

(2005) 03 CAL CK 0045**Calcutta High Court****Case No:** A.P. No. 188 of 2004

A. Tosh and Sons (India) Ltd.

APPELLANT

Vs

Happy Valley Tea Company Pvt.
Ltd.

RESPONDENT

Date of Decision: March 15, 2005**Acts Referred:**

- Arbitration Act, 1940 - Section 34
- Arbitration and Conciliation Act, 1996 - Section 14, 15, 5, 8(1), 8(3)

Citation: AIR 2006 Cal 90 : (2006) 2 ARBLR 357 : 108 CWN 526**Hon'ble Judges:** Ashim Kumar Banerjee, J**Bench:** Single Bench**Judgement**

@JUDGMENTTAG-ORDER

Ashim Kumar Banerjee, J.

The parties entered into an agreement on March 12, 1992 whereby the petitioner lent and advanced diverse sums of money to the respondent for smooth running of the Tea Estate. As the monies were not repaid in terms of the agreement, the petitioner initially approached the Civil Court by filing a suit as also applied for interim injunction under Order 39 of the Code of Civil Procedure.

2. The suit was filed by the plaintiff being the petitioner herein suppressing the arbitration clause incorporated in the agreement. The petitioner also moved the Criminal Court as against the Directors of the respondent-Company. The respondent got the criminal case stayed in view of pendency of the civil proceedings. The petitioner realising their mistake although belatedly approached the named Arbitrator in 2000 and filed their statement of claim before him. According to the petitioner although the arbitrator was approached in 2000 there was hardly any attempt by the arbitrator to conduct the arbitration effectively. Ultimately, in 2002 petitioner approached the Civil Court with an application under Order 23 of the

Code of Civil Procedure, inter alia, praying for withdrawal of the suit. In the Order-sheet annexed to the affidavit-in-opposition filed by the respondent it appears that the application was allowed by the Civil Judge, Senior Division, Darjeeling wherein it was recorded that the application for withdrawal was made on the ground that the arbitration proceeding had been initiated in terms of the contract between the parties and the said proceeding was pending on the said date. Upon hearing both the parties the learned Civil Judge, Senior Division, Darjeeling allowed the suit to be withdrawn with liberty to "file afresh". The learned Counsel appearing for the respondent submits that the said application was not opposed by the respondent.

3. Even after the withdrawal of the suit the Arbitrator was not proceeding with the reference effectively. According to the petitioner, they paid a sum of Rs. 10,000/- to the Arbitrator for the purpose of advertisement of public notice in newspaper as the respondent was not appearing before the Arbitrator. Accordingly, advertisement was published. Pursuant to the advertisement the learned Advocate appearing for the respondent wrote to the Arbitrator on March 10, 2003, inter alia, contending that once the Civil Suit was filed, the parties waived their right to go in for arbitration and, as such, the Arbitrator was not entitled to proceed. According to the Arbitrator there were other issues which the petitioner was insisting to be gone into beyond the scope of the agreement and, as such, it was difficult for the Arbitrator to proceed with the reference. In course of hearing Mr. Mishra, learned Advocate on instruction submits that the Arbitrator is not willing to act as Arbitrator and he should be relieved of responsibility. He, however, has filed an affidavit denying all the allegations made against him by the petitioner.

4. The present application has been made under Sections 14 and 15 of the Arbitration and Conciliation Act, inter alia, for revoking the authority of the Arbitrator and also for consequential relief. Mr. Uptal Bose, learned Counsel appearing in support of this application, submits that the petitioner was wrongly advised to approach the Civil Court. Once the agreement incorporate the arbitration clause the parties were bound to adhere to the said terms and, as such, the arbitrator was approached by the petitioner. According to Mr. Bose it was incumbent upon the Arbitrator to proceed with the reference irrespective of pendency of the suit in view of Section 8(3) of the said Act of 1996. Mr. Bose further submits that for last five years the arbitrator did not effectively hold any sitting. In any event once he has expressed his unwillingness to act as Arbitrator his authority should be revoked.

5. Mr. Ahmed, learned Counsel "while opposing this application submits that the petitioner knowing fully well that the contract stipulated an arbitration clause approached the Civil Court and invited the respondent to appear in the said proceeding. The respondent duly appeared without any objection as to the maintainability of the said proceeding. The petitioner having failed to obtain any

interim protection also approached the Criminal Court. That criminal proceeding was stayed by the Hon'ble Court. The petitioner is thus not entitled to invoke arbitration clause and proceed with the arbitration. According to Mr. Ahmed the right the petitioner had under the agreement to invoke the arbitration clause had been waived by the petitioner which would be apparent from the conduct as discussed above. Mr. Ahmed further submits that although the old arbitration law being the Arbitration Act of 1940 stood repealed by the new Act of 1996 underlying principle enunciated u/s 34 of the Act of 1940 should be considered by this Court in the peculiar facts and circumstances of this case.

6. u/s 5 of the Act of 1996 no judicial authority is empowered to deal with any issue covered by the arbitration agreement. u/s 8(1) the judicial authority is duty-bound to refer the dispute to arbitration in case an arbitration clause is drawn attention to on an application by any party. Under Sub-section (3) of Section 8 the pendency of any other proceeding does not debar the Arbitrator to proceed with the reference or to enter upon reference, if asked for. Under the scheme of old Act the Civil Court had a discretion either to allow an application for stay of suit on the ground of arbitration clause or not. Such discretion is no longer prevalent in the new Act. It is true that the petitioner approached the Civil Court in 1999 suppressing the arbitration clause in the said suit. Before the written statement was filed the suit was withdrawn by the petitioner who was the plaintiff in the said case. It appears from the order of the learned civil Judge that the application for withdrawal was made in view of pendency of the arbitration proceeding. Mr. Ahmed submits that since the suit was withdrawn with liberty to file afresh the petitioner is only, entitled to file a fresh civil proceeding and nothing else. Such submission of Mr. Ahmed is not tenable in law. Even if the suit has been pending today it was and still is the duty of the Arbitrator to proceed with the reference irrespective of pendency of the suit in view of Section 8(3) of the said Act of 1996. However, once the Court's attention was drawn, the suit was allowed to be withdrawn. Hence the contention of Mr. Ahmed to the extent that the petitioner is not entitled to proceed with the arbitration reference, in my view, cannot be sustained and is thus rejected.

7. The Arbitrator is not willing to proceed with the reference. Hence it would not be proper for me to go into the allegations made against him. I only wish to record his unwillingness to act any further. On the basis of such submission being made through his counsel I revoke his authority under the agreement dated March 12, 1992. The petitioner is given liberty to take appropriate steps for appointment of a new arbitrator in accordance with the provisions of the Act of 1996.

8. A.P. No. 188 of 2004 is disposed of accordingly.

9. There would be no order as to costs.

10. The outgoing Arbitrator is directed to hand over all papers lying with him to the Registrar, Original Side, High Court within a period of two weeks from date.

11. An urgent xerox certified copy of this order be made available to the parties, if applied for.