General Electric Co

Vs

Renusagar Power Co

Civil Appeal No. 2319 of 1986

(O. Chinnappa Reddy, K. Jagannatha Sehtty JJ)

11.08.1987

JUDGMENT

CHINNAPPA REDDY, J. -

1.The appellant, General Electric Company, a multi-national, entered into a contract with the respondent, Renusagar Power Company Limited, an Indian Company, agreeing to sell equipment for a Thermal Electric generating plant to be erected at Renukoot on the terms and conditions set forth in the contract. For the purposes of this case, it is unnecessary to set out the terms of the contract and the details of what we envisaged to be done by the parties. It is also unnecessary to set out the various events that took place subsequently. It is sufficient to state that on March 2, 1982, the GEC submitted certain disputes between the GEC and Renusagar for arbitration to the International Chambers of Commerce. On June 11, 1982, Renusagar filed a suit in the Bombay High Court for a declaration that the claims purported to be referred to arbitration by GEC to ICC were beyond the scope and purview of the arbitration agreement contained in the contract and sought an injunction to restrain the GEC from taking any further steps pursuant to their request for arbitration addressed to ICC on March 2, 1982. In Renusagar's suit, GEC, on August 11, 1982 filed a petition under Section 3 of the Foreign Awards (Recognition and Enforcement) Act, 1961 seeking a stay of the suit. On August 19, 1982 GEC also filed a suit in the Calcutta High Court against the United Commercial Bank to enforce a bank guarantee given by the bank at the instance of Renusagar. On November 25, 1982, Renusagar filed a suit No. 127 of 1982 in the Court of Civil Judge, Mirzapur praying for a declaration that the guarantee given by the United Commercial Bank for and on behalf of the plaintiff stood discharged and had become ineffective and unenforceable and for a mandatory injunction against the GEC directing and ordering them to settle the plaintiff's claim regarding 75 MVA Transformers and to satisfy validly the settlement arrived at of the plaintiff's claim as mentioned in para 12 of the plaint.

2. It is useful to refer at this juncture to some of the happenings in the proceedings in the Bombay High Court. On April 20, 1983, a learned Single Judge of the Bombay High Court dismissed the notice of motion taken out by Renusagar for stay of the arbitration proceedings and allowed the application of GEC for stay of further proceedings in the Bombay High Court. Appeal filed by Renusagar to the Division Bench of the High Court were dismissed on October 21, 1983. Further appeals filed by Renusagar to the Supreme Court were also dismissed on August 16, 1984. The Supreme Court held that the claims of GEC were arbitrable and that the decision of the court was conclusive on that issue and would not arise before the court of arbitration of ICC.

3. On January 17, 1983, GEC filed an application (7-c) purporting to put on record their complaint that annexures to the plaint had not been received by them. On the same day, the Civil Judge made

an order : "Copy of the plaint has been given to the defendant (GEC) so that the defendant may file a written statement." On the same day, the defendant GEC also filed another application (8-C) purporting to be 'under Section 20 and Order 7 Rule 11 read with Section 151 of the Code of Civil Procedure' praying that the court may be pleased to reject the plaint and the suit. In this application, it was stated that the suit was an abuse of the process of the court and an attempt to harass the defendants. The court was requested to dismiss the plaintiff's suit on that ground as also on other grounds which were thereafter mentioned. It was stated that the defendant did not reside and no cause of action arose within the local limits of the jurisdiction of the court. There was a violation of the stipulation laid down in Section 20 of the Code of Civil Procedure resulting in an abuse of the process of the court. It should entail a dismissal of the suit. The suit had been fraudulently instituted on insufficient court fee and for that reason also the suit deserved to be dismissed. The defendant then proceeded to state that they reserved the right to take further objections as preliminary objections to the maintainability of the suit and craved leave to add to or alter or amend the application whenever necessary. What is important to be noticed here is that there was no prayer at this juncture for stay of the suit. On January 19, 1983, GEC filed an application (10-C) requesting the court to call upon Renusagar to furnish a complete record of the suit and annexures. The Civil Judge passed an order :

The case is called out. Shri J. P. Singh, present for the plaintiff, Shri R. S. Dhawan, advocate for the defendant. 10-C by the defendant to direct the plaintiff to give copies of complete record so that the defendant may plead preliminary objections. The copies of papers have been given. Now the defendant may file W.S. by March 4, 1983. Put up on March 7, 1983 for issues. Preliminary objections like 7-C and 8-C can be heard and disposed of after filing of written statement when the issues may be framed.

