

(1993) 03 MP CK 0016

In the Madhya Pradesh High Court

Case No : Miscellaneous (F) Appeal No. 402 of 1990

Sita Ram

APPELLANT

Vs

District Abhiyanta Dursanchar, Raipur and Another

RESPONDENT

Date of Decision : 29-03-1993

Acts Referred:

Arbitration Act, 1940 — Section 41
Civil Procedure Code, 1908 (CPC) — Section 80

Citation : AIR 1994 MP 71 : (1993) 2 MPJR 318 : (1994) 39 MPLJ 78 : (1994) MPLJ 78

Hon'ble Judges : P.P. Naolekar, J

Bench : Single Bench

Advocate : D.C. Jain, for the Appellant; A. Choudhary and J. Choudhary, for the Respondent

Final Decision : Allowed

Judgement

P.P. Naolekar, J.

The appellant filed an application u/s 20 read with Section 46 of the Arbitration Act, 1940 (hereinafter called the Act) for directions to the respondents to file the arbitrations agreement in Court and to make an order of reference. During the pendency of the proceedings, the appellant also moved an application u/s 41 read with Schedule II of the Act for injunction. The trial Court after considering the application, granted an ex parte ad interim injunction restraining the respondents from disconnecting the appellant's telephone connection till 20th August, 1990 for non-payment of the telephone bills. This order was passed on 31-7-1990.

On 22-8-1990, the telephone connection of the appellant was disconnected by the respondents and, therefore, the appellant moved two applications for taking appropriate steps for breach of injunction order issued by the trial Court on 31-7-1990 and another application for direction to the respondents to restore the telephone of the appellant. These applications were considered by the trial Court

in the light of the previous orders issued by the Court granting ad interim injunction on 31-7-1990 and the trial Court held that the application moved by the appellant u/s 41 of the Act read with Schedule II for injunction is a suit by virtue of Section 41(a) of the Act and, therefore, provisions of the Civil P.C. are attracted and in the absence of a notice u/s 80 of the Civil P.C., the application for injunction was not maintainable nor ex parte injunction order could have been issued by the Court on 31-7-1990. Further, the trial Court was of the opinion that had it been an application u/s 20 of the Act alone, it could have been held to be maintainable and that service of notice u/s 80 of the C.P.C. is mandatory for an application u/s 41 read with Schedule II of the Act; in the absence of notice u/s 80 C.P.C. the application u/s 41 read with Schedule II of the Act is not maintainable and no injunction orders could have been issued by the Court; there is no question of breach of injunction order; nor any order for restoration of the telephone connection could be passed and consequently dismissed the applications filed by the appellant. It was (sic) further directed the appellant to service a notice u/s 80 of the C.P.C. on the respondents and then revive his applications for injunctions.

In *H.M. Kamaluddin Ansari and Co. Vs. Union of India (UOI) and Others*, the Supreme Court has held that the court has power u/s 41(b) read with Second Schedule to the Arbitration Act to issue interim injunction only for the purpose of and in relation to arbitration proceedings. So, for the exercise of powers by the Court u/s 41(b) read with Second Schedule to the Act, it is necessary that the proceedings are pending under the Act either before the arbitrator or before the Court. Schedule II of the Act confers powers on the Court to pass appropriate orders for the purpose of interim injunction. However, Section 41(a) of the Act makes only the procedural rules of the Civil P.C. applicable to the proceedings in Court under the Arbitration Act and does not unthorise the Court to pass an order of injunction.

In the present case, the appellant had moved an application u/s 20 of the Act for filing the arbitration agreement in Court and the matter which is pending in the Court is that of u/s 20 of the Act and in this pending proceeding the appellant has moved an application for injunction u/s 41 read with Schedule II of the Act. The application for injunction moved by the appellant was not a separate proceeding but it was an application moved in a pending proceeding under the Arbitration Act. If proceedings u/s 20 of the Act are maintainable without giving a notice u/s 80, C.P.C., then there* is no reason why an application moved u/s 41 read with Second Schedule of the Act in a pending proceeding is not maintainable without giving a notice u/s 80 of the C.P.C.

