

Union of India (Uoi) Vs. Hind Galvanizing and Engineering Co. Pvt. Ltd.

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Court : Kolkata

Decided On : Jul-14-1972

Reported in : AIR1973Cal215

Judge : A.N. Sen and ;T.K. Basu, JJ.

Acts : [Arbitration Act, 1940](#) - Sections 34 and 39

Appeal No. : A.F.O.O. No. 271 of 1971 and Award Case No. 74 of 1971

Appellant : Union of India (Uoi)

Respondent : Hind Galvanizing and Engineering Co. Pvt. Ltd.

Disposition : Appeal dismissed

Judgement :

T.K. Basu, J.

1. This is an appeal arising out of the judgment and order passed by Salil K. Roy Chowdhury, J., dated the 20th August, 1971, dismissing an application for stay of a suit under Section 34 of the [Arbitration Act, 1940](#).

2. Although the facts have been fully noted by the learned trial judge, they may be briefly recorded.

3. The appellant Union of India accepted a tender of the respondent with regard to the supply of G, T. Steel tubes of particular specifications. The contract constituted by such acceptance of the tender contained the usual arbitration clause. The contract also contained a Price Increased Clause. The respondent preferred a claim against the appellant based on this clause relating to the increase in the price of steel. Out of this claim, the appellant allowed only a portion. Thereafter a notice under Section 80 of the Civil Procedure Code was served on the appellant for the balance of the claim and a suit was instituted in this Court on the 27th January, 1970 praying for a decree for Rs. 16,46,080.58P. being Suit No. 67 of 1970. The Writ of summons was duly served on the appellant. The suit appeared in the Warning list of Undefended Suits, on the 17th February, 1971, 3rd March, 1971 and 17th March, 1971. On the 19th March, 1971 when the suit appeared in the Peremptory list of the Undefended suits; learned Counsel appeared before the learned Judge and asked for an adjournment. The minutes of the order made on the date is material and may be set out:

'Order dated the 19th March, 1971 Cor. K. L. Roy, J., Mr. P. K. Sen prays for adjournment. Mr. Bhaskar Sen for the plaintiff submits. The Cor. adjourned for a fortnight. All costs thrown away to be costs in the cause, so far as the plaintiff is concerned.'

4. The suit again appeared in the list on the 1st April, 1971 when the following order was made:

'Order dated 1st April, 1971 of K. L. Roy, J. Mr. N. C. Roy Chowdhury mentions and asks for an adjournment on the ground that the respondent will make an application under Section 34 of the [Arbitration Act, 1940](#).

Mr. Bhaskar Sen for the plaintiff opposed. The Cor. adjourned till 8th of April, 1971.'

5. Thereafter the application out of which the present appeal arises was made by the appellant on the 6th April, 1971.

6. In delivering his judgment the learned trial Judge adverted to three principal questions as will appear from the following observations in the judgment:

'Three questions are to be gone into in this application: Firstly, whether in the facts and circumstances of this case the petitioner(s) have taken a step in the proceeding whereby (they) have been debarred from making any application under Section 34 of the [Arbitration Act, 1940](#); secondly, whether the disputes between the parties involved an intricate and complicated question of law and thirdly, whether the petitioners were ready and willing at the commencement of the proceeding to do all things necessary to the proper conduct of the arbitration.'

7. On the first question after noticing a number of decisions cited before the learned trial Judge the proposition of law is summarised in the judgment as follows:

'I do not think it is necessary for me to refer the said decisions in detail as it is now well settled as would appear from the said decisions that any act which shows an unequivocal intention on the part of the defendant to proceed with the suit would be a step in the proceedings. Such an act may be of diverse nature depending on the facts and circumstances of each and the substance is that whether from such an act the intention of the defendant is clear and unambiguous to defend and proceed with the suit or proceeding.'

8. Applying the above proposition of law to the facts of the present case the learned trial Judge has come to the conclusion that the defendant expressed an unequivocal and unambiguous intention to defend this suit and got the suit adjourned and in fact the Court directed that all costs thrown away to be costs in the cause, that is in the said suit.