On March 4, 1983 which was the date fixed by the Civil Judge for the filing of a written statement by GEC, GEC filed three applications before the Mirzapur Court : 11-C, 12-C and 13-C. 13-C was styled as "objections by the defendant to the jurisdiction of the court to entertain this suit for declaration and injunction". The document began with the statement : "The hon'ble court has no jurisdiction to entertain this suit because of the following reasons." Seven reasons were set forth. The first and the fourth grounds related to the territorial jurisdiction of the court. The second ground stated that the plaint did not disclose any cause of action and, therefore, was liable to be rejected under Order 7 CPC. The third ground stated that from the statements in the plaint, the suit was barred by limitation. The plaint was, therefore, liable to be rejected under Order 7 Rule 11. The fifth ground was to the effect that the reliefs claimed were untenable on their face and the suit was liable to be straightway dismissed on that account. The sixth ground was that the suit was liable to be stayed under Section 10 or Section 151 of the CPC. The seventh ground was : "Similarly the suit is liable to be stayed as regards the second relief claimed by the plaintiff under Section 3 of the Arbitration (Protocol and Convention) Act, 1937 and Foreign Awards (Recognition and Enforcement) Act, 1961 and/or Section 34 of the Indian Arbitration Act, 1940 or under all of them. " Thereafter the document proceeded to amplify the seven grounds by detailed reference to the allegations in the plaint and by further traversing those allegations. In regard to the seventh ground that the suit was liable to be stayed under Section 3 of the Foreign Awards (Recognition and Enforcement) Act, 1961, it was stated :

The present claim arises out of the only contract between the parties entered into in 1964. Disputes arising out of or related to this contract have to be settled, after being unable to resolve such disputes by sincere negotiation by arbitration under the rules of the International Chamber of Commerce Court of Arbitration because of the Provisions of Article XVIII of the said contract. The

defendant is ready and willing to have the present dispute raised by the plaintiff in this plaint to be settled by arbitration without prejudice the defence of want of cause of action, the bar of limitation and all other defenses. This Honourable Court is therefore "bound to stay the present suit under Section 3 of the foreign Awards (Recognition and Enforcement) Act, 1961".

The final prayer made in the application (13-C) was :

> For the above reasons it is prayed that the plaint be either rejected for failure to disclose the cause of action or as being barred for limitation on the face of it, or it be returned to the plaintiff for presentation top a proper forum. Further, the suit is also liable to be dismissed because reliefs claimed by the plaintiff are untenable on their face. Again, alternatively the suit is liable to be stayed under Section 10 and/or Section 151, CPC in respect of first relief and under Section 3 of the Foreign Awards (Recognition and Enforcement) Act, 1961 in respect of the second relief claimed by the plaintiff in the plaint.

4. 11-C was an application under Order 8 Rule 9 and Section 151 CPC seeking postponement of the striking of issues from March 7, 1983 to April 4 or 5, 1983. In the course of the application it was recited :

> That in keeping with the time schedule fixed by this Hon'ble Court in effect, that a written statement be filed on March 4, 1983, the defendant is filing objections to the jurisdiction of the court to entertain this suit for declaration and injunction to file a subsequent pleading as written statement on merits in the event of the objections taken in the preliminary written statement dated February 21, 1983 being rejected.

The reference to the objections to the jurisdiction of the court and the preliminary written statement dated February 21, 1983 was obviously to 13-C which was verified at Singapore on February 21, 1983.

5. 12-C was an application to grant leave to the defendant to file a subsequent pleading as written statement on merits if the court rejected the objections taken in the preliminary written statement. This application was filed under Order 8 Rule 9.

6. On March 7, 1983, the court adjourned the case to April 5, 1983 and from time to time thereafter. On May, 31, 1983, GEC filed their written statement raising their pleas in defence to Renusagar's suit. However, in the first paragraph it was stated :

> The defendant has filed in this Hon'ble Court an application under Section 20 and Order 8 Rule 9 read with Section 151 CPC for rejection of the plaint with special costs to the defendant on January 15, 1983. The defendant haw also placed on record on January 17, 1983, that a copy of the plaint was supplied without annexures and documents and without the injunction application said to have been filed. The defendant has filed its preliminary written statement contesting the jurisdiction of this Hon'ble Court to try and entertain the suit as no cause of action has arisen to the plaintiff to sue this defendant on March 4, 1983. An appropriate application under Order 8 Rule 9 read with Section 151 CPC was also filed for leave to file subsequent pleading as written statement on merits in the event of the preliminary written statement and the pleas being rejected was also filed on the same date.

In the second paragraph, it was added :

> This defendant craves leave of this Hon'ble Court to incorporate the preliminary objections taken it theretofore by this defendant in its applications and pleadings and preliminary written statement as if the same are set out herein in extenso.

Later in paragraph 6 and 7 of the written statement, it was stated as follows :

> (6) The plaintiff states and submits that the preliminary objections are sufficient to dispose of the entire claim in suit on issues of law alone which go to the root of the jurisdiction aspect of the suit and its apparent non-maintainability and those sought to be decided as preliminary questions of law.
>
> (7) Without prejudices to the preliminary objections referred to hereinabove and deemed to be incorporated herein as stated this defendant shall now deal with the plaint parawise and on merits ....

