

**(1974) 06 GUJ CK 0011**  
**In the Gujarat High Court**

Jagjivandas Mulchand Chokshi

APPELLANT

Vs

Soni Manilal Mohanlal

RESPONDENT

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**Date of Decision :** 21-06-1974

**Acts Referred:**

Arbitration Act, 1940 — Section 22, 22

**Citation :** (1975) 16 GLR 759

**Hon'ble Judges :** S.H. Sheth, J

**Bench :** Single Bench

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## Judgement

S.H. Sheth, J.—The plaintiff and the defendant had been carrying on business in partnership under the name and style of Bhagyodaya Engineering Company at Palanpur. The partnership firm business was commenced on 19th January, 1960. The partnership was dissolved by mutual consent on 9th September, 1965. Though the partnership firm was dissolved by mutual consent the parties could not settle the accounts of partnership business. The plaintiff, therefore, filed the present suit for accounts. The defendant applied for time to file his Written Statement. Subsequently he filed the Written Statement and issues were raised. On 22nd January, 1970 some evidence was recorded by the Trial Court. On 18th June, 1970 the parties gave a joint purshis, Ex. 60 in which they stated that the dispute should be referred to the arbitration of two persons named therein. The Court made an order below Ex. 60 and referred the dispute to the arbitrators u/s 22 of the Arbitration Act. On 1st August 1970 the arbitrators wrote to the Court that they were not in a position to proceed with the arbitration and to make the award. The learned Trial Judge thereafter heard the parties. The parties could not agree to a fresh appointment of arbitrators. On 6th October, 1970 the Court made an order by which it superseded the arbitration and directed the suit to proceed further. That order was challenged by the defendant in appeal to the District Court. The learned District Judge took a contrary view and held that the learned Trial Judge ought not to have superseded the arbitration, but ought to have supplied the vacancies.

2. It is that order which is challenged by the plaintiff in this Civil Revision Application.

3. It is not in dispute before me that the present case is governed by the provisions in Chapter IV of the Arbitration Act, 1940. The order of reference which the Trial Court made was under Sub-section (1) of Section 23. Section 21 provides that the parties may at any time before the judgment is pronounced apply in writing to the Court for an order of reference if they have agreed that any matter in difference between them in the suit shall be referred to arbitration. The joint application, Ex. 60, was given by the parties to the Court u/s 21. Section 22 provides that the arbitrator shall be appointed in such manner as may be agreed upon between the parties. Then follows Sub-section (1) of Section 23 to which I have made reference. Sub-section (2) of Section 23 provides that where a matter is referred to arbitration, the Court shall not, save in the manner and to the extent provided in the Act, deal with such matter in the suit. It is Sub-section (2) of Section 23 which brings into play the other provisions of the Act to which I am now referring. Section 25 provides as follows:

The provisions of the other Chapters shall, so far as they can be made applicable, apply to arbitrations under this Chapter:

Provided that the Court may, in any of the circumstances mentioned in Sections 9, 10, 11 and 12, instead of filling up the vacancies or making the appointments, make an order superseding the arbitration and proceed with the suit, and where the Court makes an order superseding the arbitration u/s 19, it shall proceed with the suit.

I am not concerned in the instant case with Section 19. Section 47 which is a general section provides as follows:

Subject to the provisions of Section 46, and save in so far as is otherwise provided by any law for the time being in force, the provisions of this Act shall apply to all arbitrations and to all proceedings thereunder.

... .. It is not necessary for the purpose of this case to reproduce the proviso to Section 47. Section 25 to which I have referred earlier brings into play amongst others Section 8. Clause (b) of Sub-section (1) of Section 8 is material for the purpose of the present case. It provides as follows:

(1) In any of the following cases-

... .. (b) if any appointed arbitrator or umpire neglects or refuses to act, or is incapable of acting, or dies, and the arbitration agreement does not show that it was intended that the vacancy should not be supplied, and the parties or the arbitrators, as the case may be, do not supply the vacancy;

... ..

any party may serve the other parties or the arbitrators, as the case may be, with a written notice to concur in the appointment or appointments or in

supplying the vacancy.

Reading Sections 25 and 8 together I find that in a case which is governed by Section 23 if the parties do not agree to the appointment of fresh arbitrators or to proceed with the arbitration after the arbitrators earlier appointed resign, refuse to enter upon arbitration or are otherwise incapable, unable or unwilling to perform their duties or die, it is within the discretion of the Court either to supply the vacancies or to supersede the arbitration. Indeed the Court has got to exercise that discretion judicially and judiciously and it ought to take into account the facts and circumstances of the case before deciding upon one course or the other. This discretion which the Court has in such a situation is subject to the condition specified in Clause (b) of Sub-section (1) of Section 8, that the arbitration agreement does not show the intention that the vacancy or vacancies should not be supplied. If the arbitration agreement expressly or by necessary implication provides that the vacancy or vacancies should not be supplied, the Court has no discretion in the matter but to supersede the order of reference and to proceed with the hearing of the suit. Mr. Shah has tried to lay a good deal of emphasis on the language of the joint application which the parties made to the Trial Court, Ex. 60. He has tried to argue that the language of Ex. 60 leads to a necessary inference that the parties did not intend that the vacancy or vacancies should be supplied. In order to examine the soundness or otherwise of his contention it is necessary to reproduce the material part of the joint application, Ex. 60. When translated into English it reads thus:

We the plaintiff and the defendant have jointly agreed for the mutual settlement of the disputes in suit by an award of the arbitrators.

