
(1979) 05 J&K CK 0001

In the Jammu And Kashmir High Court

Case No : Civil First Miscellaneous Appeal No. 35 of 1976

Union of India (UOI)

APPELLANT

Vs

Haikim Chand and Co.

RESPONDENT

Date of Decision : 03-05-1979

Acts Referred:

Arbitration Act, 1940 — Section 34
Contract Act, 1872 — Section 70

Citation : (1979) 05 J&K CK 0001

Hon'ble Judges : Mian Jalal-ud-Din, C.J

Bench : Single Bench

Advocate : V.S. Malhotra, for the Appellant; L.K. Sharma, for the Respondent

Final Decision : Dismissed

Judgement

Mian Jalal-Ud-Din, C.J.—This is the defendant's civil first appeal against an order dated 9-3-1976 of the Sub-Judge (CJM) Jammu,

dismissing the application u/s 34 of the Arbitration Act and refusing to stay the proceedings.

2. A suit for declaration and injunction brought by M/s. Hakim Chand and Co. against Union of India is pending in the court of the Sub-Judge

(CJM) Jammu. The reliefs claimed in the suit are that the contracts between the parties are not valid and enforceable at law as these were executed

not in accordance with law and Constitution. These contracts also suffer from the doctrine of frustration. As the contracts are not valid, therefore,

all the supplies of milk made by the plaintiff could only be determined in terms of Section 70 of the Contract Act and are liable to be paid on

reasonable and fair prices. The defendant appeared and submitted an application u/s 34 of the Arbitration Act. He contended that by virtue of

Clause 20 of the agreement, the suit could not be tried by the civil court and the disputes were referable to the aforesaid clause and needed to be

adjudicated upon by the arbitrator designate in the said clause. The defendant prayed for the stay of the suit. By supplementary affidavit the

defendant affirmed that he was ready and willing to get the matter settled and decided by the arbitrator. The application was resisted by the plaintiff

on twofold grounds, namely, that the question relating to the constitutional invalidity of the contracts could not be gone into by the arbitrator. This

matter could only be heard and decided by the Civil Court. Secondly that the defendant was earlier given the option to refer the dispute to the

arbitrator. As he did not agree, there was, therefore, no indication of the fact that he (the defendant) was ready and willing to do all things

necessary to the proper conduct of the arbitration even before or at the time when the proceedings commenced. The trial Judge after hearing the

counsel for the parties declined to accede to the request of the defendant to stay the proceedings in terms of Section 34 of the Arbitration Act. He

observed that because of the alleged invalidity of the contracts in regard to which the defendant sought arbitration the Court could not refer the

matter to the arbitrator as the arbitrator could not pronounce upon this question. That by the conduct of the defendant it was manifest that he was

not willing to do anything that would show his readiness and willingness to seek arbitration of the disputes between the parties. The third ground on

which the order of rejection proceeded was that the suit involved difficult and complicated questions of law and in view of that the Court was not

satisfied that such questions should be referred to the arbitrator. Aggrieved by this order, the defendant has come up in appeal before this Court.

3. In order to attract the provisions of Section 34 of the Arbitration Act, and claim the stay of the proceedings before the Civil Court, a party

seeking arbitration must satisfy the Court that he was at the time when the proceedings were commenced, and still remains, ready and Willing to do

all things necessary to the proper conduct of the arbitration. The legal proceeding which is sought to be stayed must be in respect of a matter or a

dispute which the parties had agreed in the agreement to be referred to the arbitrator. The applicant must not have taken any steps towards further

proceedings of the suit. And lastly, the Court must also be satisfied that there are no sufficient reasons which would justify the Court to stay the

proceedings.

