

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU**

CJ Court

Case: AA No. 17/2009
Reserved on : 10.03.2023
Pronounced on :02.06.2023

Shukal Singh ...Petitioner(s)/Appellant(s)

Through: Mr. Pranav Kohli, Sr. Advocate with
Mr. Vastav Sharma, Advocate.

v/s

G.M., Jammu Co-Operative Wholesale Respondent(s)
Ltd.& Anr.

Through: Mr. Rupinder Singh, Advocate

CORAM : HON'BLE THE CHIEF JUSTICE

ORDER

01. The present application has been filed under Section 8 read with Section 11 of the *Arbitration and Conciliation Act, 1996*(for short the 'Act') for appointment of an arbitrator to settle the dispute between the applicant and the respondents.

02. It is the case of the applicant that there is a shop, being Shop No. 2, situated in SMGS Hospital, Jammu, which is under the management of the respondent no.1, which was allotted to the applicant on lease for a period of 20 years with effect from 31.01.2003 for which an Agreement was executed on 31.01.2003.

03. As per the aforesaid Agreement, the applicant was to pay a sum of ₹ 50,000 per month as commission-cum-rent for the first 5 years, which was to be enhanced by 10% for the next 5 years and on expiry of 10 years, to be enhanced

by another 10% and after 15 years of the contract, the rent was to be increased by 15%.

04. The applicant, accordingly, had been running the Fair Price Shop and selling medicines under the name and style of '*Super Bazar Medical Fair Price Shop*'. According to the applicant, he was constrained to approach the Court of Principal District Judge, Jammu, under Section 9 of the Act as the respondent no.1 sought to oust him but managed to obtain a *status quo* order from the Court of Principal District Judge, Jammu.

05. The applicant also stated that though he was to pay the monthly rent of ₹55,000/- he was compelled to pay the sum of ₹60,000 per month because of which a dispute arose between the applicant and respondents.

06. It is also the case of the applicant that as per Clause 5 the aforesaid Agreement dated 31.01.2003, the respondent No.1 cannot sublet the shop to any other person and that the respondent No.1 had no right to interfere with the running of the shop before expiry of 20 years as per the Agreement.

07. It has been also alleged by the applicant that he was transferred and posted at Medical Co-operative Shop, Gandhi Nagar Hospital, Jammu, by an order dated 30.05.2009 and the respondent no.1 was interfering with the running the shop, though the applicant is neither an employee of the respondent no.1 nor receiving any salary or emolument from the respondent no.1, as he is only a lessee as per the aforesaid Agreement.

The applicant also alleged that the respondent no.1 unilaterally rescinded the Agreement, thus, creating a dispute.

08. The applicant stated it is provided under Clause 11 of the Agreement that if any difference arises out of the aforesaid Agreement between the parties, it is

required to be referred to an arbitrator to be appointed with consent of both the parties, which shall be final and binding on the parties.

Accordingly, the applicant served a notice to the respondent no.1 that he will not pay the rent of ₹ 60,000/- and he cannot be ousted before expiry of 20 years w.e.f. 31.01.2003 and proposed the name of an arbitrator for approval by the respondent no.1 for referring the matter to the named arbitrator in terms of Clause 11 of the Agreement, to which the respondent no. 1 responded by denying receiving the rent of ₹ 60,000/-.

09. This application has been vehemently opposed by the respondents by raising a preliminary objection that the application is not at all maintainable on the grounds mentioned hereinafter.

10. It has been contended by the respondents that as per the Agreement executed on 31.01.2003, the parties to the said deed of Agreement are the General Manager, Rampal Sharma, Jammu Cooperative Wholesale Ltd. and Shukul Singh, the applicant who was an employee of the Jammu Cooperative Wholesale Ltd., Super Bazar, Jammu, a society registered under the *J&K Co-operative Society Registration Act, 1989* which is controlled by the Government and the shop belonged to the Co-operative Society, as such, if any dispute arises which pertains to the management or business of the said Cooperative Society, such dispute is to be resolved in terms of Section 70 of Chapter 9 of J&K Cooperative Societies Act,1989 (for short the '**Societies Act**') under which the Registrar, Cooperative Society, is the competent authority to adjudicate by himself or refer the dispute to a designated person as an arbitrator.

