Supreme Court of India
Food Corporation Of India & Anr vs Yadav Engineer & Contractor on 6 August, 1982
Equivalent citations: 1982 AIR 1302, 1983 SCR (1) 95
Author: D Desai
Bench: Desai, D.A.

PETITIONER:
FOOD CORPORATION OF INDIA & ANR.

Vs.

RESPONDENT:
YADAV ENGINEER & CONTRACTOR

DATE OF JUDGMENT06/08/1982

BENCH:
DESAI, D.A.
BENCH:
DESAI, D.A.
SEN, A.P. (J)
ISLAM, BAHARUL (J)

CITATION:
1982 AIR 1302 1983 SCR (1) 95
1982 SCC (2) 499 1982 SCALE (1)591
CITATOR INFO :
F 1989 SC 635 (9)
F 1990 SC 893 (6)

ACT:
Arbitration Act 1940-Section 34-scope of-"Taking any other steps in the proceedings" meaning of-notice of motion taken out by plaintiff for interim injunction-Defendant appeared and prayed for time to reply-Defendant's action whether "step taken in the proceedings".
Practice : attention of single Judge drawn to a binding decision of Division Bench of the same High Court-Decision not adverted to-Decision contrary to that of Division Bench-Propriety of.

HEADNOTE:
Section 34 of the Arbitration Act 1940 provides that where one of the parties to an arbitration agreement commences any legal proceedings against the other party in respect of any matter agreed to be referred to arbitration, any party to such legal proceedings may at any time before the filing of 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 the authority on being satisfied that the opposite party is ready and willing to do all things necessary to the proper conduct of the arbitration make an order staying the proceedings.

The contract entered into by the respondent with the appellant Corporation for handling and transportation of the Corporation's goods contained an arbitration clause authorising the Managing Director of the Corporation to appoint an arbitrator in respect of any dispute arising out of the contract between the parties.

Apprehending breach of contract, the respondent filed a suit for a declaration that the contract was subsisting on the date of the suit. The respondent prayed for an ad interim injunction against the Corporation restraining it from committing breach of the contract. On the notice being issued the District Manager of the Corporation appeared before the Court and sought time to file reply to the application for interim injunction. On the next day an application was filed on behalf of the corporation that it was fully ready and willing to have the dispute resolved by arbitration under the subsisting arbitration agreement and prayed that the suit be stayed as provided in section 34 of the Arbitration Act 1940.

96

The respondent alleged that section 34 was inapplicable in that when the District Manager sought time to file a reply to the notice for interim injunction, it was a "step taken in the proceedings" within the meaning of section 34.

Negativing the respondent's plea the Trial Court held that the dispute was covered by the arbitration clause. It granted stay of further proceedings in the suit and this view was upheld by the District Judge in the respondent's appeal.

In the revision petition filed in the High Court a single Judge although his attention was drawn to a binding precedent of a Division Bench of the same High Court supporting the view that an application for filing a reply to the notice of motion taken out by the plaintiff for interim injunction was not a "step taken in the proceedings", without adverting to that decision, held that an application of this nature was a "step taken in the proceedings" and that this disentitled the Corporation from invoking the arbitration agreement.

On the question whether, where there is a subsisting valid arbitration agreement between the parties, entering an appearance and contesting a petition or notice of motion for interlocutory order constitutes a "step in the proceedings" as would disentitle the party to an order under section 34 of the Arbitration Act.

Allowing the appeal,

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HELD: Contesting the application for interim injunction or for appointment of a receiver or for interim relief by

itself, without anything more, would not constitute a "step in the proceedings" as would disentitle the party to an order under section 34 of the Arbitration Act. [119 F]

1. (a) Section 34 envisages that before a party to the arbitration agreement seeks stay of the suit filed by the opposite party it must disclose its unequivocal intention to abide by the arbitration agreement; but once the party takes steps which may indicate its intention to waive the benefit of the arbitration agreement or abandons the right to claim the benefit by conduct, such party would not be entitled to enforce the agreement because there is a breach of the agreement by both parties disentitling them to claim any benefit of the arbitration agreement. [105 D]

Ramji Dayawala & Sons (P) Ltd. v. Invest Import [1981] 1 S C.R. 899, followed.

(b) The general words "taking any other steps in the proceedings" follow the specific expression "filing a written statement" and both are used for achieving the same purpose. Therefore the latter general expression must be construed ejusdem generis with the specific expression just preceding to bring out the ambit of the latter. The expression "written statement" is a term of specific connotation ordinarily signifying a reply to the plaint filed by the plaintiff. [106 E]

97

(c) The expression "taking any other steps in the proceedings" does not mean that every step taken in the proceedings would come in the way of enforcement of the arbitration agreement; the step must be such as would clearly and unambiguously manifest the intention to waive the benefit of arbitration agreement and to acquiesce in the proceedings commenced against the party and to get the dispute resolved by the court. Interlocutory proceedings are incidental to the main proceedings and stand independent and aloof of the main dispute. When these interiocutory proceedings are contested it cannot be said that the party contesting them had displayed an unequivocal intention to waive the benefit of the arbitration agreement or that it had submitted to the jurisdiction of the court. [109 E-H]

Uttar Pradesh v. Janki Saran Kailash Chandra [1974] 1 S.C.R. 31, referred to.

Sansar Chand Deshraj v. State of Madhya Pradesh AIR 1961 MP 322; Nuruddin Abdulhussein v. Abu Ahmed Abdul Jalli, AIR 1950 Bom. 127; Anandkumar Parmanand Kejriwala & Anr. v. Kamaladevi Hiralal Kejriwal, AIR 1970 Bom. 231; Queens College Kanetra & Anr. v. The Collector, Varanasi & Ors., AIR 1974 All. 134; Biswanath Rungta v. Oriental Industrial Engineering Co. Pvt. Ltd. & Ors., AIR 1975 Cal. 222; State of Gujarat & Ors.v. The Ghanshyam Salt Works AIR 1979 Guj. 215; Arjun Agarwalla v. Baidya Nath Roy & Ors. AIR 1980 Cal. 354; and M/s. Bhonrilal Hiralal & Ors. v. Prabhu Dayal & Anr., AIR 1980 Raj. 9, approved.

Subal Chandra Bhur v. Md. Ibrahim & Anr., AIR 1943 Cal.

