SUPREME COURT OF INDIA

State of U.P.

Vs.

Janki Saran Kailash Chandra

C.A.No.1701 of 1971

(A. Alagiriswami, I. D. Dua and C. A. Vaidialingam, JJ.)

23.04.1973

JUDGEMENT

DUA, J.:-

1. In this appeal by special leave the State of U. P. and the Divisional Forest Officer, Bijnor (defendants in the trial Court in the plaintiff-respondents' suit) challenge the judgment and order of a learned Single Judge of the Allahabad High Court, allowing the plaintiff-respondents' appeal and setting aside the order of the trial Court staying the suit under Section 34 of the Arbitration Act.

2. The plaintiffs had instituted a suit for the recovery of Rupees 69,556.27 by way of damages for breach of contract impleading the State of U. P. (through the Collector of Bijnor) as the first defendant and the Divisional Forest Officer, Bijnor as the second defendant. The summonses in the suit issued to the State of U. P. were served on the District Government Counsel. On September 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 written statement. This prayer was granted. On October 1,1966 the District Government Counsel filed an application under Sec. 34 of the

Arbitration Act pleading that there was an arbitration clause in the agreement between the parties to the suit and the State of U. P. being willing to refer the matter to arbitration the suit should be stayed. The trial Court held that the dispute was subject to arbitration clause and since the State of U. P. had not taken any steps in the suit proceedings and had also not filed the written statement the suit was liable to be stayed. So holding the application of the State Government was allowed and the suit stayed.

3. On appeal by the plaintiff the High Court relying on two of its earlier decisions in United Provinces Govt. v. Sri Har Nath, AIR 1949 All 611 and Union of India v. Hans Raj Gupta and Co., AIR 1957 All 91, held that action of the District Government Counsel in applying for time to file the written statement amounted to taking a step in the proceedings within the meaning of Section 34 of the Arbitration Act. On this view the defendant was held disentitled to claim that the suit should be stayed. The appeal was accordingly allowed and the order of stay set aside.

4. In this Court Shri G. N. Dikshit learned counsel for the State of U. P. strongly contended that the District Government Counsel had no instructions to ask for adjournment for the purpose of filing the written statement and, therefore, his action in applying for adjournment for that purpose cannot bind the State of U. P., with the result that application for stay of proceedings in the suit under Section 34 of the Arbitration Act could not be held to be incompetent. It was also contended that the trial Court having granted stay in its discretion the High Court was in error in reversing that order and setting it aside on appeal. According to this submission the discretion had been exercised by the trial Court which could not be considered to be either unreasonable or contrary to any recognised principles and the High Court should, therefore, have upheld it.

5. The counsel relied in support of his submission on Punjab State v. Moji Ram, AIR 1957 Punj 223. In that case on the date fixed by the trial Court for appearance of the defendant, the Government pleader, with one Kartar Singh Sub-Divisional Officer, appeared and asked for time to file written statement as instructions with a copy of the plaint had not been received. Adjournment was granted and a date was fixed for filing the written statement. On the adjourned date the Government pleader filed an application for stay of the suit under Section 34 of the Arbitration Act. On these facts the High Court observed that the Government pleader had merely acted as a volunteer and asked for adjournment on the assumption that in due course he would receive instructions from the Government. The Government as a defendant, therefore, could not be said to have taken any step in the proceedings. The application for adjournment in these circumstances was held really to amount to a prayer to get time to discover the exact nature of the suit and nothing more. The application thus could not be said to have been made with a view to taking a step in the proceedings within the contemplation of Section 34 of the Arbitration Act. Reliance was next placed on State of Himachal Pradesh v. Lalchand Shahi, AIR 1953 Him Pra 75, where it was observed by the learned Judicial Commissioner that no person can be deemed to take any step in a proceeding who is not aware of what the proceedings are and, the prayer for adjournment of the case made by a counsel, who up-till the moment of making the request for adjournment had received no instructions from his client, did not amount to taking of a step in the proceedings within Section 34 of the Arbitration Act. Harbans Lal v. National Fire and General Insurance Co. Ltd., AIR 1955 NUC

(Punj) 4917, is also a decision by a learned Single Judge of the Punjab High Court. In that case the branch office of the defendant company had only received the summons of the suit filed by the plaintiff, a day previous to the date of appearance. It was observed by the learned single Judge that presumably it was in the circumstances necessary to obtain instructions from the head office of the Company and, therefore, a mere oral application for an adjournment for filing a written statement could not be regarded as a step in the proceedings which disentitled the defendant company from applying for stay under Section 34 of the Arbitration Act. In the Printers (Mysore) Private Ltd. v. Pothan Joseph, (1960) 3 SCR 713 = (AIR 1960 SC 1156), it was observed that where discretion under Sec. 34 of the Arbitration Act has been properly and judiciously exercised by the trial Court the appellate Court would not be justified in interfering with such exercise of discretion merely on the ground that it would have taken a contrary decision if it had considered the matter at the trial stage. If, however, it appears to the appellate Court that the trial Court had exercised its discretion unreasonably or capriciously or had ignored relevant facts or had approached the matter injudiciously it would be the appellate Court's duty to interfere. Shri Dikshit did not submit that the earlier decisions of the Allahabad High Court in the cases of Sri Har Nath, AIR 1949 All 611 (supra) and Hans Raj Gupta and Co., AIR 1957 All 91 (supra), laid down an erroneous rule of law. His contention on the other hand in substance was that where the counsel without any instructions asks for adjournment, though ostensibly, for filing the written statement, the prayer, if it is likely to affect his client prejudiciously, should be construed to mean as if it was for seeking time merely to get instructions, so that the client's interests do not suffer. This, he added, is a matter to be decided on the facts and circumstances of each case. He cited Joharimal v. Fatehchand, 1960 Raj LW 84 = (AIR 1960 Raj 67), as enunciating correct test in such cases, specifically relying on the following observations at page 71 in para 23:-

