

(1995) 11 SHI CK 0007

In the High Court Of Himachal Pradesh

Case No : F.A.O. (Ordinary) No. 372 of 1992

M/s. Him Sports

APPELLANT

Vs

State of Himachal Pradesh

RESPONDENT

Date of Decision : 10-11-1995

Acts Referred:

Arbitration Act, 1940 — Section 14(2), 3, 30, 33, 34
Civil Procedure Code, 1908 (CPC) — Section 80
Limitation Act, 1963 — Article 119

Citation : (1995) 4 ILR HP 2712

Hon'ble Judges : S.N. Phukan, C.J.; A.L. Vaidya, J

Bench : Division Bench

Advocate : A.K. Goel, P.C. Markanda, R. Markanda and Y. Paul, for the Appellant; M.S. Guleria, D.A.G., for the Respondent

Final Decision : Dismissed

Judgement

A.L. Vaidya, J.—One Sh. Guru Dutt Sharma representing himself to be the sole arbitrator filed the award dated 8th April, 1986 in the Court on 5th May, 1986. On the basis of this award, a sum of Rs. 31 lacs were awarded against claim No. "A" and further a sum of Rs. 39 lacs were awarded against claim "B" against the State of Himachal Pradesh and in favour of the Petitioner-claimant, who happened to be the Appellant in the present appeal. Learned Arbitrator further awarded a sum of Rs. 43,200/- with interest since 1977 at the rate of 12% per annum against claim No. "C. Apart from that a further sum of Rs. 10,500/- with interest since 1977 at the rate of 12% per annum against claim No. "D" was also awarded. Learned Arbitrator further directed that the aforesaid award amounts would be paid by the State within a period of one month from the making of the award and on its failure to pay the said amount, further interest at the rate of 12% per annum, till its realisation, was also awarded.

2. The facts giving rise to the present proceedings are that M/s Him Sports the present Appellant entered into an agreement with the State of Himachal Pradesh

on 10th July, 1975 and on the basis of that agreement State agreed to sell standing willow trees and trees of other species in favour of the Appellant for the manufacturer of sports articles and other allied produces, subject to availability. This agreement was to last for a period of ten years and during this period the forest wood, as referred in the agreement, was to be supplied and some broad leaf species of wood was also to be agreed to be supplied annually for the purpose of converting the same into sports articles in the factory to be set up at Mehatpur. A dispute arose between the parties regarding supply and price thereof. Clause 39 of the agreement stipulates reference of the disputes, arising out of the agreement, for arbitration. State of Himachal Pradesh rescinded the agreement in November, 1979 as it was observed that the present Appellant was defrauding it by selling the wood outside Himachal Pradesh, since the Appellant had neither any machinery nor factory for manufacturing the sports articles. A report in this behalf was submitted by Deputy Commissioner, Una and in pursuance to that, a show cause notice was issued to the Appellant and a penalty to the extent of Rs. 1,14,210/- was also imposed. The Appellant disputed these allegations and also assailed the cancellation of the agreement as well as the imposition of the penalty.

3. The present Appellant filed a suit in this Court of Senior Sub Judge, Una against the State of Himachal Pradesh restraining it from cancelling the agreement and imposing the penalty on the Plaintiff-Appellant. The suit was found to be bad for want of notice u/s 80 of the CPC and after removing this lacuna, another suit was filed in the Court at Una. State of Himachal Pradesh preferred an application before the Court for sending the case for arbitration and this plea was allowed and the suit was stayed u/s 34 of the Indian Arbitration Act. In this Court, a suit for recovery of Rs. 35, 63,200/- was filed by the present Appellant against the State of Himachal Pradesh and in that suit an application u/s 34 of the Indian Arbitration Act was preferred, which application was allowed on July 19, 1982 and the suit was stayed.

4. The matter was referred to Sh. R.C. Datta, who was appointed as Arbitrator by Chief Conservator of Forests vide his order dated January 16, 1983 as per directions of this Court dated November 3, 1982. However, Sh. Datta expressed his inability to undertake the job and thereafter name of Sh. G.C. Gupta, I.F.S. was approved as Arbitrator. The Plaintiff-Appellant also consented to this appointment (though contested in the present proceedings). Sh. G.C. Gupta, was appointed as sole Arbitrator under the agreement to enter upon the reference and give his award within four months. The arbitration proceedings could not be finalised within the aforesaid period and thereafter present Appellant conveyed its inability to enlarge the time for making and publishing the award for the reason that the appointment of the Arbitrator was not agreed by him. However, on the other hand the State of Himachal Pradesh represented that Sh. G.C. Gupta had been appointed Arbitrator in the case and was functioning as such, therefore, he could only be removed by the order of the Court. The Plaintiff-Appellant was informed through letter dated August 29, 1985.

