
Before D. S. Tewatia and S. S. Sodhi, JJ.

SAHIB DAYAL,—Petitioner

versus

FOOD CORPORATION OF INDIA AND OTHERS,—Respondents.

Civil Revision No. 3816 of 1986.

September 1, 1987.

Arbitration Act (X of 1940)—Section 34—Code of Civil Procedure (V of 1908)—Order XXXIII Rule 1—Application for leave to sue as indigent person—Request for an adjournment to file reply to the said application—Effect of such request.

Held, that proceedings in the application under Order XXXIII. Rule 1 of the Code of Civil Procedure, 1908 remains ancillary and interlocutory and therefore a request for adjournment to file reply to the application would not exhibit an unequivocal intention on the part of the defendants to waive their right of having the dispute resolved by the arbitrator and thus would not constitute any step in the proceedings in terms of Section 34 of the Arbitration Act, 1940. (Para 7).

Petition Under Section 115 C.P.C., for revision of the order of the Court of Shri J. S. Sekhon, District Judge, Ludhiana, dated 4th September, 1986 reversing that of Shri G. C. Suman, Sub Judge 1st Class, Ludhiana, dated 15th May, 1986 setting aside the order of the trial court by accepting the appeal and staying the proceedings of the trial court in view of the application under section 34 of the Indian Arbitration Act and there is no order as to costs.

K. G. Chaudhry, Advocate, for the Petitioner.

Nemo, for the Respondents.

JUDGMENT

D. S. Tewatia, J. (Oral)

(1) The learned Single Judge before whom the present revision petition was listed for motion hearing after admitting the same referred it to the Division Bench, for he was of the opinion that the decision of this Court reported as *Messrs William Jacks and*

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Company (India) Limited, Bombay, v. The Saraswati Industrial Syndicate Limited (1), which was cited before him in justification of admitting the case for full hearing required reconsideration in view of the Supreme Court decision in *Food Corporation of India and another v. Yadav Engineer and Contractor* (2). That is how this revision petition is before us. The relevant facts for appreciation on the point at issue can be stated thus :

(2) The petitioner herein filed a suit for the recovery of Rs. 70,000 against the defendant-respondent herein. Along with the plaint he also filed an application under Order 33, rule I, Civil Procedure Code, for permission to file a suit as an indigent person. On this application notices were ordered to be issued to the defendants and the report of the Collector was called for by the trial Court, for 17th September, 1982. On 17th September, 1982, Mr. M. P. Vasudeva, Advocate, appeared for the defendants, but no reply to the application was filed, as the copy of the application was supplied to him by the plaintiff on that date only. The case was adjourned to 23rd October, 1982 for which date the notices to the Collector could not be issued due to the non-stamping of the registered cover properly. On that date, i.e., 23rd October, 1982, the respondents herein did not file the reply to the application and they were burdened with costs of Rs. 10, which were paid on that very date. The case was then adjourned to 26th November, 1982. On the adjourned date, i.e., 26th November, 1982, the defendant-respondents herein moved an application under section 34 of the Indian Arbitration Act (for short 'the Act') for seeking stay of the proceedings before the Civil Court. The trial Court dismissed the application. However, that order was set aside by the District Judge, Ludhiana, who stayed the proceedings and it is this order which has been impugned in the present revision. The question that pointedly arises for consideration is as to whether the action of defendant-respondents in getting a date on 23rd October, 1982, for filing reply to the application under Order 33, rule I, Civil Procedure Code, constituted 'taking of any other step in the proceedings', in terms of section 34 of the Act and thus dis-entitling the defendant-respondents to the relief (of staying the proceedings) sought by them.

(3) In our view, the present case is squarely covered by the ratio of *Food Corporation's case* (supra). Desai, J. who prepared the

(1) 1984 P.L.R. 489.

(2) AIR 1982 S.C. 1302.

unanimous opinion for the Bench after exhaustive survey of case law including an earlier judgment of that Court in *The State of Uttar Pradesh and another v. M/s Janki Saran Kailash Chandra and another* (3), on which counsel for the petitioner heavily relies and which formed the basis of *William Jack's case* (supra), which the learned 'Single Judge thought, required reconsideration.

