BOMBAY HIGH COURT

Anandkumar Parmanand Kejriwala

Vs.

Kamaladevi Hiralal Kejriwal

Appeal No. 18 of 1969; Suit No. 73 of 1969

(Patel and Madon, JJ.)

09.04.1969

JUDGMENT

Patel, J.

1. The question in this appeal is whether the suit should have been stayed under Section 34 of the Indian Arbitration Act (hereinafter referred to as the Act). A few facts leading to the present appeal are as follows : The plaintiff and the defendants were partners. The suit was filed by the plaintiff for a declaration that the firm was dissolved and for taking accounts of the partnership. This suit was filed on January 20, 1969. On the same day the plaintiff made an application for receiver and for injunction. An ex parte order was granted appointing the Court Receiver to take charge of all books of accounts, vouchers, papers etc., connected with the partnership and in possession of the mediator, K. M. D. Thakersey. An interim injunction was also granted, one particular direction being in a mandatory form regarding the continuance of the supply of steam from the boiler to the plaintiff. The papers of the motion and the plaint were served on the defendants on the same day. The certificate of the Prothonotary was served on them on January 27, 1969 which indicated that liberty was reserved to the defendants to move the Court regarding the interim order. The defendants filed their appearance on the same day under protest. The defendants also wrote a letter to the Attorneys for the plaintiff on January 28, 1969 intimating that they had filed their appearance under protest and that they would make an application to the learned Judge on January 30 for vacating and/or modifying the ex parte interim order. On January 29, 1969 an affidavit sworn by appellant No. 1 was served on the Attorneys for the plaintiff and an application was made to the learned Judge on January 30, 1969 to vacate and/or modify the interim order. Mr. Joshi appearing for the plaintiff stated that his client would deposit the amount of Rupees 3,000/- in Court on the next day. On the next day i.e., January 31, 1969, the defendant's counsel applied for adjournment of the notice of motion for a week, and thereafter on a similar motion it was adjourned to February 22, 1969. It was again adjourned to February 25 and ultimately on February 27, 1969 a consent order was made therein. In the

meantime, on February 27, 1969, the appellants took out the present motion for staying of the suit under Section 34 of the Act on the ground that in the agreement of partnership there was a clause which required the dispute of the partnership to be referred to arbitration. After hearing this motion the learned Judge rejected the same. By this appeal the said order is being challenged.

2. Section 34 of the Act has been so often canvassed that we do not think that it is necessary to reproduce the same. In the present case, no written statement has been filed and the question, therefore, is, whether the conduct of the defendants amounts to taking any steps in the proceedings.

3. The Act does not define the word "proceedings". Then the question is, what meaning should be assigned to that word in the context. In its generic sense it means any and every proceeding. Under the Code of Civil Procedure it is well settled that a suit starts by a plaint and ends in a decree. A suit is a specie of a proceeding. Section 141 of the Code of Civil Procedure prescribes the same procedure for all proceedings and decided cases hold that those proceedings should be of the nature of Suits. 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 proceedings are called incidental for the simple reason that they are intended to advance the process of suits or original proceedings in the nature of suits to their conclusion, since the Sections give power to issue commissions to other courts, letters of request to other courts and executions of commissions issued by foreign courts. The supplemental proceedings are dealt with under Sections 94 and 95 of the Code and they relate to the powers of the courts for preventing the ends of justice being defeated. In the absence of such powers, it is obvious that a decree in a suit or in any substantive proceeding of the nature of a suit, would be futile. In order to prevent such a result it is necessary to vest in the Court supplemental powers to be exercised in a suit when necessary. Hence the powers for the issue of a warrant for the arrest of the defendant for purposes mentioned therein or an order directing the defendant to furnish security for the purposes mentioned therein or grant of temporary injunction necessitated by the case and the punishment for its breach, appointment of receiver and making of other interlocutory orders are provided for. These proceedings, which are supplemental to the suit or proceedings in the nature of suit, do not deal with the merits of the dispute between the parties but are intended merely for protection of the parties and they do not advance the progress of the suit. On the other hand, the incidental proceedings are those which are necessary in the taking of the suit to its fruition i. e. its ultimate decision and making of a decree.

