

APPEAL FROM ORIGINAL CIVIL.

Before Mookerjee and Fletcher JJ.

JOYLALL & CO.

v.

GOPIRAM BHOTICA.*

1920

Jan. 13.

Arbitration—Application to stay legal proceedings commenced by party to submission—Order refusing to stay—“Step in the proceedings”—Appeal, right of—Judgment—Arbitration Act (IX of 1899), s. 19—Letters Patent, 1865, cl. 12.

The decision of the Court that the applicant was not in the circumstances of the case competent to avail himself of the benefit of the section by reason of steps taken by him in the proceedings in the suit determined that the controversy between the parties must be decided by that Court and not by arbitration and was a judgment within the meaning of the Letters Patent and as such was appealable under clause 15.

The Justices of the Peace for Calcutta v. The Oriental Gas Company, Limited (1), Hadjee Ismail Hadjee Hubteeb v. Hadjee Mahomet Hadjee Joosub (2), Mathura Sundari Dasi v. Ilaran Chandra Saha (3) and Budhu Lal v. Chattu Gope (4) referred to.

Section 19 of the Arbitration Act contemplates the institution of a suit notwithstanding an agreement to refer to arbitration and authorises the defendant in such suit to apply for stay before he has filed his written statement or taken any other step in the suit. Such an application for stay does not constitute taking a step in the proceedings within the meaning of section 19 so as to operate as a bar.

An appeal by the defendant on certain grounds taken in his memorandum of appeal, against an order restraining him from proceeding with the arbitration does not constitute the taking of “a step in the proceedings” within the meaning of section 19. Such grounds in order to constitute a bar must be taken in the suit.

* Appeal from Original Civil No. 112 of 1919 in Suit No. 1623 of 1918.

(1) (1872) 8 B. L. R. 433.

(3) (1915) I. L. R. 43 Calc. 857.

(2) (1874) 13 B. L. R. 91.

(4) (1916) I. L. R. 44 Calc. 804.

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Adams v. Catley (1) and *Ives & Barker v. Willans* (2) referred to.

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APPEAL by Joylall & Co., the defendants, from the judgment of Greaves J.

By a contract dated the 6th December, 1917, Joylall & Co. sold on behalf of Gopiram Bhotica, the plaintiff, for their order and on their account to their principal certain goods specified in the contract which, *inter alia*, contained a clause providing that any dispute arising on or out of the contract should be referred to arbitration. Subsequently, disputes arose with regard to the aforesaid contract and Joylall & Co. in November, 1918, under the terms of the arbitration clause referred the matter to the arbitration of the Bengal Chamber of Commerce. On the 18th December, 1918, before any arbitration had taken place, Gopiram Bhotica instituted a suit against Joylall & Co. asking for a declaration that the defendants were not entitled to proceed with the arbitration proceedings or to claim any damages under the aforesaid contract and seeking to restrain them from proceeding with the arbitration. On the 4th June, 1919, by the order of Mr. Justice Chaudhuri, Joylall & Co. were restrained from proceeding with the arbitration. On the 21st June, 1919, Joylall & Co. filed an appeal against that order and on the 2nd December, 1919, the appeal was allowed and the order for interlocutory injunction was set aside. On the same day on which the appeal was heard the plaintiff applied for the transfer of his suit against Joylall & Co. to the list of undefended causes or in the alternative for a direction on the defendants to file their written statement within a limited period. On the 4th December, 1919, the defendants applied for a stay of proceedings under section 19 of the Indian Arbitration Act. After hearing both the applications

(1) (1892) 66 L. T. R. 687.

(2) [1894] 2 Ch. 478.

