

**IN THE HIGH COURT OF JAMMU & KASHMIR AND
LADAKH AT SRINAGAR**

Reserved on: 28.04.2025

Pronounced on:06.05.2025

CM(M) No.214/2024

GHULAM RASOOL BHAT

.. PETITIONER(S)

Through: - Mr. Yasir Nabi Rather, Advocate.

Vs.

SHAFEEQ FRUIT COMPANY

...RESPONDENT(S)

Through: - Mr. Ibrahim Mehraj, Advocate.

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1) The petitioner, through the medium of present petition, has challenged order dated 12.06.2024 passed by learned Munsiff, Handwara (hereinafter referred to as "the trial court") whereby on an application under Section 8 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act of 1996") filed by the respondent in a suit filed by the petitioner, the learned trial court has referred the parties to arbitration with a direction to appear before Kashmir Fruit Growers and Dealers Association, Fruit Mandi, Sopore.

2) It appears that a suit came to be filed by the petitioner/plaintiff against the respondent/defendant seeking settlement of accounts with a further relief of

permanent injunction. In the plaint, it was alleged by the plaintiff that the defendant had approached him for supply of fruit boxes for their further sale. It was also pleaded that the terms and conditions were settled between the parties whereby the defendant had undertaken to sell the fruit supplied by the plaintiff at higher rates and to deduct commission of 1% and expenses from the sale proceeds. Another condition agreed to by the parties was that the defendant would provide money to the plaintiff as per requirement and that defendant would provide all necessary items like boxes, waste paper and pesticides at genuine and reasonable rates.

3) According to the plaintiff, he has maintained true and correct account of dispatches of the transactions which he had received from the defendant but the terms and conditions of the agreement have been violated by the defendant, inasmuch as the fruit supplied by the plaintiff has been sold at very low rates which resulted in loss to the plaintiff. It was further pleaded that the defendant has not maintained proper accounts, as a result of which the plaintiff could not make payment to the orchard owners resulting in loss to him. It was further pleaded that the plaintiff had asked the defendant at the end of the year to settle the accounts which he refused. On the basis of these allegations,

the plaintiff sought a preliminary decree for settlement of accounts and a final decree for recovery of outstanding amount from the defendant. A further injunction restraining the defendant from recovering any amount from the plaintiff and from causing interference in his business was also sought.

4) The defendant, upon putting appearance through counsel before the learned trial court, filed an application under Section 8 of the Act of 1996, in which it was submitted that there is an arbitral clause in the written agreement between the parties which negates jurisdiction of the civil court. It was further submitted that in terms of Section 8 of the Act of 1996, the dispute between the parties is required to be referred to arbitration of the sole Arbitrator of the Union of Kashmir Fruit Growers and Dealers Association, Fruit Mandi, Sopore and that civil court has no jurisdiction to adjudicate upon the issues raised in the suit.

5) The aforesaid application was contested by the plaintiff/petitioner by filing a reply thereto. In the reply, the plaintiff denied the existence of arbitration clause and pleaded that there is a condition in the agreement executed between the parties which cannot be termed as an arbitration clause. According to the plaintiff, the condition attached to the agreement executed between the parties

cannot oust the jurisdiction of the civil court as the same does not qualify to be an arbitration clause. It was also contended that if the matter is heard by the President of the Fruit Growers Associations, Sopore, of which the plaintiff happens to be a member, the same would not qualify to be an arbitration and, therefore, jurisdiction of the civil court is not barred.

6) The learned trial court after hearing the parties passed the impugned order dated 12.06.2024 and observed that there exists an arbitration clause in the agreement executed between the parties. It has also been observed that in terms of Section 16 of the Act of 1996, the arbitral tribunal is itself competent to rule on its jurisdiction as well as the objection with respect to the validity and existence of the arbitration agreement and, therefore, the plaintiff can raise this issue before the arbitral tribunal. After recording these observations, the learned trial court referred the parties to arbitration and the Arbitrator was directed to make the award and file the same before the court by or before 01.08.2024.

7) The petitioner/plaintiff has challenged the impugned order on the grounds that the learned trial court has erroneously interpreted the condition in the agreement executed between the parties as an arbitration clause which

otherwise does not qualify to be an arbitration agreement. It has been further contended that the impugned order has been passed by the learned trial court in contravention to the provisions of the Act of 1996

8) I have heard learned counsel for the parties and perused record of the case.

