

ORIGINAL CIVIL.

Before Lord-Williams J.

DWARKA DAS & CO.

v.

CHAIN ROOP SINGHEE.*

1936

Dec. 17.

Arbitration—Arbitration clause in contract—Suit for damages—Adjournment (by consent without prejudice) of plaintiff's summons for written statement after defendant's application for stay, if "step" in proceedings—Stay of suit—Indian Arbitration Act (IX of 1899), s. 19.

Where, in a suit for damages for breach of a contract containing an arbitration clause, the defendant, after serving an application for stay of that suit under the Indian Arbitration Act of 1899 but before his application was heard, got the hearing of the plaintiffs' summons to compel the defendant to file his written statement adjourned by consent without prejudice,

held that the obtaining of such adjournment did not, in the circumstances, amount to taking a step in the proceedings within the meaning of s. 19 of the Act.

Sarat Kumar Roy v. Corporation of Calcutta (1) distinguished.

Ives & Barker v. Willans (2) referred to.

MOTION.

Application by the defendant to stay suit under s. 19 of the Indian Arbitration Act of 1899.

The material facts and the arguments appear in the judgment.

S. R. Das for the defendant applicant.

K. P. Khaitan for the plaintiffs.

LORD-WILLIAMS J. This is an application for stay under s. 19 of the Indian Arbitration Act.

*Application in Original Suit No. 1553 of 1936.

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It is opposed on three grounds, the first being that the applicant took a step in the proceedings within the meaning of the section prior to making this application for stay; secondly, that he was not ready and willing to go to arbitration, and thirdly, that the discretion of the Court should be exercised in refusing the application, because the matter in issue is eminently suitable for decision by the Court and because there are a number of similar suits by the plaintiffs against different defendants raising the same or similar issues.

With regard to the last point, I think that the points in issue would have been better tried by arbitrators conversant with the custom of the trade. But, unfortunately, in view of the fact that there are a number of different defendants, there are no means, except by consent, of ensuring that all the cases will be referred to arbitration.

With regard to the second point, I am satisfied that the defendant has always been ready and willing to have the matter referred. So early as January 20, 1936, a letter was written on his behalf to the plaintiffs' solicitors disputing their claim and saying that in terms of the contract the matter must be referred to arbitration, that a suit could not be filed, and that he was agreeable to have the dispute so decided.

With regard to the first point, it appears that the applicant served his application for stay upon the plaintiff on the 18th November, and on the 19th his application with the necessary papers was filed in Court. On the 19th the plaintiffs took out a summons to compel the defendant to file the written statement, it being already considerably out of time. This was down for hearing on the 21st, and as counsel for the plaintiffs has admitted that it was adjourned by consent and the defendant has shown in his affidavit that this was done without prejudice to his present

application, I am satisfied that it was so adjourned by consent and without prejudice to the applicant's pending application for stay of the suit. The position was explained to the Master and the adjournment granted.

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These being the circumstances, I am satisfied that the applicant did not take any step in the suit prior to making his application for stay.

The only case which has caused me some uncertainty upon the point is that of *Sarat Kumar Roy v. Corporation of Calcutta* (1). In that case the Calcutta Corporation applied for further time to file their written statement and obtained a fortnight's time. Subsequently they applied to the Court for a reference to arbitration and stay of proceedings. It was held that such an application for time was a step in the proceedings within the meaning of s. 19 of the Arbitration Act.

Woodroffe J., referring to the circumstances of that case, stated that the applicant had been in a dilemma, for, if he had filed his written statement, an objection would have been taken under the section; if, on the other hand, he had not, and had not taken further time to do so, then, in the event of the failure of his application for stay, the case would have been transferred to the undefended list. The learned Judge said further that—

These difficulties might have been avoided by a prompt application for stay of proceedings before the expiry of the period allowed for filing the written statement. While also it is true that the immediate object was to procure a respite, the ultimate object was (in the event of the application for stay being refused) to file a defence. What was done therefore was a step in the proceedings and was none the less so because in a particular eventuality it would not have been necessary for the party applying to avail himself of the liberty given to file a written statement after the usual time allowed for that purpose.

(1) (1907) I. L. R. 34 Cal. 443, 448.

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It is to be observed that in that case the applicant had taken out a summons for extension of time to file his written statement, which was obviously a step in the proceedings within the meaning of the section. For this reason that case is distinguishable from the present case.

In *Ives & Barker v. Willans* (1), Lindley L. J. said :—

The authorities show 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, nor the writing of letters, but the taking of some step, such as taking out a summons or something of that kind.

In the present case the summons was taken out by the plaintiffs and no such step was taken by the defendant. All that he did was to tell the Master what the position was and ask him to adjourn the hearing of the plaintiffs' summons. Eventually this was done by consent and without prejudice, as I have already stated.

In these circumstances the application must be allowed with costs, and the proceedings must be stayed.

Suit stayed.

Attorneys for defendant : *P. D. Himatsingka & Co.*

Attorneys for plaintiffs : *Khaitan & Co.*

A. K. D.

(1) [1894] 2 Ch. 478, 484.