Mr. Justice Greaves delivered judgment the material portion of which was as follows:—

“The real argument had turned upon the question whether the defendants by fighting the application for an injunction and by preferring the appeal have taken a step in the proceedings within the meaning of section 19 of the Indian Arbitration Act, so that they are now precluded from getting a stay of the suit. In that connection it is necessary to refer shortly to the grounds of appeal that were preferred to the Appeal Court. I need not refer to all of them. Ground (3) is that the Judge ought to have found that the name of the principal of the contract remained undisclosed to the plaintiff up to the last moment; (4) that the learned Judge ought to have held that the defendant was entitled to claim difference from the plaintiff; and (9) that the learned Judge ought to have directed the respondent to deposit in this Court or to give security for the full amount claimed by the defendant appellants. If the defendant had merely confined himself to dispute the grant of the injunction and when such injunction was granted had merely appealed against that injunction, I should have myself felt considerable doubt whether he had taken a step in the proceedings within the meaning of section 19 of the Indian Arbitration Act. It is not necessary for me to decide that, as it is not really a matter that is before me in the view I take of the grounds of appeal. I think, having regard to the grounds of appeal that were preferred, which counsel for Joylall & Co. states are merely argumentative and not substantive, that Joylall has taken a step in the proceedings within the meaning of the decided cases, I need only refer to one of them, that is, the case of *Adams v. Catley* (1). There it was held that where a party to a submission, against whom legal proceedings had been commenced by another party to a submission, applies to the Court for a stay of proceedings until security for his costs was given that he has taken a step in the proceedings which disentitled him to apply afterwards under section 4 of the Arbitration Act, which is the corresponding section to our section 19. In view of that decision and in view of the ground (9) of the grounds of appeal I think the defendant has taken step in the proceedings. The result is that so far as his summons is concerned asking to stay the arbitration proceedings I must dismiss that application and dismiss it with costs and in passing I should say that I think his proper course would have been to have made this application immediately after the institution of the suit at the same time that he was resisting the injunction that was sought on behalf of the plaintiff. Having refused the stay of the suit, it follows that I must accede to the application made to me on the motion. I am not prepared

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to transfer the suit to the undefended list, but I think the proper course will be to order the defendants to file their written statement within one week from date and in default of the written statement being filed within that time, the suit will be transferred to the undefended list for hearing."

The defendants, thereupon, appealed.

Mr. S. R. Das (with him *Mr. P. K. Chatterjee*), for the appellants, submitted that the appellants had taken no steps, in the proceedings, such as would preclude them within the meaning of section 19 of the Arbitration Act and that they were entitled to apply to the Court for stay of proceedings under that section, and referred to *Ives & Barker v. Willans* (1), to the same case on appeal (2) and to *Adams v. Catley* (3).

Mr. H. D. Bose (with him *Mr. S. M. Bose*), for the respondent. No appeal lay against this order as it was not an appealable order within the meaning of clause 15 of the Letters Patent.

With regard to the appellants' contention that no steps had been taken in the proceeding, as a matter of fact steps had been taken by them, though not on the grounds put forward by Mr. Justice Greaves. The refusal to stay proceedings was justified. The appellants ought not to have relied on the proceedings before Mr. Justice Chaudhuri. They ought to have applied to the Court for a Rule immediately after the institution of the suit. This they did not do. The appeal in fact was a step in the proceeding.

MOOKERJEE J. This is an appeal against an order dismissing an application for a stay of proceedings under section 19 of the Indian Arbitration Act.

The facts as set out in the judgment of the Court below are shortly as follows. On the 6th December 1917, a contract was entered into whereby the

(1) [1894] 1 Ch. 68.

(3) (1892) 66 L. T. R. 687.

