

A

THE BAHREIN PETROLEUM CO. LTD.

v.

P. J. PAPPU AND ANOTHER

August 16, 1965

B

[K. SUBBA RAO, J. R. MUDHOLKAR AND R. S. BACHAWAT, JJ.]

Arbitration Act (10 of 1940), ss. 34 and 39(1)— Application for stay—Dismissed—Appeal—If recognition of jurisdiction of Court.

C

The respondent instituted a suit for recovery of gratuity and arrears of salary from the appellants. The appellants applied for stay of suit under s. 34 of the Indian Arbitration Act, 1940 and protested against the jurisdiction of the court to try the suit. They fought up to the appellate and revisional courts, and having failed to obtain the stay order, they were compelled to apply to the trial court for permission to file their written statement, and, on the permission being granted they filed it objecting to the jurisdiction and also pleading on the merits. The question of jurisdiction was tried as a preliminary issue, and the trial and appellate courts decided in favour of the appellant. But on revision, the High Court held that the objection as to territorial jurisdiction was waived by the appellant.

D

In the appeal to this Court,

HELD : The appellants did not waive their objection as to the territorial jurisdiction of the trial court. [464 D-E]

E

A defendant may waive the objection as to jurisdiction and may subsequently be precluded from taking it. But the appellants lodged their protest at the earliest opportunity and persisted in their objection. An application to the court before which the suit is pending for stay of the suit under s. 34 of the Arbitration Act, is in no way a recognition that that court has jurisdiction to try the suit, nor can an appeal from an order of the Court, under s. 39(1), have that effect, because the general definition of "Court" in s. 2(c) cannot be imported into s. 34. The appellants need not allege nor prove a failure of justice in consequence of the order of the High Court, because, s. 21, Civil Procedure Code, does not preclude the objection as to the place of suing, if the trial court has not given a verdict on the merits at the time when the objection is taken in the appellate or revisional court. [463 B-C; F; 464 B-G]

F

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 432 of 1965.

G

Appeal by special leave from the judgment and order dated October 19, 1964 of the Kerala High Court in Civil Revision Petition No. 536 of 1963.

G. B. Pai, J. B. Dadachanji, O. C. Mathur and Ravinder Narain, for the appellant.

Gopal Singh, for respondent No. 1.

H

The Judgment of the Court was delivered by

Bachawat, J. The plaintiff was a typist clerk in the employ of the second defendant, the Bahrein Petroleum Co. Ltd. The

first defendant was the recruiting agent of the Company at Bombay. The contract of service was signed at Bombay. The zone of operation under the contract of service was Bahrein Island outside India. The plaintiff instituted a suit for recovery of gratuity and arrears of salary against the Company and its recruiting agent in the Court of the Subordinate Judge of Cochin. Both defendants applied to the Cochin Court for stay of the suit under s. 34 of the Indian Arbitration Act, 1940. The Cochin Court refused to stay the suit. An appeal from this order to the District Court of Ernakulam was dismissed, and a revision petition to the High Court was dismissed *in limine*. In the meantime, the Cochin Court passed an order declaring that the suit should proceed *ex parte*. On an application by the defendants, this order was set aside, and the defendants were allowed to file their written statement. In their written statement, the defendants pleaded on the merits and also disputed the territorial jurisdiction of the Cochin Court. On the application of the defendants, the Cochin Court tried the preliminary issue as to jurisdiction. The Cochin Court held that it had no territorial jurisdiction to try the suit, and directed the return of the plaint for presentation to the proper Court. An appeal to the District Judge of Ernakulam was dismissed. But, on revision, the High Court of Kerala held that the defendants had waived the objection as to the territorial jurisdiction of the trial Court, set aside the orders of the lower Courts, and directed the Cochin Court to try the suit on the merits. The second defendant now appeals to this Court by special leave.

The defendants neither resided nor carried on business, nor did any part of the cause of action arise within the local limits of the jurisdiction of the Cochin Court. The Cochin Court had, therefore, no territorial jurisdiction to try the suit under s. 20 of the Code of Civil Procedure, 1908.

Counsel for the plaintiff-respondent submitted that it was open to the defendants to waive this objection, and if they did so, they could not subsequently take the objection. This submission is well-founded. As a general rule, neither consent nor waiver nor acquiescence can confer jurisdiction upon a Court, otherwise incompetent to try the suit. But s. 21 of the Code provides an exception, and a defect as to the place of suing, that is to say, the local venue for suits cognisable by the Courts under the Code may be waived under this section. The waiver under s. 21 is limited to objections in the appellate and revisional Courts. But s. 21 is a statutory recognition of the principle that the defect as to the place of suing under ss. 15 to 20 may be waived. Independently

A of this section, the defendant may waive the objection and may be subsequently precluded from taking it, see *Seth Hira Lal Patni v. Sri Kali Nath.*⁽¹⁾

B Counsel for the plaintiff further submitted that, as a matter of fact, the defendants by their conduct have waived the objection. Though this submission found favour with the High Court, we are unable to accept it. If the defendant allows the trial Court to proceed to judgment without raising the objection as to the place of suing and takes the chance of a verdict in his favour, he clearly waives the objection, and will not be subsequently permitted to raise it. It is even possible to say that long and continued participation by the defendant in the proceedings without any protest may, in an appropriate case, amount to a waiver of the objection. But, in this case, we find no conduct of the defendants which amounts to a waiver, or which precludes them from raising the objection.

