(1976) 04 J&K CK 0005

In the Jammu And Kashmir High Court

Case No : Arbitration Application No. 10 of 1974

M/s. Kashmir Hill Forests — APPELLANT

Vs

The State of J. and K. and Others — RESPONDENT

Date of Decision : 28-04-1976

Acts Referred:

Constitution of India, 1950 — Article 122
Jammu and Kashmir Arbitration and Conciliation Act, 2002 — Section 11, 17, 30, 32, 33
Limitation Act, 1908 — Article 158

Citation : (1976) 04 J&K CK 0005

Hon'ble Judges : Mian Jalal-ud-din, J

Bench : Single Bench

Advocate : V.S. Malhotra, for the Appellant; A.D. Singh, for the Respondent

Final Decision : Dismissed

Judgement

Mian Jalal-ud-din, J.—This is an application u/s 33/11 of the Jammu and Kashmir Arbitration Act (hereinafter to be referred as 'the Act')

made by the firm Petitioner through Bhikam Chand the holder of General Power of Attorney for adjudging the arbitration agreement as void and

unenforceable and for setting aside the award made pursuant to the said agreement or in the alternative for removal of the Arbitrator.

2. It is averred that the Petitioner firm was constituted under a deed of partnership dated 16-5-1968 and it had six partners namely Shri Des Raj,

Smt. Lila Rani, Smt. Thakari Devi, Shri Girdhari Lal. Sh. Om Parkash and Smt. Durgi Devi. The firm was granted lease in Dudu Range, District

Udhampur which has since been worked and all dues have been paid to the Government. Another firm bearing the same name but consisting of

almost different partners (excepting one common partner) also obtained a lease in 1964 in the Forest Compartments Nos. 89(b), 90 and 91 in

Lander Range Ramban Division and an agreement for working the said lease was executed by that firm on 31-5-1964. The said agreement was

signed by the Respondent No. 2. Conservator of Forests who had no authority to sign it on behalf of the Sadar-i-Riyasat (now the Governor). The

aforesaid agreement is, therefore, claimed as void and illegal as the same was made in contravention of Section 122 of the Jammu and Kashmir

Constitution. It is further averred that in the course of operation of the aforesaid lease certain disputes arose between the said firm and the

Department The matter was therefore referred to the arbitration of the Chief Conservator of Forests under the Arbitration Agreement. The

Arbitrator who was biased against the said firm arbitrarily found that an amount of Rupees 27800/- was due from the said firm and he

consequently made the award. Recovery proceedings have been initiated although the firm is under no obligation to pay the claim. The Petitioners

have urged that no award could be made on a void agreement and no claim found due on the said agreement could be enforced against the

Petitioner's firm. The award be therefore set aside and the arbitration agreement declared void and the Petitioner firm absolved of the liability to

pay the amount in question.

3. The Respondents have resisted the application on the ground that the application is not maintainable and is incompetent because the disputes

that were referred to the arbitrator have already been resolved by him. He has given the award which award was made rule of the court on 18th of

September 1972. The arbitrator having become functus officio the prayer of the Petitioner that he may be removed is misconceived and is not

maintainable, The award having been made rule of the court cannot be challenged more so when the decree has followed the award. At the

appropriate stage opportunity for filing objections against the award was given to the firm and its partners but they failed to file the same within the

statutory period. Now it is too late in the day for the Petitioner to come forward after two years to object to the validity of the award as also

challenge the legality of the agreement as being in contravention of the provisions of the Constitution. It is denied that the agreement is void. The

Petitioner firm has no locus standi and cannot dispute the liability to pay an amount of Rs. 27800/ - which is now payable under the decree of the

court. In view of this it is submitted that the application be dismissed.

4. The following issues have been raised in the case:

1. Is the present petition maintainable when admittedly the disputes which arose out of the contract were referred for arbitration and when the

arbitrator passed an award which has already been made rule of the court? O.P.P.

2. In case the petition is held maintainable is the contract containing arbitration clause void? If so, how? O.P.P.

5. Counsel for the parties submitted that they had no evidence to lead on issue No. 1.

6. Mr. Malhotra appearing for the Petitioner has conceded that the arbitrator has already given his award and the said award was made rule of the

court on 18-9-72 and that under the decree passed pursuant to the award by this Court a sum of Rs. 27800/ - has been found due. He has also

conceded that the Petitioner has moved the court two years after the award was made rule of the Court. He has further conceded that the firm

which entered into contract sought to be avoided by him was (barring one partner) constituted of different partners. He has, however contended

that notwithstanding this the Petitioner can nevertheless approach the court and seek the annulment of the award as also of the decree on the

ground that the agreement on which the award is founded is void as it contravenes the provisions of Article 122 of the J. and K. Constitution. He

has farther urged that no liability could be fastened on the Petitioner's firm to pay the outstanding as the Petitioner's firm is under no obligation to

the Respondent to pay the amount. As notice of demand has been issued to the Petitioner's firm it can ask the court to adjudicate upon the legality

of the agreement dated 31-5-1964.

