

## APPELLATE CIVIL.

*Before Gurnam Singh, J.*

KARAM CHAND,—Appellant.

*versus*

MESSRS. SANT RAM-TARA CHAND,—Respondents.

**First Appeal from Order No. 71 of 1955.**

1957

Dec., 24th

*Arbitration Act (X of 1940)—Sections 8, 20 and 47—Application for filing the arbitration agreement in Court made—Objection raised that the arbitrator named is not a fit person to act as arbitrator—Objection upheld—Court, whether entitled to file the agreement in Court and keep it alive.*

*Held*, that on an application being made under section 20 of the Arbitration Act, 1940, it is necessary for the Court to give notice to all the parties to the agreement other than the applicants to show cause why the agreement should not be filed. Where such parties fail to show sufficient cause as contemplated by subsection (4) of section 20, it is obligatory on the court to order the filing of the agreement. After this is done, the Court shall make a reference to the arbitrator appointed by the parties and in case the parties fail to come to any agreement it can make reference to the arbitrator appointed by itself. Thus the court is competent to keep the agreement alive in spite of the incapacity of the named arbitrator to act and has the jurisdiction to order the filing of the agreement.

*Held further*, that after the arbitration agreement is ordered to be filed, the arbitration is to proceed in accordance with and is to be governed by the other provisions of the Arbitration Act so far as they can be made applicable (*vide* sections 20(5) and 47). Undoubtedly, therefore, the provisions of section 8 of the Act are attracted and it can be presumed that it was intended to supply the vacancy and the burden to show otherwise must rest on the party objecting to it. It is, therefore, for the objector to show that the intention of the party was not to refer the dispute to any other arbitration than that of the named arbitrator. The only objection raised by the appellant against the filing of the arbitration agreement was the unfitness of the named

arbitrator on account of his close relationship with the applicant-respondent. That by itself does not show that the parties did not intend to refer their disputes to arbitration.

*Yar Mohammad and another v. Ghulam Sarwar and others* (1), relied on.

*First Appeal from the order of Shri Radha Kishan, Sub-Judge, 1st Class, Amritsar, dated 28th December, 1954, holding that arbitration agreement can be ordered to be filed and if the parties do not agree to the appointment of an arbitrator, any one of them can move the court.*

S. L. PURI, for Appellant.

C. L. AGGARWAL, for Respondent.

#### JUDGMENT

GURNAM SINGH, J.—This first appeal against Gurnam Singh, J. order has arisen out of the following facts.

On the 21st of May, 1947, Karam Chand and Diwan Chand mortgaged certain property in favour of the respondents for Rs. 30,000 by a registered mortgage deed of the same date. Clause 14 of this deed provided that any dispute arising between the parties out of this transaction would be referred to the arbitration of Hari Kishan Dass who was known to the parties. On the 17th of April, 1954, on account of certain disputes arising out of the transaction the mortgagees presented an application under section 20 of the Arbitration Act (Act No. X of 1940), hereinafter to be called the Act, that the arbitration agreement be filed in Court. The mortgagor admitted the execution of the mortgage deed incorporating the agreement for reference to arbitration but maintained that Hari Kishan Das, the arbitrator named, being father-in-law of Siri Kishen, one of the parties in the petitioners' firm, was not a fit person to act

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as an arbitrator. The Court framed the following issues:—

- (1) Whether Shri Hari Kishen Das is not a fit person to arbitrate between the parties?
- (2) Relief.

The learned Sub-Judge upheld the objection of the mortgagor. He, however, ordered the filing of the arbitration agreement. The present appeal by the mortgagor is directed against that order.

The learned counsel for the appellant contends that after accepting the objection of the appellant the only course open to the Court was to dismiss the application for filing the agreement. The Court, according to him, had no jurisdiction to allow the filing of the agreement in the absence of the intention of the parties to refer the dispute to the arbitration of any other person. The question for determination, therefore, is whether the arbitration agreement has become inoperative on account of the incapacity of the above-named arbitrator to act or can the Court keep the agreement alive under the Act? Section 20 of the Act under which the application is made refers to arbitration with intervention of Court where there is no suit pending. For the decision of the question raised the following subsections of section 20 are relevant:—

- (3) On such application being made, the Court shall direct notice thereof to be given to all parties to the agreement other than the applicants, requiring them to show cause within the time specified in the notice why the agreement should not be filed?

