CALCUTTA HIGH COURT

Arjun Agarwalla

Vs.

Baidys Nath Roy

Matter No. 930 of 1979

(Mrs. Pratibha Bonnerjea, J.)

10.07.1980

ORDER

Mrs. Pratibha Bonnerjea, J.

1.The parties to this application entered into a partnership agreement dated 5-1-1976 to carry on business under the name and style of Godhur Colliery Co. The said deed contained an arbitration clause as follows :

> "32. If during the continuance of the partnership or any of them afterwards any dispute, differences or question shall arise between the partners hereto relating to or appertaining to such partnership of these presents, such disputes, difference and question shall be referred to arbitration of two Arbitrators one to be appointed by the First party and the other by the other parties and in case of difference between the Arbitrators at any point the same shall be referred to a third party umpire as the case may be final and binding on the parties."

2. According to the petitioner, the partnership stood dissolved on expiry of the period on partnership on 31-12-1970 or from 17-10-1971 when the business undertaking was taken over by the Government under the provisions of Coking Coal Mines (Emergency) Provisions Ordinance 1971 which ultimately culminated in nationalization of the said business under the provisions of Coking Coal Mines (Nationalization) Act 1972. This allegation of dissolution is denied by the respondents Nos. 1 and 3 who are contesting this application. It is further alleged in the petition that a settlement was arrived at by and between the parties and a joint petition was filed before the Commissioner of Payment whereby the respondent admitted that a sum of Rs. 1,15,000 would be payable to the petitioner out of the compensation money and pursuant to the order of the Commissioner of Payment the partners have received payments. These allegations are denied by the respondents. The petitioner stated that on 4-8-1979, the petitioner was surprised to receive a letter from one Solil Kumar Mukherjee whereby the petitioner was intimated that in *(Baidys Nath Roy v. Arjun Agarwalla and Ors*[1]*)* this Court had passed an order restraining the petitioner from receiving any money in respect of compensation. Thereafter he instructed M/s. Meheria and

Co. to enquire into the matter and on 13-8-1979 the matter was mentioned on behalf of the petitioner and the Court directed service of a copy of the

[1] Suit No. 555 of 1979

plaint on the petitioner and have directions for filing affidavits in the pending application. The matter was again mentioned on behalf of the petitioner on 31-8-1979 for adjournment of the date of hearing of the application. Instead of filing the affidavit-in-opposition, the petitioner took out this application under Section 34 of the Arbitration Act for stay of the Suit No. 555 of 1979 filed by the respondent No. 1 on 30-7-1979 for dissolution of the partnership and accounts. The petitioner alleged that he did not take any step in the proceeding and was ready and willing to do everything necessary for proper conduct of the Arbitration The respondents Nos. 1 and 3 filed their respective affidavits-in-opposition alleging that the petitioner orally prayed for vacating the interim order of injunction on 13-8-1979. The court refused to grant the said prayer and gave directions for service of a copy of the plaint on the petitioner and for filing affidavits. The petitioner again prayed for extension of time to file affidavit on 31-8-1979 and obtained another adjournment of hearing of the application on 6-6-1979 (or 6-9-1979 ?). Thereafter on 7-9-1979 the present application under Section 34 of the Arbitration Act was taken out. The conduct of the petitioner will show that he had taken steps in the proceeding prior to the taking out of this application. It was further alleged that the subject matter of the suit was not covered by the arbitration agreement and the agreement became unworkable. Hence stay should be refused.

3. The counsel for the appearing respondents, cited several cases in support of their contention that the aforesaid acts of the petitioner would amount to taking steps in the proceeding. Great reliance was placed on AIR 1943 Cal, 484. AIR 1954 Calcutta 606, AIR 1949 Madras 582, AIR 1945 Allahabad 24 and AIR 1970 Madras 323. But the petitioner's counsel, Mr. Mitter submitted that what acts should be considered as steps in the proceeding and its guiding principles were laid down finally by the Supreme Court in *(The State of Uttar Pradesh v. Janki Saran Kailash Chandra[2])* as follows :

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> "Taking other steps in the suit proceeding 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 on the merit of the controversy in the suit."