11. It has been also submitted that the applicant No.1 has not been arrayed in its appropriate name, but the application has been filed against the General

Manager, Jammu Co-operative Wholesale Limited, Super Bazar, Jammu. Hence, the application is not maintainable, by referring to the decision in case titled '**University of Jammu &ors. Vs. Birender Nath &ors.**', AIR 2000 J&K 93.

12. Further it has been submitted that the said lease Agreement dated 31.01.2003 which has been relied upon by the applicant is neither stamped nor registered with the competent authority and such unregistered and unstamped Lease Agreement is not enforceable in law. Thus, it was submitted that such an Agreement being not enforceable, the arbitration application is also liable to be rejected by relying on the decision in case titled **Garware Wall Ropes Ltd. Vs. Coastal Marine Constructions &Engineering Ltd. (2019) 9 SCC 209.**

13. It has been also contended that since the applicant was an employee of the respondent no. 1-Society, he could not have been a lessee, thus, the question of referring the dispute to an arbitrator does not arise. It has been also contended that the Society at no point of time had entered into an Agreement with applicant as claimed by him and, if any unscrupulous official or employee of the society had entered any Agreement with applicant, the same is not binding upon the society. This is the reason why the Agreement was shown to have been entered into between one Rampal Sharma, who was shown to be the General Manager of the Cooperative Society and the applicant- Shukal Singh. If the Co-operative Society was indeed the entity which had entered into an Agreement with the applicant, the Deed of Agreement ought to have described the first party as the Society through its authorized representative which is not the situation in the present case.

14. Further, it has been submitted that the fact that the applicant-Shukul Singh was an employee, who had engaged in various misconducts for which he was penalized and that he has now retired from service on attending the age of superannuation on 30.09.2020 has not been disputed by him. Thus, the applicant, being an employee and not a lessee, does not have any *locus standi* to seek arbitration of a dispute other than in the manner provided under the Societies Act.

15. As regards to claim of the applicant that he had obtained an order of *status quo* from the Court of Principal District Judge, Jammu, it has been submitted that the *status quo* order passed by the Principal District Judge was subsequently stayed by an order passed by this Court on 19.01.2010 in a writ petition, being OWP No. 788 of 2009, whereupon, the applicant handed over charge of the shop no. 2 situated in SMGS Hospital Jammu, in presence of the members of the Committee constituted by the General Manager of the Cooperative Society.

16. Having heard the learned counsel for the parties and having perused the materials on record, it appears that an Agreement was entered between the applicant and one Rampal Sharma, who was stated to be the General Manager of the Jammu Cooperative Wholesale Limited. The applicant claims to be a lessee, though the respondent no.1 claims that he is not a lessee but an employee. The respondents have taken the plea that as the applicant was an employee, he was transferred to other locations under the management of the Co-operative Society and after attaining the age of superannuation, he has retired from service in 2020 and as such he has no relation with the Society anymore.

17. From the above, what is evident is that while the applicant has relied upon the Deed of Agreement executed on 31.01.2003 which contains an arbitration clause which provides for resolution of disputes between the parties by arbitration, the respondents have submitted that since the petitioner was not a lessee but employer of the Cooperative Society and if there is any dispute between an employee and the Society employer, and as the Agreement was entered between the employer-Society with its employee, any dispute has to be invariably referred to the Registrar of the Co-operative Society for arbitration as provided under Sections 70 of the Act which provides that disputes relating to the constitution, management or the business are referable to the Registrar, and, hence, this application is not maintainable, in support of which, the learned counsel for the respondents has relied on a decision of this Court rendered in **‘Abdul Majid Dar Vs. Kashmir Mercantile Co-operative Bank Ltd. &Ors.’** in **JKJ ONLINE 10962**.

18. Thus, this Court has to examine whether the application is not maintainable in view of Section 70 of the Societies Act, 1989 as contended by the respondent no.1.

