BOMBAY HIGH COURT

Jadavji Narsidas Shah

Vs.

Hirachand Chatrabhuj

A.F.O. No. 112 of 1952, in Summary Suit No. 1079 of 1952

(Chagla, C.J. and Dixit, J.)

13.07.1953

JUDGMENT

Chagla, C.J.

1. This is an appeal from an order of Mr. Bakhle Judge of the City Civil Court, dismissing the notice of motion taken out by the defendants for stay of proceedings under Section 34, Arbitration Act. The plaintiff filed a summary suit on 17-4-1952, and appearance was filed by the defendants on 25-4-1952. On 4-7-1952, the plaintiff took out a summons for judgment, and on 12-7-1952, the defendants filed an affidavit in reply setting out the defence and asking for leave to defend. The defendants took out a notice of motion for stay on 24-7-1952, and this is the notice of motion which was dismissed by Mr. Bakhle. The ground on which the learned Judge dismissed the notice of motion was that by filing the affidavit in reply the defendants had taken a step in the proceedings within the meaning of Section 34.

2. Now, it is clear that under Section 34 it is necessary that the party who applies for stay should himself take a step in the proceedings before he becomes disentitled to the stay which is asked for. It must be some application made by the party in the proceedings, and as the authorities show that application must be of such a nature as to lead the Court to the conclusion that the party prefers to have his rights and liabilities determined by the civil Court rather than by the domestic forum upon which the parties might have agreed. These really are the two tests which the authorities show ought to be applied, and the cases on which Mr. Shah has relied in order to convince us that the decision of the learned Judge was wrong, far from supporting him emphasize these principles.

3. Turning first to the cage of - *'Ives and Barker v. Willans[1]'.* That was a case where a notice was given by the defendant to the plaintiff requiring from him a copy of the statement of the claim, and the English Court held that that was not a step in the proceedings. Obviously, this was not a

step in the proceedings because the defendant had made no application and had taken no step. All that he had done was to call upon the plaintiff to supply him with a copy of the statement of the claim. It is in this connection that Lord Justice Lindley laid down certain principles. At p. 484 the learned Law Lord says :

[1]1894-2 Ch. 478

> "The authorities shew 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."

The learned Law Lord also points out that before a party can exercise his option as to whether he would allow the suit to go on in the civil Court or ask for stay of proceedings under Section 34 he had to know what the nature of the claim was, and, therefore, when the defendant applied for a copy of the statement of the claim he had a right to do so before he made up his mind as to whether he should apply for stay under Section 34 or not.

4. The next case on which reliance is placed is - *'Zalinoff v. Hammond'*[2]*,* That was a case where the defendant filed an affidavit in answer to a notice of motion for receiver taken out by the plaintiff. Again, it is difficult to understand how it could possibly be said that when the plaintiff applies for a receiver and the defendant meets that case by filing an affidavit in reply, it could be said that he had taken any step or that he had made any application; and Mr. Justice Stirling in deciding this case merely applied the principles enunciated by Lord Justice Lindley in the earlier case to which reference has been made.

5. Then reference is made to a judgment of Bhagwati, J. in - *'Chimanram Motilal v. Vandravancias*[3]*',* That case is rather significant as pointing out the difference between as party making an application and a party merely agreeing to an application made by the other side. In the case before Bhagwati, J. the plaintiffs filed a praecipe for the adjournment of the suit and the defendants consented to the praecipe being filed, and the learned Judge held that that was not a step in the proceedings. But Bhagwati, J. drew the attention to an earlier decision of this Court in - *'Edward Radbone v. Juggilal Kamalapat*[4]*',* where Kania, J. had held that if the defendant had filed a praecipe and the plaintiff had consented to the praecipe being filed, then the filing of the praecipe for an adjournment of the suit would have been a step, in the proceedings. That, in our opinion, is as far as any Court has gone. All that the defendant did in the case before Kania, J. was merely to ask for an adjournment before the Prothonotary, and yet the learned Judge held that that was a step taken in the proceedings.