7. The plaintiff objected to the presentation of the written statement on the ground that it was filed outside court hours. The plaintiff also filed an application for postponement of the date of settlement of issues. On August 4, 1983, the defendant filed an application (19-C), requesting the court to settle the issues on August 18, 1983 itself without further postponement. Thereafter the case was adjourned from time to time. On October 19, 1983, the plaintiff filed an application (21-C) requesting the court to set the defendant ex parte as not having filed any written statement and to decree the suit. On August 1, 1984 the plaintiff, Renusagar filed an application, 25-A, for amendment of the plaint. The amendment sought included a prayer for a decree in a sum of Rs. 62,72,272. After contest, the application for amendment was allowed on October 15, 1984 and GEC was given time to file an additional written statement. A few days earlier, the defendant had filed application (30-C) requesting the court to decide the issues regarding maintainability and jurisdiction and stating that the suit may proceed after decisions on these issues. On this application, the court made an order on October 15, 1984 to the effect that a similar request had earlier been rejected by the court on January 19, 1983 and it was not therefore, open to the court to reopen the matter.

8. On November 30, 1984, GEC filed an application (34-D) seeking time to file a written statement "if so advised" and postponement of settlement of issues. Time was granted. On January 5, 1985, GEC filed an application (65-C) stating that they had consistently pleaded that the issues relating to the jurisdiction of the court and maintainability of the suit should be heard first and reiterating that request prayed that two issues may be struck and decided before the case was proceeded upon on merits. The two issues suggested were :

> (1) Whether the Hon'ble Court had jurisdiction to try and entertain the suit and
>
> (2) Whether the present suit is maintainable against the defendant applicant who neither resides nor carries on business in India.

On February 2, 1985, the Mirzapur Court rejected the application, commenting that such a request was being repeatedly made. Against the order of the Mirzapur Court rejecting the application 65-C, GEC filed a petition under Article 227 before the Allahabad High Court for quashing the proceedings in the suit. In ground eight of the petition, it was stated that GEC had already raised the plea that the suit was liable to be stayed under Section 3 of the Foreign Awards (Recognition and

Enforcement) Act, 1961. It was also stated in ground twelve that the question of arbitrability of the disputes had already been decided by the Supreme Court. On April 4, 1985 the Allahabad High Court dismissed the petition in limine observing as follows :

> We have considered the matter carefully and we are of the view that so far the court below has not been called upon to apply its mind to the provisions contained in Section 3 of the Act. Shri R. S. Dhawan who appears alongwith Shri V. N. Deshpande has stated at the bar that amongst other contentions advanced before the learned Civil Judge, he had pointedly pressed that in view of the aforesaid provisions further proceedings in the suit should be stayed. We have no doubt that such an argument must have been advanced by him. Nonetheless, the learned Civil Judge had not given any decision on this point. We, therefore, consider it appropriate that the petitioner should make a fresh application setting out the relevant facts in the spirit of Section 3 of the Act. This application should be made within a fortnight from today. If such an application is made within the time specified by us, the learned Civil Judge will dispose of the same on merits and in accordance with the law. Till the learned Civil Judge disposes of this application he shall not proceed further with the hearing of the suit. No other order is necessary at this stage. With these observations the writ petition is dismissed summarily.

9. Consequent on the order of the High Court in the application under Article 227, GEC filed another application (83-C) before the Mirzapur Court on April 15, 1985 expressly setting forth their objection under Section 3 of the Foreign Awards (Recognition and Enforcement) Act and praying for a stay of the suit under that provision. Reference was also made to their earlier applications made on March 4, 1983. The contentions raised in 13-C were reiterated. This application (83-C) was rejected by the learned Civil Judge, Mirzapur by an order dated July 9, 1985. The learned Civil Judge took the view that the objection raised on the basis of Section 3 of the Foreign Awards Act must, in the circumstances of the case, be considered to have been abandoned and the defendant considered to have elected to proceed with the suit. The revision application preferred by GEC to the High Court of Allahabad against the order dated July 9, 1985 was dismissed by the High Court on March 7, 1986.

10. The High Court referred to the contents of 13-C in great detail and concluded :

> The plaint as initially presented appears to have been completely answered by the General Electric Company in its application 13-C which it may be remembered was also verified as a pleading, because in the written statement 16-Ka which was undoubtedly filed on May 31, 1983, no further facts referred to .... 13-C is clearly in nature a written statement in the case, raising such pleas which constitute the defence of the General Electric Company to the case set-up in plaint as it stood then.

The High Court also observed that it was apparent to them that the emphasis in 13-C was on the other objections and not on the objections under Section 3 of the Foreign Awards Act. The High Court also rejected the further contentions advanced on behalf of the General Electric Company that a fresh right to make an application under Section 3 of the Foreign Awards (Recognition and Enforcement) Act accrued on the plaint being amended by Renusagar. Stay of the suit was, therefore, refused. General Electric Company has preferred the present appeal against the judgment of the High Court of Allahabad under Article 136 of the Constitution.

11. Shri Shanti Bhushan, on behalf of the appellant General Electric Company and Dr. L. M. Singhvi, on behalf of Renusagar addressed elaborate arguments covering indeed a wide range of facts and law. They also cited before us a host of cases Indian, English and Canadian. We do not propose to examine the several side issues and non-issues which were argued before us. We propose to confine ourselves to the basic questions which were argued before us namely,

> (a) whether either 8-C or 13-C could be considered to be a step in the suit so as to disentitled the defendant from seeking a stay of the suit under Section 3 of the Foreign Awards (Recognition and Enforcement) Act,
>
> (b) whether 13-C was in the nature of a written statement, the filing of which precludes the defendant from seeking a stay and
>
> (c) whether the defendant could be said to have abandoned the right to seek a stay in the circumstances of the case.

