

(2003) 11 DEL CK 0015
In the Delhi High Court
Case No : F.A.O. No. 286 of 1995

Cement Corporation of India Ltd.

APPELLANT

Vs

Naresh Kumar Coal Sales Ltd.

RESPONDENT

Date of Decision : 13-11-2003

Acts Referred:

Arbitration Act, 1940 — Section 34

Citation : (2004) 2 BC 391 : (2004) 109 DLT 252 : (2004) 75 DRJ 63

Hon'ble Judges : S.K. Mahajan, J

Bench : Single Bench

Advocate : S.K. Taneja and Amit Kumar, for the Appellant; S.K. Luthra, for the Respondent

Final Decision : Dismissed

Judgement

S.K. Mahajan, J.—This appeal is directed against the order passed by the learned Trial Court on an application of the appellant u/s 34 of the Arbitration Act whereby the application of the appellant for stay of suit was dismissed. A few facts relevant for deciding this appeal are:

2. In response to an invitation to tender issued by the appellant, the respondent submitted its quotations pertaining to licensing, handling and supervision of coal movement from collieries of Singareni Collieries Ltd. to the defendant's factory at Tandur. The tender of the respondent was accepted and the respondent had alleged to have executed the work under the contract to the entire satisfaction of the appellant. The work order expired on 31.10.1991 and a sum of Rs. 1,49,727.70 paise was stated to be due from the appellant to the respondent towards balance amount for the work undertaken by the respondent. This amount included a sum of Rs. 1,15,000/- as the security deposit and the remaining amount was stated to be the 20% balance of the running bills. In response to a request made by the appellant for releasing the said amount, the appellant on 21.5.1992 wrote to the respondent that a sum of Rs. 4,238/- being the balance 20% payment and another sum of Rs. 50,000/- towards security

deposit was payable to the respondent. It was, however, stated that these payments were kept in abeyance as the appellant's sister unit at Nayagaon had reported a recovery of Rs. 3,40,116.46 paise from the respondent. On receipt of this letter, the respondent appeared to have served a notice on 4.7.1992 calling upon the appellant to make payment of the total amount of Rs. 1,49,727.70 paise. This letter of the respondent was replied to by the appellant by its letter dated 16.7.1992 and it was stated that a sum of Rs. 84,728/- payable to the respondent by the appellant was kept in abeyance because the sister unit of the appellant at Nayagaon had reported a recovery of Rs. 3.40 lakhs. It was further stated that the coal supervision contract was on all India basis and the respondent had to contact the appellants C&T Department of the Corporate Office, Hyderabad to carry out the coal supervision work effectively. The appellant, Therefore, expressed its inability to release the balance amount to the respondent. On receipt of this reply, the appellant filed suit for recovery of the aforesaid amount along with interest.

3. It was stated in the plaint that a sum of Rs. 1,49,727.70 paise had become payable to the respondent on 31.10.1991 and no dispute in respect thereto was ever raised by the appellant except that the said amount has been withheld by the appellant on the ground that it had a claim against the respondent with respect to their sister unit at Nayagaon. It was further stated in the plaint that the said stand of the appellant was wholly arbitrary and raising a frivolous claim which was disputed by the respondent did not entitle the appellant to withhold the payment admittedly due to the respondent in respect of independent contract. It was further stated that the amount allegedly claimed by the Nayagaon unit had no nexus with the claim of the respondent as the same did not pertain to the contract in question. It was further alleged in the plaint that the claim of the appellant in respect of the Nayagaon contract was in any case the subject matter of dispute in a suit pending in the Court of the District Judge, Mandsaur (Madhya Pradesh).

4. On being served with the summons in the suit, learned Counsel for the appellant appeared in Court on 19.4.1993 and sought an adjournment because the written statement was not ready. On this submission being made, the Court adjourned the case to July 2, 1993 for filing of the written statement. The Presiding Officer was on leave for quite some time and on the date when the Court assembled, the appellant filed an application u/s 34 of the Arbitration Act for stay of the suit on the allegations that as the matter in dispute was covered by an arbitration agreement between the parties and the appellant was at all times ready and willing to refer the matter to arbitration and had not taken any steps in proceedings, the suit cannot proceed and was liable to be stayed. As already mentioned above, this application was dismissed by the Trial Court on the ground that, firstly, by seeking an adjournment on 19.4.1993 for filing written statement, the appellant had taken steps in proceedings and, secondly, the application did not disclose any dispute, which may be referred to arbitration under the aforesaid agreement and consequently no case was made out for stay

of proceedings.

5. Mr. Taneja appearing on behalf of the appellant has referred to the arbitration agreement to contend that the appellant had a lien over all or any money that may become due and payable to the contractor under the contract and unless the contractor pays and clears the claim of the Corporation, the Corporation will be entitled to deduct the said sum due from the contractor from any money/security deposit, which may have become payable to the contractor or may become due at any future date under the contract. It is submitted that it was pursuant to this clause that the appellant had withheld the amount allegedly due to the respondent and since a dispute has arisen between the parties as to whether or not the appellant could withhold the amount, the same was liable to be referred to arbitration. Clause 2.8 which empowers the Corporation to have a lien over the money that may become due to the contractor and Clause 11 which is the arbitration agreement between the parties and reliance upon which has been placed by both the parties read as under:

"2.8. The Corporation shall have a lien over all or money that may become due and payable to the contractor under this contract and unless the contractor pays and clears the claims of the Corporation immediately on demand, the Corporation shall be entitled to all dues to deduct the said sum due from the contractor from any money/security deposit which may have become payable to the contractor or may become due at any future date under the contract.