D At the earliest opportunity and before taking any steps in the suit, the defendants applied for stay of the suit under s. 34 of the Indian Arbitration Act, 1940. In the petition for stay, they protested against the jurisdiction of the Court to try the suit. In paragraph 5 of the petition, they clearly pleaded that the Cochin Court had no jurisdiction to entertain the suit. They objected to the trial of the suit on the merits, pressed for a stay order before the Cochin Court and fought up to the appellate and revisional Courts. Having failed to obtain the stay order, they were compelled to apply to the Court for permission to file their written statement, and on the permission being granted, they filed it objecting to the jurisdiction and also pleading on the merits. Throughout, the defendants protested against the jurisdiction of the Court to try the suit. They lodged their protest at the earliest opportunity, and persisted in their objection thereafter. At no stage they waived or abandoned their objection.

G The High Court was of the view that the effect of ss. 2(c), 34 and 39 of the Indian Arbitration Act was that by filing the appeal under s. 39 against the order of the Cochin Court refusing to stay the suit, the defendants must be deemed to have conceded that the Cochin Court was a Court having jurisdiction to try the suit. An application under s. 34 lies to the judicial authority, before which the suit is pending. Section 39(1) permits an appeal from an order of a Court under s. 34. Section 2(c) defines a "Court"

(1) [1962] 2 S.C.R. 747, 751-752.

as a Civil Court having jurisdiction to decide the questions forming the subject-matter of the reference if the same had been the subject-matter of a suit. On a combined reading of ss. 2(c), 34 and 39, the High Court concluded that by filing the appeal under s. 39(1), the defendants conceded that the Cochin Court before which the application under s. 34 was made was a Court as defined in s. 2(c), and, therefore, a Court having jurisdiction to try the suit. We are unable to accept this line of reasoning. Even substituting the word "Court" for the words "judicial authority" in s. 34, it would appear that the general definition of "Court" in s. 2(c) cannot be imported into s. 34. An application for stay of a suit must be made to the Court before which it is pending. That Court may or may not be the Court having jurisdiction to decide the questions forming the subject-matter of the reference, if the same had been the subject-matter of a suit. Still, the application must be made to the Court and to no other. An application to the Court before which the suit is pending for stay of the suit under s. 34 is in no way a recognition that that Court has jurisdiction to try the suit, nor can an appeal from an order of the Court under s. 34 have that effect. We, therefore, hold that the defendants did not waive their objection as to the territorial jurisdiction of the Cochin Court.

Counsel for the plaintiff also submitted that the defendants having neither alleged nor proved that there has been a failure of justice in consequence of the order of the High Court, they are precluded by s. 21 of the Code from raising this objection in this Court. We think that this contention has no force. The suit has not yet been tried on the merits. So far, only the preliminary issue as to jurisdiction has been tried. That issue was decided in favour of the defendants by the trial Court and the District Court and against them by the High Court, and from the order of the High Court, this appeal has been filed. There cannot be a consequent failure of justice at this stage. The condition "unless there has been a consequent failure of justice" implies that at the time when the objection is taken in the appellate or revisional Court, the suit has already been tried on the merits. The section does not preclude the objection as to the place of suing, if the trial Court has not given a verdict on the merits at the time when the objection is taken in the appellate or revisional Court. The point is clearly brought out in the judgment of Venkatarama Aiyar, J. in *Kiran Singh and others v. Chaman Paswan and others*⁽²⁾ thus :

(1) [1955] 1 S.C.R. 117, 122.

(2) 1955] 1 S.C.R. 117, 122.

- A "The policy underlying sections 21 and 99 of the Civil Procedure Code and section 11 of the Suits Valuation Act is the same, namely, that when a case had been tried by a Court on the merits and judgment rendered, it should not be liable to be reversed purely on technical grounds, unless it had resulted in a failure of justice, and the policy of the Legislature has been to treat objections to jurisdiction both territorial and pecuniary as technical and not open to consideration by an appellate Court, unless there has been a prejudice on the merits."
- B

- C The appeal is allowed, the judgment of the High Court set aside, and the orders of the trial Court and the District Court are restored. There will be no order as to costs.

Appeal allowed.