484; Amritraj Kothari v. Golcha Financiers, AIR 1966 Cal. 315; P. Gannu Rao v. P. Thiagaraja Rao & Anr ., AIR 1949 Madras 582 and Kunta Malla Reddy v. Soma Srinivas Reddy & Ors., AIR 1978 A.P. 289, not approved.

In the instant case the District Manager of the Corporation only appeared before the court in obedience to the notice on the notice of motion taken out for ex parte ad interim injunction and prayed for time to reply. The proceedings of the court did not disclose any step having been taken by the Corporation in the proceedings as would disentitle the Corporation to an order under section 34. Moreover, the application for stay filed on behalf of the Corporation clearly stated that the "defendant is ready and willing 'ichuck' for this purpose" which means that it was ready and willing to proceed with the arbitration when commenced. [119 H]

2. If a single Judge hearing a matter is inclined to take a view contrary to the earlier decision of a Division Bench of the same High Court it would be judicial improriety to ignore that decision but after referring to the binding decision he may direct that the papers be placed before the Chief Justice of the High Court to enable him to constitute a larger division bench to examine the question. Judicial comity demands that a binding decision to which attention had been drawn should neither be ignored nor over-looked. [112 G-H]

98

In the instant case although attention of the single Judge was drawn to the binding decision of a Division Bench of the same High Court he did not refer to it but relied upon the decision of another High Court which took the contrary view.

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3317 of 1981.

Appeal by Special leave from the judgment and order dated the 20th November. 1981 of the Madhya Pradesh High Court in Civil Revision No. 696 of 1981.

K.K. Venugopal and S.K. Gambhir for the Appellant. Soli J. Sorabjee, D.K. Katare and S.S. Khanduja for the Respondent.

The Judgment of the Court was delivered by DESAI, J. A fond hope that a decision of this Court with the sanction of Article 141 of the Constitution that the law laid down therein will be the law of the land would put an end to a raging controversy amongst various High Courts stands to some extent rudely shaken when the controversy with a slight variation has again been placed in the lap of this Court.

For highlighting and then resolving the controversy facts in dispute have a little or no relevance save and except mentioning certain events. Respondent Yadav Engineer & Contractor, a partnership firm filed a suit against Food Corporation of India, 1st defendant and Shyam Narain Nigam, District Manager of 1st defendant as 2nd defendant, for a declaration that the contract between the plaintiff and the 1st defendant for handling and transportation of the goods of the 1st defendant Corporation was subsisting on the date of the suit and restraining the defendant from committing breach of the same by handing over that work to some one other than the plaintiff. The suit was instituted on June 1, 1981, in the Court of the III Civil Judge, Class I, Gwalior. In the suit a notice of motion was taken out purporting to be under Order XXXIX, rules 1 and 2 read with s. 151 of the Code of Civil Procedure, for an interim injunction restraining the defendants from committing a breach of contract and from interfering with the work of handling and transport of goods of the 1st defendant Corpora-

tion by the plaintiff during the pendency of the suit. On the notice of motion being taken out the Court directed notice of the same to be served and the same was made returnable on the next day, June 2, 1981. On the returnable date the 2nd defendant, District Manager of the 1st defendant Corporation who had office in the City of Gwalior was served and he appeared through one Shri N.K. Modi, Advocate, filed the letter of authority (Vakalat) in favour of the learned advocate on behalf of 2nd defendant and the learned advocate prayed for time for 'reply and arguments to the plaintiff's application for temporary injunction'. The court acceded to the request and posted the matter on June 3, 1981. An endorsement appears in the record that the 1st defendant Food Corporation of India was not served though the endorsement reads 'absent'. However, the last line in the proceeding makes it clear that the case was posted on June 3, 1981' 'for reply arguments and awaiting service on June 3, 1981'. When the matter came up on the next day, i.e. June 3, 1981, an application was moved on behalf of 1st defendant inviting the attention of the Court to the subsisting arbitration agreement between the plaintiff and the 1st defendant and which agreement authorised the Managing Director of the 1st defendant to appoint an arbritrator in respect of any dispute arising out of the contract between the plaintiff and the 1st defendant. It was also stated that the 1st defendant desires to have the dispute, if any, resolved by arbitration under the subsisting arbitration agreement and that the defendant is fully ready and willing (ichhuk) to go to arbitration. The application concluded with a prayer that under the circumstances the suit may be stayed as provided in s. 34 of the Arbitration Act, 1940 ('Act' for short).

The learned trial Judge was of the view that the dispute between the parties is covered by the arbitration agreement set out in Article 19 of the contract between the plaintiff and the 1st defendant. The learned Judge negatived the contention that an application made by the 2nd defendant for filing reply to the notice of motion taken out by the plaintiff for interim injunction is a step taken in the proceedings in view of the binding decision of a Division Bench of the Madhya Pradesh High Court in Sansar Chand Deshraj v. State of Madhya Pradesh.(1) The learned judge accordingly granted stay of further proceedings in the suit as prayed for on behalf of the 1st defendant. Plaintiff preferred an appeal in the Court of the District Judge, Gwalior. The learned III Additional District Judge, before whom the appeal came up for hearing, agreed with the view taken by the learned trial judge and confirmed the order granting stay of further proceedings in the suit and dismissed the appeal. Undaunted even by this second rejection plaintiff approached the High

Court in revision under s. 115 of the Code of Civil Procedure. The learned judge, though his attention was drawn to the binding decision of the Division Bench of the same High Court, did not refer to it in the judgment and relied upon a decision of the Adhara Pradesh High Court in Bajaj International v. Indian Tobacco Suppliers(1) and held that an application for filing reply to a notice of motion for interim injunction is a step taken in the proceeding which would disentitle the party from invoking the arbitration agreement. In support of this conclusion the learned judge also relied upon Abdul Qudoos v. Abdul Gani,(2) which decision clearly does not support any such proposition. The learned judge further observed that even if the view that the application filed by the 2nd defendant praying for time to reply to the notice of motion for interim injunction may not be treated as a step in the proceeding, yet the 1st defendant would not be entitled to a discretionary order under s. 34 of the Act on the ground that one of the conditions necessary for invoking the jurisdiction of the court under s. 34 is not satisfied inasmuch as nowhere in the application the 1st defendant has stated that the 1st defendant at the time when the proceedings were commenced and still remains ready and willing to do all things necessary for the proper conduct of the arbitration. For this additional reason which was never urged on behalf of the plaintiff either in the trial court or in the 1st appellate court and as would be presently pointed out which is contrary to the record the High Court interfered in revision, set aside the order of the trial court granting stay and confirmed by the appellate court and rejected the application for stay of proceedings in the suit. Hence this appeal by special leave.

