FOOD CORPORATION OF INDIA

v.

M/s. THAKUR SHIPPING CO. LTD. & ORS.

December 19, 1974

[V. R. KRISHNA IYER, P. K. GOSWAMI AND A. C. GUPTA, JJ.]

Arbitration Act (10 *of* 1940), *s.* 34—*'Ready and willing at the time when the proceedings were commenced to do all things necessary to the proper conduct of arbitration'—Scope of.*

The appellant chartered two ships belonging to the 2 respondents for carrying rice from Thailand to India. The Charter-party provided *inter alia* that any dispute should be referred to 2 arbitrators one to be nominated by the owners and the other by the Charterers. The appellant made claims against one respondent for damages for short delivery, and against the other for damages for short delivery and damage in respect of the consignment of rice. The appellant, thereafter, suggested to one of the respondents to agree to arbitration by a single arbitrator, but there was no response from that respondent. The appellant also wrote to the agents of the other respondent urging them to take steps for referring the dispute, but the appellant only got evasive replies.

The appellant, a few days before the claims would be barred by time, filed suits against each of the respondents for recovery of the amounts claimed by it.

The respondents applied for stay of trial of the suits under s. 34 of the Arbitration Act, 1940. The trial court rejected the applications, but the High Court allowed the prayer for stay on the ground that the decision of the trial court was perverse.

Allowing the appeals to this Court,

HELD: (1) Under s. 34, one of the conditions that the applicant for stay should satisfy the court is that not only he is but also was, at the commencement of the proceedings, ready and willing to do every thing necessary for the proper conduct of the arbitration. Where a party to an arbitration, agreement chooses to maintain silence in the face of repeated requests by the other party to take steps for arbitration, the case is not one of mere inaction. Failing to act when a party is called upon to do so is a positive gesture signifying unwillingness or want of readiness to go to arbitration especially when legal proceedings in Court were about to be barred by time. [150F-G; 151E-F; 152C]

In the present case, one of the respondents sent evasive replies to the appellant in reply to the appellants letter urging them to take steps for referring the dispute to arbitration.

As regards the other respondent, the appellant's suggestion of a sole arbitrator was contrary to the arbitration clause of the charter-party, but the appellant's deviation was not a valid excuse for that respondent to remain silent and inactive. If the respondent was ready and willing to go to arbitration, the respondent would have replied that it was not willing to any departure from the arbitration clause, but it did not send any replies to the appellant or do anything for reference of the dispute to arbitration according to the arbitration clause. [152A-C]

The trial court found as a fact that the respondents were not ready and willing to go to arbitration at the time when the suit was instituted. Silence and inaction on their part may in the circumstances, very well justify the inference that they were not ready and willing to go to arbitration. The conclusion was not arbitrary or perverse and the High Court was wrong in so characterizing it. [151G; 152C]

Anderson Wright Ltd. v. *Moran and Company* [1955] 1 SCR 862 followed.

A *Subal Chandra Bhur* v. *Md. Ibrahim & Anr.* AIR 1943 Cal. 481. referred to.

(2) It is true that a court should not allow a party to an arbitration agreement to proceed with the suit in breach of the solemn obligation to seek resort to the tribunal selected by him; but this is subject to the terms of s. 34, one of which is that the other party to the agreement must remain 'ready and willing to do all things necessary for the proper conduct of the arbitration.' [152E-F]

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Michael Colodetz & Ors. v. *Serajuddin and Company* [1964] 1 SCR 19 referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1518 and 1519 of 1974.

C Appeal by special leave from the judgment & order dated the 8th August 1973 of the Madras High Court in A.A.D. Nos. 389 and 401 of 1971.

M. Krishna Rao and *B. Parthasarthy*, for the appellant (in C.A. No. 1518/74.)

Niren De, Attorney General for India and *B. Parthasarthy*, for the D appellant (in C.A. No. 1519/74.)

N. M. Ghatate and *S. Balakrishnan*, for respondent No. 1 (in C.A. No. 1518/74).

S. T. Desai, N. M. Ghatate and *S. Balakrishnan*, for respondents E (in C.A. No. 1519/74.)

The Judgment of the Court was delivered by

GUPTA, J. In these two appeals by special leave the appellant, Food Corporation of India, challenges the correctness of two orders passed by the High Court of Madras staying under sec. 34 of the Arbitration F Act two suits for damages it had instituted in the Court of the Subordinate Judge at Tuticorin. The question for consideration is whether the first respondent in each of these two appeals, who are the first defendant in the respective suits out of which these appeals arise, was "ready and willing to do all things necessary to the proper conduct of the arbitration" as required by sec. 34. This is really a question of fact and the trial court found that in neither case the defendant G who applied for stay satisfied this test. On appeal, the High Court stayed the suits reversing the decision of the trial court by two separate orders passed on the same day. Whether the High Court acted rightly would depend upon the facts and circumstances of the two cases which are essentially similar. It is necessary therefore to state briefly the facts leading to the institution of the suits.

