BOMBAY HIGH COURT

Nuruddin Abdulhusein

Vs.

Abu Ahmed Abdul Jalli

C.C.J. Suit No. 106 of 1949

(Tendolkar, J.)

12.04.1949

ORDER

Tendolkar, J.

1. This is a notice of motion for stay of the suit on the ground that there is a valid agreement for reference to arbitration. It is resisted on the plea that the defendant has taken a step in the proceedings in that he has filed an unconditional appearance in Court. The question for decision, therefore, is whether filing of an unconditional appearance is a step in the proceedings.

2. Such a question has not arisen for determination either in England or in India for the simple reason that both under Section 4, English Arbitration Act, and under Section 19, Arbitration Act of 1899, a step in the proceedings taken "at any time after appearance" disqualifies the defendant from applying for stay, with the result that, whether or not filing of an appearance was a step in the proceedings, it was manifestly inarguable that it prevented the defendant from applying for a stay of the suit. Section 34, Arbitration Act of 1940, which takes the place of Section 19 of the Act of 1899, omits the words "at any time after appearance" and the relevant words of the section now are :

> "Any party to such legal proceedings may, at any time before filing a written statement or taking any other steps in the proceedings, apply to the judicial authority before which the proceedings are pending to stay the proceedings."

It is argued, in the first instance, that as the words "at any time after appearance" which still appear in the English Act, and which appeared in the Indian Act of 1899, have deliberately been deleted, it must have been the intention of the Legislature that filing of an appearance, which, before the amendment, was not a step in the proceedings for the purposes of the section, should, after the amendment, be considered to be one. This argument to my mind is wholly untenable.

The old Act in effect provided that nothing done prior to and inclusive of the filing of an appearance should debar a defendant from applying for stay irrespective of whether such act or acts were steps in the proceedings or not. In my opinion it does not help us to determine whether or not any of such Acts was a step in the proceedings. The amendment changes the law by providing that the step in the proceedings may be taken at any stage; but it cannot possibly bring about the result that every act done prior to and inclusive of the filing of an appearance, which up to the date of the amendment did not constitute a bar to an application for stay, becomes ipso facto a step in the proceedings after the amendment. In the case of every such act, as in the case of acts subsequent to appearance, one has to consider in each case the nature of the act, and to determine whether it is or is not a step in the proceedings.

3. Attempts have been made both in England and in India to lay down a ratio for determining what is a step in the proceedings. Those decisions must of necessity be read with the reservation that the ratio was sought to be laid down in relation to the section as it stands in England to-day and as it stood in India, before the amendment, which precludes the possibility of the ratio being sought to be applied to acts done up to and inclusive of the filing of an appearance. They do not, therefore, necessarily afford a dependable test for determining whether the filing of an appearance is a step in the proceedings.

4. In *Ives S. Barker v. Willans*[1], the plaintiffs issued a writ against the defendant who entered an appearance and by a formal document required the statement of claim. The question arose as to whether this was a step in the proceedings which precluded the defendant from making an application for stay. It was held that it was not. Lindley L.J. stated (p. 483) :

> "I cannot say that is taking a step in the proceedings which precludes the defendant making the application, and I do not think it would be good sense if we held that it was."

The learned Law Lord further observed (p. 484) :

> "Quite apart from the case not being within the words, therefore, it is not within the spirit or the sense of the Act."

The learned Law Lord thereafter made the following observations which have been accepted as a guide in subsequent English and Indian decisions for determining what is a step in the proceedings. They are as follows (p. 484) :

> "The 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 or solicitors' clerks, nor the writing of letters, but the taking of some step, such as taking out a summons or something of that kind, which is in the technical sense a step in the proceedings."

If I may say so with respect, these observations, so far as they go, are unexceptionable; but they do not obviously cover some acts which unquestionably are steps in the proceedings. For example, the section itself, when it refers to "before filing a written statement or taking any other steps in the proceedings", clearly indicates that filing a written statement is a step in the proceedings. Yet, it appears to me to be difficult to say that a written statement is an application to the Court. Therefore, although the weighty observations of Lindley, L.J. provide a very useful test in many cases they do not in my

[1](1894) 2 Ch. 478 : (63 LJ Ch. 521)

opinion supply an exhaustive definition of what is a step in the proceedings.

5. In *Ford's Hotel Co. v. Bartlett*[2], where the defendant took out a summons and obtained an order ton further time to deliver his defence it was held by the House of Lords that this was a step in the proceedings. Halsbury L.C. considered it sufficient to say that it was a step and refused to attempt any definition of a step in the proceedings. Lord Shand who came to the same conclusion stated (p. 6) :

> ".. 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."

In these observations I see the seeds of a fair workable definition of a "step in the proceedings."

6. In *Austin and Wkitdy, Limited v. S. Bowleyand Son*[3]in an action in a County Court the defendant filled in a slip attached to a default summons giving notice of his intention to defend the suit. It was held by the King's Bench Division that this was merely an equivalent to filing an appearance is the High Court and not a step in the proceedings. Ridley, J. observed as follows (p. 921) :

> "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 be desires that the action should proceed and bag do desire that the matter should be referred to arbitration."

This is an amplification of the ratio indicated by Lord Shand in *Ford's Hotel Co. v. Bartlett* referred to above.

7. In *Subal Chandra v Md. Ibrahim*[5], counsel for the defendant applied for and obtained (a) time to file an affidavit in reply to an application for Receiver and (b) an order for inspection. It was held that this constituted a step in the proceedings. Das, J. after reviewing the English authorities observed as follows (p. 487) :

> "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.. or

> something in the nature of an application to the Court. . 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."

