1969 KHC 154
Kerala High Court
V. R. Krishna Iyer, J.

Abraham Thomas v. Darragh Smail and Co.
Parallel citation(s) : 1969 KHC 154 : 1969 KLT 721 : 1969 KLR 933
CaseNo : C. M. A. No. 100 of 1968
Date : 10/07/1969

Arbitration Act, 1940 -- S.34, S.36 -- Arbitration Act being exhaustive has nothing to do with an arbitration clause being a condition precedent to a contract -- Civil Court's jurisdiction not repelled and right of action not absent -- Exclusion of Court's jurisdiction is the exception -- Contract Act, 1872, S.28 -- Civil Procedure Code, 1908, S.9

Important Para(s):6, 7

Referred: 1956 Bom. 97; 1963 KLT 415; Referred to

Advocates:

E. P. Poulose; M. Abraham; C. M. Stephen; M. Rajasekharan Nair; For Appellant
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JUDGMENT

1. The appellant in this Court is the 5th defendant and the respondent the plaintiff, the other defendants 1 to 4 not having been made parties to this appeal. Nor have they challenged the reversing judgment of the Subordinate Judge in separate appeals.

2. The plaintiff company engages in aerial spraying of insecticides of rubber plantations and defendants 1 to 5 are said to own a rubber estate 50 acres in extent. The plaintiff undertook the spraying of the defendants' estate and claimed the charges agreed to be paid under the contract between the parties, evidenced by a requisition slip, Ext. P1. Since the 1st defendant, the father of the other

defendants, went to the extent of even denying the agreement, the plaintiff took steps to put into operation the arbitration clause contained in Ext. P1. The amount due was Rs. 3000/, but an advance had already been made of Rs. 750/- and thus the balance demanded by the plaintiff was Rs. 2250/-. Clause.10 of the terms and conditions of Ext. P1 provides that in case of any dispute, the matter shall be settled by arbitration under the Indian Arbitration Act. Accordingly, the plaintiff Company informed the 1st defendant that they were nominating one Kuncheria, Advocate, Alleppey, as the Arbitrator but could not make headway because the 1st defendant denied the agreement altogether. Consequently, the plaintiff filed a suit for the amount due. The 1st defendant remained ex parte; defendants 2 to 4 jointly contended, inter alia, that the rubber trees in their estate had become old and could not and did not benefit by any spraying etc. The 5th defendant, however, admitted that the plaintiff company had to be paid a balance of Rs. 2250/- for spraying the 50 acres of rubber estate but that he had also counter claims against the plaintiff towards commission, travelling expenses and other incidental charges connected with his work as commission agent of the plaintiff company and that the suit claim should be adjusted towards what was due to him. He further contended that since Clause.10 of Ext. P1 contained an arbitration clause, the suit was not maintainable without an earlier arbitral award. The learned Munsiff tried the suit, recorded the evidence, heard arguments but disposed of the suit on issue No. 1 upholding the 5th defendant's contention about the maintainability of the suit. He did not record findings on the other issues "in the light of the findings on issue No. 1" and dismissed the suit. An appeal was carried to the Subordinate Judge's Court. An opposite view was taken on the maintainability of the suit by the appellate Court which remanded the suit to the Trial Court for recording findings on the other issues. Although the entire evidence had been closed, the appellate Court directed that "the parties are at liberty to further plead and prove their cases on issues other than this after remand in the Court below". The 5th defendant, in C. M. Appeal, has repeated his plea before me.

3. Ext. P1 states that the contract is "subject to the terms and conditions overleaf" and Clause.10 of the terms and conditions reads:
"In case of any dispute the matter shall be settled by Arbitration under the Indian Arbitration Act".
Counsel for the appellant states that this amounts to the contract being subject to

the Scott v. Avery clause and relies upon the ruling reported in Vanguard Fire & General Insurance Co. Ltd. v. Sreenivasa Iyer (1963 KLT 415). Mathew J. has elaborately considered the maintainability of a suit in a case where the contract, which is the basis of the action, also contains an arbitration clause. Extracts from the head note of the report sufficiently reflect the point decided:

"If the making of an award is a condition precedent for the accrual of a cause of action to the plaintiff, then that condition has to be satisfied before the plaintiff can acquire a cause of action; and if a suit is instituted before that, it is a good defence to the maintainability of the action itself. A distinction has always been made between cases where the arbitration and the award are made conditions precedent to the right of action itself and where they are merely collateral to the main agreements. In the latter case if a suit is instituted in violation of the collateral agreement, the only consequence is that the suit will be liable to be stayed at the instance of the defendant under S.34 of the Arbitration Act. But where a suit is instituted, when the making of the award is a condition precedent to the accrual of a cause of action in favour of the plaintiff, before the making of the award, such a suit is also liable to be dismissed if a defence is taken to that effect, the reason being that the plaintiff has no cause of action, until the award is made".