6. In the light of these decisions, let us consider the facts of this case. What Mr. Shah says is that the summons for judgment was taken out by the plaintiff and all that the defendants did was to resist that summons and asked the Court to dismiss that summons, and according to Mr. Shah the defendants did not make any application but filed this affidavit. Now that is an entirely erroneous

view to take of the affidavit filed by the defendants. Under Order 37, Rule 3, the Court has, upon the application by the defendant to give leave to him to appear and to defend the suit, and it is only on such leave being given that a defendant is entitled to be heard in a summary suit. The nature of the affidavit filed by the defendants is clear. As required by Order 37, Rule 3, they disclosed in the affidavit such facts as the Court may deem sufficient to support the application for leave to defend. They have disclosed the nature of their defense, they have attempted to satisfy the Court

[2]1898-2 Ch. 92 [4] AIR 1943 Bom 228

[3] AIR 1948 Bom 55

that they are entitled to be heard and leave to defend should be given, and, what is more, in the last paragraph of the affidavit they have in terms asked the Court that the summons for judgment be dismissed and that the defendants be granted unconditional leave to defend. What Mr. Shah says is that under our old practice when a defendant used to take out a summons for leave to defend he did apply for leave to defend and such an application would have been a step in the proceedings, but says Mr. Shah that under our new rules it is not the defendant who applies for leave to defend, but the plaintiff takes out a summons for judgment and all that the defendant does is to show cause against the summons for judgment. The mere fact that instead of the defendant taking out a summons the plaintiff takes out a summons does not really change the substance of the matter. The substance of the matter is that when the summons for judgment comes up before the Court, it is the defendant who has to obtain leave to defend and on that leave being, granted he becomes entitled to defend. Therefore it is clear that by filing this affidavit the defendants expressed an unequivocal intention that the matter should be heard by the civil Court and gave clear effect to that intention by asking the Court to give them leave to defend so that they should resist the plaintiff's claim.

7. Mr. Shah has relied on a decision reported in - *'Pitchers, Ltd. v. Plaza', (Queensbury Ltd[5].)* and Mr. Shan says that that decision lays down that if you file an affidavit to show cause against a summons for judgment and then you take out a notice of motion for stay and if the summons for judgment is not disposed of and both the notice of motion and the summons, for judgment come up for decision as the same time, the filing of the affidavit cannot be looked upon as a step in the proceedings. Mr. Shah says, that in this case although tine notice of motion was taken out after the summons for judgment, the summons for judgment was not disposed of and, therefore, the defendants were not too late in applying for a stay under S, 34. That is not the effect of the decision in - *'Pitchers, Ltd. v. Plaza, Ltd.",* . What the learned Judges there point out is that if at the same time as the affidavit is filed to show cause against the summons for judgment, ail application, is made by the defendant for stay, or if in the affidavit itself the arbitration clause is set out and an application is made for stay under Section 34, then the filing of the affidavit would not be a step in the proceedings. Now that judgment is perfectly understandable on the principle already stated. When the defendant goes to Court to show cause against a summons for judgment and he makes his intention, clear that he does not want the Civil Court to adjudicate upon his rights or liabilities, but he wants the domestic forum to decide that, then clearly the mere fact that he has filed an affidavit in reply to the summons cannot be relied upon as a step in the

proceedings. But in this case the defendants file an affidavit in reply, make their intention perfectly clear, and then. 12 days after that they take out a notice of motion, for stay of the proceedings. Therefore when they take out the notice of a motion for stay of proceedings, they have already taken a step in the proceedings by filing their affidavit on 12-7-1952, and unequivocally expressing their intention as to which Court should decide the case. We fail to understand what possible bearing the fact that the summons for judgment was not disposed of has got to do with Section 34. What Section 34 requires is that there should be an application made by the defendant; a step taken by the defendant. Section 34 does not require that the application must be disposed of or decided before the defendant would be disabled from asking for stay under Section 34. Once the defendants took a step in the proceedings on 12-7-1952, it was entirely immaterial that the summons for judgment was not decided

[5]1940-1 All England Reporter 151

when they took out the notice of motion on 24-7-1952. Therefore, in our opinion, the learned Judge below was right in the conclusion he came to.

8. The result is that the appeal fails and must be dismissed with costs.

Appeal dismissed.