

**HIGH COURT OF JAMMU & KASHMIR LADAKH
AT JAMMU
(Through Virtual Mode)**

CJ Court

Case :AP No. 14 of 2019
(Arb P No. 13 of 2019)

Arshad Hussain

...Applicant(s)/Petitioner(s)

Through: Sh. Rahul Bharti, Senior Advocate

v/s

General Officer Commanding (GOC) C/o
56 APO

.... Respondent(s)

Through: Sh. Vishal Sharma, ASGI

CORAM: HON'BLE THE CHIEF JUSTICE

ORDER
28-01-2022

01. The petitioner is a civilian. He has moved this petition under Section 11 (6) of Jammu and Kashmir Arbitration and Conciliation Act, 1997 (for short 'the Act') which is *pari materia* with the Arbitration and Conciliation Act, 1996 for the appointment of an independent arbitrator to resolve the dispute regarding renewal of allotment of shop allotted to him by the respondent.

02. A shopping complex known as "*Triveni Complex*" was established by 26 Infantry Division at Satwari in District Jammu consisting of 20-22 shops. One of the shops was allotted to the petitioner for doing business in electric and electronic goods purely on temporary basis for a fixed period of eleven months.

An agreement was executed between the parties to witness the aforesaid allotment and the licence to run the above shop. The first licence/agreement is not available to the petitioner and has not been brought on record by either of the parties. However, the subsequent agreement to the same effect dated 01.02.2018 is on record.

03. The aforesaid agreement clearly stipulates that it shall be valid from 01.02.2018 to 31.12.2018 and that the petitioner is entitled to run an electronic goods shop on monthly charges @ Rs. 4484/- payable by post dated cheques for the complete duration of the contract which may be renewed for the next year subject to 10% enhancement of the monthly charges. The agreement specifically provides that it is valid for eleven months from the date of signing. It can be terminated by either of the parties by 30 days notice to other party or by mutual agreement of both the parties.

04. In addition to the above conditions, the agreement vide Clause 25 provides that in case of dispute in respect of interpretation of the agreement, the decision of the GOC will be final and binding.

05. The petitioner alleges that he had been occupying the shop and running his electronic goods business since 2007 and that the agreement had been renewed from time to time for eleven months each. The last time, the agreement was renewed on 01.02.2018. Subsequently, though the petitioner continues to be in possession of the shop, the agreement has not been renewed rather the respondent on the basis of the letter of the Ministry of Defence, Government of India dated 17.01.2018 which directs for providing 100% reservation in the matter of allotment of the regimental shops for the defence personnel i.e. War Widows of the defense personnel /disabled soldiers/ex-servicemen and spouses, etc. has refused to renew the agreement and vide

notice dated 21.12.2018 has directed the petitioner to vacate the shop within a month.

06. The petitioner had legitimate expectation of getting the agreement renewed for the subsequent years as per the past practice and as the same was not renewed and the petitioner was asked to vacate the shop, he preferred an application under Section 9 of the Act for interim protection before the District Judge/Additional District Judge, Jammu wherein the respondent took a stand that Clause 25 of the Agreement is not an arbitration clause and, therefore, the petitioner is not entitled for any relief in exercise of power under Section 9 of the Act.

07. Since the respondent is disputing the existence of the arbitration clause, the petitioner instead of approaching the respondent for appointment of an arbitrator or for reference of disputes *inter se* the parties to an independent arbitrator, has directly approached the Chief Justice or his designate for appointment of an arbitrator in exercise of powers under Section 11(6) of the Act.

08. The parties have exchanged the pleadings and with the consent of counsel for the parties, I proceed to decide the matter finally.

09. I have heard Sh. Rahul Bharti, Senior counsel for the petitioner and Sh. Vishal Sharma, learned ASGI for the respondent.

10. The appointment of an arbitrator is being resisted by the respondent on the ground that Clause 25 of the Agreement is not an arbitration agreement and that there is no arbitral dispute between the parties which could be referred for resolution to the arbitrator.

11. Sh. Vishal Sharma further submits that the petitioner cannot directly come to the court for appointment of an arbitrator without taking recourse for

the appointment of the arbitrator before the authority concerned in terms of the so called Arbitration Clause no.25 contained in the Agreement.