Section 34 of the Act reads as under :

> "34. 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, 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 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 contours of the controversy are confined to one of the negative requirements of s. 34 to be fulfilled by a party seeking the discretionary relief of stay of proceedings to qualify for the same. It is not necessary to reproduce all the relevant conditions for attracting the application of s.

34. One of the conditions to be satisfied before an order under s. 34 can be obtained is that the party to the legal proceeding has at any time before filing a written statement or taking any other steps in the proceedings applied to the judicial authority for stay of proceedings. In other words, a party seeking stay of proceedings must move the court with an application under s. 34 before filing the written statement to the suit or before taking any other steps in the proceedings. Admittedly, application in the present proceedings was filed before filing the written statement. The question is whether the second pre-condition is satisfied in that the application under s. 34 was filed before

taking any other steps in the proceedings. What does the expression 'before taking any other steps in the proceedings' signify? Before ascertaining the scope and ambit of the expression it would be worthwhile to briefly narrate the raison d'etre for prescribing this condition.

Ordinarily as provided in s. 9 of the Code of Civil Procedure all suits of a civil nature except suits of which cognizance is either expressly or impliedly barred would be triable by the courts set up for the purpose. If the dispute is of a civil nature the forum is one or the other court set up for the purpose. The State courts have been set up for an easy access by persons who seek resolution of their disputes. They must be disputes of civil nature and the cognizance of which is not either expressly or impliedly barred. Civil courts set up by the State having defined jurisdiction will be the forum for resolution of such disputes. Ordinarily, therefore, whenever a dispute of a civil nature arises the party claiming relief would approach the court having jurisdiction to resolve the dispute. The party against whom relief is sought will be informed of the cognizance of the dispute being taken by the court and it must come forth and either concede that the dispute is genuine in whole or in part or defend the action. Sometimes a dispute as to jurisdiction, territorial or pecuniary, is raised but apart from such specific exclusions claimed by a party civil courts are set up with the object of resolving civil disputes. A forum thus may readily be available and presumed to be easily accessible. This is the prescribed mode of access to justice. Arbitration Act carves out an exception to the general rule that the forum for resolution of civil disputes is the civil court having jurisdiction to deal with the same by providing that the parties to a dispute by agreement unto themselves may choose a forum of their choice for settlement of disputes between them in preference to the State Courts. Undoubtedly, for making these agreements enforceable sanction of law is necessary. That is the object underlying the Act. Industrial revolution bringing into existence international commercial transactions led to a search for finding a forum outside the municipal law courts involving protracted and dilatory legal process for simple, uninhibited by intricate rules of evidence and legal grammar. This explains resort to forums for arbitration at international level. No two contracting parties are under any legal obligation to provide for an arbitration agreement. If the parties enter into an arbitration agreement implying that they would like that the disputes covered by the agreement will be resolved by a forum of their choice, the approach of the court must be that parties to the contract are held to their bargain. If in breach or derogation of a solemn contract a party to an arbitration agreement approaches the court and if the other side expeditiously approaches the court invoking the court's jurisdiction to stay the proceedings so that by this negative process the court forces the parties to abide by the bargain, ordinarily the court's approach should be and has been to enforce agreements rather than to find loopholes therein. More often it is found that solemn contracts are entered into on the clearest understanding that any dispute arising out of the contract and covered by the contract shall be referred to arbitration. It may be that one or the other party may not have entered into the contract in the absence of an arbitration agreement. Therefore when in breach of an arbitration agreement a party to the agreement rushes to the court, unless a clear case to the contrary is made out the approach of the court should be to hold parties to their bargain provided necessary conditions for invoking s. 34 are satisfied.

Arbitration Act prescribes various methods by which an arbitration agreement can be enforced. Section 20 enables parties to an arbitration agreement to approach the Court in the circumstances therein mentioned for a direction that the agreement be filed in the court and on such agreement

being filed the Court is empowered to make an order of reference to the arbitrator. Provisions of Chapter IV provide for arbitration in suits. Section 34 prescribes one other method of enforcing arbitration agreement if a party to an arbitration agreement in breach of it approaches the court and files a suit in respect of a dispute covered by the arbitration agreement.

Section 34 prescribes a method by which the other party to the arbitration agreement by satisfying the conditions prescribed in s. 34 can enforce the arbitration agreement by obtaining an order of stay of the suit. It is crystal clear that once the suit is stayed the party who in breach of the arbitration agreement approaches the court for relief will be forced to go to arbitration and thus the court by this negative attitude of declining to proceed further with the proceedings brought before it would enforce the arbitration agreement. In order, therefore, to satisfy the court that the other party to the arbitration agreement who would be defendant in the suit is ready and willing to abide by the arbitration agreement and ready to take all steps necessary for the proper conduct of the arbitration, it must show that it is not waiving or abandoning its right under the arbitration agreement or submitting to the jurisdiction of the court thereby accepting the forum selected by the plaintiff for resolution of dispute and acquiescing in it. In order to steer clear of this charge the provision is made in s. 34 for an application by the party who is brought to the court by the opposite party in breach of the arbitration agreement to apply for stay before filing the written statement or before taking any other steps in the proceeding. This explains the purpose and object underlying the provision contained in s. 34.

The contention and the resultant issue in dispute must now be neatly framed. The primary issue is: what action on the part of the defendant who is sued in a court of law and who has a subsisting valid arbitration agreement with the plaintiff, would constitute step in the proceeding so as to disentitle him to stay of the suit which, if granted, would enable him to enforce the arbitration agreement ? Would entering an appearance and contesting petition or notice of motion for interlocutory order constitute such step in the suit or proceedings as would disentitle the party to an order under s. 34 ? The subsidiary point is, whether where in a suit filed in a court, a prayer for an ex parte ad interim injunction is made either by an application or by a notice of motion or an application is made for appointment of a receiver and either ex parte ad interim injunction is granted or ex parte receiver is appointed and the copies of the pleadings and the order are served upon the defendant, if the defendant appears and requests the court either to vacate the injunction or discharge the receiver or modify the orders without filing a written statement or making an application for filing a written statement to the plaint, could he be said to have taken a step in the proceedings so as to disentitle him from obtaining stay of the suit ?

