

Kunta Malla Reddy Vs. Soma Srinivas Reddy and ors.

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Court : Andhra Pradesh

Decided On : Jun-07-1977

Reported in : AIR1978AP289

Judge : Lakshmaiah, J.

Acts : [Arbitration Act, 1940](#) - Sections 34 and 39; [Code of Civil Procedure \(CPC\), 1908](#) - Sections 115

Appeal No. : A.A.O. No. 488 of 1977

Appellant : Kunta Malla Reddy

Respondent : Soma Srinivas Reddy and ors.

Advocate for Def. : A. Anantha Reddy and ;M. Jeevan Reddy, Advs.

Advocate for Pet/Ap. : Upendralal Waghray and ;M. Rama Rao, Advs.

Judgement :

1. This revision by the 1st defendant under S. 115 of the Civil P. C. is directed against an order dated 12th March 1976 in I. A. 1012/75 in O. S. 387/75 on the file of the 2nd Addl. Judge, City Civil Court. Hyderabad dismissing the application filed by the petitioner under S. 34 of the Arbitration Act. 1940 (referred to hereinafter merely as the Act).

2. At the very outset a doubt was entertained whether it is an appeal or a revision that has to be filed against the impugned order rejecting the application filed under S. 34 of Act.

3. Section 34 of the Act deals with the power to stay legal proceedings where there is an arbitration agreement. Section 39 of the Act provides that an appeal shall lie from the various orders enumerated therein passed under that Act. Under Cl. (5) of sub-sec (1) of the said S. 39 of the Act an appeal lies from the order granting stay or refusing to stay the legal proceedings where there is an arbitration agreement.

4. The order impugned is one passed in an application filed by the petitioner under S. 34 of the Act. An appeal under S. 39 of the Act lies against such order refusing to stay under S. 34 of the Act the legal proceedings where there is an arbitration agreement. Therefore it is not a revision under S. 115, C. P. C. that is entertainable against the impugned order but it is an appeal under S. 39 of the Act and therefore an appeal is maintainable against the impugned order. That propositional position is not disputed by the learned counsel appearing on the other side. We shall therefore treat this

revision petition as an appeal under S. 39 of the Act and proceed.

5. The respondent No. 1 the plaintiff in this case filed the suit O. S. 387/75 for accounts of the dissolved partnership firm viz., The Janata Rice Mill. The partnership deed dated Jan. 9, 1964 contains a C. (11) pertaining to arbitration's which reads thus :

'In case of any dispute arising out of the interpretation of any clause or clauses in these presents, the same shall be referred to an arbitrator or arbitrators as chosen by the aggrieved partners and the Arbitration Act in force in the State of Andhra Pradesh with all the relevant amendments from time to time shall be applicable to the deed of partnership.'

6. Along with the plaint, the 1st respondent-plaintiff filed I. A. 670/75 seeking a temporary injunction restraining the petitioner and other defendants from carrying on the rice milling business in the premises of the said Janata Rice Mill. An ex parte interim injunction was issued on August 11, 1975 and the matter was posted to Sept. 15, 1975 for the arguments of the defendants. This petitioner and defendant 2 filed I. A. 675/75 on Aug., 13, 1975 seeking the vacation of the ex parte interim injunction granted on 11th August 1975. The petitioner filed a counter affidavit in support of that application for vacating the interim injunction. The Court below after hearing both sides passed an order on August 26, 1975 dismissing I. A. 670/75 and the interim injunction was vacated.

7. The 1st respondent filed another application I. A. 745/75 on Sept. 4, 1975 under O. 40, R.1, C. P. C. seeking the appointment of a Receiver in order to complete the winding up proceedings of the dissolved partnership firm. That application also was opposed by the petitioner who filed a counter affidavit opposing the same. That application I. A. 745/75 also was dismissed by the court below on 18-10-1975.

8. The petitioner filed I. A. 1012/75 under S. 34 of the Act requesting the court below to stay the suit till the matter was referred to arbitrators as contemplated under Cl. 11 of the partnership agreement. The court below dismissed that application on March 12, 1976. The present appeal under S. 39 of the Act is filed by the 1st defendant against that decision of the court below.