5. Thereafter Sh. G.D. Sharma was appointed as Arbitrator by the present Appellant, as per agreement, though this aspect is being disputed by the State of Himachal Pradesh. Sh. Guru Dutt Sharma, has made the award, as referred to above.

6. State of Himachal Pradesh after having received notice of filing of the award by the Court, preferred objections under Sections 30/33 of the Indian Arbitration Act (hereinafter to be called as "The Act"). It was pleaded that the appointment of self styled arbitrator Sh. Guru Dutt Sharma was bad in the eye of law and he had no jurisdiction to arbitrate the case as per facts of the case. According to the objector, the present Appellant, appointed the arbitrator at their own accord despite information to the firm M/s Him Sports, Mehatpur by the Petitioner vide letter dated August 29, 1985 that Sh. G.C. Gupta, T.F.S. Director (North) H.P. State Forest Corporation could only be removed with the order of the Court, - as he was appointed according to mutual consent of both the parties. It has also been pleaded that self styled Arbitrator, was appointed by the present Appellant without any authority. The award as such made by Sh. Guru Dutt Sharma, was bad in the eye of law. On merit, the award has been assailed on various grounds.

7. The present Appellant raised various pleas against the objections filed by the State of Himachal Pradesh. It was pleaded that the objections were barred-by time and on this sole score were liable to be dismissed. It was also averred that the award was filed by the Arbitrator on 8th April, 1986 and the matter was listed before this Court on 29th July, 1986 and 6th August, 1986. On both the hearings the Assistant Advocate General was present and made submissions on behalf of the State. According to the Appellant, State had notice of the filing of award and the objections were not filed within thirty days calculated from July 29, 1986 or August. 6, 1986. Appellant also averred in their reply-affidavit to the objection petition that appointment of Sh. G.C. Gupta was under protest and was, therefore, no consent in law. It was also pleaded that Sh. G.C. Gupta had become functus officio when he failed to make the award within the stipulated period, allowed to him and in the absence of non-extension of the same either by the parties or by the Court. In this background, it has been pleaded that appointment of Sh. Guru Dutt is perfectly legal and valid one and in this behalf State of Himachal Pradesh was informed through letters dated 15th November, 1985 and 5th December, 1985 and the State had been requested through these letters to accept Sh. Guru Dutt as mutually acceptable Arbitrator, failing which the Defendant was given liberty to nominate its own Arbitrator within the stipulated period. Consequently, the present appeal 1 ant was entitled to appoint Sh. Guru Dutt Sharma as sole Arbitrator as per provision of Section 9(b) of the Act, read with Clause 39 of the agreement between the parties. The other averments in the petition have been denied.

8. The parties were put to trial on the following issues:

1. Whether the objections have been preferred within limitation ? Onus on objector.

2. Whether Sh. Guru Dutt was validly appointed as the Arbitrator ? Onus on Respondent.

(Note: A plea taken in defence that Sh. G.C. Gupta was the validly appointed Arbitrator and could not be removed except by an order of the Court will stand incorporated in this very issue).

3. Relief.

8-A. The parties examined evidence by way of affidavit(s) and the Hon"ble Single Judge after hearing the parties decided issue No. 1 against the Appellant and under Issue No. 2 it was held that the appointment of Sh. Guru Dutt Sharma was absolutely illegal and without jurisdiction, so was the award given by him. The Hon"ble Single Judge accepted the objection petition and set aside award filed by the Arbitrator in this Court.

9. The aforesaid judgment of the Single Judge has been assailed in the present appeal, on various grounds.

10. We have heard the learned Counsel for the parties and have minutely scrutinised the entire record.

11. Learned Counsel for the Appellant at the very outset has strongly contended that the appointment of Sh. G.C. Gupta was not in accordance with the agreement and, in a way,, was void abinitio, non-existent in the eye of law and has not to be legally taken note of. In order to elucidate this argument, learned Counsel submitted that Sh. G.C. Gupta whose appointment could not be termed to be an appointment of an Arbitrator mutually consented to by the parties as per term of the agreement inasmuch as present Appellant for such an appointment has made a protest and this appointment was accepted as a protest, which could not amount to have been agreed upon by the Appellant in terms of the legal requirement. _ It has further been submitted that the appointment of Sh. G.C. Gupta was accepted by the Appellant under protest as there was no alternative for the Appellant but to behave in that manner inasmuch as there was much pressure and un-due influence upon the Appellant to accept that appointment and according to the learned Counsel, in this view of the matter also the appointment so made under undue influence and coercion cannot be the result of free consent of the Appellant.

12. It has also been stressed on behalf of the Appellant that in case the appointment of Sh. G.C. Gupta as sole Arbitrator under the agreement is held to be without jurisdiction and void, the appointment of Sh. Guru Dutt Sharma comes within the ambit of Section 9(b) of the Act read with Clause 39 of the agreement.

