A RACHAPPA GURUADAPPA BIJAPUR

v.

GURUSIDDAPPA NURANIAPPA & ORS.

NOVEMBER 16, 1988

B [SABYASACHI MUKHARJI AND S. RANGANATHAN, JJ.]

Arbitration Act, 1940: Section 34—'Taking any other steps in the proceedings'—Interpretation of—Step should clearly and unambiguously manifest intention to waive benefit of arbitration agreement—Adjournments taken for filing written statement—Disentitles asking for stay of suit.

C

The petitioner and the respondents in the S.L.P. were partners in a partnership firm. On 8th November, 1980, respondent No. 1 issued a notice calling for dissolution of the firm alleging mismanagement, loss and exclusion from the management, and later filed a civil suit for: (i) D **dissolution of the firm, and (ii) accounts. On 4th November, 1981, respondent No. 9 who was defendant No. 7 in the suit, filed an application under Section 34 of the Arbitration Act, 1940 for stay of the suit.**

The Trial Judge after referring to the order-sheet in the matter and noticing that the counsel for the petitioner had taken steps in the E **proceedings in the suit, by seeking and securing adjournments for filing the written statement, held that there was no jurisdiction to stay the suit under Section 34 of the Act.**

On appeal, the Division Bench of the High Court confirmed the order of the Trial Judge, and held that the petitioner having taken steps F **in the suit, had thereby disentitled himself from asking for the stay of the said suit.**

Dismissing the petitioner's Special Leave Petition,

HELD: 1. Arbitration is an alternative procedure for speedy G **adjudication of disputes between the parties and should normally be encouraged as parties have bound themselves to have their disputes adjudicated by arbitration, so they should be held bound by the agreement. [887B]**

2. Section 34 of the Arbitration Act is the statutory provision H **which deals with the powers to stay legal proceedings where there is an**

arbitration agreement. One of the requirements is that the application for stay must be filed before the filing of the written statement or 'taking any other steps in the proceedings'. [887C; 888E] A

3. The expression 'taking any other steps in the proceedings' does not mean that every step in the proceedings would come in the way of enforcement of the arbitration agreement. The step must be such as would clearly and unambiguously manifest the intention to waive the benefit of arbitration agreement, and display an unequivocal intention to proceed with the suit giving up the right to have the matter disposed of by arbitration. [891E-F; B] B

4. Each Court must find out from the context of each case what has happened, and whether a step was taken in the suit which would disentitle the party from obtaining stay of proceedings. [891C] C

In the instant case, it is indisputable that the proceeding was commenced by a party to an arbitration agreement against the other party to the agreement and the legal proceedings which was sought to be stayed was in respect of a matter agreed to be referred to arbitration. From the order-sheet in the case as noted by the Trial Judge, it appears that the counsel appearing for the petitioner had sought adjournment 'specifically for filing written statement', and obtained time on more than one occasion for such purpose. It was not only the time taken to consider whether written statement should be filed as a defence to the plaint, but it was time taken to have the matter decided by the suit. The party evinced an intention to have the matter adjudicated by the Court and not keen to have the matter adjudicated by arbitration. If that is so, the party has disentitled itself to ask for the stay of the said suit. The High Court was, therefore, right in affirming the order of the Trial Judge. [891F-H; 892A] D E F

State of Uttar Pradesh & Anr. v. *Janki Saran Kailash Chandra & Anr.*, [1974] 1 SCR 31 and *Food Corpn. of India & Anr.* v. *Yadav Engineer and Contractor*, [1983] 1 SCR 95, referred to.

Law of Arbitration by R.S. Bachawat (Ist Edn.), pp. 498-499, referred to. G

CIVIL APPELLATE JURISDICTION: Special Leave Petition (Civil) No. 10264 of 1988

From the Judgment and Order dated 26.5.1988 of the Karnataka H

A High Court in M.F.A. No. 52 of 1982.

S.K. Kulkarni and Mrs. Kiran Suri for the Petitioner.

Jagdish G. Yadwad and S. Srinivasan for the Respondents.

B The Judgment of the Court was delivered by

SABYASACHI MUKHARJI, J. This is a petition for leave to appeal against the judgment and order of the High Court of Karnataka dated 26th of May, 1988. By the said judgment the High Court affirmed the order of the learned Civil Judge, Hubli. To appreciate the C controversy, a few facts may be necessary.