9. Sri Waghrey the learned counsel appearing for the appellant submitted that the appellant as the 1st defendant did not file any written statement nor he took any other steps in the proceedings and as such he is entitled to file the application under S. 34 of the Act for the stay of the suit.

10. Sri Anantha Reddy the learned counsel appearing for the respondents on the other hand contended that the matter was adjourned before the court below from time to time in order to enable the defendants including the appellant herein to file a written statement without being objected to and that conduct on the part of the appellant constitutes on the part of the appellant constitutes taking a step in the proceedings. The learned counsel further contended that the appellant's filing counter affidavit in the application filed by the 1st respondent seeking interim injunction as well as the appointment a Receiver constitutes taking of steps by the 1st defendant in the proceedings so as to disentitle him from invoking S. 34 of the Act. It was lastly contended by the learned counsel that the matter that was agreed to be referred to having regard to the language employed in Cl. 11 of the partnership deed

has nothing to do with the present suit giving rise the above appeal and as such for that reason also the application under S. 34 of the Act by the 1st defendant is not maintainable in law and there is nothing to show that the discretion exercised by the court below while refusing the application of the appellant is in any way arbitrary or capricious warranting interference by this court.

11. The controversy in this appeal remains centred around the interpretation of S. 34 of the Act and it may not be out of place to refer to S. 34 of the Act and S. 9 of the Civil P. C. in this connection.

12. Section 34 of the Act reads thus:----

'Where any party to an arbitration agreement or any person claiming under him commence 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.'

Section 9 C. P. C. reads as follows:----

'The courts shall (subject to the provision herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.'

13. Section 34 of the Act has been interpreted authoritatively on more than one occasion by the Supreme Court. Dua. J. interpreting S. 34 of the Act observed thus in State of U. P. v. Janki Saran. AIR 1973 SC at p. 2075.

'The legal position with respect to the scope and meaning of S. 34 of the Arbitration Act admits of little doubt, the language of this section being quite plain. When a party to an arbitration agreement commences any legal proceedings against any other party to the said agreement with respect to the subject-matter thereof, then the other party is entitled to ask for such proceedings to be stayed so as to enable the arbitration agreement to be carried out. It is, however, to be clearly understood that the mere existence of an arbitration clause in an agreement does not by itself operate as a bar to a suit in the Court. It does not by itself impose any obligation on the court to stay the suit or to give any opportunity to the defendant to consider the question of enforcing the arbitration agreement. The right to institute a suit in some court is conferred, on a person having a grievance of a civil nature, under the general law. It is a fundamental principle of law that where there is a right there is a remedy. Sec. 9 of the Civil P. C. confers this general right of suit on aggrieved person except where the cognizance of the suit is barred either expressly or impliedly. A party seeking to curtail this general right of suit has to discharge the onus of establishing his right to do so and the law curtailing such general right has to be strictly complied with. To enable a defendant to obtain an order staying the suit, apart from other conditions mentioned in Section 34 of the Arbitration Act, he is required to present his

application praying for stay before filing his written statement or taking any other step in the suit proceedings. In the present case the written statement was indisputably not filed before the application for stay was presented. The question is whether any other step was taken in the proceeding as contemplated by Sec. 34 and it is this point with which we are directly concerned in the present case. Taking other steps in the suit proceedings connotes the idea of doing something in aid of the progress of the suit or submitting to jurisdiction of the court for the purpose of adjudication of the merits of the controversy in the suit.'

14. In the case before the Supreme Court, a suit was instituted against the State of U. P. through the Collector, Bijnor as the 1st defendant and the Divisional Forest Officer, Bijnor as the 2nd defendant seeking the recovery of a certain amount by way of damages for breach of a contract. Summons in the suit issued to the State Government was served on the District Govt. Counsel and on Sept. 22, 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 the written statement. The activity with that formal application by requesting for one month's time for filing of a written statement was characterised by the Supreme Court as 'taking a step in the proceedings' within the meaning of that expression as occurring in Section 34 of the Act.

