
(1986) 10 MAD CK 0009
In the Madras High Court
Case No : A.A.O. No. 811 of 1986

A. Kothandapani and Others

APPELLANT

Vs

Sampathkumar and Another

RESPONDENT

Date of Decision : 24-10-1986

Acts Referred:

Arbitration Act, 1940 — Section 34

Citation : AIR 1987 Mad 204 : (1987) 100 LW 103 : (1987) 1 MLJ 297

Hon'ble Judges : Srinivasan, J

Bench : Single Bench

Advocate : B.T. Seshadri, for the Appellant; S. Ramalingam, for N. Thiagarajan, for the Respondent

Judgement

1. This is an appeal under Sec. 39 of the Arbitration Act by the defendants in O. S.227 of 1984 on the file of the court of Subordinate Judge,

Udumalpet against the dismissal of their application under S. 34 of the said Act for stay of all further proceedings in the suit.

2. The respondents herein filed the suit for a division of the suit properties into two equal shares and allotment of one such share to them on the

following allegations -" The father of the plaintiffs by name P. K. Ramswami Gounder and the father of the defendants by name P. K. Arumugha

Gounder were divided brothers and the suit properties belonged to the families of both. As heads of their respective families, they executed a

document on 22-2-1963, styled as a deed of dissolution and partition whereby it was agreed inter alia that the plaintiffs and their two brothers will

together have a half share and the defendants together will have the other half share. Neither of the heads of the families took any share therein.

The plaintiffs, their brothers and the defendants entered into a partnership for

running a theatre. On account of misunderstanding between the parties, they stopped running the theatre on 31-7-1980 and the licence also expired. Even as per the terms of the partnership deed the partnership came to an end on 28-8-1983 by efflux of time.

3. In 1984 the plaintiffs and their two brothers divided their family properties under a registered partition deed in and by which the half share in the suit properties stood allotted to the plaintiffs. The plaintiffs issued a notice on 8-9-1984 demanding a partition. The defendants issued a reply falsely setting up an arrangement that the plaintiffs agreed to sell their share for Rs. 5.50 lakhs. The plaintiffs issued a rejoinder reiterating their demand and expressing their willingness to purchase the share of the defendants for the said amount. The plaintiffs prayed for a division of the properties after expressly denying the allegations made by the defendants that the suit properties were the assets of the partnership.

4. The defendants filed I.A.246 of 1985 for stay of all further proceedings in the suit on the ground that the partnership deed provided for determination of all disputes by arbitration and that the plaintiffs were not entitled to pursue the suit.

5. The learned Subordinate Judge of Udumalpet dismissed the petition on the grounds that the dispute did not fall under the arbitration clause and that the defendants having set up an arrangement by a prior mediation were not entitled to invoke the arbitration clause.

6. It is the said order of dismissal which is challenged before me. Mr. B. T. Seshadri, learned counsel appearing for the appellant referred to the various deeds of partnership and the notices prior to the suit and contended that the suit properties were undoubtedly partnership properties and the dispute being one relating to the said properties would fall under cl. 10 of the deed of partnership dt. 29-8-1968 which provided for

arbitration. He places strong reliance on the decisions in Annamalaichetti v. Annamalaichetti, AIR 1919 Mad 146; Addanki Narayanappa and

Another Vs. Bhaskara Krishtappa and Others, and Anderson Wright Ltd. Vs. Moran and Company, , and contends that the plaintiffs are not

entitled to any relief in the suit. In other words, learned counsel for the appellants contends that no partner can claim any share in properties of the

firm unless and until the firm is dissolved and the accounts are settled. Learned

counsel submits that the only remedy open to the, plaintiffs was to resort to arbitration as provided in clause 10 of the Partnership deed.

7. Now I proceed to consider the correctness of the contentions made by, learned counsel for the appellants. Admittedly the properties belonged

to the families of the two parties. In Ex. B1 dt 22-2-1963, the following clause is found

That the theatre Kalaimagal, a property of the firm, with all the land, buildings and other fittings belonging to the same is hereby allotted jointly to

the following seven persons in two sets to be enjoyed by them in common as absolute owners, each of the sets having the interest in that theatre to

the extent indicated against them."" (underlining mine)

The next partnership deed is on 1-4-1964, which is superseded by the one dt. 28-6-1985, which in turn was superseded by the last of the

partnership deeds dt. 29-8-1968. None of the three documents by itself refers to the suit property or makes it the property of the firm. In the

plaint, there is a specific averment denying the allegation that the suit properties are partnership properties. The plaint is based upon co-ownership

and dehors the partnership deeds or any rights arising therefrom. When the only claim put forward in the plaint is on the basis of joint ownership,

the dispute. in the suit cannot be said to be one covered by clause 10 of the partnership deed dt. 29-8-1968.

