Before R. N. Mittal, J.

WILLIAM JACKS & COMPANY (INDIA) LTD.,—*Petitioner.*

versus

THE SARASWATI INDUSTRIAL SYNDICATE LTD., YAMUNANAGAR,—*Respondent.*

Company Application No. 54 *of* 1983.
in
Company Petition No. 4 *of* 1983.

October 20, 1983.

Arbitration Act (X of 1940)—Section 34—Companies Act (I of 1956)—Sections 433, 434 and 439—Arbitration clause in the agreement between the creditor and the company—Creditor filing a winding up petition—Notice ordered to be issued to the Company—Counsel appearing on behalf of the company and seeking time for filing a written statement—Application by the company under section 34 for stay of proceedings—Action of the counsel in seeking time for filing written statement—Whether amounts to a step in the proceedings—Application under section 34 not containing material particulars of the dispute—Such an application—Whether liable to be dismissed—Application under section 34—Whether maintainable in a winding up petition.

Held, that the action of the Counsel in seeking time to file the written statement amounts to taking step in the proceedings within the meaning of section 34 of the Arbitration Act.

(Para 5)

Held, that the existence of a dispute is a condition precedent for referring the matter under section 34 of the Act to the Arbitrator. Therefore, the defendant in an application under the said section should bring all the material before the Court, so that it may be able to record a finding that the subject matter of dispute was agreed to be referred to the Arbitrator. If such material is not provided, the application is liable to be dismissed on this ground.

(Para 10)

Held, that the jurisdiction for ordering winding up of a company is a special jurisdiction which has been conferred on the High Courts. The object of passing such an order is that the assets of the company should be realised and debts paid expeditiously. The passing of such an order against the company has serious consequences and, therefore, the jurisdiction has been conferred on the High Courts. The order of winding up can be passed on the grounds mentioned in section 433 of the Companies Act, 1956. It does not appear to be the intention of the Legislature that such

a power can be conferred on an Arbitrator. The petition for winding up cannot be treated as the one for recovery of an amount of debt from the company. Therefore, an application under section 34 is not maintainable in a winding up petition.

(Para 12).

Application under Section 34 of the Arbitration Act, 1940 praying. that this Hon'ble Court may be pleased to make an order staying the proceedings under the Company Petition No. 4 of 1983 and such other order may be made as shall be just and equitable under the circumstances.

Bhagirath Das, Senior Advocate Ramesh Kumar, Advocate with him, *for the Applicant.*

N. K. Khaitan, Advocate, R. N. Narula, Advocate M. S. Sud. Advocate and P. S. Sain, Advocate, *for the Respondent.*

JUDGMENT

Rajendra Nath Mittal, J.

(1) Briefly, the facts are that Messrs William Jacks and Company (India) Limited (hereinafter referred to as the Company), filed a petition under section 439 read with sections 433 and 434 of the Companies Act, 1956, against Saraswati Industrial Syndicate Limited (hereinafter referred to as the Syndicate), stating that an amount of Rs. 5 lakhs and odd was due from it which it failed to pay in spite of acknowledging that the above said amount was due from it. Notice in the petition was ordered to be issued by this Court on 13th January, 1983, for 3rd March, 1983. The notice was despatched on behalf of the Company by Mr. R. N. Narula, Advocate, to the Syndicate on 18th January, 1983, which must have been received within one week thereafter. On 3rd March, 1983, Mr. A. K. Jaiswal, Advocate, appeared on behalf of the respondent and made a request for time to enable him to file a written statement. At his request, the case was adjourned to 7th April, 1983. Two days before the date of hearing, that is, on 5th April, 1983, an application (C. A. No. 54 of 1983) was filed on behalf of the Syndicate under section 34 of the Arbitration Act, 1940 (hereinafter called the Act), for staying the proceedings on the ground that the agreement between the parties contained an arbitration clause. The application has been contested on behalf of the Company.

(2) The first contention of Mr. Bhagirath Dass is that there is an arbitration clause in the agreement between the parties according to which all the disputes are to be referred to the Arbitrator to be appointed by the parties by mutual agreement and in the event of the parties failing to agree the reference would be to a nominee of the Federation of Indian Chamber of Commerce and Industry, Delhi, at the instance of the party first applying to him. He submits that therefore, the proceedings are liable to be stayed under section 34 of the Act.

(3) On the other hand, Mr. Khaitan has argued that the Syndicate took step in the proceedings as a request was made on its behalf to file a written statement. In the circumstances, he submits, that the proceedings cannot be stayed.