7. Mr. Anil Dev Singh appearing for the Respondent has, on the other hand, submitted that the Petitioner has got no locus standi to make the

application u/s 38 of the Act as he is not a party to the agreement. He has further disputed the correctness of the allegation made by the Petitioner

that the agreement in question was void. A more formidable argument raised by him is that the application u/s 33 is not competent inasmuch as the

plea regarding the invalidity of the agreement was available at the time of filing of the objections u/s 30 of the Act when the parties were called upon to do so by the court. As no objections were filed then and the parties allowed the court to make the award the rule of the court the

Petitioner cannot now turn round and contend that the award and the decree based thereon are bad in law and unenforceable. Moreover, Section

33 enables a party to challenge the validity of the agreement and the award but not the decree passed pursuant to the award. It is further submitted

that the application is beyond time and has been made two years after the passing of the decree. Ordinarily the objections to the award should

have been field within 30 days as prescribed by Article 158 of the Limitation Act. This right was available to the Petitioner u/s 30 of the Act.

According to the learned Counsel there is no practical difference between Section 30 and 33 in so far as the grounds for setting aside the award

can be taken. Section 30, more so Clause (c) of that Section sets out comprehensive grounds whereas Section 33 lays dow the procedure for it.

Even the ground that the award be adjudged as void because of the nullity or the non-existence of the agreement is covered by Clause (c) of

Section 30. To put it differently the argument is that the whole of Clause (c) ""that an award has been improperly procured or is otherwise invalid"" is

the genus and Section 33 is the species thereof. According to the learned Counsel the words ""or is otherwise invalid"" are intended to be general in

character and they cover all forms of invalidities including invalidities which amount to nullities. Therefore the application in the instant case even for

adjudging the agreement and the award as void even though labelled u/s 33 should have been made within the statutory period of 30 days under

Article 158. Authorities have been cited at the bar which will be taken due notice of and dealt with at the appropriate stage.

8. The points raised at the bar though not free from difficulty are nevertheless of great interest and import. In the first place is to be determined the

locus standi of the Petitioner; whether he can challenge the validity of the agreement as also the award. u/s 33 any party to an agreement may

challenge the validity or the existence of an agreement or award. The words ""any party to an agreement"" are no doubt comprehensive enough to

include any partner of the firm also against whom the award has been made. But there must be semblance between the two. It is admitted that the

firm against which the award was made by the arbitrator is a different firm from the Petitioner's firm although the two firms bear the same name.

When the constituents of the two firms are different or at any rate when it has not been established that there is some common relationship or

semblance between the two firms and when the leases worked out by the two firms are different and the amount sought to be recovered pursuant

to the award is in respect of a different lease in which the Petitioner's firm has no concern or connection, then it is difficult to follow as to how the

Petitioner's firm can be said to be a party to the agreement and how the provisions of Section 33 can be attracted to such a case. Before invoking

Section 33 the locus standi or competence of a party to make an application must be established. According to the Section the only competent

person to make an application is one who is party to the agreement. The Petitioner's firm which seeks to avoid the agreement and the award was

not a party to the agreement. Therefore, in my view the Petitioner firm has got no locus standi to make the application. Even if it be assumed, as

argued by the counsel for the Petitioner, that Des Raj was a common partner of both the firms that will not however make the two firms as one

entity. The two firms are two different entities. The observations made in Basant Lal Vs. Surendra Prasad and Others, at para 41 relied upon by

the learned Counsel for the Petitioner that the words ""any party"" contemplate and include the persons alleged to be parties though they may not be

actually parties and therefore they mean also persons who are not actually parties but who claim and who are alleged to have entered into

arbitration agreement are of no substantial import in the case of the Petitioner inasmuch as the authority relied upon lays down that any party though

not actually a party to the agreement must nevertheless be a party who claims to be so or is alleged to have entered into the arbitration agreement.

