
(1973) 04 P&H CK 0018
In the Punjab And Haryana At Chandigarh
Case No : Civil Revision No. 1181 of 1971

Messrs Sir Ganga Ram and Sons

APPELLANT

Vs

The Punjab State Electricity Board, Patiala

RESPONDENT

Date of Decision : 21-04-1973

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151

Citation : (1973) 04 P&H CK 0018

Hon'ble Judges : Prem Chand Pandit, J

Bench : Single Bench

Advocate : J.N. Kaushal with Ashok Bhan, for the Appellant; D.N. Awasthy with Mr. R.L. Kapur, for the Respondent

Final Decision : Dismissed

Judgement

Prem Chand Pandit, J.—In November, 1963, contracts were entered into between M/s Sir Ganga Ram and Sons, hereinafter called the firm, and the Punjab State Electricity Board, Patiala, hereinafter referred to as the Board. The former was to supply galvanised steel towers for transmission lines to the latter in specified quantity. In order that the firm should complete the supply, the Board agreed to 100 per cent payment of the cost of raw material, but the said material had to be hypothecated by the firm with the Board. Besides this, the firm had to furnish bank guarantee for an agreed amount. It is said that pursuant to the contract the Board started making payments to the firm for purchasing raw material and similarly the firm furnished the bank guarantee and also executed the hypothecation deed. The bank guarantee, however, expired in January, 1967, but in spite of that the firm failed to furnish fresh guarantee. It is also alleged by the Board that the firm did not supply the requisite quantity of galvanised steel towers in spite of the fact that the raw material had been purchased and the Board had made advances for that purpose to the firm. That necessitated the filing of the present suit by the Board against the firm for a permanent injunction restraining the defendant from disposing of the said raw material which was

about 942 metric tons of steel and approximately 81 metric tons of zinc lying with it and which, according to the Board, had been hypothecated by the firm. Along with the plaint, plaintiff made an application under Order 39, rules 1 and 2, read with section 151, Code of Civil Procedure, for the issue of a temporary injunction against the defendant for the same relief. This application was granted ex parte and then notice of the same was issued to the opposite party. Thereafter, the firm made two applications, one u/s 34 of the Arbitration Act, and the other under Order 39, rule 4, Code of Civil Procedure. The prayer in the first application was that in view of the arbitration clause in the agreement, the proceedings in the suit be stayed and the matter referred to arbitration. In the second application, it was stated that the ex parte ad interim injunction order granted by the Court be vacated. These applications were opposed by the Board. It is said that one more application was made by the Board for the physical verification and stock taking of the firm, including the raw material. This application was also contested by the firm. The trial Court has mentioned that evidence is being recorded in the application u/s 34 of the Arbitration Act. The learned Judge, however, disposed of the other two applications, one under Order 39, rules 1 and 2, Code of Civil Procedure, and the other for the physical verification of the raw material which was lying with the defendant firm. The injunction order, after hearing the firm, was confirmed. As regards the other application for physical verification, that also was granted and a Local Commissioner appointed for that purpose. Against this decision, the firm went in appeal before the learned Senior Subordinate Judge, Patiala, but the same was rejected. Against that order, the present revision petition has been filed by the firm.

2. The main argument raised by the learned counsel for the petitioner is that no injunction should have been issued by the trial court till the application u/s 34 of the Arbitration Act had been decided by the Court. If the controversy between the parties had to be settled by arbitration, then the Court had no jurisdiction to pass any interim order even with regard to preservation of the property till the matter was decided by the arbitrators, because, according to the learned counsel, the granting of such orders also was the privilege of the arbitrators.

3. From the facts given above, it would be apparent that the Board had filed a suit for a permanent injunction restraining the defendant-firm from disposing of the raw material that was lying with them, and along with the plaint, they had made an application under order 39, rules 1 and 2, Code of Civil Procedure, for granting a temporary injunction for the same relief. It is true that in the contract that was entered into between both the parties, there was an arbitration clause, on the basis of which the firm had made an application u/s 34 of Arbitration Act that the suit should not be proceeded with. It is further true that evidence is being recorded in that application and the same has not yet been finally settled one way or the other. The question, therefore, arises whether in such circumstances, the Courts below acted within their jurisdiction in granting the temporary injunction mentioned above. Counsel for the parties, in spite of an

adjournment, were not able to cite any direct authority on this point. There is, however section 41 of the Arbitration Act, under which, in my opinion, the Court could pass the impugned order Section 41 reads:

Subject to the provisions of this Act and of rules made thereunder:

(a) the provisions of the Code of Civil Procedure, 1908, shall apply to all proceedings before the Court, and to all appeals, under this Act, and

(b) the Court shall have, for the purpose of, and in relation to, arbitration proceedings, the same power of making orders in respect of any of the matters set out in the Second Schedule as it has for the purpose of, and in relation to, any proceedings before the Court;

Provided that nothing in clause (b) shall be taken to prejudice any power which may be vested in an arbitrator or umpire for making orders with respect to any of such matters.