Let the precedents rest for the time being and let an attempt be made to ascertain the underlying intendment in enacting the condition in s. 34 which prescribes a mode of enforcing the arbitration agreement to the effect that if a party to an arbitration agreement commences an action the other party to the agreement, if it desires to enforce the agreement, may seek stay of the suit before either filing written statement or taking other steps in the proceeding. Ordinarily the court would respect the sanctity of contracts. A valid arbitration agreement between the parties obliges both the parties to the agreement to act according to the terms of the agreement. A valid arbitration agreement envisages resolution of dispute by a forum of the choice of the parties and displaces the state courts.

Ordinarily, a party to a valid arbitration agreement is not entitled unilaterally to commit a breach of the agreement or ignore the agreement. Now, if a party to an arbitration agreement has a dispute to be resolved arising out of the contract in which the arbitration agreement is Incorporated and instead of invoking the arbitration agreement by inviting the parties to appoint the arbitrator it rushes to the court in breach of the agreement and files a suit, the other party is undoubtedly entitled to enforce the agreement. True, the other party is equally entitled to waive the benefit of the arbitration agreement. If the other party desires to waive the benefit of the agreement it can appear in the suit and contact the suit. Such conduct would demonstrably show that both the parties have waived the benefit flowing from the arbitration agreement of getting the dispute between them resolved by a forum of their choice. But if the first party in breach of the agreement files a suit the other party to the agreement must have an option and opportunity to enforce the arbitration agreement. Section 34 prescribes a mode and method of enforcing the arbitration agreement. When a party to the agreement has filed a suit in breach of the agreement and the other party to the agreement is dragged to the court, by staying the suit at the instance of the other party so dragged to the court the first party consequently would be forced to honour the arbitration agreement. But before the other party to the arbitration agreement is entitled to enforce the arbitration agreement by stay of the suit it must disclose its unequivocal intention to abide by the agreement and, therefore, s. 34 obliges such a party to ask for stay of the proceedings before such a party takes any steps which may unequivocally indicate the intention to waive the benefit of the arbitration agreement. Abandonment of a right to seek resolution of dispute as provided in the arbitration agreement must be clearly manifested by the step taken by such party. Once such unequivocal intention is declared or abandonment of the right to claim the benefit of the agreement becomes manifest from the conduct, such party would then not be entitled to enforce the arbitration agreement because there is thus a breach of the agreement by both the parties disentitling both to claim any benefit of the arbitration agreement. Section 34 provides that a party dragged to the court as defendant by another party who is a party to the arbitration agreement must ask for stay of the proceedings before filling the written statement or before taking any other step in the proceedings. That party must simultaneously show its readiness and willingness to do all things necessary to the proper conduct of the arbitration. The legislature by making it mandatory on the party seeking benefit of the arbitration agreement to apply for stay of the proceedings before filing the written statement or before taking any other steps in the proceedings unmistakably pointed out that filing of the written statement discloses such conduct on the part of the party as would unquestionably show that the party has abandoned its rights under the arbitration agreement and has disclosed an unequivocal intention to accept the forum of the court for resolution of the dispute by waiving its right to get the dispute resolved by a forum contemplated by the arbitration agreement. When the party files written statement to the suit it discloses its defence, enters into a contest and invites the court to adjudicate upon the dispute. Once the court is invited to adjudicate upon the dispute there is no question of then enforcing an arbitration agreement by forcing the parties to resort to the forum of their choice as set out in the arbitration agreement. This flows from the well settled principle that the court would normally hold the parties to the bargain (see Ramaji Dayawala & Sons (P) Ltd. v. Invest Import).(1) Apart from filing written statement, what other step did the legislature contemplate as being taken in the proceedings which would disentitle the party to the suit from obtaining stay of the proceedings which would have the effect of enforcing the arbitration agreement ? General words 'taking any other steps in the proceedings' just follow the specific expression 'filing

a written statement' and both are used for achieving the same purpose. Therefore, the latter general expression must be construed ejusdem generis with the specific expression just preceding to bring out the ambit of the latter Expression 'written statement' is a term of specific connotation ordinarily signifying a reply to the plaint filed by the plaintiff. Therefore, the expression 'written statement' in s. 34 signifies a specific thing, namely, filing an answer on merits to the plaint filed by the plaintiff. This specific word is followed by general words 'taking any other steps in the proceedings'. The principle of ejusdem generls must help in finding out the import of the general words because it is a well established rule in the construction of statutes that general terms following particular ones apply to such persons or things as are ejusdem generis with these comprehended in the language of the legislature. In Ashbury Railway Carriage & Iran Co. v. Riche,(2) the question of construction of the object of a Company: 'to carry on business of mechanical engineers and general contractors', came in for consideration and it was said that the generality of the expression 'general contractors' was limited to the previous words 'mechanical engineers' on the principle of ejusdem generis. Filing of the written statement would disentitle the party from seeking enforcement of arbitration agreement by obtaining stay of proceedings because it is such an act on behalf of the party entitled to enforce the arbitration agreement which would disclose unequivocal intention of the party to give up the benefit of the arbitration agreement and accept the method in preference to the one set out in the arbitration agreement to the one adopted by the other party by filing the suit and get the dispute adjudicated upon by the machinery of the court. If this is the underlying intendment in providing that application for stay of the proceedings must be filed before the filing of the written statement, the same conclusion must follow when instead of filing the written statement the party has taken some other step in the proceedings. That some other step must indisputably be such step as would manifestly display an unequivocal intention to proceed with the suit and to give up the right to have the matter disposed of by arbitration. Each and every step taken in the proceedings cannot come in the way of the party seeking to enforce the arbitration agreement by obtaining stay of proceedings but the step taken by the party must be such step as would clearly and unmistakebly indicate an intention on the part of such party to give up the benefit of arbitration agreement and to acquiesce in the proceedings commenced against the party and to get the dispute resolved by the court. A step taken in the suit which would disentitle the party from obtaining stay of proceeding must be such step as would display an unequivocal intention to proceed with the suit and to abandon the benefit of the arbitration agreement or the right to get the dispute resolved by arbitration.

If the step in the proceedings contemplated by s. 34 must be such step as would clearly, unambiguously and unequivocally disclose the intention of the party taking the step to give up the benefit of the arbitration agreement or its right of getting the dispute resolved by arbitration and to acquiesce in the methodology of resoluution of dispute by court, would an appearence in the suit for contesting interlocutory applications such as application for appointment of receiver or ex parte ad interim injunction, mandatory or prohibitory, and contesting the same be a step which would disclose an unequivocal intention to proceed with the suit and to give up the benefit of the arbitration agreement ? That is the controversy in the appeal before us.

