

(1964) 01 J&K CK 0002
In the Jammu And Kashmir High Court
Case No : Original Suit No. 10 of 1963

Radha Krishan Mirza

APPELLANT

Vs

The State of Jammu and Kashmir

RESPONDENT

Date of Decision : 02-01-1964

Acts Referred:

Arbitration Act, 1940 — Section 19, 34
Civil Procedure Code, 1908 (CPC) — Order 5 Rule 2, 9

Citation : (1964) 01 J&K CK 0002

Hon'ble Judges : J.N. Bhat, J

Bench : Single Bench

Advocate : J.N. Bhan, General, for the Respondent

Judgement

J.N. Bhat, J.—A suit for Rs. 34,333.69 was instituted by the Plaintiff against the Defendant, the State of Jammu and Kashmir, on 13-5-63

as arrears of some contract money due to him from the State. The suit came up before me on 31-5-63. On that day the learned Advocate General

put in his appearance on behalf of the Defendant, State of J. and K. It was directed that a copy of the plaint be furnished to the Advocate General

in order to enable him to file his written statement for which he wanted one and a half month's time. When the written statement was not filed by the

Advocate General on behalf of the State within the time granted, the case was again put up before me on 6-8-63. On that day the learned

Advocate General again made a request for further time to enable him to file his written statement. The case was adjourned to 29-8-62, giving him

further time to file the written statement, as no objection to further adjournment was taken by the other side. On 8-8-63 the Advocate General on

behalf of the State put in an application u/s 34 of the Arbitration Act requesting

this Court to stay the proceedings in the suit in terms of that

section. Along with this application he filed a Power of Attorney on behalf of the State in his favour executed on the same date.

The Plaintiff's learned Counsel filed objections to this application of the Defendant on 4-9-63 and a rejoinder to the objections was filed by the

Advocate General on 12-9-63. The parties wanted to lead evidence with regard to the application for stay and the objections thereto. The Plaintiff

examined himself as a witness and on behalf of the State Mr. H.K. Gandotra, Chief Engineer Roads and Buildings, Jammu, was examined as a

witness. I heard the arguments in the case on 27-12-63. After hearing arguments I reserved judgment.

2. The learned Advocate General has stated that the suit of the Plaintiff cannot proceed because of the arbitration clause in the agreement and the

Plaintiff is bound to get the case decided in terms of that clause by an arbitrator. The Defendant was at the time when the suit was instituted and still

remains ready and willing to do all things necessary to the proper conduct of the arbitration, and further there is no sufficient reason why the matter

should not be referred in accordance with the arbitration agreement to the arbitration of the arbitrator. Mr. Bhan appearing for the Plaintiff has

stated that in the first place there is no arbitration clause in the agreement and secondly the Defendant has lost that right because he took two

adjournments for filing the written statement and because he had taken other steps in the proceedings before putting in his application u/s 34 of the

Arbitration Act (hereinafter to be mentioned as the Act in this order). Mr Bhan has referred to the following authorities in support of his contention:

Roop Kishore Vs. United Provinces Government, , Bansidhar Narayanji Vs. E.B. Sukhia, , Edward Radbone Vs. Juggilal Kamalapat, , Abdul

Quddoos Dost Mohammad Momin v. Abdul Gani Abdul Rahman AIR 1954 Nag 332, Murlimal Santram v. Banarsidas and Sons AIR 1935 Sind

62:

On the other hand the learned Advocate General has referred to the following authorities:

Dewanchand v. State of J. and K. AIR 1961 J.& K. 58, Governor General v. Simla Banking and Industrial Co. AIR 1947 Lah 215, Prem Nath

Pran Nath v. Amba Parshad AIR 1941 Lah 64.

3. I shall first take up the point whether there is an arbitration clause in the agreement and whether the Plaintiff can be bound in terms of that clause

and other material on record to have been a party to an arbitration agreement. The clause referred to by the learned Advocate General is clause

No. 21 of the agreement which is in the following words:

In the event of any dispute between the contractor and the department, the decision of the Chief Engineer, P.W.D.J. and K. Government shall be

final and binding on both the parties.

