

## **PUNJAB AND HARYANA HIGH COURT**

Charan Das

Vs

Harbhajan Singh-Hardit Singh

(Soni, J.)

18.10.1951

### **ORDER**

**Soni, J.**

1. A suit was brought by Messrs Bhajan Singh Hardit Singh & Company of Delhi in the Court of a Subordinate Judge, Delhi against Messrs. Charan Das & Sons of Amritsar for the recovery of Rs. 1,500/-.

2. After the plaintiffs had put in the plaint they tried to serve the defendants, but the defendants could not be served and substituted service was ordered. On the 28th April 1949 the Court's order was that substituted service had been effected and that there was no appearance on behalf of the defendants in Court, and ex parte proceedings were ordered to be taken against them and the case was put up for hearing for the 10th May 1949. On the 29th April 1949 an application was put in on behalf of the defendants by Daulat Ram Tandon, the proprietor of the defendants, urging, on various grounds, that the ex parte proceedings should be set aside. He stated that he had left Amritsar and had taken up business in Bombay long before the institution of the suit and the plaintiffs were fully aware of this fact. He also stated that he had gone to Japan and that was another reason why he could not come to know about the suit. The Court accepted the contention of the defendants and set aside the ex parte order and fixed a date for the hearing of the case. On the 18th July 1949 the defendants put in an application under Section 34 of the Indian Arbitration Act submitting that the contract on which the plaintiffs had sued the defendants contained an arbitration clause and that the matter should be referred to arbitrators and the proceedings should be stayed. The Court on this held that there was an arbitration clause and accepted the contention of the defendants and stayed the proceedings. This order staying the proceedings was passed on the 11th November 1949. From this order there was an appeal to the District Judge, Delhi. The learned Additional District Judge by his order dated the 21st November 1950 accepted the appeal and set aside the order of the trial Judge. It was not contended before him that the contract did not contain any arbitration clause. What was contended before the learned Additional District Judge was that under Section 34 the defendants should have put in their application for stay

before they took any other proceedings and that the fact that they took proceedings for setting aside the ex parte order precluded them from putting in the application for stay. This contention found favour with the learned Additional District Judge while accepting the appeal. From the order of the Additional District Judge a revision has been taken to this Court.

3. I have heard learned counsel for the parties. The way in which I look at the matter is this. When proceedings are ordered to be taken ex parte before a Court the party against whom proceedings have been ordered to be ex parte has no right to come to the Court or take any other application to the Court except the application that the ex parte order be set aside. It is only when the ex parte order is set aside that he can take any other proceedings in the Court. If that order setting aside the ex parte proceedings stands, no other proceedings can be taken in the suit before the Court. Mr. Gurdev Singh, learned counsel for the respondent. In this case, urged that under Section 34 the application for stay could be made before any other proceedings were taken in the Court. The section no doubt says so, but the Section refers to normal proceedings which are taken before a Court. A case normally proceeds before a Court when defendant is served with a notice by the Court of a suit having been brought against him and he is asked to put in whatever defence he would care to put in. Section 34 refers to those normal proceedings, and when the section says that the party 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, it refers to the normal manner in which these proceedings are not normally pending, but when ex parte proceedings have been taken and the person against whom ex parte proceedings are taken comes up before the Court the first thing that he must do is to convince the Court that the ex parte order was not rightly made. Unless he convinces the Court he has no right to make any other application before the Court. Therefore the first act which the defendants had to do, was to have the ex parte order set aside. The Court accepted the contention of the defendants and set aside the ex parte proceedings. If after setting aside the ex parte proceedings the defendants had taken any other step in the suit except the step of asking the Court to stay the proceedings because of arbitration clause in the contract, then no doubt they would be debarred under the provisions of Section 34 from urging for the stay of proceedings. But this is what did not happen in the case. The ex parte order, as I have said before, was set aside on the 6th June 1949 and a date was fixed for further proceedings in the suit. On that date the present application for stay of proceedings under Section 34 of the Arbitration Act was put in. In my opinion, there has been nothing done by the defendants in contravention of the provisions of Section 34, and in my view the learned Additional District Judge was wrong in setting aside the order of the learned trial Judge.

4. I accept the revision petition, set aside the order of the Additional District Judge and restore that of the trial Court. The petitioners will have their costs in this Court.