
(1978) 09 SHI CK 0011

In the High Court Of Himachal Pradesh

Case No : O.M.P. No. 42 of 1978 in Civil Suit No. 5 of 1978

R.D. Bhardwaj

APPELLANT

Vs

State of Himachal Pradesh and Others

RESPONDENT

Date of Decision : 21-09-1978

Acts Referred:

Arbitration Act, 1940 — Section 34

Citation : (1979) ShimLC 27

Hon'ble Judges : C.R. Thakur, J

Bench : Single Bench

Advocate : H.S. Thakur, for the Appellant; O.P. Sharma and Joseph Dina Nath, for the Respondent

Final Decision : Dismissed

Judgement

C.R. Thakur, J.—This application u/s 34 of the Arbitration Act (shortly called the Act) has been filed by the State of Himachal Pradesh, against whom, Shri R.D. Bhardwaj has filed a suit for damages, declaration as also mandatory injunction to the effect that a decree for Rs. 20,4000/- on account of the damages, and for declaration that the Plaintiff is the lawful owner of 2,720 resin tins, which are now stacked by him at his different depots within Kunihar Forest Division and that the action of seizing the property taken by the Defendants is illegal, and he has further prayed by the suit for a decree for mandatory injunction directing the Defendants not to carry the stacked 2,750 resin tins from the depots of the Plaintiff to Bilaspur factory or any other place and to allow the Plaintiff to export the same for sale in the open markets and also to direct the Defendants to issue a transit permit in his favour without any delay.

2. The Defendants filed this application for stay of the proceedings on the grounds that in the agreement dated 5th of February, 1975 between the parties in respect of Lot No. 7/75 in Kohoo Range within Kunihar Forest Division for extracting resin from the "chil" trees there is an arbitration Clause No. 31 under which, in case of any dispute or difference between the parties, the matter is to

be referred to arbitration. But the Plaintiff without taking resort to that forum has wrongly filed the suit in this Court, and, therefore, on that ground it is contended that the suit should be stayed and the matter be referred to arbitration. Further, it has been contended that the Defendants have not taken any steps in the proceedings after appearance in the Court in the aforesaid suit.

3. In reply, it has been averred that this application u/s 34 of the Act is not maintainable. The arbitration agreement, if any, was repudiated by the Defendants. When a dispute had arisen between the parties, it was incumbent for the Defendants to resort to arbitration proceedings, that the application is delayed and resort cannot be had to the arbitration proceedings. In fact the Defendants are estopped from raising the plea of arbitration.

4. Further, on merits, it was contended that after the filing of the suit, the Defendants had been taking time to file reply to the applications as also the written statement to the plaint in the suit. As such, the Defendants had taken steps in proceedings of the case and cannot take the plea of referring the matter to an arbitrator. Prior to the filing of the suit, the Petitioner had filed a writ petition registered as C.W.P. No. 132 of 1977. In the said writ petition, the Plaintiff had contended that the dispute would be referred to an arbitrator. In reply to the contention of the Plaintiff, it was stated that there was no clause in the agreement between the parties to refer the dispute to an arbitrator, and as such the Defendants are debarred from filing this application. As a matter of fact, the Plaintiff had made full and final payment in respect of Lot No. 7/75 and a clearance was given on behalf of the Defendants.

5. After hearing the Counsel for the parties, I am of the view that this application is not sustainable and must be dismissed.

6. The suit has been brought by the Plaintiff on the basis of three agreements. The first agreement is that of 1975 in respect of Lot No. 7/75; the second is of 1976 in respect of Lot No. 7/76, and the third agreement is of 1977 in respect of Lots No. 1/77 and 7/77. In so far as the latter two agreements of 1976 and 1977 are concerned, admittedly there is no arbitration clause in those two agreements. In so far as the agreement of 1975 is concerned, there is admittedly an arbitration clause No. 31. But the contention of the Plaintiff is that he had worked out the contract and made the full payment in respect of this contract to the Government. He had removed and sold some of the resin tins out of the contract for the year 1975 and the remainder which had not been sold was stacked on the road side and he had been issued an export permit also in respect of the resin extracted from the blazes in respect of the contract in 1975. He had also worked out the contracts for the years 1976 and 1977, and had also stacked the resin so extracted from the blazes in respect of these two contracts of 1976 and 1977 and the resin so extracted was also stacked along with the resin extracted for the contract of 1975. Since the entire resin in respect of all these had been stacked at the road side, the Defendants had forfeited the resin on the ground that the Plaintiff had wrongfully tapped blazes which had been marked or sold and that

