

(1953) 01 SHI CK 0004

In the High Court Of Himachal Pradesh

Case No : Civil Miscellaneous First Appeal No. 46 of 1952

State of Himachal Pradesh

APPELLANT

Vs

Lalchand Shahi

RESPONDENT

Date of Decision : 15-01-1953

Acts Referred:

Arbitration Act, 1940 — Section 34

Citation : AIR 1953 HP 75

Hon'ble Judges : Chowdhry, J.C.

Bench : Single Bench

Advocate : Dalip Singh, for the Appellant; Bishan Singh, for the Respondent

Final Decision : Allowed

Judgement

Chowdhry, J.C.

1. This is a defendant's appeal u/s 39(1)(v), Arbitration Act (10 of 1940) from an order of the Senior Subordinate Judge of Sirmur dated 24-7-1952 refusing to stay legal proceedings on an application to that effect having been made before him by the appellant u/s 34 of the Act.

2. The plaintiff-respondent filed this suit for recovery of Rs. 7,886/9/6 on account of balance of price of empty tins, refund of security deposit etc., on foot of an agreement. The agreement contained an arbitration clause to the effect that in case of any dispute arising between the parties the matter would be referred to the arbitration of the Conservator of Forests and his decision shall be final.

3. The suit was filed on 15-12-1951 and summonses were issued to the defendant-appellant fixing 29-2-1952 for settlement of issues. The order-sheet of that date is to the following effect: "Present: Plaintiff through Sri L. D. Varma, Pleader and Sri Dalip Singh, Advocate for the defendant. Defendant's counsel prays for extension of time to enable him to file the written-state-ment. Time allowed till 29-4-1952." On the latter date the presiding officer was absent as he had been transferred, and therefore the case was adjourned to 24-5-1952. It

was noted in the order-sheet of 29-4-1952 that no written statement had been filed. On 24-5-1952 the defendant filed an application for stay of the suit u/s 34, Arbitration Act. The application was opposed by the plaintiff, and the learned Judge passed the order in question dated 24-7-1952 against which the defendant has come up in appeal to this court. The learned Subordinate Judge was of the view that, reading the two orders dated 20-2-1952 and 29-4-1952 together, the defendant will be deemed, within the purview of Section 34 of the said Act, to have already taken steps in the proceedings before putting in his aforesaid application dated 24-5-1952. I have heard learned counsel for the parties and am clearly of the opinion that the order of the learned Senior Subordinate Judge was wrong.

4. The learned Senior Subordinate Judge had before him two affidavits, one by Kr. Dalip Singh, Advocate for the defendant and another by Sri L. D. Varma, Pleader for the plaintiff. It was averred in the former by Kr. Dalip Singh that it was on 29-2-1952 that he was engaged on behalf of the defendant, the State of Himachal Pradesh, to appear in the case, that by the time he appeared before the Court on that date he had not received instructions for the case, and, that therefore he verbally requested the Court to adjourn the case to enable him to prepare the defence on behalf of the defendant. The counter-affidavit of the learned pleader for the plaintiff on the other hand is to the effect that Kr. Dalip Singh asked the Court for extension of time to enable him to file a written statement.

It is common ground that no written application was filed but that the request of adjournment made by Kr. Dalip Singh was an oral one. It will be seen that while according to Kr. Dalip Singh he only asked for adjournment for enabling him to prepare the Government's defence, according to Sri L. D. Varma the adjournment was prayed for specifically for filing a written statement. Essentially however there is no difference between the two affidavits, for it may be said that an adjournment to enable the counsel to prepare the Government's defence is the same as one to enable him to file a written statement on behalf of the Government. What is material, however, is that the averment of Kr. Dalip Singh that by the time he appeared before the Court on 29-2-1952 and prayed for adjournment he had received no instructions from the defendant was not controverted on behalf of the plaintiff. I must therefore accept the averment in, the affidavit of Kr. Dalip Singh as correct.

The correctness of that averment in Kr. Dalip Singh's affidavit is further supported by a communication on the record of the case from the Deputy Commissioner of Sirmur informing the Court that the counsel in question was being appointed to conduct the case on behalf of the State of Himachal Pradesh, with copies of communication to the counsel and the Conservator of Forests Nahan. The counsel was directed to take the relevant documents and to obtain necessary help for the purpose of conducting the case from the Conservator of Forests, and similar directions were given to the Conservator of Forests. This

communication is dated 29-2-1952. There can be no manner of doubt therefore that Kr. Dalip Singh, Advocate was appointed counsel on behalf of the defendant, the State of Himachal Pradesh, on 25-2-1952, and that by the time he put in appearance in Court on that date and asked for adjournment he had received no instructions. Can it be said in such circumstances that by reason of his having requested the Court for time to file written-statement Kr. Dalip Singh should be deemed, within the intendment of Section 34, Arbitration Act, to have taken a step in the proceedings?