12. The foreign Awards (Recognition and Enforcement) Act was enacted 'to enable effect to be given to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards done at New York, on the 10th day of June, 1958, to which India is a party and for purposes connected therewith'. The Convention is set forth in the Schedule to the Act and Section 4(i) of the Act provides that a foreign award shall, subject to the provisions of the Act, be enforceable in India as if it were an award made on a matter referred to arbitration in India. Except Section 3, we are not concerned with the remaining provisions of the Act. Section 3 is as follows :

> Stay of proceedings in respect of matters to be referred to arbitration - Notwithstanding anything contained in the Arbitration Act, 1940, or in the Code of Civil Procedure, 1908, if any party to an agreement to which Article II of the Convention set forth in the Schedule Applies, or any person claiming through or under him commences any legal proceedings in any court against any other party to the agreement or any person claiming through or under him in respect of any matter agreed to be referred to arbitration in such agreement, any party to such legal proceedings may, at any time after appearance and before filing a written statement or taking any other step in the proceedings, apply to the court to stay the proceedings and the court, unless satisfied that the agreement is null and void, inoperative or incapable of being performed or that there is not, in fact, any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings.

13. Section 3 of the Foreign Awards (Recognition and Enforcement) Act is analogous to Section 34 of the Indian Arbitration Act which is as follows :

> Where any party to an arbitration agreement or any person claiming under him commences 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.

14. It may be straightway noticed that while Section 34 of the Indian Arbitration act vests in the court the discretion to stay or not to stay the proceedings, Section 3 of the Foreign Awards (Recognition and Enforcement) Act vests no such discretion in the court. Under the Foreign Awards (Recognition and Enforcement) Act it is mandatory that the proceedings could (sic should) be stayed if the conditions prescribed are fulfilled. But, whether it is a defendant who invokes the discretion of the court under Section 34 of the Indian Arbitration Act or whether it is a defendant who seeks to enforce the right under Section 3 of the Foreign Awards (Recognition and Enforcement) Act, it is necessary that he should not have disentitled himself from doing so either by filing a written statement or by taking any other step in the proceedings. His application to the court, be it under section 34 of the Indian Arbitration Act or Section 3 of the Foreign Awards (Recognition and Enforcement) Act may be filed "before filing a written statement or taking any other step in the proceedings". It is competent then only and not thereafter. The question is when may a written statement said to have been filed or when may any other step said to have been taken in the proceedings?

15. On the question of the meaning of the expression 'step in the proceedings', on the question of the proper approach to the solution of the problem and on allied questions, we were referred by the learned counsel for GEC and Renusagar to decisions of the English courts (Ford's Hotel Co v. Bartltt, [1896] AC 1; Ochs v. Ochs Brothers, [1909] 2 Ch D 121; Parkar, Gaines & Co. v. Turpin, (1918) 1 KB 358; Henry v. Geopresco International Ltd., (1975) 2 All ER 702; Tracomin SA v. Sudan Oil Seeds, (1983) 1 All ER 404 and The Tuyuti (1984) 2 All ET 545), decisions of the Canadian courts (((1) Raymond v. Adrema Ltd., 37 DLR (2d) 9)(2)Fathers of Confederation Bldgs. Trust v. Pigott Construction Co. Ltd. 44 DLR (3d) 265) and passages from textbooks ((1) Russell on Arbtration 20th edn. (2) Commercial Arbtration by Mustil & Boyd). We do not propose to refer to them in our judgment - not because we do not find them instructive; indeed we read them carefully and found them helpful, but because we think that reference to such persuasive authority is justified only if there is no guidance from binding authority. The time has perhaps arrived to discourage uninhibited reference to and extravagant use foreign precedents, though indeed we welcome such precedents when they explore virgin territory and expand the horizons of legal thought. The setting of a foreign judgment is the foreign country's past and present history, its economic relations, its social relations, its trade and commerce, its traditions, its values, its needs, the stages of the development of its people, its legal ideology, its constitutional direction and strategies and its statutes and precedents. Foreign precedents are to be read and remembered in their setting, but never to be elevated to the level of binding precedents and, therefore, to be avoided from frequent and needless quotation.

16. Section 34 of the Indian Arbitration Act has received the consideration of the Supreme Court in State of U.P. v. Janki Saran Kailash Chandra ((1974) 1 SCR 31 : (1973) 2 SCC 96 : AIR 1973 SC 2071) and Food Corporation of India v. Yadav Engineer (1983) 1 SCR 95 : (1982) 2 SCC 499 : 1982 Mah LJ 803).

