

(2002) 06 J&K CK 0003
In the Jammu And Kashmir High Court
Case No : Civil Revision No. 136 Of 2000

Lakshmi Narayan and others	Vs	APPELLANT
University of Jammu and others		RESPONDENT

Date of Decision : 12-06-2002

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 2, 7

Citation : AIR 2003 J&K 53 : (2003) JKJ 647 Supp : (2003) 1 SriLJ 37

Hon'ble Judges : T.S.DOABIA, J and S.K.GUPTA, J

Bench : Division Bench

Advocate : U. K. Jalali, Sr. Advocate with Ruchi Bhakhri, J. P. Singh, Advocates appearing for the Parties

Judgement

1. During pendency of Civil Original Suit for partition No. 104 of 91 titled Qazi Abdul Hamid Vs. Qazi GhulamNabi, on the file of District Judge,

Budgam, plaintiff Qazi Abdul Hamid moved an application for appointment of an Arbitrator and for settlement of the dispute. The defendants

including the revision petitioner through Counsel did not object to the request for appointment of the Arbitrator. After recording agreed

submissions of the counsel for the parties, the application was allowed and on agreement of the counsel for the parties, one Mr. Mohd Qasim

Shah, President Bar Association, Budgam was appointed as sole Arbitrator to settle the dispute. The Arbitrator was under direction to afford

parties effective opportunities to lead/produce evidence and after hearing parties to submit award within two months. The Arbitrator undertook the

proceedings in which the parties participated. Arbitrator recorded the evidence. He heard the parties and on conclusion of proceedings filed

Award dated: 07032000 in the Court of reference on this very date.

2. Objections were invited to the Award. In the meanwhile, the matter was withdrawn from the Court of District Judge and transferred to the court

of Addl. District and Sessions Judge, Srinagar. Defendant No. 1, the revision petitioner objected to the Award and the other parties did not make

any objections to the Award before the court below. Besides the objections, alleging misconduct of proceedings and the arbitrator, objection has

been taken to , ' the very power and jurisdiction of the court of, District Judge Budgam to order Arbitration proceedings and making reference to

and appointing Arbitrator. The court below has taken up first the basic objection of alleged want of jurisdiction and lack of powers of court of

reference to initiate arbitration proceedings, making reference and appoint Arbitrator. He has left out the other objections touching the conduct of

Arbitrator etc. to be determined subsequently. On the raised question, the court below came to the conclusion that the District Judge. Budgam, the

court of reference has jurisdiction and powers to refer matter to and appoint Arbitrator. This order dated: 18112000 of Additional District Judge

Srinagar is under challenge in this revision petition. Apart from the objections touching the misconduct of the Arbitrator and the proceedings, yet to

be decided by the court below, the learned 'counsel for the revision petitioner submits that the Arbitrator has been appointed in violation of law and

the reference made in incompetent, as the matter has not been dealt with within the enabling provisions of Arbitration Act 1997, (hereinafter for

short 'Act').

3. The counsel contends that the, parties did not agree to the reference of the matter to Arbitration and appointment of the Arbitrator. There is no

power vested under the Act with the court to entertain any application for reference of the matter to Arbitration. There has been no agreement

between the parties for such reference. Petitioner has not authorised his counsel to make a statement agreeing to reference of matter to Arbitration.

In absence of agreement, law gives no power to court to entertain application for reference to Arbitrator. The reference of the matter to Arbitration

and the consequent award, impugned in the revision, is nonest and fall beyond parameters of jurisdiction of the court of reference.

4. The counsel for respondents while refuting the contention of the other side, urges that there is an agreement between the parties. Court had the

power to entertain the application.

The reference of the matter to Arbitration is valid and Award and proceedings cannot be challenged on this score. The revision is not maintainable,

in as much as, neither jurisdictional error nor any legal infirmity vitiates the impugned order or the Arbitration proceedings.

5. The admitted position is that during the pendency of the above suit in the Court of District and Sessions Judge Budgam, plaintiff Qazi Abdul

Hamid moved an application for reference of the matter to Arbitration and for appointment of the Arbitrator to settle the dispute between the

parties, who happen to be the real brothers. Mr. Mohd Ashraf Advocate the counsel for defendant No. 1 before court below (not the present

counsel pursuing the matter in revision) did not object to appointment of the Arbitrator and for settlement of the dispute between real brothers,

through Arbitration proceedings. The other side has not disputed that the said Mohd Ashraf Advocate was in fact the counsel representing the

defendants in the court of reference. The court acting on the agreed submissions of the counsel for the parties appointed Mr. Mohammad Qasim

Shah, President Bar Association Budgam, again unanimous choice of parties, as sole Arbitrator. The Arbitrator after entering the reference,

conducted the proceedings although till award was made and submitted before the court on 07032000. The record reveals that although the

parties appeared before the Arbitrator, the proceedings were conducted in the house of the party, none other than objector the defendant No. 1,

(Revision petitioner before this Court). The Advocates for the parties appeared and participated in the proceedings. The Arbitrator inspected the

site, received the statement of parties and also perused the material/documents/evidence before the Arbitrator and heard the parties. The process

culminated in submitting the impugned award before the Court.

