
(1983) 10 J&K CK 0002
In the Jammu And Kashmir High Court
Case No : Arbitration Application No. 128 of 1980

Wali Mohd.Kar

APPELLANT

Vs

Habib Ullah Kar & anr

RESPONDENT

Date of Decision : 14-10-1983

Acts Referred:

Jammu and Kashmir Arbitration and Conciliation Act, 2002 — Section 2(a), 3

Citation : (1983) JKLR 498 : (1984) KashLJ 11 : (1984) SriLJ 56

Hon'ble Judges : A.S.Anand, J

Bench : Single Bench

Advocate : Z.A.Shah, Advocates appearing for the Parties

Judgement

1. The members of the Beopar Mandal, Baramula, have submitted an award made by them, on 14th of July, 1980, to this court with the request that the award be made a rule of the court. Their application is supported by the petitioner, who was one of the parties to the proceedings before them. Notice was issued to the parties and while the petitioner accepted the award and prayed that the same to be made a rule of the court, the respondents did not accept the award. Respondent No. 1 filed C. M. P. No. 10 of 1981, on 30th of January, 1981, being an application under section 30/33 of the Arbitration Act and prayed for the award to be set aside on the grounds detailed therein. Respondent No. 2 also filed a similar application on 28.2.81. being C. M. P. No. 19A of 1981 Since the award was acceptable to one party and not to the other, following issues were raised by a learned Single Judge of this court on 18.9.1981:

2. 1. Is there no arbitration agreement in writing between the parties? If so, is the award a nullity? O. P. R.

2. In case the answer to issue No. 1, is in negative, is the appointment of Beopar Mandal an artificial and unregistered body, as arbitrator, bad in law, If so how? O. P. R.
3. Has the award been made in violation of principles of Natural Justice? If so, how? O. P. R.
4. Is the award based on no legal evidence and is against the record, and as such not maintainable ? If so. how ? O. P. R.
5. Is not the application making award a rule of the court maintainable? If so, how? O. P. R.
6. Is the award liable to be vitiated on account of bias, lack of impartiality and misconduct? If so, how? O. P. R.
7. Has not the award been made within four months? If so, what is its effect? O. P. R.
8. Has not the award been made by all the members of Beopar Mandal ? If so, what is its effect? O. P. R.
9. Does the award suffer from any error apparent on the face of record ? If so, how ? O. P. R.
10. Was the allotment of shop to the petitioner not a part of reference. If so, what is its effect ? O. P. R.

11. Relief?

3. Issue Nos. 1, 2, 5 and 7 were directed to be treated as preliminary issues. Learned counsel for the parties submitted before the court that no evidence was required to be led on these issues and the case was set down for arguments on the preliminary issues. The case, if appears, was, thereafter, adjourned from time to time at the request of counsel for the parties.
4. On the case coming up for hearing before me it transpired that the application on the basis of which the alleged arbitration proceedings had started, as also other documents and depositions had not been sent by the arbitrators to this court. They were, therefore, directed to end the record to the court which was subsequently received from them.
5. I have heard learned counsel for the parties on the preliminary issues and have perused the record.

ISSUE NO. 1

6. Learned counsel for the respondents has argued that there was no arbitration agreement executed between the parties and no reference of any

dispute was made to the Beopar Mandal under the Arbitration Act and the same cannot be made a rule of the court. Learned Counsel went on to

urge that the intention of the parties was not to appoint the Beopar Mandal, Baramulla as arbitrators in the case but to appoint them only as

mediators to settle the differences and accounts between the parties. Further argued the learned counsel, that the Beopar Mandal was required

only to adjudicate upon the settlement of accounts and therefore it had no jurisdiction to make an award under the Arbitration Act,