4. The orders which could be made by the Court, have been mentioned in the Second Schedule, which says:

1. The Preservation, interim custody or sale of any goods which are the subject matter of the reference.

2. Securing the amount in difference in the reference.

3. The detention, preservation or inspection of any property or thing which is the subject of the reference or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon or into any land or building in the possession of any party to the reference, or authorising any samples to be taken, or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence.

4. Interim injunctions or the appointment of a receiver.

5. The appointment of a guardian for a minor or person of unsound mind for the purposes of arbitration proceeding.

5. A perusal of the provisions of section 41 and the Second Schedule will show that simply because a party to a suit had made an application u/s 34 of the Arbitration Act, the Court is not debarred from making interim orders for the preservation of the property. It is true that the main dispute between the parties would be settled by the arbitrators if the application u/s 34 succeeds and it is held that the matter in dispute had been agreed to be referred to arbitration. But we are concerned with a situation where the matter in dispute has not yet gone to the arbitrators and one of the parties wants an injunction from the Court regarding the preservation of the property in dispute. Among the five items mentioned in the Second Schedule, the power of the Court is also regarding the preservation and the interim custody of any goods which are the subject-matter

of the reference vide item No. 1 in the said schedule. Item No. 3 thereof deals with the detention, preservation or inspection of any property and item No. 4 specifically deals with interim injunctions. In my opinion, therefore, the Court had the power to make an order of a temporary injunction regarding the preservation of the property in dispute. The reason for this also seems to be quite simple, because, if ultimately the dispute is referred to the arbitrators and an award is given in favour of a party, the award will become meaningless if, in the meantime, the property in dispute is wasted or disposed of by any of the parties to the litigation. It is precisely for that reason that the Court has been empowered u/s 41 of the Arbitration Act to pass interim orders in respect of the matters, which have been set out in the Second Schedule irrespective of the fact whether one of the parties had already made an application u/s 34 of the Arbitration Act before the said Court. It perhaps might have been a different matter if the power to issue temporary injunctions regarding the preservation of the property had also been specifically agreed to be referred to arbitration in the contract between the parties, but that is not the position in the instant case. The Courts below had come to the conclusion that the Board had made advance payments to the firm to enable the latter to purchase raw material. It was also held that in spite of the facility of credit extended by the Board to the firm, the latter had not supplied the zinc in agreed quantity. In such circumstances, the Board was well within its rights to ask for a temporary injunction that the firm might not in the meantime dispose of the raw material, which was lying in such a large quantity with them. The firm had borrowed big sums of money on the basis of the hypothecation deed and if it was allowed to dispose of the goods, the Board would be left with no remedy to recover the said sum from them. The view that I have taken above finds support in three rulings of different High Courts. The first is the decision of the Madras High Court in *Sha Vaktavarmal Seshmull Vs. Shah Nainmull Umaji and Co. and Others*, where it was held:

It will be apparent from a reading of the section (Section 41) that it provides both for the case where arbitration proceedings are pending before a Court as well as for one where such proceedings are not pending before the Court but before the arbitrator. Clause (a) refers to proceedings, which are before the Court. That indicates that the provisions of the CPC will generally apply to all such proceedings. Clause (b), on the other hand, relates to proceedings, which are not before the Court, but which are only pending before the arbitrator. If clause (b) also were to apply only to proceedings, which are pending before the Court, it would have been redundant or unnecessary, as the previous clause, clause (a), would be quite sufficient to meet all contingencies. The second schedule, which is incorporated into the provisions of clause (b) of section 41 contains five items. This is purely to prevent a party to the arbitration proceedings secreting the properties pending arbitration proceedings and defeat any award that may be passed therein. In *Subramanian and Others Vs. M.P. Vasudevan Chettiar and Others*, , *Krishnaswami Nayudu, J.* observes that clause (b) of section 41 makes certain provisions of the CPC covered under the Second

Schedule of the Act applicable generally to arbitration proceedings, i.e. not to proceedings before the Court, but to proceedings before the arbitrators. I agree with that view with respect.

