partnership. The previous abortive arbitration certainly shows that there is a possibility that one or other of the parties including the petitioner may render an arbitration in terms of the agreement equally infructuous. I cannot say that this possibility by itself must in all circumstances and of necessity be a ground for refusing the stay. Such a possibility did not stand in the way of the Court in In re *Babaldas Khemchand* [14]in directing a stay of proceedings. But I should also say that such a possibility should not be altogether overlooked in determining whether there is any sufficient reason why matters in dispute should not be referred to arbitration. It is not necessary for me to say anything more on this point, in view of my decision on the other points. The result is that for the reasons stated above and principally because I hold that the petitioner has taken a step in the proceedings, I dismiss this application with costs.

Cases Referred.

1('21) 8 A.I.R. 1921 Bom. 185
2(1896) 1896 A.C. 1
3(1902) 1 K.B. 480
4(1903) 2 Ch. 222
5(1909) 2 Ch. 121
6('07) 34 Cal. 443
7(1894) 2 Ch. 478 at p. 484
8(1896) 1896 A.C. 1
9(1913) 108 L.T. 921
10(1918) 1 K.B. 358
11(1898) 2 Ch. 92
12('20) 7 A.I.R. 1920 Cal. 685
13('41) 28 A.I.R. 1941 Lah. 64
14('21) 8 A.I.R. 1921 Bom. 185