7. In reply, learned counsel for the petitioner, Mr. Z A. Shah, has submitted that an arbitration agreement is in the nature of a contract between the

parties and what is relevant is to see as to what was the intention of the parties. It is submitted that a written agreement to refer the disputes to

arbitration need not be on a common paper nor need it be in a particular form and that an agreement can be spelt out even from the

correspondence and need not be drawn up formally. Submitted the learned counsel that the intention of the parties in this case was clear that they

desired the disputes to be settled by the Beopar Mandal acting as arbitrators and that since the respondents had participated in the proceedings

and had produced the record before the arbitrators and made oral statements before them and signed the minute book, it unequivocally showed

that the parties were agreed that the Beopar Mandal should act as an arbitrator to settle the disputes that had arisen between the parties. Learned

counsel in this connection also urged that the intention of the parties to have the differences resolved through arbitration was also clearly spelt out

from the fact that even prior to the submission to Beopar Mandal, the parties had referred their disputes or adjudication to some other arbitrators

but since those arbitration proceedings were not completed, they superseded the earlier arbitrators and appointed the Beopar Mandal as the

arbitrator. After making reference to various applications in the record and minutes recorded in the Minute Book of the Beopar Mandal on 29th

of April, wherein the parties had appeared and submitted before the Beopar Mandal that they shall be bound by their decision, learned counsel

urged that the intention of the parties had become more than clear. He further urged that the applications dated 19.4.1980 by Habib Ullah Kar and

Abdul Hamid Kar, and on 25.4.1980 by Wali Mohd Kar clearly brought into existence the arbitration agreement between the parties.

8. Indeed, in this case, there is no single document which can be called an arbitration agreement, Sec. 2(a) of the Arbitration Act provides that an arbitration agreement means a written agreement to submit present or future differences to arbitration whether an arbitrator is named therein or not.

However, in order to constitute an Arbitration Agreement in writing, it need not be signed by all the parties. It is sufficient if the terms are reduced to writing and the agreement of the parties thereto is established. To be valid under the Act, no particular form or formal document, is necessary.

The agreement may even be collected from a number of documents or from correspondence. In the instance case, the agreement is sought to be

spelt out by the petitioner from the applications dated 19480, 2541980, and 2941980. On 19480, Abdul Hamid addressed an application to the

President Beopar Mandal in which he stated:

Janab Aali

Gujarish khidmat ye hai ke Hamara apas mein nisbat dookan wagera wa ineba hisab ka Jagra hai. Is silsla mein dookan bund hai. Brai insaf hamara hisab fermaya Jaye.

on receipt of this application, the Beopar Mandal directed the applicant to deposit Rs. 25/ as the fee so that the application could be taken up. On

the same date i. e. 19480 Habib Ullah Kar also addressed an application to the President Beopar Mandal Baramulla stating :

Janab Aali

Gujarish khidmat ye hai ke hamara apas mein nisbat dookan wagera wa hisab ka Jagra hai es silsla mein dookan band hai. Kafi nuksan hua hai brai insaf hamara hisab fermaya jay.

This applicant was also directed to deposit Rs. 25/ as fee by the Beopar Mandal Baramulla. On 25th of April, 1980, Wali Mohd Kar addressed

the following applications to the President Beopar Mandal.

Gujarish khidmat ye hai ke mabein brotherian musamian Habib Ullah wa Abdul Hamid mein mujar ka dermian tazarat meeva karobar wa mankula

wagera..... dukanat wagera ka taksim ki nisbat kush arse se jagra chal raha hai aur es jagra ko hai karne ke liye brathron kudne apne daftar mein

arji nisbat taksim joydad mankula wagra..... diar ke hai. mujar chunkees mein ek uhsm frik hun es tour mujar bhi ye ajj aap ki kidmat mein de

raha hun ke es tanaza ko baad takekat wa shadit freken muiyna hisbat hem cha
kisam ke amurat ka mulaiza wa mu bane kar ke taksim joydad

wagrea mutzakra hisban ke nisbat munasib fasila sadar farmyian.

The applicant was also directed to deposit Rs. 25/ as the fee.

