

**RANIN KUMAR, PROPRIETOR, MESSRS PHARMA CHEMIE**  
**v**  
**STATE PHARMACEUTICAL CORPORATION**

SUPREME COURT  
BANDARANAYAKE, J.  
EDUSSURIYA, J. AND  
DE SILVA, J.  
S.C. (APPEAL) NO. 80/2002  
H.C. COLOMBO NO. 111/98 (ARB)  
15 AUGUST AND 8 OCTOBER 2003

*Arbitration Act, No. 11 of 1995 – Enforcement of award – Section 31(1) of the Act – Appeal from the enforcement order – Plea of lack of jurisdiction of the arbitrator first raised in appeal – Untenable objection.*

The appellant the proprietor of Messrs Pharma Chemie tendered through Pharma Associates to supply Amoxycillin capsules and supplied 25 million capsules to the respondent Corporation on a tender called by the Corporation. These capsules were supplied by Messrs Pharma Chemie. As the capsules were found to be sub-standard the dispute was decided by arbitration and the award was made in favour of the State Pharmaceutical Corporation after an inquiry was made on the merits of the claim. The High Court made an order in favour of the Corporation for enforcement of the award under section 31(1) of the Arbitration Act.

On appeal to the Supreme Court, the appellant raised the point that there was an arbitration agreement hence the Arbitrator had no jurisdiction and the award

was a nullity. But the dispute raised by the Corporation was heavily contested before the Arbitrator and no question of jurisdiction was raised.

**Held:**

(1) Clause 29 of the tender conditions provided for arbitration of disputes.

(2) *Per de Silva, J.*

“Long participation and acquiescence in the proceedings precludes a party from contending that the proceedings were without jurisdiction. Where a party to an arbitration agreement participates in the arbitration proceedings with the clear knowledge that the matter is legally incapable of being submitted to arbitration he cannot thereafter raise the question of lack of jurisdiction”.

(3) The arbitration award could be enforced against Mr. Ranin Kumar the proprietor of Pharma Chemie. The offer to supply the capsules was made through the agent Pharma Associates on behalf of Pharma Chemie which was a sole proprietorship owned by Ranin Kumar.

**Cases referred to:**

1. *Keliner v Baxfer* LR 8 Ch APP 407

2. *Waharaka Investment Ltd v The Commissioner of Stamp* – 34 NLR 266 at 275

**APPEAL** from the judgment of the High Court, Colombo.

*Gamini Marapana, P.C.* with *Navin Marapana* for appellant

*Saleem Marsoof, P.C.* Additional Solicitor-General with *Anil Goonaratne*, Deputy Solicitor-General for respondent.

*Cur.adv.vult*

January 30, 2004

**J.A.N. DE SILVA, J.**

This is an appeal against the order of the learned High Court Judge dated 15.06.2001 wherein he allowed the application to enforce an arbitral award made in favour of State Pharmaceutical Corporation, the respondent in this appeal.

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On 22.11.2002 this court granted Special Leave to Appeal on the following questions of law.

(1). Did the learned High Court Judge fail to appreciate that the award is a nullity and void and has been made without jurisdiction and is unenforceable?

- (2) Did the Learned High Court Judge err in Law in holding that the award is enforceable against the appellant in the absence of an award against him? 10

Section 31(1) of the Arbitration Act, No. 11 of 1995 entitles a party to an arbitration agreement pursuant to which an arbitral award is made to apply to the High Court for the enforcement of the award within the period specified in the section. The primary question raised by the appellant in this case is whether there is "an arbitration agreement" between the parties. The appellant's case is that the arbitrator had no jurisdiction whatsoever to make the said award (patent lack of jurisdiction). 20

The following are the key players in this transaction which led to the dispute.

1. The State Pharmaceutical Corporation – the respondent
2. Mr. Ranin Kumar – The appellant – proprietor of the Pharma Chemie Ltd
3. M/s. Pharma Associates
4. Pharma Chemie Ltd.

The State Pharmaceutical Corporation of Sri Lanka called for tenders by document dated 19/05/1993 for fifty (50) million Amoxycillin Capsules. It is the contention of the appellant that M/S Pharma Associates responded to the tender but was awarded only half the quantity tendered for, that is 25 million capsules. The number of the tender was DAS /24/5/98. The balance 25 million capsules were purchased direct by respondent on a different transaction from M/s Pharma Chemie under reference number DHS/PA/722/94 dated 12/11/1993. 30

The contention of the appellant is that the goods supplied by Pharma Chemie under the above numbered purchase order were allegedly found to be sub-standard and the respondent thereupon made a claim on Pharma Chemie. After this allegation was made Pharma Chemie requested to inspect the goods in dispute but this request was not acceded to by the respondent and over that there was a dispute between the respondent and Pharma Chemie Ltd. The appellants position is that Pharma Chemie Ltd took no part in the tender and that the document XI had nothing to do with Pharma Chemie. 40

