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the claimant from pleading adverse possession at the date of the order in a suit brought to eject him. Since the date of the order, the possession has been insufficient to establish a title.

The decision of the District Judge is right and the appeal must be dismissed with costs.

ODGERS, J.

ODGERS, J.—I agree.

K.R.

APPELLATE CIVIL.

Before Sir Walter Salis Schwabe, Kt., K.C., Chief Justice, and Mr. Justice Krishnan.

1923, August 20.

ANGLO-PERSIAN OIL COMPANY, LIMITED, MADRAS (DEFENDANTS), APPELLANTS,

v.

P. S. PANCHAPAKESA AIYAR (PLAINTIFF), RESPONDENT.*

Sec. 19—Indian Arbitration Act (IX of 1899)—Stay of legal proceedings—Considerations for Court before staying or refusing to stay—Discretion of Court and onus of proof.

The mere fact that the defendant who was threatened with legal proceedings for breach of a contract containing an arbitration clause did not, before the institution of the suit, insist on the arbitration clause but relied on it for the first time only in his written statement is no ground for not granting his application for stay of proceedings under section 20 of the Arbitration Act (IX of 1899). Under the section, the onus is on the plaintiff to show why the application for stay should not be granted and why the matter should not be referred to arbitration. It is a discretionary matter with the Court to refuse to stay. Stay is generally refused where there are serious allegations of fraud or a novel or difficult point of law likely to be considered by the arbitrators fit to be referred to the Court. If the matter is a commercial one fit for decision of commercial men as arbitrators,

* Original Side Appeal No. 59 of 1923.

the Court will stay the suit and send the matter for the arbitrators' decision as agreed upon. If the defendant's conduct has not actually estopped him from making the application for stay but his attitude has misled the plaintiff it might be a good ground for punishing him in costs.

Per KRISHNAN, J.—The fact that the plaintiff has paid a heavy Court fee is no ground for not granting the stay.

APPEAL from the judgment of KUMARASWAMI SASTRI, J., passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court on the Judge's summons filed on 6th April 1923 praying for an order directing stay of proceedings in Civil Suit No. 88 of 1923.

The facts appear from the judgment.

The defendant preferred this appeal.

V. Mockett for appellant.—The grounds on which the learned Judge has refused to stay are unsustainable in law. See section 19 of the Arbitration Act corresponding to section 4 of the English Arbitration Act. The intention to rely on the arbitration clause need not be disclosed before the suit is launched. It may be stated for the first time in the written statement.

S. Duraiswami Ayyar (with *P. S. Panchapagesa Ayyar*) for respondent.—Under section 19 the defendant has to show that he was always ready to refer to arbitration according to the contract. An arbitration clause does not by itself oust the jurisdiction of the Court if a dispute has arisen between the parties. After the institution of the suit the arbitrators are *functus officio*. Granting stay is a matter of discretion with the original and appellate Courts; no good reason has been shown by the defendants for stay; he referred to Russell on Arbitration, page 103, and *Bristol Corporation* v. *John Arid & Co.*(1). Stay should not be granted when a question of law is involved as in this case. Here the question

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(1) [1913] A.C., 241.

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is one of construction of a document, which is a question of law.

JUDGMENT.

SCHWABE, C.J.—This is an interlocutory appeal from the order of KUMARASWAMI SASTRI, J., refusing to stay an action on an application made under the Arbitration Act, the suit being on a contract which contains an arbitration clause referring any question or dispute which may arise under the contract to two European merchants resident in Madras and in the event of their disagreeing to an umpire chosen by the arbitrators before commencing the reference.

The view expressed by the learned Judge in his judgment is that the defendants had been threatened with legal proceedings for a considerable time and had not then called the attention of the plaintiff to the arbitration clause or said that they were willing to refer to arbitration and objected to the litigation, and that it is a ground for refusing to stay on an application on the part of the defendants after the action was brought. I do not agree. There is no authority in support of the proposition which has been adduced before us and I am satisfied that the reason is that there is no such authority and I can see no ground on principle for so holding. The law provides that if there is a submission for a reference to arbitration, and a party chooses to bring his suit, the other party can then decide whether or not he will remain before the Court, which he indicates by taking some step in the action, or whether he will avail himself of his contractual rights to have the dispute referred to arbitration. If he had misled the plaintiff in some way into bringing the suit, it might be a good ground for punishing him in costs and if the misleading had been definite enough to amount to a particular statement that he would not apply to have the matter

referred to arbitration and would submit to the jurisdiction of the Court, it might be a good ground for punishing him in costs, and it might even amount to an estoppel, so as to prevent him from making an application thereafter. But I can see nothing of the kind in this case.