11. In the event of any dispute, breach or differences arising in respect of the meaning and scope of terms and conditions herein contained or in connection with any matter under this agreement (except or those matters which are to be decided as per provisions made in these terms and conditions) the same shall be referred to the Sole Arbitration of an officer of the Cement Corporation of India Ltd. appointed by the C&MD of the Corporation. The contractor shall furnish to the Corporation details of such disputes item-wise and with reasons based on contract conditions and shall also indicate amount involved in each dispute with basis for the same, while invoking the arbitration clause. There will be no objection if the Arbitrator is an employee of the Corporation and he at any time while discharging his duties as an employee of the Corporation has expressed views on all or any of the matters in dispute or difference. The award to this contract."

6. It is also the contention of Mr. Taneja that merely because the Counsel on 19.4.1993 had sought an adjournment from the Court would not mean that the appellant had taken steps in the proceedings. It is submitted that what the Courts are required to examine is whether the intention of the party in taking the adjournment was to file the written statement and abandon its right to refer the matter to arbitration. It is submitted that if such an intention is not expressed in the order, the Court could not refuse to refer the matter to arbitration or refuse to stay the proceedings. For this he has placed reliance upon the judgment of the Supreme Court in M/s. Sadhu Singh Ghuman Vs. Food Corporation of India and

others, .

7. I have carefully considered the arguments advanced by learned Counsel for the parties and have also gone through the judgment cited by Mr. Taneja but I have not been able to make myself agreeable with the submissions made by him. In *Sadhu Singh Ghuman v. Food Corporation of India and Ors.* (supra), the facts were that the defendant, when served with the summons in the suit, appeared in the Court and filed an application stating inter alia that the photostat copy of the original agreement and other documents, which were produced by the plaintiff were not visible and clear and it was very difficult for the defendants to inspect and give the written statement. It was further stated in the application that it was very essential to get the original documents produced in Court so that the defendants may file the written statement and the prayer was, Therefore, made to the Court to direct the plaintiff to produce the original agreement and other documents, which had been filed with the plaint. While considering as to whether this application amounted to a step in proceedings, the Court observed that the expression "a step in the proceedings" which would disentitle the appellant from invoking Section 34 of the Arbitration Act was not every step taken by him in the suit but it should be a step to abandon the right to have the suit stayed. It was observed that it should be a step in aid of the progress of the suit. The step must have been consciously taken with a view to submit to the jurisdiction of the Court for the purpose of adjudicating the controversy on merits. The Court observed that in the application filed by the defendants in that case they had only sought a direction to the plaintiff to produce the original agreement and other documents so that they may file the written statement, but they had not stated that they would file the written statement. The Court observed that defendants had not taken any step submitting to the jurisdiction of Court to decide the case on merits. The Court was of the view that right to have the dispute settled by arbitration has been conferred by agreement of parties and that should not be deprived of by technical pleas. The Court in the facts of that case, Therefore, held that the defendants by filing the application for a direction to be given to the plaintiff to file the original documents cannot be said to have taken steps in the proceedings and their application could not be dismissed only on the ground that they had filed an application for a direction to the plaintiff to file the original agreement and other documents.

8. u/s 34 of the Arbitration Act, 1940 where any party to an arbitration agreement or any person claiming under him commences any legal proceedings against any other party to the agreement 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. u/s 34, Therefore, it is not that an application for stay of proceedings must be made before filing the written statement but it is required to be made before any step is taken by the defendant in the proceedings. On 19.4.1993 when Counsel for the defendant had appeared in

Court, he sought an adjournment. Though it is the contention of Mr. Taneja that the Counsel had only sought an adjournment and he had not stated that he wanted to file the written statement but the order suggests that the matter was adjourned at the request of the Counsel for the defendant for filing the written statement. In case, the Counsel who had appeared for the defendant had not sought any adjournment to file the written statement, there was no occasion for the Court to record in the proceedings that the matter is adjourned because the written statement was not ready. The fact that the adjournment is sought because the written statement was not ready clearly suggests that the Counsel who had appeared before the Court had sought an adjournment to file the written statement. In my opinion, seeking an adjournment to file the written statement will clearly be a step in the proceedings envisaged by Section 34 of the Arbitration Act. It is not the case of the appellant that it did not have either the complete plaint or the documents in its possession and it was, Therefore, not aware as to what was the subject matter of the suit. It was clearly stated in the plaint itself that the plea taken by the appellant that it could withhold the amount due to the respondent because of certain amount allegedly due to the appellant in respect of other contract clearly shows that at the time of seeking adjournment to file the written statement, appellant was fully aware about the subject matter of the suit and by seeking an adjournment to file written statement, in my opinion, it had abandoned its right to seek arbitration and stay of suit. The judgment in *Sadhu Singh Ghuman v. Food Corporation of India and Ors.* (supra), is, Therefore, not applicable to the facts of the present case.

9. Appellant having thus taken steps in proceeding, in my opinion, the learned Trial Court was fully justified in dismissing the application on the ground that the appellant having taken steps in proceedings it was not entitled to the grant of stay of proceedings in the suit. Since it is held that seeking an adjournment to file the written statement by the appellant amounted to step in proceedings, which would disentitle the appellant to seek stay of proceedings in the suit. I need not dwell into the other argument of the appellant that it had a lien over the amount due to the respondent in terms of Clause 2.8 of the agreement and thus a dispute had arisen between the parties under Clause 11 of the agreement.

10. For the foregoing reasons, I do not find any merits in this appeal and the same is, accordingly, dismissed leaving the parties to bear their own costs.