Ex. 60 then specifies the names of two arbitrators: (1) Shah Babulal Manilal and (2) Jogani Chimanlal Zumchand. Mr. Shah has advanced two arguments before me on the construction of Ex. 60. His first argument is that two arbitrators have been specifically named by the parties in Ex. 60. They, therefore, according to him, did not intend that the disputes between the parties in the suit should be referred to any other arbitrators. The second argument which he has raised is that the parties had jointly agreed to the above-mentioned two arbitrators and that, therefore, if there was a difference of opinion between the two, it should necessarily lead to the supersession of the order of reference. I am unable to accept this construction placed by Mr. Shah upon Ex. 60. Ex. 60 has been written in a very simple language and contains only a few words. It is not possible for me to place upon the language of Ex. 60 the extended construction which Mr. Shah has canvassed before me. In my opinion, all that Ex. 60 means is that the parties had agreed to have the matter decided by arbitration, as contemplated by Section 21 of the Arbitration Act and had named for that purpose two arbitrators therein. In this view of the matter the conclusion which I reach is that the application, Ex. 60 neither expressly states that in case of one or more vacancies occurring amongst the arbitrators they should be supplied or they should not be supplied. How should such a situation be dealt with in a case of

this type?

4. In *Parbhat General Agencies, etc. Vs. Union of India (UOI) and Another, etc.*, the Supreme Court has laid down the manner in which such an agreement should be construed. They have observed that if the agreement is silent as regards supplying the vacancy, the law presumes that the parties intended to supply the vacancy. To take the case out of Section 8(1)(b) what is required is not the intention of the parties to supply the vacancy but their intention not to supply the vacancy. Applying the aforesaid principle to the instant case I am of the opinion that since the joint application, Ex. 60, is silent on the question whether vacancies should be supplied or not, the parties intended that they should be supplied.

5. In taking the view that proviso to Section 25 confers upon the Court discretion to supersede the arbitration I am supported by a Division Bench decision of the Patna High Court in *Satyawan Prasad Vs. Kunj Behari Lal*, .

6. Mr. Shah has placed before me three circumstances in support of his contention that the order made by the Trial Court should be restored. In other words, according to him, there are cogent circumstances which warrant the supersession of arbitration. The first circumstance which he has placed before me is that the deed of dissolution provided for referring to arbitration disputes between the parties, if any arose, and that it was not availed of by the defendant at the initial stage. It is only during the progress of the suit that the parties agreed by Ex. 60 to refer the matter to arbitration. In my opinion, it is a relevant circumstance the effect of which should be considered in light of other circumstances. The second circumstance which Mr. Shah has placed before me is that the partnership was dissolved as early as on 9th September, 1965. On account of one reason or another, according to Mr. Shah, nine years have elapsed since then and yet no accounts of the partnership business have been settled between the parties. The present suit was filed in 1966, that is to say, eight years ago and yet there is no decision of the dispute between the parties. The third circumstance which he has placed before me is that before the parties agreed by the joint application, Ex. 60, to refer the matter to arbitration, the suit had proceeded to hearing and a part of the plaintiff's evidence was recorded. He has pressed these three circumstances into service in order to bring home his contention that the arbitration should be superseded. As against these circumstances Mr. Oza has argued that in matters of business it is always desirable and expedient to have disputes between two partners settled by arbitrators chosen or selected from that section of the business community to which the parties belong. He has further submitted that the Court in its very nature will not be able to appreciate or take into account the niceties or intricacies of a particular business. According to him, therefore, settlement of disputes between two partners by arbitration would be a more desirable course. The argument advanced by Mr. Oza is quite cogent but it cannot be allowed to go to the extent of protracting proceedings for years together and leaving for an

indefinite period of time disputes between the parties unsettled. The three circumstances which Mr. Shah has pressed before me are in their very nature strong enough to convince the Court that the arbitration should be superseded. It is true that the protraction of proceedings for a period of eight years is partly the result of the pendency of this Civil Revision Application for a period of little more than three years. In my opinion, in matters of this type, this Court is entitled to take such a circumstance into account. Taking these three circumstances into account which I believe to be cogent and well-founded, I think the order of the Trial Court should be restored and the parties be directed to have their disputes settled by the Court.

In view of the aforesaid reasons, the appellate order made by the learned District Judge is liable to be set aside. I, therefore, allow the Revision Application, set aside the order made by the learned District Judge and, for the reasons stated in this judgment and not for the reasons stated by the learned Trial Judge in his judgment, the order made by the Trial Court is restored. Rule is made absolute with no order as to costs in the circumstances of the case.

7. Since the suit has been pending on the file of the learned Trial Judge for about 8 years it would be very much desirable if the learned Trial Judge expeditiously proceeds with the suit and decides it as early as he can.