Arbitration agreement generally provides for resolution of disputes either present or future by a forum of the choice of the parties. Ordinarily, arbitration agreement finds its place in contracts. Apprehending that while preforming contract some disputes may arise, care is taken to incorporate

an arbitration agreement in the contract itself prescribing the forum for resolution of such disputes. To illustrate, partnership contracts incorporate arbitration agreement for resolution of disputes arising out of the contract of partnership. Building contracts these days incorporate arbitration agreements. International commercial transactions also incorporate arbitration agreements. The purpose underlying entering into arbitration agreement is to provide for resolution of disputes arising from the contract between the parties. Now, if a party to an arbitration agreement files a suit seeking relief in respect of disputes arising from the contract the other party to the agreement can either waive the benefit of the arbitration agreement and acquiesce in the suit or enforce the arbitration agreement. Such conduct has specifically to be in relation to disputes covered by arbitration agreement. But if a party to an arbitration agreement files a suit and simultaneously moves an interlocutory application such as an application for appointment of receiver, usually to be found in suits for dissolution of partnership and rendering accounts, or for an interim injunction to ward off a threatened or continuing breach of contract, irreparable harm would be suffered by the other party to the arbitration agreement if it cannot contest the interlocutory application on the pain of abandoning the benefit of arbitration agreement. A concrete illustration would be both illuminating and convincing. In a suit for dissolution of partnership and accounts an application for appointment of receiver as also an application for interim injunction restraining the defendant from using the partnership goods or assets for continuing the business are filed. The court passes ex parte interim order and issues notice calling upon the defendant to show cause why the same should not be made absolute. In a running business appointment of a receiver would thoroughly dislocate the business and an injunction would bring to standstill the flourishing business. If the defendant appears and contests the application for appointment of receiver as also the application for injunction, could he be said to display an unequivocal intention to give up the benefit of the arbitration agreement and to acquiesce in the suit ? The dispute between the parties is whether the partnership should be dissolved as per the contract of partnership. Interim injunction application or application for appointment of receiver have nothing to do directly or substantially with the terms of the partnership. The main or substantial dispute will be covered by the plaint filed in the suit. Incidental proceedings for appointment of receiver or for interim injunction are for the protection either of the property or the interests of the parties. Now, when ex parte orders are obtained on ex parte averments the other party cannot be precluded from coming and pointing out that no case is made out for granting interim reiief. It would be too cumbersome to expect the party first to apply for stay and then invite the court under s. 41 (2) of the Act to vacate the injunction or to discharge the receiver. Giving the expression 'taking any other steps in the proceedings' such wide connotation as making an application for any purpose in the suit such as vacating stay, discharge of the receiver or even modifying the interim orders would work hardship and would be inequitous to the party who is willing to abide by the arbitration agreement and yet be forced to suffer the inequity of ex parte orders. Therefore, the expression 'taking any other steps in the proceedings' must be given a narrow meaning in that the step must be taken in the main proceeding of the suit and it must be such step as would clearly and unambiguously manifest the intention to waive the benefit of the arbitration agreement and to acquiesce in the proceedings. Interlocutory proceedings are incidental to the main proceedings. They have a life till the disposal of the main proceeding. As the suit or the proceeding is likely to take some time before the dispute in the suit is finally adjudicated, more often interim orders have to be made for the protection of the rights of the parties. Such interlocutory proceedings stand independent and aloof of the main dispute between the parties involved in the

suit. They are steps taken for facilitating the just and fair disposal of the main dispute. When these interlocutory proceedings are contested it cannot be said that the party contesting such proceedings has displayed an unequivocal intention to waive the benefit of the arbitration agreement or that it has submitted to the jurisdiction of the court. When ex parte orders are made at the back of the party the other party is forced to come to the court to vindicate its right. Such compulsion cannot disclose an unambiguous intention to give up the benefit of the arbitration agreement. Therefore, taking any other steps in the proceedings must be confined to taking steps in the proceedings for resolution of the substantial dispute in the suit. Appearing and contesting the interlocutory applications by seeking either vacation thereof or modification thereof cannot be said to be displaying an unambiguous intention to acquiesce in the suit and to waive the benefit of the arbitration agreement. Any other view would both be harsh and inequitous and contrary to the underlying intendment of the Act. The first party which approaches the court and seeks an ex parte interim order has obviously come to the court in breach of the arbitration agreement. By obtaining an ex parte order if it forces the other party to the agreement to suffer the order, or by merely contesting be imputed the intention of waiving the benefit of arbitration agreement, it would enjoy an undeserved advantages. Such could not be the underlying purpose of s. 34. Therefore, in our opinion, to effectuate the purpose underlying s. 34 the narrow construction of the expression 'taking any other steps in the proceedings' as herein-above set out appears to advance the object and purpose underlying s. 34 and the purpose for which the Act was enacted.

Having examined the contention on the language of the statute, the setting in which it is placed, the underlying intendment and the purpose it seeks to serve, let us turn to precedents. There is a clear cut cleavage and divergence of opinion amongst various High Courts. Allahabad, Bombay and later decisions of Calcutta High Court, Gujarat, Madhya Pradesh and Rajasthan High Courts have taken the view that appearing and contesting interlocutory application is not a step taken in the proceedings so as to disentitle the party from taking benefit of the arbitration agreement by seeking stay of the suit. On the other hand, earlier decisions of Calcutta High Court, Delhi and Madras High Courts have taken a contrary view.