12. It may be pertinent to mention here that the licence of the petitioner to run the Electronic Goods Shop in the aforesaid complex has not been renewed after 31.12.2018, on account of the notification of the Ministry of Defense dated 17.01.2018 which provides for reservation of the shops for the purposes of allotment in favour of War Widows of the defense personnel/disabled soldiers/ex-servicemen and spouses, etc.

13. The validity of the said notification came to be challenged by means of writ petition WP(C) No. 6026/2018 in the case of '*Danish Akhtar v. Union of India and another*' before the Delhi High Court and the aforesaid notification was upheld and the petition was dismissed.

14. A division bench of the Punjab and Haryana High Court in *Rajender Prasad Aggarwal & ors vs U.O.I & ors 2020 (2) PLR 158*, while dealing with the aforesaid notification dated 17.01.2018 held that it is not illegal and the notices issued on its basis to the parties to vacate the shops are in accordance with the law.

15. Notwithstanding the above, the prayer herein is simply for appointment of an independent arbitrator. Obviously, in a petition under Section 11(6) of the Act, neither the validity of any notification much less that of 17.01.2018 of the Ministry of Defense can be assailed nor any relief for the renewal of the agreement or for the quashing of the eviction notice can be granted as all such reliefs if any would be foreign and beyond the subject matter of the proceedings for the appointment of an arbitrator.

16. It has been settled that exercise of power by the Chief Justice or his designate in the matter of appointment of an arbitrator is a judicial power and

not an administrative one and that the Chief Justice or his designate is bound to consider only the following aspects in exercising the same.

- (i). Whether he has the jurisdiction or that the party seeking appointment of an arbitrator has approached the right Court;
- (ii). whether there is a valid arbitration agreement in terms of Section 7 of the Act;
- (iii). Whether the person claiming appointment is a party to the arbitration agreement; and
- (iv). Whether there is live dispute/claim subsisting which is capable of being arbitrated upon.

17. In other words, the Chief Justice or his designate in appointing an arbitrator under Section 11(6) of the Act is enjoined upon to examine the existence of the arbitration agreement between the parties and whether there exists a live arbitral claim/dispute.

18. The facts, as narrated earlier, would reveal that the petitioner has not raised any dispute regarding the interpretation of the agreement. He appears to be aggrieved by the non renewal of his agreement or the notice of eviction given to him. The disputes he wants to get settled have not been spelled out.

19. The agreement clearly provides that it is valid only for a period of one year and may be renewed for the next year. It is not mandatory to renew the agreement rather one of the clauses provides that it can be terminated by either of the parties by giving 30 days notice without waiting for the expiry of the period.

20. Accordingly, there appears to be no jurisdictional error in issuing the notice of eviction to the petitioner. In fact, the petitioner has no legal right to continue to be in possession and to occupy the shop after the period stipulated in the agreement i.e. 31.12.2018 has expired and the agreement has come to an

end. The petitioner cannot compel the respondent to renew the agreement. The notification dated 17.01.2018 of the Ministry of Defense has been uniformly applied to all the allottees and the petitioner has not been discriminated. The reason for non renewal of the agreement is immaterial as the respondent in its discretionary jurisdiction could have even otherwise refused to renew the agreement irrespective of the above notification.

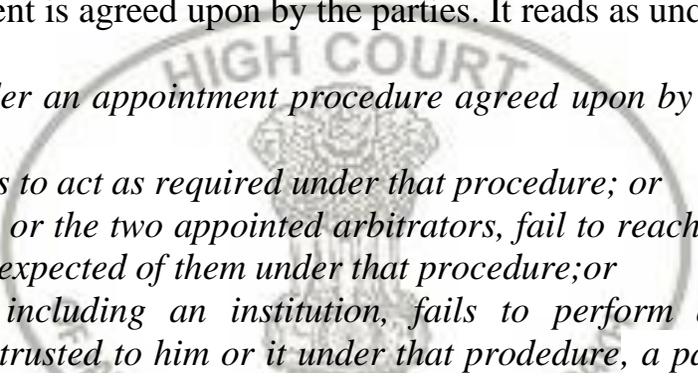
21. The petitioner is simply a licensee, who has no legal right to get the licence renewed to run his business from the shop in question on the expiry of licence except for getting it considered for renewal. The consideration has been accorded and denied in the wake of the above notification. Thus, bringing to an end even the above right.

