(7) Consequently, this revision petition succeeds and is allowed with costs. The impugned order dated August 16, 1984, passed by the Rent Controller is set aside. He is directed to pass necessary orders in view of the report of the referee dated March 23, 1984. The parties have been directed to appear before the Rent Controller on 4th November, 1985. The records of the case be sent back forthwith.

N.K.S.

Before M. M. Punchhi, J.

FOOD CORPORATION OF INDIA AND OTHERS,—*Petitioners.*

versus

M/S GURU HARKISHAN RAI RICE MILLS,—*Respondents.*

Civil Revision No. 2016 *of* 1985.

October 15, 1985.

Arbitration Act (X *of* 1940)—*Section* 34—*Arbitration clause in an agreement—One party instituting proceedings in the Civil Court —Application by the other party for stay of proceedings—Intention of the applicant to invoke the arbitration clause—Whether to be manifested in any particular form or manner—Filing of an application under section* 34—*Whether by itself an indication that the applicant was ready and willing to have the matter decided by arbitration.*

Held, that a plain reading of section 34 of the Arbitration Act 1940 makes it clear that when any legal proceedings have been commenced by whichever party, any party to such legal proceedings may, at any time before filing a written statement (not necessarily by him) or taking any other steps in the proceedings (which means proceedings after the commencement of the suit) apply to the judicial authority before which the proceedings are pending to stay the proceedings. Now this stay is dependent on the judicial authority being 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. It is in that event that such authority may make an order staying the proceedings. No specific form or manner is necessary to exhibit the intention of the applicant's readings and willingness and all steps towards that direction are meant to satisfy the court that the applicant opts for the controversy being settled by any arbitrator as per the arbitration agreement. Filing of an application under section 34 of the Act invoking the arbitration agreement and asking for the stay of the suit is by itself a clear indication that the applicant was ready and willing to have the matter decided by arbitration because the expression of his readiness was implicit in the objection raised by him. No specific works of that kind had to find way in the application and the matter is not of form but of substance.

(Paras 3, 6 & 7)

Petition under section 115 C.P.C. for revision of the order of Shri G. S. Khurana, Additional District Judge, Jalandhar, dated 6th March, 1985 reversing that of Shri Gurdev Singh, PCS, Additional Senior Sub Judge, Jalandhar, dated 11th January, 1983 and dismissing the application under section 34 of the Arbitrtion Act, and sending the case back to the learned trial Court with the directions that it shall proceed to try the suit in accordance with law directing the parties to appear in the trial Court on 18th March, 1985.

G. C. Garg, Advocate, *for the Petitioner.*

S. C. Nagpal, Advocate, *for the Respondent.*

JUDGMENT

M. M. Punchhi, J. (Oral)

(1) This is a revision petition against the appellate order of the Additional District Judge, Jalandhar, in a matter in which section 34 of the Indian Arbitration Act was invoked.

(2) Broad facts are these : The Food Corporation of India, the petitioner herein, through its officer, the other petitioners, entered into a contract with Messrs Guru Harkishan Rai Rice Mills, Shahkot, the respondent, on December 2, 1980, for shelling of rice. The agreement postulated, how the paddy was to be released and how periodic payments were to be made. In case of dispute, there was an arbitration clause. The Arbitrator was to be nominated by the Managing Director, Food Corporation of India. As agreed to, the

respondent-Mills had furnished two bank guarantees in favour of the Food Corporation of India to the tune of Rs. 1,60,000 and Rs. 1,00,000. In the course of the operation of the contract, the respondent had at one time some finished rice with if after shelling, which it wanted the petitioner-Corporation to lift on payment, as per agreement. Since the same was not done and there was corresponding threat of the encashment of the bank guarantees, the plaintiff-respondent filed a suit for permanent injunction, seeking restraint against the Food Corporation of India and its Officers from recovering any amount under the bank guarantees and also a mandatory injunction directing the Food Corporation of India and its officers to take the finished rice after shelling from the plaintiff-respondent, as per agreement dated December 2, 1980 and to make the payment accordingly and also to release further paddy. On notice issued to the defendant-petitioners, they did not file written statement but pleaded existence of the arbitration clause, sequally moving an application under section 34 of the Indian Arbitration Act for stay of proceedings of the suit. The learned trial Judge found favour with the prayer of the defendant-petitioners and stayed the suit. The Additional District Judge, Jalandhar, on appeal reversed that decision, which has given rise to the present petition.

(3) The argument centres around the import and significance of section 34 of the Arbitration Act, which is worthwhile to be reproduced herein:—

> "34. POWER TO STAY LEGAL PROCEEDINGS WHERE THERE IS AN ARBITRATION AGREEMENT.—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."

