

MADHYA PRADESH HIGH COURT

Sansarchand Deshraj

Vs.

State of M. P.

Misc. First Appeal No. 31 of 1980, Decided on 12.9.1960. from an order of 1st Addl.

Dist. J., Jabalpur

(T.C. Shrivastava and S.P. Bhargava, JJ.)

21.12.1959. 12.09.1960

JUDGMENT

Bhargava, J.

1. This is a plaintiff's appeal under Section 39 of the-Arbitration Act by which the order passed by the First Additional District Judge, Jabalpur, in Civil Suit No. 26-A of 1959 staying the proceedings in the suit under the provisions of Section 34 of the Arbitration Act is challenged.

2. The main contention urged on behalf of the plaintiff-appellant is that it is too late now for the applicant to ask for stay of proceedings under Section 34 of the Arbitration Act (hereinafter called the 'Act') inasmuch as he has already taken 'other steps in the proceedings' within the meaning of Section 34 of the Act.

3. It is necessary to state the facts briefly to appreciate the contentions of the parties. The plaintiff's suit is for the recovery of damages on account of breach of contract for plying ferries from two-ghats. The plaintiff has claimed damages to the extent of Rs. 14,838/-. He alleges that he has paid Rs. 31,000/- towards the lease amount of Rs. 39,660/- in respect of one ghat; the defendants are now recovering from him the balance and that they are also claiming the entire lease money with regard to the other ghat. This amount is stated to be Rs. 19,834/- in the plaint. It was also claimed that the amount of Rs. 8291 which remained to be paid to him in respect of one lease be adjusted towards the amount of damages that may be decreed and that a permanent injunction be granted against the defendants restraining them from making recovery of Rs. 19,834/-.

4. The plaint was filed on 5-8-1959 and on the same day, an application for grant of temporary injunction against the defendants was also made. On 6-8-1959, ex parte temporary injunction restraining the defendants from attaching moveable property except cash was passed by the trial Court. On behalf of defendants Nos. 1 and 3 vakalatnam was filed on 1-9-1959. The counsel for defendants Nos. 1 and 3 stated on that day that he was prepared to file reply to the original application for temporary injunction but as on 1-9-1959 the plaintiff amended his previous application for temporary injunction the Court ordered the reply to be filed to the amended application on 8-9-1959. The reply was filed by Shri Uppadhyaya opposing the grant of temporary injunction and raising these points also in the reply, that both the lease deeds contained arbitration clauses according to which the dispute between the parties had to be decided by an award of the Superintending Engineer and that the Court had no jurisdiction to entertain the suit by virtue of the provisions of Section 34 of the Northern India Ferries Act. The case was then fixed for arguments on the application for temporary injunction on 19-9-1959. On this date, the defendants took an adjournment to argue the case. Arguments were heard on 22-9-1959 and the Court rejected the application for temporary injunction on 23-9-1959. On 17-11-1959, an application was made on behalf of the defendants under Section 34 of the Act to stay the proceedings in the suit. The plaintiff filed his reply to this application on 21-12-1959 and the proceedings were ordered to be stayed by the trial Court on the same day.

5. The filing of the reply, taking an adjournment for arguments and finally arguing the application for temporary injunction are said to be 'the other steps in the proceedings' within the meaning of section 34 of the Act.

6. According to the provisions of Section 34 of the Act, an application to stay the proceedings can be made at any time before filing the written statement or before taking any other steps in the proceedings. It is admitted that the written statement in the suit had not till then been filed. No adjournment was taken to file the written statement also. But, the plaintiff's contention is that the defendants had taken other steps in the proceedings in view of the part taken by them on 1-9-1959 and the subsequent dates of hearing and the effect is that they are precluded from maintaining the application, dated 17-11-1959.

7. The plaintiff has relied upon *Gannu Rao v. Thiagaraja Rao*,¹ In that case, the plaintiff had obtained an order of temporary injunction. The defendants protested against the order and got it modified. There was not a word said on that date that the defendants contemplated filing an application under Section 34 of the Act. An application was subsequently made in the case to have the proceedings stayed under Section 34 of the Act and the learned Judge discussing the English and Indian cases bearing on the point came to the conclusion that this amounted to taking other steps in the proceedings and, therefore, he refused the stay of proceedings. The learned counsel for the appellant has also relied upon *Bansidhar v. E.B. Sukhia*,² In that case, it was held that the defendant's act in asking for time to file his written statement amounted to taking a step in the proceedings. In *Nuriddin Abdul Husein v. Abu Ahmed*,³ Tendolkar, J. after reviewing several authorities expressed his opinion in these words :

"In my opinion, the true test for determining whether an act is a step in the proceedings is not so much the question as to whether it is an application - although of course, that would be a satisfactory test in many cases but whether the act displays an unequivocal intention to proceed with the suit and to give up the right to have the matter disposed of by arbitration." We respectfully agree with this view.

8. The short question, therefore, for our consideration in this case is as to whether the filing of reply to the application for securing a temporary injunction and arguing the said application itself amounts to "taking other steps in the proceedings" within the meaning of Section 34 of the Act. In our opinion, opposing the said application is not an unequivocal indication on behalf of the defendants to choose to give up their right under the agreement to refer the dispute to arbitration. In the reply that was filed by them, they have emphasized that the right to get the matter decided by arbitration was subsisting and they objected to the jurisdiction of the Court itself to entertain the suit. If the provisions of clause (b) of Section 41 of the Arbitration Act and paragraph 4 of Schedule II thereof are seen, it will be clear that even when the proceedings have been stayed under section 34, the Court has for the purpose of and in relation to arbitration proceedings the same power of making orders in respect of any of the matters set out in Schedule II as it has for the purpose of, and in relation to, any proceedings before the Court. Further, para 4 of Schedule II of the Act clearly mentions the power to grant interim injunctions or to appoint a receiver. See *Budhu Lal v. Jagan Nath*⁴ Thus, it is

clear that when a party asks for interim relief by way of an appointment of a receiver or by issue of an injunction, that is no ground for refusing stay of the suit. To ask the Court to vacate the injunction order passed by it and to request that proceedings in the suit may be stayed under Section 34 of the Act are not self-contradictory or inconsistent steps. It is clear that the interlocutory application for the appointment of a receiver or for granting of an injunction does not necessarily amount to a proceeding in the suit. Further, mere filing of a reply to any such application does not in our view indicate that there is in effect abandonment of the proposal to have the subject of the cause disposed of by arbitration.

9. It was also urged on behalf of the appellant that to take advantage of the provisions of section 34 of the Act, the defendants should have shown that they were ready and willing to have the matter decided by arbitration and they have failed to do so in the instant case. The point raised is without any substance. The defendants in their reply, dated 8-9-1959, have clearly drawn the attention of the Court to the subsistence of the arbitration agreement and further have pointed that that was the correct remedy for the plaintiff to follow. It is implicit in the objection raised that they were prepared to have the dispute decided by arbitration.

10. Thus, there is no substance in the appeal and it is dismissed with costs.

Appeal dismissed.

Cases Referred.

1. AIR 1949 Mad 582
2. AIR 1957 Mad Pra 24
3. AIR 1950 Bom 127
4. AIR 1949 All 70