"The defence that the suit was not maintainable is entirely legal and must succeed, and the defendant was entitled not only to apply for a stay, but also to demur to the action as being premature and pray for a dismissal of the same. The suit was not maintainable because the plaintiff had no cause of action until after an award has been made. It is immaterial that the defendant could have applied for stay, because that will not preclude the defendant from relying upon the defence which he has to the suit".

"Attempts have been made to enunciate a test for determining whether an arbitration clause amounts to a condition precedent to the institution of a suit or not. It has some time been said that the test is whether the arbitration clause is merely collateral or whether the parties have agreed that the liability of one party or other is to arise only after the making of the award This proposition put in this manner though unexceptionable does not carry the matter far. The test is whether there is an absolute covenant to pay with a collateral provision that the amount shall be fixed by arbitration or whether there is only a conditional covenant to pay such amount as will be awarded, a test which it is not easy of application in all cases. Therefore ultimately it depends upon the language of the

agreement....."

"We are here concerned only with the short question as to whether the clause in Ext. P1 is of the Scott v. Avery clause and whether the defendant can only move for stay of the suit or can stifle it altogether. The condition for arbitration in the contract upon which Mathew J. pronounced reads as follows:

"All differences arising out of this policy shall be referred to the decision of an arbitrator.....and the making of an award shall be a condition precedent to any right of action against the Company".

His Lordship had no difficulty in holding, on the terms of that contract, that "the suit was not maintainable because the plaintiff had no cause of action until after an award has been made". Nevertheless, Mathew J. pointed out the difficulties arising in construing an arbitration clause as amounting to a condition precedent or not. "The test is", according to his Lordship, "whether there is an absolute covenant to pay with a collateral provision that the amount shall be fixed by arbitration or whether there is only a conditional covenant to pay such amount as will be awarded". His Lordship proceeded to illustrate the difference. "An example of the condition for arbitration being held merely collateral and independent of the covenant to pay will be found in Dawson v. Fitzgerad 1876 (1) Ext. D 257 where a tenant covenanted not to keep such quantities of rabbits and hares as would be injurious to the crops and if he did that, then he would pay reasonable compensation to be settled, in the case of difference, by arbitration. An action for the lessor's estimated compensation was held to be maintainable although no recourse was had to arbitration proceedings". Among the Indian authorities referred to in the judgment, the ruling reported in AIR 1956 Bombay 97 found approval with Mathew J. There, Mr. Justice Gajendragadkar, as he then was, held that an arbitration clause in the agreement concerned in that case would oust the jurisdiction of the Court. The head note of the report reads:

"Plaintiff and defendant were members of Bombay Bullion Association. The plaintiff brought a suit for recovery of a sum due to him in respect of forward transactions of bullion that took place between him and the defendant. Bye law 38 of the Association provided as follows: 'In connection with ready or forward transactions between members of the company or between numbers and non members, in gold, silver and sovereigns done in accordance with the rules and bye laws of the Association, or whether a ready or forward transaction in gold, silver and sovereigns has been entered into or not, all the claims or disputes or

