

NAGPUR HIGH COURT

Abdul Quddoos Dost Mohammad Momin

Vs

Abdul Gam Abdul Rahman

Misc. First Appeal No. 49 of 1951. decided on 28.1.1954

(Mangalmurti and Deo, JJ.)

28.01.1954

JUDGMENT

Mangalmurti, J.

1. This is plaintiffs' appeal against an order, staying the suit, passed under Section 34, Arbitration Act.
2. On 2-9-1950 plaintiffs instituted a suit for dissolution of partnership and rendition of accounts and on 5-9-1950 they made an application for appointment of a receiver. This application was fixed for hearing on 11-9-1950. On that date the defendants and their Counsel Shri Nisaralli appeared and he filed their reply supported by an affidavit. This case was taken up on 14-9-1950. On that date, after the case was partly heard the Court sent for the record of the Court of 3rd Civil Judge, Class II, Nagpur. Parties were further heard on 25-9-1950 and the application for appointment of a receiver was disposed of on that day.
3. The suit was originally fixed for settlement of issues on 16-11-1950 and the defendants were directed to file their written statement a week before the date of hearing. The defendants did not file the written statement as directed. On 16-11-1950 the defendants engaged Shri Imdadali. He appeared and made an oral prayer for adjournment to file the written statement. It was allowed. The defendants were ordered to pay Rs. 5 as adjournment costs. The hearing was adjourned to 13-12-1950 with a direction to pay the costs and file a written statement a week before the date of hearing.
4. On 9-12-1950 the defendants made an application under section 34 for stay of suit till the disposal of the application for revision in the High Court against the order of 3rd Civil Judge, Class II, and till the arbitration agreement did not cease to have effect. The plaintiffs opposed this application on the ground that there was sufficient reason why the matter should not be referred in accordance with the arbitration agreement. They contended that the agreement had ceased to subsist, having been revoked by a competent Court, and consequently no question of reference to arbitrators arose. On 18-12-1950 the lower Court stayed the suit, on the grounds that the agreement between the parties still subsisted in spite of the order of the 3rd Civil Judge, Class II,

that arbitrators could still be appointed under section 12(2) and that the application for revision-against the order of the 3rd Civil Judge, Class II, was pending in the High Court.

5. In appeal the contentions raised in the lower Court are repeated with a further addition that the application under section 34 is not maintainable as the defendants have taken steps in the proceedings. What those steps are has not been stated in the grounds of appeal.

6. There is no substance in any of the contentions except the last. They were not pressed. The learned Counsel for the plaintiffs submits that in filing a written statement and affidavit in answer to the application for appointment of a receiver the defendants have taken a step in the proceeding. Reliance was placed on a number of decisions which were noticed in - '*Kisanlal v. Nagpur Improvement Trust*'¹, to which one of us (Deo, J.) was a party. They all refer to making an application for time to file a written statement.

7. The learned Counsel for the defendants relies on - '*Subal Chandra v. Md. Ibrahim*'¹, - '*Gannu Rao v. Thiagaraja Rao*'², and - '*Zalinoff v. Hammond*', 1898-2 Ch 92. According to him, the defendants were not taking any steps in the proceeding; they were only defending an attack by opposing the application for appointment of a receiver and that does not amount to a step in the proceedings.

8. Before the application for stay was made, the defendants made an application for time to file a written statement. Making such an application is undoubtedly taking a step in the proceedings. (Vide Misc. Appeal No 70 of 1950 and the decisions noticed therein). It is not necessary that the step in the proceeding must be taken by a written application. In this view it is not necessary to examine for the disposal of this appeal the contention that appearing in opposition to the application for the appointment of a receiver is not taking a step in the proceedings within the meaning of Section 34, Arbitration Act.

9. Relying on - '*Nuruddin Abdulhusein v. Abu Ahmed*'³, the learned Counsel for the respondents submits that making an application for time to file a written statement does not amount to taking a step in the proceedings in view of the other circumstances of the case. He submits that in opposing the application for appointment of a receiver the respondents had pleaded that the Court had no jurisdiction to entertain the suit for dissolution of partnership in view of the existence of the arbitration agreement. In the cited case reliance was placed on the following observations of Ridley, J. in - '*Austin and Whiteley Ltd. v. S. Bowley and Son*'⁴,

"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 he desires that the action should proceed and has no desire that the matter should be referred to arbitration."