Section 70 of the Societies Act reads as follows:

“70. Dispute which may be referred to arbitration:-

(1)Notwithstanding anything contained in any law for the time being in force, if any dispute touching the constitution, management or the business of a Co-operative Society arises, -

- (a) among members, past members and persons claiming through a member, past member or deceased member, and sureties of members, past members or deceased members whether such sureties are members or non-member; or
- (b) between any member, past members or persons claiming through a member, past members or deceased member, or sureties of members, past members or deceased members and the society, its committee or any officer, agent or employee of the society; or

- (c) between the society or its committee and any past committee, any officer, agent or employee, or any past officer, past agent or past employee or the nominee, heirs or legal representative of any deceased officer, deceased agent or deceased employee or the society; or
- (d) between the society and any other Co-operative Society.

Such disputes shall be referred to the Registrar for decision and no court shall have jurisdiction to entertain any suit or other proceeding in respect of such disputes.

(2) For the purposes of sub-section (1) the following shall be deemed to be dispute touching the constitution, management or the business of a co-operative society, namely:-

- (a) a claim by the society for any debt or demand due to it from a member or the nominee, heirs or legal representatives of deceased member, whether such debt or demand be admitted or not;
- (b) a claim by a surety against the principal debtor where the society has recovered from the surety any amount in respect of any debt or demand due to it from the principal debtor as a result of the default of the principal debtor whether such debt or demand is admitted or not;
- (c) any dispute arising in connection with the election of any office of the society;
- (d) the question whether a person is or was member of a Cooperative society or not.

3. If any question whether a dispute referred to the Registrar under this section is or is not a dispute touching the constitution, management or the business of a Co-operative Society, the decision thereon of the Registrar shall be final and shall not be called in question in any court."

19. Perusal of Section 70 would indicate that if the dispute relates to matters touching the constitution, management or the business of the Cooperative Society which arises amongst the members, between any member, past or present members, or between the Society or its Committee, or any officer present or employer or between the society and the other societies, it which would be required to be referred to the Registrar for its decision and no court shall have jurisdiction to entertain any suit or proceeding in respect of such dispute.

20. Keeping the aforesaid provision of Section 70 of the Co-operative Societies Act in mind, this Court would examine the application at hand.

That there is an Agreement which contains an arbitration clause cannot be disputed and has not been also. Thus, as provided under Clause 11 of the Agreement if there is any difference between the parties, it is to be resolved by way of arbitration. The plea of the respondents is that the said Agreement was not entered into by the authorized person of the Society, and it may have been a manipulated agreement and the applicant being an employee cannot have entered into such an agreement. In the opinion of this Court, unless, it is clearly evident to be illegal, it will not be within the scope of Section 11 of the Act to examine this issue and such an issue can certainly be raised before the arbitrator on the principle of *kompetenz-kompetenz*.

That a difference has arisen between the parties is evident from the claim made by the applicant that he was compelled to pay more rent than what is contemplated under the Agreement and that he has been sought to be replaced by another person by transferring him to another location and he has been sought to be removed from the leased premises, all of which allegations though have been denied by the respondents, are indicative of the existence of a dispute between the parties.

21. In view of the existence of the dispute between the parties, under normal circumstances, as provided under the Agreement, the dispute would be required to be referred to arbitration as provided under Clause 11 of the Agreement. However, in view of the specific statutory provision under Section 70 of the Co-operative Societies Act providing for referring disputes to the Registrar of Co-operative Societies for arbitration, the issue which will be required to be

determined is whether the dispute which has arisen is to be resolved as per the arbitration Clause 11 under the Agreement as claimed by the applicant, or under Section 70 of the Societies Act as contended by the respondents.

22. For this, the Court has to examine whether the present dispute falls within the ambit of the above referred Section 70 of the Societies Act. As noted above, any dispute touching upon the constitution, management or the business of the co-operative society is to be referred to the Registrar of Co-operative Societies for his decision.