22. This apart, the petitioner has not served any legal notice upon the respondent invoking the arbitration clause specifying the disputes which require to be resolved by an independent arbitrator. The notice demanding reference of disputes to arbitration would have indicated the specific disputes which the petitioner wants to be adjudicated upon by the arbitrator. In the absence of such a notice, demand for arbitration and the mentioning of the specific dispute which require adjudication it cannot be said that there actually exists any arbitral dispute between the parties which is referable to arbitration.

23. Section 11 of the Act provides for the appointment of arbitrators. It leaves free the parties to decide on the procedure to be followed for the appointment of arbitrator or arbitrators. It inter alia provides that where there is no agreement on the procedure regarding appointment of a sole arbitrator and the parties fail to agree on the arbitrator within 30 days from the request by one party to the other party, the appointment shall be made on an application of the party by the High Court. The Court steps into the picture for the appointment

of arbitrator only when the parties fail to agree on the arbitrator within 30 days of the receipt of the request by one party. Therefore, request for the appointment of arbitrator or the invocation of the arbitration clause is a sine qua non for getting an arbitrator appointed by the court.

24. The petitioner has moved the present petition under Section 11(6) of the Act which inter alia provide for the appointment of arbitrator where the procedure for appointment is agreed upon by the parties. It reads as under:

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- (6) *Where, under an appointment procedure agreed upon by the parties,-*
- (a) *a party fails to act as required under that procedure; or*
 - (b) *the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or*
 - (c) *a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.*

25. It *inter alia* provides that only where the party fails to act as required under the procedure or a person fails to perform any function entrusted to him under the procedure that the appointment of an arbitrator shall be made by the High Court to take necessary measures.

26. A reading of the aforesaid provision would also reveal that it is only on the failure of the procedure prescribed that the court can appoint an arbitrator and otherwise. In order to establish that the procedure for the appointment of arbitrator as agreed upon has failed, it is mandatory to prove the invocation of the arbitration clause by the party interested and denial or inaction on part of the other party for the appointment of the arbitrator. It is only when the demand made is not fulfilled that the party can move to the court. The object of the notice is to allow the other party a reasonable time to respond either accepting

the demand or refusing it. The other party is entitled to at least 30 days' time to refer the dispute to the arbitrator or the named arbitrator to enter into arbitration, failing which the court on an application of a party can proceed with the appointment. This right of the other side cannot be taken away by strait away approaching the court without giving any notice. A party seeking appointment of an arbitrator through the intervention of the court must demonstrate that there was a failure by the other party in following the procedure and accepting to the request for the appointment of an arbitrator before approaching the court. To put it simply, invocation of the arbitration clause or the notice or the request to appoint an arbitrator appears to be mandatory before approaching the High Court for appointment of the arbitrator.

27. Under the old Arbitration Act of 1940, service of notice by the party seeking arbitration was an essential preliminary step to give jurisdiction to the court and in the absence of such a notice, the action of the court, if any, was held to be one suffering with material irregularity.* The Delhi High Court in '*Bhartiya Construction Company v. Delhi Development Authority, 1997 (1) ArbLR 204*,' while dealing with the appointment of an arbitrator on the intervention of the court under Section 20 of the old Act, held that the court cannot assume jurisdiction to appoint an independent arbitrator if the party has not served a notice on the other side seeking arbitration. Even though the provisions of the old Arbitration Act do not come into play in the present case but the principle regarding the appointment of an arbitrator through court would more or less remain the same.

