**CALCUTTA HIGH COURT**

Biswanath

Vs.

O.I. Engineering Co

Award Matter No. 94 of 1974

(Sabyasachi Mukharji, J.)

09.07.1974

**JUDGEMENT**

**Sabyasachi Mukharji, J.**

1.This is an application under Section 34 of the Arbitration Act, 1940, for stay of a suit. A suit has been instituted by Oriental Industrial Engineering Co. (P) Ltd. and Ghanshyamdas Rungta and Rajendra Prasad Rungta, two of its directors against another director Biswanath Rungta. In the suit Allahabad Bank has also been made a party. The suit mainly is on the ground that in the course of business of the plaintiff-company, namely, Oriental Industrial Engineering Co. (P) Ltd. a sum of Rupees 11,13,000/- became due and payable to the company by the Uranium Corporation of India Ltd., a Government Company and with this amount of money the said defendant to the suit Biswanath Rungta had opened an account in the Allahabad Bank and is operating the said account acting upon certain alleged Board resolutions which are challenged as being forged or not genuine and without authority. In essence what is being said is that the act and conduct of the defendant Biswanath Rungta were unauthorized and incorrect on behalf of the company and he should be restrained from operating or withdrawing any money deposited in the said account with the Allahabad Bank. It is stated in paragraph 3 (k) of the petition that the defendant No. 2, namely, Allahabad Bank has informed the company that unless it was restrained by an order of injunction the said defendant Allahabad Bank would allow operation of the said account by the defendant No. 1, as, indeed, it was bound to do. In the aforesaid view of the matter the suit was instituted asking for an appropriate order of injunction and declaration. The suit is by the company and two of its directors as mentioned hereinbefore. This is an application by the defendant for stay of the suit. It is stated that there is an arbitration clause contained in the Articles of Association in the following terms :-

> "In case any difference shall arise between the Company and the Directors relating to their remuneration, duties or privileges or otherwise, or any member of the Company, or between the Company or any other person to whom these presents shall apply, the same shall be referred to arbitration ; and if the parties cannot agree upon a single arbitrator there shall be two arbitrators, who shall have power to choose an Umpire; and in either

case such reference shall be so arranged, conducted and carried out as, with regard to the mode of consequence of that reference, and in all other respects to conform to the provisions in that behalf contained in the Arbitration Act or Acts in force for the time being in British India."

That there was such an article containing the aforesaid term is undisputed. It was contended, firstly, that the disputes in this case were covered by the said arbitration clause inasmuch as these disputes were those arising between the company and the directors relating to their dues or privileges or otherwise. Read in proper perspective the disputes raised in the suit were those that were within the ambit of the arbitration clause covered by the article. In support of the proposition reliance was placed on Section 36 of the Companies Act, 1956, which unlike Section 20 of the English Companies Act, 1948, makes the Articles of Association binding on the company in specific terms. Reliance was also placed in aid of the arguments that the Articles of Association bound the directors as well as the company on the decision in the case of *Hickman v. Kent or Romney Marsh Sheep Breeders' Association, reported in*[1] and also on the decision of the Supreme Court in the case of *Hanuman Prasad Gupta v. Hiralal, reported in*[2] The facts that the directors as well as the company are bound by the Articles of Association and the arbitration clause in the instant case was quite enough to cover the disputes raised in this case between the company and its directors are not seriously disputed. What is, however, urged in this case is that in the suit there is another party, namely, the Allahabad Bank and the said bank was not a party to the arbitration agreement. It is, therefore, submitted that the suit should not be stayed. I am unable to agree. Read in proper perspective the suit does not really affect the Allahabad Bank. The Allahabad Bank has only been made a party more or less in a sense for proper adjudication of the disputes between the parties. The disputes really centre round between one group of directors of the company and the remaining directors and the bank account in the Allahabad Bank having been opened not under the proper Board's resolution authorizing the defendant Biswanath Rungta to operate the bank account, the bank has only taken the possible stand, namely, that unless restrained by an order of the court, he was authorized to operate the bank account. By impleading the said bank and by trying to add the Allahabad Bank it cannot be said that the disputes that have arisen in this case which were of substantial nature involved a third party who is not a party to the arbitration proceeding. In proper perspective the Allahabad Bank is not really a necessary party to the adjudication in this case. In that view of the matter the presence of the Allahabad Bank will not debar the rights of the parties for stay of the suit under Section 34. The first objection on behalf of the respondent is, therefore, rejected.