9) As already stated, the dispute between the parties relates to settlement of accounts with regard to supply and sale of fruits. The parties have, admittedly, entered into a written agreement in regard to the aforesaid transaction. A copy of the agreement has been produced by the petitioner along with the present petition. The agreement is on the letter head of the respondent/defendant and, admittedly, it has been signed by both the parties. As per the terms of the said agreement, which is in Urdu language, the petitioner/plaintiff has agreed to supply fruits owned by him and also the fruits that would be purchased by him from others to the defendant firm. He has further agreed that the defendant firm would be entitled to deduct expenses and commission from the sale proceeds. As per the agreement, the plaintiff/petitioner was to receive an amount of Rs.1.00 lac in the month of May, an amount of Rs.50,000/ in the month of June, Rs.50,000/ in July, Rs.50,000/ in August, Rs.50,000/ in September, Rs.75,000/ in October and

CM(M) No.214/2024

Rs.75,000/ in the month of November. The agreement further provides that besides these instalments, the plaintiff would not demand any other amount from the defendant firm unless the amount is received by the firm. At the bottom of the agreement a note is appended which is relevant to the context. The translated version thereof reads as under:

“God forbid, if a dispute arises between the parties, the same would be resolved only and only by the Union in accordance with the rules of Kashmir Fruit Growers and Dealers Association, Fruit Mandi, Sopore.”

10) The question that arises for determination is as to whether the afore-quoted clause in the agreement executed between the parties qualifies to be an ‘arbitration clause’ so as to attract the provisions contained in Section 8 of the Act of 1996.

11) The issue as to what constitutes an ‘arbitration clause’ or an ‘arbitration agreement’, has been a subject matter of deliberation and discussion before the Supreme Court and several High Courts of the Country. In order to understand the issue, it would be apt to refer to some of these decisions.

12) The Supreme Court in the case of **K. K. Modi vs. K. N. Modi**, (1998) 3 SCC 573, enumerated the following attributes of a valid arbitration agreement:

“(1) The arbitration agreement must contemplate that the decision of the tribunal

will be binding on the parties to the agreement,

(2) That the jurisdiction of the tribunal to decide the rights of parties must derive either from the consent of the parties or from an order of the Court or from a statute, the terms of which make it clear that the process is to be an arbitration,

(3) The agreement must contemplate that substantive rights of parties will be determined by the agreed tribunal,

(4) That the tribunal will determine the rights of the parties in an impartial and judicial manner with the tribunal owing an equal obligation of fairness towards both sides,

(5) That the judgment of the parties to refer their disputes to the decision of the tribunal must be intended to be enforceable in law and lastly,

(6) The agreement must contemplate that the tribunal will make a decision upon a dispute which is already formulated at the time when a reference is made to the tribunal.”

13) The aforesaid judgment was relied upon by the Supreme Court in the case of **Bihar State Mineral Development Corporation vs. Encon Builders (I) (P) Ltd.**

(2003) 7 SCC 418, and the Court listed the following as the essential elements of an arbitration agreement:

“(1) There must be a present or a future difference in connection with some contemplated affair.

(2) There must be the intention of the parties to settle such difference by a private tribunal.

(3) The parties must agree in writing to be bound by the decision of such tribunal.

(4) The parties must be ad idem.”

14) Again, the Supreme Court in the case of **Jagdish Chander vs. Ramesh Chander & Ors.** (2007) 5 SCC 719, after noticing its earlier judgments on the issue, set out the well settled principles in regard to what constitutes an arbitration agreement by observing as under:

“(i) The intention of the parties to enter into an arbitration agreement shall have to be gathered from the terms of the agreement. If the terms of the agreement clearly indicate an intention on the part of the parties to the agreement to refer their disputes to a private tribunal for adjudication and a willingness to be bound by the decision of such tribunal on such disputes, it is arbitration agreement. While there is no specific form of an arbitration agreement, the words used should disclose a determination and obligation to go to arbitration and not merely contemplate the possibility of going for arbitration. Where there is merely a possibility of the parties agreeing to arbitration in future, as contrasted from an obligation to refer disputes to arbitration, there is no valid and binding arbitration agreement.