(2) [1894] 2 Ch. 478.

defendants Joylall & Co. sold on behalf of Gopiram Bhotica, the plaintiff, for their order and on their account to their principal certain goods which are set out in the document. The contract contains an arbitration clause providing that any dispute whatsoever arising on or out of the contract shall be referred to arbitration. Disputes arose with regard to the contract and thereupon the brokers, Joylall & Co., on the 8th November, 1918, referred the matters in dispute to arbitration of the Bengal Chamber of Commerce. Before any arbitration had taken place, on the 8th December, 1918, the plaintiffs instituted the present suit, asking for a declaration that there was no contract and seeking to restrain the defendants from proceeding with the arbitration. A Rule was issued, for the grant of an interlocutory injunction, was heard in December, 1918, and judgment was reserved; but it was not till the 4th June, 1919, that Mr. Justice Chaudhuri restrained the defendants from proceeding with the arbitration. An appeal was presented by the defendants against this order of Mr. Justice Chaudhuri; that appeal was allowed, on the 2nd December, 1919, and as a result, the interlocutory injunction was dissolved: *Joylal & Co. v. Gopiram Bhotica* (1). Thereupon, the present application was made on the 4th December, 1919, for stay of proceedings under section 19 of the Indian Arbitration Act. Mr. Justice Greaves has held that the application must be refused on the ground that the applicants had taken steps in the proceedings within the meaning of that section. In our opinion, this view cannot be supported.

Section 19 of the Indian Arbitration Act is in these terms: "Where any party to a submission to which this Act applies, or any person claiming under him,

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(1) (1919) 31 C. L. J. 166.

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“commences any legal proceedings against any other
 “party to the submission, 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 after appearance and before filing a
 “written statement or taking any other steps in the pro-
 “ceedings, apply to the Court to stay the proceedings;
 “and the Court, if satisfied that there is no sufficient
 “reason why the matter should not be referred in
 “accordance with the submission and that the appli-
 “cant 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, may make an order staying the
 “proceedings.”

A preliminary objection has been taken that the order made by Mr. Justice Greaves refusing to stay proceedings, under this section, is not a ‘judgment’ within the meaning of clause 15 of the Letters Patent and is not appealable. In support of this argument, reliance has been placed upon a decision of this Court in *The Justices of the Peace for Calcutta v. The Oriental Gas Company, Limited* (1). It is not disputed that the case is not precisely in point: there the appeal was preferred against an order issuing a *mandamus*, and it was held by the Court of Appeal that the order was not a ‘judgment,’ inasmuch as it did not determine the merits of any question between the parties. Sir Richard Couch C. J. defined the term ‘judgment’ as used in clause 15 to mean a decision which affects the merits of the question between the parties by determining some right or liability. He then proceeded to point out that there may be an obvious difference between an order for the admission of a plaint and an order for its rejection.

(1) (1872) 8 B. L. R. 433.

The former determines nothing, but is merely the first step towards putting the case in a shape for determination: the latter determines finally, so far as the Court which makes the order is concerned, that the suit, as brought, will not lie. The decision, therefore, is a judgment in the proper sense of the term. The definition is further exemplified in the judgment of Sir Richard Couch in the case of *Hadjee Ismail Hadjee Hubbeeb v. Hadjee Mahomed Hadjee Joosub* (1), where he held that an order determining that the plaintiff was not entitled to maintain his suit on the Original Side of this Court was a judgment within the meaning of the Letters Patent. He observed that the decision was of great importance to the parties: it was not a mere formal order or an order merely regulating the procedure in the suit, but one that had the effect of giving a jurisdiction to the Court which it otherwise would not have, and it might fairly be said to determine some right between them, *viz.*, the right to sue in a particular Court, and to compel the defendants, who were not within its local jurisdiction to come in and defend the suit, or if they did not, to make them liable to have a decree passed against them in their absence. The test formulated by Sir Richard Couch has been repeatedly applied by this Court in principle in later cases: *Mathura Sundari Dasi v. Haran Chandra Saha* (2) and *Budhu Lal v. Chattu Gope* (3). In the case before us, section 19 of the Indian Arbitration Act entitles the applicant to apply under that section to the Court to stay legal proceedings. Mr. Justice Greaves has held by his order that the applicant was not, in the circumstances of this case, competent to avail himself of the benefit of that section by reason of steps taken by him in the

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(1) (1874) 13 B. L. R. 91.