"On principle and judicial authority, we consider that the following propositions may be easily deduced:

(1) An application for time to file written statement or any other similar application should not be treated as a matter of law a step in the proceedings. In order to constitute a "step", it must be of such a nature as to lead the Court to the conclusion that the party prefers to have his rights and liabilities determined by the Civil Court rather than by the domestic forum upon which the parties might have agreed. It must display an unequivocal intention to proceed with the suit and to abandon the right to have the matter disposed of by arbitration.

(2) The test, however, should not be subjective and a party cannot be entitled to say that he had no actual knowledge of the right under the arbitration agreement and that in fact he did not intend to give up his right. On the other hand, the test must be objective and a person shall be deemed to have taken a step under Section 34 of the Act, if it can be held that he could have actual or constructive knowledge of his right in the event of the exercising due diligence and that in spite of that he participated in the proceedings of the Court.

(3) Prima facie, an application for time to file written statement should raise a presumption that the defendant had actual or constructive knowledge of his right and that he acquiesced in the method adopted by the plaintiff. The presumption, however, is not absolutely irrefutable and can be rebutted by showing that even constructive knowledge cannot be imputed to the defendant. It is, however not proper and fair to lay down that the presumption can be rebutted only on the ground that the defendants did not receive the copy of the plaint. In rare and exceptional cases, it may be rebutted by other circumstances, such as appearance of a Government counsel without getting instructions in a particular case to appear. It is not desirable to enumerate the exhaustive list of the circumstances and to make generalization and each case should be considered on its own facts and circumstances."

Passing reference was; also made by the appellant's counsel to an un-reported decision of this Court in Anderson Wright Ltd. v. Moran and Co. Ltd. C. A 452 of 1958 decided on 1-12-1961 (SC). That case had earlier come up to this Court when the essential requirements of Section 34 of the Arbitration Act were analysed and stated: Anderson Wright Ltd. v. Moran and Co. Ltd., AIR 1955 SC 53. The case was remanded to the High Court for a fresh decision of the appeal from the order of stay made by the trial Court after determining the question whether the plaintiff was in fact a party to the agreement. Incidentally, it may be pointed out that in that case, this Court on appeal against the judgment and order of the High Court made after remand, declined to stay the suit having regard to the considerable delay since the institution of the proceedings and to the fact that questions relating to custom of the market and the liability of Moran (plaintiff) under Section 230 of the Contract Act had to be determined. Power to stay was not considered enforceable as a matter of course. It was said there:-

"We think that in this case at this stage, nearly ten years after the institution of the suit, we should not remand this proceeding to the High Court for determination of the same question over again. In our view, power under Section 34 to stay the proceedings where there is an arbitration agreement is not enforced as a matter of course. The Court may be satisfied in a particular case, having regard to the circumstances that the matter should not be referred in accordance with the arbitration agreement. Having regard to the considerable delay that has taken place since the institution of the proceeding and the fact that questions as to custom of the market fall to be determined and also of the fact that the liability if any of Morans under Section 230 of the Contract Act has to be ascertained in the light of surrounding circumstances, we think this is a case in which the hearing of the suit, in the interest of both the parties should not be held up but the dispute should be tried in the Civil Court instead of by the arbitrator."

Shri Dikshit submitted that just as a counsel cannot bind his client by his admission and the client can disown it, similarly the appellant in this case can disown the act of his counsel as unauthorised in seeking adjournment for filing a written statement, on the ground that no instructions had been issued to the counsel to make such a prayer.

