

(1973) 09 J&K CK 0002

In the Jammu And Kashmir High Court

Case No : Arbitration Application No. 26 of 1971

Gulab Rai Parshotam Dass Kohli

APPELLANT

Vs

Chief Engineer, Jammu and Kashmir Zone

RESPONDENT

Date of Decision : 06-09-1973

Acts Referred:

Jammu and Kashmir Arbitration and Conciliation Act, 2002 — Section 15, 30
Jammu and Kashmir Civil Procedure Code, 1977 — Section 11

Citation : AIR 1972 J&K 581 : (1973) JKLR 581 : (1976) KashLJ 147

Hon'ble Judges : D.D.Thakur, J

Bench : Single Bench

Advocate : V.S.Malhotra, J.L.Sehgal, Advocates appearing for the Parties

Judgement

(1) M/s Gulafo Rai Parshotam Dass Kohli, the petitioners in this case, hereinafter called ""the contractors"" entered into a contract agreement

bearing No. CEJK2/6768 with the Union of India through the Chief Engineer, M. E. S. for the erection of Prefabricated Shelters near Jaurian in

Jammu District. The contract agreement, interalia, contained an arbitration clause. Disputes having arisen between the parties to the aforesaid

contract, one, A. A. Noronha, was appointed as an arbitrator and the disputes were referred to him for arbitration. The arbitrator passed an

award on 74r1971 allowing the cLaim of the contractors. An application was made by the contractors on 271971 for filing of the award; in the

court and for passing a decree in terms thereof. The arbitrator pursuant to the directions of the court filed his award which was received in the

court on 3071971. The parties were given notice of the filing of the award on 1781971 and were directed to fie objections, if any, to the award

within the statutory period of 30 days from the date of the notice. On 22971

much after the expiry of the period of 30 days from the date of service of the notice of the filing of the award, an application was made on behalf, of the Union of India for setting aside the award. This application was accompanied by an application under section 5 of the Limitation Act for condonation of delay in making the application.

(2) The application on behalf of the Union of India was objected to by the contractors on the ground that the same was filed beyond the period of

limitation In the application under sec. 5 of the Limi. Act Sec. 37 of the Arbitration Act (hereinafter called "the Act"), it was contended by the

contractors that the provisions of Sec. 5 of the Limitation Act were not applicable to the proceedings under the Act. After having heard the counsel

for the parties Hon'ble Mr. Justice Jaswant Singh vide his judgment dated 8/11/1971 dismissed the application of the Union of India for setting

aside the award on the ground that it was filed beyond the period of limitation. The learned Judge held that the provisions of Section 5 of the

Limitation Act did not apply to the proceedings under the Act and therefore the court had no jurisdiction to extend the period of limitation and treat

the application within time. At the time of announcement of the judgment by the learned Judge Mr. V. S. Malhotra, on behalf of the Union of India,

made a prayer that since no period of limitation was prescribed for making an application under Section 15 of the Act for an order of the court for

modification or correction of the award. Ten day's time was, therefore, granted by the learned Judge to Mr. Malhotra to make the requisite

application. It is under these circumstances that the present application has been filed. On the application being filed by Union of India objections

were invited from the contractors to the application who filed the same. After hearing the counsel for the parties the learned Judge framed the

following two issues vide his order dated 30/12/1971 :

1) Whether the application is maintainable in view of the judgment of this Court dated November 8, 1971, dismissing the application for setting

aside the award ?

O. P. P.

2) If issue No. 1 is decided in favour of the applicant whether the arbitrator acted in excess of his jurisdiction in adjudicating upon matters

maintained in clauses (b), (f), (g), (e), (h) and (k) of the award which were

covered by clause 6 A of the General Conditions of Contract IAF

w2749 which formed part of the contract between the parties and the Accepting Officer has already given his decision thereon which was final ?

