

The Bahrein Petroleum Co. Ltd

Vs

P. J. Pappu and Another

Civil Appeal No. 432 of 1965

(K. Subba Rao, R. S. Bachawat, J. R. Mudholkar JJ)

16.08.1965

JUDGEMENT

BACHAWAT, J. :-

The plaintiff was a typist clerk in the employ of defendant the Bahrain Petroleum Co. Ltd. Defendant was the recruiting agent of the Co. at Bombay. The contract of service was signed at Bombay. The zone of operation under the contract of service was Bahrain island outside India. The plaintiff instituted a suit for recovery of gratuity and arrears of salary against the Co. and its recruiting agent in the Court of the Subordinate Judge of Cochin. Both defendants applied to the Cochin court for stay the suit, under s. 34 of the Indian Arbitration Act, 1940. The Cochin Court refused to stay the suit An appeal from this order to the District Court of Ernakulam was dismissed, and a revision in limine. In the meantime, the Cochin Court passed an order declaring that the suit should proceed ex parte. On an application by the defendants were allowed to file their written statement, the defendants pleaded on the merits and also disputed the territorial jurisdiction of the Cochin Court. On the applicati

The defendants neither resided nor carried on business, nor did any part of the cause of action arise within the local limits of the jurisdiction of the Cochin Court. The Cochin Court had therefore, no territorial jurisdiction to try the suit under s. 20 of the Code of Civil Procedure, 1908.

Counsel for the plaintiff-respondent submitted that it was open to the defendants to waive this objection, and if they did so they could not subsequently take the objection This submission is well-founded. AS a general rule, neither consent nor waiver nor acquiescence can confer jurisdiction upon a Court, otherwise incompetent to try the suit. But Section 21 of the Code provides an exception, and a defeat as to the place of suing, that is to say the local venue for suits cognizable by the Courts under the Code, may be waived under this section. The waiver under Section 21 is limited to objections in the appellate and revisional Courts. But Section 21 is a statutory recognition of the Principle that the defeat as to the place of suing under Ss. 15 to 20 may be waived Independently of this section, the defendant may waive the objection and may be subsequently precluded from taking it see Seth Hira Lal Patni v. Sri. Kali Nath.

Counsel for the plaintiff further submitted that, as a matter of fact, the defendants by their conduct have waived the objection. Though this submission found favour with the High Court, we are unable to accept it. If the defendant allows the trial Court to proceed to judgment without raising the objection as to the place of suing and takes the chance of a verdict in his favour, he clearly waives the objection, and will not be subsequently permitted to raise it. It is even possible to say that long and continued participation by the defendant in the proceedings without any protest may, in an

appropriate case, amount to a waiver of the objection. But, in this case, we find no conduct of the defendants which amount to a waiver, or which precludes them from raising the objection.

At the earliest opportunity and before taking any steps in the suit, the defendants applied for stay of the suit under Section 34 of the Indian Arbitration Act, 1940. In the petition for stay, they protested against the jurisdiction of the Court to try the suit. In paragraph 5 of the petition, they clearly pleaded that the Cochin Court had no jurisdiction to entertain the suit. They objected to the trial of the suit on the merits, pressed for a stay order before the Cochin Court and fought up to the appellate and revisional Courts. Having failed to obtain the stay order, they were compelled to apply to the Court for permission to file their written statement, and on the permission being granted, they filed it objecting to the jurisdiction and also pleading on the merits. Throughout, the defendants protested against the jurisdiction of the Court to try the suit. They lodged their protest at the earliest opportunity, and persisted in their objection thereafter. At no stage they waived or abandoned their objection.

The High Court was of the view that the effect of Ss. 2(c), 34 and 39 of the Indian Arbitration Act was that by filing the appeal under Section 39 against the order of the Cochin Court refusing to stay the suit, the defendants must be deemed to have conceded that the Cochin Court was a Court having jurisdiction to try the suit. An application under Section 34 lies to the judicial authority before which the suit is pending. Section 39(1) permits an appeal from an order of a Court under Section 34. Section 2(c) defines "Court" as a civil Court having jurisdiction to decide the questions forming the subject matter of the reference if the same has been the subject-matter of a suit. On combined reading of Ss. 2(c), 34 and 39 the High Court concluded that by filing the appeal under Section 39(1), the defendants conceded that the Cochin Court before which the application under Section 34 was made was a court as defined in Section 2(c), and therefore, a Court having jurisdiction to try the suit. We are unable to ac

Counsel for the plaintiff also submitted that the defendants having neither alleged nor proved that there has been a failure of justice in consequence of the order of the High Court, they are precluded by Section 21 of the Code from raising this objection in this Court. We think that this contention has no force. The suit has not yet been tried on the merits. So far, only the preliminary issue as to jurisdiction has been tried. That issue was decided in favour of the defendants by the trial Court and the District Court and against them by the High Court, and from the order of the High Court, this appeal has been filed. There cannot be a consequent failure of justice at this stage. The condition "unless there has been a consequent failure of justice" implies that at the time when the objection is taken in the appellate or revisional Court, the suit has already been tried on the merits. The section does not preclude the objection as to the place of suing, if the trial Court has not given a verdict on the merit

"The policy underlying Ss. 21 and 99 of the Civil Procedure Code and Section 11 of the Suits Valuation Act is the same, namely, that when a case had been tried by a Court on the merits and judgment rendered, it should not be liable to be reversed purely on technical grounds, unless it had resulted in failure of justice, and the policy of the legislature has been to treat objections to jurisdiction both territorial and pecuniary as technical and not open to consideration by an appellate Court, unless there has been a prejudice on the merits".

The appeal is allowed, the judgment of the High Court set aside, and the orders of the trial Court and the District Court are restored. There will be no order as to costs.

Appeal allowed.

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