13. Learned Counsel for the Appellant also laid much stress on the plea of limitation also. In this behalf, it has been contended that the objections filed by the State of H.P. assailing the award under reference were without limitation as the State had already a notice of filing of the award, when their counsel was

present in the court and from that date of notice, objections were not preferred within the statutory period.

14. The aforesaid pleas stressed on behalf of the Appellant, are not so simple a matter, as has been contended. In- order to appreciate this aspect of the case, the factual as well as legal aspect of the case has to be appreciated.

15. Clause 39 of the agreement runs as under:

39. If at any time thereafter either during the continuance or after the termination of the agreement any differences, doubts or disputes, on the terms and conditions arise between the Seller and the Buyer concerning their respective rights or privileges or otherwise arising out of these presents then, save in so far as the decision on any such differences, doubts or disputes has been finally made as provided herein-before, every such difference, doubt or dispute including any question or difference as regards whether the decision of any particular matter has been otherwise provided for and or whether it has been finally decided, shall be referred to an Arbitrator mutually acceptable to both the parties, failing which the two Arbitrators, one appointed by each of the two parties. If the Arbitrators, agree then the aforesaid two Arbitrators shall appoint one umpire who shall be serving or retired High Court or Supreme Court Judge whose decision shall be binding on the parties such reference shall be deemed to be a reference to Arbitrator under the Indian Arbitration Act, 1940 and shall be regulated and conducted accordingly.

16. The aforesaid clause postulates the following alternatives for the appointment of an Arbitrator:

(a) at first instance, the dispute between the parties, under the aforesaid clause is required to be referred to an Arbitrator mutually acceptable to both the parties;

(b) in case the parties are not agreeable for such mutual appointment, in that event the dispute is to be referred to two Arbitrators, one appointed by each of the two parties. It is also provided that in case the two Arbitrators agree, then the aforesaid two Arbitrators shall appoint one umpire, who shall be serving or retired High Court or Supreme Court Judge, whose decision shall be binding on the parties.

17. The aforesaid second alternative is dependant upon the first one, meaning thereby second alternative would be available to the parties in case they fail to appoint an Arbitrator mutually acceptable to both of them. The second alternative would come to the picture only in case in the event of parties failing to appoint a mutually acceptable Arbitrator.

18. It is apparent from the intention of the aforesaid arbitration clause that in case the parties have exercised the option of appointing a sole arbitrator with mutual consent in a legal manner, and after such appointment, parties will have no right to invoke the other alternative of appointing two arbitrators, as referred to above. In that event the arbitration clause regarding the appointment of an

Arbitrator by the parties, would be deemed to have been complied with, and the sole Arbitrator so appointed has to be replaced which could be so done under the provisions of Arbitration Act and second alternative, referred to above, could not be invoked. To invoke the second alternative the only pre condition would be that the sole arbitrator by mutual consent has not been appointed.

19. In order to appreciate the case of the parties and its legal implications, the factual aspect of the case has, at the first instance, to be gone into and in that background, the pleas being raised can be safely disposed of.

20. There is no dispute between the parties that at the first instance Sh. G.C. Gupta, was appointed as a sole Arbitrator under the agreement. Regarding the appointment of sole Arbitrator, the present Appellant vide letter dated 10th February, 1984 informed the Secretary Forest conveying their consent with some reservations. For the sake of convenience, that letter is being reproduced hereunder:

By Name: Secretary Forest Department (HP) 10.2.1984 Shimla.

Subject: Arbitration Proceedings- M/s HIM Sports Mahatpur v. State of H.P. - order of the Hon"ble High Court etc.

Dear Sir,

Kindly refer to our letter dated 2.12.1983 in response to letter No. Ft.C XIX (CFD) (Him Sports) dated 25th October, 1983 as received and acknowledged by us on 25.11.1983 from the Chief Conservator Forest, H.P.

We regret, we have not been obliged with a reply, even after two months.

We may also remind you of order of Hon"ble Sub Judge, 1st Class Una, dated 24.4.1978, Order of Hon"ble High Court, Shimla dated 19.1.1982 and also their observations dated 3.11.1982.

We regret we have not been helped to arrive at mutually agreed upon arbitrator in terms of the agreement. We also note that time beyond limit has been allowed to lapse and process of law has been delayed. We have been forced to suffer losses, damages and defamation ever since the beginning of agreement and more so under the present circumstances.

We have been left with no other way but to submit, under protest to your dictation.

2. We consent to the nomination of Sh. G.C. Gupta, IFS, Conservator of Forests, formulation and plantation as arbitrator in this case.

Yours faithfully, (PRITHVI NATH PRASHER) Managing Partner.

Copy under Regd. A.D. Post:

Sh. G.C. Gupta, IFS, Conservator of Projects formulation and plantation, Forest Department, Himachal Pradesh Govt. Shimla with the request to start arbitration proceedings immediately.