* Poran Lal v. Rup Chand, (1930) All LJ 1564 : AIR 1931 All 761

28. At the same time the provision of Section 21 of the Act cannot be lost sight of which provides for the commencement of arbitral procedures. It in specific terms lays down that the arbitral proceedings commences on the date on which the request to refer the said dispute to arbitration is received by the other side. Therefore, the date of request to refer the dispute to arbitration is imperative to ascertain the date of commencement of the arbitral proceedings. The said date cannot be determined unless there is a request or notice seeking appointment of an arbitrator. The date of commencement of arbitral proceedings is essential for the conclusion of such proceedings. Therefore on the conjoined reading of Sections 11 and 21 of the Act, it can safely be ruled that invocation of the arbitration clause by serving a legal notice upon the other party is a sine qua non for approaching the High Court for appointment of an arbitrator.

29. The petitioner has not made any request seeking an arbitration and has straight away come to the High Court. In the absence of such a request or notice, the petition is apparently premature and it cannot be said that the other party has failed to act as required under the procedure to warrant appointment of an arbitrator by the court. The absence of such a notice also cast a shadow of doubt on the existence of any dispute, if any, between the parties. The notice alone would have demonstrated the disputes which were sought to be referred to arbitration.

30. In view of the aforesaid facts and circumstances the petition filed under Section 11(6) of the Act is not maintainable for want of invocation of the arbitration clause if any and for want of live arbitral claim/dispute.

31. The submission that as the respondent denied existence of the arbitration clause there was no necessity to invoke the same is neither here nor there. The

petitioner has based his claim on an arbitration clause, therefore denial of existence of such a clause by the respondent is immaterial and the petitioner ought to have proceeded on its basis in the manner prescribed. If the petitioner accepts the plea of respondent that there is no arbitration agreement, the petitioner could not have maintained this petition for the appointment of an arbitrator.

32. The agreement dated 01.02.2018 on record vide Clause 25 provides as under:

“25. In case of any dispute in respect of interpretation of this agreement, the decision of the GOC will be final and binding.”

33. Sh. Rahul Bharti relying upon the wording of the aforesaid clause submits that the said clause is clearly an arbitration agreement within the meaning of Section 7 of the Act and, as such, any dispute between the parties is referable to arbitration. He submits that it is the substance of the agreement which has to be considered and not only the language used therein in deciding whether the particular clause is an arbitration agreement or not. In this connection, he has placed reliance on number of cases starting from '*Dewan Chand v. State of J&K, AIR 1961 (J&K) 58*' to '*Mahanagar Telephone Nigam Limited v. Canara Bank and others, AIR 2019 (SC) 4449*'.

34. On the other hand, Sh. Vishal Sharma submits that the aforesaid Clause is not an arbitration agreement and that it only refers to the disputes concerning interpretation of the agreement rather than the dispute arising out of the agreement *inter se* the parties. Since there is no dispute regarding the interpretation of the agreement, it was not even referable to the GOC and in the absence of any other dispute, there is no arbitral dispute.

35. A simple reading of the aforesaid Clause reveals that the intention of the parties for adding such a clause is to have the opinion of the GOC in respect of matters of interpretation of the agreement. It expresses no intention of the parties to get any dispute arising from the agreement settled or adjudicated by the GOC or by an independent arbitrator.

36. The GOC happens to be the author of the agreement therefore, he is one of the best person to interpret the clauses therein in case any ambiguity arises or there is a dispute regarding its interpretation. It is only with the above limited purpose that the parties to the agreement agreed that “any dispute in respect of interpretation of this agreement” would be decided by the GOC and his decision will be final and binding. Here the decision of the GOC is in the nature of an expert opinion on the interpretation of the agreement and not adjudicatory regarding the inter se dispute between the parties arising from the said agreement.

37. The precedents cited by Sh. Rahul Bharti are to the effect that substance of the agreement is to be considered to find out if there is an arbitration clause therein and it is not necessary that in such an agreement the words ‘reference’ or ‘arbitration’ should be used.

38. He also submits that the intention of the parties to refer the dispute to arbitration has to be inferred from the agreement as a whole and that no particular form of the agreement is necessary.