17. In State of Uttar Pradesh v. Janki Saran Kailash Chandra ((1974) 1 SCR 31 : (1973) 2 SCC 96 : AIR 1973 SC 2071,) the facts were that the summons in a suit instituted against the State of Uttar Pradesh were served on the District Government Counsel. On September 2, 1966, the District Government Counsel entered his appearance in the suit and also filed a formal application praying

for a month's time for filing a written statement. Time was granted as prayed for. On October 1, 1966, the District Government Counsel filed an application under Section 34 of the Arbitration Act pleading that there was an arbitration clause in the agreement between the parties, that the State was willing to have the matter referred to arbitration and that the suit should therefore, be stayed. The trial court stayed the suit. But, on appeal, the High Court took the view that the application for time for filing the written statement was a step in the proceedings within the meaning of that expression in Section 34 of the Arbitration act and the defendant was therefore, disentitled to claim that the suit should be stayed. The Supreme Court affirmed the decision of the High Court observing : (SCC p. 102, para 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 court then proceeded to discuss the scope and meaning of Section 34 of the Arbitration Act and went on to observe : (SCC p. 103, para 7)

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 filling 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.

18. Thereafter, the court also noticed that the State had taken benefit of the appearance of the District Standing Counsel and his successful prayer for adjournment of the case by one month for the purpose of filing the written statement. Dealing with the question whether the High Court had interfered with the discretion of the trial court, it was observed : (SCC p. 104, para 9)

If the appellants' application was for adjournment for the purpose of filing a 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 nothing 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.

The court then added : (SCC p. 104, para 10)

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.

19. In Food Corporation of India v. Yadav Engineer (1983) 1 SCR 95 : (1982) 2 SCC 499 : 1982 Mah LJ 803) the question arose whether the appearance of the defendant and his prayer for time to reply to the notice of motion taken out by the plaintiff for an interim injunction could be said to amount to a step in the proceeding so as to disentitle the defendant from seeking a stay of the

proceeding under Section 34 of the Arbitration Act. First interpreting Section 34 without the aid of authority, Desai J. speaking for the court, observed that if a party to an arbitration agreement sought to enforce the agreement by seeking a stay of the suit, he was obliged to disclose his unequivocal intention to abide by the agreement by asking for stay before taking any step which may unequivocally indicate otherwise, that is, a step which may unequivocally indicate the intention to waive the benefit of the arbitration agreement : (SCC p. 508-9, para 9)

Abandonment of a right to seek resolution of dispute as provided in the arbitration agreement must be clearly manifested by the step taken by such party. Once such unequivocal intention is declared or abandonment of the right to claim the benefit of the agreement becomes manifest from the conduct, such party would then not be entitled to enforce the arbitration agreement because there is thus a breach of the agreement by both the parties disentitling both to claim any benefit of the arbitration agreement. Section 34 provides that a party dragged to the court as defendant by another party who is a party to the arbitration agreement must ask for stay of the proceedings before filing the written statement or before taking any other step in the proceedings. That party must simultaneously show its readiness and willingness to do all things necessary to the proper conduct of the arbitration. The legislature by making it mandatory on the party seeking benefit of the arbitration agreement to apply for stay of the proceedings before filing the written statement or before taking any other steps in the proceedings unmistakably pointed out that filing of the written statement discloses such conduct on the part of the party as would unquestionably show that the party has abandoned its rights under the arbitration agreement and has disclosed an unequivocal intention to accept the forum of the court for resolution of the dispute by waiving its right to get the dispute resolved by a forum contemplated by the arbitration agreement. When the party files written statement to the suit it discloses its defence, enters into a contest and invites the court to adjudicate upon the dispute. Once the court is invited to adjudicate upon the dispute there is no question of then enforcing an arbitration agreement by forcing the parties to resort to the forum of their choice as set out in the arbitration agreement. This flows from the well settled principle that the court would normally hold the parties to the bargain [see Ramji Dayawala & Sons (P) Ltd. v. Invest Import ((1981) 1 SCR 899 : (1981) 1 SCC 80 AIR 1981 SC 2085].

Posing the next the question what other steps the legislature contemplated as disentitling a party from obtaining stay of the proceeding, the learned judges applied the principle of ejusdem generis and held : (SCC p. 510, para 10)

That some other step must indisputably be such step as would manifestly display an unequivocal intention to proceed with the suit and to give up the right to have the matter disposed of by arbitration. Each and every step taken in the proceedings cannot come in the way of the party seeking to enforce the arbitration agreement by obtaining stay of proceedings but the step taken by the party must be such step as would clearly and unmistakably indicate an intention on the part of such party to give up the benefit of arbitration agreement and to acquiesce in the proceedings commenced against the party and to get the dispute resolved by the court. A step taken in the suit which would disentitle the party from obtaining stay of proceeding must be such step as would display an unequivocal intention to proceed with the suit and to abandon the benefit of the arbitration agreement or the right to get the dispute resolved by arbitration.