2. It is then contended that the defendant had taken steps in the proceeding and as such was disentitled to ask for stay under Section 34. It is stated that after filing of the suit before the application was served upon the defendant the plaintiff made an application for an injunction restraining the defendant No. 1 from operating the bank account with the Allahabad Bank and obtained an ad interim order of injunction. Thereafter the matter appeared as a new motion and on the 31st May, 1974, after the order of injunction had been made absolute restraining the defendant No. 1, counsel mentioned on behalf of the present petitioner asking for an order that the Allahabad Bank be, however, restrained from allowing the plaintiff from operating the bank account and that was done on the 31st May, 1974, at the instance of the defendant-petitioner to this application. It is further

[1](1915) 1 Ch D 881 at p. 902

[2] AIR 1971 SC 206

stated that the defendant-petitioner did not file affidavit-in-opposition to the application for injunction made in this Court. Upon these facts it is stated that the defendant had evinced an inclination to proceed with the suit by taking steps in the proceeding and as such was disentitled to ask for a stay under Section 34 of the Arbitration Act, 1940. My attention was drawn to several decisions to all of which I need not refer in details. The principle seems to be that if a party who has evinced an inclination by such overt act that he wishes to proceed with action then he was not entitled later on to ask for the stay of the suit. In what concrete situation it could be said that that a party has unequivocally expressed the inclination or desire to proceed with the suit by taking step in the proceeding naturally depends upon the facts and circumstances of each particular case and the courts have taken such decision depending on the facts of each case. Reliance was placed on the decision of the Calcutta High Court in the case of *Subal Chandra Bhur v. Md. Ibrahim*[3], in which S. R. Das, J. as the learned Judge then was, observed at page 487 as follows :-

> "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 (1896) A. C. 1 or 34 Cal 443 or orally as in 28 CWN 771 or something in the nature of an application to the Court, e. g., attending on summons for directions as in (1902) 1 KB 480, (1903) Ch 222, (1909) 2 Ch 121 and (b) such an act as would indicate that the party is acquiescing in the method adopted by the other side of having the dispute decided by the Court."

3. In my opinion what the learned Judge meant was that the action mentioned in the said categories must be such as to lead to indicate the intention of acquiescing in the method adopted by the other side of having the dispute decided by the Court. In a subsequent decision in the case of *Amritraj Kothari v. Golecha Financiers*[4], P. C. Mallick, J. held that opposing an application was evincing interest to proceed with the proceeding which disentitled a party to a stay under Section 34. A different view, however, was expressed by a Division Bench of the Bombay High Court in the case of *Anandkumar v. Kamaladevi*[5], where the Division Bench held that there should be express desire to take a step in the suit to indicate that the defendant proposed to go on with the suit and to abandon the agreement to refer the matter to arbitration. Therefore, the Bombay High Court proceeded on the basis that the fact that even in opposing the interlocutory application the defendant did not know the purport of the plaint or the purport of the arbitration agreement and in considering whether the defendant wanted to abandon the arbitration and to proceed with the suit, these aspects should be borne in mind. In the case of *Union of India v. M/s. Hind Galvanizing and Engineering Co. Pvt. Ltd*[6]., the Division Bench of this court found that where the defendant had expressed unequivocal and unambiguous intention to defend the suit by obtaining an order of adjournment, that conclusion could not be called either unreasonable or capricious or unjudicial. In a recent judgment the Supreme Court has laid down the principles which should guide the courts in deciding what is meant by a step in the proceeding. It has, however, to be borne in mind that in the case before the Supreme Court the Supreme Court was concerned with extension of time to file written statement and there the Supreme Court observed at page 2075 in the case of *State of U. P. v. Janki Saran*[7], as follows :

