

Padma Ram Vs. Bhanwari Devi

Padma Ram Vs. Bhanwari Devi

SooperKanoon Citation : sooperkanoon.com/751406

Court : Rajasthan

Decided On : Jul-13-1977

Reported in : AIR1979Raj84; 1977()WLN328

Judge : S.N. Modi, J.

Acts : [Arbitration Act, 1940](#) - Sections 34 and 39

Appeal No. : Civil Misc. Appeal No. 155 of 1976

Appellant : Padma Ram

Respondent : Bhanwari Devi

Advocate for Def. : R.K. Kapoor, Adv.

Advocate for Pet/Ap. : G.R. Singhi, Adv.

Disposition : Appeal dismissed

Judgement :

S.N. Modi, J.

1. The defendant Padmaram has filed this appeal against the order of the Additional District Judge No. 1, Jodhpur dated September 8, 1976 dismissing his application under Section 34 of the [Arbitration Act, 1940](#) for stay of proceedings in the original suit No. 30 of 1976.

2. The suit was instituted by the plaintiff-respondent Mst. Bhanwari Devi. The parties are said to be close relatives inasmuch as the daughter of the plaintiff is married to the son of the defendant.

3. The parties entered into an oral agreement of partnership in the year 1973 for retail sale of foreign liquor. Subsequently on July 5, 1974 the parties executed an agreement of partnership to carry on the said business under the name and style of 'Quality English Wine Store' in the city of Jodhpur. According to the plaintiff some time near about Deepawali of 1974 disputes arose between the parties. The plaintiff respondent thereupon issued a notice on April 3, 1976 calling upon the defendant appellant to render true accounts of the business, to allow her or her husband or her son or her nominee to inspect all accounts, correspondence, stock in hand etc. for the period 1975-76 and allow her son, her husband or her nominee to visit the shop and supervise the business in future. The plaintiff in her notice also mentioned that in case her demands were not carried out within a week, she would file a suit for dissolution of partnership and rendition of accounts and shall also apply for appointment of a receiver during the pendency of the suit. The said notice is said to have reached the defendant on April 14, 1976. When no reply was received from the defendant of the notice, the plaintiff filed the suit on July 5, 1976 claiming dissolution of partnership and rendition of partnership accounts.

4. The defendant-appellant before filing written statement and taking any other steps in the proceedings moved an application under Section 34 of the Arbitration Act to stay the proceedings in the suit on the ground that the disputes arising in the suit fall within the purview of the arbitration clause incorporated in the agreement of partnership dated July 5, 1974. The plaintiff-respondent contested the application. She pleaded that prior to the filing of the suit, a registered notice dated April 8, 1975 was issued to the defendant which was served on the defendant on April 14, 1976. She further alleged that since the defendant neither gave any reply to the notice nor he attempted to take any steps to refer the dispute to arbitration, the defendant's application deserved to be rejected. It was also mentioned that the plaintiff filed the suit after 21/2 months from the date of the notice and incurred considerable expense in instituting the suit.

5. The learned Additional District Judge dismissed the application holding that because the defendant on receipt of the notice gave no reply and drove the plaintiff to institute the suit, it cannot be said that the defendant was at the time when proceedings were commenced ready and willing to do all things necessary to the proper conduct of the arbitration. In the circumstances it was held that the defendant was not entitled to invoke the court's judicial discretion in his favour, The learned Additional District Judge, accordingly, dismissed the application. In this connection he placed reliance on the Division Bench decision of this Court in Union of India v. Thekedar Bhojraj, ILR (1960) 10 Raj 1244. Dissatisfied with the said order, the defendant has preferred this appeal.

6. At the outset it must be mentioned that the authority relied upon by the learned Additional District Judge nowhere lays down that mere silence of the defendant to reply the notice sent by the plaintiff prior to the filing of the suit, is sufficient to indicate unwillingness on the part of the defendant to resort to arbitration. On the contrary, their Lordships in that case specifically stated that 'mere silence before the commencement of the proceedings does not indicate unwillingness.' Section 34 gives a statutory right to a party to move the court for stay of proceeding after the proceedings are taken against him. The mere silence on the part of the defendant before the suit cannot deprive him of his statutory right granted under the said section. A notice by the plaintiff prior to the filing of the suit does not impose any duty on the defendant to reply to the allegations of the plaintiff. The object of the notice before the suit is to give time to the defendant to think and decide whether he would like to contest the claim of the plaintiff. I am supported in my view by the decision of the Lahore High Court in Governor General v. Simla Banking & Industrial Co., AIR 1947 Lah 215, where while considering an identical argument their Lordships observed as follows:--

'According to the language of the section, the question as to when a party to an arbitration against whom legal proceedings have been commenced is entitled to ask for stay of the proceedings has to be determined by the choice which he makes not before the proceedings are commenced but after they have been commenced. The silence of the party applying for stay or his omission to remind the party, which has started the proceedings, of his duty not to start them under

the agreement between the parties before the proceedings have been started do not, in my view, seem to be material. It is only when a suit or a proceeding has been commenced against a party that the latter can make up his mind as to whether he would apply for stay or not. If he decides to ask for stay he can do so at any time 'before filing a written statement or taking any other steps in the proceedings' and not thereafter. But during that period (i.e. after the suit or proceedings have been commenced and before a written statement has been filed which is given to him by law his choice is unfettered and remains unaffected by his silence or omission such as referred to above.'