15. Considering the effect of the impact of contract containing an arbitration clause on the discretion conferred on the court under S. 34 of the Act, Justice Ramaswami speaking for the Supreme Court in U. P. Co-operative Federation V. Sunder Bros. Delhi, : AIR1967SC249 of the report thus:

'It is manifest that the strict principle of sanctity of a contract is subject to the discretion of the court under S. 34 of the Indian Arbitration Act, for, there must be read in every such agreement an implied term or condition that it would be enforceable only if the court having due regard to the other surrounding circumstances, things fit in its discretion to enforce it.'

16. Proceeding further the learned Judge explicated the inherent content of the concept of discretion contemplated by S. 34 of the Act thus in para. 8:

'It is well established that where the discretion vested in the court under S. 34 of the Arbitration Act has been exercised by the lower Court the appellate Court should be slow to interfere with the exercise of that discretion. In dealing with the matter raised before it at the appellate stage the appellate court would normally not be justified in interfering with the exercise of the discretion under appeal solely on the ground that if it had considered the matter at the trial stage it may have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. As is often said, it is ordinarily not open to the appellate court to substitute its own exercise of discretion for that of the trial judge; but if it appeal to the appellate court that in exercising its discretion the trial court has acted unreasonably or capriciously or has ignored relevant facts then it would certainly be open to the appellate court to interfere with the trial court's exercise of discretion. This principle is well established; but, as has been observed by Viscount Simon, L. C. in *Charles Osenton and Co. v. Johnston*, 1942 AC 130 at p. 139: 'The law as to the reversal by a court of appeal of an order made by a judge below in the exercise of his discretion is well

established, and any difficulty that arises is due only to the application of well settled principles in an individual cases.'

17. The nature and the content of the ambit of the discretionary power in the matter of granting or refusing to grant stay under S. 34 of the Act was explicated by Justice Gajendragadkar (as he then was) in *Printers (Mysore) Private Ltd., v. Pothan Joseph*, : [1960]3SCR713 .

'Section 34 of the Act confers power on the court to stay legal proceedings where there is arbitration agreement subject to the conditions specified in the section the section clearly contemplates that even though there is an arbitration agreement and the requisite conditions specified by it are satisfied, the court may nevertheless refuse to grant stay if it is satisfied that there are sufficient reasons why the matter should not be referred in accordance with the arbitration agreement. In other words, the power to stay legal proceedings is discretionary, and so a party to an arbitration agreement against whom legal proceedings have been commenced cannot by relying on the arbitration agreement claim the stay of legal proceedings instituted in a court as a matter of right. It is, however, clear that the discretion vested in the court must be properly and judicially exercised. Ordinarily where a dispute between the parties has by agreement between them to be referred to the decision of a domestic tribunal the court would direct the parties to go before the tribunal of their choice and stay the legal proceedings instituted before it by one of them. As in other matters of judicial discretion, so in the case of discretion conferred on the court by S. 34 it would be difficult, and it is indeed inexpedient to lay down any inflexible rules which should govern the exercise of the said discretion. No test can indeed be laid down the automatic application of which will help the solution of the problem of the exercise of judicial discretion. As was observed by Bowen L. J. in *Gardner v. Jay*. ((1885)29 Ch. D. 50 at P.58) ' that discretion like other judicial discretion, must be exercised according to common sense and according to justice'.'

Proceeding further the learned Judge observed in para 9 thus:

'Where the discretion vested in the court under S. 34 has been exercised by the trial court the appellate court should be slow interfere with the exercise of the said discretion. In dealing with the matter raised before it at the appellate stage the Appellate Court would normally not be justified in interfering with the exercise of discretion under apple solely on the ground that if it had considered the matter at the trail stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the Appellate Court would have taken a different view may not justify interference with the trail court's exercise of discretion. As is often said, it is ordinarily not open to the Appellate Court to substitute its own exercise of discretion for that of the trail judge; but it appears to the appellate court that in exercising its discretion the trial court has acted unreasonably or capriciously or has ignored relevant facts and has adopted an unjudicial approach then it would certainly be open to the Appellate Court - and in many cases it may be its duty - to interfere with the trial court's exercise of discretion. In cases falling under this class the exercise of discretion by the trial court is in law wrongful and improper and that would certainly justify and call for interference from the appellate court. These principles are well established ;but, as has been observed by Viscount Simon L.C. in *Charles Osenton and Co. v. Johnston*, (1942) AC130 at P. 138, the law as to the reversal by a court of appeal of an order made by a judge below in the exercise of his discretion is well established, and any

application of well settled principles in an individual case.'