4. In the instant case, it is noticed that over and above, the conditions as laid down in Section 34 of the Arbitration Act, there is yet another

important aspect which requires to be taken into consideration before the application u/s 34 can be disposed of. The said aspect relates to the

allegation made in the plaint as regards the constitutional and legal validity of the contracts. Now if the very vires of the contracts is called in

question by the plaintiff in his suit, then it is the Civil Court alone that is competent to adjudicate upon this matter. The arbitration clause inserted in

the contract is enforceable only when the contract is found valid. The authority of the arbitrator to arbitrate in terms of the arbitration clause is

founded upon the validity of the contracts. The arbitrator is the creature of the agreement, therefore, he is not competent to pronounce upon the

validity of the contract. When this important aspect was brought to the notice of the learned Counsel for the appellant, he conceded that the

arbitrator could not decide the constitutional validity of the contracts but nevertheless submitted that in such circumstances, the Court may raise an

issue with regard to the validity of the contract, try and decide this issue, and if the contracts are found valid and enforceable, then refer the case to

the arbitrator. In other words he claims partial stay. I should not have hesitated to accede to this argument but there are some practical difficulties,

the consideration of which impels me to hold that such a course may not be conducive to justice. In the first place, if partial stay in terms of Section

34 is granted and it is held to be operative in law, it may not ultimately lead to the passing of an order of absolute stay of the legal proceedings

when from the material on the record it is found that the defendant has not by his conduct shown that he was willing to perform his obligations

under the arbitration agreement at the commencement of the proceedings. This factual aspect was gone into by the trial Court. The trial Court

examined it and came to the conclusion that the conduct of the defendant was suggestive of negative response. This being a question of fact and

there being nothing to suggest that this finding stands vitiated on account of any other circumstance, is binding on the panes. As observed in Food

Corporation of India Vs. Thakur Shipping Co. and Others, , the High Court is not justified to interfere with a finding of fact unless it is shown that

the finding is arbitrary or perverse. This was a case where a party to an arbitration agreement had applied for stay of legal proceedings u/s 34. The trial Court found that the appellant had chosen to maintain silence and had failed to act when he was called upon to do so. There was no positive gesture signifying willingness on the part of the applicant to seek arbitration at the commencement of the proceedings. The stay was consequently refused. The High Court of Madras on appeal granted stay after reversing the order of the trial Court. The Supreme Court held that the trial Court's finding that the defendant was not ready and willing to go to arbitration at the time when the suit was instituted was a finding of fact and it was not perverse or arbitrary, the High Court was wrong in interfering with that finding of fact. Not only that the applicant must show that he was willing to do his part under the arbitration agreement at the commencement of proceedings, but it must also appear that he, in fact, was willing to seek arbitration of the dispute even before the commencement of the proceedings. The learned trial Judge has relied upon an unreported decision of the Supreme Court, quoted by him as 1975 Feb. Part, page 137 : (1976 UJ 137 (SC)). The relevant portion of the judgment as quoted in the judgment of the trial Court is reproduced hereunder:

Readiness and willingness must also be before the suit is filed. Where the defendant remained silent in spite of many telegrams and the plaintiff had to file suit, it was held that readiness and willingness after filing the suit, would not entitle the defendant to claim stay of the legal proceedings.

Again Section 34 of the Arbitration Act confers discretion on the Court to order or not to order stay of the legal proceedings but this discretion is to be exercised judicially according to judicial principles. Once the discretion is exercised properly, the High Court will be loath to interfere with that discretion, unless it is shown that the exercise of the discretion has resulted in grave injustice. In the instant case, the Court below has taken into consideration the nature and character of the suit and the allegations made therein. The plaintiff primarily seeks declaration to the effect that the contracts are invalid, that they suffer from the doctrine of frustration, that they are unenforceable at law that Section 70 of the Contract Act is applicable. Now these important and complicated questions of law cannot ordinarily be tried by the arbitrator. They require judicial mind to be

brought to bear upon them, It is the Judicial Court alone that can effectively examine and determine these legal controversies between the parties.

Therefore, it can be said that there is sufficient reason u/s 34 not to stay the proceedings. All these matters have been taken into consideration by

the trial Court and it has come to the conclusion that it is satisfied that there is no sufficient reason to refer the matter to arbitration, in accordance

with arbitration agreement. For these reasons, I am of the view that the order of the trial Court rejecting the application u/s 34 of the Arbitration

Act and declining to grant stay is perfectly according to law and cannot be interfered with in this appeal.

5. The result is that the appeal fails and is hereby dismissed leaving the parties to bear their own costs.