In this connection the learned Advocate General has referred me to AIR 1961 J. & K. 58 and AIR 1947 Lah 215 (Supra). The ordinary rule is

that all civil matters shall be instituted in a civil Court of competent jurisdiction; the jurisdiction of a civil Court cannot be taken away unless it is

expressly so provided by some enactment for the time being in force. Therefore, when a party wants to snatch away the ordinary powers of a civil

Court, he has clearly to establish that the civil Court is precluded by an express provision of some, enactment to hear a cause. As has been held in

The State of Bombay Vs. Adamjee Hajee Dawood and Co., :

Every person has a right to bring a suit which is of a civil nature and the Court has jurisdiction to try all suits of a civil nature u/s 9, Code of Civil

Procedure. If this right has got to be taken away that must be taken away by express terms or by necessary implication.

Similarly it has been held in In re Sri Krishna Khanna and Bros. AIR 1934 Sind 29 that a reference to arbitration will be strictly construed because

it deprives a party of his right to resort to the ordinary tribunal.

4. It has been laid down in Halsbury's Laws of England, 3rd edn. vol. 2., page 5 that:

The Chairman of a conciliation board is not an arbitrator, and an architect or engineer is not in the position of an arbitrator where, as frequently

happens, a contract simply provides that on certain questions his certificate is conclusive.

5. Similarly on page 6 (ibid) we find 'where the engineer was to be the exclusive judge on all matters arising out of the contract and his certificate

was to have the force of an award"' it was held that such an agreement did not constitute submission to arbitration. Cardiff Collieries Ltd. v.

Meredith (1929) 45 TLR 321.

6. To my mind the language of Clause (21) of this agreement does not constitute an arbitration clause at all. What is the essence of an arbitration

clause is that the parties must consciously submit to the jurisdiction of a person or persons in his or their capacity of arbitrator or arbitrators and not

in any other capacity. It is true, as has been said in this case, that the decision of the Chief Engineer shall be final and binding on both the parties. It

is not clear from the language of this clause in what capacity the Chief Engineer P.W.D. had to give his decision. It may be that his decision would

be binding on the parties because of his professional skill, because of some noble traits in his character, his popularity in society, his spiritual

powers or his position in the department, or any other quality or attribute of his. What is of the essence in an arbitration clause is that a certain

person is to be designated as an arbitrator and that designation brings to him certain powers and responsibilities and clothes him with a legal

character. In the absence of any such character being bestowed upon him, I am afraid any person's decision cannot be regarded as an arbitrator's

award.

It is true that no particular form of language is necessary to designate a certain person as an arbitrator, but the intention of the parties must be clear

and unmistakably reduced into writing that they appoint a particular individual or individuals as arbitrator or arbitrators in the case of a dispute.

Without that express condition I am afraid we cannot stretch a stipulation as Clause (21) in the present agreement as an arbitration clause wherein

the Chief Engineer would be held to be an arbitrator within the meaning of the Arbitration Act. The two authorities referred to by the learned

Advocate General are AIR 1947 Lah 215 and AIR 1961 J. & K. 58 (Supra): in the Lahore ruling all the terms of the contract were not

reproduced except Clause (25) which said that the decision of the Superintending Engineer shall be final and conclusive and binding on all the

parties to the contract. Their Lordships have simply held that the absence of the words 'arbitration' 'arbitrator' and 'arbitration agreement' did not

make an arbitration agreement any the less an agreement of that sort.

7. So far so good. As already stated the intention of the parties should be to clothe the person with the powers of an arbitrator, no matter what

language may be used in the agreement or the arbitration clause.

8. AIR 1961 J. & K. 58 (Supra) has simply followed this authority without discussing the matter in detail and in the absence of any argument in support of its view, I am afraid the finding is too cryptic to be followed.

9. With all this, I am afraid the above discussion in this case is of an academic nature and may sound as an obiter dictum, because in this case the

Plaintiff has himself admitted:

I know that there is a clause in the agreement that any dispute between me and the State shall be referred to the Chief Engineer P.W.D. for

arbitration whose decision shall be final, and that is why I approached him.