18. What is necessary for the grant of stay under S. 34 of the act was stated succinctly by Mukherjea, J. (as he then was) in *Anderson Wright Ltd. v. Moran and Co.*, : [1955]1SCR862 :

'Thus in order that a stay may be granted under this section, it is necessary that the following conditions should be fulfilled;

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

(2) the legal proceeding which is sought to be stayed must be in respect of a matter agreed to be referred;

(3) the applicant for stay must be a party of the legal proceeding and he must have taken no step in the proceeding after appearance. It is also necessary that he should satisfy the court not only that he is but also was at the commencement of the proceedings ready and willing to do everything necessary for the proper conduct of the arbitration; and

(4) the court must be satisfied that there is no sufficient reason why the matter should not be referred to an arbitration in accordance with the arbitration agreement'.

19-20. The facts of the case in *Gannu Rao v. Thiagaraja Rao*, AIR 1949 Mad 582, are very instructive. There was a partnership contract between the plaintiff and the defendants, the date of the deed of the partnership being 15th Sept, 1943. A suit was filed on 27-2-1947 by one of the partners for dissolution of the partnership and for accounts. On the following day the plaintiff filed an interlocutory application seeking the grant of an interim injunction and for appointment of the Commissioner. On that application an ex parte order was passed on 28-2-47 directing notice to the respondents granting interim injunction as prayed for and appointing Commissioner. The notice was returnable on 3-3-1947. On that date the 1st respondent who filed an application under S.34 of the Act appeared by a counsel, and an order was passed by the court on that date the purport of which was described by Justice Kunhi Raman at page 583 thus:

'It is clear from this order that what happened on that date was that the present applicant through his counsel asked for ten days time for filing counter affidavit and for modification of the order of interim injunction

On 14-3-1947 another order was passed whereby the interim order of injunction was modified and continued and was directed to be continued and the application was ordered to be posted along with the application filed under Section 34 of the Act. After referring to the case law and after referring to the participation by the defendant who is the applicant under S.34 in the proceedings filed on 3-3-47 as well as on 14-3-47 the learned Judge observed at page 586 thus:

'On the authorities discussed above, I have no doubt that the defendant in this case who now applies for stay of proceedings in the suit did not take a step in the proceedings within the meaning of S. 34 both of 3rd March 1947 and on 14th March

1947 in C. S. No.89 of 1947 came on for hearing. The wording of the section is general in as much as reference is made to a step in the 'proceedings' and not a step in the 'suit'. The interlocutory application in the suit will certainly come under the category of proceedings and since the defendant did take a step in the proceedings he is precluded from applying under S. 34 of the Act for stay of the suit.'

21. Bortes S. A. v. Astrouic Compania, AIR Mad 323, is a case where a Single Judge of the Madras High Court held that filing an application seeking vacation of interim injunction granted in an application filed by the plaintiff pending disposal of the suit would constitute 'taking step in the proceedings' within the meaning of S. 34 of the Act.

22. The meaning of the expression 'other steps in the proceedings' in S. 34 was explicated by a Division Bench of the High Court of Allahabad in Union of India v. Hans Raj Gupta and Co., : AIR1957All91 thus:

'The words 'other steps in the proceedings' are words of a general character. They are words of a wide import, and would embrace within their amplitude a large variety of acts. Any application by a party indicating that he has participated in the proceedings of the case or has contributed to its further progress, or any act by a party showing that he has acquiesced in the jurisdiction of the court would constitute a step in legal proceedings.'

Proceeding further, Justice Beg (as he then was) speaking for the Bench observed thus on the same page::

'All that appears to be necessary is that a party against whom the bar against stay is set up should have been apprised of the contents of the plaint so as to have knowledge of the facts that might attract the arbitration clause or bring it into play. Any laches on its parts and any association by the said party in proceedings of the case thereafter would constitute a waiver of his claim for stay'.