(4) I have duly considered the arguments of the learned counsel. It is not disputed that the service of the petition was ordered to be effected on the Syndicate in the second week of January, 1983. It is also not disputed that the notice must have been served upon the Syndicate within a week from 18th January, 1983, the date of its issuance. A request was made by Mr. A. K. Jaiswal to adjourn the case for enabling him to file the written statement on 3rd March, 1983, that is, more than a month after having received notice by the Syndicate. In that situation, the inference is that the Syndicate knew the contents of the petition and it wanted to defend the same on merits. Section 34 of the Arbitration Act *inter alia* provides that where any party to arbitration agreement commences any legal proceedings 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.

(5) The question that arises for determination is whether the statement of Mr. Jaiswal amounts to taking a step in the proceedings. A similar question arose before the Supreme Court in *the State of Uttar Pradesh and another v. M/s Janki Saran Kailash Chandra and another*, (1). In that case, a suit was instituted for recovery of some amount by way of damages against the State of Uttar Pradesh. The summonses of the case were served on the District Government Counsel who filed an appearance slip in the

(1) AIR 1973 S. C. 2071.

Court and an application praying for one month's time for the purposes of filing the written statement. The prayer was granted. Before the next date, he moved an application under section 34 of the Act stating that there was an arbitration clause in the agreement between the parties to the suit and, therefore, the suit should be stayed. The trial Court accepted the application and stayed the suit. On appeal, the High Court held that the action of the Government Pleader in applying for time to file the written statement amounted to taking step in the proceedings within the meaning of section 34 of the Act. Consequently, the appeal was accepted and the application under section 34 was dismissed. The State went up in appeal before the Supreme Court. Dua, J., while speaking for the Court, after taking into consideration various cases, observed that there was no serious infirmity in the impugned judgment of the High Court. The District Government Counsel in that case was empowered to appear and act for and on behalf of the Government and also to make applications on its behalf. If the Counsel wanted time for the purpose of having fuller instructions, he could have asked for it specifically, for he was not a layman ignorant about the legal position but a professional lawyer retained by the Government for the purpose of acting and pleading on behalf of the Government as a recognized agent. He however, chose instead to ask for time specially for filing written statement and this act he purported to do on behalf of the State Government which he was fully empowered to do. The State took benefit of his appearance and his successful prayer for adjournment of the case by one month for the purpose of filing the written statement. In those circumstances, it was hardly open to the State Government to plead that the District Government Counsel was not authorised to seek adjournment on its behalf for that purpose. If he wanted time for further consultations, he could and should have specifically made a prayer to that effect. It was further observed that it would be somewhat irrational and perhaps incongruous to permit the State, after having taken the benefit of that adjournment, to plead that the application for adjournment was not made on instructions and was unauthorised. To accede to the State Government the right to do so would clearly be unjust to the opposite party which could have rightfully objected to the adjournment, had there been any indication that the prayer was not being made on instructions from one State Government. The above observations are fully applicable to the facts of the present case.

(6) Mr. Bhagirath Dass sought to distinguish the case on the ground that Mr. Jaiswal did not file any memorandum of appearance on behalf of the Syndicate nor did he move any application as was done in the above referred to case. I am not impressed with the alleged distinction. It is presumed that when a lawyer puts in appearance, he does so on the instructions of his client. It is not necessary that he must put in a memorandum of appearance. It is not necessary that a request should always be made in writing. An oral request is as good as a request in writing. In this view, I am fortified by the observations of this Court in *Union of India* v. *M/s Hira Lal Sud and others,* (2), wherein it was held that the oral request for adjournment for filing the written statement is as good as a written request. It was further held that if a written request seeking adjourment to file written statement amounts to taking a step in the proceedings, there is no reason why an oral request to the same effect would not amount to taking such a step. That case was followed in *M/s Segat Brothers and others* vs. *Food Corporation of India and others,* (3), wherein similar observations were made.

(7) Mr. Bhagirath Dass made a reference to *Harbans Lal* v. *National Fire and General Insurance Co. Ltd.* (4), and *Punjab State* v. *Moji Ram,* (5), to show that a request for adjournment in some circumstances does not amount to a step in the proceedings. In *Harbans Lal's case* (supra) the summons was served on the Branch office of the defendant and it was necessary to obtain instructions from the head office of the company. Consequently, an adjournment was given on an oral request. In *Moji Ram's case* (supra) the Government pleader appeared voluntarily without any authority from the Government to represent it and asked for an adjournment for filing the written statement on the assumption that in due course he would receive instructions from the Government. Therefore, it was held that the request would not amount to a step in the proceedings. From the above facts, it is clear that both the cases are distinguishable.

(8) After taking into consideration all the aforesaid facts and the case-law, I am of the view that the request for an adjournment

(2) 1978 P.L.R. 239.

(3) 1983 C.L.J. (C & Cr.) 24.

(4) AIR 1955 N.U.C. (Punjab) 4917.

