

(1992) 05 DEL CK 0066

In the Delhi High Court

Case No : Interim Application No. 6645 of 1988 and Suit No. 3256 of 1988

A.K. Bose

APPELLANT

Vs

Shaw Wallace and Co.

RESPONDENT

Date of Decision : 21-05-1992

Acts Referred:

Arbitration Act, 1940 — Section 34

Citation : (1993) 1 ARBLR 103 : (1992) 48 DLT 376 : (1992) 23 DRJ 308 :
(1993) 1 ILR Delhi 164 : (1993) LabIC 31

Hon'ble Judges : A.D. Singh, J

Bench : Single Bench

Advocate : J. Villapillai, Sandeep Agarwal, S.B. Ghosh and M. Harabu, for the Appellant;

Judgement

Anil Dev Singh, J.

(1) This is defendant's application u/s 34 of the Arbitration Act (for short "the Act") seeking stay of the suit. The relevant facts which are necessary for the disposal of this application are; The plaintiff was employed by the defendant company by its letter dated June 12, 1984 (for short "appointment letter") in Grade Vi at a monthly salary of Rs. 5500.00 . The terms and conditions of appointment were contained in the said letter and also in an agreement executed by the parties on August 1, 1984. According to clause 10 of the agreement, the appointment was to continue until July 31, 1987 unless determined earlier in accordance with clauses 11 or 12 thereof. The defendant by its letter dated July 10, 1987 extended the appointment of the plaintiff up to July 31, 1988 on the same terms and conditions as contained in the appointment letter except that the basic salary with effect from July 1, 1987 was enhanced from Rs. 5500.00 to Rs. 6000.00 per month. But before the plaintiff could complete the extended term. his services were terminated by the defendant company on December 23, 1987 in purported exercise of its power under clause 11 of the agreement. The letter of termination, however, specifically stated that the defendant company

reserved its right to proceed against the plaintiff as may be considered necessary. On February 8, 1988 the plaintiff requested the defendant company to pay a sum of Rs. 1,28,162.00 on account of his alleged dues up to June 22, 1988. Besides the plaintiff also demanded payment on account of various other entitlements. By a legal notice dated April 11, 1988 given through Bajpai & Co. Advocates, the defendant was called upon to pay a sum of Rs. 1,49,162.00 to the plaintiff. The notice, inter alia, averred that the services of the plaintiff were terminated in contravention of the agreement dated July 31, 1984 in as much as this was done without giving six month's notice in writing or six months salary in lieu thereof. Finding no response from the defendant company to the letter and notice, the plaintiff on October 26, 1988 filed a suit against the defendant company for recovery of the aforesaid amount together with pendente lite and future interest till realisation @ 21% per annum. The defendant company on being served with summons filed the present application on August 23, 1989 u/s 34 of the Act for stay of the suit on the ground that clause 15 of the agreement provides for Arbitration of the Bengal Chamber of Commerce in the event of disputes/ differences between the parties arising out of the agreement.

(2) Dr. Shanker Ghosh, Learned Senior counsel, appearing in support of the application contended that the services of the plaintiff were terminated in accordance with clause 11 of the agreement and any dispute arising out of such termination and matters connected therewith fall within the purview of clause 15 thereof, which provides for reference to Arbitration of the Bengal Chamber of Commerce. Learned counsel submitted that the plaintiff has not vacated the company's flat even after his termination and the defendant has adjusted the rent, which was being paid by the company in respect of the flat, against the dues payable to the plaintiff. Dr. Ghosh urged that the disputes which are being raised by the parties are covered by the arbitration clause and the defendant at the commencement of suit and still remains ready and willing to do every thing necessary for the proper conduct of the arbitration. He further submitted that silence on the part of the defendant in regard to the letter and notice of the plaintiff, without anything more, cannot be construed as lack of readiness and willingness on the part of the defendant to resort to arbitration, learned counsel contended that in the facts and circumstances of the case the suit should be stayed.

