

(1994) 10 AHC CK 0013
In the Allahabad High Court

Case No : FAFO No. 100 of 1994 (With Connected Fafo No. 219 of 1994)

Union of India and another	Vs	APPELLANT
Civil Judge and another		RESPONDENT

Date of Decision : 24-10-1994

Acts Referred:

Arbitration Act, 1940 — Section 34

Citation : (1994) 10 AHC CK 0013

Hon'ble Judges : S.C.Mohapatra, J and V.P.Goel, J

Final Decision : Disposed Of

Judgement

1. These two appeals by the defendants, against an order refusing to stay the suit in view of arbitration clause in the agreement and grant of temporary injunction.
2. Appellants are illadvised to add the learned presiding officer as party to these appeals. Learned counsel for appellants agrees that presiding officer being a party be expunged Stamp Reporter who examines the record and memorandum of appeal shall point out this defect in all appeals and where a person is added as party who was not a party in the lower court, should he be treated as defect so that appeal does not proceed further until defect is removed or is dismissed for nonremoval of the defect in spite of opportunity to remove the same.
3. Respondent no. 2 is a work contractor, which entered into an agreement with the appellants for execution of work. During such execution, appellants entered into agreement with another contractor for executing balance work. Aggrieved by the same, respondent no. 2 filed a suit for permanently restraining appellants from entrusting the work to another contractor and for having saddled plaintiff with extra cost incurred for such work.
4. Respondent no. 2 filed an application for temporary injunction. Trial court having granted temporary injunction, appellants have filed these appeals and this court has stayed operation of that part of the impugned order granting

temporary injunction. Thus, there is no order of restraint against appellants at present.

5. Appellants filed applications for stay of the suit under section 34 of the Arbitration Act. Trial court has rejected the application on the ground that appellants have not raised such objection at earliest opportunity and the stage for appointment of Arbitrator has not yet come, as provided in the arbitration clause.

6. When this appeal (First Appeal From Order No. 100 of 1994) was being heard, we called for the records of the other appeal, where the Impugned order of temporary injunction challenged and was stayed, so that both appeals can be finally disposed of in one hearing.

7. We find that the order of temporary injunction was not justified as all the there preconditions for grant of injunction are not satisfied. Moreover, such an order has been stayed. By stay of the order, no prejudice has been caused to respondent no. 2. Accordingly, order of temporary injunction is reversed and application for the said temporary relief is dismissed Appeal is allowed.

8. Coming to question of stay of suit, learned counsel for the appellants has brought to our notice that at this stage the arbitration clause has become operative and the Arbitrator can be appointed. We accept the oral submission of the learned counsel for the appellants, which is based on instruction. Learned counsel for the respondent submits that the arbitration clause was not operative when the suit was filed. If the arbitration clause has become operative now, there is strength in the submission of the learned counsel for the appellants that the suit should remain stayed in view of section 34 of the Arbitration Act, since Arbitrator can decide the dispute as to whether the plaintiff is entitled to any damages for wrongful cancellation of the contract. It can also determine the quantum of damages. Claim of appellants that in view of the execution of the work by another contractor they have incurred extra expenses for which the plaintiff is liable to pay the extra amount incurred, can also be decided by the Arbitrator if reference is made to him. This would depend upon the materials to be brought before the Arbitrator and there would be no complicated question of fact or law involved in that so that discretion of court not to stay the suit under section 34 of the Arbitration Act would be exercised.

9. When we called upon learned counsel for the appellants whether the appellants are going to appoint an Arbitrator under the clause of the contract, he fairly submitted that an Arbitrator can be appointed. Therefore; we give liberty to the appellants to take steps for appointment of an Arbitrator and intimate the appointment to the plaintiffrespondent. Thereafter, appellants can move the trial court for stay of the suit under section 34 of the Arbitration Act. Since an Arbitrator has already been appointed to adjudicate the dispute between the parties, we make it clear that no step in the suit having taken for filing written statement, application under section 34 of the Arbitration Act was competent and

contesting application for injunction does not debar appellants to invoke powers of court under section 34 of the Arbitration Act.

10. On such information being given to the plaintiff, statements shall be filed before the Arbitrator by both the parties and the trial court shall stay further proceedings of the suit until finality of the arbitration proceedings.

11. Learned counsel for plaintiff states that already a recovery proceeding has been initiated and to protect its interest there should be temporary injunction. This is not the subject matter of either of the appeals and accordingly we do not entertain such prayers. If an arbitrator is appointed, question of granting injunction can be considered under Section 41 of the Arbitration Act. In that view of the matter, we leave the question open at this stage.

12. In result, both the appeals are disposed of, with the aforesaid order. There shall be no order as to costs.

13. A copy of the judgment, if applied, shall be supplied to the learned counsel within 15 days.