9. On 29.4.1980, Wali Mohd Kar submitted another applications to the Beopar Mandal in which he stated that previously a Board of Arbitrators

had been appointed comprising of certain members of the Beopar Mandal, but those arbitrators have failed to conclude the proceedings and make

the award. He, therefore, requested the Beopar Mandal that in the arbitration proceedings now pending before the Beopar Mandal, none of the

previous members, who had failed to conclude the arbitration proceedings, be associated. In the proceedings of 29.4.1980 recorded in the

Minute Book, it is receded that the applications of the three brothers come up for consideration and the President of the Beopar Mandal

impressed upon the members to deal with the matter carefully and with honesty and also directed the parties to the dispute that in case they wanted

the Beopar Mandal to proceed further and to settle the dispute between the parties, they should state in writing that the decision of the Beopar

Mandal shall be binding and acceptable to them. The parties accepted that position and stated that the decision of the Beopar Mandal will be

acceptable and binding on them. They also signed the minute book at page No. 12 in token of their agreeing to abide by the decision of the

Beopar Mandal. Can on the basis of the aforesaid applications and the minutes of proceedings of Beopar Mandal dated 29.4.1980 it be said that an

arbitration act had come into existence between the parties, is the basic question which requires determination at my hands at this stage?

10. As already noticed to constitute an arbitration agreement in writing no particular form or the execution of a formal document is necessary. It is

sufficient if there is an agreement in writing whether contained in one document or several documents or correspondence. What is important is to

find out as to what was the intention of the parties and what are the points of their agreement. The words used in the agreement, documents, or

correspondence must be words of choice and should disclose the determination of the parties to go for arbitration. Assuming that the applications

of the parties addressed to the Beopar Mandal can be treated as documents or

correspondence, do they constitute an agreement in writing within the meaning of the Act. In these application which were submitted to the Beopar Mandal none of the parties expressly appointed the Beopar Mandal as an arbitrator. In fact a perusal of the application shows that the parties wanted the Beopar Mandal to mediate between them and to settle their disputes and accounts. Therefore, even if the widest possible meaning is given to the intention expressed in the minutes of the proceedings dated 29/4/80, it can only be said that the parties agreed that the Beopar Mandal should act as a mediator to settle the matters between them and therefore the Beopar Mandal was not appointed as an arbitrator within the meaning of the Act. Both Habib Ullah and Abdul Hamid Kar in their applications, contents whereof have been noticed elsewhere in this judgment, have only desired that their accounts be settled. In none of these applications, have the parties spelt out the exact dispute which they intended to be determined in a quasi judicial manner.

11. Under Sec. 3 of the Arbitration Act, it is provided that unless a different intention is expressed in the arbitration agreement, it shall be deemed to include the provisions set out in the first schedule in so far as they are applicable to the reference. It implies that an arbitration agreement may include all or any of the provisions set out in the 1st schedule. The object of this section is to include in all arbitration agreements a well known set of Rules and their expression "unless a different intention is expressed therein" makes it clear that it is open to the parties to exclude the provisions of the First Schedule by the agreement. However, before the provisions set out in the First Schedule can come to the aid of an arbitration agreement, it must be clear from the documents, on the basis of which an arbitration agreement is desired to be set up, that the intention of the parties was to refer the disputes to the arbitrators. After carefully considering various documents referred to elsewhere in the judgment, I find it difficult to agree with Mr. Z. A. Shah that from those documents an agreement between the parties to refer the disputes and differences to arbitration can be spelt out. I am unable to persuade myself to hold that there was any meeting of minds between the parties that their disputes and differences shall be settled by the Beopar Mandal acting as an arbitrator within the meaning of Arbitration Act. There is a definite distinction

between "'an arbitrator'" and 'a mediator'. An arbitrator is a person to whom differences and disputes are submitted by the parties and he is a judge

of the parties own choice. His functions are quasi judicial in nature. "'A mediator'" on the other hand, is one requested to mediate or intervene

between the parties, as a friend, to bring out a settlement. His act is not that of an arbitrator. The settlement brought about by him is net an award

within the meaning of the Arbitration Act. In my opinion, the Beopar Mandal, which is a body of business men of the locality entersted to look after

the interests of the business man, was only appointed as a mediator to intervene and settle the disputes between the parties as on account of the

disputes, the shop had been closed which was causing loss to the parties, a matter of concern to the business community also.