(PRITHVI NATH PRASHER) Managing Partner.

21. The aforesaid letter in very clear terms reflected that the appointment of Sh. G.C. Gupta, as sole Arbitrator, was accepted under protest, as referred in the letter.

22. It is not being disputed that Sh. G.C. Gupta, IFS, Conservator of Forest, the sole Arbitrator entered upon the reference, but could not complete the Award within the statutory period of four months. It is also not being disputed that the present Appellant did not agree for extension of time for making the award by the sole Arbitrator Sh. Gupta.

23. It has been brought to the notice of this Court, during the course of arguments, that the State of H.P. after many years has approached this Court by preferring a petition for extension of time to be awarded for making the award by the alleged sole Arbitrator Sh. G.C. Gupta. We have also been informed that petition has not yet been disposed of.

24. There is nothing on record to suggest that during the statutory period of four months, when the matter remained pending for arbitration before Sh. Gupta the sole Arbitrator, the present Appellant at any stage raised objections regarding the appointment of Sh. Gupta as sole Arbitrator, but on the other hand the Appellant submitted to the jurisdiction of the sole Arbitrator to whom Appellant had requested to start arbitration proceedings immediately, and after expiry of four months the Appellant did not agree for extension of time for making the award. This aspect of the matter otherwise has not been disputed before us.

25. Sh. Guru Dutt Sharma was appointed as an Arbitrator at the instance of present Appellant, as the State of H.P. according to the Appellant, has failed to appoint its nominee arbitrator within a period of 15 days after the service of notice. It appears, as has been the case of the appellant, Sh. Guru. Dutt Sharma was appointed as an Arbitrator by the Appellant, after complying with the provisions of Section 9 of the Act. The Appellant has brought on record certain documents whereby the Appellant had informed the State Government to appoint one Arbitrator as per agreement and the provisions of Section 9 of the agreement.

26. The aforesaid factual position is not being seriously disputed. In the aforesaid context now the legal propositions being argued have to be appreciated and disposed of.

27. Learned Counsel for the Appellant submitted that the appointment of Sh. Gupta as sole Arbitrator cannot be said to be an appointment mutually acceptable to both the parties, as per requirement of Clause 39 of the agreement. In this behalf, it has been further elucidated that on the basis of the

aforesaid letter dated 10th February, 1984 the appointment has been accepted as a protest which aspect cannot on any stretch of imagination be interpreted under the law to be "mutually acceptable appointment to both the parties". According to the learned Counsel, the word protest signifies the absence of mutual agreement which was the main condition to be complied with for such an appointment.

28. At this stage, "Russell on Arbitration" has been cited to get some help for the arguments, being advanced on behalf of the Appellant. Russell on Arbitration in 19th Edition by Anthony Walton, at page 276 has commented as follows:

continuing to take part in the proceedings after protest made does not amount to a consent. "It is being inferred from the aforesaid comments of the learned Author that in the present case as the Appellant had protested against the appointment of the sole Arbitrator, therefore, the Appellant's participation in the arbitration proceedings before the alleged sole Arbitrator Sh. Gupta, will not amount to his consent, for such appointment. We think, the aforesaid comments have been inferred without context it has been made. The relevant portion of the comments runs as under:

In arbitrations, where a protest is made against jurisdiction, the party protesting is not bound to retire; he may go through the whole case, subject to the protest he has made" per Lord Selborne L.C. *Hamlyn v. Betteley* (1886) 6 Q.B.D.63

Continuing to take part in the proceedings after protests made does not amount to a consent.

We find that the Defendant did not protest and did all in his power to resist the proceeding. I cannot agree that it amounts to a consent on the part of the Defendant, because being tied to the stake and dragged on to trial, he endeavours to make the best of it": per Lord Ellenborough C.J., *Holt v. Meddowcroft* (1846) 4 M. & S 467 , see also *Blisset v. Tenant* (1828 (7) L.J.C.P.108; *Sheonath v. Ramnath* (1865) 35 L.J.P.C. 1.

It should in this connection be remembered that it is proper for an arbitrator to make such inquiries as are necessary to enable him to decide whether, he has or has not jurisdiction over a matter which one or other party asks him to consider.