(3) Mr. J. Vellapalli, learned Senior counsel, appearing for the plaintiff submitted that the disputes between the parties are not covered by clause 15 of the agreement. According to the learned counsel the termination was not in terms of clause 11 of the agreement as six month's notice or six months salary in lieu thereof, as postulated by the said clause, was not given to the plaintiff. He invited my attention to the second para of the letter of termination whereunder the defendant reserved its rights to proceed against the plaintiff, if considered necessary. Learned counsel contended that notwithstanding the reference to clause 11 of the agreement in the letter, the termination was referable to clause 12, which falls outside the purview of clause 15 of the agreement, being an

excepted matter. He also contended that the conduct of the defendant clearly and unmistakably shows that it was not ready and willing to refer the dispute to arbitration at the commencement of the suit. In this regard he invited my attention to the fact that the letter of the plaintiff dated February 8, 1988, whereby he requested for payment of a sum of Rs. 1,28,162.00 and various other sums up to June 22, 1988 remained unanswered. Learned counsel also referred to the legal notice dated April 11, 1988 sent on behalf of the plaintiff to the defendant. It was submitted that in this notice again the question of payment was raised and it was inter alia, mentioned that no notice as contemplated by clause 11 of the agreement was given to the plaintiff. Learned counsel submitted that towards this notice also the defendant maintained complete silence. In view of the conduct of the defendant and the fact that the letter and notice did not evoke any response from the defendant, learned counsel wants me to assume that the defendant was not ready and willing to refer the matter to arbitration at the commencement of the suit. In the alternative, learned counsel submitted that since the claim of the plaintiff was not disputed by the defendant any time prior to the filing of the suit, the application u/s 34 of the Act is untenable, the existence of a dispute prior to the filing of the suit being a condition precedent for the stay of the suit under the said section. He pointed out that the only case set up by the defendant to the claim of the plaintiff is that the rent of the company flat under the occupation of the plaintiff has been adjusted against his dues. According to the learned counsel the counter claim of the defendant does not arise under the agreement. In support of his submission the learned counsel has placed reliance on the decision of the Supreme Court in Union of India (UOI) Vs. Birla Cotton Spinning and Weaving Mills Ltd., and the decision of House of Lords in London & North Western Joint Railway Companies Vs. J.H. Billington Ltd. 1899 A.C. 79.

(4) Respective contentions of the learned counsel for the parties have to be resolved in view of provisions of Section 34 of the Act. The Supreme Court in Anderson Wright Ltd. Vs. Moran and 1955 Sc 53, while construing Section 34 of the Act, held that a party to the arbitration agreement can ask for stay of the proceedings in the suit provided the following conditions are fulfilled :

1) The proceedings must have been commenced by a party to the arbitration agreement against any other party to the agreement; 2) The legal proceedings which are sought to be stayed must be in respect of a matter agreed to be referred; 3) The applicant, asking for stay of the proceedings must be a party to the legal proceedings and he must have taken no steps in the proceedings after appearance; 4) The applicant should satisfy the court not only that he is but also was at the commencement of the proceedings ready and willing to do everything necessary for the proper conduct of the arbitration and there is no sufficient reason why the matter should not be referred to an arbitrator in accordance with the agreement.