4. Under the Arbitration Act the arbitrator is given the power to decide the dispute if there is an agreement to this effect in a contract. The disputes may be referred to arbitration in various ways as provided therein i. e., independently of Court or at the direction of the Court or in a pending suit. The arbitrator, however, is not vested with supplemental powers provided by Part VI of the

Code of Civil Procedure. These powers are vested in Civil Courts by Section 41 of the Arbitration Act read with the Second Schedule of the Act. The Second Schedule refers to (1) the preservation, interim custody or sale of any goods which are the subject-matter of the reference, (2) securing the amount in difference in the reference, (3) the detention, preservation or inspection of any property or which is the subject of the reference and other incidental matters, (4) interim injunctions or the appointment of a receiver, and (5) the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitration proceedings. It is in this context of the division of the proceedings into suits and supplemental proceedings both in the Code of Civil Procedure and the Arbitration Act that we have to construe the word "proceedings" used in Section 34 of the said Act. It is, therefore, clear that when Section 34 of the Act uses the word "proceedings", it means the suit or the proceeding in the nature of a suit relating to the dispute. This is the meaning that must be assigned to the word "proceedings". The requirement of the section is that such party must make the application for stay before taking any step in the suit or proceeding by proceeding being meant the proceeding which relates to the dispute. We do not think that an analysis of the various cases which have been decided leads to any other conclusion.

5. The first case on the question in connection with a somewhat similar provision in England is that of *Ives and Barker v. Williams*[1], Here the plaintiffs issued the writ against the defendant, who entered an appearance and by a formal document addressed to the Solicitors for the plaintiffs required a statement of the claim to be delivered to him. The question was whether that was a step in the proceedings which precluded the defendant from making an application for stay. Lindley, L. J., observed as follows : (page 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 Lord Justice further observed : (page 484).

> "..... Quite apart from the case not being within the words, therefore, it is not within the spirit or the sense of the Act.
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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, not 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". Later on, a similar question arose before the House of Lords in *Ford's Hotel Company v. Bartlett*[2], In that case, the defendants had taken out a summons and obtained an order for further time for delivering his defense, and it was held that he took a step in the proceedings. The defendants had originally asked for one month's time, but the master on hearing made an order that the defendants should have fourteen days'

time for delivering their defence. Lord Halsbury L. C. pointed out the reasons why such statutory provision was made and said : (page 4) :-

> "My Lords, there can be no doubt that what was in the mind of the Legislature was this one of the great scandals which induced the Legislature to interfere by statutory provision was the delay, and another was the costs incurred, notwithstanding that the proceedings did not go on, so that there was a great number of proceedings for which the parties had to pay although they furnished no ultimate decision of their rights. The intention of the Legislature in giving effect to the contract of the parties, and saying that one of them should be entitled to make an application to insist that the matter should be referred according to the original agreement, was that they should at once, and before any further proceedings were

[1](1894) 2 Ch 478

[2](1896) AC 1

> taken, specify the terminus a quo, and that if an application to stay proceedings was made under those circumstances, then that the Court should enforce the contractual obligation to go to arbitration." Lord Shand reasoned : (page 6) :-
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> "..... . The proceeding of presenting such a summons and supporting it before the master was unquestionably judicial and implied a statement to the effect that the appellants were to defend the action ..... Having regard to the provisions of the arbitration statute 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". Decided cases disclosed that this fundamental test has been subsequently followed in almost all cases.