This clinches the matter so far as the Plaintiff is concerned. The Plaintiff has taken Clause (21) clearly as an arbitration clause in the agreement and

on his own showing he approached the Chief Engineer P.W.D. for arbitration in the dispute between him and the State in this case. So whatever

lacuna may be existing in Clause (21) of the agreement, there has been no misgiving in the mind of the parties that by incorporating this clause they

appointed the Chief Engineer P.W.D. as an arbitrator for any dispute arising out of the contract. To that extent, apart from my interpretation of

Clause (21) read by itself, the entire material on record including the statement of the Plaintiff leads to the inference that the parties acted with

consensus ad idem on the matter of appointing the C.E. P.W.D. as their sole arbitrator in the dispute.

10. The second argument advanced by Mr. Bhan is that as the learned Counsel for the Defendant State took two adjournments to file his written

statement, the protection given u/s 34 of the Act to get the suit stayed in the civil Court could not be enjoyed by the Defendant. As already stated,

the Advocate General first appeared for the Defendant State on 31-5-63. On that day it was directed that a copy of the plaint be supplied to him

and he sought a month and a half's time for filing the written statement. He again appeared for the State on 6-8-63 and made Anr. request for filing

the written statement. For this purpose an adjournment was granted to him. But from the file it is not clear on what date the Advocate General

came in possession of a copy of the plaint. I called the learned Advocate General and asked him if he could make a statement on the subject, but

he professed his inability to throw any light on the matter. So, in the absence of any cogent evidence on the record the bald facts are that the,

Advocate General represented the State on 31-5-63 and sought an adjournment for filing the written statement.

The copy of the plaint was sent to the Chief Secretary along with the notice of the suit on 16-5-63. On the subsequent hearing also - on which day

he must be presumed to have gone through the plaint and other relevant papers - he again made a request for adjournment of the case to enable

him to file his written statement. There are numerous authorities on this point which lay down that an application or a request whether written or

oral, made by a Defendant to file his written statement would amount to taking a step in the proceedings debarring the Defendant from setting, up

the plea of the. stay of the suit u/s 34 of the Act. The Calcutta High Court has persistently followed this view. The Karnani Industrial Bank Ltd. Vs.

Satya Niranjana Shaw and Others, , Subal Chandra v. Md. Ibrahim AIR 1943 Cal 484 and Sadhan Kumar Bhattacharjee Vs. Sunil Kumar

Bhattacharjee and Others, .

11. The High Court of Allahabad in a series of cases reported as Roop Kishore Vs. United Provinces Government, ; United Provinces

Government Vs. Sri Har Nath, and Union of India (UOI) Vs. Girish Chandra and Others, has also held that an application for adjournment

enabling a Defendant to file his written statement would be tantamount to taking a step in the proceedings. In Roop Kishore Vs. United Provinces

Government, , a Division Bench authority, Dhar, J. has said:

It may be possible to hold in some cases that an application for adjournment of a case to enable the Defendant to file a written statement was not a

step in the proceedings within the meaning of Section 34 of the Act, but prima facie such an application should be treated as a step in the

proceedings within the meaning of Section 34 and the whole burden should be upon the Defendant to establish the circumstances which will lead to

the result that effect should not be given to the prima facie meaning of the application.

This means that in the absence of any fact showing that the Defendant did not intend to submit to the jurisdiction of the civil Court, the presumption

would be that he was taking a step in the proceeding which would deprive him of pleading that the suit should be stayed and the matter referred to

the arbitrator.

12. The later authorities also lead to the same conclusion that an adjournment sought by the Defendant for filing his written statement would

constitute a step in the proceedings as contemplated by Section 34.

13. The Nagpur High Court in AIR 1954 Nag; 332 has held that an oral application for time to file a written statement is undoubtedly taking a step

in the proceedings. An application is as good an application even if it is made orally instead of in writing.

14. The Bombay High Court in Firm Chimanram Mothilal v. Firm Vandravandas Goverdhandas AIR 1948 Bom 55 and Nuruddin Abdulhusein

Vs. Abu Ahmed Abdul Jalli, has laid down that:

the true test for determining whether an act is a step in the proceedings is not so much the question as to whether it is an application - although of

course, that would be a satisfactory test in many cases - but whether the act displays an unequivocal intention to proceed with the suit and to give

up the right to have the matter disposed of by arbitration.