23. The present dispute referred to above certainly does not pertain to the constitution or management of the co-operative society. But it appears to be relating to the business of the Co-operative Society as it pertains to running on lease of a shop belonging to the Society. However, every dispute relating to the business of the Co-operative Society need not be referred to the Registrar unless it is between the parties mentioned under sub-clauses (a), (b), (c) and (d) of Sub-section 70 of the Societies Act. A close examination of the aforesaid sub-clauses (a), (b), (c) and (d) would show that there is some re-existing jural relationship in existence between/amongst the disputants with reference to the society, prior to any dispute, except for sub-clause (d) where the dispute is between co-operative societies.

24. Thus, it appears that Section 70 is primarily meant to be an in-house mechanism to resolve the disputes between/amongst the parties who have some jural relationship amongst themselves before the dispute arises. It cannot, as a consequence, be applicable to any person who did not have any such prior jural relationship with any of the persons involved with the affairs of the society.

25. It is from this perspective that the scope of Section 70 has to be understood. In the opinion of this Court, the mere incidental fact that the applicant happens to be an employee of the Society will not distract from this scheme of Section 70 of confining this mode of dispute resolution amongst the disputants who have pre-existing jural relations qua the Society.

26. In the present case, it has been specifically claimed by the respondents that the applicant is an employee of the society, which has not been denied by the applicant. As such at first blush, it would appear that the disputants are covered under sub-clause (d) of Sub-section (1) of Section 70 as the dispute appears to be between the Society and its employee.

27. However, it has been contended by the applicant that the lease Agreement was between two entities, i.e., the respondent-Society and the applicant as a lessee and not between the Society and the applicant as an employee.

28. A minute examination of the Deed of Agreement would show that the applicant, who is the second party to the Agreement has nowhere been described as an employee of the Society, by himself or by the first party. It may so happen that the Society entered into a Lease Agreement with a lessee who incidentally also happens to be an employee. The respondents though have claimed that an employee of the Society cannot be given lease of the property of the Society, nothing has been brought to the notice of this Court to that effect, of any such provision under the bye-laws or rules or regulations regulating the affairs of the Society.

29. Thus, though the applicant may be an employee of the Society, he did not enter into the Agreement with the society in the capacity of an employee, but as a lessee. As to whether such an Agreement could have been entered into by an

employee with the Society as per the bye-laws, in absence of any material prohibiting such relationship before this Court, this Court cannot give any such definitive finding to the contrary. Hence, this Court would proceed with this position that the applicant, even though incidentally happens to be an employee of the Society, had entered into an Agreement as a lessee of the first party on 31.01.2003.

30. Since the lease Agreement was executed between the society and the applicant as a lessee and not in the capacity of an employee, this Court is of the view that the disputants are not covered under sub-clause (c) of sub-section 1 of Section 70 of the Co-operative Societies Act. The jural relation of the applicant with the Society is merely a coincidence or accidental.

31. Therefore, this Court would hold that even if the dispute between the parties pertains to business of the society, yet, since the parties/disputants do not fall within the category mentioned under sub-clause (c) or any other sub-clause, provision of Section 70 of the Co-operative Societies Act would not be applicable.

32. Consequently, the dispute is to be referred to an arbitrator in terms of Clause 11 of the Agreement and not under Section 70 of the Co-operative Societies Act.

33. However, before this Court proceeds further, this Court has to consider the objection raised by the respondents relying on the decision in **Garware** (supra) that since the deed of Agreement is neither stamped nor registered, the arbitration clause cannot be invoked.

34. To appreciate this contention, we may consider what was held in the aforesaid case of **Garware** (supra).

In that case, the Supreme Court was dealing with the question as to what would be the effect of an arbitration clause contained in a contract which requires to be stamped. In answering this question, the Supreme Court referred to the decision in **SMS Tea Estates (P) Ltd. v. Chandmari Tea Co. (P) Ltd., (2011) 14 SCC 66** and considered the issue where a lease deed or any other instrument which is relied upon as containing arbitration Agreement is not only not properly stamped but also not registered, though such an Agreement is compulsorily registrable.

The Supreme Court, in **Garware** (supra), referred to the decision in **SMS Tea Estates** (supra), wherein it was held as follows.