O. P. P.

(3) The counsel for the parties submitted before the learned Judge that issue No. 1 thus framed may be dealt with and decided as preliminary issue

as they did not wish to produce any evidence in regard to issue No : 1. From a perusal of the file however, it appears that on 731972 the counsel

for the parties again submitted before the learned Judge that the two issues framed by the court were interconnected with each other, the same may

be decided together. The decision on issue No : 2 being dependent upon evidence the parties were asked to lend evidence. The contractors,

however did not lead any evidence whereas the Union of India produced only one witness namely Shri Y. V. Narayana Rao, Surveyor of Works,

Head Quarters 138, Works Engineers.

(4) Having narrated the facts of the case I proceed to dispose of the issues framed in the case.

(5) Issue No : 1. On this issue there is no evidence on the record. The question whether an application under section 15 of the Act"" would be

maintainable even when an application under section 30 of the Act has been dismissed is essentially a question of law and in fact does not require

any evidence for its decision. Mr. Malhotra, appearing on behalf of the Union of India, has argued before me that there is no period of limitation

prescribed in the Limitation Act or in the Arbitration Act for the making of an application under Section 15 of the Act, therefore the present

application could be made at any stage before the court passed a decree in terms of the award. This is not, however, disputed that the period of

limitation prescribed under Article 158 of the Limitation Act related only to an application under Section 30 of the Act and not the one under

Section 15 of the Act. There might have been no difficulty in accepting the contentions of Mr. Malhotra in case he would have made such an

application instead of making an application under section 30 of the Act. The difficulty, however, crops up due to the fact that an application under

section 30 of the Act was made which has been dismissed as time barred. It is not disputed before me by Mr. Malhotra that the grounds which he

has now mentioned in the application under Section 15 of the Act are those which were taken by him in the application under section 30 of the

Act. To allow such an application to proceed after the dismissal of the application under section 30 of the Act would, in my opinion, amount to

rendering ineffective a judgment of the court in this very case legally and lawfully passed. Such a course would be violative of the principles of

resjudicata. It is true that Section 11 of the Code of Civil Procedure would not in term be applicable to a case under the provisions of the

Arbitration Act but the principle contained in Section 11 of the C. P. C. must apply even when the conditions for the application of Section 11 of

C. P. C. do not stand satisfied. The principle on which the rule of res judicata is founded is the principle of recognising the finality of the judgment.

At the time when the Union of India made application under Sec. 30 of the Act all the grounds which were available to it for getting rid of the

award were pleaded by it in the application. The ground which has now been made a basis for 3 relief under Section 15 of the Act was also

included in the application under Sec30 of the Act. It was, therefore, directly in issue in the previous application. If the ground now mentioned in

the application did not stand in good stead with the Union of India in the previous application it can hardly be relied upon now in this application.

The fact that the ground now taken in this application was one of the grounds taken in the previous application clearly suggests that the relief which

the Union of India now seeks could have been granted to it by the court in the previous application. What matters in substance is not the section of

the statute mentioned in an application but the facts and the grounds on which the relief under a particular section can be granted. The mere fact

that the present application mentions section 15 instead of Section 30 would not entitle the Union of India to a relief which it failed to get in the

application under section 30 of the Act.

(6) There is another aspect of the matter and that is that the relief which a court under section 30 of the Act can grant is a higher in character than

the one under Sec. 15 of the Act. The court trying an application under sec. 30 of the Act may not deem a particular ground sufficient for the

setting aside of the award and yet the same ground may be made a basis for granting a lesser relief in the form of correction or modification of the

award. The relief of modification or correction therefore was inherent in an application under section 30 of the Act also and nothing prevented the court from granting that relief if otherwise it could be justifiably granted. In this view of the matter therefore I am of the opinion that the dismissal of the application under section 30 of the Act resulted in a total disentitlement for the Union of India to obtain a relief under section 15 of the Act. The dismissal of the application under section 30 of the Act even when it contained a ground for a relief under Section 1[^] of the Act cannot but be deemed to have refused any relief to the Union of India regardless of the fact whether the same could be granted under the one Section or the other.

(7) In support of my observations that the principle of res judicata must apply even in cases in which section 11 C. P. C. does not apply. I may refer to a judgment of the Supreme Court in *Satyadhyan Ghosal and others v. Smt. Deorajin Debi and another*, reported as AIR 1960 S. C. 1941.