The question then remains as to whether or not this is a case where the discretion of the Court under section 19 of the Arbitration Act should be exercised in favour of the defendants by referring to arbitration or whether this is a case which should be kept before the Court. In that matter the learned Judge has not exercised any discretion; but on appeal, as we are disagreeing with the grounds which he has given, it is open to the unsuccessful party below to ask us to exercise the discretion which he could have asked the learned Judge to exercise there. We, therefore, consider it for ourselves. As I understand the principle in England and here, the Court, where there is a submission to arbitration, in order to refuse to stay the proceedings must be satisfied that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the submission, that is, really saying in other words that the *onus* is on the party resisting the application for stay to show some sufficient reason why in the particular case the parties should be relieved from the obligation which they have contracted, namely, that their case should go before arbitrators selected by them and not before the ordinary tribunals of the land. There are certain well-defined instances where a Court almost invariably refuses to stay, such as a case where there are serious allegations of fraud. There are cases where the point involved is a novel or difficult point of law which the Court is satisfied is bound to come back by way of a special case to it to decide or where it comes

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to the conclusion that the sending of the case to the arbitrators will involve a waste of time and expense.

Having considered this case, I am not satisfied that this is a case which it is not proper to refer to arbitration. From several aspects of the case, it is clear that evidence will have to be gone into unless the arbitrators are persons who have knowledge of their own so as to make it unnecessary to have the whole evidence before them. The actual point of construction as I understand it is not a point which seems in any way beyond the powers of a commercial man to grapple with. If, at any time, there is a really difficult point of law in which the opinion of the Court is required, there is ample provision in the Arbitration Act for taking the opinion of the Court.

In these circumstances, this order is wrong and the appeal must be allowed with costs here and the action stayed. The costs of the application before the learned Judge will follow the event of the arbitration. (Certified for counsel in the motion before the learned Judge.)

KRISHNAN, J.

KRISHNAN, J.—This case is governed by section 19 of the Indian Arbitration Act, 1899 Under that section the Court should refer in accordance with the arbitration clause in the contract a case like this to arbitration unless it is satisfied that there is sufficient reason why it should not do so. The section puts the burden upon the person who seeks to get the stay refused to show good reasons for taking such action. The learned Judge in his judgment has given two reasons for refusing stay in this matter and for going on with the suit in Court. He says that there is no sufficient indication in the correspondence, nor even in the replies to the lawyer's notices threatening legal proceedings, that the defendants were ready and willing to have the matter arbitrated upon. Apparently this refers to the last clause of section 19 which lays down as one of the

conditions for the exercise of the discretion under the section that the applicant was at the time when the proceedings were commenced and thereafter, ready and willing to do all things necessary for the proper conduct of the arbitration. The mere fact that in the replies to letters sent by the opposite side threatening legal proceedings the defendant company did not write back to say "No, you cannot take legal proceedings against me" is no ground for holding that they were not ready and willing to submit to arbitration if it became necessary to do so. The plaintiff in this case never asked the defendant to nominate his arbitrators or do anything in connexion with the arbitration in this case. If he had done so and if the defendant had refused to agree, it might well be said that he was not ready and willing to do all things necessary for the proper conduct of the arbitration. I am unable to accept the learned Judge's view, that in this case there is any indication either in the correspondence or in the replies to the lawyer's notices that the defendant was not ready and willing to have an arbitration.

The other ground taken by the learned Judge is that already a heavy stamp fee has been paid for the case and that it would be a waste of money if the case is sent to arbitrators. That is a matter which the defendant could not have helped. If the plaintiff knowing full well that he was bound by the arbitration clause rushed into Court and spent money in court fee, that could not in any way affect the defendant's right to apply for stay under section 19, for all that he has to do under the section is to apply to the Court before filing his written statement to stay the suit. The expense of paying court fee would have been incurred already in every case; it cannot well be treated as a good ground for refusing to stay the case.

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KRISHNAN, J.

These are the two grounds upon which the learned Judge has based his order refusing the stay. The respondent before us has taken another ground as well in support of the order of the learned Judge. He contends that the question which has to be dealt with in the present dispute being the construction of a written contract between the parties, it is a matter more fit for the Court to dispose of, than for arbitrators and that therefore the Court should retain the case on its own file and not refer it to the arbitrators. As regards that point the learned Chief Justice has fully dealt with it and I need hardly go over the same grounds as I agree with him in what he said on the point. The learned Judge has not put the case on that ground at all so that we cannot say that he exercised his discretion on such a ground as that. We are, therefore, free to exercise our own discretion on this point and in exercising that discretion I am satisfied that this is a fit case for staying the action and for sending it to arbitrators as the construction of the document as well as the facts to be found in the case seem to be more fit for two European merchants who are familiar with oil contracts to deal with, than for the Court.

In these circumstances I agree with the learned Chief Justice that this appeal must be allowed and that the stay applied for should be ordered. I agree also as to the order about costs proposed by the learned Chief Justice.

N.R.