H The appellant Food Corporation of India, referred to hereinafter as the Corporation, chartered two ships belonging respectively to M/s. Thakur Shipping Co. Ltd. and the Great Eastern Shipping Co. Ltd. for carrying rice from Thailand to India. The Charter-Party between the

Corporation and the shipping companies contained a clause, namely clause 42, which reads as follows : A

> "Any dispute under this charter to be referred to arbitration in India one Arbitrator to be nominated by the owners and the other by the charterers and in case the Arbitrators shall not agree then to the decision of an umpire to be final and binding upon both parties." B

The bills of lading provided *inter alia* that the contract between the parties was subject to the Indian Carriage of Goods by Sea Act, 1925 and that the provisions of the Act would be deemed as incorporated in the bills of lading. The bills of lading contained a clause that "no suit shall be maintained unless instituted within one year after the date on which the ship arrived or should have arrived at the port of discharge notwithstanding any provision of law of any country or state to the contrary. The Indian Carriage of Goods by Sea Act, 1925 in clause 6 of Article III of the Schedule also provides *inter alia* that "the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when goods should have been delivered". C D

The ship belonging to M/s. Thakur Shipping Co. Ltd., first respondent in Civil Appeal No. 1518 of 1974 and first defendant in suit No. 103 of 1970 out of which this appeal arises, arrived at Tuticorin Port, which is the port of discharge, on August 31, 1969 and discharge of cargo was completed on September 13, 1969. The Corporation made a claim for damage for short delivery, provisionally on November 29, 1969 and finally on January 24, 1970. On July 2, 1970 the Corporation sent a telegram to the second defendant in the suit, M/s. Pent Ocean Steamship Private Ltd., Bombay, who were the Operating Managers of the ship concerned, asking them to confirm whether they were agreeable to refer the dispute as to short delivery to the sole arbitration of the Director General Shipping, Bombay stating that the matter was "most immediate". It is to be noted that the proposed reference to the sole arbitration of Director General Shipping was a deviation from clause 42 of the Charter-Party. There was no reply to this telegram. On July 8, 1970 another telegram repeating the earlier proposal was sent to the second defendant again emphasizing the urgency of the matter. On July 9, 1970 the second defendant sent a reply saying that they were no longer the Operating Managers and asking the Corporation to contact the first defendant for further advice. The Corporation then sent a telegram on July 10, 1970 to the first defendant seeking to know if they were agreeable to have the dispute referred to the sole arbitration of Director General Shipping, Bombay repeating that the matter was "most urgent". The first defendant chose not to answer the telegram. Any reminder after this, one expected, would be sent to the first defendant but on July 25, 1970 the Corporation telegraphically asked the second defendant again to nominate an arbitrator in terms of clause 42 of the Charter Party in case the proposal for arbitration by the Director General Shipping, Bombay was not acceptable. In this telegram it was stated that the time within which the claim should be made was to expire shortly and that failure on the part E F G H

A of the other side to take prompt action for reference of the dispute to arbitration would compel the Corporation to take legal proceedings. Failing to get any response from the other direction, the Corporation on August 31, 1970 instituted suit No. 103 of 1970 in the Court of the Subordinate Judge at Tuticorin for recovery of Rs. 1,57,724/73p. on account of short delivery and damage to the rice shipped. A few B days more delay would have barred the claim. Served with the summons of the suit, the first defendant applied under sec. 34 of the Arbitration Act for stay of the suit. As stated already, the trial court rejected the application, on appeal the High Court reversed that decision and allowed the prayer for stay on the view that the trial court had failed to exercise its discretion properly. Civil Appeal 1518 of 1974 arises out of this order.