In this case also a question had arisen whether the principle contained in Section 11 of the C. P. C. could be attracted in application to matters not strictly falling within the scope of section 11 of C. P. C. Dealing with the question the Court observed :

The principle of res judicate is based on the need of giving a finality to judicial decisions. What it says is that once a res is judicata, it shall not be adjudged, again. Primarily it applies as between past litigation and future litigation. When a matter whether on a question of fact or a question of law has been decided between two parties in one suit or proceeding and the decision is final, either because the appeal was dismissed, or no appeal lies neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. This principle of res judicata is embodied in relation to suits in S, 11 of the Code of Civil Procedure, but even where S, 11 does not apply, the principle of res judicata has been applied by courts for the purpose of achieving finality in litigation. The result of this is that the original court as well as any higher court must in any further litigation proceed on the basis that the previous decision was correct.

On an assessment of the contentions raised by the counsel for the parties therefore I hold that the present application under section 15 of the Act

was barred by the principle of res judicata and was not maintainable.

Issue No. 2.

(7) Even when issue No. 2 does not arise for consideration in view of my findings on issue No. 1, I proceed to deal with it, being conscious of the

fact, that this judgment is open to appeal under the Letters Patent. I am returning a finding on issue No. 2 to obviate a remand by the Appellate

Bench in case my findings on issue No. 2 are reversed.

In regard to this issue only one witness has been examined by the Union of India whereas none has been produced by the contractors. The witness

examined by the Union of India is one, Y. V. Narayana Rao, Surveyor of works, Head Quarters 138, Works Engineers. He has stated that under

general conditions of the contract clause No. 70 the aforesaid dispute was referred to the Arbitration of Mr. Naronha. The witness proceeded to

state that the disputes regarding discrepancy in the designs etc. had to be decided by the Accepting Officer who had already given his decision

rejecting the claim of the contractors. He has further stated that the arbitrator entered into the dispute in regard to the decision of the Accepting

Officer which was beyond the scope of the Arbitration clause. In the course of crossexamination however, he has stated that the matters referred

to in the application under Section 15 of the Act in para No. 2 (b), (f), (g), (e), (k), (h) were also referred to the arbitrator for adjudication and the

parties had placed their view points before the arbitrator in regard to these items in dispute also. This statement, in my opinion knocks at the very

root of the case of the Union of India. Assuming therefore that any item of dispute could not be arbitrated by the Arbitrator under Clause 70 of the

Contract Agreement, the fact remains that the disputes were referred to arbitrator for arbitration. Once the parties agreed to refer the disputes to

the arbitrator and took a chance of obtaining a decision in their favour neither of them can be heard to say that a part of the award was upon a

matter not referred to arbitration.

(8) Section 15 of the Arbitration Act reads as under :

15. The Court may by order modify or correct an award

(a) Where it appears that a part of the award is upon a matter not referred to arbitration and such part can be separated from the other part and

does not affect the decision on the matter referred ; or

(b) where the award is imperfect in form or contains any obvious error which can be amended without affecting such decision ; or

(c) where the award contains a clerical mistake or an error arising from an accidental slip or omission.

(7) A perusal of the afore said section would show that a modification or a correction in the award made by an arbitrator can be ordered under the

section only where it appears that a part of the award is upon a matter not referred to arbitration. The statement of Mr. Narayana Rao therefore

sets the whole controversy at rest, as according to him the disputes mentioned in Clause (b), (f), (g), (e), (k) and (h) of para 2 in the application

under Section 15 of the Act were referred to arbitrator for arbitration. In view of this evidence the Union of India cannot now successfully plead

that the award was incorrect as a part of it was based on a matter not referred to arbitration. The issue, therefore, is decided in favour of the

contractors against the Union of India.

(8) Both the defences raised by the Union of India to the application of the contractors for grant of a decree on the basis of the award having failed

the contractors are left entitled to the decree sought by them. I, therefore, dismiss this application under Section 15 of the Act and pass a decree in

favour of the contractors against the Union of India in terms of the award dated 7471 made by the arbitrator. In the peculiar circumstances of the

case the parties shall bear their own costs.