6. The first case thereafter which came before the Chancery Division is *Zalinoff v. Hammond*[3], This case arose out of an action for dissolution of partnership between the plaintiff and the defendant. On March 22, 1898 the plaintiff gave notice of motion for the appointment of a receiver, and in support he filed affidavits in which he made various allegations of misconduct against the defendant. The writ in the suit was issued on March 16, 1898 and the notice of motion was served on March 22, 1898. The defendant entered an appearance and filed affidavits in answer to the charges made against him by the plaintiff; and on April 16, 1898 the plaintiff's notice of motion having stood over once or twice in the interval, the defendant gave notice of Motion to refer all matters in difference between the parties to arbitration. The learned Judge held that mere filing of affidavits in defence to a motion for a receiver is not in the nature of an application to the Court, and consequently not a 'step in the proceedings'. By such a step is meant a substantive step taken by a party though it may be of a very limited application.

7. Coming to the decisions of this Court, in *Edward Radbone v. Juggilal Kamlapat*[4], Kania, J. (as he then was) applied the test of an application. In that case the defendants made an application by consent praecipe for extending the time for filing their written statement and the learned Judge held that it amounted to a step in the proceedings, and though the reasoning is the making of the

application, it fully justifies the conclusion for it was a clear indication in the suit itself that the defendants wanted to defend the suit.

8. In *Chimanram Motilal v. Vandravandas*[5], the defendants had signed unconditionally a consent praecipe sent by the plaintiffs for postponment of the suit on the ground that the writ of summons had not been served. The question was whether the conduct of the defendants amounted to taking a step in the proceedings. The learned Judge distinguishing the case before Kania, J., held that what was done by the defendants was not a substantive step in the proceedings.

9. A similar question arose in *Nuruddin Abdulhusein v. Abu Ahmed*[6], where after referring to various cases both English and Indian, Tendolkar, J., arrived at the following test. He says :

> "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

[3](1898) 2 Ch 92 [5]49 Bom LR 431
[4]45 Bom LR 402 [6] AIR 1950 Bom 127

> 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."

This test is in accord with the one formulated in Ford's Hotel Company's case, 1896 AC 1 by Lord Shand. Before the learned Judge the only thing that was done by the defendant was to file an appearance in the proceedings. It was argued on behalf of the plaintiff that as an unconditional appearance was filed in the proceedings it amounted to giving up arbitration and expressing an intention to go on with the suit on merits, as the appearance was not filed under protest. The learned Judge deprecated the practice of filing appearances under protest and said that, whether or not the appearance was filed under protest it ought not to make any difference.

10. The test adopted by Tendolkar, J., was later on accepted by a Division Bench of this Court in *Jadavji Narsidas v. Hirachand Chaturbhuj*[7], where the learned Chief Justice says :

> "..... The step in the proceedings must be such an application made by the party 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. It is not however necessary that the application must be disposed of or decided before the defendant is disabled from asking for stay under Section 34 of the Act". Various cases to date were referred to. This interpretation of the section accords with our inclination and is binding on us and the matter, therefore, has to be decided in the light of these principles.

11. As observed earlier, the defendants filed their appearance under protest, protested against the interim order made by the Court and got it modified within three days. Thereafter, within ten

days the certificate of the Prothonotary was served upon them, and within about seventeen days after the service they took out the notice of motion for stay without taking any step in the substantive proceedings which related to the actual dispute between the parties. No doubt, they filed the appearance but they filed the same under protest. Even after the service of the injunction, in the affidavit dated January 29, 1969 defendant No. 1 made it clear that the appearance was filed under protest in view of the fact that the partnership agreement required the matter to be referred to arbitration and that the defendants would take out a proceeding to enforce the said agreement. He then went on to show how the plaintiff was not entitled either to the appointment of a receiver or to get the injunction which the plaintiff obtained. Our attention is invited to paragraph 9 of the affidavit where defendant No. 1 stated :

> "..... Without prejudice to the above I submit that the said ex parte interim order in regard to the said boiler should in any event be modified by directing the plaintiff to make payment to the defendants of all arrears of 50% of the expenses of operation and maintenance of the said boiler and to pay the 50% of the said expenses in future regularly as a condition to her obtaining supply of steam from the said boiler, pending the final disposal of notice of motion." This is something in terms of Order 39, Rule 2 (2) of the Code of Civil Procedure, which gives the