Chagla, C.J. in Jadavji Narsidas Shah and Co. Vs. Hirachand Chatrabhuj, has laid down two tests for the application of Section 34. According to

him the two tests which ought to be applied are, that there must be some application made by the party in the proceedings and that application

must be of such a nature as to lead the Court to the conclusion that the party prefers to have his rights and liabilities determined by the civil Court

rather than by the domestic forum upon which the parties might have agreed.

16. The converse of this proposition may be stated like this: If a party after knowing the case against him prays for an adjournment to file the

written statement, that will be deemed to be a step in the proceedings.

17. The High Court of Lahore in AIR 1941 Lah 64 has held:

Having regard to the provisions of Order 5 Rule 2, CPC a proceeding must be taken to have commenced within the meaning of Section 19,

Arbitration Act only when the Defendant is supplied with a copy of the plaint and the fixing of time (SIC) by the Court for filing a written statement

when the Defendant has been supplied with a copy of the plaint cannot, in any sense, be regarded as a step taken by the Defendant in the

proceedings inasmuch as time for filing the written statement is necessarily given by the Court.

In State of Himachal Pradesh Vs. Lalchand Shahi, it has been laid down:

No person can be deemed to take any step in the proceedings who is not aware of what the proceedings are. Therefore the prayer for

adjournment of a Counsel who upto that moment had received no instructions from his client did not amount to the taking of a step in the

proceedings u/s 34 of the Act.

18. Basing his argument on this authority, the learned Advocate General stated that he had actually got his Power of Attorney from the State on 8-

8-63 on which day he applied for stay of the proceedings. Therefore he should be deemed to be legally conversant with the facts of the case on

that day. I am afraid this argument is farfetched and cannot help the learned Advocate General for the following reasons:

19. When the Advocate General put in his appearance on 31-5-63 it was an unconditional appearance on behalf of the State. The subsequent

appearance also was unqualified. The drawing up of a regular Power of Attorney is of no consequence. If the Advocate General were not fully

briefed on these two hearings, he should have given some such indication in the Court. On the other hand he in unequivocal terms stated that he

had been engaged by the Defendant and was appearing for the Defendant without any qualification or reservation. He must have discussed the

facts of the case with his principals long before he executed the Power of Attorney. He has not taken us into confidence when his principals

contacted him in this case, but the latest date of his having been engaged in the case shall be deemed to be 31-5-63 when he first appeared for the

Defendant in the suit. After that he took two adjournments to file the written statement. There is no reason advanced by the learned Advocate

General why his two requests or at least one of them, the latter in order of time, should not be deemed to be a step in the proceedings disqualifying

him from invoking the provisions of Section 34 of the Act, unless, of course, it can be argued in the words of Mushtaq Ahmad J. in AIR 1949 AII

611 that:

No classification is suggested of the cases in which the rule would apply and those in which it would not apply. At least nothing has been urged by

the learned Counsel to show that the rule would not apply in the present case except that the Defendant was the U.P. Government. We do not

consider that this circumstance can be taken as a ground for departing from the rule laid down in the ruling mentioned above.

20. The law makes no distinction in a case where the Defendant is the State from one where the Defendant is a private person.

21. About the question of fact whether the Plaintiff approached Mr. H.K. Gandotra Chief Engineer for arbitration, I do not think that it is

necessary to adjudicate upon this matter in view of my above findings, but none-the-less as the point was raised, I think it worth-while to say

something about this controversy also. I feel the Plaintiff has not been able to prove that he ever made any attempt at getting the matter decided by

arbitration of the Chief Engineer P.W.D. There is no such mention of his having approached anybody for arbitration in either the notice or the

plaint. The oral statements on this aspect of the case are very loose on either side, but I am convinced that there has never been a real request or

offer by the Plaintiff to the Chief Engineer to get the matter settled by arbitration. This point is therefore decided against the Plaintiff.

22. In view of the above authorities and the findings arrived at by me I am sure that the learned Advocate General after knowing the full facts of the

case long before 6-8-63 applied for extension of time for filing the written statement, which will be deemed to be a step in the proceedings, no

matter that he or his principals changed their mind on the 8th August. The right which they had u/s 34 had been completely lost on the 6th of

August when a second adjournment was sought for in filing the written statement. The suit cannot, therefore, be stayed and must go ahead. The

Defendant is directed to put in his written statement within three weeks from today and the application of the Defendant u/s 34 of the Act for stay

of the suit is rejected.