29. The aforesaid commentary clearly depicted that the protest referred therein pertains to the protest against jurisdiction of the Arbitrator, who is proceeding with the reference. It has been so observed by the learned Author, that when such objection is raised before him, it is proper for the Arbitrator to make such inquiries as are necessary to enable him to decide whether he had or had not jurisdiction over a matter which a party or other party asks him to consider. In the present case, as referred earlier, on factual side no reference has been made on behalf of the Appellant that the Appellant before the Arbitrator raised any objection with respect to his jurisdiction. In such an eventuality, when such objection has not been raised and the sole Arbitrator was asked by none-else

than the Appellant to start arbitration proceedings immediately, there was absolutely no occasion for the Arbitrator to have decided such objections. Prima-facie Sh. G.C. Gupta was appointed as a sole Arbitrator under the Arbitration clause. No doubt, the Appellant agreed for such appointment under protest, but the fact remains that inspite of that protest, the Appellant submitted to the jurisdiction of the sole Arbitrator Sh. G.C. Gupta without raising any objection pertaining to his appointment or pertaining to the jurisdiction, which he had acquired by such appointment. So the present case is not of that nature on the factual side, which could be equated with the aforesaid comments of the learned Author, but on the other hand as revealed earlier, the facts are very distinct.

30. At page 277 of the same edition of aforesaid book, following comments also require some consideration:

Continuing proceedings with knowledge and without protest-Irregularities in the mode of conducting an arbitration will be waived by the party continuing the proceedings with full knowledge and without protest.

The Courts will not permit to lie by or act in an indecisive manner, so as to obtain the benefit of the award if it is in his favour and endeavour to set it aside if it is not.

31. It has been further contended that consent given by the Appellant for the appointment of sole Arbitrator cannot be termed to be free consent, as defined in the Contract Act. It has been further submitted in this particular behalf, that in the present case consent for Arbitrator has been procured by coercion and undue influence, as there was no alternative for the Appellant but to submit to the wishes of the State Government in" the appointment of the sole Arbitrator. This aspect of the matter also does not help the case of the Appellant at all on two scores. Firstly, this plea is being raised for the first time before this Court and secondly even if for arguments sake it is accepted that the consent of the Appellant for the appointment of sole Arbitrator was procured under coercion or un-due influence, such conduct only makes the agreement for the appointment of sole Arbitrator to be voidable one and it could have been under the law avoided by any of the party so alleging. In the present case, the agreement for appointment of sole Arbitrator could be, at the most voidable agreement but it is really strange to note that the party did not select to avoid that agreement but on the other hands submitted to the jurisdiction of the Arbitrator, meaning thereby that the Appellant never intended to avoid such agreement and in the absence of avoiding the agreement for the appointment of sole arbitrator, it will continue to have its legal binding force on the parties. In this view of the matter also, the Appellant does not get any help in support of his case.

32. In view of the aforesaid circumstances, it cannot be legally said that the appointment of the sole Arbitrator by the parties was void, non-existent in the eye of law and has to be totally ignored. It is really very strange to note that such a plea is being raised in these proceedings assailing the appointment of the

Arbitrator to be void one without taking recourse earlier. It does not hold good for the Appellant that after submitting to the jurisdiction of the sole Arbitrator, to whom Appellant had requested to start arbitration proceedings immediately and without raising any objection before the Arbitrator pertaining to his jurisdiction and now raising such pleas that appointment of the sole Arbitrator was void and has to be ignored. On the basis of the facts established on record only, reflected that the parties had appointed the sole Arbitrator Mr. Gupta in accordance with the Arbitration clause and second alternative for appointment of two Arbitrators, one each by the parties, in the present case was not available to them. If at all, new Arbitrator was to be appointed, it has to be appointed now under the provisions of Arbitration Act and not on the basis of Arbitration clause which provided second alternative to be available in the absence of first alternative having not been complied with by the parties.

33. The Appellant has appointed Sh. Guru Dutt Sharma, as an Arbitrator, u/s 3 of the Arbitration Act. Section 9 of the Arbitration Act runs as under:

Where an arbitration agreement provides that a reference shall be to two arbitrators, one to be appointed by each party then, unless a different intention is expressed in the agreement:

(a) if either of the appointed arbitrators neglects or refuses to act, or is incapable of acting, or dies, the party who appointed him may appoint a new arbitrator in his place:

(b) if one party fails to appoint an arbitrator, either originally or by way of substitution as aforesaid, for fifteen clear days after the service by the party of a notice in writing to make the appointment, such other party having appointed his arbitrator before giving the notice, the party who has appointed an arbitrator" may appoint that arbitrator to act as sole arbitrator in the reference, and his award shall be binding on both the parties as if he had been appointed by consent:

Provided that the Court may set aside any appointment as sole arbitrator made under Clause (b) and either, on sufficient cause being shown, allow further time to the defaulting party to appoint an arbitrator or pass such other order as it thinks fit.

34. The aforesaid provision applies only where an arbitration agreement provides that reference shall be to two arbitrators, one to be appointed by each party. In the present case, as discussed above, this eventuality has not arisen at all. If it is so, how provision of Section 9 of the Act could be made available in favour of the Appellant?