Applying this test, the oral application for time to file a written statement can have no other meaning than a desire to proceed with the suit. The respondents had a copy of the plaint with them, and if they did not want to defend the suit on merits they would not have asked for time to file a written statement; they would have straightway made an application under section 34, Arbitration Act.

10. The other consideration is whether the other conditions of the section are satisfied in this case. Unfortunately, the plaintiffs did not raise this point in the Court below or in the grounds of appeal. But as the matter can be disposed of on the facts admitted before this Court, it is its duty to examine the applicability of the section to those facts.

11. Section 34. Arbitration Act, so far as it is material for this case runs thus :

"Where any party to an arbitration agreement commences any legal proceedings against any other party to the agreement..... in respect of any matter agreed to be referred, any party to such legal proceedings, may apply to the judicial authority before which the proceedings are pending to stay the proceedings; and if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement and that the applicant was, at the time when the proceedings were commenced, and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, such authority may make an order staying the proceedings."

It is therefore necessary for the defendants applying to stay the proceedings to prove that the legal proceedings are commenced in respect of a matter agreed to be referred and that he was and is ready and willing to have the matter decided by arbitration. There is no dispute as regards the second condition. For determination of the first condition it is necessary to examine the arbitration agreement and the subject-matter of the suit. Unless the suit refers to the whole of the subject-matter referred to arbitration, the section is not attracted because the plaintiff will still have to seek relief in a civil Court for matters which are not referred to arbitration.

12. The first arbitration agreement, dated 31-5-1948, is to decide the dispute between the parties

"in respect of making a settlement of the accounts of the brick business which is continuing since 1946-47, 1947-48, in our partnership at Beed, Bina."

This reference was made to only three arbitrators. By a second agreement, dated 21-8-1948, five more arbitrators were added but the scope of the matters referred to arbitration was not enlarged. The suit is for dissolution and rendition of accounts of the partnership commenced in 1946 and continuing till the date of suit. If the allegations in the plaint are denied, the matters to be decided in the suit are :

- (a) Whether the partnership of the plaintiffs and defendants continued till the date of the suit.
- (b) What were the shares of the partners ?
- (c) What were the terms of partnership ?
- (d) Who is liable to render accounts, and in respect of which business ?
- (e) Whether the accounts have been made and closed on 28-4-1948 ? If so, up to what period ?

13. The learned Counsel for the defendants contends that the partnership was dissolved on 28-4-

1948 and a new partnership was formed in which the plaintiffs were not partners and the assets shown in the plaint, though not accurately stated, referred to the assets of that partnership. This was the stand taken by the defendants in the proceedings for the appointment of a receiver.

14. It is manifest that all these disputes were not referred to the arbitrators. All that they had to do was to settle the accounts for the two years 1946-47 and 1947-48. The award of the arbitrators will therefore not dispose of the whole suit. The suit cannot therefore be stayed. *The Gaya Electric Supply Co. Ltd. v. State of Bihar*⁵,

15. In a suit for dissolution of partnership and accounts a preliminary decree will have to be passed, determining the shares of partners, the duration of the partnership and the liability of the different partners to render accounts of the partnership. The Court will also have to decide on other controversies that may be raised in the suit. If the Court finds that the partnership was dissolved on 28-4-1948 and the accounts are to be taken only for the years 1946-47 and 1947-48 as the defendants seem to contend, there may be no final decree proceedings as the taking of accounts for these years is already before the arbitrators.

16. Under these circumstances, Section 35 of the Act will not be a bar to the continuance of the arbitration proceedings to the extent provided by the arbitration agreement.

17. The appeal is therefore allowed with costs. Counsel's fee Rs. 20/-. The lower Court will proceed with the suit till the stage of the preliminary decree and further proceedings for taking accounts for the years 1946-47 and 1947-48 will be stayed till the final disposal of the arbitration proceedings.

Appeal allowed.

Cases Referred.

¹ Misc. F.A. No. 70 of 1950 (Nag)

² AIR 1949 Mad 582

³ AIR 1950 Bom 127

⁴(1913) 108 LT 921

⁵ AIR 1953 SC 182