I am therefore unable to agree with the learned Additional District Judge that the conduct of the defendant in not replying the notice issued by the plaintiff amounted to waiver and gave rise to the inference of unwillingness on the part of the defendant to resort to arbitration proceedings.

7. There is yet another aspect of the case. The plaintiff in her plaint alleged that the notice was served on the defendant on April 14, 1976, but the postal acknowledgment receipt filed by the plaintiff along with the plaint does not bear the signature of the defendant. It, therefore, cannot be said with certainty at this stage that the notice issued by the plaintiff was received by the defendant. In this view of the matter no inference of unwillingness on the part of the defendant can be drawn from non-reply to the plaintiff's notice.

8. The learned counsel for the plaintiff respondent has argued that the application of the defendant under Section 34 is liable to be dismissed for the reason that the defendant in his application did not allege that he was and is still ready and willing to do all things necessary to the proper conduct of the arbitration. In order to appreciate the above argument it is necessary to read Section 34:--

'34. Where any party 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 proceeding; 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.'

9. While interpreting the above section their Lordships in *Union of India v. Thekedar Bhojraj* (ILR (1960) 10 Raj 1244) (*supra*) observed:

'Section 34 of the Arbitration Act provides that a party to any legal proceeding may at any time before filing a written statement or taking any steps in the proceedings apply to the judicial authority before which the proceedings are pending to stay the proceedings provided he satisfies the authority concerned: (1) that there is no sufficient reason why the matter should not be referred in accordance with the Arbitration Agreement; and (2) that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary for the proper conduct of the arbitration. If the above conditions are fulfilled, the Court may make an order staying the proceedings. The power to grant or refuse stay is a matter within the judicial discretion of the authority concerned, and the discretion may be exercised in favour of a party if the requisite conditions are found to exist.'

10. Their Lordships further observed:

'The use of the past tense 'was' and the present tense 'still remains' go to indicate that both before and after the commencement of the proceedings the party applying for stay must have shown his willingness and readiness to go to arbitration and the Court should be satisfied on that point. After all the Court has to exercise its judicial discretion in the matter, and it is for the Court to be satisfied about the conduct of the defendant.'

11. In view of the above authority of the Division Bench of this Court, I have no hesitation in holding that the party who invokes Section 34 must specifically allege that he was not only at the commencement of the suit quite ready and willing to have the dispute resolved by arbitration proceedings, but that his readiness and

willingness existed throughout the period before and after the commencement of the suit. I am further of the view that the readiness of the defendant should not be a matter of implication but there should be clear, unambiguous and specific averment to that effect in the application for stay and it should be supported by an affidavit of the defendant. In the instant case there is no averment at all in the application about the readiness and willingness of the defendant either at the time of the commencement of the suit or thereafter. Equally there is no averment that the defendant would do everything necessary for the proper conduct of the arbitration proceedings. There is thus no material on the record to satisfy the court that the defendant was at the time when the proceedings were commenced and is still ready and willing to do all things necessary for the proper conduct of the arbitration. Since the requirements of Section 31 are not fulfilled in the present case, the application of the defendant deserves to be dismissed. I am supported in my view by the decision of the Madras High Court in *N.C. Padmanabhan v. S. Srinivasan*, AIR 1967 Mad 201 and also by the decision of the Bombay High Court in *Middle East Trading Co. v. N. N. Mills*, AIR 1960 Bom 292.

12. The learned counsel for the defendant invited my attention to the Division Bench decision of this Court in *Kashiram v. Netram*, 1953 Raj LW 645 wherein it has been observed as follows:--

'The next point that was urged was that the plaintiff did not state in the plaint that he was ready and willing to perform his part of the contract, and this is very necessary in a suit for specific performance of the contract. Here again, it may be noted that this technical plea was not taken in the trial court, nor has it been taken in the grounds of appeal before us. Learned counsel is raising it for the first time today. If this plea had been taken at the proper time, the plaintiff might have met it by amending the plaint and by leading evidence if necessary. Under the circumstances, we are not prepared to allow this new plea to be raised for the first time in arguments before us today.'

13. On the basis of the above authority it is argued by the learned counsel for the defendant that the application of the defendant under Section 34 is not liable to be dismissed simply because no averment was made therein as to readiness and

willingness on the part of the defendant to resolve the dispute by arbitration. According to the learned counsel, the plaintiff should not be allowed to raise this point for the first time in this court. The observations in Kashi Ram's case relate to a suit for specific performance of the contract. That case is therefore, clearly distinguishable. It may be mentioned that the order staying proceedings under Section 34 can only be passed by the court if the requirements of the section are fully satisfied. As already observed above since one of the requirements of the section viz. that the applicant was at the time when these proceedings were commenced and still remains ready and willing to do all things necessary for the proper conduct of the arbitration, is not satisfied in the instant case, no order for the stay of the suit proceedings can be passed, readiness and willingness to do all things necessary to the proper conduct of arbitration cannot be presumed from the mere fact that the defendant has moved the application for stay.

14. In the result, I uphold the order of the learned Additional District Judge; of course on a different ground and dismiss the appeal. Having regard to the circumstances of the case, the parties are left to bear their own costs in this appeal.