

(1987) 01 PAT CK 0025

In the Patna High Court

Case No : Appeal from Original Order No. 269 of 1979

Bihar Water Development Corporation (Private) Ltd.

APPELLANT

Vs

Batliboi and Company (Private) Ltd., and another

RESPONDENT

Date of Decision : 14-01-1987

Acts Referred:

Arbitration Act, 1940 — Section 34

Citation : (1987) PLJR 205

Hon'ble Judges : S.S. Sandhawalia, C.J.; S.B. Sanyal, J

Bench : Division Bench

Advocate : H.R. Das, for the Appellant; Samir Kumar Ghose and L.N. Das, for the Respondent

Final Decision : Dismissed

Judgement

S.B. Sanyal, J.—Bihar Water Development Corporation Private Ltd., (defendant no. 2) in a money suit instituted by the plaintiff respondent bearing Money Suit No. 78 of 1976, has preferred this appeal against an order passed by the Additional Subordinate Judge refusing to stay the suit u/s 34 of the Arbitration Act. Pursuant to two agreements dated 12.1.73 and 25.1.73 between the plaintiff respondent and defendant no. 1, the State of Bihar through the Secretary to the Government of Bihar, Department of Irrigation (Minor Irrigation) the plaintiff supplied submersible pumps complete with all accessories. The agreements provided arbitration clause. The plaintiff instituted the suit in the year 1976 against the two defendants for the recovery of a sum of Rs. 3,03,603.96 as the balance price of the said supply along with interest calculated up to December 20, 1975. Defendant No. 2, who was not a party to arbitration agreement, was impleaded in the suit as it took over State owned tube wells with rights and liabilities of the Government of Bihar. The claim is stated to have been admitted on behalf of defendant no. 1, the State of Bihar, as alleged in paragraph 18 of the plaint. From the impugned order it appears that the State of Bihar entered appearance and moved two dozen petitions for filing written statement and at no

stage filed any objection u/s 34 of the Arbitration Act (hereinafter referred to as "the Act"), for staying the suit and referring the matter to arbitration in view of the arbitration clause in the agreement referred to above. On 6.1.78 the appellant (defendant no. 2), which came to be constituted on 22nd April, 1973, having taken over all rights and liabilities of the Government of Bihar so far as they related to tube wells, buildings, assets and works project, filed an application u/s 34 of the Act as successor-in-interest of defendant no. 1 to enforce the arbitration clause and stay of the suit. The court below held that in the facts and circumstances of this case, the State of Bihar having not taken any objection to the continuance of the suit and, on the contrary, having taken large number of steps in aid of the progress of the suit, defendant no. 2 being only the successor-in-interest of defendant no. 1 cannot be permitted to enforce the arbitration clause and thus rejected the petition of defendant no. 2 u/s 34 of the Act.

2. Mr. H.R. Das, Learned Counsel appearing on behalf of the appellant (defendant no. 2) contended that his client having preferred an application u/s 34 of the Act on its very first appearance for stay of the suit and the plaintiff being interested in obtaining a decree, jointly and severally, against both the defendants, the court below has failed to exercise judicial discretion vested in it in not staying the suit. It is further contended that the petition u/s 34 of the Act is not only maintainable at the instance only of a party to an arbitration agreement but also at the instance of any person claiming under a party in respect of any matter agreed to be, referred to arbitration and the Corporation being the successor-in-interest of the State of Bihar, therefore, is entitled to enforce the arbitration clause. Mr. Das in support of his stand relied upon a decision of this Court in *Ram Naresh Kumar Singh v. The Food Corporation of India Ltd.*, reported in 1983 P.L.J.R. 521.

3. Mr. Ghose, senior counsel appearing on behalf of plaintiff respondent no. 1, on the other hand, submitted that the power to stay legal proceeding u/s 34 of the Act is discretionary and, therefore, a party against whom legal proceedings have been commenced cannot claim stay of legal proceedings as a matter of right. The State Government which is a party to the arbitration agreement, being willing to proceed with the suit by the conduct manifested and having not resorted at any time to enforce the arbitration agreement, the trial court has not acted unreasonably in refusing to stay the suit at the instance of the successor-in-interest of the State of Bihar. According to Learned Counsel, the decision in *Ram Naresh Kumar Singh's* case (*supra*) is of no help to the appellant. He in support of his stand relied upon the decisions of the Supreme Court in *The Printers (Mysore) Private Ltd. Vs. Pothan Joseph*, and *The State of Uttar Pradesh and Another Vs. Janki Saran Kailash Chandra and Another*, .

4. The power to stay legal proceedings u/s 34 of the Act is discretionary and mere existence of arbitration clause in an agreement does not by itself operate as a bar to a suit in the court nor there is any obligation on the part of the court to

provide opportunities to the defendant to consider the question of referring the matter to arbitration proceedings. In the instant case the principal defendant no. 1, namely, the State of Bihar, filed two dozen petitions indicating its intention to proceed with the legal proceedings and never filed an application to enforce the arbitration agreement. It is true that even though the State of Bihar kept on taking time to file the written statement, the written statement was not filed before defendant no. 2 filed an application, almost two years after the institution of the suit, to invoke the arbitration agreement for stay of the suit. The court below, in my opinion, has rightly found that defendant no. 1 the State Government, as disclosed by its conduct, chose to proceed with the legal proceedings before the court.

5. The question, however, is whether in the facts and circumstances of this case the court below adopted an unjudicial approach in refusing to stay the suit at the instance of defendant no. 2, which is the successor-in interest of the State of Bihar. I find that the amount involved in the suit is quite heavy. The suit has also been pending for more than one decade. The principal defendant does not appear to have any objection to proceed with the legal proceedings. The course adopted by the court below does not appear to me to be unjust and prejudicial to the appellant so as to require interference by this Court. The decision in Ram Naresh Kumar Singh's case (supra) is of no assistance to the appellant and is clearly distinguishable in as much as it was held in the facts and circumstances of that case that the prayer for adjournment in the case for filing written statement "cannot be construed as taking any step in the suit with a view to contest the suit on merits and abandon their right to have the matter disposed of by the arbitration". Here in this case the situation is otherwise. After having so said, their Lordships refused to interfere with the exercise of discretion by the trial court for the additional reason that defendants 3, 4, 5 and 8, who were parties to the suit, had a right to make an application u/s 34 of the Act and they did file an application. Therefore, the stay of the suit by the Subordinate Judge can not be said to be bad and illegal.

6. Having considered all the facts and circumstances of this case, I am of the opinion that the discretion exercised by the trial court is neither unreasonable, capricious, unjust and/or unjudicial nor prejudicial to the appellant to require interference by this Court. The appeal accordingly fails and is dismissed with costs.

S.S. Sandhawalia, C.J.

I Agree.