(ii) Even if the words 'arbitration' and 'arbitral tribunal (or arbitrator)' are not used with reference to the process of settlement or with reference to the private tribunal which has to adjudicate upon the disputes, in a clause relating to settlement of disputes, it does not detract from the clause being an arbitration agreement if it has the attributes or elements of an arbitration agreement. They are : (a) The agreement should be in writing. (b) The parties should have agreed to refer any disputes (present or future) between them to the decision of a private tribunal. (c) The private tribunal should be empowered to adjudicate upon the disputes in an impartial manner, giving due opportunity to the parties to put forth their case before it. (d) The parties should have agreed that the decision of the Private Tribunal in respect of the disputes will be binding on them.

(iii) Where the clause provides that in the event of disputes arising between the parties, the disputes shall be referred to Arbitration, it is an arbitration agreement. Where there is a specific and direct expression of intent to have the disputes settled by arbitration, it is not

necessary to set out the attributes of an arbitration agreement to make it an arbitration agreement.

But where the clause relating to settlement of disputes, contains words which specifically excludes any of the attributes of an arbitration agreement or contains anything that detracts from an arbitration agreement, it will not be an arbitration agreement. For example, where an agreement requires or permits an authority to decide a claim or dispute without hearing, or requires the authority to act in the interests of only one of the parties, or provides that the decision of the Authority will not be final and binding on the parties, or that if either party is not satisfied with the decision of the Authority, he may file a civil suit seeking relief, it cannot be termed as an arbitration agreement.

(iv) But mere use of the word 'arbitration' or 'arbitrator' in a clause will not make it an arbitration agreement, if it requires or contemplates a further or fresh consent of the parties for reference to arbitration. For example, use of words such as "parties can, if they so desire, refer their disputes to arbitration" or "in the event of any dispute, the parties may also agree to refer the same to arbitration" or "if any disputes arise between the parties, they should consider settlement by arbitration" in a clause relating to settlement of disputes, indicate that the clause is not intended to be an arbitration agreement. Similarly, a clause which states that "if the parties so decide, the disputes shall be referred to arbitration" or "any disputes between parties, if they so agree, shall be referred to arbitration" is not an arbitration agreement. Such clauses merely indicate a desire or hope to have the disputes settled by arbitration, or a tentative arrangement to explore arbitration as a mode of settlement if and when a dispute arises. Such clauses require the parties to arrive at a further agreement to go to arbitration, as and when the disputes arise. Any agreement or clause in an agreement requiring or contemplating a further consent or consensus before a reference to arbitration, is not an arbitration agreement, but an agreement to enter into an arbitration agreement in future.

15) A Single Judge of Calcutta High Court in the case of **BGM and M-RPL-JMCT (JV) vs. Eastern Coalfields Ltd** (AP 745 of 2023 decided on 19 Jan, 2024), after noticing various judgments of the Supreme Court on the issue, has held that

CM(M) No.214/2024 Page 9 of 15

clarity of intention should be expressed through clear-cut words. It would be apt to quote the following observations made by the learned Single Judge of Calcutta High Court:

“13. The clarity of intention should hence be expressed through clear-cut words. Therefore, words such as

"the parties wish", or

"the parties will consider", or

"the parties will thereafter decide" and

"the parties may"

will be counter-productive to the unequivocality of the intention to arbitrate. The above instances are not exhaustive and may include other words which give a sense of indecision, lack of purpose, prevarification or even saving the option for arbitration to a later date or as a last resort.

14. An arbitration agreement also does not sit comfortably with conditions attached for the parties to go to arbitration. The clause should not be subject to or conditional upon further or future events which may or may not occur.

15. In essence, there cannot be any ifs and buts or an undecided mumble; the parties must give a resounding "Yes" to arbitration. For a movement analogy; the arbitration agreement is not about a hesitant 1 step ahead - 2 steps backward / back-tracking but a confident 1-way stride forward to arbitration.

16. Section 11 of the 1996 Act is one of the earlier interventions by a Court on the presumption of the existence of an arbitration clause. The Court must hence ensure the existence of an arbitration agreement before flagging of the road to the award and beyond. The parties cannot set forth on the procedural journey if there is no arbitration agreement.”

16) From the foregoing analysis of law on the subject, it is clear that nomenclature of the agreement is not the determinative factor for ascertaining as to whether the parties have agreed to resort to arbitration. What is relevant

is whether the parties have agreed that dispute arising between them in respect of the subject matter of the contract, would be referred to arbitration and the decision would be binding on them. The agreement between the parties has to clearly specify that the rights of the parties would be determined by the agreed tribunal by adjudication of the disputes which would be binding on the parties. The agreement must contemplate adjudication of disputes on the basis of the evidence that may be produced before the Adjudicatory Forum after hearing the parties. The intention of the parties should be clear and there should be no doubt about their intention of resolution of disputes through arbitration.