- (4) Where no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise, or, where the parties cannot agree upon an arbitrator, to an arbitrator appointed by the Court. Karam Chand  
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- (5) Thereafter the arbitration shall proceed in accordance with, and shall be governed by, the other provisions of this Act so far as they can be made applicable."

From a reading of these provisions of the Act it is clear that as soon as an application for filing the agreement is made it is necessary to give notice to all parties to the agreement other than the applicants to show cause why the agreement should not be filed. Where such parties fail to show sufficient cause as contemplated by subsection (4) "the Court shall order the agreement to be filed." It is, therefore, clear that it is obligatory on the Court to order the filing of the agreement where the parties fail to show sufficient cause against it. After this is done the Court shall make a reference to the arbitrator appointed by the parties. In case the parties fail to come to any agreement it can make reference to the arbitrator appointed by it. No doubt that under the old law as found in paragraph 17 of the Second Schedule of the Civil Procedure Code, 1908, in case of death or refusal of the arbitrator to act, the Court had no jurisdiction to entertain an application to enforce the agreement to refer the dispute to the arbitration. Under the present Act powers of the Court are undoubtedly widened by the words occurring in section 20 "by the parties, whether in the agreement or otherwise, or where the parties cannot

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agree upon an arbitrator, to an arbitrator appointed by the Court". From this it is abundantly clear that on failure of the parties to agree to the appointment of the arbitrator the Court can appoint one. Thus the Court is competent to keep the agreement alive in spite of the incapacity of the named arbitrator to act. It follows, therefore, that the Court has jurisdiction to order the filing of the agreement.

After the Court has ordered the filing of the agreement subsection (5) of Section 20 at once comes into operation. It says that after the agreement is ordered to be filed the arbitration shall proceed in accordance with and shall be governed by the other provisions of the Act so far as they can be made applicable. In similar terms is section 47 of the Act. It says the provisions of this Act shall apply to all arbitrations and to all proceedings thereunder. Thus the Act makes a provision for the application of the other provisions of the Act. Undoubtedly, therefore, provisions of Section 8 of the Act are also attracted. Under subsection (1) (b) of this section it can be presumed that it was intended to supply the vacancy and the burden to show otherwise must rest on the party objecting to it. It is, therefore, for the objector to show that the intention of the party was not to refer the dispute to any other arbitration than that of the named arbitrator. The only objection raised by the appellant against the filing of the arbitration agreement was the unfitness of the named arbitrator on account of his close relationship with the applicant-respondent. This by itself does not show that the parties did not intend to refer their disputes to arbitration. The appellant in these circumstances, in my opinion, has failed to show sufficient cause against the filing of the award. I, therefore, do not find any substance

in the submission of the learned counsel for the appellant that the Court should have dismissed the application for filing the award. It was for the appellant to show sufficient cause against filing of the agreement and further to show that it was not intended to supply the vacancy on account of the refusal or incapacity of the named arbitrator to act. In this the appellant has utterly failed. I am, therefore, firmly of the view that the Court was justified in allowing the filing of the agreement. This view finds support in an authority of the Lahore High Court—*Yar Muhammad and another v. Ghulam Sarwar and others* (1), in which it was held:—

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“Under the new Act, mere refusal to act on the part of the arbitrator named by the parties in the arbitration agreement will not make the agreement wholly ineffectual, but the agreement can still be kept alive by the parties agreeing to another person as an arbitrator, and failing that, by the Court itself.”

No other authority either of our High Court or of any other Indian High Court was cited before me by the counsel for the parties. I agree with the reasons given by the learned Judge in the Lahore authority for coming to the conclusion that the Court is competent to keep the agreement of arbitration alive. I, therefore, do not find any substance in this appeal.

In the result, the order of the Sub-Judge 1st Class, Amritsar, is maintained and the appeal is dismissed with costs.

B.R.T.

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(1) A.I.R. 1950 Lah. 145.