The position of the State Pharmaceutical Corporation is totally different. According to the respondent corporation, the Corporation accepted the tender of the appellant for the supply of Amoxycillin by letter dated 1st November 1993 (X3) and placed the order for 25 million capsules. The appellant by his letter dated 5th November 1993 (X4) confirmed the acceptance for the supply of the said quantity of Amoxycillin capsules. The respondent Corporation sent a purchase order dated 17th November 1993 (X5) and in that indicated that 15 million capsules were to be delivered in January 1994 and the balance 10 million in March 1994. These drugs were delivered by the appellant and payments were made by Corporation to the appellant accordingly. About one year after purchase of these capsules and their distribution to various government institutions a post marked surveillance was conducted by the National Drug Control Assurance Laboratory at various institutions. These test of samples from 8 batches from the amount of capsules delivered by the appellant were found to be of sub-standard quality which cannot be used for medication. As a result the respondent Corporation had to withdraw these drugs from the Medical Supplies Division of the Ministry of Health. The value of the drugs so withdrawn amounted to Rs. 3,825,000/-. Thereafter the respondent Corporation had to claim the said sum from the petitioner and this resulted in arbitration proceedings.

From the evidence of Sirisena, Commercial Manager of the Pharmaceutical Corporation, it appears that the tender document marked X1 was perfected and submitted by Pharma Associates on behalf of Pharma Chemie along with a covering letter dated 5th August 1993 marked P.2. The fact that the tender document containing clause 29 was submitted along with the letter dated 5th August 1993 quoting certain prices for Cloxycillin and Amoxycillin 250 mg capsules shows that the offer made by Pharma Chemie was subject to the said arbitration clause. The said offer was accepted by the letter dated 1st November 1993 marked P3 addressed to Pharma Associates by the appellant.

It is to be noted that the appellant in X19 takes full responsibility for the supply of capsules indicated in several documents marked X2, X3, X4 and X5 in the High Court proceedings. X2 is the letter dated 20th August 1993 addressed to the Chairman of the respondent corporation by the agent of the appellant who had participated in the ten-

der on behalf of the appellant. X3 is a letter by the respondent to the appellant's agent giving details of the order required by the respondent. By X4 (5th November 1993) the appellant acknowledges document marked X3. X5 is the purchase order and details of same has been regularly referred to by the appellant in his subsequent correspondence (vide X19, X21 and X24). X19 gives details of the order as order No. 1P/DAS/PA/722/94 of 12/11/94.

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The appellant's counsel in his written submissions and at the hearing of this appeal submitted that Pharma Associates offer was an independent offer and Pharma Chemie had nothing to do with it.

However he has forgotten the fact that in the petition of appeal presented to this court the appellant had admitted that Pharma Associates acted as agents of Pharma Chemie. The averment in paragraph 2(b) of the petition of appeal is as follows:

*"Messers Pharma Associates submitted a tender on behalf of Pharma Chemie for the supply of 25 million Amoxycillin capsules, which tender was accepted by the State Pharmaceutical Corporation of Sri Lanka."*

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In these circumstance we hold that the appellant's claim that Pharma Associates acted independently is baseless and calculatedly presented to confuse the issue and therefore is deplorable.

Additional Solicitor General Mr. Marsoof P.C. who appeared for the respondent amongst other things also submitted that the appellant is estopped in law from taking up the position that there was no arbitration agreement between the parties. The learned counsel pointed out that the appellant failed to take up this position before the Arbitration Tribunal. In fact when this matter was taken up by the Arbitral Tribunal on the continuation of the proceedings on the basis that the application is time barred. Thereafter written submissions had been filed by the appellant before the arbitrator on the 16th December 1996 where specific reference had been made to clause 29 of the tender conditions marked P1 and X1. It is relevant to note that in paragraph 10 of the written submission (in the arbitration proceedings) counsel for the appellant has taken up the position that the State Pharmaceutical Corporation has acted in contravention of clause 29 of the invitation to tender wherein is stated that "shall within 30 days give the other party notice in writing of such dispute or difference."

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Mr. Marsoof also submitted that a party cannot be inconsistent in his approach in legal proceedings. The learned counsel pointed out that a party to a transaction cannot affirm and disaffirm the same transaction simultaneously. Attention of court was drawn to Arbitration Law, Third Edition by S.K.Roy Chowdhury, H.K.Sahoray at page 339 where it is stated that "The principle is that a party shall not be allowed to blow hot and cold simultaneously. Long participation and acquiescence in the proceedings precludes a party from contending that the proceedings were without jurisdiction. Where a party to an arbitration agreement participates in the arbitration proceedings with clear knowledge that the matter is legally incapable of being submitted to arbitration he cannot thereafter raise the question of lack of jurisdiction". – Prasum Roy 1988 S.C.205. 130

A similar approach was adopted by Mukkarje and Oza JJ. in a case reported in A.I.R.1988 Supreme Court 205 (from 1987(1) Cal LJ 207) where the court held that where a party is aware from the beginning that by reason of some disability the matter is legally incapable of being submitted to arbitration, participates in arbitration proceedings and when he sees that the award has gone against him come forward to challenge the whole of the jurisdiction on the ground of known disability, the same cannot be allowed. This principle applies both before and after making the award. (1987 1 Cal LJ 207 – Reversed AIR 1956 Cal 470 –approved (1876) 3 Ind App. 209 and AIR 1925 – 230)". 140

We are in full agreement with this submission of Mr.Marsoof P.C. and hold that the appellant is estopped from contesting the fact that there was no arbitration agreement between the parties.