In Bombay there has been a reference to a practice commended to us by Mr. Sorabji, learned counsel for the respondent that to avoid the pitfall of s. 34 even while contesting an interlocutory application the party seeking to enforce the arbitration agreement must enter appearance under protest. This practice not only does not commend to us, but way back in Nuruddin Abdulhussein v. Abu Ahmed Abdul Jalli,(1), Tendolkar, J. has rejected it as one of the doubtful legal import and utility. One must construe the section on its own language keeping in view the purpose and object of the enactment. One cannot add to the requirement by introducing a practice brought into vogue by Solicitors in Bombay, when no such practice exists elsewhere in the country. Section 34 is even invoked in rural backward areas. The highly skilful solicitor's draftmanship cannot provide as escape route to an unwary litigent. We are, therefore, not disposed to accept the suggestion that in order to avoid any pitfall of being denied the benefit of arbitration agreement the party seeking to enforce the agreement must enter an appearance under protest because we affirm what Tendolkar, J. has said. It reads as under:

> "It appears to me therefore that the addition of the words 'under protest' to an appearance filed in court in cases not covered by O. 30, R.S. Civil P.C., is meaningless when neither the jurisdiction of the Court nor the validity of the writ or service is challenged. It is not challenged where a defendant files an appearance under protest under the prevailing practice because he desires to apply for stay under the Arbitration Act. Therefore, whatever may be the reason for the practice which has grown up, it seems to me clear that there is no obligation on the defendant to follow this practice of doubtful import and utility and he is at liberty to file an unconditional appearance."

Before we turn to the only decision of this Court in State of Uttar Pradesh v. Janki Saran Kailash Chandra,(2) which at one stage was expected to resolve the controversy, we may briefly refer to the decisions of the various High Courts to which our attention was drawn.

We would first refer to the decisions which take the view that appearing to contest interlocutory application either for vacating the interim orders or modification of the same does not constitute a

(1) AIR 1950 Bom. 127.

(2) [1974] 1 S.C.R. 31.

step in the proceedings which would disentitle the party to an order of stay under s. 34. In Nuruddin Abdulhussein, (supra) learned single judge of the Bombay High Court held that the true test for determining whether an act is a step in the proceedings is not so much the question as to whether it is an application-although, of course, that would be a satisfactory test in many cases-but whether the act displays an unequivocal intention to proceed with the suit and to give up the right to have the matter disposed of by arbitration. In reaching this conclusion the Court relied upon Ford's Hotel Co. v. Bartlett,(1) where Lord Shand observed as under;

> "...this appears to me to have been in effect an abandonment of the proposal to have the subject of the cause disposed of by arbitration".

The contention that when the defendant filed an unconditional appearance, presumably having reference to the practice that had grown up in Bombay High Court of appearance under protest. it was a step in the proceeding as contemplated by s. 34 was negatived and stay was granted. In Sansar Chand Deshraj, (supra) a Division Bench of the Madhya Pradesh High Court approved the decision in Nuruddin Abdulhussein, and held that mere filing of a reply to an application for interim relief by way of appointment of a receiver or for issue of an injunction does not constitute a step in the proceeding which would indicate that there is in effect abandonment of the proposal to have the subject of cause disposed of by arbitration. It may be pointed out here that the Division Bench decision of the Madhya Pradesh High Court which was in terms binding on the learned Judge of the High Court, and it was specifically submitted to us that even though the attention of the learned judge was invited he neither referred to it nor distinguished it. Times without number this Court has observed that considerations of judicial propriety and decorum require that if a learned single Judge hearing a matter is inclined to take the view contrary to the earlier decision of a Division Bench of

the same High Court, it would be judicial impropriety to ignore that decision but after referring to the binding decision he may direct that the papers be placed before the Chief Justice of the High Court to enable him to constitute a larger Bench to examine the question. Judicial Comity (1) [1896] A.C. 1.

demands that a binding decision to which attention has been drawn should neither be ignored nor overlooked (see Mahadeolal Kanodia v. The Administrator General of West Bengal,(1) Shri Bhagwan & Anr v. Ram Chand & Anr., (2) and State of Gujarat v. Ramprakash P. Puri & Ors). (3).

In Anandkumar Parmanand Kejriwala & Anr. v. Kamaladevi Hiralal Kejriwal,(4) a Division Bench of the Bombay High Court approved the decision of the learned single judge in Nuruddin Abdulhussein and observed that the test of making an application being styled as the step in the proceedings is neither a sole test nor a conclusive test and what is such a step in the proceedings has been settled by the decision of Tendolkar, J. The defendant having filed appearance under protest and reserved the right to move the Court for referring the dispute to arbitration, contested the notice of motion taken out for appointment of receiver and injunction in both of which ex parte order was made would not constitute a step in the proceedings as would disentitle the defendant to an order under s.34.

In Queens College Kanetra & Anr. v. The Collector, Varanasi & Ors.,(5) the defendant first applied for stay of proceedings under s. 34 and after the court granted stay of proceedings requested the court that the ex parte ad interim injunction be vacated. Two objections were taken on behalf of the plaintiffs to this request of the defendant. One being that when the suit is stayed the court has no jurisdiction to deal with any part of the suit and secondly that if the application for ad interim injunction had been contested before obtaining stay of the suit it would have been a step in the suit and the defendant would not have been entitled to an order for stay of the suit and, therefore, his action constituted a step in the proceeding. The Court negatived both the contentions and observed that there could be no doubt that the act of the defedant to get an ex parte order of injunction vacated does not indicate an unequivocal intention to proceed with the suit and to give up the right to (1) [1960] 3 SCR 578.

(2) [1965] 3 S.C.R. 218 at p. 228.

(3) [1970] 2 S.C.R. 875.

(4) AIR 1970 Bom. 231.

(5) AIR 1974 All. 134.

have the matter disposed of by arbitration. In reaching this conclusion the Court approved the decision of the Madhya Pradesh High Court in Sansarchand and the decision of the Punjab High Court in M/s. Charandas & Sons v. M/s. Harbhajan Singh Hardit Singh.(1) In Sri Ram Shah v. Mastan Singh & Ors.,(2) a Division Bench of Allahabad High Court approved the decision in Queens College Kanetra.

In Biswanath Rungta v. Oriential Industrial Engineering Co. Pvt. Ltd. & Ors.,(3) a learned single Judge of the Calcutta High Court after referring to the decision of this court in Janki Saran Kailashchandra held that when the defendant sought to circumvent the ex parte injunction obtained by the plaintiff he could not be said to have taken such a step in the proceeding as would disentitle him to a relief under s. 34.

In Stata of Gujarat & Ors. v. The Ghanshyam Salt Works.(4) a learned single Judge of the Gujarat High Court accepted the Allahabad, Punjab and Madhya Pradesh decisions as laying down the correct law and dissented from the view raken in the earlier Calcutta and Madras cases. The learned judge was of the view that appearing and contesting an interim injunction application would not constitute such a step as would disentitle the defendant to an order under s.