C The facts in Civil Appeal 1519 of 1974 are these. The ship belonging to the first respondent in this appeal, the Great Eastern Shipping Co. Ltd., arrived at Tuticorin Port from Thailand on August 15, 1969 and discharge of cargo was completed on August 27, 1969. By a letter dated November 29, 1969 addressed to the steamer agents of the first respondent, the clearing agents of the Corporation made a D claim for short delivery and damage in respect of the consignment of rice. The steamer agents, who figure as the second respondent in this appeal, replied to this letter on December 2, 1969 stating : "We have referred the matter to our principals and shall revert on hearing from them". After waiting for about four months, the clearing agents of the Corporation again wrote to the second respondent asking them to contact their principals and to "settle the claims immediately". The E reply sent to this letter by the second respondent on April 9, 1970 repeated : "We have referred the matter to our principals and shall revert on hearing from them". Having heard nothing for about a month, the clearing agents of the appellant wrote again to the second respondent on May 11, 1970 wanting to know the attitude of the first respondent regarding the claim adding that if the claim was not settled in time the appellant would have to take legal action to recover the amount of F claim. By their letter dated May 14, 1970 the second respondent acknowledged receipt of that letter and repeated for the third time that they had referred the matter to their principals and "shall revert on hearing from them". Thereafter on July 9, 1970 the second respondent wrote again to the appellant's agents only to know how the appellant had disposed of the damaged rice adding that this information would enable them to advise their principals. Finally, on July 29, G 1970 the District Manager, Food Corporation of India, Tuticorin, wrote to the first respondent stating, *inter alia,* that if the claim was not settled on or before August 13, 1970 the appellant would be constrained to take legal action. From the dates given above, it would appear that the claim was going to be barred in a few days. To this letter there was no reply. On August 14, 1970 the Corporation instituted suit No. 101 of 1970 in the Court of the Subordinate Judge at H Tuticorin for recovery of a sum of Rs. 1,12,420.70p. impleading as the first and second defendant respectively the first and second respondent of this appeal. Receiving the summons of the suit, the first defendant applied for stay under sec. 34 of the Arbitration Act. The trial court

declined to stay the suit and rejected the application. On appeal the High Court held that the decision of the trial court was perverse and allowed the application for stay. Civil Appeal 1519 of 1974 is directed against this order of the High Court.

The trial court held that the fact that the in either case the first defendant took no steps for referring the matter to arbitration in spite of being urged to do so by the plaintiff indicated that the defendants were not ready and willing to go to arbitration and were only waiting for the claim to be barred by lapse of time. As stated already, the bills of lading contained a provision that no suit to enforce such claims would be maintainable after one year from the date of arrival of the ship at the port of discharge. The Indian Carriage of Goods by Sea Act also provides in clause 6 of Article III of the Schedule that "the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered". The High Court reversed the decision of the trial court relying on a decision of the Calcutta High Court reported in *Subal Chandra Bhur* v. *Md. Ibrahim & Anr.*(1) In that case S. R. Das J., as his Lordship then was, observed at one place in his Judgment: "Mere inaction prior to the commencement of the legal proceedings cannot, in my opinion, be construed as want of readiness and willingness to go to arbitration at the commencement of the legal proceedings". The proceeding sought to be stayed in that case was a partnership action and the observation was made in repelling a contention that there should be no stay as none of the partners thought fit to take advantage of the arbitration clause for a long time after the partnership came to an end. Apparently, in this case inaction did not affect in any way the matter proposed to be referred to arbitration. But the two suits out of which the instant appeals arise were instituted just before the plaintiff's claim in either case was going to be barred by time; it is not disputed that after the lapse of one year from the date when the goods were to be delivered, the defendants would have been discharged from all liability in respect of any loss or damage and there would have been no live dispute to be referred to arbitration. Where a party to an arbitration agreement chooses to maintain silence in the face of repeated requests by the other party to take steps for arbitration the case is not one of "mere inaction". Failing to act when a party is called upon to do so is a positive gesture signifying unwillingness or want of readiness to go to arbitration. The aforesaid observation in *Subal Chandra Bhur's* case (supra) does not therefore appear to have any application on the facts of the cases before us.

The High Court pointed out that in each of these two suits the first defendant applied for stay under sec. 34 as shown as they received the summons of the suit stating in the application that they were ready and willing to have the dispute settled by arbitration. The High Court held that the requirement of sec. 34 is satisfied if the defendant expresses his willingness to go to arbitration at the earliest opportunity after the

(1) A.I.R. 1943 Cal. 481.

A suit is instituted. In our opinion the High Court was wrong in taking this view. Sec. 34 of the Arbitration Act reads :

> "Where any party to an arbitration agreement or any person claiming under him commences any legal proceedings against any other party to the agreement or any person claiming under him in respect of any matter agreed to be referred, B any party to such legal proceedings may, at any time before filing a written statement or taking any other steps in the proceedings, apply to the judicial authority before which the proceedings are pending to stay the proceedings; and if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement and that the applicant was, at the time when the proceedings C were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, such authority may make an order staying the proceedings."