9. On the second question the conclusion of the learned trial Judge is found in the following observations in the judgment:

'Secondly, in the fact of this case as it appears from the plaint that there is a question of part of the goods despatched by Steamer to the petitioner by the respondent was seized during transit by the Government of Pakistan due to the

hostilities then existing between India and Pakistan and as such complicated questions involving International Law and Law of Contract would arise in adjudication of the disputes between the parties. That itself is a consideration for the Court in not exercising discretion under Section 34 of the [Arbitration Act, 1940](#) in favour of staying the suit.'

10. On the third question the learned trial Judge comes to the following conclusion:

'Applying the well-settled principles for granting stay under Section 34 of the Arbitration Act in the facts and circumstances of this case. I hold that the petitioner has taken a clear and unequivocal step in the proceeding within the meaning of Section 34 of the [Arbitration Act, 1940](#) and as such the application is not maintainable.'

11. Mr. M.N. Banerjee appearing on behalf of the appellant assailed the judgment of the learned trial Judge as being wrong on all the three grounds on merits.

12. But before we deal with these contentions on merits it would be useful to remind ourselves of the limits of the right of interference by a Court of Appeal in dealing with a discretionary order of a learned trial Judge passed under Section 34 of the [Arbitration Act, 1940](#).

13. Mr. Biswarup Gupta appearing on behalf of the respondent strongly relied on a decision of the Supreme Court on this aspect of the matter. That is a decision in the case of the Printers (Mysore) Private Ltd. v. Pothan Joseph, reported in : [1960]3SCR713 in which Gajendragadkar, J. (as he then was) observed as follows:--

'Where the discretion vested in the court under Section 34 has been exercised by the trial Court the appellate Court should be allowed to interfere with the exercise of the said discretion. In dealing with the matter raised before it at the appellate stage the appellate Court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial Court reasonably and in a judicial

manner the fact that the appellate Court would have taken a different view may not justify interference with the trial Court's exercise of discretion. As is often said, it is ordinarily not open to the appellate Court to substitute its own exercise of discretion for that of the trial Judge, but if it appears to the appellate Court that in exercising its discretion the trial Court has acted unreasonably or capriciously or has ignored relevant facts and has adopted an unjudicial approach then it would certainly be open to the appellate Court--and in many cases it may be its duty--to interfere with the trial Court's exercise of discretion. In cases falling under this class the exercise of discretion by the trial Court is in law wrongful and improper and that would certainly justify and call for interference from the appellate Court. These principles are well established; but, as has been observed by Viscount Simon L. C. in *Charles Oseinton and Co. v. Johnston*, (1942) AC 130 at p. 138 'the law as to the reversal by a Court of Appeal of an order made by a Judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well settled principles in an individual case.'

14. In a latter decision of the Supreme Court in the case of *Uttar Pradesh Co-operative Federation Ltd. v. Sunder Bros., Delhi*, reported in : AIR 1967 SC249 there are almost identical observations on this aspect of the matter at page 253 of the report

15. That being the legal position as settled by Supreme Court it is clear that the Court of Appeal can interfere with a discretionary order passed by the learned trial Judge under Section 34 of the Arbitration Act only if the Court of Appeal comes to the conclusion that the trial Court in exercising its discretion has acted unreasonably or capriciously or has ignored relevant facts or has adopted an unjudicial approach. We may at this stage observe as will appear from the reasons which will be given hereinafter that we have no hesitation in holding that the discretionary order of the [earned trial Judge is not vitiated by any of the infirmities which we have mentioned above. In other words, the decision of the learned trial Judge cannot be called either unreasonable or capricious or having ignored relevant facts or having adopted an unjudicial approach. We will proceed to deal with the merits of the contentions to show why we have come to the above conclusion.