The learned judges then proceeded to consider the question whether an appearance in the suit to contest an interlocutory application, such as, an application for appointment of receiver or ex parte ad interim injunction, disclosed an unequivocal intention to proceed with the suit and give up the benefit of the arbitration agreement. The question was answered as follows : (SCC pp. 511-12, para

12)

Incidental proceedings for appointment of receiver or for interim injunction are for the protection either of the property or the interests of the parties. Now, when ex parte orders are obtained on ex parte averments the other party cannot be precluded from coming and pointing out that no case is made out for granting interim relief. It would be too cumbersome to expect the party first to apply for stay and then invite the court under Section 41 (2) of the Act to vacate the injunction or to discharge the receiver. Giving the expression "taking any other steps in the proceedings" such wide connotation as making an application for any purpose in the suit such as vacating stay, discharge of the receiver or even modifying the interim orders would work hardship and would be inequitous to the party who is willing to abide by the arbitration agreement and yet be forced to suffer the inequity of ex parte orders. Therefore, the expression "taking any other steps in the proceedings" must be given a narrow meaning in that the step must be taken in the main proceeding of the suit and it must such step as would clearly and unambiguously manifest the intention to waive the benefit of the arbitration agreement and to acquiesce in the proceedings. Interlocutory proceedings are incidental to the main proceedings. They have a life till the disposal of the main proceeding. As the suit or the proceeding is likely to take some time before the dispute in the suit is finally adjudicated, more often interim orders have to be made for the protection of the rights of the parties. Such interlocutory proceedings stand independent and aloof of the main dispute between the parties involved in the suit. They are steps taken for facilitating the just and fair disposal of the main dispute. When these interlocutory proceedings are contested it cannot be said that the party contesting such proceedings has displayed an unequivocal intention to waive the benefit of the arbitration agreement or that it has submitted to the jurisdiction of the court. When ex parte orders are made at the back of the party the other party is forced to come to the court to vindicate its right. Such compulsion cannot disclose an unambiguous intention to give up the benefit of the arbitration agreement. Therefore, taking any other steps in the proceedings must be confined to taking steps in the proceedings for resolution of the substantial dispute in the suit. Appearing and contesting the interlocutory applications by seeking either vacation thereof or modification thereof cannot be said to be displaying an unambiguous intention to acquiesce in the suit and to waive the benefit of the arbitration agreement. Any other view would both be harsh and inequitous and contrary to the underlying intendment of the Act. The first party which approaches the court and seeks an ex parte interim order has obviously come to the court in breach of the arbitration agreement. By obtaining an ex parte order if it forces the other party to the agreement to suffer the order, or by merely contesting be imputed the intention of waiving the benefit of arbitration agreement, it would enjoy an undeserved advantage. Such could not be the underlying purpose of Section 34. Therefore, in our opinion, to effectuate the purpose underlying Section 34 the narrow construction of the expression "taking any other steps in the proceedings" as hereinabove set out appears to advance the object and purpose underlying Section 34 and the purpose for which the Act was enacted.

The court then referred to various decisions on the question. There after the case of State of U. P. v. Janki Saran Kailash Chandra (1974 1 SCR 31 : (1973) 2 SCC 96 : AIR 1973 SC 2071)w as discussed in detail. After quoting from the judgment of Justice Dua, the court observed : (SCC p. 518, para 29)

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.

The court finally concluded the discussion as follows : (SCC p. 519, para 31)

Having thus critically examined both on principle and precedent the meaning to be given to the expression 'taking steps in the proceedings', 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.

Thus we see that it is the view of this Court that a step in the proceeding which would disentitle the defendant from invoking Section 34 of the Arbitration Act should be a step in aid of the progress of the suit or submission to the jurisdiction of the court for the purpose of adjudication of the merits of the controversy in the suit. The step must be such as to manifest the intention of the party unequivocally to abandon the right under the arbitration agreement and instead to opt to have the dispute resolved on merits in the suit. The step must be such as to indicate an election or affirmation in favour of the suitmay be by express choice or by necessary implication by acquiescence. The broad and general right of a person to seek redressal of his grievances in a court of law is subject to the right of the parties to have the disputes settled by a forum of mutual choice. Neither right is insubstantial and neither right can be allowed to be defeated by any manner of technicality. The right to have the dispute adjudicated by a civil court cannot be allowed to be defeated by vague or amorphous mis-called agreements to refer to 'arbitration'. On the other hand, if the agreement to refer to arbitration is established, the right to have the dispute settled by arbitration cannot be allowed to be defeated on technical grounds.

20. What do we have in the present case ? We mentioned at the outset that GEC filed two applications on January 17, 1983, 7-C and 8-C. In 7-C, GEC purported to put on record their complaint that they had not received the annexures to the plaint. By no stretch of imagination could it possibly be said that 7-C indicated either an abandonment of arbitration or an affirmation of the suit. 8-C was an application requesting the court to reject the plaint and the suit for the reasons set forth in the application. One of the grounds urged was hat the Mirzapur Court had no territorial jurisdiction. Another ground was that the plaint was insufficiently stamped. Yet another ground was that the plaint disclosed no cause of action. Every one of the objections was in the nature of a preliminary objection to the trial of the suit on the merits of the dispute between the parties. Every one of the objections was what may be called a threshold objections pleaded as a bar to any further hearing of the suit. None of the objections invited an adjudication on the merits of the controversy. It was sad that the return of a plaint under Order 7 Rule 10 and the rejection of a plaint under Order 7 Rule 11 put an end to the controversy so far as the court where the proceedings had been instituted and that the rejection of a plaint under Order 7 Rule 11 was a decree within the definition of that expression in Order 2 Rule 2 of the Civil Procedure Code. It was argued that the rejection of a plaint for non-disclosure of a cause of action was also an adjudication of the merits of the controversy in the suit and reliance was placed on decisions under the Representation of the People Act. We do not