[7] ILR (1954) Bom 848

> Court a discretion to impose condition before granting of the order. It is contended that by making this request the defendants made an application to the Court and this application must be conclusive about the intention of the defendants not to proceed with arbitration but to proceed with the suit. As stated by Stirling, J., in Zalinoff's case the application which must debar a defendant from moving to refer the case to arbitration, must be a substantive application, and it means an application which expresses a desire to take step in the suit to indicate that the defendant proposes to go on with the suit. According to the test formulated by our Court, it must indicate that the defendants desire to abandon the agreement to refer the matter to arbitration and proceed with the suit. Having regard to what is stated by defendant No. 1 in paragraph 2 of his affidavit and their filing of the appearance under protest, it is clear that the defendants wanted to rely upon the arbitration clause and not to proceed with the suit in the Court. It is no doubt true that Tendolkar, J., did point out that there is no rule in the Original Side Rules requiring an appearance under protest in the case of arbitration clause. Even so, when an appearance is filed under protest it must indicate that the defendants do not desire to proceed with, the suit but desire an arbitration, though no doubt filing of an appearance without protest would not mean that they abandon their right of arbitration as held by Tendolkar, J.

12. In the conclusion to which we have reached, we are supported by the decision in *Sansarchand v. State of M. P*[8]*.,* a judgment of a Division Bench. In that case the plaint was filed on August 5, 1959 and on the plaintiff's application, an ex parte temporary injunction was issued on August 6, 1959 restraining the defendants from attaching the movable property except cash.

The defendants filed their appearance on September 1, 1959. The defendants were ready to file their reply to the application for temporary injunction, but as the plaintiff had amended the previous application for temporary injunction, the reply was filed later. In the reply the arbitration clause was relied upon claiming that the Court had no jurisdiction to entertain the suit. The injunction matter was thereafter fixed for argument on September 19, 1959. On this date the defendants asked for adjournment to argue the matter. Arguments were heard on September 22, 1959 and the Court rejected the application for temporary injunction on September 23, 1959. On November 17, 1959, an application was made by the defendants under Section 34 of the Act to stay the proceedings in the suit. The learned Judges accepted the test for deciding the question as formulated by Tendolkar, J., and held, having regard to the provisions of Section 41 read with Schedule II of the Act, that it was no ground to refuse stay of the suit to a party merely because the defendants asked for vacating of the injunction issued by the Court ex parte. They clearly expressed the opinion that an interlocutory application of this nature i.e., for appointment of a receiver or for injunction, did not necessarily amount to a proceeding in suit. With respect, we agree with the conclusions of the learned Judges for the reasons already given.

13. Much reliance has been placed by Mr. Joshi, for the respondent, on the following statement in Halsbury's Laws of England, Third Edition, Vol. 2, page 25, paragraph 58. So far as relevant it reads as follows :-

> "..... A party who makes any application whatsoever to the court, even though it
> be merely an application for time, takes a step in the proceedings. Thus the filing of an affidavit in opposition to a summons for summary judgment, delivery of a defense, application to the court for leave to interrogate, or for a stay pending the giving of security for costs, or for extension of time for delivery of defiance, are 'steps' in the proceedings. Even attendance on an ordinary summons for directions issued by the plaintiff and permitting an order to be made thereon without objection amounts to taking a step in the action".

[8] AIR 1961 Mad Prad 322

If each of these statements is carefully analyzed, it is obvious that each of the things done by the defendant is related to the advancement of the hearing of the suit or the substantive action and is not connected with any supplementary proceeding the purpose of which is not to decide or proceed to decide the hearing of the dispute on merits but a different purpose, and this apparently is made clear by Lord Halsbury in the same paragraph which reads as follows : (page 26)

> "On the other hand, neither a notice requiring a statement of claim nor a request by letter for extension of time for pleading, nor the filing of affidavits in answer to an application by the plaintiff for the appointment of a receiver, nor getting a summons placed in counsel's list, amount to taking a step in the proceedings".