16. Mr. M. N. Banerjee for the appellant contended in the first place that When the learned counsel for the appellant mentioned the matter before K. L. Roy, J. on the 19th March, 1971 when the order for adjournment and the order for costs was made and which we have set out hereinabove; neither the instructing solicitor nor the learned counsel was aware of what the suit was about. In other words, at that stage the learned lawyers acting on behalf of the appellant Union of India were completely ignorant of the nature of the claim made in this suit as also of the question whether there was any arbitration agreement covering the subject-matter of the dispute in this suit. The very foundation of this argument is, however, completely demolished if we turn to the affidavit-in-opposition filed on behalf of the appellant in the application under Section 34 of the Arbitration Act before the trial Court. That is the affidavit of Kalyan Kumar Nag affirmed on the 28th June, 1971. The material portion of paragraph 19 (which is to be found at pages 130-131 of the Paper Book) is as follows:

'With reference to paragraph 16 of the said affidavit I reiterate what is stated in paragraph 17 of the petition and save what are matters of record I deny each and every allegation and contention contained in the said paragraph. I say that on 19th March, 1971 counsel appeared on behalf of Union of India and prayed that the suit should go out of the list as the subject-matter of the suit was covered by arbitration agreement. Necessary instructions had to be obtained from Delhi for moving the application. On such representation his Lordship the late Honourable Mr. Justice K. L. Roy was pleased to direct that the suit should not be placed on the list for fortnight to enable the defendant to take necessary steps in the meantime and cost of the day was reserved. On 1st April, 1971 on the representation of the counsel of Union of India that the instruction from New Delhi has just been received for slaying the suit under the Arbitration Act, and that application for the same have to be prepared. His Lordship the late Honourable Mr. Justice K. L. Roy was pleased to adjourn the suit till 8th April, 1971 to enable the petitioner to make the application under Section 34 of the Arbitration Act.'

17. This statement on oath on behalf of the appellant clearly shows that the learned lawyers for the appellant were fully aware on the 19th March, 1971 that the subject-matter of the suit was covered by an arbitration agreement. In fact,

according to this affidavit the matter was mentioned for an adjournment on that very ground. From the order dated the 19th March, 1971 made by K. L. Roy, J. it does not appear that the adjournment was given for the purpose of making an application under Section 34 of the Arbitration Act. In making the order, the learned Judge directed that in so far as plaintiff is concerned the costs thrown away would be costs in the cause. This order, it seems to us, could only have been made on the postulate that the cause was to be kept alive and proceeded with. There is another aspect of this order to which we shall avert immediately.

This order is to be contra-distinguished with the latter order of the same learned Judge dated the 1st April, 1971] where it was clearly recorded that the adjournment was being sought for making an application under Section 34 of the Arbitration Act.

18. In these circumstances the learned trial Judge construed the earlier order of the 19th March, 1971 as evincing the intention on the part of the appellant to proceed with the suit.

19. The other aspect of the matter raises a rather interesting question of law which we put to the learned counsel on behalf of the appellant and to which in our view there was no clear-cut or satisfactory answer. As we have said, the order of K.L. Roy, J. dated the 19th March, 1971 directed that the costs of the plaintiff which were thrown away would be costs in the cause, that is to say, if the plaintiff succeeded in the suit and was awarded the costs it would be entitled to include in such costs the costs incurred as a result of that adjournment. Mr. Bancrjee in this connection relied on a decision in the case of the American Trading Co. v. Bird and Co., reported in ILR 50 Bom 430 = (AIR 1926 Bom 596) in support of the proposition that such costs would be part of the general costs of the suit. We shall assume for the purpose of this case that it would be so. Even then if at the ultimate hearing of the application under Section 34 the learned trial Judge had granted a stay of the suit it would in our view have completely nullified the order for costs made by K.L. Roy, J. on the 19th March and made the same infructuous. This, it seems to us was one of relevant considerations which weighed that the learned trial Judge in exercising his discretion in refusing to stay the suit.

20. Without expressing any further definite opinion on this aspect of the case it is our view that, if on a consideration of the totality of all the circumstances which we have mentioned above, the learned trial Judge, came to the conclusion that the appellant had expressed an unequivocal and unambiguous intention to defend the suit by obtaining the order dated the 19th March, 1971, that conclusion cannot be called either unreasonable or capricious or unjudicial and calling for our interference on appeal.