This, the Petitioner has not alleged much less, has established. Have the Respondents alleged or admitted anywhere that the Petitioner firm was a

party to the said agreement? They have not. Therefore the authority is distinguishable.

9. The next question that falls for consideration is about the true scope of Sections 30 and 33 of the Act, and their application to the present case.

Also as to what is the period of limitation for making such applications. This proposition of law has been the subject-matter of many decisions of

the Indian High Courts and conflicting views have been expressed on these questions. The difficulty has arisen because of inartistical language employed in the two sections. Nevertheless the two sections have to be construed harmoniously to obviate any difficulty or avoid any inconsistency

in them and in order to find out the scope and object of each of the two sections.

10. On a thoughtful consideration of the matter it appears to me that Section 30 applies to those cases in which an award has been filed and is

sought to be set aside on the ground of misconduct of arbitrator or umpire or that it is made in contravention of Section 35 or that it has been

improperly procured. These grounds stand quite apart from the ground of invalidity or the non-existence of the arbitration agreement or the award.

The words occurring in Sub-clause (c) of Section 30 ""or is otherwise invalid"" contemplate of those cases where the award suffers from a legal

infirmity which is apparent on the face of the award or the record which is the basis of the award. Section 33 is a distinct section and it covers

those cases in which an arbitration agreement itself or the award based on such agreement is sought to be avoided on the ground of non-existence

or invalidity of the agreement or the award. In other words Sub-clause (c) of Section 30 can have no application to cases where an agreement or

an award is challenged on the ground of its non-existence or invalidity. The agreement and the award based on such agreement may be declared

by the court void and destitute of any legal effect u/s 33 on account of their being non-existent or void. Thus Section 30(c) is not a genus and

Section 33 species thereof. The two sections have got different scope and have been enacted for achieving different objectives. In AIR 1954 Punj

171, Bhandari G.J. held as under: (At p. 173):

that when the court proceeded to dismiss the application u/s 30 on the ground that the application was barred by time, it was incumbent upon the

court to pronounce upon the application u/s 33 and to decide whether the arbitration agreement, and consequently the award which was given in

pursuance of that agreement was or was not invalid. If after hearing the parties the court came to the conclusion that the award was not invalid, it

was perfectly justified in pronouncing judgment in accordance with the award.

In Saha and Co. Vs. Ishar Singh Kripal Singh and Co., Bachawat J. (as he then was) dissenting from the majority view observed as under (at p.

349):

The Arbitration Act, 1940 distinguishes between an application for setting aside an award and an application for a decision that the award is a

nullity and consequently, does not legally exist and contemplates that an application of the former kind may be made u/s 30 and an application of

the latter kind u/s 33. Non-existence and invalidity of arbitration agreement and an order of reference to arbitration are not grounds for setting

aside the award u/s 30"". This minority view of Bachawat I was quoted with approval in a Full Bench judgment of Delhi High Court in AIR 1968

Delhi 21 where their Lordships held as under (at p. 25):

Where the challenge to the award is on the ground of factual non-existence of the arbitration agreement, the case would be one of challenge to the

existence of the award in Section 33 and not to its validity in 30 with the result that such an award will not (sic) to be set aside but adjudged is non-

existent. An award on the supposition of an arbitration agreement which dose not exist would be void ab initio and, therefore, not worthy of notice

in the eye of law for the purpose of being set aside. The same appears to be the position where the challenge to the award is on the ground that the

arbitration agreement is void by reason of non-compliance with any of the conditions precedent to its validity. The existence and validity of the

arbitration agreement, therefore may be challenged by an application u/s 33 even though an ward on the basis of the supposed arbitration

agreement has been made, and even though an application u/s 33 is made after the expiry of the time prescribed by Article 158 of the Limitation

Act of 1908. The (sic)me distinction between the existence and validity of an arbitration agreement or award reflected in Section 32 of the

Arbitration Act. thus. non-existence and invalidity of an arbitration agreement are not grounds for betting aside the award u/s 30 and Article 158 of

the Limitation Act (1908) does not apply where the relief sought is to have he award declared null and void on the ground that there existed no

arbitration agreement.

however, do not subscribe to the view said down by a Single Bench of Allahabad High Court reported as Firm Nanak Chand and Others Vs. Lala

Pannalal Proprietor, that u/s 33 the court has not ample power to set aside the award on any (sic)unds other than those mentioned in Section 30

and that Section 33 relates to the procedure which has to be adopted for setting an award aside, while Section 30 con(sic)es the power or jurisdiction of the court a which an application is made for setting side an award on the grounds mentioned in at section and that the two sections

have be read together.