The propositions deducible from the forgoing discussion may now be summed up.

(1) There is a right recognised as inherent in every person to institute a suit as recognised by Section 9 of the Code of Civil Procedure.

(2) The right of a party to arbitration agreement to have the matters stated therein as referable to arbitration is also recognised as paramount to the right of such a person to institute a suit under S.9 C. P. C. and this is always subject to the fulfilment of the conditions mentioned in S.34 of the Arbitration Act.

23. The conditions required to be fulfilled before S.34 of the Act can be successfully invoked are :

(1) The legal proceedings must have been commenced by a party to the arbitration agreement against the other party to the agreement.

(2) The subject-matter of reference to the arbitration must be same as the subject-matter of the legal proceedings.

(3) The legal proceeding sought to be stayed must be in respect of the matter agreed

to be referred to the arbitration.

(4) The right conferred upon the party under S. 34 of the Act to have the legal proceedings stayed can be exercised at any time before the filing of a written statement of taking any other steps in proceedings. Lastly,

(5) The court shall have to be satisfied that there was sufficient reason why the matter should not be referred to an arbitration in accordance with arbitration agreement.

24. The discretion conferred upon the court under S. 34 of the Act shall have to be exercised in a judicious and judicial manner but not in an arbitrary or unreasonable or capricious manner.

25. Having regard to the nature of the discretion contemplated under S. 34 of the Act the possibility of the appellate authority taking a view different from the one taken by the inferior court is not certainly a circumstance warranting interference with the order passed by the Court below under S. 34 of the Act subject of course to the condition the order by the court below should always be reasonable and proper and it must be shown to have been arrived at after having taken into consideration all relevant facts and circumstances of the case eschewing from out of the consideration those that are not relevant and germane for the disposal of the case.

26. Having regard to the point of time before which S. 34 of the Act can be invoked, the application thereunder shall have to be filed before filing the written statement or any step taken in connection therewith and also before taking any other steps in the proceedings. The expressions 'proceedings' as well as 'legal proceedings' as occurring in S. 34 of the Act are comprehensive to take within their ambit any steps taken by the person claiming the benefit of S. 34 of the Act either in the main suit or in the interlocutory proceedings arising therefrom. No injustice on account of the above construction of S. 34 is likely to be caused to the party to the arbitration agreement or to the party to the legal proceedings under Sec. 34 must have known even prior to the institution of the suit the rights accruing to him under the partnership agreement containing arbitration clause and as such it is always open to him if only such a party is desirous of abiding by the partnership clause in that agreement to apply to the court before filing of the written statement or taking any other proceeding.

27. In the light of the aforesaid principles, we shall now examine the facts of the present case.

28. On 11-8-75 the suit was instituted by the 1st respondent for the rendition of accounts of the dissolved firm and for his share in the assets of the firm.. The plaintiff-1st respondent filed on the same day, I. A. 670/75 seeking the grant of a temporary injunction restraining the petitioner and the other defendants from doing the rice milling business. On 11-8-1975 itself an ex parte interim injunction was issued by the court below and the matter was posted to 15th Sept. 1975. Notice was served upon the defendants on 12-8-1975 and on 13-8-1975 the 1st defendant filed I. A. 675/75 requesting the court to vacate the interim injunction. On 26-8-1975 I. A. 670/65 was dismissed. Pausing there for a while filing of the application I. A. 675/75 by the 1st defendant seeking the vacation of the interim injunction granted in I. A. 670/75 would constitute defendant's taking any other steps in the proceedings as contemplated by

S. 34 of the Act so as to disentitle him from invoking S. 34 of the Act.

29. Not stopping there, we find another circumstance where the plaintiff filing another application I. A. 745/75 on 4-9-1975 under O. 40 R. 1 C. P. C. seeking the appointment of a Receiver and the 1st defendant opposing the same by filing a counter affidavit and court dismissing that application on 18-10-1975. We find thus the petitioner 1st defendant filing application under S. 34 of the Act actually filing counter affidavits in the previous I. As viz. 670/75 and 745/75 filed by the plaintiff. These actions do certainly constitute defendant's taking steps in the proceedings as contemplated by S.34 of the Act.