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.

[2] (1896) AC 1; (65 LJ QB 166) [4](1896) AC 1 : (65 LJ QB 166)
[3] (19I3) 108 LT 921 [5] AIR 1943 Cal 484 : (ILR (1943) 2 Cal 298)

8. Applying this test to the present case, the act of filing an appearance does not, in my opinion, disclose any such intention. Indeed under Rule 117 of the High Court Rules, it is obligatory on the defendant to file an appearance, the consequence of non-appearance being that the suit be set down as undefended. The filing of an appearance is equivalent to the filing in of the slip attached to the default summons in a County Court in England, which was held not to be a step in the proceedings in *Austin and Whitdy Limited v. S. Bowley and Son*[6], above referred to. Moreover, for the purpose of making an application for stay, the defendant must of necessity file an appearance; and it would be in my opinion against good sense to hold that something which the defendant is bound to do before he can apply for stay is a step in the proceedings. But, it is urged on behalf of the plaintiff that the defendant could and indeed ought to have filed not an unconditional appearance but an appearance "under protest". It is no doubt true that a practice has grown up in this Court to file an appearance "under protest" where the defendant desires to apply for a stay of the suit under the Arbitration Act. There is no provision in the High Court Rules for filing an appearance "under protest," and the Civil Procedure Code only provides for the filing of an appearance "under protest," where a person is served as an alleged partner in the defendant firm and denies that he is a partner. (See Order 30 Rule 8). A corresponding provision appears in England in the Rules of the Supreme Court, Order 48A, Rule 7. But apart from this, a "conditional appearance" which is sometimes also called "appearance under protest" is well recognized in England. It is thus defined in the Annual Practice 1946-47 (p. 151) :

> "The term 'conditional appearance' means an appearance in qualified terms, reserving to the appearing defendant the right to apply to the Court to set aside the writ, or service thereof for an alleged informality or irregularity which renders either the writ or service invalid."

The effect of a "conditional appearance" is thus set out in the Annual Practice (p. 151) :

> "A conditional appearance or appearance under protect is a complete appearance to the action for all purposes, subject only to the right reserved by the defendant to apply to act aside the writ or the service thereof, on any ground which he can sustain."

It appears to me therefore that the addition of the words "under protest" to an appearance filed in

Court in cases cot covered by Order 30, Rule 8, Civil Procedure Code, is meaningless when neither the jurisdiction of the Court nor the validity of the writ or service is challenged. It is not challenged where a defendant files an appearance under protest under the prevailing practice because he desires to apply for stay under the Arbitration Act. Therefore, whatever may be the reason for the practice which has grown up, it seems to me clear that there is no obligation on the defendant to follow this practice of doubtful import and utility and he is at liberty to file an unconditional appearance.

9. My attention has been drawn to two decisions of this Court in both of which the teat applied for determining whether an act was a step in the proceedings was whether it was in the nature of an application. In *Edward Radbone v. Juggilal Kamalapa*[7] there the

[6](1913) 108 LT 921

[7]45 Bom LR 402 : AIR 1943 Bom 228

defendant put in a consent praecipe for extension of time for filing his written statement Kania, J. (as he then was) held that this was a step in the proceedings. The learned Judge held that filing a consent praecipe was an application. On the other band in *Chitmanram Motilal v. Vandravandas*[8], a praecipe consented to by the defendant and filed by the plaintiff for postponement of the suit was held not to be a step in the proceedings by Bhagwati J. on the ground that the application, if any, was made by the plaintiff who filed the praecipe. With respect to the learned judges who decided these two cases, I find it somewhat difficult to reconcile the two decisions. The line of distinction is a very thin one if the ratio to be applied is whether the act was an application. The ratio I have suggested above yields the same results in these two cases without creating any inconsistency and without putting one to the necessity of making out too superfine a distinction between a consent praecipe filed by the plaintiff and one filed by the defendant. A consent praecipe for extension of time to put in a written statement (which was the case in *Edward Radbone v. Juggilal Kamalapat*[9], undoubtedly indicates a desire to contest the suit on the merits by putting in a written statement and to my mind obviously displays an unequivocal intention to abandon the right to have the matter disposed of by arbitration. While, on the other hand, a consent praecipe for a mere adjournment of the suit (which was the case in *Chimanram Motilal v. Vandravandas*[10], is as best an equivocal act consistent both with an intention to apply for stay or to proceed with the suit. In these two cases, their Lordships' attention does not appear to have been drawn either to *Ford's Botel Co v. Bartlett*[11], or *Austin and Whiteley Limited v. S. Bowley and Son*[12], referred to above. I do not, therefore, read these two cases as authorities for the proposition that the only test to be applied is whether the act is an application or something in the nature of an application. However, even if the test applied by the two learned Judges in these two cases is the correct test to be applied, I have no hesitation on the facts of the present notice of motion in holding that filing an appearance in Court is not an application of any kind but is an act which is incumbent upon the defendant to do by virtue of Rule 117 of the High Court Rules for preventing the suit from being get down us being undefended and therefore is not a step the proceedings. The result therefore is that the notice of motion. must be made absolute with costs.

Order accordingly.

[8]49 Bom LR 431 : AIR 1948 Bom 55

[9]45 Bom LR 402 : AIR 1943 Bom 228)

[10]49 Bom LR 431 : AIR 1948 Bom 55

[11](1896 AC 1 : 65 LJ QB 166)

[12]((1913) 108 LT 921)