A plain reading of the section makes it clear that when any legal proceedings have been commenced by whichever party, any party to such legal proceedings may, at any time before filing a written statement (not necessarily by him) or taking any other steps in the proceedings (which means proceedings after the commencement of the suit) apply to the judicial authority before which the proceedings are pending to stay the proceedings. Now this stay is dependent on the judicial authority being 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. It is in that event that such authority may make an order staying the proceedings. The point which arises for determination in this petition is there a form, manner or rite from which the conduct of the applicant is to be manifested, on which the judicial authority has to derive the requisite satisfaction? The learned Additional District Judge got entangled in the coils of the bare reading of the head note in *M/S Sass Construction and Power Company (P) Ltd.* v. *Fertilizer Corporation of India Ltd.*, (1) which is in the following terms:—

> "Before filing an application under Section 34 the applicant must satisfy these conditions namely that (i) that he must file the application at any time before filing the written statement or taking any other steps in the proceedings, and (ii) that he was at the time when the proceeding commenced and is still ready and willing to do all things necessary for the proper conduct of the arbitration. The applicant is also required to make necessary averments that not only he is ready at present but he was also ready and willing to participate in the arbitration at the commencement of the proceedings. These facts must be supported by an affidavit. If there is no such averment nor there is any affidavit, the application under section 34 must fail."

If one goes through the report, the ratio arrived at by the Patna High Court was emergent from the peculiar facts established in that case. Broadly put, the appellant therein, taking aid of the arbitration clause in the agreement between the parties, served a notice on the respondent, requiring him to nominate the Arbitrator. The respondent did

(1) A.I.R. 1979 Patna 14.

not respond to that notice. Instead the respondent filed an application under section 33 of the Arbiration Act before a Subordinate Court, challenging the validity of the arbitration clause. In view of that application, the learned Subordinate Judge an interim order, restraining the opposite side (the appellants) from enforcing the arbitration clause and restrained the General Manager of the Corporation from proceeding with the arbitration, who was the nominated Arbitrator under the arbitration agreement. Since the appellant could not avail of the arbitration agreement, he was constrained to file two money suits for realisation of the moneys due from the respondents. Then, the respondent, when served with a notice in the suit, pleaded the existence of the arbitration clause in the agreement and made two separate applications under section 34 of the Arbitration Act for staying the proceedings in these suits. It became thus obvious to the Court that firstly the stance adopted by the respondent was that the arbitration agreement was invalid, but in the other proceedings it had taken shelter of the same very arbitration clause for having the suits stayed. It is in that context that the Patna High Court took the view that the applicant was required to make necessary averments that not only is he ready at present, but had remained ready and willing to participate in the arbitration at the commencement of the proceedings and that these facts must be supported by an affidavit. Rather the Court went to the length of holding that if there was no such averment, nor such an affidavit, the application under section 34 must fail. The insistence for making the necessary averment about the applicant being willing in the past and ready in the present to participate in the arbitration proceedings was for ascertainment. That undoubtedly is one of the methods in which a tricky applicant can be made to still its monkey mind but is not necessarily the absolute means for achieving that purpose. The Court can yet devise its own ways and means to derive satisfaction from the facts and circumstances of each case, and even if illustrations were possible they could by no means be exhaustive. And the matter is not *res integra* so far as this Court is concerned.

(4) In *Daulat Ram Rala Ram* v. *State of Punjab*, (2) Chopra J. had taken the view that silence of a party before the proceedings are started is not of any serious consequence, and that not resorting to arbitration or taking up a plea in support of the same, on being

(2) A.I.R. 1958 Punjab 19.

threatened with a suit, would not disentitle a party to take a stand on the arbitration clause as a bar to the suit. Chopra, J. further went on to hold that the choice whether the party would like the matter to be referred or determined by the court is to be made after the proceedings are instituted and not when the same are contemplated or threatened, and that it is only then that the party has to make up his mind and act accordingly. In *Governor-General in Council* v. *Simla Banking and Industrial Co. Ltd. New Delhi and another*, (3) a Division Bench of the Lahore High Court had also held that the question as to when a party to an arbitration, against whom legal proceedings have been commenced, is entitled to ask for stay of proceedings has to be determined by the choice which he makes not before the proceedings are commenced but after they have been commenced, and further that silence of the party before the proceedings have been started is immaterial. Rather it was held that the party's choice remained unfettered before the commencement of the proceedings. This seems to me precisely the reason why section 34 talks of the past as also the present when need arises towards manifestation of the intention to invoke the arbitration clause, but after the commencement of the legal proceedings.