30. Sri Ananth Reddy the learned counsel appearing for the respondents submitted that this a case where the 1st defendant is otherwise disentitled from invoking S.34 of the Act because he acquiesced by conduct in asking for time for filing written statement, though Sri Waghray the learned counsel appearing for the appellant strenuously contended for the position that there is absolutely nothing on record to show that the 1st defendant requested for time for filing in the written statement. The matter was going on . There is no doubt , that no written statement was filed by the 1st defendant being adjourned from time to time with respect to two interlocutory application filed on for grant of interim injunction and the other being for the appointment of a Receiver. The docket sheet placed before me in the case shows time was granted and extended for enabling the defendants to file their written statements. On the date on which the application under S. 34 of the act was filed by the 1st defendant, defendants 4 to 11 filed their written statements. This conduct on the part of the 1st defendant who did not choose to state or submit till the filing of the application under S. 34 of the Act that he would so file one, notwithstanding the fact that he has had occasion to do so before the court contesting hotly I. As 670/75 and 745/75 shows that he acquired time by extended (sic) for the filing of written statement. But for the grant of extension of time for filing the written statement, the 1st defendant could have been out of the court because the time prescribed originally for filing the written statement was over by the time he came to file the application under S. 34 of the Act.

31. For the aforesaid reasons also I am satisfied agreeing with the court below that the conduct of the 1st defendant clearly amounts to taking steps in the proceedings as contemplated under S. 34 of the Act so as to disentitle him to entertain that application.

32. The court below observed in this connection that there is nothing on record to show that defendants 1 and 2 had at any time expressed their intention to file written statements in the suit though the suit was going on being posted on different dates from the date of its institution and time was extended for filing written statements by the defendants including defendants 1 and 2. The court below also was of the view that having regard to the language employed in clause 11 of the partnership deed executed by the parties on 9-1-1964, the subject-matter of the suit has nothing to do with interpretation of any clauses of the deed and, therefore, one of the essential conditions under S.34 of the Act as regards the identity of the subject-matter of the suit and reference to arbitration was not fulfilled. After having been taken through the averments contained in the plaint and the contents of C1. 11 of the partnership deed, I am not persuaded to take a view different from the one taken already by the court below in that connection.

33. There is always involved in cases like these, the determination of priorities between the right to institute a suit under S.9 C. P. C. and to proceed with the suit and the right of a party to an arbitration agreement to have the matter arbitrated upon notwithstanding the fact that a suit with respect to that matter has already been instituted. That is the reason why the framers of the Act in their wisdom thought it fit to confer discretion upon the court under S.34 of the Act in the matter of determination of such priorities and the court evolved in a pragmatic way certain principles laying the same as guidelines for the exercise of that discretion under that section of the Act. That is the reason why it has been laid down by the Supreme Court in unequivocal terms with regard to the exercise of discretion contemplated under S. 34 of the Act that the mere possibility of superior courts arriving at a conclusion different from the one arrived at below with respect to the grant or refusal to grant stay under S.34 of the Act should not be a circumstance warranting interference by the appellate court unless the discretion as conferred under S. 34 of the Act on the court below is shown to have been exercised capriciously, improperly and unreasonably without taking relevant circumstances into consideration. In the present case, the court below held that the petitioner's opposing the two interlocutory applications filed by the plaintiff-1st respondent seeking interim injunction and the appointment of a Receiver, constitute taking steps in the proceedings and besides that the court below on an interpretation of cl.11 of the partnership deed, came to the conclusion that the subject-matter of the suit was not one referable to cl. 11 of the partnership deed. By taking all the circumstances into account the court below arrived at a conclusion in exercise of the discretion that it is not a fit case where stay should be granted. I am not persuaded to disturb that finding of the court below.

34. I find no merits in this appeal but having regard to the facts and circumstances of the case, this appeal is dismissed without costs.

35. Appeal dismissed.