there had been some defect in the work of tapping the resin, as required under the rules and directions of the Forest Department. So the submission of the Plaintiff is that the Department has got no right to forfeit the resin stacked by him. In so far as the resin extracted out of the blazes sold during the years 1976 and 1977 is concerned, there is no arbitration clause, and in so far as the agreement of 1975 is concerned, though there is an arbitration clause but there is no dispute with regard to the execution of that contract, and the Defendants had wrongfully forfeited his property. The learned Counsel for the Defendants contends that in view of the arbitration clause in the agreement of 1975, this Court cannot proceed with the suit and the matter has got to be referred to arbitration. This argument appears to have been raised simply to be rejected because there is no dispute with regard to the tapping of the blazes for extracting the resin in the contract of 1975 so as to invoke the arbitration clause. The dispute is only with regard to the tapping of the blazes for extracting the resin in respect of the agreements of 1976 and 1977 in which there is no arbitration clause. In so far as the 1975 agreement is concerned, as alleged the Plaintiff has paid up the entire royalty amount to the Defendants and they had given the permit for the export and sale of the resin. But since the Plaintiff had stacked the resin on the road side along with the resin extracted from the contracts of 1976 and 1977, therefore they have wrongly seized the resin. In my opinion, the learned Counsel for the Plaintiff is perfectly right in arguing that there is no dispute with regard to the agreement of 1975 and as such the submission made by the Defendants that there is arbitration clause And that the matter must be referred to arbitration, is wholly devoid of merit and is, therefore, repelled,

7. The second point is whether the Defendants-applicants have taken any steps in the proceedings so as to debar them from applying for stay of the suit. In this behalf the law as laid down by their Lordships of the Supreme Court in *The State of Uttar Pradesh and Another Vs. Janki Saran Kailash Chandra and Another*, is that where an application for adjournment for filing written statement is moved it will be a step in the proceeding. It has been held that when there is any such application filed, then there is no question of any exercise of discretion by the trial Court. Discretion with regard to stay u/s 34 of the Arbitration Act is to be exercised only when an application under that section otherwise competent.

8. In the instant case, as the record shows, on 31st March, 1978 the Respondents were represented by Shri H.K. Paul the Law Officer attached to the learned Advocate General. He made a request to allow him one week's time for filing written statement to the main suit as also to the OMP No. 26 of 1978. Thereafter the case came up before the Court on 12th April, 1978. On that date, the order passed by the Court is as under:

It is stated by the learned Advocate General that he has filed an application purporting to be one u/s 34 of the Indian Arbitration Act, but that application is not listed today for orders. The same be listed on 13th April, 1978 for orders.

9. It is apparent from the application OMP No. 42 of 1978 that it was filed on 10-4-1978. Therefore, it would appear that the request for adjournment which had been made before filing this OMP No. 42 of 1978 was really a step in aid in the proceedings of the suit. It is incumbent upon the party who wants the suit to be stayed that he must clarify his position at the earliest possible opportunity so as to, leave no manner of doubt that he wishes to have a resort to arbitration proceedings. And if he does not clarify that position and allows the suit to progress, he can be presumed to have given up his claim to have the matter decided by the arbitrator and to have thereby forfeited his right to claim a stay. Since Shri Paul appearing on behalf of the Defendants had specifically prayed for an adjournment to enable him to file a written statement to the suit as also a reply to the stay application "under Order 39, Rules 1 and 2, it amounted to a step in the proceedings. In such circumstances the Court has to refuse to stay the proceedings on the ground that the stage fixed by the law for making application has passed. It is now not open to the Defendants to say that in spite of it their intention was to apply for stay at a future date. Once they opted to get time for filing the written statement, that tantamounted to a step in the proceedings of the suit and forfeited the right to apply for stay of the suit.

10. In these circumstances, in my opinion, the application cannot be allowed, and is hereby dismissed. The suit shall hereafter proceed and the Defendants shall file their written statements.