22. We may therefore sum up the procedure to be adopted where the arbitration clause is contained in a document which is not registered (but compulsorily registerable) and which is not duly stamped:

22.1. The court should, before admitting any document into evidence or acting upon such document, examine whether the instrument/document is duly stamped and whether it is an instrument which is compulsorily registerable.

22.2. If the document is found to be not duly stamped, Section 35 of the Stamp Act bars the said document being acted upon. Consequently, even the arbitration clause therein cannot be acted upon. The court should then proceed to impound the document under Section 33 of the Stamp Act and follow the procedure under Sections 35 and 38 of the Stamp Act.

22.3. If the document is found to be duly stamped, or if the deficit stamp duty and penalty is paid, either before the court or before the Collector (as contemplated in Section 35 or 40 Section of the Stamp Act), and the defect with reference to deficit stamp is cured, the court may treat the document as duly stamped.

22.4. Once the document is found to be duly stamped, the court shall proceed to consider whether the document is compulsorily registerable. If the document is found to be not compulsorily registerable, the court can act upon the arbitration Agreement, without any impediment.

22.5. If the document is not registered, but is compulsorily registerable, having regard to Section 16(1)(a) of the Act, the court can delink the arbitration Agreement from the main document, as an Agreement independent of the other terms of the document, even if the document itself cannot in any way affect the property or cannot be received as evidence of any transaction affecting such property. The only exception is where the respondent in the application demonstrates that the arbitration Agreement is also void and unenforceable, as pointed out in para 15 above. If the respondent raises any objection that

the arbitration Agreement was invalid, the court will consider the said objection before proceeding to appoint an arbitrator.

22.6. Where the document is compulsorily registerable, but is not registered, but the arbitration Agreement is valid and separable, what is required to be borne in mind is that the arbitrator appointed in such a matter cannot rely upon the unregistered instrument except for two purposes, that is (a) as evidence of contract in a claim for specific performance, and (b) as evidence of any collateral transaction which does not require registration."

35. As also contended by the respondents, it has been observed that the Agreement deed executed on 31.01.2003 is neither stamped nor registered, but merely executed before a Notary. Hence, it cannot be said that an Agreement which is valid in law exists, for any such lease deed executed for 20 years with monthly rent of Rs.50,000/- is not only properly stamped under the Stamp Act 1899 but also not registered under the Registration Act, 1908.

36. In view of the decision in **SMS Tea Estates** (supra), the said deed not being valid in the eyes of law, the arbitration clause cannot be acted upon, unless the deficiencies are rectified as mentioned in **SMS Tea Estate** (supra).

37. Since the original/certified copy of the Deed of Agreement has not been submitted before this Court as required under Section 8(2) of the Arbitration and conciliation Act, this Court cannot impound it for the purpose of payment of proper stamp duty as provided under Section 35 of the Stamp Act and to proceed accordingly as held in **SMS Tea Estate**(supra).

38. The course of action available, under the circumstances, is allow the applicant to produce the original/certified copy of the deed of Agreement dated 30.01.2003 before this Court after affixing proper stamp/paying stamp duty, so that consequential order relating to appointment of an arbitrator can be passed by this Court.

As far as non-registration of the Deed of Agreement is concerned, since law does not require registration of the arbitration agreement, such an arbitration

clause/agreement contained in the Deed of Agreement can be acted upon for the purpose of dispute resolution by arbitration. Thus, the present Deed of Agreement even if not registered will not affect the validity of the arbitration Clause 11.

39. The application is, accordingly, disposed of with liberty to the applicant to file before this Court, the original/certified copy of the deed of Agreement dated 30.01.2003 after ensuring that proper stamp is affixed/stamp duty paid as the *Indian Stamp Act, 1899* so as to enable this Court to pass appropriate order under Section 11 of the Arbitration and Conciliation Act, 1996.

(N. KOTISWAR SINGH)
CHIEF JUSTICE

JAMMU
02.06.2023
SUNITA/PS

Whether the order is speaking.	Yes
Whether the order is reportable.	Yes.