11. Again, it is to be noticed that in under to set aside an award u/s 30 party has to apply within 30 days under Article 158 of the Limitation Act.

But this Article can have no application to an application made u/s 33 of the Act. There is no limitation prescribed for making a application under

this Section. In this law of mine I am fortified by a judgment this Court in AIR 1967 J and K 120 and Basant Lal Vs. Surendra Prasad and Others,

. I, however, cannot persuade to follow AIR 1955 Raj 153 which says that Article 158 will apply to (sic)th sets of the applications. In the case

before us from the subject-matter of the application it is evident that it does come within the purview of Section 33 and not Section 30 of the Act

The application is not beyond time as Article 158 can have no application to this. But even conceding this proposition in favour of the Petitioner, he

has to surmount a formidable difficulty that he can really seek relief u/s 33. This is so because the section confers a right on a party to challenge the

validity of an 'arbitration agreement' or an 'award'. This section nowhere gives power to a party to challenge the decree passed pursuant to the

award. Therefore, whereas an application can be made u/s 33 for adjudging an agreement or an award as invalid no such application is

contemplated by the section for challenging the decree based on the award itself. In my opinion when an award is made rule of the court after the

parties are given chance to file their objections thereto, a command of the court is super-added to it and it becomes a decree of the court. A party

cannot after the award has been made rule of the court apply for declaring an agreement or the award invalid without calling in question the validity

of the decree itself as the award has merged in the decree of the Court. It is true that jurisdiction of an arbitrator to give an award is founded upon

a valid agreement and if an award is made on a void agreement then it be ignored as it is destitute of any legal of is an award without jurisdiction

and it can feet. But even on the question of jurisdiction a party has to come at the appropriate time and show to the court before a decree follows

on the award that the award is invalid or void because of want of jurisdiction. u/s 17 of the Act where the court sees no cause to remit the award to the arbitrator for reconsideration and does not set aside the same it shall after the time for making the application to set aside the award has

expired or such application having been made after refusing it announce judgment according to the award and upon the judgment so pronounced a

decree shall follow. The question therefore is when a plea as regards the jurisdiction which is also a question of fact and law is available to a party

at an appropriate stage of the passing of the decree and the plea is not taken and a decree is passed without any objection, is it open to him to

come afterwards and agitate the question that the decree and the award are invalid? Will not his case be governed by the principle of constructive

res judicata?

It is true that a court which has no jurisdiction to try a cause cannot confer on itself competence to decide it and its decision on the question of

jurisdiction cannot operate as res judicata in a subsequent proceeding. But where the plea of want of jurisdiction in a forum though available is not

raised and a decree is passed in that case the question of jurisdiction must be held to have been decided by implication and the decree will be

constructively res judicata. This view was expressed in Jnan Chand Chugh Vs. Jugal Kishore Agarwal and Others, and Benaras Ice Factory Ltd.

Vs. Sukhlal Amarchand Vadnagra, . It is competent for legislature to alter the rights of parties by making appropriate provisions as it thinks proper

in a statute but courts of law are in no way authorised to alter the rights of parties, for if that view is held to prevail that will be abhorrent to the

doctrine of res judicata and in that case the court shall become instrument for the unsettlement of rights rather than for the preservation thereof.

Therefore even the reference on point of law which concerns the point of jurisdiction or limitation, if that question is a mixed question of fact and

law special consideration should not be applied for reopening it. In the instant case the question that the arbitration agreement is void and

unenforceable and therefore award founded on it is void is also a mixed question of fact and law. It was open to the party claiming under the

agreement at that time when notice was issued to it to show to the court that the arbitrator had no jurisdiction to make the award as the agreement

was void. This was not done. Therefore, keeping in view the principle enunciated above, it is too late in the day for the Petitioner even though his right to maintain this application is assumed to exist for the sake of argument to challenge the legality of the award when he could have done so at

the time when the award was filed in the court and he was asked to file objections but he did not file any. The question is, is it permissible to allow

a party to rake up a controversy after considerable time, say after 10, 20, 30 or 50 years from the date of the decree, when the decree has settled

the rights of the parties, when rights have been conferred, obligations have been incurred and an action has been taken pursuant to a decree

granting that no limitation is provided in the Act? In my opinion this cannot be permitted when the party seeking to do so could do so at the

appropriate time but failed to do so.

12. For all what has been stated above. I see no force in this application and the same is hereby dismissed.