(5) At this stage, the observations of a Division Bench of the Madhya Pradesh High Court in *Moolchand Prop. Firm Lallimal Biharilal and others* v. *Ram Babu Vaishya*, (4) would be worthy of notice, which while defining the expression "ready and willing" ruled that when a defendant in his reply drew attention of the Court to the subsistance of an arbitration agreement and pointing out that reference to arbitration was the correct remedy for the plaintiff to follow, it must be held that the defendant had shown that he is ready and willing to have the matter decided by arbitration, because the expression of his readiness is implicit in the objection raised.

(6) Thus in view of these varied notes on the subject, I have come to the conclusion that no specific form or manner is necessary to exhibit that intention of readiness and willingness and all such steps towards that direction are meant to satisfy the Court that the applicant opts for the controversy being settled by an Arbitrator as per the arbitration agreement. The view of the learned Additional District Judge wholly relying on the decision of the Patna High

(3) A.I.R. 1947 Lahore 215.
(4) A.I.R. 1961 M.P. 323.

Court, the ratio of which was not applicable to the facts of the present case, seems to me erroneous and materially irregular, requiring rectification, at this end especially in view of the few facts now mentioned hereafter.

(7) It is plain from the averments in the plaint that the respondent had nowhere sent any notice to the Corporation to have the Arbitrator appointed to settle the dispute. The plaintiff straightaway filed a suit for injunction requiring the two reliefs, obviously exhibiting his intention not to avail of the arbitraton agreement. Thus, before the filing of the suit, the defendant-petitioners had no occasion to exhibit their readiness and willingness to have the arbitration agreement invoked except when the suit was filed and they received notice. The first step they took in the direction was to invoke the arbitration agreement and asked for the stay of the suit. In view of the ratio of Moolchand's case (supra) that by itself was a clear indication that the defendant-petitioners were ready and willing to have the matter decided by arbitration, because the expression of their readiness was implicit in the objection raised by them. No specific words of that kind had to find way in the application as was required by the Additional District Judge. The matter, as is clear, is not of form but of substance. And even the substance here was put across in the statement of one of the functionaries of the petitioner-Corporation when he said that the Corporation was and is willing to refer the matter to the Arbitrator. And concludingly, the cautious works of the Supreme Court in *The State of Punjab* v. *M/s Geeta Iron and Brass Works etc.* (5) a judgment which was quoted by the Additional District Judge, need to be recapitulated. Their Lordships say :

> "Where the parties have by contract agreed to refer their dispute to arbitration the courts should as far as possible proceed to give an opportunity for resolution of dispute by arbitration rather than by judicial adjudication."

It would not be wrong to spell therefrom that the tilt is in favour of arbitration where necessary foundation for the purpose has been laid. And here, as is obvious, such foundation was timely laid.

(5) A.I.R. 1978 S.C. 1608.

(8) For the foregoing discussion, this petition merits acceptance. The order of the learned Additional District Judge is set aside and that of the trial Court restored, but without any order as to costs.

N.K.S.

Before R. N. Mittal, J.

BANK OF BARODA,—*Petitioner.*

versus

GURCHARAN SINGH,—*Respondent.*

Civil Revision No. 1670 *of* 1985.

October 29, 1985.

Code of Civil Procedure (V *of* 1908)—*Order* 6 *Rule* 17 *and Order* 8 *Rule* 6-A—*Suit instituted for recovery of money—Written Statement filed by the defendant in the suit—Application subsequently made by defendant praying for amendment of the written statement to set up a counter claim—Such application allowed by the court—Order of the court—Whether sustainable.*

Held, that from a reading of Order 8 Rule 6-A of the Code of Civil Procedure, 1908 it is clear that the defendant can file the counter claim before delivering the defence or before the time limited for delivering the defence expires. This fact also has to be mentioned in the written statement. It is thus evident that the defendant can file the counter-claim before he files the written statement and cannot be allowed to do so by amending the written statement. The object of incorporating the provision for setting up the counter claim before the filing of the written statement appears to be, that the disposal of the suit may not be delayed. As such the application for amendment under order 6 Rule 17 of the Code of written statement can not be allowed and the order of the court is not sustainable.

(Para 4)

Petition under section 115 *C.P.C. for revision of the order of the Court of Shri R. C. Jain, District Judge Gurgaon dated* 25*th January*, 1985 *allowing the defendant (appellant in the first Appellate Court) to amend the written statement and to make a counter claim under Order* 8 *Rule* 6-*A, Code of Civil Procedure.*

J. S. Shahpuri, Advocate, *for the Petitioner.*

P. D. Shakir, Advocate, *for the Respondent.*