8. The said clause reads thus -

That all questions or differences whatsoever which may at any time hereafter arise between the parties hereto or other respective representatives

touching these presents or the subject matter of or arising out of or in relation thereto respectively and whether as to construction or otherwise shall

be referred to a single arbitrator in case the parties agree upon one, otherwise to two arbitrators (one to be appointed by each party to the dispute

or difference) and this agreement shall be deemed to be submission to the arbitration of two arbitrators within the meaning of the Arbitration Act of

1940 or any re-enactment or statutory modification thereof for the time being in force.

The dispute in the suit is not one falling under the above clause. If the plaintiffs had admitted that the property belonged to the firm the position

might have been different.

9. But, even then, on the facts of this case, I am of the opinion that clause 10 would not be attracted. The business was admittedly stopped on 31-

7-1980. The firm got dissolved by efflux of time on 28-8-1983. When the plaintiffs issued a notice demanding partition the reply of the defendants

was that there was already a concluded mediation pursuant to which the plaintiffs had agreed to take a sum of Rs. 5.50 lakhs for their share and

leave the properties to the defendants. Having thus set up a case of concluded mediation it is not open to the defendants to seek refuge under the

arbitration clause.

10. The decisions relied on by the appellant will not apply to the facts of the case. In *Annamalai Chetti v. Annamalai Chetti*, AIR 1919 Mad 146, a

Division Bench of this court held that a partner was not entitled to sue for his share, in one item of the assets of the firm without first having an

account taken of the partnership assets and liabilities. In *Addanki Narayanappa and Another Vs. Bhaskara Krishtappa and Others*, the Supreme

Court held that during the subsistence of a partnership a partner cannot claim or exercise any exclusive right over any properties of the firm even if

he had brought it in. As pointed out already the plaintiffs dispute the allegation that the property is owned by the firm. When that is a matter to be

decided on the evidence, the court cannot assume it to be so for the purpose of the application under S. 34 of the Arbitration Act.

11. Reliance is placed on the decision of the Supreme Court in *Anderson Wright Ltd. Vs. Moran and Company*, that where a party contends that

the contract containing the arbitration clause is between the defendant and another party and not between him and the defendant, the court has

jurisdiction under S. 34 to decide the said question for the purpose of finding out whether there is a binding arbitration agreement. I do not know

how that decision can at all help the appellants. It is one thing to decide the existence or validity of a contract of arbitration but entirely a different

matter to decide the truth of the claim made in the suit itself.

12. Recently a Division Bench of this Court has considered the scope of S. 34 of Arbitration Act in *Vasanji Navji and Co. Vs. K.P.C. Spinners*

and Others, . In that case, in pursuance of a contract for supply of cotton, the plaintiff made supplies and the defendants issued five cheques on

different dates. Three of the cheques were dishonoured and the plaintiff filed a

suit to recover a sum of Rs. 28736-77 with interest thereon. The .defendants filed an application under S. 34 for stay of suit on the ground that the contract was subject to the bye-laws of the East India Cotton Association Ltd., Bombay, which contained a provision for arbitration. The trial court ordered the application and the plaintiffs filed an appeal in this court. While allowing the appeal, the Bench pointed out that the suit was on dishonoured cheques and not one arising solely out of the contract.

The Bench observed thus :-

Though the plaint refers to the antecedent facts which gave rise to the issue of the cheques by the defendants in favour of the plaintiff, the suit is in substance a suit on dishonoured cheques. Such a suit cannot be taken to arise solely out of, the contract entered into by the plaintiff with the defendants for supply of cotton.

Similarly, in the present case, the suit is based upon- the right of co-ownership and not on any right arising under the Partnership deed.

13. It is also well known that the power under Sec. 34 of the Arbitration Act is discretionary. The trial Court has properly exercised its discretion and refused to grant stay at the instance of the defendants who set up a definite case of completed mediation in the reply notice. I do not find any warrant for interfering with the discretion of the trial court.

14. In the result, the appeal fails and is dismissed. There will be no order as to costs.

15. Appeal dismissed.