35. In case, the Appellant had any grievance in the appointment of Sh. Gupta, who had entered upon the reference without any objection being raised before him, pertaining to his jurisdiction, his removal could be under the provisions of Arbitration Act and a party could avail" that legal aspect. Section 8 of the

Arbitration Act deals with such type of matters, which provides a right to the party for appointment of an arbitrator or umpire through the intervention of the Court. At the cost of repetition, it may be pointed out very specifically that once a party has submitted to the jurisdiction of the sole arbitrator appointed under the Arbitration clause without raising any objection to the jurisdiction of the Arbitrator, in that event second alternative for appointing two arbitrators, one each by the parties, would not be available inasmuch as the first alternative has been opted by the parties.

36. The parties in order to find support to the submissions made by them, have cited some case law, which is being referred herein-below:

37. Learned Counsel for the Appellant Mr. Markanda in order to get some support for the submissions put forth by him placed reliance on *Waverly Jute Mills v. Raymon & Co.* (A.I.R. 1963 Supreme Court 90), *Girdhari Lal Bansal Vs. The Chairman, Bhakra Beas Management Board, Chandigarh and Others*, and *Arbn Hindusthan Steel Vs. Appejay Pr. Ltd.*,

38. In *Waverly Jute Mills v. Raymon & Co.* (supra) it has been held by the Apex Court that an agreement for arbitration is the very foundation on which the jurisdiction of the arbitrators to act rests, and where that is not in existence, at the time when they enter on their duties, the proceedings must be held to be wholly without jurisdiction. And this defect is not cured by the appearance of the parties in those proceedings, even if that is without protest, because the consent cannot confer jurisdiction. There is absolutely no dispute to this proposition. Insofar as the present case is concerned, as has been discussed earlier Mr. Gupta was appointed as sole arbitrator under the agreement and it cannot be said that his appointment was beyond the terms of the agreement, as has been discussed earlier. On the other hand, jurisdiction of the present arbitrator Sh. Guru Dutt Sharma, whose award is under challenge can definitely be said to be without jurisdiction especially when the Appellant under the agreement had no right to take shelter u/s 9 of the Act and that right Appellant had already lost when consenting to the appointment of the sole arbitrator though under protest and later on submitting to his jurisdiction without there being any objection. The aforesaid case decided by the Apex Court, does not help the case of the Appellant, but on the other hand ratio if applied will dislodge the award made by Sh. Guru Dutt Sharma as his appointment being not in accordance with the agreement and as such can safely be said that said arbitrator was lacking inherent jurisdiction.

39. In *Girdhari Lal Bansal v. The Chairman, Bhakra Beas Management Board* (supra) it has been held that if the Arbitrator is satisfied that he is the Arbitrator under the agreement he will be duty bound to call upon the opposite party to file their counter-claim and then to proceed to arbitrate the matter in accordance with law. It has been further held that if he fails to proceed with the arbitration and allows 4 months" time to pass it may be a fit case for his removal and for appointment of another Arbitrator.

40. In the present case, the sole Arbitrator was appointed by the parties and no objection was raised pertaining to the said appointment before the Arbitrator, when he entered upon reference. There is no doubt that as per facts of the present case, award under reference was not completed within the statutory period of four months. In the aforesaid ruling, it has been held that it may be a fit case for his removal and for appointment of another Arbitrator. It will definitely depend upon the facts of the individual case inasmuch as in certain circumstances period after four months can legally be extended with the prior permission of the court for making the award or in case the Arbitrator has mis-conducted himself or otherwise there are grounds to support his in-activeness during this four months" time, it could be made a ground for his removal and for appointment of another Arbitrator.

41. In the case, under reference, the award was not made by the Arbitrator within the statutory period of four months, that could only mean that either the period could be extended or a party if so desired could move for his removal and for appointment of another Arbitrator, if the circumstances so warranted. In the present case, admittedly the sole Arbitrator has not been removed at all. It could be so under the provisions of the Act and not u/s 9 of the Act, as has been done by the present Appellant, inasmuch as provisions of Section 9 of the Act were not available to the Appellant. Thus, the aforesaid case law does not help the case of the Appellant.

42. In *Arbn Hindustan Steel v. Appejay Pr. Ltd.* (supra) it has been held that the authority of an Arbitrator cannot be revoked when in law the Arbitrator does not exist and/or cannot function. It has been further held that in other words if the Arbitrator has become *functus officio* by reason of the expiry of four months in terms of Rule 3 of Sch. 1 of the Act, the question of revocation of authority of the Arbitrator cannot arise.

43. Rule 3 of Sch.1 of the Act requires an Arbitrator to make an award within four months of entering on the reference or within such extended time as the court may allow. In the present case, admitted facts are that after the passing of four months present appellant did not agree for extension of time, though it has been brought to the notice of this Court that some application for extension of time has been filed at a belated and delayed stage. In the aforesaid case, the facts were that after four months no application was filed for extension of time. It was then held that in this background there was absolutely no occasion for removal and revocation of the authority of the Arbitrator as after four months he became *functus officio*, especially when no extension was sought for by the parties and with this background it was "held that its consequential effect would be that the said arbitration agreement shall cease to have"effect with respect to the differences referred to the said Arbitrator. We think these are not the circumstances present in this case nor the Appellant has sought such a declaration from the court.