6. Then we have the ruling of the Madhya Pradesh High Court in Daulat Ram Phoolchand Vs. Shriram and Others, Where it was observed:

The powers of the Court under the Second Schedule to the Arbitration Act can be exercised even in a case where the reference to arbitration has been made without the intervention of the Court, and no proceedings are pending in connection therewith in any Court. The effect of the provisions of section 41(b) of the Arbitration Act is to clothe the Court with the same powers in relation to arbitration proceedings to issue interim orders for the preservation and safety of the subject-matter of the dispute as it would have in relation to proceedings pending before itself.

Section 41 (b) read with the Second Schedule to the Act was intended to empower the Court to pass interim orders for the preservation or safety of the subject-matter of the dispute during the pendency of arbitration proceedings. In a case where an application is filed before the Court u/s 20(1) of the Act, or where the reference to arbitration is made through the intervention of the Court, the Court has seisin of the case and can undoubtedly pass interim orders. But there is no reason to suppose that the Court has no power u/s 41 (b) of the Act read with the Second Schedule to prevent the properties in dispute from being wasted during the pendency of the proceedings before the arbitrators. Such an interpretation would have the effect of depriving the successful party of the fruits of the decree which is eventually obtained by him on the basis of an award.

The expression "arbitration proceedings" was substituted in section 41 (b). Arbitration Act, for the words "a reference" in order to cover the various kinds of proceedings which the Act contemplates. The intention of the legislature by effecting this amendment was to include within the scope of clause (b) of section 41 all those proceedings which are held in pursuance of an arbitration agreement whether with or without the intervention of the Court. To hold otherwise would have the result of rendering superfluous the words "as it has for the purpose of and in relation to any proceedings before the Court" which occur in section 41 (b) of the Act.

The arbitrators have not been vested by the Act with any powers to grant interim orders for the protection and safety of the subject-matter of the dispute. Such powers had, therefore, to be vested in the Court u/s 41 (b) of the Act read with the Second Schedule. There is nothing in that section or in the Second Schedule to justify the view that the power to grant interim orders for the protection and safety of the properties in dispute cannot be exercised until proceedings under some other Section of the Act are started.

7. Lastly, we have the decision of the Calcutta High Court in Debendra Nath Singha v. Dwijendra Nath Singha AIR 1970 Cal. 256, where it was held:

By virtue of section 41 (b), the Court has the power and jurisdiction to appoint a receiver or to make any order of interim injunction or to make orders in respect of other matters set out in the, Second Schedule in appropriate cases for the purpose of, and in relation to arbitration proceedings ; but this power and jurisdiction of the Court cannot be exercised, if the exercise of any such power would prejudice any power which might be vested in an arbitrator or umpire for making orders with respect to any of such matter. Further, in view of the provisions contained in Section 41 of the Arbitration Act, the power and jurisdiction of the Court to appoint a receiver or to make any order of interim injunction or any order in respect of the matters set out in the the Second Schedule are now governed, controlled and regulated by the said section, and apart from the power and jurisdiction conferred by the said section, the Court has no power and jurisdiction independently of the provisions contained in the said Section 41 to appoint a receiver, to make any order of interim injunction or any order in respect of the other matters set out in the Second Schedule.

Where the parties in a suit, concerning disputes between them with regard to partnership properties and business, agreed to refer them to arbitration and under one of the terms of settlement, the arbitrator had been empowered, to give necessary interim direction for the protection and/or conduct of the joint business, management of the joint properties and or to enhance the monthly payment to the parties and subject to that clause the partnership business was to be continued as it was being done till then:

Held that it could not be contended that the powers which had been conferred on the Arbitrator under that clause could not be vested in a Arbitrator. If any receiver was appointed by the Court, pending arbitration proceedings the powers vested in the Arbitrator "under that clause of the "Terms of Settlement" were bound to be prejudiced and in that event, the Arbitrator would not be in a position to exercise the said powers vested in him, as the exercise of those powers would amount to interference with the possession and duties of the receiver appointed by Court. In this view of the matters, the Court was not competent to appoint any receiver because of the provisions contained in section 41 (b) of the Arbitration Act and more particularly in the proviso therein.

8. No counter decision has been brought to my notice by the learned counsel for the petitioner.

9. In view of what has been said above, I dismiss this petition, but leave the parties to bear their own costs.