34. While reaching this conclusion he observed that the question as to interim relief is decided only on the basis of the prima facie case and nothing is decided finally. In such a case, therefore, to prevent a defendant from contesting the interim application on the pain of losing his right to get the dispute decided by arbitration may, in a given case, work injustice, and a functional approach in the matter of interpretation of the relevant words is called for.

In Arjun Agarwalla v. Baidya Nath Roy & Ors.,(5) a learned single Judge of Calcutta High Court did not follow the earlier Calcutta decisions in view of the decision of this Court in Janki (1) AIR 1952 Punj. 109.

(2) AIR 1970 All. 288.

(3) AIR 1975 Cal. 222.

(4) AIR 1979 Guj. 215.

(5) A.I.R. 1980 Cal. 354.

Saran's case and agreed with the decision in Biswanaih Rungta's case.

In M/s. Bhonrilal Hiralal & Ors. v. Prabhu Dayal & Anr.,(1) a learned single Judge of the Rajasthan High Court after a review of large number of decisions agreed with the Allahabad, Bombay and Madhya Pradesh and later Calcutta decisions and held that appearing to contest an interlocutory application is not a step in the proceedings as would disentitle the defendant to an order under s. 34.

We would now refer to the set of decisions which take the contrary view. In Subal Chandra Bhur v. Md. Ibrahim & Anr.(2) S.R. Das, J., after referring to Ives & Barker v. Willans,(3) and two earlier decisions of the Calcutta High Court concluded that in order to constitute a step in the proceedings the act in question must be: (a) an application made to the Court either on summons; or (b) such an act as would indicate that the party is acquiescing in the method adopted by the other side of having the disputes decided by the Court. The second test is beyond question invariably followed because if the party entitled to the benefit of arbitration agreement by taking such step in the suit indicates

that it is acquiescing into the method adopted by the other side for resolution of dispute, such party cannot at a later stage seek to enforce the arbitration agreement by praying for stay of the suit. But with respect, merely making some applications in the suit without examining the purpose, object and implication of making the application would not always constitute such step as would disentitle the party making such application from seeking relief under s. 34 on the short ground that by merely making the application it has either abandoned its right to enforce the arbitration agreement by praying for stay of suit or has acquiesced into the mode adopted by the opposite party for resolution of dispute. Every application by a party in the suit has to be examined keeping in view the purpose and the object in making the application and what does the conduct of the party making the application disclose. After formulating the aforementioned test the (1) AIR 1980 Raj. 9.

(2) AIR 1943 Cal. 484.

(3) [1894] 2 Ch. 478.

learned judge proceeded to apply the test to the facts before him with which we are not concerned. This decision was followed by the same High Court in Amritraj Kothari v. Golcha Financiers,(1) and it was observed that it is difficult to make a distinction between filing a written statement in suit and filing an opposition to an interlocutory application in that suit-both of them are 'taking step in the suit'. The decision in Sansarchand Deshraj was dissented from. It may, however be pointed out that in the later decisions in Biswanath Rungta and Arjun Agarwalla, the same High Court after referring to the aforementioned two decisions took the contrary view for which reliance was placed on the decision of this Court in Janki Saran's case. The test formulated by the Calcutta High Court in the recent decisions is that the step which would disentitle the defendant from taking the benefit of s. 34 must be such step unequivocally showing that the party had acquiesced in the mode of resolution of the dispute adopted by the other side or had abandoned its right to enforce the arbitration agreement. It was further observed that if an injunction is obtained or a receiver is appointed or a prayer to that effect is made, any step taken to get the order vacated or circumscribe the injunction without in any way touching upon the main dispute in the plaint would not be such a step as would disentitle the party from obtaining stay of the proceedings. To that extent the earlier Calcutta view is whittled down and the later decisions have adopted the trend of decisions in other High Courts.

The earliest decision of the Madras High Court is P. Gannu Rao v. P. Thiagaraja Rao & Anr.(2) Examining the ambit of the expression 'taking step in the proceedings', it was held that if something is done by the party concerned which is in the nature of an application to the court it will necessarily come under the category of a step in the proceedings. After formulating this test the Court held that when ex parte interim injunction was served upon the defendant and the defendant appears and prays for modification of the injunction it constitutes a step in the proceedings which would disentitle him from obtaining stay of the suit. In reaching this conclusion the Court amongst others placed reliance on the decision of Das, J. in Subal Chandra Bhur's case. The Madras High Court (1) A.I.R. 1966 Cal. 315.

(2) A.I.R. 1949 Mad. 582.

has consistently followed this view in M/s. Bortes S.A. v. Astouic Compania Naviors S.V.,(1) & S. Ramalingam Chettiar v. S. Sarveswaran & Ors.(2) The Delhi High Court in M/s. Dadri Cement Co. & Anr. v. M/s. Bird & Co. Pvt. Ltd.,(3) after referring to a large number of decisions but particularly the Madras cases and early Calcutta cases ultimately based the decision on the facts of the case. The Court distinguished the decision of the Madhya Pradesh High Court in Sansarchand Deshraj's case observing that that is the decision based on the facts of that case. The Delhi High Court has not addressed itself to the controversy under discussion.

In Kunta Malla Reddy v. Soma SrInivas Reddy & Ors.,(4) It was held that the expression 'steps in the proceedings' in s. 34 also comprehends step in interlocutory proceedings also. In reaching this conclusion reliance was placed on the decisions of the Madras High Court.

A review of these precedents would unmistakably indicate that the trend of the authorities points in the direction of not treating every application made in the suit as a step in the proceeding nor entering appearance with a view to contesting the petition for interim relief such as injunction or appointment of receiver as being steps in the proceedings. Therefore, with respect, the decisions taking the contrary view do not commend to us.

It is at this stage that we must refer to the decision in Janki Sarcn's case in some detail. In that case Janki Saran Kailashchandra filed a suit against State of U.P. and Divisional Forest Officer, Bijnor for recovery of damages alleging breach of contract. The summons in the suit issued to the State of U.P. was served on the District Government Counsel. On September 2, 1966, the District Government Counsel filed an appearance slip in the Court and also put in a formal application praying for one month's time for the purpose of filing written statement. On October 1, 1966 the District Government Counsel filed an application under s. 34 of the Act pleading that there was an arbitration clause in the contract between parties to the suit and the State of U.P. being willing to refer the matter to arbitration the suit should be stayed. The trial court granted the motion for stay of suit. On appeal the High Court held that the action of the District Government Counsel in applying for time to file the written statement amounted to taking a step in the proceedings within the meaning of s 34 of the Act, and set aside the order of the trial court and rejected the request for stay of proceedings. State of U.P. approached this Court against the order of the High Court. Rejecting the appeal this Court observed as under:

> "To enable a defendant to obtain an order staying the suit, apart from other conditions mentioned in s. 34 of the Arbitration Act, he is required to present his application praying for stay before filing his written statement or taking any other step in the suit proceedings. In the present case the written statement was indisputably not filed before the application for stay was presented. The question is whether any other step was taken in the proceeding as contemplated by s.