44. In the present case, according to the learned Counsel for the Appellant, after

passing of the four months and without getting any extension from the competent court, the Arbitrator became functus officio. Even if this argument is accepted, this does not give any right to the Appellant, more so under the agreement for invoking the provisions of Section 9 of the Act. There is nothing in the agreement itself that in case the sole Arbitrator fails to give award within four months, the second alternative regarding appointment of two Arbitrators, one each by a party, could be invoked. The second alternative will be available to the party concerned in case the first has not been complied with. But in the present case, the first alternative has been complied with and the sole Arbitrator has been appointed which conduct of the parties does not give any right to any party to take recourse to the second alternative, referred to above. In this view of the matter also the aforesaid case law will also not be helpful to the Appellant.

45. On the other hand, the learned *Prasun Roy Vs. Calcutta Metropolitan Development Authority and Another*, and *Dwarkaparsad v. Firm Dipchand Parsram and Anr.* A.I.R.1918 Sind 21.

46. Para 7 of *Prasun Roy's* case (supra) is being reproduced hereunder for the sake of convenience:

Russell on Arbitration, 18th Edition page 105 explains the position as follows:

If the parties to the reference either agree" before-hand to the method of appointment, or afterwards acquiesce in the appointment made, with full knowledge of all the circumstances, they will be precluded from objecting to such appointment as invalidating subsequent proceedings. Attending and taking part in the proceedings with full knowledge of the relevant fact will amount to such acquiescence.

47. In *Dwarkaparsad v. Firm Dipchand Parsram and Anr.* case (supra) it has been held that once a valid submission has been made to an arbitrator, it is irrevocable without leave of the Court, u/s 5 and if the arbitrator refuses or neglects to act, the procedure laid down by Section 8 should be adopted and the arbitrator holds his mandate un-revoked, the parties cannot appoint a fresh arbitrator.

48. Taking into consideration, the ratio of the aforesaid cited law, in the background of the present case, it can safely be said that the Appellant had absolutely no occasion under the agreement to invoke the provisions of Section 9 of the Act for appointing Sh. Guru Dutt Sharma as the Arbitrator. Appointment of Sh. Guru Dutt Sharma as Arbitrator by the Appellant u/s 9 of the Act, basically lacks inherent jurisdiction, as it does not come within the terms of the agreement more so within the purview to the arbitration clause. In this view of the matter, the award made by the Arbitrator, who lacks inherent jurisdiction, as his appointment is against the terms of the agreement, cannot be legally sustained, as has been held by the Single Judge.

49. The Appellant has assailed the objections, preferred by the State, on the point of limitation. Article 119 of the Limitation Act, which would be applicable to

the present case, runs as under:

Under the Arbitration Act, 1940 -

(a) for the filing in Court of an award:

Thirty days

The date of service of the notice of the making of the award;

(b) for setting aside an award or getting an award remitted for re-consideration.

Thirty days

The date of service of the notice of the filing of the award.

50. On the basis of the aforesaid Article thirty days time for filing the objections for setting aside the award would run from the date of service of notice of filing of the award. There is no dispute to this proposition.

51. It has been contended on behalf of the Appellant that in the present case when the award was filed in the court, the counsel for the State was present there and as such had notice of filing of the award and from that date the objections preferred were beyond period of limitation.

52. In the present case, service upon the State-Respondent was effected on August 22, 1986 and the limitation expired on September 21, 1986, which was Sunday and the objections were filed on September 22, 1986.

53. According to the Appellant, the State-Respondent had knowledge of filing of the award on July 29, 1986 and August 6, 1986. In the order of July 29, 1986 and August 6, 1986 the presence of counsel for the State has not been recorded. The Appellant-Plaintiff had moved OMP No. 323 of 1986 stating that presence of Sh. Rakesh Kanwar, Advocate, had been wrongly recorded, since no authorisation in favour of Sh. Rakesh Kanwar had been extended by the Plaintiff. This application also sought modification of the order by recording appearance of Sh. Malkiat Singh Chandel, Assistant Advocate General on behalf of the State. This application was decided by the Court on October 14, 1986 and the order passed on this OMP is being reproduced hereunder:

14.10.1986 Present: M/s Kedarishwar and Yoginder Pal, Advocates, for the plaintiff-applicant. Mr. H.K. Pal. Asstt. to the Advocate General for the State-respondent.