differences of opinion of any sort arising out of the contracts in respect thereof shall be settled by reference to arbitration.
The bye law also provided that 'only after obtaining an award from the arbitrators in this manner, any party can go to a Court of law in order to obtain relief in respect of the said transactions'.
.....that bye law No. 38 amounted in law to an agreement in writing to refer disputes between persons governed by the bye law to arbitration within the meaning of S.2(a), Arbitration Act. Hence the claim in suit must be resolved by the domestic tribunal contemplated by the bye law and a suit in respect of it was not maintainable'."
The decision reported in L. Raghunath Prasad v. L. Gurdyal Prasad (AIR 1956 All. 194) elicited the following comment from Mathew J.
"I do not find any discussion of the points relevant to that question. Beyond tracing the history of the evolution of the arbitration law, I do not find the case very helpful for deciding the point now under consideration".
With great respect, I agree with the views of Mathew ;J. on both the decisions. In the present case, the crucial question is to find out when an arbitration clause becomes a Scott v. Avery clause and when not. Of course, if the terms of the contract expressly make an award a condition precedent to an action in Court there is little difficulty. That was how the contract prescribed in Scott v. Avery (1856 (5) HL 811) and that was the language of the 1963 KLT case, but that was not the language in which bye law 38 construed by Gajendragadkar J. in 1956 Bombay case, was expressed and yet the learned Judge held that the jurisdiction of the Civil Court to entertain the suit was clearly barred. Similarly that was not the language adopted in Brown v. Overbury (4 WR 252) and yet Lord Campbell in his speech in Scott v. Avery "referred to Brown v. Overbury as being identical in principle". Lord Macmillan made the position perfectly plain in Arthur Andrew Cipriani v. Macdonald Burnett (AIR 1933 PC 91) "Their Lordships agree that the question is one of construction, but in their view the learned Chief Justice has misconceived the effect of the condition printed on the ticket. It is not essential in order to exclude a right of action at law that the contract should in terms prescribe that the award of the specially constituted tribunal shall be a condition precedent of any legal proceedings".

4. How then can we break through this ambiguity and reach some sort of certainty? The clue is given in Baron Alderson's observations in Brown v.

Overbury, excerpted by Lord Macmillan in the Privy Council case:
"every contract must be determined according to the circumstances belonging to it. This is one of racing and the universal practice has been that in order to ascertain who is to have the stakes, it must first be determined who is the winner, not in the opinion of a jury, but of the persons appointed to decide it, viz., the judge or the stewards."
In Cipriani v. Burnett (AIR 1933 PC 91) Lord Macmillan observed with regard to a horse racing dispute as follows:
"Their Lordships accordingly read the condition on the ticket, having regard to "the circumstances belonging to it, "as a condition precedent, the fulfilment of which is essential before any action for the stakes can be entertained by the Courts".
Thus, if the circumstances belonging to the subject matter are such that one can import a Scott v. Avery implication to the arbitration clause, the need for arbitration can be transmuted into a condition precedent to the enforce ability of the contract in Court. The ruling reported in Prataprai Manmohandas v. Sheo Narayan Balal & Co. (AIR 1956 Bom. 97) also lands itself to this interpretation. There, the Bombay Bullion Association Limited framed bye laws to regulate transactions in bullion and contracts were entered into, subject to those bye laws. An amount of expertise and an intimate familiarity with the type of business is necessary in adjudication of disputes arising in that area of contracts. In this background, one might readily infer that the arbitration clause has a Scott v. Avery meaning, if I may say so. Gajendragadkar J., as he then was, makes a few observations which are important from this angle:
"It is common ground that both the parties were and are members of the Association and that bye law 38 governs their dealings. This bye law provides that "in connection with ready or forward transactions, between members of the company or between members and non members, in gold, silver and sovereigns, done in accordance with the rules and bye laws of the Association, or whether a ready or forward transaction in gold, silver and sovereigns has been entered into or not, all the claims or disputes or differences of opinion of any sort arising out of the contracts in respect thereof shall be settled by reference to arbitration".
"We have also held that if a contract has taken place between members of an association whose bye laws or articles of association provide for an arbitration agreement, when the disputes must be resolved by the domestic tribunal contemplated by the bye laws and articles of association and a suit in respect of

them cannot be filed".

Bullion transactions by way of ready or forward contracts are handled day in and day out, under the auspices of the Bombay Bullion Association and disputes can be decided only if the judge possesses expertise in the line and parties must be deemed to imply an arbitral pre requisite to enforcement of such contracts by way of suit. Moreover, commercial transactions of that nature must run smoothy and disputes ironed out by men in whose commercial ability and integrity parties have great confidence. Instinctively, parties look up to arbitral solutions in such cases and not to civil courts. So universal is the practice that one may legitimately read a Scott v. Avery intent into an arbitration clause in all such cases. However, a similar argument was pressed unsuccessfully before a Division Bench of the Kerala High Court in a ruling reported in Govindji Jevat and Co. v. M/s. Cannanore Spinning and Weaving Mills Ltd. (1968 KLJ 635). There, the clause was very similar to the one in AIR 1955 Bombay case. The subject matter was a cotton transaction and the East India Cotton Association Limited, Bombay and its bye laws governed the contract. All that I have stated with regard to the Bombay Bullion Association and bullion contracts might well apply, with equal force, to cotton contracts and the East India Cotton Association, Bombay. Raghavan J , speaking for the Court, repelled the argument that the arbitral bye law there attracted the rule in Scott v. Avery and observed:

"The most important aspect of this question now arises for consideration; and that is whether the suit has to be dismissed on the ground that the arbitration contemplated by bye law 38 (A) had not been resorted to before the suit was filed.....The Counsel argues that in the present case bye law 38 (A) comes within the Scott v. Avery Group".