think that we can accept the argument nor are we able to derive any assistance from the cases cited. In the first place, the expression 'merits of the controversy in the suit' does not occur either under Section 34 of the Arbitration Act or Section 3 of the Foreign Awards (Recognition and Enforcement) Act. The words occur in the decision of this Court in State of U.P. v. Janki Saran Kailash Chandra ((1974) 1 SCR 31 : (1973) 2 SCC 96 : AIR 1973 SC 2071) where the court said :

> 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.

As often enough pointed out by us, words and expressions used in a judgment are not to be constructed in the same manner as statutes or as words and expressions defined in statutes. We do not have any doubt that when the words "adjudication of the merits of the controversy in the suit" were used by this Court in State of U.P. v. Janki Saran Kailash Chandra ((1974) 1 SCR 31 : (1973) 2 SCC 96 : AIR 1973 SC 2071), the words were not used to take in every adjudication which brought to an end the proceeding before the court in whatever manner but were meant to cover only such adjudication as touched upon the real dispute between the parties which gave rise to the action. Objections to adjudication of the disputes between the parties, on whatever ground are in truth not aids to the progress of the suit built hurdles to such progress. Adjudication of such objections cannot be termed as adjudication of the merits of the controversy in the suit. As we said earlier, a broad view has to be taken of the principles involved and narrow and technical interpretation which tends to defeat the object of the legislature must be avoided. We are of the view that an invitation to the court to reject a plaint or dismiss a suit on a ground not touching the merits of the controversy between the parties, but a ground such a insufficiency of the court fee paid, maintainability of suit, territorial jurisdiction etc. is really to enable the proceeding before the arbitrator to go on and far from an election to abandon arbitration and continue the suit. Every threshold bar to a suit set up by a defendant is a step to allow the arbitration to go on. It is a step in aid of arbitration and not in aid of the progress of the suit. In that view, we think that 8-C can hardly be called an invitation to the court to adjudicate upon the merits of the controversy, when in fact it is designed to prevent the court from touching upon the merits of the controversy.

21. The next set of events relied upon by the plaintiff to deny the defendant's right to obtain stay is the filing by GEC of the application 11-C, 12-C and 13-C in the Mirzapur Court on March 4, 1983. March 4 and March 7 were the dates which had been fixed by the court for filing the written statement and for the striking of the issues. The defendant, on March 4, instead of filing the written statement, filed 11-C, 12-C and 13-C. 13-C as already mentioned, was styled "objections by the defendant to the jurisdiction of the court to entertain a suit for declaration and injunction". It began with the statement, "the Hon'ble Court has no jurisdiction to entertain the suit for the following reasons" and ended with the prayer :

> For the above reasons it is prayed that the plaint may either rejected for failure to disclose a cause of action or as being barred by limitation on the face of it, or it be returned to the plaintiff for presentation to a proper forum. Further the suit is also liable to be dismissed because reliefs claimed by the plaintiff are untenable on their face. Again, alternatively the suit is liable to be stayed under Section 10 and/or Section 151 CPC in respect of first relief and Section 3 of the Foreign Awards (Recognition of Enforcement) Act, 1961 in respect of second relief claimed by the plaintiff in the suit.

11-C was an application seeking postponement of the striking of the issues from March 7 to a later date in the event of the preliminary objections being rejected. 12-C was an application to grant leave to file a subsequent pleading as written statement in the event of the preliminary being rejected. Obviously 11-C, 12-C and 13-C have to read together and reading them together, it appear to us to be clear that the defendant raised objections to the trial of the suit on merits, which were loosely described as 'objections' to the jurisdiction of the court and objections to the maintainability of the suit' and which were requested to be disposed of first with a further request that if the objections were rejected the defendant may the be allowed to file a proper written statement on merits and issues struck thereafter. The invitation to the court was not to proceed with the suit but to refrain from proceeding with the suit until the preliminary objections were first decided. The preliminary objections were set out by the defendant in 8-C and 13-C and we have set them out earlier while narrating the facts. We notice that the preliminary objections raised were not of such a nature as to make adjudication on merits of any part of the real dispute between the parties necessary for deciding the preliminary objections. While elaborating the preliminary objections, particularly in order to explain the contention that the plaint did not disclose a cause of action, the defendant did choose to controvert several factual averments made in the plaint. We do not think that the circumstances that the defendant chose to deny in his applications inviting decision on his preliminary objections, the allegations of material facts made by the plaintiff in the plaint changes the character of the applications into a written statement any more than a reply to a notice of motion seeking an ad interim injunction acquires the character of a written statement merely because factual allegations made in the plaint are also dealt with in the reply. A defendant may consider it necessary to deny the averments of the fact in the plaint with a view to explain the preliminary objections raised by him or he may deny the averments of fact by way of abundant caution so as not to understood as having admitted (by not denying) the plaint averments.