The next question that arises for consideration is whether the arbitration award could be enforced against the appellant Mr.Ranin Kumar, the proprietor of Pharma Chemie/Pharma Chemie Ltd. 150

As stated earlier, it was the contention of the counsel for the appellant that the offer contained in the letter dated 5th August 1993 marked P2 was made by Pharma Associates and that the letter of acceptance of 1st November 1993 marked P3 and X3 has also been addressed to Pharma Associates and the said transaction was never authorized by Pharma Chemie Ltd. However it is clear from page 92 of the brief that Pharma Chemie (Pvt)Ltd. was

incorporated only on 29th September 1993 and that therefore this company did not have any legal existence on the closing date of tender namely 6th August 1993 which appears on schedule 1 of the Tender Documents marked P1 and X1. (vide page 51 of the brief). It was for this reason that the offer was made through the agent Pharma Associates on behalf of Pharma Chemie which was a sole proprietorship owned by A.Ranin Kumar. The letters dated 30th May 1993 (X15) and 7th July 1995 (X16) have been addressed to M/S Pharma Chemie with no reference to "Ltd" or "Co.Ltd etc." signifying an incorporated company. However, it is clear from the letter dated 17th November 1995 (X17) that there has been some confusion in the minds of the authorities as to whether they were dealing with Pharma Chemie or Pharma Chemie Ltd. It is however trite law that a company is neither bound by or entitled to the benefit of any contract entered into prior to its incorporation (vide *Keliner v Baxter*<sup>(1)</sup>) a decision which was described by Macdonald CJ. In *Waharaka Investment Co.Ltd, v Commissioner of Stamp* <sup>(2)</sup> as "a case where authority has never been doubted".

Notice of Arbitration issued on behalf of the respondent by its letter dated 15th December 1995 marked X18 has been addressed to Pharma Chemie Ltd. obviously as a result of this confusion. However the appellant himself has replied X18 by his letter dated 20th December 1995 marked X19 (page 89 of the brief) sent in his personal capacity as A.Ranin Kumar, Managing Proprietor of Pharma Chemie. In X21 it was his position that the notice under section 29 of the invitation to tender is out of time and that the same has not been complied with within 30 days of the arising of the dispute. Mr.Ranin Kumar also stresses in "X21" and has admitted that the dispute arose on 30.05.1995 and that the notice of Arbitration as required by clause 29 of the invitation to tender was sent on 15.12.1995. Therefore letter marked X24 fortifies the position in favour of the respondent. Each paragraph in 'X24' must be considered carefully as the appellant has knowingly admitted very relevant facts which are contrary to the matters set out in the written submissions and submission made in open court. In these circumstances it is clear from all the documents marked and produced in the arbitration proceedings and in the High Court that the appellant was awarded the tender and that he is bound by the arbitration award.

The Learned High Court Judge in his Judgement allowing enforcement has considered the appellant's position i.e. award is against Pharma Chemie and not against A.Ranin Kumar has observed thus "..... **From the documents filed in these proceedings and from the evidence led at the arbitration reveals that from the day on which the dispute arose the respondent A.Ranin Kumar as the Managing Proprietor of the Messers Pharma Chemie had correspondence with the petitioner i.e. endorsement in X18 requesting "please return the pack for further action" and by his letter 'X19' Ranin Kumar has stated "all these problems came only after my objection to the tender awarded to a foreign supplier. Therefore it appears that you are trying to find some fault after consuming all the capsules to eliminate me from the tender competition. Anyway, we both are local manufacturers and therefore please try to maintain our good will. "This statement shows that Mr. Ranin Kumar is the sole proprietor of Pharma Chemie ..."** The notice of award was given to Mr.Ranin Kumar the respondent. The respondent after taking all steps to resist the petitioner's claims before arbitration and at the beginning of the arbitration proceedings cannot now at the time of enforcement disclaim the responsibility of fulfilling his obligations. Therefore I overrule this objection." 200 210

We fully endorse the above observations of the Learned High Court Judge and dismiss this appeal with cost fixed at Rs. 50,000/-.

**SHIRANI BANDARANAYAKE, J.** - I agree

**EDUSSURIYA, J.** - I agree

*Appeal dismissed.*