Adverting to the decision in 1963 KLT 415 his Lordship observed:

'In the case before our learned brother, there was a clause in the arbitration agreement that the due observance and fulfilment of the terms, conditions, etc. of the insurance policy in so far as they related to anything to be done or complied with by the insured, etc., shall be condition precedent to any liability of the Insurance Company to make any payment under the policy. It was interpreting this clause that Mathew J. held that this was a Scott v. Avery clause; and that without complying with the provision for arbitration as a condition precedent, no suit lay. In the case before us, such a provision is absent in bye law 38 (A). Therefore, the decision of Mathew J. as such may not apply to the present case; and it is not necessary for us to consider further whether that decision is correct

in so far as cases falling under the Indian Arbitration Act are concerned".
The ruling reported in AIR 1956 Bombay 97 was distinguished, stating that there the bye law was to the effect that only after obtaining an award from the arbitrators, a party could go to a court of law to obtain relief in respect of the transaction. However, the learned Judge agreed that Gajendragadkar J. had held that the jurisdiction of the Civil Court to entertain the suit would be barred and the domestic tribunal could alone deal with the dispute even if the bye law was exactly similar in terms to the one before his Lordship Raghavan J. His Lordship proceeds to deal with this aspect and observes:
"The counsel of the appellants, relying on the reasoning of Gajendragadkar J., argues that the conclusion of the learned Judge was not based on the latter part of the bye law, but only on the earlier part, which is similar in terms to the bye law before us. We reiterate that Gajendragadkar J. has treated the earlier part of the bye law itself as a condition precedent, though the condition precedent clause was in the latter part of the bye law before him. What appears further from the reasoning of the learned Judge is that he was inclined to accept the objection that such a condition precedent clause was bad in the case before him."
However, taking the view that the Arbitration Act was exhaustive of the law relating to arbitration agreements, his Lordship held that
"..... the remedy of parties to such an arbitration agreement lies within the act itself. Our attention has not been drawn to any provision in the Arbitration Act under which a suit can be dismissed for not resorting to the arbitration agreement. .....With due respect to Gajendragadkar J., we find it difficult to agree with his decision; and we hold that the suit was maintainable."

5. I have grave doubts about the correctness of this Division Bench decision. And for that reason I would have placed this case for consideration by a Full Bench as requested by appellant's counsel: but it is unnecessary to do so in the present case because even accepting the line of reasoning which found favour with Mathew J. (and in the Bombay case) the present appellant cannot exclude an action in the Civil Court.

6. The decision in 1968 KLJ 635 takes the view that the Arbitration Act is exhaustive of the law of Arbitration based on Belli Gowder v. Joghi Gowder (AIR 1951 Mad. 683), and the only remedy of the party lies under S.34 of the Act to move for stay of the suit and not to challenge its very maintainability on the Scott v. Avery argument. AIR 1951 Madras 683 dealt with an oral submission to

arbitration and an award thereon The question was whether such an award could be filed and made a rule of Court. Viswanatha Sastri J. answered it in the negative since there was no provision for an oral arbitration agreement. "The answer is not free from difficulty" his Lordship observed and held that while the filing of an award is provided for under S.14(2) of the Act, the condition for the Section to apply is the existence of an arbitration agreement which, by definition, requires a written reference. Assuming this decision to be authority for the position that since oral submissions are not provided for under the Act which is exhaustive of the law of arbitration, it does not follow that the rule in Scott v. Avery, that when a contract prescribes arbitration as a condition precedent to its enforcement, is obliterated by the Act. Indeed, the decision in 1963 KLT 415 was taken up in appeal to the Supreme Court (1968 KLT 125) and their Lordships while remanding the case did not suggest that the Indian Arbitration Act, being exhaustive, did not provide for dismissal of suits for not moving the arbitral tribunal earlier, even if it was worded as a condition precedent and so the decision of the High Court was wrong. Indeed, Raghavan J. distinguished the decision of Mathew J. by observing that the clause there in terms attracted Scott v. Avery while the clause before the Division Bench did not, thus taking the impeccable view, if I may say so with great deference, that the effect of the Scott v. Avery clause was not to innovate upon the Arbitration Act by importing a new provision that if a suit is filed in derogation of the arbitration clause, the suit will be dismissed but to constitute the making of an award a condition precedent to the accrual of the right to sue. And if no right to sue accrued, the suit was liable to be dismissed. In other words, the plea is not that the suit should be dismissed, instead of being stayed, in view of the arbitration clause but that this particular arbitration clause, falling within the Scott v. Avery group, is a condition of the contract to which the Court must give effect This has nothing to do with the law of arbitration but has much to do with the law of conditional or contingent contracts. The indirect ouster of the jurisdiction of Courts by such a provision may work hardship in some cases and so S.35 of the Act (corresponding to S.25(4) of the English Arbitration Act, 1950) empowers the Court to override this clause whereupon the making of an award as a condition precedent shall cease to have effect, S 36 runs as follows:

"Where it is provided (whether in the arbitration agreement or otherwise) that an award under an arbitration agreement shall be a condition precedent to the bringing of an action with respect to any matter to which the agreement applies,

the Court if it orders, (whether under this Act or any other law) that the agreement shall cease to have effect as regards any particular difference, may further order that the said provision shall also cease to have effect as regards that difference".

It is useful to remind oneself of S.28 (particularly Exception I) of the Contract Act in this context:

"Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.

Exception I. This section shall not render illegal a contract by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred".

The very existence of these provisions in the Indian Statute book is sufficient arguments to hold that Indian Law still recognises an arbitration clause, properly worded, as a condition precedent to the bringing of an action. It is one thing to say that a certain clause has no such effect; it is a different thing to say that the Arbitration Act excludes such a plea because it contains no section entailing dismissal for not going to arbitration. Thus the Arbitration Act being exhaustive has nothing to do with an arbitration clause being a condition precedent to a contract. And like other conditions precedent its non fulfilment has the effect of postponing the accrual of the cause of action. The only question is whether on the construction of the particular arbitration clause it amounts to a condition precedent The key to the solution of that problem is the keywords used by Baron. Alderson in Brown v. Overbury (4 W.R. 252) that every contract must be determined according to the circumstances belonging to it Where by common consent, or the technical or specialised nature of the business, or the universal practice prevailing in that area of activity or other peculiar features attaching to the type of contract an esoteric tribunal is the best instrument for deciding disputes and the ordinary Court with its inadequacies less fitted for the job in the usual course it will promote justice and public interest to read a Scott v. A very meaning into the arbitral clause. Otherwise, the principle that the right to move the normal forum exists in all civil disputes must prevail.

7. There is no expertise or technical knowledge needed, nor the control of a specialised body, in aerial spraying contracts. There is here no universal practice of looking up to a special set of people trained for deciding disputes in complicated commercial practices relating to that subject matter so as to read into the minds of the contracting parties the intention to insist on a particular body of Judges instead of the ordinary Courts. Nor is the language of Clause.10 in Ext. P1 indicative of treating arbitration a condition precedent. I hold that the Civil Court's jurisdiction is not repelled and the right of action is not absent. It must be remembered, the exclusion of the Court's jurisdiction is the exception. Of Course, in the Scott v. Avery clause the Court's jurisdiction is not excluded but the Court is called upon to enforce the contract giving full effect to the condition precedent clause.

8. The judgments of the Courts below, it is regrettable, do not even refer to the 1963 KLT 415 ruling, may be because the law libraries in the mofussil bars and Courts leave much to be desired. The rule of law will remain a mock phrase if law books are not within the reach of lawyers and Judges. The logistics of law, shall I say, can be improved by implementing S.76 of the Kerala Court Fees and Suits Valuation Act so as to meet current deficiencies in this regard. In this context I must state that Sri. Rajasekharan Nair, counsel for the appellant, argued with ability and persistence worthy of a better cause.

9. It is also regrettable that the Trial Court, after closing the trial, disposed of the suit on one issue without so much as recording findings on the other issues, thus necessitating a remand and consequent protraction of litigation.

10. I uphold the appellate finding and dismiss the C. M. Appeal. I do not think it necessary to give either party any fresh opportunity to further plead and prove anything except for special reasons, if any. It is strange indeed that the only defendant who had admitted the suit claim has persisted in contending that the suit is not maintainable. Strange are the workings of litigant's minds.
I dismiss the C. M. Appeal with costs in this Court.