(5) AIR 1957 Punjab 223.

for filing the written statement on behalf of the Syndicate amounts to a step in the proceedings. Consequently, it is not entitled to the benefit of section 34 of the Act.

(9) Mr. Khaitan raised some more points. Though in view I the above observations those are of academic interest only, yet I deem it proper to deal with them.

(10) Mr. Khaitan argues that in the application material particulars of the dispute have not been given and, therefore, it is liable to be dismissed on this short ground. I find substance in this submission too. It is evident from the language of section 34 of the Act that the existence of a dispute is a condition precedent for referring the matter to the Arbitrator. Therefore, the defendant, in an application under the said section, should bring all the material before the Court so that it may be able to record a finding that the subject-matter of dispute was agreed to be referred to the Arbitrator. If such material is not provided, the application is liable to be dismissed on this ground. Reference in this regard may be made to my decision in *Daman Anand and another* v. *Hira Lal and others*, (6), wherein it was held that an application under section 34 of the Arbitration Act for stay of proceedings in a suit must disclose the existence of a dispute between the parties, which would oblige the parties under the Arbitration clause in an agreement, to refer the matter to arbitration. In the absence of such allegation an application for stay of the proceedings is not maintainable. Similar view was taken by the Delhi High Court in *M/s Pearl Hosiery Mills, Ludhiana* v. *Union of India and another*, (7). It was held therein that in an application under section 34 *ibid*, the Court has to see as to what is the dispute and what is the difference and then look at the arbitration clause to find out if it falls within its scope. Therefore, the Court has necessarily to look both at the arbitration clause as well as the particular dispute or difference which is specified in the application under section 34. In view of the above observations, the application under section 34 was dismissed holding that neither the dispute or difference nor the reason for the matter being referred to arbitration was set out in the application for stay.

(6) AIR 1974 Punjab and Haryana 232.

(7) AIR 1979 Delhi 64.

(11) Adverting to the facts of the present case, it will be seen that the allegation of the Syndicate applicant is that on account of non-compliance of the obligations enjoined upon the Company it has suffered losses and hardship. No particulars as to what were the obligations of the Company which were not complied with have been given. It has also not been made clear as to what losses have been suffered by it. Therefore, I am of the view that the details of the dispute are lacking. In the circumstances, it can also be inferred that the application has been made *mala fide* to delay the proceedings.

(12) The last submission of Mr. Khaitan is that an application under section 34 of the Arbitration Act is not maintainable in a winding up petition. In support of his contention, he places reliance on a decision of this Court in *Salig Ram etc.* v. *New Suraj Financiers and Chit Fund Company, etc.* (8). I also find substance in this submission. The jurisdiction for ordering winding up of a Company is a special jurisdiction which has been conferred on the High Courts. The objects of passing such an order is that the assets of the Company should be realised and debts paid expeditiously. The passing of such an order against the Company has serious cosequences and, therefore, the jurisdiction has been conferred on the High Courts. The order of winding up can be passed on the grounds mentioned in section 433 of the Companies Act. It does not appear to be the intention of the Legislature that such a power can be conferred on an arbitrator. The petition for winding up cannot be treated as the one for recovery of an amount of debt from the Company. Therefore, I am of the opinion that an application that an application under section 34 is not maintainable in a winding up petition. In the above view, I am fortified by the following observations of B. S. Dhillon, J. in *Salig Ram's case* (supra): —

> "The application is wholly misconceived. The proceedings under the provisions of sections 433 and 434 read with section 439 of the Companies Act, 1956, are completely a different jurisdiction than the one regarding which remedy can be sought by way of arbitration under the clause in question. It is fallacious to conceive that the proceedings for winding up under the provisions of sections 433, 434 and 439 of the Companies Act, are by way

(8) C.A. 8 of 1979 in CP No. 147 of 1978, decided on 12th July, 1979.

of recovery of amount touching the various provisions of the scheme. Under the provisions of section 433 of the Companies Act, the Legislature codified the circumstances/grounds on which a company may be ordered to be wound up by the Court. Section 434 provides as to under what circumstances a Company may be deemed to be unable to pay its debts, whereas section 439 makes provision as to the application for winding up. It goes without saying that in case the petitioner is unable to satisfy the conditions precedent as laid down in sections 433 and 434 of the Companies Act, the petition for winding up is bound to be dismissed. The said petition cannot be taken to be the proceedings for the recovery of the disputed debts or proceedings regarding the setttlement of the disputes arising out of the rights and liabilities of the conditions of the scheme. Therefore, the petition for staying the proceedings is misconceived."

(13) For the aforesaid reasons, I do not find any merit in the application and dismiss the same. The case is adjourned to 17th November, 1983, for written statement.