4A. It has been held in *Firm Ramchand & Sons v. Governor General in Council* AIR 1947 Sind 147, that the provisions of Section 80, C.P.C. applies only to institution of a suit and it does not apply to an application to file an arbitration agreement in Court u/s 20 of the Arbitration Act. A Division Bench of the Lahore High Court in *Secretary of State v. Kundan Singh* AIR 1932 Lah 374, was called

upon to decide the question : "Does an application under para 17, Sch. 2, Civil P.C., asking the Court to file an agreement to refer a dispute to arbitration amount to a "suit" within the meaning of Section 80 of the Code?" and has decided the question thus :

"It is clear that the object of notice required by the section is to inform the Secretary of State or the public officer of the claim which it is contemplated by bring against him and to afford him an opportunity to settle it, if so advised, without litigation. Now, if an agreement to refer to arbitration has been entered into by him, he is already in possession of all the information required by him; and it would be an act of supererogation to give him a notice repeating the same information. The absurdity of observing this superfluous formality is fully demonstrated, when it is sought to apply it to an application under para 20, Civil P.C. which admittedly stands on the same footing as an application under para 17 in so far as Section 80 is concerned."

I am in complete agreement with these decisions. An application u/s 20 of the Arbitration Act is not a suit and, therefore, there is no obligation on the part of the appellant to give a notice to the respondents u/s 80, C.P.C.

The appellant filed an application u/s 20 of the Act read with Section 46 for a direction to the respondents to file the arbitration agreement in Court and to make an order of reference. During the pendency of this proceeding, an application was moved u/s 41 read with Schedule II of the Act for injunction. That application was moved in a pending proceeding which was already filed by the appellant. The application for injunction was not a separate proceeding and cannot be said to be a separate suit filed by the appellant. A notice u/s 80, C.P.C. is given to the State or Central Government or a public officer in respect of any act purported to be done by such public officer in his official capacity and this notice u/s 80, C.P.C. is mandatory before filing of a suit. An application for injunction in a pending proceeding is not a suit and, therefore, the provisions of Section 80, C.P.C. will not be attracted. Section 41(a) of the Act makes only the procedural rule of the Civil P.C. applicable to the proceedings in Court under the Arbitration Act whereas Section 80, C.P.C. requires a notice to be given prior to the institution of the proceedings. Power to grant injunction is vested in the Court by virtue of Section 41(b) of the Act. As Clause(a) of Section 41 of the Act makes the procedural rule of the CPC applicable to arbitration proceedings, application of the provisions of the CPC will be to the proceedings pending in the Court only.

In view of the aforesaid, there is no necessity of service of notice u/s 80, C.P.C. to maintain an application u/s 41(b) read with Schedule II of the Act for grant of injunction and the trial Court has committed an error in holding that the Court should not have granted ex parte ad interim injunction in the absence of a notice u/s 80, C.P.C. Consequently, refusal to adjudicate on the applications moved by the appellant on merits and dismissing them, the trial Court has committed an error.

The learned counsel for the respondents then tried to support the order on the ground that the proceedings taken u/s 20 of the Act itself is not maintainable in view of Section 7(b) of the Indian Telegraph Act, 1885 whereunder a statutory arbitration is provided and that there is no arbitration clause at all. This point was neither raised before the trial Court nor was considered by the trial Court. The full record of the case was not summoned and, therefore, it is not possible for this Court to adjudicate or decide the question raised by the learned counsel for the respondent. However, it is made clear that it shall be open to the respondents to raise such questions, if and when, it is deemed fit in the circumstances of the case.

In view of the aforesaid discussion, this appeal is allowed and the order of the trial Court is set aside. The trial Court is directed to consider the applications moved by the appellant on merits and hear the respondents on the application for injunction filed by the appellant u/s 41 read with Schedule II of the Act. In the circumstances of the case, there shall be no order as to costs.