21. Mr. Banerjee for the appellant referred to the certain decisions in this connection which may now be noticed.

22. Our attention was drawn to a decision of a Division Bench of this Court in the case of the Karnani Industrial Bank Ltd. v. Satya Niranjana Shaw, reported in 28 Cal WN 771 = (MR 1924 Cal 789). In that case it was held that a verbal prayer by defendant's counsel for further time to file written statement in reply to Court's question is 'taking a step in the proceedings,' within the meaning of Section 19 of the Arbitration Act of 1899 which corresponds to Section 34 of the present Act.

23. Reliance was next placed on a decision in the case of State of Himachal Pradesh v. Lalchand Shahi reported in AIR 1953 Him Pra 75. In that case it was held that before any act of a party in the nature of an application for adjournment can be interpreted as the taking by him of a step in the proceedings, it must be the act of a party willing that the suit should proceed. That being so, the act of a counsel for a party in asking for an adjournment before having received any instructions from his client cannot be construed as indicating that he was willing that the suit should proceed.

24. This case is clearly distinguishable from the facts of the present case. As we have already indicated the affidavit of the appellant itself shows that its lawyers knew that the subject-matter of the suit was covered by an arbitration agreement when the first application for adjournment was made.

25. Reference was next made to a decision of the Punjab High Court in the case of Charan Das and Sons v. Harbhajan Singh Hardit Singh reported in AIR 1952

Punj 109. In that case, it was held that a defendant against whom a suit has been ordered to proceed ex parte is not entitled to take any step in the proceedings unless he gets the ex parte order set aside so that he can apply for stay under Section 34 of the Arbitration Act. Hence, if after the setting aside of the ex parte order, the defendant, without taking any other step, applies for stay under Section 34 he would not be precluded from obtaining the stay by reason of his prior application for setting aside the ex parte order.

26. With respect, we are in entire agreement with the decision of the learned single Judge of the Punjab High Court. Obviously in the peculiar facts of that case, unless the order for ex parte proceedings was got out of the way, the plaintiff could not possibly make any application for stay of the suit under Section 34 of the Arbitration Act. We do not, however, say how this decision rendered as it has been, in the peculiar facts and circumstances of that case, is of any assistance to the appellant.

27. Reference was next made to another decision of the Punjab High Court in the case of Punjab State v. Moji Ram reported in AIR 1957 Punj 223. In that case it was held that where in a suit against the Government, on the date filed for appearance of the defendant, the Government pleader appeared voluntarily without any authority from Government to represent it in the case and asked for adjournment for filing a written statement on the assumption that in due course he would receive instruction from the Government it cannot be said that the Government, the defendant, took any step at all in the proceedings. In any case application for adjournment in such circumstances really amounts to an application to get time to discover the exact nature of the suit and nothing more. It cannot at all be said that the application was made with a view to take a step in the proceedings within the meaning of Section 34 of the Arbitration Act.

28. This case is also distinguishable on facts because as we have already said when the first prayer for adjournment was made in the present case, the learned lawyers had the necessary instructions.

29. The last decision in this connection is another judgment of the Punjab High Court in the case of Daulat Ram Rala Ram v. State of Punjab reported in AIR

1958 Punj 19. In that case where on the first appearance in the suit the counsel for the defendant made a statement that his client wanted to present an application Under Section 34 of the Arbitration Act and since the relevant records have not been received he prayed for an adjournment, and the Court thereupon made the following order :

'For written statement of the defendant or application under Section 34. Arbitration Act, the case to come up on 1st July, 1955.'

30. It was held that the prayer for adjournment in this case did not amount to a step in the proceedings of the suit, and therefore, could not be pleaded as a bar to the application under Section 34.

31. With respect, we are again in complete agreement with the ratio of that decision. That is because there was no unequivocal intention expressed on behalf of the party to proceed with the suit as will appear from the nature of the prayer made before the learned Judge. We fail to see how this decision is of any assistance to the appellant.