39. In *Punjab State and ors vs Dinanath AIR 2007 SC 2157*, it has been held that ‘arbitration agreement’ means a written agreement to submit present or future differences to arbitration whether the arbitrator is named there or not. It further lays down that in interpreting the existence of the arbitration clause it has to be seen whether the parties have agreed to refer any dispute which arises

between them in respect of the subject matter of the contract to arbitration. The intention of the parties to make reference and to treat the decision of arbitrator as final would constitute an arbitration agreement.

40. In *Karnataka Power Transmission Corporation Ltd & ors. vs Deepak Cables (India) Ltd. AIR 2014 SC 1626*, it has been laid down that unless an arbitration agreement stipulates that the parties agree to submit all or certain disputes which have arisen or which may arise in respect of defined legal relationship, there cannot be a reference to an arbitrator.

41. In *Mahanagar Telephone Nigam Ltd vs Canara Bank & ors AIR 2019 SC 4449*, it has been observed that an “arbitration agreement” is a commercial document and must be interpreted so as to give effect to the intention of the parties rather than to invalidate it on technicalities. Such a clause cannot be construed with purely legalistic mindset.

42. On the contrary Sh. Vishal Sharma has relied upon *Jagdish Chander vs Ramesh Chander & ors 2007(5) SCC 719* which lays down the attributes of a valid arbitration agreement and proceeds to hold where an agreement requires or permits an authority to decide a claim or dispute without hearing, or require the authority to act in the interest of only one of the parties it cannot be termed as an arbitration agreement. If we test the present clause 25 of the agreement on the anvil of the above decision we would find that it do not provides that the GOC in deciding is liable to give opportunity of hearing to both the parties even though principals of natural justice may be inherent therein and at the same time since he is the author of the agreement he is not an independent person rather a person who would always act in the interest of the respondent.

43. In *Discovery Properties & Hotels Pvt. Ltd vs CIDCO 2010 (4) ArbiLR 150*, the bench of the Bombay High Court presided by Hon'ble Justice D.Y.

Chandrachud (as he then was) interpreted the two alleged arbitration clauses 41 and 44 of the contract agreement which reads as under:

“41. Interpretation of general terms & conditions for disposal of plots of land in case of dispute as regards interpretation of the General terms and conditions of disposal of plots of land and of the invitation of offer or anything there from, the final decision rests with Managing Director of CIDCO and will be binding on all parties as the award of Arbitrator.

44. Interpretation of general terms and conditions for disposal of plots of land. In case of dispute as regards interpretation of the General terms and conditions of disposal of plots of land and of the invitation of offer or any thing therefrom, the final decision rests with Managing Director of CIDCO and will be binding on all parties as the award of Arbitrator.”

45. The Court held that the aforesaid clauses do not postulate any intention on part of the parties to the agreement to refer there disputes to a private tribunal for arbitration and the said clauses do not provide that the arbitral tribunal has been empowered to adjudicate upon the dispute between the parties.

46. Similar is the position with clause 25 of the agreement, it does not provide that the arbitral tribunal is empowered to adjudicate upon the disputes between the parties. It only provides for the decision on the interpretation of the agreement and as such does not express intention of the parties to refer their disputes to a tribunal.

47. The Supreme Court in *International Amusement Ltd vs India Trade Promotion Organisation AIR 2015 SC 749*, in considering a similar clause 25 of the contract observed that a careful reading of the clause in the contract would give an indication that the Public Health Engineer is empowered to decide all questions enumerated therein other than disputes or differences arisen between the contractor and the government and in such a situation the

disputes or differences between the parties are not referable to an arbitrator. Clause 25 of agreement herein also empowers the GOC to decide on the interpretation of the agreement but not to adjudicate upon the dispute or differences arising between the parties.

48. Thus applying the above legal situation, I am of the opinion that clause 25 of the agreement in question is not an arbitration agreement, it only provides for seeking an opinion of an expert rather than empowering him to adjudicate upon the disputes or differences.

49. In view of the aforesaid facts and circumstances of the case, the petitioner is not entitled for appointment of an arbitrator for want of an arbitration agreement, existence of arbitral dispute and a notice to prove that the other party has failed to perform its part of the procedure in the matter of appointment of the arbitrator.

50. The petition is accordingly dismissed but with no orders as to costs.

Jammu
28.01.2022
Tilak