(4) For appreciating the ratio of *Food Corporation's case* (supra) relevant facts of that case deserve recapitulation. In that case the suit was instituted on June 1, 1981. In the suit a notice of motion was taken out purporting to be under Order XXXIX, rules 1 and 2, read with section 151, Civil Procedure Code, for an interim injunction restraining the defendants from committing a breach of contract and from interfering with the work of handling and transport of goods of the 1st defendant Corporation by the plaintiff during the pendency of the suit. The Court directed notice of the injunction application to be served and the same was made returnable on the next day, i.e., June 2, 1981. On the returnable date the 2nd defendant, District Manager of the 1st defendant-Corporation who had office in the city of Gwalior was served and he appeared through one Shri N. K. Modi, Advocate, who filed the letter of authority (*vakalat*) in favour of the learned Advocate on behalf of second defendant and the learned Advocate prayed for time for reply and arguments to the plaintiff's application for temporary injunction. The Court acceded to the request and posted the matter on June 3, 1981. The 1st defendant was not served and was absent. When the matter came up on the next day, i.e., June 3, 1981, an application was moved on behalf of 1st defendant inviting the attention of the Court to the subsisting arbitration agreement between the plaintiff and the 1st defendant and which agreement authorised the Managing Director of the 1st defendant to appoint an arbitrator in respect of any dispute arising out of the contract between the plaintiff and the 1st defendant. It was also stated that the 1st defendant desired to have the dispute, if any, resolved by arbitration under the subsisting arbitration agreement and that the defendant was fully ready and willing to go to arbitration. The application concluded with a prayer that under the circumstances the suit may be stayed as provided in section 34 of the Act. Desai, J. took the view that the expression "taking any other steps in the proceedings" has to be read *ejusdem genesis* with the expression "filing a written statement". The learned Judge took the view that when so read, it would mean

(3) A.I.R. 1973 S.C. 2071.

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that the given action of the defendant should unmistakably and unequivocally show that he is waiving his right of having the dispute between them settled by an arbitrator in terms of the contract entered into between the parties. His lordship had no quarrel with the view that had been taken by the Court earlier in *M/s Janki Saran's case* (supra) and expressed himself in this regard in the following words :—

“The view herein taken not only does not run counter to the view we have taken but in fact clearly supports the view because the pertinent observation is that taking step in the proceeding which would disentitle a party to obtain a stay of the suit must be doing something in aid of the progress of the suit or submitting to the jurisdiction of the Court for the purpose of adjudication of the merits of the controversy in the suit. In other words, the step must necessarily manifest the intention of the party to abandon or waive its right to go to arbitration or acquiesce in the dispute being decided by Court. In fact, the view taken in this case should have quelled the controversy but it continued to figure in one form or the other and that is why we have dealt with the matter in detail.”

His lordship then proceeded to spell out his conception of the expression “taking the steps in the proceedings.” in these words :—

“We are clearly of the view that unless the step alleged to have been taken by the party seeking to enforce arbitration agreement is such as would display an unequivocal intention to proceed with the suit and acquiesce in the method of resolution of dispute adopted by the other party, namely, filing of the suit and thereby indicate that it has abandoned its right under the arbitration agreement to get the dispute resolved by arbitration, any other step would not disentitle the party from seeking relief under Section 34. It may be clearly emphasised that contesting the application for interim injunction or for appointment of a receiver or for interim relief by itself without anything more would not constitute such step as would disentitle the party to an order under Section 34 of the Act.”

(5) The facts of this case are almost similar to the one that were present in *M/s Janki Saran's case* (supra) and there is no quarrel with the proposition laid down by R. N. Mittal, J., which is totally in accord with the view taken by their lordships of the Supreme Court, ratio whereof has been identified by Desai, J. in the latter judgment.

(6) Mr. K. G. Chaudhry, appearing for the petitioner, however, emphasised the fact that an application under Order 33, rule I, Civil Procedure Code, is part of the suit and does not constitute interlocutory proceedings or proceedings ancillary to the main suit, and sought support for his submission from a decision in *Vijay Partap Singh v. Dukh Haran Nath Singh and another* (4). The question in this case that fell for consideration was as to when is the suit said to be instituted in the context of an application under Order 1, rule 10, Civil Procedure Code, and in that context their lordships held that the suit commenced from the date of the presenting of the plaint along with an application under Order 33, rule I, Civil Procedure Code.

(7) There could be no quarrel with that view, but so far as the main dispute between the parties is concerned, the proceedings in the application under Order 33, rule I, Civil Procedure Code, remains ancillary and interlocutory and therefore a request for adjournment to file reply to the application under Order 33, rule I, Civil Procedure Code, would not exhibit an unequivocal intention on the part of the defendants to waive their right of having the dispute resolved by the arbitrator and thus would not constitute any step in the proceedings in terms of section 34 of the Act.

(8) For the reasons aforementioned, we find no merit in this petition and dismiss the same, but with no order as to costs.

S.C.K.

Before D. S. Tewatia and S. S. Sodhi, JJ.

AJAY THIND,—Petitioner

versus

STATE OF PUNJAB AND OTHERS,—Respondents.

Civil Writ Petition No. 707 of 1987.

September 8, 1987.

Constitution of India, 1950—Article 226—Advertisement inviting applications for employment—Knowledge of Punjabi one of

(4) AIR, 1962 SC 941.