The only reasonable answer to this question can be in the negative. And this for the simple reason that no person can be deemed to take any step in a proceeding who is not aware of what the proceedings are. 29-2-1952 was the date for settlement of issues and therefore for filing of written-statement on behalf of the defendant, and so Kr. Dalip Singh on behalf of the defendant naturally asked for adjournment for filing a written, statement. He had however received no instructions by that time from the defendant, and therefore he could not possibly have been aware of the agreement on foot of which the suit had been filed or of the arbitration clause in that agreement. It was impossible for him therefore to have filed any application on that date for stay of proceedings u/s 34 of the Act. Later on, when he had taken the necessary instructions, he filed such an application. It cannot in the circumstance be said by any show of reason that before filing the application u/s 34 a step in the proceedings had been taken on behalf of the defendant on 29-2-1952 by reason of the defendant's learned counsel having asked for an adjournment on that date in the circumstances mentioned above.

5. The learned counsel for the plaintiff-respondent has relied upon the following rulings:--

United Provinces Government Vs. Sri Har Nath, ; -- Sadhan Kumar Bhattacharjee Vs. Sunil Kumar Bhattacharjee and Others, ;-- Edward Radbone Vs. Juggilal Kamalapat, ;-- "Murlimal v. Banarsi Das & sons.", AIR 1935 Sind 62 (D); and -- Roop Kishore Vs. United Provinces Government, . In all these cases applications for postponement of the hearing of the suit for filing written statement were held to amount to the taking of steps in the proceedings within the purview of Section 34 of the said Act. There is this important distinction, however, between these cases and the present, that in none of them was the prayer for adjournment of the case made by a counsel who uptill the moment of making the request for adjournment had received no instructions from his clients. That being so, it goes without saying that if a counsel makes an application for adjournment of the case after having received necessary instructions from his client the application for adjournment must amount to the taking of a step in the proceedings within Section 34 of the Act. These rulings therefore are clearly distinguishable and do not apply to the facts of the present case. On the contrary, there are certain observations appearing in the last two rulings which support the view of the matter which I have taken in the present case. In the Sind ruling reliance was

placed on the following observations of Page, J., in-- Bhowanidas-Ramgobind Vs. Pannachand-Luchmipat and Another, :

"Any act in the nature of an application to the Court which indicates that a party is willing that the suit should proceed, in my opinion, would be a step in the proceedings within Section 19, Arbitration Act. The intention of the party is to be gathered from the nature of the application which is made, and if, having regard to the form of the applicatioa, the Court is of opinion that a step has been taken it will so hold, notwithstanding that the party may in truth and in fact have no such intention, or that the application is coupled with a protest that the party (desires that the matters in dispute should be referred to arbitration."

It would appear therefore that before any act of a party in the nature of an application for adjournment can be interpreted as the taking by him of a step in the proceedings it must be the act of a party willing that the suit should proceed. That being so, the act of a counsel for a party in asking for an adjournment before having received any instructions from his client cannot be construed as indicating that he was willing that the suit should proceed. Again it was laid down by Dar, J., as follows in the-- Roop Kishore Vs. United Provinces Government, , case cited above:

"The defendant, however, contends that every application made for adjournment of a case with a view to enable the defendant to file a written-statement cannot be treated as a matter of law "a step in the proceedings" and the contents of the application or the surrounding circumstances of the case may show that the application was made without prejudice to the rights of the defendant to seek relief u/s 34 of the Act & for this contention reliance is placed upon-- Bhowanidas-Ramgobind Vs. Pannachand-Luchmipat and Another, ",-- Abdul Hamid Vs. Prokash Chandra Nandi and Another, ,-- "Dwarka Das & Co. v. Chain Roop Singhee" ILR (1937) Cal 63 and-- "Premnath Pran Nath v. Amba Prasad" AIR 1941 Lah 64 . It may be possible to hold in some cases that an application for adjournment of a case to enable the defendant to file a written-statement was not a step in the proceedings within the meaning of section 34 of the Act, but prima facie such an application should be treated as a step in the proceedings within the meaning of Section 34 and the whole burden should be upon the defendant to establish the circumstances which will lead to the result that effect should not be given to the prima facie meaning of the application."

It was conceded in this ruling therefore that there may be circumstances in which the filing of an application for adjournment of the case for the purpose of filing a written-statement may not be treated as a step in the proceedings, although no doubt the burden of proving the existence of such circumstances would be upon the party who made the application. This burden, as adverted to above, has been satisfactorily discharged in this case by the un rebutted affidavit of the learned counsel for the defendant that upto the moment of praying for adjournment he had received no instructions on behalf of his client.

6. In the result, therefore, I hold that the application u/s 34, Arbitration Act, preferred on behalf of the defendant in the trial Court on 24-5-1952 was made before the taking of any step in the proceedings, and that therefore the Court should have allowed the application. Accordingly, the appeal is allowed with costs, the order of the Senior Subordinate Judge dated 24-7-1952 refusing to stay proceedings is set aside and the Court now seised of the case is directed to proceed with the case in accordance with the law in the light of the finding recorded above by this Court.