6. Shri Mohan Behari submitted in reply that there was no material on the record that the counsel

applying for adjournment on behalf of the State had no instructions. The counsel, according to the submission, must be presumed to have been duly empowered to take all steps that were necessary to be taken in the Court in connection with the proceedings on the date he appeared and filed his appearance slip in the court. Shri Mohan Behari also relied on Sarat Kumar Roy v. Corporation of Calcutta, (1907) ILR 34 Cal 443, Adward Radbone v. Juggilal, AIR 1943 Bom 228, and Roop Kishore v. U. P. Government, AIR 1945 All 24, in addition to the two Allahabad judgments referred to in the impugned judgment, for the submission that the prayer for adjournment for filing a written statement is a step in aid as contemplated by Section 34 of the Arbitration Act. In Roop Kishore's case (supra), it was emphasised that the whole burden should be upon the defendant to establish the circumstances which would lead to the result that effect should not be given to the prima facie meaning of the application for adjournment. In that case reference in support of the view adopted was made inter alia to Sarat Kumar Roy (supra) and Fort's Hotel Co. Ltd. v. Bartlet, 1896 AC 1. J. N. Shah and Co. v. Hirachand, AIR 1954 Bom 174, is a case where in a summary suit the defendant had filed an affidavit in reply setting out defences and had asked for leave to defend and that was held to amount to a step in proceedings. In Dr. V. B. Vaidya v. Union of India, C. R. No. 347 of 1967, decided by the Bombay High Court on 1-4-1970 reported in 1970 Maharashtra Law Journal (notes of case) at p.12 (Case No. 20), in accordance with the summons the counsel for the defendant prayed for adjournment for filing a written statement. On the next day, the defendant applied for stay under Section 34 of the Arbitration Act. The Court stayed the suit. This order was affirmed on appeal. On revision, the High Court set aside these orders and declined stay. It was observed that the counsel must be deemed to have prayed for adjournment for filing a written statement under instructions and it was not open to the defendant to say that there were no instructions to that effect. The fact that the vakalatnama was not filed when adjournment was prayed for, was considered inconsequential. It was also added that the discretion in the matter of stay had to be exercised on sound judicial principles.

7. In our view, there is no serious infirmity in the impugned judgment of the High Court and we are unable to find any cogent ground for interference under Article 136 of the Constitution. The legal position with respect to the scope and meaning of Section 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. Section 9 of the Code of Civil Procedure 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 Section 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 the jurisdiction of the Court for the purpose of adjudication of the merits of the controversy in the suit.

8. According to the appellant (State of U. P.), the District Government counsel is authorised by the Code of Civil Procedure to receive summons on behalf of the State: Vide ground No. 3 in the petition for special leave. Indeed, the District Government counsel was in fact so served. It is not the appellant's case that the summons were not accompanied by a copy of the plaint in accordance with law and, therefore, the District Government Counsel was not aware of the nature of the case. A copy of the plaint, therefore, must be held to have been duly served on the District Government Counsel who under Order XXVII, Rule 2 of the Code of Civil Procedure was authorised to act for the Government and was deemed to be the recognised agent by whom appearances acts and applications could be made or done on behalf of the Government. The District Government Counsel in the present case was thus fully empowered to appear and act for and on behalf of the Government and also to make applications on its behalf. If the said 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 specifically 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 is hardly open to the State Government to plead that the District Government Counsel was not authorised to seek adjournment on its behalf for this purpose. An oblique suggestion thrown on behalf of the appellant that the District Government Counsel had merely volunteered to appear without instructions, presumably taking the cue from the decision of the Punjab High Court in the case of Moji Ram (supra) is merely to be stated to be rejected. A recognized agent like the District Government Counsel can scarcely be considered to appear voluntarily in a case on behalf of the Government in the sense of being unauthorised by his client for the simple reason that he is authorised by virtue of statute to appear, act and make applications on behalf of the Government. Indeed in the present case the District Government Counsel also filed in Court the usual appearance slip. If he wanted time for further consultations, he could and should have specifically made a prayer to that effect. It is, however, idle to contend that he can be considered to have merely volunteered without authority to appear and ask for time for filing the written statement. The argument of appearance by a recognized agent as a mere volunteer is extremely difficult to appreciate. The State, as already observed, took the benefit of the adjournment. It will be somewhat irrational and perhaps incongruous to permit the State, after having taken the benefit of this 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 the State Government. September 2, 1966 was fixed in the summons for filing written statement. Failure to do so would have entailed consequences prejudicial to the State Government. Those consequences were avoided by making an application for extension of time for filing written statement which must have been understood by the opposite party, as also by the Court, to be on instructions by the State Government.

9. The argument that the trial Court's discretion has been erroneusly reversed by the High Court is equally devoid of merit. If the appellant's application was for adjournment for the purpose of filing written statement, then there is no question of any exercise of discretion by the trial Court. Discretion with regard to stay under Section 34 of the Arbitration Act is to be exercised only when an application under that section is otherwise competent. Incidentally it is worth noting that even the order of the trial Court is not included by the appellant in the paper book and we do not know the reasoning of that Court for granting stay. But on the view that we have taken that omission is of little consequence.

10. Finally, as a result of the decision of the High Court the only consequence is that the suit will now have to be tried by a competent Court on the merits in accordance with law. Keeping in view the long delay after the institution of the suit and the fact that the suit is for a very heavy amount by way of damages for breach of contract, it will, in our opinion, be more satisfactory on the whole to have the suit tried in a competent Court of law in the normal course rather than by a lay arbitrator who is not bound either by the law of evidence or by the law of procedure. This course can certainly in no way be considered unjust or prejudicial to the appellant as to require interference by this Court.

11. This appeal accordingly fails and is dismissed with costs.

Appeal dismissed.