

BOMBAY HIGH COURT

Bhagwandas Atmasing

Vs

Atmasing Jessasing

(Kania and Chagla, JJ.)

29.04.1945

JUDGMENT

Kania, J.

1. This is an appeal from the judgment of Coyajee J. on an application for stay of arbitration proceedings under Section 34 of the Indian Arbitration Act, 1940. The plaintiff, claiming to be the adopted son of defendant No. 1, filed this suit for several declarations on the footing that on adoption he became a member of the joint family. He claimed discovery and partition in the joint family properties. He alleged that he was adopted on February 9, 1942. On coming to know of this suit, defendant No. 1 took out a notice of motion for stay, on the ground that under two agreements dated January 30, 1942, and July. 26, 1942, the plaintiff and defendant No. 1 had agreed to refer all matters which may arise and cause disputes between them to arbitration. In support of that notice of motion defendant No. 1 filed an affidavit in which he propounded the two documents mentioned above. The plaintiff filed his affidavit in reply in which he denied that he had executed the documents propounded by defendant No. 1. According to him he had signed certain blank papers and defendant No. 1 had filled in the blank papers, and in order to support his case had cut out certain portions of his signature. The two documents are attested by two witnesses; one witness to each is one arbitrator. The plaintiff contended that the question about the existence of the agreement to arbitration cannot be decided by the arbitrators. The arbitrators were themselves privy or party to the forgery and were interested on behalf of defendant No. 1 and therefore biased. He contended that the questions at issue on the documents were grave and serious which could not be left to arbitrators and that defendant No. 2 was not a party to the arbitration agreement at all.

2. When the notice of motion came for hearing before Coyajee J., it was urged on behalf of defendant No. 1 that because of Sections 32 and 33 of the Indian Arbitration Act, 1940, this contention cannot be taken by the plaintiff on the notice of motion. It was contended that under Section 32 no suit was permitted to challenge the existence of an arbitration agreement. That

section further provided that no arbitration agreement could be set aside, amended, modified or in any way affected otherwise than as provided by the Act. Under Section 33 any party to an agreement, desiring to challenge the existence thereof, should apply to the Court and the Court should decide the question on affidavits. Relying on the words of these sections it was contended that the plaintiff should make a substantive application to the Court to challenge the existence of the arbitration agreement, and obtain the Court's decision on that point. The learned Judge accepted this contention and asked the plaintiff's counsel if he wanted time to make such an application. The learned Counsel for the plaintiff contended that he was not bound to do so and was entitled to raise, as his defence to the application under Section 34, the fact that there was no agreement to reference. That argument was not accepted by the learned Judge. The learned Judge in his judgment stated that he had no jurisdiction under Section 34 to determine whether there was an arbitration agreement, and as the plaintiff had failed to avail himself of the opportunity offered to proceed under Section 33, an order under Section 34 must be made.

3. In my opinion the view of the learned Judge on the construction of Sections 32, 33 and 34 of the Indian Arbitration Act is not correct. The first part of Section 32 prevents a substantive suit to challenge the existence of an agreement. The second part of that section prevents the setting aside, amending, modifying or in any way affecting an arbitration agreement, otherwise than as provided by the Act. Section 33 provides a remedy to a party who challenges the agreement to obtain from the Court a decision, irrespective of the fact whether the other side wishes to enforce it or not. I do not think Section 33 takes away the right to set up as a defence the non-existence of an agreement when the agreement is propounded under Section 34 by the other side. The rights of the parties are to be governed by Section 34. The section starts with the fact that an arbitration agreement is alleged. The Court is called upon to stay the suit on the ground that there is a subsisting arbitration agreement, which the applicant is willing to follow up but the other side is not ready and willing to act upon. In order to succeed in an application under Section 34, therefore, the defendant (who is the applicant) has to establish the necessary things required by Section 34. One of them is that he is a party to an arbitration agreement. I am emphasising this point because when the Arbitration Act of 1940 was enacted, no amendment was made in the wording of Section 34, and therefore the decisions on the meaning and effect of old Section 34 are still good. Where a question is directly covered by Section 32 or Section 33, the same will have to be taken into consideration, but the decisions based on Section 34 only are not necessarily overruled because of the enactment of Sections 32 and 33 in the new Act.

4. Proceeding with the discussion under Section 34 the defendant, who applies for a stay, therefore has to say that there is an arbitration agreement. If the plaintiff says that there is no agreement, that issue arises between the parties. I find nothing in Section 34 to prevent the Court from deciding that issue, to enable it to pass an order under that section. One can reasonably

think of cases to show the scope of the inquiry under the section. In a case the defendant may put before the Court an agreement, written on one sheet of paper, without any signs of mutilation and containing the full signature of the other side. The agreement may be attested by two witnesses, whose integrity cannot be challenged, and those witnesses make affidavits on the motion stating that the plaintiff had executed the particular agreement in their presence. I find it difficult¹ to hold that under those circumstances the Court is prevented from considering the question. On the other hand there may be a case where the defendant alleges that there was a written agreement signed by both the parties, but which he had misplaced. Because of the written agreement, he asks to stay the suit. The plaintiff in that case would say "I have never signed any agreement; I do not know what agreement is alleged; I state and will be able to show that I was, never in the town when the agreement is alleged to have been executed by me." In a case of that kind the Court may well say that the facts were so complicated that it will not go into the dispute on the application under Section 34. The importance of these two illustrations may be considered in the light of the words of Section 33. In the last mentioned illustration it appears difficult to believe that the Legislature wanted the plaintiff, who denied the existence of the agreement, to come to Court and prove the negative. What can he show? He can only say that he was never in Bombay and never executed the agreement. I do not think the object of Section 33 is to compel such party to come to Court. Section 33, in my opinion, provides for a case where a party wants to obtain the Court's substantive declaration of non-existence of an agreement for his own use. In such a case he has to make his application to get the judgment.

5. Section 34 is a discretionary section. In the normal course, the Courts are the forum to which parties go for adjudication of their rights. If one of the parties contends that because of an agreement between them the normal jurisdiction of the Court is given up by the other side, the onus of proof is on the party who makes that allegation. I think, therefore, that the party who alleges such an agreement has to satisfy the Court first, before he asks the Court to stay its hands in respect of a suit which is pending and which is filed in the normal course by the plaintiff.

6. This construction of Section 34 does not conflict with the express words of either Section 32 and 33. If it is considered that under Section 34 the Court has jurisdiction to decide the fact of an agreement, it will be a provision under the Act and thus Section 32 is not infringed. The contention of the defendant must be that the plaintiff must prove the negative (the non-existence of an agreement) and the burden of proving it is on him. This is against all recognised notions of law. The construction of Section 34 mentioned above meets this contention.

7. Having regard to the allegations made in this case, and having seen the documents which are propounded by defendant No. 1, we think this is not a case in which the Court should exercise its discretion. The stay of the suit should, therefore, be refused. The appeal is allowed with costs,

and the notice of motion is dismissed with costs throughout.

Chagla, J.

8. I agree and have nothing to add.