12. Thus, considered on the whole, I hold that there was no valid arbitration agreement between the parties and that the parties did not make any

reference of their disputes by any agreement in writing to the Beopar Mandal Baramulla to act as an arbitrator and the Beopar Mandal was

appointed as a mediator only.

13 In view of this finding, though it is not necessary for me to deal with the other submission of Mr. S. T. Hussain that since an arbitration

agreement is chargeable under Article 5 of the Stamps Act and no Stamp duty having been paid on the so called agreement, the agreement is

invalid, but since learned counsel for the parties have addressed arguments on this point and the question may arise in other cases, I deal with it

also.

14. A plain reading of Section 5 shows that arbitration agreement is chargeable under section 5 of the Stamps Act. However, letters written by the

parties to the arbitrators authorising them to arbitrate do not require to be stamped under this section. Also, where the agreement is to be deduced

from correspondence there is no requirement of law that the letters from which arbitration agreement is to be spelt out must be stamped. Thus, the

provisions of Section 5 of the stamps Act do not extend to such letters. Although, in the instant ease I have held that there was no arbitration

agreement in existence between the parties, yet, even if it was otherwise, the letters written by the parties did not require any stamp duty and

therefore the validity of these letters on the alleged ground of not bearing

requisite stamp under section 5 of the Act can not be doubted. That apart, even where an arbitration agreement though required by law to be stamped is unstamped. The award based on it can not be questioned on the ground of the agreement not being stamped in view of the provisions of Sec. 6 of the Stamps Act. There is a clear distinction between the proceedings before the arbitrators and proceeding before the Court. So far as the arbitrators are concerned, they can proceed under sec. 35 (a) of the stamps Act when the defect is brought to their notice. But if they take up the enquiry on the basis of an unstamped arbitration reference, the admission of the reference cannot be Utter on called in question to test the validity of the arbitration proceedings. However, the failure of the arbitrators to act u/s 35 (a) of the Stamps Act would preclude the court from proceeding under the section in proceedings before it to set aside the award on the ground of the absence of the requisite stamps, provided, however, that the objection to the inadmissibility of the reference under sec. 36 had been raised before the arbitrator in the first instance. In the present case, however the applications of the parties addressed to the Beopar Mandal not being arbitration agreements, the same did not need any stamps duty.

15. Since, I have found that there was no valid arbitration agreement between the parties, it must be held that the so called award based thereon is invalid and is a nullity. Issue No. 1 is, therefore, decided in favour of the respondent and against the petitioner.

Issue No. 2

16. In view of the finding on issue No. 1, it is not necessary to decide this issue. In any event, there is no bar to a dispute being referred for arbitration, to a body of persons who can sit as a tribunal while acting as arbitrators, (reference in this connection may be made with advantage to AIR 1952 Cal. 294). Reference for arbitration can even be made to a fluctuating body or an association, provided the intention of the parties is clear that such a body of persons or association is, under terms of the agreement, required to carry out the arbitration. This issue is, therefore, disposed of accordingly.

Issue No. 5

17. Learned counsel for the respondent did not press this issue. Even otherwise,

no infirmity was brought to my notice which would show that the application for making award a rule of the court was not maintainable Issue No. 5 is therefore decided against the respondent.

Issue No. 7

18. Learned counsel for the respondent did not press this issue either. The issue is also, therefore, decided against the respondent.

19. As a result of the finding on issue No. 1, I hold that the application for making the so called award a rule of the court merits dismissal. In the sence of any valid arbitration agreement, the so called award made by the Beopar Mandal, Baramulla is a nullity. The award is accordingly set aside and the prayer for making it a rule of the court is rejected.

20. On 30121980, when notice was issued of this application to the parties, the proceedings in the civil suit pending between the parties in the court of Sub Judge Baramulla were stayed. Since, the application has been dismissed those proceedings shall now revive. Parties through their counsel are directed to appear before the learned Sub Judge, Baramulla, on 1xi1983 who shall proceed with the suit and dispose of the same in accordance with law.