(5) Thus before an order for stay of legal proceedings may be made u/s 34 of the

Act the aforesaid conditions must co-exist. As would appear from the respective arguments of the learned counsel the controversy centres around the question as to whether or not in the instant case aforesaid condition Nos. 2 and 4 have been satisfied. Elaborate arguments were addressed in regard to the latter condition and matters connected therewith. Therefore I would first deal with this aspect of the case. RE: Condition NO. 4. In so far as the question whether or not the defendant at the commencement of the suit was and is still ready and willing to do everything possible for the proper conduct of the arbitration is concerned, it is necessary to consider the implications of the defendant's silence and inaction with regard to the letter of the plaintiff dated February 8, 1988 and legal notice dated April 11, 1988 coupled with other facts and circumstances of the case. In the letter the plaintiff requested the defendant to pay a sum of Rs. 1,28,162.00 up to June 22, 1988. He also called upon the defendant to pay his provident fund together with interest up to the said date, besides he also asked for the following: 1) Salary certificate for the completed service up to March 31, 1987. 2) Salary certificate for the salary drawn from April 1, 1987 to date i.e. February 8, 1988. 3) Copies of the challans for returns filed and any other related papers. In this letter it was hoped that the defendant would settle the matter amicably. It was not disputed by the learned counsel for the defendant that there was no response by his client to the letter of the plaintiff. Again by notice dated April 11, 1988 the Advocate of the plaintiff called upon the defendant to pay a sum of Rs. 1,49,162/ together with interest within 15 days of the receipt of the notice failing which appropriate legal proceedings were contemplated against it. The defendant neither replied to this notice nor honoured the claim of the plaintiff. Since the defendant remained silent and took no action the plaintiff filed the present suit on October 26, 1988. Right from February 8, 1988 till August 22, 1989, the defendant did not express any desire to refer the disputes to Bengal Chamber of Commerce. It is only when the suit was filed that the defendant moved the present application invoking for the first time clause 15 of the agreement. To ask the plaintiff to now appear before the Arbitrators at Calcutta, after he has filed the suit at considerable expense, would be highly unjust especially when the defendant did not exhibit the readiness and willingness for arbitration at any earlier point of time even though twice asked by the plaintiff to settle his claim. It cannot be denied that the plaintiff was posted at Delhi at the time of termination of his services. It is also conceded by the defendant that plaintiff still resides in Delhi(See: Para 11 of the application). If the submission advanced on behalf of the defendant is accepted the plaintiff will have to abandon his suit and prosecute his claim before Arbitrators at Calcutta, a place other than where he is located. It is not difficult to imagine the plight of an employee placed in such a position.

(6) The stand which the defendant is now taking could have been taken when the letter of the plaintiff dated February 8, 1988 was received by it. I have not been told what prevented the defendant from taking the said stand then. The failure of the defendant to reply to the notice dated April 11, 1988 acquire

significance when considered in the light of the fact that the letter of the plaintiff dated February 8, 1988 also did not move the defendant in asserting that the matter in dispute was liable to be referred to Bengal Chamber of Commerce for resolution in accordance with clause 15 of the agreement and it was keen to adopt that course. There is always a time, for speaking and a time for being still. The inaction and silence on the part of the defendant coupled with the fact that the defendant has expressed its willingness for resolution of the disputes by Arbitrators after a period of one year from the date of the receipt of the first request of the plaintiff to settle the outstanding dues explodes the bogey of the claim of the defendant that it was at the commencement of the suit and even now ready and willing to do every thing necessary for proper conduct of the arbitration. It is not a case of a mere innocent silence on the part of the defendant to reply to the notice of the defendant. The question whether a party was ready and willing to refer the dispute to arbitration at the commencement of the proceedings has to be ascertained from his conduct and surrounding circumstances. In my view mere assertion in the application that the defendant was ready and willing to refer the dispute to arbitration at all material times is not enough. Repeating words of Section 34 of the Act like a mantra for signifying readiness and willingness without such words being backed by positive action in" this regard is not enough. The conduct of a defendant filing the application u/s 34 of the Act must show that he was at the commencement of the proceedings and is still ready and willing for doing everything possible and necessary for proper conduct of the arbitration. His antecedent conduct can be appropriately taken into consideration for making a prognosis, about the seriousness of his claim in regard to his readiness and willingness for arbitration at the commencement of the suit. The defendant's lack of action and keeping quiet in regard to the request of the plaintiff to settle his dues and to the notice threatening legal action eloquently signifies its intention of not being ready and willing to go for arbitration at the commencement of the suit. It is only just, fair and proper that a defendant taking shelter of Section 34 of the Act makes his intention of claiming arbitration transparent at the earliest occasion so that the readiness and willingness at the commencement of the suit as contemplated by section no longer remains a matter of implication and imagination, for then the other party can plot his course of action accordingly, having been put on notice in regard to the stand of the defendant. The claim of readiness and willingness by a defendant should be supported by his past conduct signifying the same clearly and unambiguously provided there was an opportunity to exhibit such a conduct. As already seen, such an opportunity was available to the defendant but the same was lost by his deafening and intolerable silence. There is absolutely no proof in support of the claim of the defendant that it was ready and willing for arbitration at the commencement of the suit and still remains ready and willing. It is not a case of mere inaction on the part of the defendant to the notice of the plaintiff but a conduct indicating a positive gesture of not being willing and ready in terms of Section 34 of the Act. In Food Corporation of India Vs. Thakur Shipping Co. and Others, , the question for determination before the Supreme