4. If steps are taken in the proceedings which are not in aid of the progress of the suit or without having any intention to have the adjudication on merit by the court, then those acts would not amount to step in the proceeding. He submitted that the law on this point had to be settled by the Supreme Court in view of the difference of decisions by different High Courts in India. He further submitted that prior to 1973, in some of the High Courts including our Court, it was held that filing of affidavits or obtaining time for filing affidavits in an application for Receiver or injunction would amount to taking step in the proceeding. This caused serious hardship to the defendant if he wanted to enforce the arbitration agreement. He was unable to try to vacate interim orders for Receiver or injunction or to contest the same. In such cases, even if the defendant could obtain an order for stay ultimately, he would have to face serious producing and inconvenience during the intervening period. To eradicate these inconveniences and for the ends of justice, it was necessary to settle the law on this point. He submitted that in *(Shri Ram Shah v. Mastan Singh[3])* the Division Bench of that High Court, has elaborated this principle in the light of the decision in AIR 1973 Supreme Court 2071 and has pointed

[2] AIR 1973 SC 2071

[3] AIR 1978 All 288

out two distinct classes of proceedings viz. "incidental" and "supplemental" and has opined that contesting a supplemental proceeding or taking any step in the same will not amount to taking step in the proceeding. This will be clear from paragraph 6 of this decision :-

> "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 Procedure Code points to a division of "proceedings" into two categories. A suit after all is merely a species of the generic term "proceedings". Section 141 of the Civil Procedure Code 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 ia 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*[4] "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.
[4](AIR 1973 SC 2071) (at p. 2076)

5. He submitted that applying the guideline laid down in AIR 1973 Supreme Court 2071 our Court also came to the same conclusion as in AIR 1978 Allahabad 288. This will be clear from the decision reported in *(Biswanath Rungta v. Oriental Industrial Engineering Co. Pvt. Ltd*[5]*.)* where Sabyasachi Mukherji J. held that if the plaintiff in his suit obtained an order of injunction restraining the defendant from operating the Banking account and the defendant, in his turn obtained an order of injunction restraining the Bank from allowing the plaintiff to operate the said account that would not be tantamount to taking step in the proceeding. He explained the position as follows :-

> "What the defendant did was only to circumscribe the injunction order to such an extent that the interest of both the parties were protected until the disputes were decided."

6. The same view was again taken by the same learned Judge in *(Brij Gopal Banani v. Sreelal Banani*[6]*).* The plaintiff in that case after the institution of the suit took out an application for Receiver and a parte Receiver was appointed by consent of the defendant. At the hearing of the Section 34 application taken out by the defendant, it was contended that the defendant had submitted to the jurisdiction of the court by consenting to the appointment of Receiver and thereby took step in the proceeding. But Sabyasachi Mukherji, J. held :-

> "In my opinion, by making the submission as to who should be the Receiver, a party does not evince an intention to submit to the jurisdiction of the court for adjudication of the disputes by the court nor does the party indicate any intention not to insist on the arbitration, I think also, step in aid, in my opinion, should be such an overt act which will indicate that the party intends to submit to the jurisdiction of the court for adjudication of the disputes between the parties."

7. Although the Allahabad case is an earlier decision dated 10-8-1977, (reported in AIR 1978 Allahabad 288) the same was not cited before Sabyasachi Mukherji J. The learned Judge however came to the same conclusion that taking part in application for Receiver or injunction for protecting the interests of the parties, would not amount to taking step in the proceeding. This conclusion could not have been possible unless the Court thought that application for injunction and Receiver were not made in aid of the progress of the suit and taking part in it did not amount to submitting to the jurisdiction for adjudication on the merit of the suit by the Court. In other words, our court, without classifying the proceedings, as has been done in the Allahabad case, accepted the Allahabad views on principle. The submission of the learned counsel requires careful consideration.

8. In my opinion this broad classification, of court proceedings as given in AIR 1978 Allahabad 288 should be accepted as the same gives the Courts a useful and practical method of applying the guideline laid down in AIR 1973 Supreme Court 2071. This classification will put an end to the divergence of decisions in future on this point. If, however, while taking part in a 'supplemental proceeding', the defendant shows clear intention to submit to the jurisdiction of court for adjudication on merit such additional facts may debar him from taking recourse to

Section 34 of the Arbitration Act. This will

[5] AIR 1975 Cal 222

[6] AIR 1978 Cal 520

depend on facts and circumstances of each case. In my opinion the application for Receiver stands on the same footing as an application for injunction. None of them is taken out for aiding the progress of the suit. These applications are taken out for the protection of the interests of the parties pending the decision on dispute either by the Civil Court or in a private forum. The provisions of Section 41 of the Arbitration Act support this view. In other words application for Receiver is also a supplemental proceeding. Therefore mere contest of an application for injunction or Receiver for protection of the interest of the parties should not be treated as a step in the proceeding unless there are other additional facts in existence as hereinbefore mentioned.