14. Mr. Joshi has then invited our attention to the decision in *Subal Chandra v. Md. Ibrahim*[9], This decision has been referred to by Tendolkar, J., in his judgment and it does not decide anything different from what the learned Judge has said. In fact, the test which has been formulated has been adopted by Das J. in this case. In this case the suit was filed on January 5, 1943 by the plaintiff against his partners for a declaration that the partnership stood dissolved on April 22, 1942 and for other ancillary reliefs including one for accounts and appointment of a receiver. On January 7, 1943 the plaintiff obtained an ex parte order for appointment of a receiver and for an injunction, and it was made returnable on January 11, 1943. The motion was adjourned for three weeks with a direction that affidavit in opposition to be filed within a fortnight and the reply by the plaintiff to be filed by the following Saturday. Interim order was to continue and liberty was reserved to either parties to take inspection of the books and documents at the office of the S. D. O., Ranchi, on two days notice to one another's Solicitors. On January 22, 1943 one of the partners took out the notice for stay of the suit under Section 34 of the Act. The learned Judge held that the filing of the affidavit in opposition to the application for the appointment of a receiver and for leave to inspect documents cannot possibly be referable to any intention to go to arbitration or to any objection to the filing of the suit but only indicates that the petitioner was anxious to oppose that application. If the defendants acquiesced in the making of a substantive order in the direction of proceeding further in the suit, for inspection of documents, it is difficult to hold under such circumstances that they did not disclose an intention to go on with the suit. That case is really distinguishable from the present case and affords no parallel for deciding this case.

15. The Second decision relied upon is *Gannu Rao v. Thiagaraja Rao*[10], In this case also an interim appointment of receiver was made. The defendants appearance by an Advocate and asked for ten days' time for filing counter affidavits which was granted. The

[9] AIR 1943 Cal 484

[10] AIR 1949 Mad 582

injunction was modified by the consent of the plaintiff and the defendants' Advocate stated that respondent No. 1 had been permitted to overdraw from the Bank of the security of the fixed deposit and the plaintiff's Advocate agreed that the fixed deposit may be used as security for future overdrafts and that the order of interim injunction would not be enforced to the prejudice of respondent No. 1. The case was adjourned to March 14, 1947. At no stage was it indicated that the applicant contemplated the filing of an application for stay under Section 34 of the Act. On the adjourned date the applicant stated for the first time that he intended to file an application for referring the dispute to arbitration. This was recorded and an order was made to the Commissioner to initial certain books and documents which the defendant No. 1 said were received from the auditors. The learned Judge held, after referring to some cases, that if something is done by the party concerned which is in the nature of an application to the Court, it will necessarily come in the category of a step in the proceedings. The learned Judge also expressed the opinion that the word "proceedings" used in this section is of general application and applies not only to the suit, and that any interlocutory application in a suit would certainly come in the category of "proceedings" and as the defendant No. 1 had taken a step in those

proceedings the bar applied to him. With respect we cannot agree with the conclusion that interlocutory applications in the suit such as we are dealing with are "proceedings". This construction is contrary by the very wording of Section 34 of the Act which speaks of commencement of "any legal proceedings..... in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time before taking any other steps in the proceedings. ...." The definite article before the word "proceedings" in connection with the steps must clearly indicate that the intention of the Legislature is that the application must be made in the suit or the substantive proceedings relating to the dispute.