Court in the two appeals filed by the appellants Food Corporation of India (F.C.I) was whether the Madras High Court acted rightly u/s 34 of the Act in staying the suites instituted by Fci against the respondent- ship-owners ,, whose ships were chartered by the F.C.I, for carrying rice from Thailand to India. A clause in the charter party provided for settlement of disputes, if any, arising under the charter by arbitration, one arbitrator to be nominated by each of the parties. Two sets of disputes arose between the parties. In regard to one set of disputes the appellant wrote to the concerned respondent demanding arbitration while in regard to the other set only a monetary claim was made with a request to the other respondent to settle the same. Not finding any positive response from the respondents the appellant instituted two separate suits against them for recovery of money in the court of Sub Judge, Tuticorin. The respondents thereupon filed two separate applications for stay of legal proceedings u/s 34 of the Act in the respective suits on the ground that the respondents were ready and willing at the commencement of the suit and even at the time of filing of the applications to take all possible steps for referring the disputes to the arbitrators. The trial court refused to stay the suits. The High Court reversed the decisions of the trial Court and accepted the application for stay. The Supreme Court allowing the appeals held as follows:

"IT is thus quite clear on the authorities and from the terms of Section 34 that the readiness and willingness must exist not only when an application for stay is made but also at the commencement of the legal proceedings."

(7) At another place it was held as under:

"SILENCE and inaction on their part may in these circumstances very well justify the inference that they were not ready or willing to go to arbitration."

(8) It is significant to note that the Supreme Court treated both sets of situations, one in which arbitration was claimed by the appellant and the one in which it was not so claimed but only monetary claim was put forth at par and made absolutely no distinction between the two.

(9) Again in State of Punjab Vs. Geeta Iron and Brass Works Ltd., the Supreme Court held as follows:

"WE like to emphasize that Governments must be made accountable by Parliamentary Social audit for wasteful litigate expenditure inflicted on the community by inaction. A statutory notice of the proposed action u/s 80, CPC is intended to alert the State to negotiate a just settlement or at least have the courtesy to tell the potential outside why the claim is being resisted. Now S.80 has become a ritual because the administration is often unresponsive and hardly lives up to the Parliament's expectation in continuing S.80 in the Code despite the Central Law Commission's recommendations for its deletions .An opportunity for settling the dispute through arbitration was thrown away by sheer inaction."

(10) Dealing with the question of exercise of discretionary power to stay legal

proceedings u/s 34 of the Act, the Supreme Court in *The Printers (Mysore) Private Ltd. Vs. Pothan Joseph*, held that it would be difficult and indeed inexpedient to lay down any inflexible rules which should govern the exercise of the said discretion.

(11) It is also well settled that the judicial discretion must be exercised in furtherance of justice.

(12) Having regard to the totality of facts and circumstances of the case, I am of the view that the defendant has failed to show that it was ready and willing at the commencement of the suit to do all things necessary for the proper conduct of the arbitration. RE: Condition NO. 2 The letter of the defendant terminating the service of the plaintiff is in two parts. Under the first part the services have been terminated while in the other part the defendant has reserved its right to proceed against the plaintiff. The termination is purported to be under clause 11 of the agreement. Clause 11 of the agreement reads as under:

"11. Notwithstanding anything herein contained this Agreement may be determined by the company on giving to the Employee either at six months notice in writing or six months salary in lieu of such notice, and by the Employee by giving at least six months notice in writing to the Company."