On or about 18th September, 1972 a partnership firm was constituted which included the petitioner and the respondents Nos. 1 to 9 to run a cinema theatre and Hubli in the State of Karnataka. The said firm was reconstituted in August, 1973 for a period of 25 years with D one partner retiring from the first firm. In the said reconstituted firm the 1st respondent had 12 paise share. On 8th November, 1980 the 1st respondent had issued a notice calling for dissolution of the firm alleging mismanagement, loss and exclusion from the management. In 1981 the 1st respondent filed a suit in the Court of the Civil Judge, Hubli for (i) dissolution of the firm and (ii) accounts. On 4th November, 1981, E the 9th respondent who is defendant No. 7 in the suit filed an application under Section 34 of the Arbitration Act, 1944 (hereinafter referred to as 'the Act') for stay of the said suit. The learned Trial Judge after referring to the facts and the relevant decisions referred to the order-sheet in this matter and observed that there is a clear record in the order-sheet that the counsel appearing for the applicant had F "sought adjournment specifically for filing written statement". The order-sheet further recorded that the matter was posted to 4th November, 1981 "for arguments". The learned Trial Judge was of the view that the petitioner herein who is defendant No. 4 in the suit had sought and secured several adjournments to file a written statement. In that view of the matter, the learned Trial Judge was of the view that G the petitioner had taken steps in the proceedings in the suit by seeking and securing adjournment to file the written statement. In that view of the matter of declined to exercise his jurisdiction to stay the said suit under Section 34 of the Act. There was an appeal. The Division Bench of the High Court was of the view that in view of the facts mentioned in the order of the Trial Judge, it appeared that the petitioner herein had H taken steps in the suit and had thereby disentitled himself from asking

for the stay of the said suit. The High Court, therefore, confirmed the order of the learned Trial Judge. Aggrieved thereby, the petitioner seeks leave to appeal under Article 136 of the Constitution from the said decision.

Arbitration is an alternative procedure for speedy adjudication of disputes between the parties and should normally be encouraged and parties have bound themselves to have their disputes adjudicated by arbitration, so they should be held bound by the agreement between the parties. Section 34 of the Act is the statutory provision which deals with the powers to stay legal proceedings where there is an arbitration agreement. Section 34 of the Act which is relevant for our present purpose is as follows:

> "34. Power to stay legal proceedings where there is an arbitration agreement.—Where any part to an arbitration agreement or any person claiming under him commences any legal proceedings against any other party to the agreement or any person claiming under him in respect of any matter agreed to be referred, 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; 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."

An analysis of the aforesaid section makes it clear that in order to have the proceedings in the suit stayed, there must be an arbitration agreement between the parties covering the disputes in question. The section stipulates that in order that stay may be granted under the section, it is necessary that the following conditions are fulfilled:

(i) The proceedings must have commenced by a party to an arbitration agreement against any other party to the agreement;

(ii) the legal proceeding, in this case the suit, which is sought to be stayed must be in respect of a matter agreed to be referred;

A (iii) the applicant for stay must be a party to the legal proceeding, the suit in this case.

(iv) the applicant must have taken no steps in the proceeding after appearance;

B (v) the applicant must satisfy that only the applicant was at the time when the proceedings were commenced, ready and willing to do everything necessary for the proper conduct of the arbitration; and

(vi) the Court must also be satisfied that there was no sufficient reason why the matter should not be referred to arbitration.

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Several decisions of this Court and the decisions of the High Court have laid down the aforesaid position in law. See, in this connection, the observations in the "Law of Arbitration" by R.S. Bachawat (1st Edn.) at pages 498-499.

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Indisputably, in this case, the proceeding was commenced by a party to an arbitration agreement against the other party to the agreement and the legal proceeding which was sought to be stayed was in respect of a matter agreed to be referred to. It is also clear that the petitioner is a party to the arbitration agreement. The only question E that was agitated before the learned Trial Judge as well as before the High Court was, whether the petitioner had taken no steps after appearance. The section requires that the application must be filed before the filing of the written statement or taking any other step in the proceeding.

F In the case of *State of Uttar Pradesh & Anr.* v. *Janki Saran Kailash Chandra & Anr.*, [1974] 1 SCR 31, the palintiff instituted a suit for recovery of damages for breach of contract impleading the State of U.P. as the first defendant and the Divisional Forest Officers, Bijnor as the second defendant. The summons in the said suit issued to the State of U.P. were served on the District Government Counsel. On G 2nd September, 1966 the said counsel filed an appearance slip in the court and also put in a formal application praying for one month's time for the purpose of filing written statement. That prayer was granted. On 1st October, 1966 the District Government Counsel filed an application under Section 34 of the Act pleading that there was an arbitration clause in the agreement between the parties to the suit and the H State of U.P. being willing to refer the matter to arbitration the suit

should be stayed. The trial court held that the dispute was subject to arbitration clause and since the State of U.P. had not taken any steps in the suit proceedings and had also not filed the written statement the suit was liable to be stayed. On appeal the High Court held that the action of the District Government Counsel in applying for time to file the written statement amounted to taking a step in the proceedings within the meaning of section 34 of the Act. On this view, the defendant was held disentitled to claim the stay of the suit. By special leave, the defendant applied to this Court. This Court dismissed the appeal and observed at page 37 of the report as follows:

> "The District Government Counsel in the present case was thus fully empowered to appear and act for and on behalf of the Government and also to make applications on its behalf. If the said counsel wanted time for the purpose of having fuller instructions, he could have asked for it specifically, for he was not a layman ignorant about the legal position but a professional lawyer retained by the Government for the purpose of acting and pleading on behalf of the Government as a recognised agent. He, however, chose instead to ask for time specifically for filing written statement and this act he purported to do on behalf of the State Government which he was fully empowered to do. The State took benefit of his appearance and his successful prayer for adjournment of the case by one month for the purpose of filing the written statement. In those circumstances, it is hardly open to the State Government to plead that the District Government Counsel was not authorised to seek adjournment on its behalf for this purpose. An oblique suggestion thrown on behalf of the appellant that the District Government Counsel had merely volunteered to appear without instructions, presumably taking the cue from the decision of the Punjab High Court in the case of *Moji Ram*, is merely to be stated to be rejected. A recognised agent like the District Government Counsel can scarcely be considered to appear volutarily in a case on behalf of the Government in the sense of being unauthorised by his client for the simple reason that he is authorised by virtue of statute to appear, act and make applications on behalf of the Government. Indeed in the present case the District Government Counsel also filed in court the usual appearance slip. If he wanted time for further consultatioins, he could and should have specifi-

A cally made a prayer to that effect. It is, however, idle to contend that he can be considered to have merely volunteered without authority to appear and ask for time for filing the written statement. The argument of appearance by a recognised agent as a mere volunteer is extremely difficult to appreciate. The State, as already observed, took
B the benefit of the adjournment. It will be somewhat irrational and perhaps incongruous to permit the State, after having taken the benefit of this adjournment, to plead that the application for adjournment was not made on instructions and was unauthorised. To accede to the State Government the right to do so would clearly be unjust to the opposite party which could have rightfully objected to
C the adjournment, had there been any indication that the prayer was not being made on instructions from the State Government. September 2, 1966 was fixed in the summons for filing written statement. Failure to do so would have entailed consequences prejudicial to the State Govern-
D ment. Those consequences were avoided by making an application for extension of time for filing written statement which must have been understood by the opposite party, as also by the court, to be on instructions by the State Government."

E It may be noted that thereafter in U.P. there was amendment which added an explanation which provided that a mere application for time to file a written statement or a mere contest to an interlocutory application for injuction, would not amount to taking any steps in the proceedings.

F In the aforesaid view of the matter, without the aid of Explanation 2 added to the U.P. Act, we have to proceed to find out the conditions required to be fulfilled in order to be entitled to stay under section 34 of the Act. As mentioned hereinbefore, it is imperative to find out whether "any other steps in the proceedings" have been taken before making an application for stay of the suit in this case. In our
G opinion, proceeding without being embroiled in the facts and the circumstances of the case with the controversy whether the said expression should be construed *ejusdem generis,* it is necessary to determine whether the party had evinced or indicated any intention to proceed unequivocally with the suit and not to proceed with the arbitration. This position was examined by this Court in *Food Corpn. of India &*
H *Anr.* v. *Yadav Engineer & Contractor,* [1983] 1 SCR 95, where this

Court referred to the decision of *Uttar Pradesh* v. *Janki Saran Kailash Chandra*, (supra), and after setting out the provisions of section 34 of the Arbitration Act, this Court observed that apart from written statement "some other step" mentioned in the Section, must indisputably be such step as would manifestly display an unequivocal intention to proceed with the suit and to give up the right to have the matter disposed of by arbitration. A B

Each court must find out from the context of each case whether this has happened or not. The Court further observed therein that "a step taken in the suit which would disentitle the party from obtaining stay of proceeding must be such step as would display an unequivocal intention to proceed with the suit and to abandon the benefit of the arbitration agreement or the right to get the dispute resolved by arbitration". C

In our opinion, that is a correct position in law as declared by this Court, and it is in consonance with the principles that have been followed under section 4 of the English Arbitration Act, 1889. At page 106 of the said report this Court observed that the "general words" taking any other steps in the proceedigs' just follow the specific expression 'filing a written statement' and both are used for achieving the same purpose". Hence, this Court was of the opinion that the latter expression must be construed *ejusdem generis* with the specific expression just preceding to bring out the ambit of the latter. The expression 'written statement' is a term of specific connotation ordinarily signifying a reply to the plaint filed by the plaintiff. The expression 'taking any other steps in the proceeding' does not mean that every step in the proceedings would come in the way of enforcement of the arbitration agreement. The step must be such as would clearly and unambiguously manifest the intention to waive the benefit of arbitration agreement. D E F

From the Order-sheet in this case and as noted by the learned Trial Judge, it appears that the counsel appearing for the petitioner has sought adjournment "specifically for filing written statement" and obtained time for more than one occasions for such purpose. It was not only the time taken to consider whether written statement should be filed as a defence to the plaint to enter into an arena of controversy, but it was time taken to have the matter decided by the suit. G

The party evinced an intention to have the matter adjudicated by the Court. If that is the position, then in our opinion, in view of the principle enunciated hereinbefore, the party has disentitled itself to H

A ask for stay of the said suit. The High Court was, therefore, right in affirming the order of the learned Trial Judge. Apart from the same, from the conduct of the petitioner and the narration of the events mentioned hereinbefore, it does not appear that the petitioner was ever keen to have the matter adjudicated by arbitration. If that is the
B position then the petitioner cannot have any grievance.

In that view of the matter this application under Article 136 of the Constitution must fail and is accordingly dismissed.

On the prayer of the counsel for the petitioner, we direct that the petitioner would have eight weeks' time from today for filing the writ-
C ten statement to the plaint.

N.V.K. Petition dismissed.