[3] AIR 1943 Cal 484
[4] AIR 1966 Cal 315
[5] AIR 1971 Bom 231
[6] AIR 1973 Cal 215
[7] AIR 1973 SC 2071

> "In our view, there is no serious infirmity in the impugned judgment of the High Court and we are unable to find any cogent ground for interference under Article 136 of the Constitution. The legal position with respect to the scope and meaning of Section 34 of the Arbitration Act admits of little doubt, the language of this section being quite plain. When a party to an arbitration agreement commences any legal proceedings against any other party to the said agreement with respect to the subject-matter thereof, then the other party is entitled to ask for such proceedings to be stayed so as to enable the arbitration agreement to be carried out. It is, however, to be clearly understood that the mere existence of an arbitration clause in an agreement does not by itself operate as a bar to a suit in the Court. It does not by itself impose any obligation on the Court to stay the suit or to give any opportunity to the defendant to consider the question of enforcing the arbitration agreement. The right to institute a suit in some Court is conferred, on a person having a grievance of a civil nature, under the general law. It is a fundamental principle of law that where there it a right there is a remedy, Section 9 of the Civil Procedure Code confers this general right of suit on aggrieved person except where the cognizance of the suit is barred either expressly or impliedly. A party seeking to curtail this general right of suit has to discharge the onus of establishing his right to do so and the law curtailing such general right has to be strictly complied with. To enable a defendant to obtain an order staying the suit, apart from other conditions mentioned in Section 34 of the Arbitration Act, he is required to present his application praying for stay before filing his written statement or taking any other step in the suit proceedings. In the present case the written statement was indisputably not filed before the application for stay was presented. The question is whether any other step was taken in the proceeding as contemplated by Section 34 and it is this point with which we are directly concerned in the present case. Taking other steps in the suit proceedings connotes the idea of doing something in aid of the 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"

It is, however, to be borne in mind that the Supreme Court did not think that actual knowledge of the parties was important. All parties to arbitration proceeding should be deemed to have knowledge of arbitration agreement and that whether he has taken step in the proceeding should be judged strictly. In the light of the aforesaid principle the correct test, in my opinion, is to judge the overt acts of the parties, whether in the application or in the suit or in both, to find out if the overt acts connote the idea of doing something in aid of the suit or submitting to the jurisdiction of the court for the purpose of adjudication of the controversy in the suit. In what particular circumstances such steps would amount to a situation from where the court can deduct that a party has so expressed himself is difficult to be laid down exhaustively. It is not desirable either. It must depend on varying circumstances of each case. Bearing the above test in mind, I have to examine the situation in the present case. Here there was an arbitration clause. The plaint had not been served; the nature of relief sought could not be ascertained. In view of the decision of the Supreme Court it must be presumed that the defendant knew about the existence of the article which contained arbitration clause. The plaintiff had obtained an order of injunction restraining the defendant. What the defendant wanted was that until the rights were determined in whichever

forum, the money should be protected. The conduct only, in my opinion, properly represents the intention of the defendant that during the period the disputes would last either in court or in arbitration, each of the parties should be restrained from having the use of the money. From this conduct it is not evident that the defendant has either done anything in aid of the suit or submitted to the jurisdiction of the Court for the purpose of adjudication of the controversy in the suit. The order of injunction having been made what the defendant did was to circumscribe it to such extent that the rights of the parties were protected until the disputes were decided. In the aforesaid light I do not think it can be said that the defendant has taken any step in the proceeding. If that is the position, there is no impediment of staying the suit.

4. I make an order in terms of prayer (a) but in the interests of justice the status quo as on to day will continue for a period of three months so that the parties may take appropriate direction either in the arbitration proceeding or in the suit for protection of legitimate rights.

5. Cost in the arbitration proceedings.

Order accordingly.