9. The counsel for the respondent, however, pointed out that in *(Babulal Singhania v. Perudan Ojha[7]),* the Division Bench of this Court has held that obtaining time for contesting an application for injunction is a step in the proceeding. But a careful reading of the facts of that case will reveal that the petitioner had not only obtained time for contesting application for injunction but also made an application praying for service of the writ of summons and the plaint to enable him to file the written statement. The petitioner clearly expressed his intention to contest the suit. So far as this court is concerned, obtaining time for filing written statement has always been regarded as a step in the proceeding as will appear from (1907) ILR 34 Cal 443, AIR 1924 Calcutta 789, AIR 1948 Calcutta 59 and AIR 1977 Calcutta 503. Hence this case is not helping the respondent. Moreover, AIR 1973 Supreme Court 2071 was not cited before the Division Bench. In my opinion, the law on this point has taken a new and definite turn after this Supreme Court decision and this will be clear from the trend of the judgments reported in AIR 1975 Calcutta 222, AIR 1978 Calcutta 520 and AIR 1978 Allahabad 288. In view of this, the old decisions holding that obtaining time for filing affidavits. or filing affidavits in the application for injunction or Receiver are steps in the proceeding can no longer be regarded as good law.

10. The next point to be considered is whether the dispute in the suit is covered by the arbitration clause. The suit has been filed for dissolution of partnership and accounts. According to the submission of the counsel for the appearing respondents the suit has been filed under Section 44(f) and (g) of the Partnership Act on the grounds that the dissolution will be just and equitable and under that statute only a civil court can have jurisdiction to entertain such a suit. An arbitrator has no jurisdiction to grant such reliefs. Hence the dispute is outside the scope of arbitration agreement. In *(Bhagbati Builders v. Karim Bus[8]) paragraph 5,* it has been held :-

> "It is quite possible that the parties may agree to have the question of dissolution of partnership under Section 44(f) and (g) also decided by the arbitrator".

11. In *(Erach F. D. Mehta v. Minoo F. D. Mehta[9])* it was argued that the arbitration clause did not cover the question of dissolution of Partnership. The Supreme Court construing the arbitration clause before them held that :-

> "A dispute whether partnership was dissolved by mutual agreement was clearly a dispute between the parties touching the Partnership agreement."

[7] AIR 1977 Cal 503

[8] AIR 1971 Cal 319

[9] AIR 1971 SC1653

12. Hence the same was held to be referable to arbitration. Whether an arbitrator will have jurisdiction to grant reliefs under Section 44(f) and (g) of Partnership Act will depend on the agreement itself. The arbitration clause set out above clearly shows that the arbitrator has jurisdiction to decide any dispute between partners relating to or appertaining to the partnership deed arising during the continuance of the agreement or afterwards. Whether the firm has been dissolved or not is a dispute between the partners relating to the partnership. The respondents state that the firm is continuing. If so then this dispute has arisen during its continuance. The petitioner states that the firm has been dissolved. Then the dispute has arisen afterwards. From both points of view the dispute is clearly within the scope of the arbitration agreement. In my opinion, the dispute in suit is fully covered by the arbitration clause set out above.

13. The last point to be decided is whether this arbitration clause has become unworkable. It was submitted on behalf of the appearing respondents that the arbitration clause contemplated only the disputes arising between the 1st party on the one hand and 2nd, 3rd and 4th parties on the other. Appointment of two arbitrators were contemplated keeping in mind that in respect of the disputes the partners would be arrayed in the manner mentioned above. But in the present dispute, the partners are divided in a different manner. It is a dispute between the 2nd party on the one hand and the 1st, 3rd and 4th parties on the other. In the premises, the appointment of an arbitrator by consent amongst 2nd 3rd and 4th parties, as contemplated in the agreement, would not be possible. Considering the nature of disputes and the arrangement of the parties into two groups I find, the point raised by the counsel is very pertinent. It will delay the appointment as well as the arbitration proceeding. The attempt to appoint by agreement may ultimately prove to be infructuous. Taking into account, the normal human instincts and reactions it will be unnatural to expect that 3rd and 4th party who are making serious allegations against the 2nd party, will be able to agree to the appointment of one arbitrator jointly. I have no doubt in my mind that this part of the agreement has become unworkable on the facts of this case. Although the petitioner did not take any step in the proceedings and the dispute is fully covered by the arbitration clause, still I think the court's discretion should not be exercised in favor of the petitioner as this may lead to serious complications in future. To my mind, the present disputes can be more conveniently decided by court. In the premises, this application stands dismissed. Each party to pay and bear his own costs.
Application dismissed.