34, and it is this point with which we are directly concerned in the present case. Taking other steps in the suit proceedings connotes the idea of doing something in aid of the progress of the suit or submitting to the jurisdiction of the Court for the purpose of adjudication of the merits of the controversy in the suit"' The view herein taken not only does not run counter to the view we have

taken but in fact clearly supports the view because the pertinent observation is that taking step in the proceeding which would disentitle a party to obtain a stay of the suit must be doing something in aid of the progress of the suit or submitting to the jurisdiction of the court for the purpose of adjudication of the merits of the controversy in the suit. In other words, the step must aecessarily manifest the intention of the party to abandon or waive its right to go to arbitration or acquiesce in the dispute being decided by court. In fact, the view taken in this case should have quelled the controversy but it continued to figure in one form or the other and that is why we have dealt with the matter in detail.

In this context it is advantageous to refer to the provision contained in s. 4 of Arbitration Act, 1950, of the United Kingdom. It provides that in order to be eligible to obtain stay of proceedings the defendant must have taken no steps in the proceedings after appearance. Analysing what constitutes step in the proceedings, inter alia, it has been held that the filing of affidavits in answer to an application by the plaintiff for appointment of receiver does not amount to taking a step in the proceeding (see Zalinoff v. Hammond(1) referred to in Halsbury's Laws of England, 4th End, Vol. 2, para 563 note 12). Russell on Arbitration, 19th Edn., page 183, under the heading "steps held not to be in the proceedings", notes that filing affidavits in reply to plaintiff's affidavits in support of a motion for a receiver in a partnership action is not a step in the proceedings. There are 5-6 other situations noticed by the author which, when individually analysed, would show that the steps taken with reference to interlocutory proceedings are ordinarily not held as steps in the proceedings.

Having thus critically examined both on principle and precedent the meaning to be given to the expression 'taking steps in the proceedings,' we are clearly of the view that unless the step alleged to have been taken by the party seeking to enforce arbitration agreement is such as would display an unequivocal intention to proceed with the suit and acquiesce in the method of resolution of dispute adopted by the other party, namely, filing of the suit and thereby indicate that it has abandoned its right under the arbitration agreement to get the dispute resolved by arbitration, any other step would not disentitle the party from seeking relief under s. 34. It may be clearly emphasised that contesting the application for interim injunction or for appointment of a receiver or for interim relief by itself without anything more would not constitute such step as would disentitle the party to an order under s. 34 of the Act.

Reverting to the facts of this case it is crystal clear that the defendants had taken no steps in the proceedings which would disentitle them to a relief under s. 34. Suit was filed on June 1, 1981, impleading two defendants, Food Corporation of India 1st defendant and Shyam Narain Nigam, 2nd defendant, being the District Manager of the 1st defendant Corporation. Alongwith the plaint a notice of motion was taken out for ex parte ad interim injunction. The Court issued notice on the notice of motion and made it returnable on the next day, i.e. June 2, 1981. When the matter was placed on Board of the Court on June 2, 1981, the proceedings show that the District Manager, 2nd Defendant was served and appeared through Advocate Shri N.K. Modi. Defendant 1 was shown absent with an endorsement 'the summons showing service not received back'. Then comes what transpired on that day as disclosed in the proceedings of the day. The same may be extracted:

> "Shri Modi filed Vakalatnama on behalf of defendant No. 2 and prayed for time for reply and arguments to the plaintiff's application for temporary injunction. Plaintiff's counsel has no objection. Therefore, request is accepted. For reply arguments and awaiting service on 3rd June 1981."

On June 3, 1981, an application for stay of suit was made on behalf of the 1st defendant under s. 34. Ex facie, the proceedings did not disclose any step having been taken by the 1st defendant in the proceedings as would disentitle it to an order under s. 34. 2nd defendant was impleaded in his official capacity. Assuming the application of the 2nd defendant for filing reply to the interim injunction application also binds the 1st defendant though it was not served with the summons yet an application seeking time to file reply to an interim injunction application cannot be said to be a step in the proceedings as would display an unequivocal intention to proceed with the suit or would disclose that the defendants had acquiesced into the resolution of dispute by the court or had abandoned the rights under the arbitration agreement.

The learned judge also negatived the prayed for stay for the additional reason that the 1st defendant had not complied with another condition for relief under s. 34. The learned judge found that in the application for stay the applicant had not stated that at the time when the proceedings were commenced it was ready and willing to do all things necessary to the proper conduct of the arbitration and still remains ready and willing to do the same. The learned judge held after referring to the averments in the application for stay that there is no averment to that effect. Plaintiff contesting the application had not raised this contention before the trial court and the first appellate court and that becomes evident from what the learned judge has stated in the judgment that both the courts have not taken into account this aspect of the case at all. Obviously the learned judge ought not to have permitted the contention while hearing a revision petition under s. 115 of the Code of Civil Procedure. But apart from this, the finding of the learned judge is contrary to record. The application for stay was read over to us and a copy was submitted for our perusal. In para 2 of the application it is clearly stated that 'the defendant is ready and willing (ichhuk) for this purpose. It appears that the original application was in Hindi. The important word used in the application is ichhuk which, it was agreed, would mean ready and willing. It is followed by the expression 'for this purpose' which would imply that the Ist defendant was always ready and willing to proceed with the arbitration when commenced and is shown to be ready and willing at the time of applying for stay. Therefore, the Ist defendant had complied with the requirement of his readiness and willingness to go to arbitration. Therefore, the learned judge was clearly in error in interfering with the order of the trial court confirmed by the Ist appellate court on this ground also.

Accordingly we hold that the learned judge of the High Court was clearly in error in interfering with the order made by the trial court and confirmed in appeal granting stay of the suit. The judgment of the High Court is accordingly set aside and the one made by the trial court and confirmed in appeal is restored with no order as to costs.

P.B.R. Appeal allowed.