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proceedings in the suit. This decision virtually determines that the controversy between the parties must be decided by this Court and not by arbitration. In our opinion, the determination is a judgment within the meaning of the Letters Patent, and as such is appealable under clause 15.

The question next arises, whether the view taken by Mr. Justice Greaves can be supported on the merits. Mr. Bose has expressed his inability to support the order on the ground mentioned in the judgment. The learned Judge has held in the first place that the appeal against the order of Mr Justice Chaudhuri did not constitute "taking a step in the proceedings," within the meaning of section 19. This view is clearly right. Section 19 contemplates the institution of a suit, notwithstanding an agreement to refer to arbitration, and authorises the defendant in such suit to apply for stay, before he has filed his written statement or taken any other step in the suit. It is difficult to appreciate how this can stand in the way of the defendant, in the circumstances of the present case. If a contrary view were taken, the result would follow that the defendant would be deprived of his right to appeal against the adverse order made in the proceedings instituted by the respondent himself. The learned Judge, however, has held in the second place, and in support of his view has referred to the decision in *Adams v. Catley*(1), that certain grounds taken in the memorandum of appeal presented by the defendants to this Court when they appealed against the order of Mr. Justice Chaudhuri constituted the taking of a step in the proceedings within the meaning of section 19. Those grounds have been placed before us, and Mr. Bose has frankly conceded that he cannot explain how the

(1) (1892) 66 L. T. R. 687.

the grounds can be treated as "taking a step," which, to operate as a bar, must, as pointed out already, be taken in the suit. The decision mentioned by the learned Judge clearly does not support his view. In that case, a party to a submission against whom legal proceedings had been commenced by another party to the submission applied to the Court for stay of proceedings until security for costs was given, and it was held that he had taken steps in the proceedings so as to disentitle him to apply under section 4 of the Arbitration Act of 1889 to have the proceedings in the action stayed. There the defendant had applied to the Court to stay the proceedings until security for costs was given, and this implied that if such security was given, the action might proceed. Mr. Justice Mathew said that the defendant had done two things which were objected to as being "steps in the proceedings" so as to disentitle him to apply under section 4 of the Arbitration Act. The first was that he had applied for and obtained a statement of claim. It was said that this was really a part of the appearance, as indicated in *Ives & Barker v. Willans* (1). However that might be, it was quite clear that the other thing which he had done, *viz.*, applied for a stay until security for costs had been given, was a step in the proceedings within the section. By asking for security, the defendant had shown his willingness to proceed in the action if that security were given and showed also that he was not complying with the condition in the section that he should be ready and willing to go to arbitration. Clearly those reasons have no application to the circumstances of this case.

I see no escape from the conclusion that the order made by Mr. Justice Greaves cannot be supported, and that this appeal must be allowed with costs in

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both Courts, with the result that the application under section 19 is granted.

FLETCHER J. I am of the same opinion.

O. M.

Appeal allowed.

Attorneys for the appellants : *Mitter & Bural.*

Attorney for the respondent : *N. C. Bose.*

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In re SHRAGERS, LTD (IN LIQUIDATION).*

Feb. 4.

Company—Compulsory winding up—Indian Companies Act (VII of 1913)—Dissolution—Release of liquidators—Disposal of books and papers—Practice—Form of order.

Form of order under the Indian Companies Act, 1913, for the dissolution of a Company in compulsory liquidation, undistributed assets remaining in the hands of the Liquidator.

THIS was an application under the Indian Companies Act, 1913, for an order for the dissolution of a company in respect of which a compulsory winding up order had been made by the Court and for certain directions as to the remuneration and release of the liquidators and for the disposal of the balance of money standing to the credit of the Liquidation in the Bank and of the books and papers of the Company and of the costs of the application.

The material facts appear from the following petition of Edward William Viney of 6, Hastings Street,

* Ordinary Original Civil Jurisdiction.