The presence of Mr. Rakesh Kanwar, Advocate, for the Plaintiff has been erroneously recorded in the orders dated July 29, 1986 and August 6, 1986. Mr. Rakesh Kanwar merely filed this award on behalf of the Arbitrator. The aforesaid two orders would be read accordingly. However, the submission that Sh. Malkiat Singh Chandel, Asstt. Advocate General, was present on behalf of the State-Defendant is not correct as I distinctly remember that I had asked one or the other Assistant Advocate General who was present in the Court on that date as

to whether he accepts notice on behalf of the State and his presence be recorded but it had been submitted by him that a notice be issued to the State as the question of filing objections within the statutory period was involved. There is, therefore, no question of marking the presence of any Advocate on behalf of the State on the last date of hearing.

54. From the aforesaid order passed by this Court, it is being inferred that some Assistant Advocate General was present in the Court and as such he had notice of the filing of the award. The entire order has been reproduced hereinabove, wherein no doubt the learned Judge had referred that he had asked one or the other Assistant Advocate General who was present in the Court on that date as to whether he accepts notice on behalf of the State and his presence be recorded but it had been submitted by him that a notice be issued to the State, as the question of filing objections within the statutory period was involved, and thereafter notice was issued and when it was served upon the Defendant after the date of service, the objections were filed within the statutory period, for which there is no dispute.

55. There is no dispute to the proposition that notice to the party could be oral or in writing. In the case of present nature, notice to the Government Advocate oral or in writing would amount to the giving of notice under Article 119 of the Limitation Act.

56. The Court after accepting the submissions of some Assistant Advocate General, issued a notice and thereafter objections were filed within the statutory period. The Court also in the circumstances of present case did not accept the presence of Government Advocate, which could amount to be oral notice to the State. Presence of the Assistant Advocate General was not recorded in the order. This is an admitted fact revealed from the record. In the aforesaid circumstances, when the presence of Assistant Advocate General by name or otherwise has not been recorded in the order, it cannot be said that the oral service of notice was effected upon the State as per provisions of Article 119 of the Limitation Act. In the present case period of limitation for filing objections would start when the notice in writing had been served upon the Defendant, which date was August 22, 1986.

57. In Hari Shankar Lal Vs. Shambhunath Prasad and Others, it has been held that oral intimation to the pleader of a party is the service of notice and limitation begins from such intimation. In the present case, there is practically no competent evidence to prove the fact that the learned Counsel on behalf of the State had any oral notice of filing of the award, but on the other hand the court's order, as pointed out earlier, only reflected that some Assistant Advocate General was present who submitted that notice be sent to the Defendant, which request was allowed and thereafter a notice was served upon the Defendant. We are dealing the question of limitation on some facts which in order to be appreciated, have at first instance to be legally proved. In the aforesaid background, those facts have not legally been established and accordingly it cannot be said that in

the present case oral notice was given to the counsel for the Defendant.

58. The case of Hasanalli Abdulalli Malabari Vs. Shantilal Bhaidas Marfatia and Others, can safely be taken note of in order to appreciate the proposition in hand. Para 7 of the aforesaid case is relevant, which is being reproduced hereunder:

It is contended by the learned Counsel for opponent No. 2 that the question as to what is the starting point of limitation does not depend on what the Judge understood to be necessary in the matter of notice. He contends that even if the Judge was under the impression that a written notice was necessary and in law a written notice is not necessary provided that party had otherwise knowledge of the filing of the award, the limitation would run from the date when parties had otherwise knowledge of the filing of the award. In the instant case, if no written notice had been issued, it would be open to count the starting period of limitation as starting from 19.8.1958. But a written notice had, infact, been issued, and when there, is the service of a written notice, we cannot say that that is not the date of the service of the notice and that that is not the date of the starting point of limitation. There cannot be two starting points for the period of limitation, namely 19.8.1958 and 3.9.1958 one the date of oral intimation and the second the date of service of notice. When a written notice is sent u/s 14(2) of the Arbitration Act, that would be the starting point for the period of limitation. If there is no written notice u/s 14(2) of the Act, then the date on which oral or informal or constructive intimation was given to the parties by the Court of the fact that the award was filed would be the starting point for limitation as observed by their Lordships of the Supreme Court. But as observed, a written notice was served on 3.9.1958 and 3.9.1958 is the date on which the period of limitation would commence.

59. Thus, on the basis of the facts established in this case, it cannot be said that though the counsel, the State had any oral notice of the filing of the award, but on the other hand period of limitation in the present case, would start when a written notice was served upon the Defendant and from that date objections have been filed within the statutory period.

60. Thus, on the basis of the aforesaid discussion, the judgment of the Hon''ble Single Judge does not suffer from any legal infirmity and requires no interference whatsoever, especially when the same has been based after correct and apt appreciation of facts and law, involved in the present case.

61. In view of the foregoing reasons, the present appeal fails and is accordingly dismissed. The judgment passed by the Single Judge is maintained. Costs on the parties.