17) The reference of parties to arbitration has serious civil consequences because once the disputes between the parties are referred to Arbitral Tribunal, the provisions of the Code of Civil Procedure and Evidence Act are out of picture and the final decision made by the Arbitral Tribunal is binding upon the parties as the same can be challenged only on limited grounds. Thus, reference of disputes to arbitration has serious effect upon the rights of the parties. Therefore, unless there is a clear-cut arbitration agreement between the parties, the jurisdiction of the civil court to decide a suit between the parties is not ousted.

18) With the aforesaid legal position in mind, let us now advert to the facts of the present case. As already stated, as per the note appended to the agreement executed between the parties, they had agreed to get their disputes resolved only and only by the Union in accordance with the rules of Kashmir Fruit Growers and Dealers Association, Fruit Mandi, Sopore.

19) Respondent/ defendant has placed on record copy of the Bye-laws of Kashmir Fruit Growers and Dealers Association, Fruit Mandi, Sopore. Section 8 of the said Bye-laws relates to responsibilities and powers of Chairman of the trade Committee. Sub-section (1) of Section 8 provides that the Chairman shall have power to hear and decide cases concerning orchard owners, traders, labourers and other business relating to the trade of fruit business. As per sub-section (2), the Chairman is vested with power to resolve all trade relating cases and disputes that may arise within Mandi or outside Mandi between the traders and outside State traders. As per sub-section (3), the Chairman has power to summon the parties involved in trade cases and to initiate proceedings in this regard. As per sub-section (4), the Chairman has to get signatures of the parties and also to get their signatures on the names of the mediators. As per sub-section (5), the President and General Secretary have to be

apprised about the progress of each trade case. Sub-section (6) provides that the fee in respect the trade case has to be deposited in the office. As per sub-section (7), 2% of the awarded sum has to be recovered as donation from the parties and the same has to be deposited in the office. As per sub-section (8) in case of appeal against any order, the Chairman has to consult the President and the General Secretary.

20) From an analysis of the aforesaid Bye-laws, it comes to the fore that Chairman of the Association is vested with the power to adjudicate the disputes between the traders, orchard owners and other persons associated with the trade of fruits. He has to hear the parties and he has also to adjudicate the disputes. The Chairman is also empowered to summon the parties. Thus, a complete adjudicatory process is provided under the Bye-laws.

21) The note appended below the agreement executed between the parties, which provides for decision of the disputes by Union in terms of the bylaws of the Fruit Growers and Dealers Association, when read in conjunction with Section 8 of the Bye-laws, leaves no manner of doubt in holding that the note appended to the agreement executed between the parties is nothing but an arbitration clause as the same satisfies all the requirements of the arbitration

clause. The fact that the said clause provides that disputes between the parties shall be decided only and only in terms of the said clause, shows that the parties intended to make the decision of the Union, taken in accordance with its Bye-laws, binding on them. The contention of the petitioner that the note appended to the agreement between the parties does not qualify to be an arbitration clause is, therefore, not sustainable in law.

22) Section 8 of the Act of 1996 clearly provides that when a party to the arbitration agreement applies under the said Act before the judicial authority prior to submitting his first statement on the substance of the dispute, the judicial authority has to refer the parties to arbitration once it is found that there is a valid arbitration agreement between the parties.

23) In the present case, as already held, there is a valid arbitration agreement existing between the parties which covers the dispute between the parties, which is subject matter of the suit filed by the petitioner. An application under Section 8 of the Act of 1996 came to be filed by the respondent/defendant before filing his written statement on merits. Therefore, there was no option for the learned trial court but to refer the parties to arbitration. However, the direction of the learned trial court to the effect that award
CM(M) No.214/2024

should be filed before the said court is not contemplated under Section 8 of the Act of 1996. To that extent, the impugned order is not sustainable in law.

24) For the foregoing reasons, the impugned order passed by the learned trial court except to the extent of directing the Arbitrator to file his award before the said court is upheld and the petition is dismissed.

(Sanjay Dhar)
Judge

Srinagar,
06.05.2025
“Bhat Altaf-Secy”

Whether the order is reportable: Yes/No