(13) A bare perusal of the above clause shows that termination of the services of the employee can be brought about by giving him six months or notice pay in lieu thereof. Neither notice nor pay in lieu of notice has been given by the plaintiff to the defendant. The order does not even state that the notice pay could be collected from the office of the defendant.

(14) In *Mis. National Iron & Steel Co. Ltd. and others, Vs. The State of West Bengal* and another Air 1967 Sc 1206 while construing Section 25F of the Industrial Disputes Act the Supreme Court held as follows:

"MANIFESTLY, S. 25F, had not been complied with under which it was incumbent on the employer to pay the workman, the wages for the period of the notice in lieu of the notice. That is to say, if he was asked to go forthwith he had to be paid at the time when he was asked to go and could not be asked to collect his dues afterwards."

(15) It was -urged on behalf of the plaintiff that the matters arising out of termination are not covered by clause 15 in as much as the termination was in terms of clause 12. Clause 12 reads as follows:

"12. In the event of the Employee willfully committing a breach of any of the terms and conditions of this Agreement, or being guilty of any gross misconduct, it shall be lawful for the Company to dismiss the Employee without notice and without compensation of any kind whatever and without prejudice to any claim that the Company may establish against him for debt for damage."

(16) Dr. Ghosh, learned counsel for the defendant submitted that the aforesaid

point is not available to the plaintiff as in the letter and the notice he has proceeded on the footing that his termination was under clause 11 of the agreement. In this regard he has invited my attention to paras 2 and 3 of the notice, which read as under:

"2. That the services of our client were terminated by you in an unlawful manner without any notice vide your letter dated December 23, 1987 purporting to be a termination under clause 11 of the service agreement. 3. That under the terms of the said service agreement, you are liable to pay to our client, in the event of termination of his services, six month's salary in lieu of notice besides other dues which may be lawfully claimed by our client."

(17) It is a case where the termination order was ostensibly under clause 11 of the agreement. The plaintiff Therefore asked the defendant to give him notice pay. Since notice pay was not given and time went by, he was given to thinking that the termination was not under clause Hand the order of termination implicate was a camouflage for an order under clause 12 of the agreement. Such line of thinking is reflected from para 3 of the reply of plaintiff to the present application .The relevant portion of the said para reads as under:

THE defendant had dismissed the plaintiff from the employment without notice and without compensation of any kind which act squarely falls within clause 12 and, Therefore, is out of the purview of clause 15 i.e. the arbitration clause. It is also confirmed by the fact that though the defendant had purportedly stated in its dismissal letter that the dismissal was under clause 11 the pre-condition for applicability of the said clause 11 i.e. payment of six months salary in lieu of notice was not made and, Therefore, in effect the defendant has not applied clause 11 in dismissing the plaintiff from its employment. Payment of six months salary in lieu of notice was sine qua non for applicability of clause 11.

(18) By the defendant's own admission, the plaintiff has neither committed any breach of any term of condition of the said agreement nor he was/is guilty of any misconduct, despite the fact that the defendant dismissed the plaintiff from its employment without any notice and without any compensation. Thus the dismissal of the plaintiff is partly under clause 12 of the said agreement and partly outside the scope of this agreement.

(19) Therefore the said dispute arises partly out of clause 12 of the said agreement, this is so because despite the defendant's own admission that the plaintiff has neither committed any breach of any term of this agreement nor is guilty of any misconduct have still terminated the services of the plaintiff in the manner provided in clause 12. Therefore there is no occasion for referring the dispute to arbitration."

(20) Prima face it appears that there are sufficient grounds on which it can be urged that the termination was not under clause 11 but was under clause 12 but at this stage no definite opinion can be expressed in this regard as this will be a matter for trial. The same is also true for the alternative plea of the learned

counsel for the plaintiff noticed in the earlier part of this order.

(21) In view of the fact that the defendant has failed to establish that it was ready and willing to resort to arbitration at the commencement of the suit as required by Section 34 of the Act, this application fails and is hereby dismissed but without any order as to costs.