32. On the second conclusion of the learned trial Judge that the suit involves complicated questions of International Law and Law of Contract, the submission of learned counsel on behalf of the appellant was that this point was never argued before the learned trial Judge. In so far as the records before us concerned, we must say that we have no possible means of ascertaining the correctness of the contention. In the affidavit-in-opposition filed on behalf of the respondent before the trial Court, however, the following statement occurs in sub-paragraph (h) of paragraph 3 at page 30 of the Paper Book :

'In terms of the said contract the respondent duly sent and/or despatched 12,210 Hamilton Poles to Gauhati by Steamer in respect of which the price were F.O.B. Calcutta. In terms of the said contract and in law upon loading goods on Steamers, the property in the same duly passed to the petitioner and the petitioner in fact paid 90% of the price thereof. In respect of such of those poles for which a certificate from the consignee was received regarding arrival the petitioner also paid the balance 10% of the price. During transit of the goods to Gauhati hostility between

India and Pakistan broke out and in consequence thereof 5210 Hamilton Poles out of the said total number of 12.210 were detained and/or impounded by the Government of Pakistan amounting to Rs. 2,49,767.40 P. 1 he respondent states that the property in the said 5210 Hamilton Poles having passed to the petitioner, the respondent was and is entitled to retain 90% payment received and also obtain payment of the further 10% of the price.'

33. In paragraph 15 of pages 43-44 of the Paper Hook the following statement also occurs :

'I say that the question involved in the present suit is of great intricacy and it is desirable that the Court should hear the suit instead of putting it down for arbitration.'

34. In another judgment delivered by us today in the case of the Angus Co. Ltd. v. Eastern Dealers Ltd. (A. F. O. O. No. 103 of 1969 (Cal.)) we have come to the conclusion that impounding of goods by Pakistan under somewhat similar circumstances raises complex questions of law including the question as to even if the property in the goods had passed to the respondent it was entitled to payment in view of the provisions of Section 133B of the Defence of India Rules. As we have said in that judgment it is not for us to speculate at this stage as to what manner of defence will be taken by the appellant in the written statement which is yet to be filled. Suffice it to say, that the conclusion of the learned trial Judge that as a result of the impounding of these goods by Pakistan complex questions of law are likely to arise in the suit and therefore the matter should not be referred to arbitration cannot be called either an unreasonable or capricious conclusion and calling for our interference in this appeal.

35. The last contention advanced on behalf of the appellant was with regard to the third conclusion of the learned trial Judge that the appellant was not ready and willing to do all things necessary for the proper conduct of the arbitration at the commencement of the proceedings. It was submitted by Mr. N. C. Roy Chowdhury who followed Mr. Banerjee that the finding of the learned trial Judge that because the appellant took no steps to invoke the arbitration clause after the receipt of the notice under Section 80 of the Code of Civil Procedure shows that the appellant

was not ready and willing to do all things necessary for the proper conduct of the arbitration could not possibly be sustained.

It was submitted that It is only the conduct of the appellant after the filing of the suit that is germane in deciding this question of readiness and willingness. In any event, absence of readiness and willingness constitutes a bar in making an application under Section 34 in view of the provisions thereof and should not have been taken as a factor in exercising discretion in favour of not staying the suit by the learned trial Judge.

36. Whether the conduct of the appellant after the receipt of the notice under Section 80 of the Code of Civil Procedure and before the filing of this suit is a relevant consideration in deciding its readiness and willingness to do all things necessary for the proper conduct of the arbitration may be a debatable question. But as would appear from the law enunciated in the Supreme Court case mentioned earlier, even if we are of the view that sitting as trial Judges in the hearing this application we would have come to conclusion different from that arrived at by the learned trial Judge, that, by itself, 'would not justify our interference with the decision in appeal. We must further find that the decision is either unreasonable or capricious or ignores relevant facts or is unjudicial. It seems to us that this third finding of the learned trial Judge is really a corollary of the first finding that the appellant had evinced an unequivocal and unambiguous intention to proceed with the suit. This must be so because if the appellant was unambiguously ready and willing to proceed with the suit at all material times it could not be still ready and or willing to proceed with the arbitration. For the reasons given above, we have come to the conclusion that the first finding of the learned trial Judge does not warrant our interference as being unreasonable or capricious. It would necessarily follow that the decision of the learned trial Judge on the third question would similarly not justify our interference in the appeal.

37. This disposes of all the contentions raised on behalf of the parties.

38. In the result, this appeal fails and is dismissed. All interim orders will stand vacated. The costs of this appeal would be costs in the suit.

A.N. Sen, J.

39. I agree.

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