The observation of Das J. in *Subal Chandra Bhur*'s case on which the High Court relied, is preceded by the following sentence : "Further, the readiness and willingness required by sec. 34 of the Act has to D exist at the commencement of the legal proceedings and has to continue up to the date of the application for stay". In *Anderson Wright Ltd.* v. *Moran and Company*(1), this Court enumerating the conditions that should be fulfilled before a stay may be granted under sec. 34 notes as one of the conditions that the applicant for stay "should satisfy the court not only that he is but also was at the commencement of the proceedings ready and willing to do everything necessary for the pro- E per conduct of the arbitration". It is thus quite clear on the authorities and from the terms of sec. 34 that the readiness and willingness must exist not only when an application for stay is made but also at the commencement of the legal proceedings. From the conduct of the first defendant in either of these two suits the trial court found that they were not ready and willing to go to arbitration at the time when the suits were instituted. This is a finding of fact and we are afraid F there was no valid ground in either case for interference with this finding. From the letters written on behalf of the Corporation to the agents of the first defendant in the suit giving rise to Civil Appeal 1519 of 1974 urging them to take steps for referring the dispute to arbitration and the evasive replies sent to these letters, the trial court came to the conclusion that the first defendant was not ready and willing to go to arbitration at the time when the suit was instituted. We do not G think this was an arbitrary or perverse conclusion as the High Court characterized it. In our opinion the High Court went wrong in disregarding relevant and significant material, namely, the correspondence that passed between the parties, as "innocuous" and erred in disturbing the finding of fact for no valid reason.

As regards the suit which gives rise to Civil Appeal 1518 of 1974, H the trial court repelled the contention that as the Corporation's proposal to refer the dispute to the sole arbitration of the Director General

(1) [1955] 1 S.C.R. 862.

Shipping, Bombay was different from what clause 42 of the Charter-Party provided, the defendant was justified in not replying to the telegrams or doing anything for the proper conduct of the arbitration. The argument that the trial court rejected found favour with the High Court. That the Corporation's proposal was a deviation from clause 42 of the Charter-Party was hardly a valid excuse for the first defendant to remain silent and inactive. If the first defendant were ready and willing to go to arbitration, one would have expected them, as the trial court observed, to reply to the telegrams saying that they were not agreeable to any departure from the terms of clause 42 and could insist on compliance with that clause. But they did not reply to the telegrams or do anything for reference of the dispute to arbitration as provided in clause 42. Silence and inaction on their part may in these circumstances very well justify the inference that they were not ready or willing to go to arbitration. The finding of the High Court that the trial court had exercised its discretion not judicially cannot therefore be supported. And in this case really no question arises as to exercise of discretion. Granting stay under sec. 34 is of course discretionary as the section indicates but the occasion for the exercise of discretion does not arise unless all the conditions stated in the section are fulfilled. In this case the trial court found as a fact that the first defendant was not ready and willing to go to arbitration when the suit was instituted and we have held that the finding is not perverse or arbitrary; one of the requirements of the section not having been fulfilled, sec. 34 could not be invoked in this case.

Mr. Desai for the respondent relied on certain observations of this Court in *Michael Colodetz & Ors.* v. *Serajuddin and Company*(1) in support of the proposition that the Court should not allow a party to an arbitration agreement to proceed with the suit in "breach of the solemn obligation to seek resort to the tribunal selected by him". It is however made clear in that decision that these observations are subject to the terms of sec. 34, one of which is that the other party to the agreement must remain "ready and willing to do all things necessary for the proper conduct of the arbitration". The legal position is explained in that decision as follows :

> "The Court ordinarily requires the parties to resort for resolving disputes arising under a contract to the tribunal contemplated by them at the time of the contract. That is not because the Court regards itself bound to abdicate its jurisdiction in respect of disputes within its cognizance, it merely seeks to promote the sanctity of contracts, and for that purpose stays the suit. The jurisdiction of the Court to try the suit remains undisputed : but the discretion of the court is on grounds of equity interposed..... It is for the court, having regard to all the circumstances, to arrive at a conclusion whether sufficient reasons are made out for refusing to grant stay. Whether the circumstances in a given case make out sufficient reasons for refusing to stay a suit is essentially a question of fact."

(1) [1964] 1 S.C.R. 19.

A

For the reasons stated above we think that the appeals must succeed. Accordingly we allow both the appeals and set aside the order of the High Court and restore that of the trial court in each of these two cases. In Civil Appeal 1519 of 1974 the appellant will be entitled to its costs in this Court and in the High Court against the contesting respondent. In Civil Appeal 1518 of 1974, considering all aspects, we direct the parties to bear their own costs throughout.

B

V.P.S. *Appeals allowed.*