22. In such a situation, the question to be considered is did the defendant intend it to be a written statement or was the document capable of being construed as setting out unreservedly the case which the defedant wished to put forward ? Was it meant to answer the plaint ? We do not think either 8-C or 13-C is capable of being so constructed. Neither the title of the documents not the prayer in the documents would justify their being dubbed as written statements. We have referred to their contents and we do not think it possible to view 8-C or 13-C as meant to answer the plaint. They were objections and not answer to the plaint. We are unable to hold that either of them can be treated as a written statement. It is of interest to note here that the plaintiff himself filed an application 21-C requesting the court to set the defendant ex parte on the ground that he did not file any written statement. Obviously the plaintiff never considered 13-C to be a written statement We are also unable to hold that either of them can be said to be a step in the proceeding. We have already explained why 8-C cannot be treated as a step in the proceeding. The same reasons apply to 13-C also. 13-C invited the court to consider the preliminary objections amongst which was a prayer to stay the suit under Section 3 of the Foreign Awards (Recognition and Enforcement) Act. An invitation to the court decide the was in fact a request to the court not to proceed with the trial of the suit on merits. We are unable to hold that 13-C was an invitation to the court to adjudicate upon the merits of the controversy, when in fact as we said in the case of 8-C, it was designed to prevent the court from touching upon the merits of the controversy. It was argued that the defendant himself sought permission for filing additional pleadings if preliminary objections were rejected and, therefore, the defendant himself thought that 13-C was pleading, namely, a written statement. Our attention was also invited to the written statement filed on May 31, 1983 in which the preliminary objections filed earlier were referred to as preliminary written statement. We do not think we will be justified in harping upon a word here or a word there. As we said earlier we propose to look at the

substance of the matter and ignore the chaff. Looking to the substance of the matter, we find that before May 31, 1983, that is, the date on which the written statement was filed, the defendant did not take any step in the suit. The applications filed by him were not in aid of the progress of the suit, but to request the court to refrain from proceeding with the suit. 13-C contained a prayer for the stay of the suit under Section 3 of the Foreign Awards (Recognition and Enforcement) Act and we hold that, in terms of that provision, it was made before the written statement was filed and before any step in the proceeding was taken.

23. An argument which was pressed before us was that the conduct of the defendant was such that he must be considered to have abandoned his right to have the suit stayed under Section 3 of the Foreign Awards (Recognition and Enforcement) Act. We do not think there is any substance in the submission. On the one hand, we have the outstanding circumstance that the defendant was proceeding with the arbitration. On the other hand, we have also the circumstance that the defendant filed 13-C one of the prayers of which was a stay of the suit under Section 3 of the Act. The argument was that the defendant did not press his application and did not seek the orders of the court on 13-C. This would not be a correct picture of the events since we find that even on January 19, 1983, the court made an order that preliminary objections like 7-C and 8-C could be heard and disposed of after filing of written statement when the issues may be framed. We also find that at every stage the defendant kept referring to his preliminary objections and never for a moment abandoned them. 30-C was another application filed by him requesting the court to decide the preliminary objections regarding jurisdiction and maintainability of the suit. On this order was that it was not competent for the court to reopen the order dated January 19, 1983. It was therefore, not the defendant's fault that the preliminary objections were not decided. Later again the defendant filed 34-C requesting the court to frame preliminary issue and try them on the question of the jurisdiction of the court and the maintainability of the suit. This application was also rejected by the court with the comment that the request was being repeatedly made. It was against this order that the defendant went to the High Court with the application 65-C. The High Court directed the defendant to file an application for the trial court specifically requesting that court to apply its mind on the provisions of Section 3 of the Foreign Awards (Recognition and Enforcement) Act and pointedly pressing the contention relating to those provisions. Pursuant to this direction, the defendant filed 83-C before the trial court and it is on the orders made on this application that the present appeal has come before us. The submission of the learned counsel for the plaintiff was that the appeal before us arose directly from the order made on the application 83-C not on the application 13-C. According to the learned counsel, 13-C must be considered to have been given up and since 83-C was filed long after the filing of the written statement, it was incompetent. We are unable to agree. 13-C was never abandoned by the defendant. On the other hand 83-C also expressly refers to 13-C. 83-C is a reiteration and revival of 13-C with emphasis on the objection relating to Section 3 of the Foreign Awards (Recognition and Enforcement) Act.

24. Looking to the substance of the matter and ignoring technicalities, we are firmly of the view that the defendant sought a stay of the suit before filing a written statement or taking any other step in the suit and that he never abandoned his right to have the suit stayed. The appeal is, therefore allowed with costs and the suit No. 127 of 1982 in the court of Mirzapur stayed under Section 3 of the Foreign Awards (Recognition and Enforcement) Act. In the view that we have taken we do not think it necessary to consider the further question raised by the learned counsel for the appellant that the amendment of the plaint introducing a substantially new cause of action gave the defendant a fresh right under Section 3 of the Foreign Awards (Recognition and Enforcement) Act.

</html