6. Although, at no point of time despite having submitted to jurisdiction of the Arbitrator, defendant (Revision Petitioner) never raised any question

as to the jurisdiction of the Arbitrator and powers of the court to appoint such Arbitrator till the award was filed in court. Perhaps, finding the

award unpalatable the revision petitioner has chosen to come forth with the objections questioning and as also the award. The counsel for the

parties submit in unison that the matter is covered by Jammu and Kashmir

Arbitration and Cancellation Act 1997 and Rule framed there under.

Section 2 (b) defines "arbitration agreement" as an agreement referred in Section 7. Section 7 reads as under:

7. Arbitration agreement

(1) In this part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in

(a) a document signed by the parties.

(b) an exchange of letters, telex, telegram or other means of telecommunication which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement, if the contract is in writing and

the reference is such as to make out arbitration clause part of the contract.

7. Obviously, in our case, Arbitration agreement is an agreement of the parties to submit to Arbitration dispute(s) having arisen in respect of a

defined legal relationship interse the parties. An arbitration agreement has to be in writing and interalia is presumed to be in writing, if it is contained

in a document signed by the party/statements of claim and defence, whereby the existence of the agreement alleged by one of the party is not

denied by the other. In our case, admittedly an application has been moved. The counsel for the otherside has agreed to reference of the matter to

Arbitration. The otherside has not denied the consent of the counsel and is for all practical purposes consent of the parties. Mere bald assertion,

unsupported by any material, that counsel was not instructed to record the consent shall scarcely suffice. Nothing of the sort goes beyond the

powers given to the Advocate in the power of attorney. Even the conduct of the revision petitioner/defendant sufficiently shows that he consented

to the agreement of reference of the matter to arbitrator and appointment of the Arbitrator, in as much as, he has participated in the Arbitration

proceedings although without even a murmur. He has offered his house as sitting place for conduct of the proceedings. Not only the parties, even

their counsel participated in the proceedings. The parties filed statements, produced evidence and argued the matter before the Arbitrator. All this

sufficiently points to the fact that there was an agreement between the parties in the pending suit. The order of District Judge Budgam dated:

12071999, is clear enough to show that the reference has been based on the agreement of the parties, even the parties agreed to the Sole

Arbitration of Mr. Mohammad Qasim Shah, Advocate. Not only that parties have associated with the proceedings but have even paid the

remuneration to the Arbitrator. The conclusion of the court below that the Arbitrator is appointed by the court on agreement of the parties cannot

be taken exception. Obviously, the judicial authorities of District and Sessions Judge Budgam seized of the matter was within its rights to refer the

matter for arbitration and to the named agreed Arbitrator.

8. The Arbitration and Conciliation Act of 1997 does not place any fetters on the freedom and powers of the parties to agree on a procedure for

appointing the Arbitrator(s). The appointment by Chief Justice of Arbitrator in terms of Section 11 of the Act on which revision petitioner's counsel

lays much stress, comes into play, in absence of agreement of parties on appointment of Arbitrator(s). This section in terms does not apply to the

case at hand.

9. The authority M/s Sandaram Finance Ltd. Vs. M/s NEPC India Ltd. (AIR 1999 SC: 565) cited at Bar does not provide that an Arbitrator can

be appointed under the Act only by the Chief Justice of High Court as laid down in Section 11 of the Act. The following par. from the judgment

should make this position clear:

... It is only if an action which is pending before the court that a party applies that the matter is the subject of an arbitration agreement does the

court get jurisdiction to refer the parties to arbitration. The said provision does not contemplate, unlike Section 20 of the 1940 Act, a party

applying to a court for appointing an arbitrator when no matter is pending before the Court. Under the 1996 Act appointment of Arbitrator(s) is

made as per the provision of Section 11 which does not require the court to pass a judicial order appointing arbitrator(s). The High Court was,

therefore, wrong in referring to these provisions of the 1940 Act while interpreting Section 9 of the new Act.

10. In the above view of the matter, I have taken, the impugned order is not seen to suffer from any jurisdictional error, illegality or infirmity. It is

not found a case of exceeding the jurisdiction/acting legally or with material irregularity in the exercise of jurisdiction. It is not even shown to be a

case of failure of justice. The impugned order falls within the parameters of law and jurisdiction.

11. In result, the revision petition is dismissed. Inform court below of this order. Send back the record.