16. In *Amritrai v. Golecha Financiers*[11], the suit was instituted on December 23, 1964 in respect of a motor car by the plaintiff. On the same day, he obtained an interim injunction and the notice was made returnable on January 4, 1965. On that date the plaintiff's counsel asked for some additional interim orders which were opposed by the defendant's counsel. After the arguments were heard an order was made in a particular manner. On January 2, 1965 the defendant's solicitor wrote a letter to the solicitor for the plaintiff that he had received instructions from his client to enter appearance and defend the suit on his behalf and asked for a copy of the petition and also a copy of the plaint. On January 9, 1965 the defendant entered appearance. These acts were held to be "steps in the proceedings". The learned Judge relied upon his own judgment in *Deluxe Film Distributors Ltd. v. Sukumar*[12], where he had held that even an oral application for extension of time to file an affidavit in interlocutory injunction amounted to taking step in the proceeding. The learned Judge differed from the decision of the Madhya Pradesh High Court in Sansarchand Deshraj's case, AIR 1961 Madhya Pradesh 322 on the footing that the judgment of Das, J., in Subal Chandra's case in AIR 1943 Calcutta 484 was ignored. As Tendolkar, J., observed, the making of an application is a reasonably good working test, but not the only test. The application, as we have said above, must be such as to advance the suit and not any supplementary proceedings. If one has regard to human affairs it appears reasonable to hold that mere filing of affidavit or contesting or seeking to modify an interim, order for appointment of a receiver or an injunction ought not to

[11] AIR 1966 Cal 315

[12] AIR 1960 Cal 206

debar a defendant from obtaining reference to arbitration. An interim order which may be granted by a Court on ex parte hearing may prove to be extremely prejudicial to the defendant, who may be under a strain first to get out of the interim order and then only reason coolly as to what he should do. To expect a defendant to think out all pros and cons of the matter and to take recourse to making an application for stay without trying to get the interim order modified may in most cases work serious prejudice to the defendant as the application for stay may take quite some time during which the interim order would be operative. With respect, therefore, it is not possible to agree with the conclusion of the learned Judge that taking any part in interlocutory proceedings for appointment of a receiver or an injunction should amount to taking a step in the proceedings to disentitle the defendants from applying for stay of the suit.

17. The learned trial Judge after referring to the decisions of this Court and particularly the

decision of the Division Bench in Jadavji Narsidas's case, ILR (1954) Bom 348 said :

> ".....In my view, the effect of the observations of the Division Bench was not intended so to affect the provisions of the Act that on facts as glaring as in this case the Court should be entitled to hold that the application made by the defendants on January 29, was not a step in the proceedings".

The learned trial Judge observes :

> "..... It is quite clear that the Notice of Motion was not on the daily board of the Court on January 29. It is quite clear that no hearing of any kind could have taken place before the Court unless the defendants had not made their application for vacating of the interim order on that day. It is quite clear that the proceedings that took place on January 29, must be held to be proceedings by way of an application made on behalf of the defendants for vacating the interim order made on January 28..... ..... There is hardly any doubt that the defendants intended to take out such proceedings and were not intending to have their disputes against the plaintiff decided by a Civil Court".

As we have observed, the test of an application is not the sole test or a conclusive test. The section does not refer to an application as such. The section refers to a step in the proceedings and the principles for deciding as to what is a step in the proceedings have been settled by the decision of Tendolkar, J., and the decision of the Division Bench of this Court. Applying this test and having regard to the defendants filing of the appearance under protest and reserving their right to move the Court for referring the dispute to arbitration, we hold that they had not taken any steps in the proceedings.

18. We accordingly set aside the order of the learned Judge and remit the matter for further hearing.

19. We must make it clear that we are not deciding the other questions that must be determined by the Court before granting the stay. The Court has to be satisfied that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the agreement and it has also to consider whether it would be proper to take the matter to arbitration. It is argued by Mr. Joshi that the arbitration agreement does not now subsist in view of certain events that have taken place. The trial Court will decide this question also.

20. Respondent to pay the costs of this appeal. Costs of the motion will be decided on the final order thereon. The amount deposited by the appellants is allowed to be withdrawn by the attorneys for the appellants. The motion to be fixed on the board for hearing on the next motion day.
Order accordingly.